1957

CANADA
LAW REPORTS

Supreme Court of Canada

Editors

ALAN BURNSIDE HARVEY, Q.C., B.C.L., M.A.
FRANÇOIS des RIVIÈRES, LL.L.

PUBLISHED PURSUANT TO THE STATUTE BY

ALAN BURNSIDE HARVEY, Q.C., Deputy Registrar of the Court

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1958

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Honourable PATRICK KERWIN, P.C., *Chief Justice of Canada.*
The Honourable ROBERT TASCHEREAU.
The Honourable IVAN CLEVELAND RAND.
The Honourable ROY LINDSAY KELLOCK.
The Honourable CHARLES HOLLAND LOCKE.
The Honourable JOHN ROBERT CARTWRIGHT.
The Honourable GÉRALD FAUTEUX.
The Honourable DOUGLAS CHARLES ABBOTT, P.C.
The Honourable HENRY GRATTAN NOLAN.

ATTORNEYS GENERAL OF CANADA

The Honourable STUART SINCLAIR GARSON, Q.C.
The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITORS GENERAL OF CANADA

The Honourable W. ROSS MACDONALD, Q.C.
The Honourable LÉON BALCER, Q.C.

MEMORANDUM

On the 8th day of July, 1957, the Honourable HENRY GRATTAN NOLAN, puisne judge of the Supreme Court of Canada, died.

89518—1½

ERRATA

in Volume 1957

Page 121, line 5 of Caption. Read "R.S.B.C. 1948".

Pages 599 and 602, fn. (1). Read "[1956] O.R. 225".

Pages 599 and 602, fn. (2). Read "[1955] O.W.N. 507".

Page 605, fn. (1). Read "[1955] O.W.N. 507".

Page 605, fn. (2). Read "[1956] O.R. 225".

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between December 31, 1956 and December 31, 1957, delivered the following judgments which will not be reported in this publication:

Abbott v. *Desmarteaux et al.*, [1957] Que. Q.B. 378, appeal dismissed with costs, December 4, 1957.

Bellefleur et al. v. *Spohn*, [1956] Que. Q.B. 608, appeal dismissed with costs, May 9, 1957.

Bladek v. *Kanzas*, (Ont.) (not reported), appeal dismissed with costs, June 3, 1957.

Caughell v. *Johnson*, (Ont.) (not reported), appeal dismissed with costs, June 26, 1957.

Dominion Structural Steel Corpn. v. *Leyland*, [1956] Que. Q.B. 629, appeals dismissed with costs, June 26, 1957.

Dyba v. *Dyba*, (Ont.) (not reported), appeal dismissed with costs, April 12, 1957.

Fargnoli v. *The Queen*, [1957] O.R. 140, [1957] O.W.N. 116, appeal dismissed, April 4, 1957.

Forster and King v. *Forster*, [1955] 4 D.L.R. 710, appeal of *Forster* allowed with costs, appeal of *King* allowed without costs, June 6, 1957.

Grant v. *Trudel*, [1955] Que. Q.B. 746, appeal dismissed with costs, May 23, 1957.

Guardian Trust Co. v. *Packard & Co.*, [1956] Que. Q.B. 539, appeal allowed with costs, Rand J. dissenting in part, and Locke J. dissenting, June 26, 1957.

Hamel v. *The Queen*, [1956] Que. Q.B. 256, appeal dismissed, March 8, 1957.

Ialenti v. *Lauzé*, [1956] Que. Q.B. 435, appeal dismissed with costs, May 13, 1957.

Lachapelle v. *Constantin*, [1955] Que. Q.B. 865, appeal dismissed with costs, June 26, 1957.

Mark v. *City of Moncton*, (N.B.) (not reported), appeal allowed, November 18, 1957.

Mehr v. *Republic of China et al.*, [1956] O.W.N. 363, appeal dismissed with costs, February 18, 1957.

Moisan v. *The Queen*, [1957] Que. Q.B. 261, appeal dismissed, May 6, 1957.

J. P. Porter Co. Ltd. v. *Russell et al.*, [1956] Que. Q.B. 727, appeal dismissed with costs, May 8, 1957.

Robert Simpson Ltd. v. *Jacobsen*, [1956] Que. Q.B. 627, appeal dismissed with costs, May 9, 1957.

Roy v. *Friedman*, [1955] Que. Q.B. 76, appeal dismissed with costs, June 26, 1957.

Ruby et al. v. *Kraupner et al.* (1957), 21 W.W.R. 145, 7 D.L.R. (2d) 383, appeal quashed with costs, October 23, 1957.

S.S. "Giovanni Amendola" v. *Powell River Co. Ltd.*, (B.C.) (not reported), appeal dismissed with costs, November 18, 1957.

Siders v. *Martel and Tittley*, [1956] Que. Q.B. 434, appeal against *Martel* dismissed with costs, appeal against *Tittley* dismissed with costs, May 17 and 21, 1957, respectively.

Smith et al. v. *Niefer*, (Ont.) (not reported), appeal dismissed with costs, March 28, 1957.

Smoky Lake No. 89, District of v. *Ralston; Smoky Lake No. 89, District of v. Nix* (1957), 21 W.W.R. 59, appeals dismissed with costs and cross-appeals dismissed without costs, December 19, 1957.

Tanguay v. *The Queen*, [1955] Que. Q.B. 609, appeal allowed, conviction quashed and acquittal directed, March 21, 1957.

Tardif v. *Métivier*, [1954] Que. Q.B. 499, appeal allowed with costs, March 8, 1957.

Wrobel et al. v. *Armstrong*, (Alta.) (not reported), appeal dismissed with costs, March 1, 1957.

Zellers Contracting Co. Ltd. v. *Conant Paints et al.*, [1955] O.W.N. 337, appeal dismissed with costs, February 20, 1957.

MOTIONS

Bailis v. *The Queen*, (Que.) (not reported), leave to appeal refused, December 19, 1957

Beaudry Brown v. *The Queen*, [1957] Que. Q.B. 169, leave to appeal refused, February 27, 1957.

Bell v. *Milner* (1957), 21 W.W.R. 366, 8 D.L.R. (2d) 546, leave to appeal refused with costs, October 28, 1957.

Boisvert v. *Corporation of Trécesson*, [1957] Que. Q.B. 525, leave to appeal refused with costs, November 7, 1957.

Cascone v. *The Queen*, (Ont.) (not reported), leave to appeal refused, February 25, 1957.

Cleveland-Cliffs SS Co. et al. v. *The Queen*, [1956] Ex. C.R. 255, motion to appoint assessors refused with costs, May 13, 1957.

Cohen v. *The Queen*, (Que.) (not reported), leave to appeal refused, October 18, 1957.

Courval v. *The Queen*, 25 C.R. 239, leave to appeal refused, February 5, 1957.

Dorval, City of v. *Drouin*, (Que.) (not reported), leave to appeal refused with costs, April 1, 1957.

Duhamel v. *The Queen*, (N.S.) (not reported), leave to appeal and to advance further evidence refused, October 7, 1957.

Emond v. *The Queen*, [1957] Que. Q.B. 704, leave to appeal refused, April 1, 1957.

Foll v. *The Queen* (1957), 21 W.W.R. 481, 65 M.R. 67, 118 C.C.C. 43, 26 C.R. 68, leave to appeal refused, June 17, 1957.

Fontenelle v. *The Queen*, [1957] Que. Q.B. 702, leave to appeal refused, October 7, 1957.

Goldhar v. *The Queen*, [1957] O.W.N. 138, 117 C.C.C. 404, leave to appeal refused, May 1, 1957.

Haggerty v. *The Queen*, (Ont.) (not reported), leave to appeal refused, June 4, 1957.

Hardwick v. *Hardwick*, (B.C.) (not reported), leave to appeal refused with costs, February 11, 1957.

Hibbert v. *The Queen*, (Ont.) (not reported), leave to appeal refused, October 1, 1957.

Kennedy v. *The Queen*, 117 C.C.C. 117, leave to appeal refused, November 13, 1957.

Laplante v. *The Queen*, (Ont.) (not reported), leave to appeal refused, December 19, 1957.

Levesque v. *Gagnon*, [1957] Que. Q.B. 343, leave to appeal refused with costs, May 13, 1957.

Levesque v. *Langlois*, [1957] Que. Q.B. 345, leave to appeal refused with costs, May 13, 1957.

Lorondeau v. *The Queen*, (Ont.) (not reported), leave to appeal refused, November 11, 1957.

Lougheed v. *Corporation of Surrey* (1957), 22 W.W.R. 504, leave to appeal refused with costs, October 1, 1957.

Moffats v. *The Queen*, [1957] O.R. 93, [1957] O.W.N. 58, 7 D.L.R. (2d) 405, 25 C.R. 201, 118 C.C.C. 4, leave to appeal refused, February 4, 1957.

Montreal-Australian New Zealand Line Ltd. v. *Fournier Van Ltd.*, (Ont.) (not reported), leave to appeal refused with costs, March 18, 1957.

Montreal Trust v. *Bell* (1956-57), 20 W.W.R. 273, 6 D.L.R. (2d) 589, leave to appeal refused with costs, January 22, 1957.

Moore v. *The Queen*, [1956] O.W.N. 877, 25 C.R. 159, leave to appeal refused, October 7, 1957.

McGorran v. *The Queen*, (B.C.) (not reported), leave to appeal refused, October 28, 1957.

McKenna v. *The Queen*, (B.C.) (not reported), leave to appeal refused, November 11, 1957.

Paton v. *The Queen* (1957), 23 W.W.R. 559, leave to appeal refused, October 28, 1957.

Pearson v. *The Queen* (1957), 21 W.W.R. 337, 25 C.R. 342, 117 C.C.C. 249, motion to extend time to appeal refused, June 26, 1957.

Prince George Gas v. *Inland Gas* (1957), 9 D.L.R. (2d) 47, leave to appeal refused with costs, October 2, 1957.

Rodgers v. *The Queen*, (Ont.) (not reported), leave to appeal refused, October 3, 1957.

St. Bruno, Corporation of v. *Marchand*, [1957] Que. Q.B. 796, leave to appeal refused with costs, November 25, 1957.

Sommers v. *Sturdy* (1957), 22 W.W.R. 49, 10 D.L.R. (2d) 269, leave to appeal refused with costs, June 26, 1957.

Symes v. *The Queen* (1957), 21 W.W.R. 568, 26 C.R. 130, 117 C.C.C. 323, leave to appeal refused, May 28, 1957.

Syndicat National des Travailleurs de la Pulpe et du Papier de la Tuque v. *Commission de Relations Ouvrières de la Province de Québec*, (Que.) (not reported), leave to appeal refused with costs, December 9, 1957.

Watchstrap Inc. v. *Rodi*, [1957] Que. Q.B. 757, leave to appeal from judgment affirming the judgment of the Superior Court of February 1956, refused, April 29, 1957.

Waugh v. *Koechlin*, [1957] O.W.N. 245, leave to appeal refused with costs, June 10, 1957.

White v. *White* (1957), 6 D.L.R. (2d) 445, motion to quash granted with costs, February 19, 1957.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

B

B—Concluded

C

D

D—Concluded

E

F

G

H

I

J

K

L

L—Concluded

M

N

N—Concluded

R—Concluded

S

S—Concluded

W—Concluded

Y

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

82258—1

FRANK KIRKLAND.....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

1956

*Nov. 20
Dec. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Habitual criminals—Matters to be proved by prosecution—Proof that accused "is leading persistently a criminal life" at time of primary offence—The Criminal Code, now 1953-54 (Can.), c. 51, s. 660(2)(a).

Before a person can be found to be an habitual criminal the Crown, in addition to proving the prescribed number of previous convictions, must satisfy the onus of proving beyond a reasonable doubt that at the time of committing the primary offence the accused was "leading persistently a criminal life". This onus is not satisfied by showing that since his release from imprisonment he has done no work and has no visible means of earning an honest livelihood, and on the other hand the fact that he has done some honest work since his last release is far from conclusive proof that he is not an habitual criminal, although it is an important consideration. *Rex v. Stewart* (1910), 4 Cr. App. R. 175 at 178; *Rex v. Baggott* (1910), 4 Cr. App. R. 67 at 70; *Rex v. Lavender* (1927), 20 Cr. App. R. 10, quoted or referred to.

There are cases in which an accused's criminal record, coupled with the conviction for the substantive offence, may form a sufficient basis for the finding that he is an habitual criminal. But Parliament did not intend that a man should be found to be an habitual criminal merely because he has a number of previous convictions against him. *Rex v. Jones* (1920), 15 Cr. App. R. 20 at 21, agreed with. In all the cases in which this has been held sufficient the substantive offence has been of such a nature as to show premeditation and careful preparation, and in this way to constitute in itself evidence of leading persistently a criminal life. *Rex v. Keane and Watson* (1912), 8 Cr. App. R. 12 at 14; *Rex v. Heard* (1911), 7 Cr. App. R. 80 at 83, quoted. If the circumstances of the primary offence are consistent with the view that the accused yielded to a sudden temptation, and do not establish premeditation or a plan, the fact of that offence, even when coupled with a lengthy criminal record, does not constitute sufficient evidence to support a finding that the accused is an habitual criminal.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a sentence of preventive detention imposed on the appellant as an habitual criminal. Appeal allowed.

J. W. Brooke, for the accused, appellant.

W. B. Common, Q.C., for the respondent.

*PRESENT: Kerwin C.J. and Rand, Kellock, Locke and Cartwright JJ.

82258—1½

1956

KIRKLAND
v.
THE QUEEN

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by this Court, from an order of the Court of Appeal for Ontario, dated May 26, 1953, affirming the finding of His Honour Judge Lovering dated February 26, 1953, that the appellant was an habitual criminal.

On February 26, 1953, the appellant was tried before His Honour Judge Lovering, without a jury, on the charge of having, on October 4, 1952, stolen from the person of Hugh McCulloch a wallet containing $107 in money and personal papers. The learned judge convicted the appellant on this charge and then proceeded with the hearing to determine whether or not he was an habitual criminal, with the result indicated above.

In view of the dates of the proceedings the questions raised on this appeal are to be determined under the provisions of Part X (A) of the *Criminal Code,* R.S.C. 1927, c. 36, as enacted by 1947, c. 55, s. 18.

The notice required by s. 575C(4)(*b*) was given to the appellant. In it the grounds upon which it was intended "to found the charge of being an habitual criminal" were specified as follows:

1. That since attaining the age of eighteen years you have been convicted of the following indictable offences for which you were liable to at least five years imprisonment, that is to say,

(a) On the 18th day of January, 1936, in the Magistrate's Court for the City of Toronto in the County of York, you were convicted for that you did on the 30th day of December, 1935, at the City of Toronto in the County of York, unlawfully did steal one carton containing thirty pounds of tea the property of the Toronto St. Catharines Transport, value under $25.00, contrary to the Criminal Code, and that you were sentenced to imprisonment for 60 days.

(b) On the 11th day of May in the year 1936, in the County of York Magistrate's Court, you were convicted for that on the 28th day of April in the year 1936, at the Township of Scarboro in the County of York, you unlawfully did steal four cases of beer, the property of the Brewery Corporation, value under $25.00, contrary to Section 386 of the Criminal Code, and you were sentenced to a definite term of 6 months.

(c) On the 15th day of May in the year 1936, in the Magistrate's Court for the City of Toronto in the County of York, you were convicted for that in the month of April in the year 1936, at the City of Toronto in the County of York, you unlawfully did receive in your possession eighteen cartons of beer, the property of Reinhardt Brewery and theretofore stolen, then well knowing the same to have been so stolen, value over $25.00, contrary to the Criminal Code, section 399, and you were sentenced to a definite term of 6 months in the Ontario Reformatory.

(d) On the 27th day of October A.D., 1937, in the County Court Judge's Criminal Court of the County of York, you were convicted for that at the City of Toronto in the County of York on or about the 27th day of September in the year 1937, you unlawfully stole a diamond ring, two watches, a set of dress studs, a silver ring, a silver brooch, a silver ring box and the sum of forty-five dollars ($45.00) in money, the property of Henrietta Dunn, contrary to the Criminal Code, and you were sentenced on the 2nd day of November, 1937, to serve a term of one year in jail.

(e) On the 5th day of November, A.D., 1937, in the County of York Magistrate's Court, you were convicted for that you did on the 4th day of October, A.D., 1937, at the Township of North York, in the County of York, unlawfully have, receive, or retain in your possession one cuff link, the property of W. G. Richards, 9 Brook Street, before then stolen, well knowing the same to have been stolen, contrary to Section 399 of the Criminal Code, and you were sentenced to imprisonment for a term of 12 months.

(f) On the 15th day of November, A.D., 1938, in the County Court Judge's Criminal Court of the County of York, you were convicted for that at the City of Toronto in the County of York, on or about the 1st day of October in the year 1938, you broke and entered the shop, warehouse, store or storehouse of Dominion Stores Ltd., situate and known as number 497 Parliament Street, in the said city, and stole therein a quantity of cigarettes and other articles, the property of Dominion Stores Ltd., contrary to the Criminal Code;

(g) And further at the time and place last above mentioned, you were also convicted for that at the City of Toronto on or about the 1st day of October in the year 1938, you robbed Benjamin Pearson of a revolver, and at the time of or immediately before or immediately after such robbery, wounded, beat, struck or used personal violence to the said Benjamin Pearson, contrary to the Criminal Code;

(h) And further at the time and place last above mentioned, you were also convicted for that at the said City of Toronto, on or about the 9th day of October in the year 1938, you robbed one Alex Thompson of the sum of two hundred and eight dollars, ($208.00) in money, a wrist watch and a fountain pen, and at the time of or immediately before or immediately after such robbery, wounded, beat, struck or used personal violence to the said Alex Thompson, contrary to the Criminal Code.

(i) On the 21st day of November, 1938, you were sentenced to imprisonment in Kingston Penitentiary for three years for each of the offences mentioned in paragraphs f, g, and h above, the sentences to run concurrent.

(j) On the 4th day of June, A.D., 1946, at the sittings of the County Court Judge's Criminal Court of the County of York, you were convicted for that at the City of Toronto in the County of York, on or about the 9th day of June in the year 1945, you unlawfully did steal the sum of three hundred and eighteen dollars ($318.00), the property of Kenneth Adair, contrary to the Criminal Code and that you were sentenced to imprisonment in Kingston Penitentiary for two years.

(k) On the 20th day of June, A.D., 1946, at sittings of the County Court Judge's Criminal Court of the County of York, held at the City of Toronto, you were convicted for that at the City of Toronto in the County of York, in or about the month of May in the year 1946, you unlawfully did steal three suitcases and two week-end bags and contents,

1956

KIRKLAND
v.
THE QUEEN

Cartwright J.

the property of Albert Catalone, Irma Wolfe, Margaret L. Clark and Eli Van Dirlin, contrary to the Criminal Code and that you were sentenced to serve a term of three years in Kingston Penitentiary.

(l) On the 15th day of December, A.D., 1949, at a sittings of the County Court Judge's Criminal Court of the County of York, held at the City of Toronto you were convicted for that at the City of Toronto in the County of York, in the month of October in the year 1949, you broke and entered the dwelling house of Wilfred Deschamp, situate and known as number 338 Bloor Street East, in the said City, by night, with intent to commit an indictable offence therein, to wit, theft, contrary to the Criminal Code, and that you were sentenced to imprisonment in Kingston Penitentiary for three years.

2. That since the expiration of your last term of imprisonment you have been doing no work and you have no visible means by which to earn an honest livelihood.

3. You are charged with being a persistent criminal because shortly after your release from Kingston Penitentiary, you committed the fresh offence that you are now charged with.

The convictions as set out in items (*a*) to (*l*) of para. 1 of this notice were proved at the hearing. It appears from the certificates of conviction, which were filed as exhibits, that the sentences imposed under items (*b*) and (*c*) were to run concurrently as was also the case in regard to those imposed under items (*d*) and (*e*), those imposed under items (*f*), (*g*) and (*h*) and those imposed under items (*j*) and (*k*).

There was evidence that in November 1937 the appellant had stated his age to be 19 and that in September 1945 he had stated it to be 27.

We were informed by counsel that the appellant was released from the penitentiary on April 4, 1952, so that exactly six months elapsed between the date of his release and that of the commission of the substantive offence of which he was convicted by His Honour Judge Lovering. The only evidence given for the prosecution as to the activities of the appellant during this period was that in July and August 1952 he was seen in the village of Belle Ewart assisting from time to time in a booth operated by his sister in which refreshments were sold.

The defence called William Dineen, a nephew of the appellant, who testified that the latter had helped the mother of the witness in the operation of the booth at Belle Ewart; that the appellant had tried to get employment at the Canadian National Exhibition in August 1952 but could not do so as he was not a union member; that

the witness and his wife then took the appellant into their home and that he helped with digging the cellar and with some reconditioning and decorating of their house; that the appellant got some odd jobs as a stevedore; that the appellant was "living for free at home" and getting some money from his sister, the mother of the witness; and that during the war years the appellant had worked at war-work but that the witness knew of this only by hearsay as he was in the armed services at that time.

The learned County Judge gave no reason for his finding that the appellant was an habitual criminal and the Court of Appeal gave no reasons for their decision that the appeal from that finding should be dismissed.

While the grounds of appeal were expressed in varying terms in the memorandum filed on behalf of the appellant, the main ground argued before us was that on the evidence the Crown had failed to satisfy the onus of proving that at the time of the commission of the substantive offence the appellant was leading persistently a criminal life. We were informed by counsel that this ground was not urged in the Court of Appeal. It must be borne in mind that, leave to appeal having been granted under s. 41(1) of the *Supreme Court Act,* R.S.C. 1952, c. 259, our jurisdiction is not restricted to questions of law alone: *vide* the judgment of this Court granting leave to appeal in *Parkes v. The Queen* (1).

Section 575C(1) so far as relevant to the question now before us read as follows:

> (1) A person shall not be found to be a habitual criminal unless the judge . . . finds on evidence,
>
> (*a*) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life;

Part X(A) of the *Criminal Code,* first enacted in 1947, is in its wording similar to, although not identical with, Part II of the *Prevention of Crime Act,* 1908, 8 Edw. VII, c. 59, and counsel in the course of their full and helpful

(1) [1956] S.C.R. 134.

1956

KIRKLAND v. THE QUEEN

Cartwright J.

arguments discussed a number of the decisions of the Court of Criminal Appeal in cases arising under the last-mentioned statute.

In my opinion it is established by these decisions, and I would so hold on the wording of s. 575C(1) if the matter were devoid of authority, that before an accused can be found to be an habitual criminal the Crown, in addition to proving the prescribed number of previous convictions, must satisfy the onus of proving beyond a reasonable doubt that at the time when he committed the indictable offence referred to in s. 575B the accused was leading persistently a criminal life. It is true that a finding that a person is an habitual criminal is not a conviction of a crime: *vide Brusch v. The Queen* (1) and *Parkes v. The Queen* (2); but, as was said by Rand J. in *Parkes v. The Queen* (3) when the finding that Parkes was an habitual criminal was quashed:

> Under such a determination a person can be detained in prison for the rest of his life with his liberty dependent on the favourable discretion of a minister of the Crown. The adjudication is a most serious step in the administration of the criminal law . . .

and, in my opinion, the rule requiring proof beyond a reasonable doubt applies to such an adjudication as fully as in the case of any criminal charge.

In the case at bar there is no evidence that during the six months following his release from the penitentiary in April 1952 the appellant had done anything unlawful or dishonest. Such evidence as there is goes to show that he was trying to obtain work, albeit without much success, and was doing such work as he was able to get. Ground no. 2 set out in the notice required under s. 575C(4)(*b*) and quoted above is not made out on the evidence but if it had been it would not have required a finding adverse to the appellant. It was said by Jelf J., giving the judgment of the Court of Criminal Appeal in *Rex v. Stewart* (4),

> It does not follow, because he is not getting an honest living, that it must be a dishonest one—he may be doing nothing.

(1) [1953] 1 S.C.R. 373, 105 C.C.C. 340, 16 C.R. 316, [1953] 2 D.L.R. 707.

(2) [1956] S.C.R. 134.

(3) [1956] S.C.R. 768 at 773-4, 116 C.C.C. 86, 24 C.R. 279.

(4) (1910), 4 Cr. App. R. 175 at 178.

and by Pickford J. giving the judgment of the Court in *Rex v. Baggott* (1):

> He refused the work of stone-breaking that had been offered him by the guardians. It is said that you can infer criminality from this. But the evidence was that the appellant was living on the charity of his relations. Therefore the choice was not stone-breaking or stealing, but stone-breaking or charity. He chose the latter.

I agree with the view expressed in a number of cases in the Court of Criminal Appeal that the mere fact that the prisoner has done some honest work since his last release is by no means conclusive proof that he is not an habitual criminal: see, for example, *Rex v. Lavender* (2); although the fact of his having done such work is an important consideration.

It was argued on behalf of the respondent that the appellant's criminal record coupled with the conviction of the substantive offence formed a sufficient basis for the finding that he was an habitual criminal. As to this I agree with the view expressed by Lord Reading L.C.J. giving the judgment of the Court of Criminal Appeal in *Rex v. Jones* (3):

> The legislature never intended that a man should be convicted of being a habitual criminal merely because he had a number of previous convictions against him.

There have however been cases in which the Court of Criminal Appeal has upheld a finding that a prisoner was an habitual criminal on the ground that the nature of the substantive offence viewed in the light of his previous record was in itself evidence that he was leading persistently a criminal life. For example in *Rex v. Keane and Watson* (4), Channell J. in giving the judgment of the Court said:

> The point is whether, at the time when he commits the offence then being dealt with, he *is* leading persistently a dishonest or criminal life. The verb is in the present tense. If he has done some honest work but has given it up and committed another crime, it may well be that he has returned to a life of crime and is then a habitual criminal, and the nature of the most recent crime may itself be evidence that at the time he commits it he is persistently leading a dishonest or criminal life. In *Baggott's* case, which was relied on for the appellants but is really an authority against them, the offence of coining was given as an illustration of such a crime. But the present case is another illustration which will do equally well. The appellants, who must have planned the crime

(1) (1910), 4 Cr. App. R. 67 at 70.
(2) (1927), 20 Cr. App. R. 10.
(3) (1920), 15 Cr. App. R. 20 at 21.
(4) (1912), 8 Cr. App. R. 12 at 14.

1956

KIRKLAND
v.
THE QUEEN

Cartwright J.

together, broke into this dwelling-house by means of a jemmy and stole bracelets and rings and other property from the bedrooms. We think that when they were committing this offence, they must then have been leading persistently a dishonest and criminal life. In our opinion, therefore, there was sufficient evidence to support the verdicts of the jury . . .

I have examined all the cases of this class to which we were referred by counsel and find that in each of them the substantive offence was of such a nature as to show premeditation and careful preparation. I shall refer to only one example. In *Rex v. Heard* (1), Hamilton J., speaking for the Court, said:

> Where the interval between the last known fact against the prisoner and the commission of the substantive crime is considerable—and six or nine months are a considerable interval—there should be additional evidence. In this case there was such evidence, for the crime was carefully planned, was committed in association with another habitual criminal, and was carried out with skill, so the jury, with the facts before them, were justified in convicting . . .

In the case at bar the transcript of the evidence given at the trial on the charge of the substantive offence was not before the Court of Appeal nor was it before us at the argument. In considering the matter, after judgment had been reserved, this Court was unanimously of the opinion that this transcript should have formed part of the material in the Court of Appeal, and requested the Attorney-General to furnish it to us unless counsel should desire to make any submission that it should not be before us. No objection was made and we have now received the transcript.

The evidence of McCulloch whose wallet was stolen is uncontradicted. He was walking north on Jarvis Street about midnight after watching television in a hotel. There had been a collision and an argument was in progress as a result. McCulloch had stopped to observe this and was having a conversation with the appellant during the course of which he offered the appellant a cigarette. He does not say who started the conversation. He says in part:

> Anyway, we talked for about a minute or two and he said, "All right sir, you are a good sport", and gave me a pat on the shoulder and walked off across the street.

A moment later, on putting his hand in his pocket to get his handkerchief, McCulloch noticed that his wallet which had been in his left hip pocket was gone. He ran after

(1) (1911), 7 Cr. App. R. 80 at 83.

the appellant calling for the police and the appellant was seen to drop the wallet. The appellant did not give evidence.

In my opinion, the offence thus committed by the appellant is not of such a nature as to warrant the inference that he was leading persistently a criminal life. The circumstances are consistent with the view that, yielding to a sudden temptation, he availed himself of the opportunity afforded by his chance meeting with McCulloch following the collision. It may be said that the circumstances are not inconsistent with the view that the appellant had gone out that night for the express purpose of picking someone's pocket if the opportunity offered, but so to hold would be mere speculation. Bearing in mind that the appellant is entitled to the benefit of every reasonable doubt it is my opinion that there is not sufficient evidence to support the finding of the learned County Court Judge that the appellant was an habitual criminal. As pointed out above we are not restricted to a consideration of the question of law whether there was any evidence on which such a finding could have been made and I express no final opinion upon it although it is my present view that there was no such evidence.

I do not intend in anything I have said above to minimize the seriousness of the substantive offence of which the appellant was convicted, and for which he has been punished by two years' imprisonment; but that offence was not, in my opinion, of such a nature as, without more, to furnish evidence that he was leading persistently a criminal life.

I would quash the finding that the appellant was an habitual criminal and the direction that he be held in preventive detention.

Appeal allowed.

Solicitor for the appellant: John W. Brooke, Toronto.

1956

*Nov. 21
Dec. 21

KLASSY SHOE STORE INC. (*Plaintiff*) . . . . APPELLANT;

AND

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

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

Municipal corporations—Special statutory provisions—Action against City of Montreal arising from backing up of water from sewers—Elements of defence under city charter, art. 536c, enacted by 1939 (Que.), c. 104, s. 19.

Where damages are sought from the City of Montreal arising out of the flooding of a cellar as a result of the backing up of water from the City's sewers, the City has a complete defence, under art. 536c of its charter, if it establishes: (1) that the building was erected after April 28, 1939; (2) that safety valves, of a model approved by the Quebec Public Service Commission, were not installed in it; and (3) that the presence of such valves would have prevented the flooding.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment at trial and dismissing the action. Appeal dismissed.

A. L. Stein, for the plaintiff, appellant.

P. Beauregard, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant's claim is one for damages sustained by reason of flooding in the basement of premises at 2671 Notre Dame Street West, Montreal, occupied as tenant by the appellant.

The learned trial judge awarded appellant $3,485 as damages sustained by it as a result of the flooding, but this judgment was reversed by the Court of Queen's Bench (1).

The facts are fully set forth in the judgments in the Courts below and need not be repeated here.

The amount of damages assessed is not now in issue, and the main question argued before this Court related to the interpretation of art. 536c of the Charter of the City

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

(1) [1954] Que. Q.B. 616.

of Montreal, as enacted by 3 Geo. VI, c. 104, s. 19, which reads as follows:

English version:

536*c*. No action in damages shall lie against the city when the damages resulting from flooding shall be due to the failure to install, in any immoveable erected after the 28th of April, 1939, Safety Valves of a model approved by the Quebec Public Service Commission, to prevent the backing up of the waters from the sewers of the City into the cellar of such immoveable.

French version:

536*c*. Aucune action en dommages—intérêts n'est recevable contre la cité lorsque les dommages provenant d'inondation auront été occasionnés par le défaut d'installation, dans tout immeuble construit après le 28 avril 1939, de soupapes de sûreté d'un modèle approuvé par la Commission des services publics de Québec, en vue de prévenir le refoulement des eaux d'égouts de la cité dans la cave de tel immeuble.

Appellant based its claim upon the allegations that the basement in question was flooded to a depth of between 12 to 18 inches by water flowing from the respondent City's sewer into the said basement, and that the City was responsible under the provisions of arts. 1053 and 1054 of the *Civil Code*.

In its plea and at the trial, the respondent based its defence to the action upon art. 536*c* of the city charter, which has been quoted.

In the circumstances of the instant case, in order to invoke successfully the provisions of art. 536*c* of the charter, the City respondent, in my opinion, had to establish three things: (1) that the building containing the leased premises was erected after April 28, 1939; (2) that a safety valve or valves had not been installed in the said premises or, if such valves had been installed, that they were not of a model approved by the Quebec Public Service Commission, and (3) that such a valve or valves, if properly installed at the proper point or points in the plumbing system, would have prevented the backing up of water from the respondent's sewer and, therefore, the flooding complained of.

It was conceded by the parties that the building in question was erected after April 28, 1939, and the evidence clearly established (i) that there were no safety valves of any kind installed in the leased premises, (ii) that the flooding in the basement was caused by water backing up from the sewer into the basement through a drain in the

1956

KLASSY SHOE STORE INC. v. CITY OF MONTREAL

Abbott J.

floor of that basement, and (iii) that a safety valve installed below the floor drain would have prevented the flooding complained of.

I am in agreement, therefore, with the finding in the Court below that the respondent discharged the burden imposed upon it of proving the three facts to which I have referred.

Water falling upon the exterior of the premises in question finds its way down from the roof through certain pipes or ducts into the city sewer, a system of drainage which under certain conditions may be obligatory upon the property-owner under the city by-laws. Had the appellant alleged and proved a case of "flooding" due to the inability of the respondent's sewer serving the premises to carry away the drainage it was at the time called upon to carry, including that from the appellant's premises, it might have lain upon the respondent to establish not only that the presence of an approved valve or valves would have prevented the reverse flow of the contents of the sewer into the cellar but also that the appellant's premises would not have suffered damage by reason of any inability of its own drainage to get away. It is, however, unnecessary to consider this aspect of the matter, as the case actually alleged and proved by the appellant was one of damage caused by water backing up from the sewer into the cellar.

The other questions raised by appellant were, in my opinion, satisfactorily disposed of in the Courts below.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Stein & Stein, Montreal.

Solicitors for the defendant, respondent: Choquette & Berthiaume, Montreal.

LA CIE J. A. GOSSELIN LTEE (*Plaintiff*) APPELLANT; 1956

AND *Nov. 22, 23 Dec. 21

J. G. PELOQUIN (*Defendant*) .....RESPONDENT;

AND

HILAIRE BLANCHETT (*Defendant*).

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

Contracts—Fraud and error—Whether causes of absolute nullity—Person in position of trust—Effect of confirmation of contract.

Concealment of a fact which would be in the interest of the other party to a contract to know can constitute fraud, but fraud and error are not causes of absolute nullity in contracts but only of relative nullity. Therefore a party to a contract will not be entitled to have it set aside on that ground, if it is proved that subsequently to his discovery of the fraud or error he has confirmed the contract either expressly or tacitly.

The plaintiff sought to have set aside, on the ground of fraud and error, two contracts dealing with the manufacture and sale of a machine invented by the defendant B. The other defendant, P, took part in the negotiations of the contracts in an advisory capacity, but did not disclose his partnership with B in the utilization of the patent.

Held: Tacit confirmation of the contracts was alleged in the defence to the action, and the plaintiff's conduct in continuing to take full advantage of the contracts long after its discovery of the relationship between the two defendants, amounted to a tacit confirmation. In the circumstances, the question of fraud and error need not be considered and the action should be dismissed.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment at trial and dismissing the action. Appeal dismissed.

A. M. Watt, Q.C., and L. Tremblay, Q.C., for the plaintiff, appellant.

J. Ahern, Q.C., and E. Lafontaine, for the defendant, respondent.

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

FAUTEUX J.:—En juin 1951, la compagnie appelante intentait à l'intimé Péloquin et Hilaire Blanchett une action en annulation de deux contrats intervenus entre elle et

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

(1) [1954] Que. Q.B. 674.

1956

CIE J. A. GOSSELIN LTÉE v. PÉLOQUIN et al.

Fauteux J.

Blanchett, l'un en mai 1946, l'autre en mars 1947, ayant trait à l'exploitation d'une invention faite par ce dernier. Au temps des négociation et signature de ces contrats, auxquelles l'intimé Péloquin participa, l'exploitation de cette invention était déjà, à l'insu de l'appelante, le sujet d'une convention entre Blanchett et l'intimé Péloquin. A raison de ce fait et de ses incidences, l'appelante prétendit avoir été induite à croire erronément contracter avec Blanchett uniquement alors qu'en réalité, elle contractait avec la société Blanchett et Péloquin, et qu'en acquiesçant à la méthode de division des profits suggérée par Péloquin, son aviseur financier, elle a été fraudée.

Blanchett n'a pas plaidé à l'action. Péloquin a soumis, en défense, que les relations existant entre lui et l'appelante, au temps des négociation et signature de ces contrats, ne lui faisaient aucune obligation de lui dénoncer sa convention avec Blanchett; que l'appelante n'a été victime d'aucune fraude, n'a subi aucun préjudice et que, de toutes façons, elle a, pendant deux ans, après avoir appris que Blanchett et Péloquin étaient associés, confirmé ces contrats de façon non équivoque. Le juge de première instance a écarté cette défense et en est arrivé à la conclusion que l'appelante avait été victime d'erreur et de fraude et que la conduite tenue par elle après avoir connu l'existence de la convention non dénoncée ne pouvait, sous les circonstances, équivaloir à une confirmation tacite des contrats attaqués. Ce jugement fut infirmé en appel (1) sur un motif, commun aux trois juges, soit la confirmation; M. le juge Rinfret ajoutant que l'erreur et la fraude n'avaient pas été prouvées.

Pour les raisons ci-après indiquées, il est impossible d'accepter la proposition de l'appelante voulant que la confirmation n'ait été ni alléguée en défense, ni établie en preuve. Dans ces vues, il devient inutile de s'attarder à considérer si pour aucune des raisons invoquées, les contrats attaqués pouvaient être annulés. Mais il paraît juste de reconnaître que si, sous toutes les circonstances de cette cause, la non dénonciation de la convention à laquelle il était partie pouvait constituer un acte répréhensible susceptible en droit de justifier l'annulation des

(1) [1954] Que. Q.B. 674.

contrats, rien dans la preuve n'établit que, de fait ou d'intention, Péloquin ait trompé l'appelante par les avis qu'il lui donna en l'occurrence.

Pour disposer des prétentions de l'appelante à l'encontre du principal motif de la décision de la Cour d'Appel, il convient de rappeler généralement l'économie de la loi sur la confirmation tacite des contrats. Disons d'abord que si la loi frappe de nullité absolue certains contrats, en raison de la nature juridique des relations des parties, tels, par exemple, certains actes entre tuteur et mineur, personne, dans le cas qui nous occupe, ne prétend que, sans la réticence dont on se plaint, les contrats en question ne pouvaient être validement passés. La réticence consistant à garder volontairement le silence sur un fait que l'autre partie au contrat aurait intérêt à connaître peut sans doute constituer un dol. Mais le dol et l'erreur ne sont pas cause de nullité absolue, mais simplement relative, et la convention qui en est entachée peut être confirmée par la partie qui aurait droit de s'en plaindre, soit de façon expresse ou purement tacite. Cette confirmation présuppose évidemment de la part de son auteur la connaissance du vice du contrat. Elle peut alors résulter de l'exécution volontaire, totale ou même partielle, ou de l'exercice des droits acquis par la convention, même par des actes passés avec des tiers. Dans certains cas, la connaissance du vice, une fois établie, entraînera une présomption de fait de l'intention de confirmer: ainsi en présence d'une exécution proprement dite ou de l'exercice des droits acquis par l'acte: Planiol et Ripert, Droit Civil, 1952 2e éd., tome 6, n° 201 et n^{os} 303 *et seq.*

Il n'est pas douteux que la confirmation tacite des contrats en question est soulevée aux plaidoiries. A la vérité, la demanderesse elle-même a jugé nécessaire, au soutien de son action, de se justifier de n'attaquer qu'en juin 1951 ces contrats consentis par elle en mai 1946 et en mars 1947. C'est ainsi qu'elle allègue: au paragraphe 22, n'avoir acquis la connaissance de la déception dont elle se plaint que le 20 mai 1949, et aux paragraphes 23 et 24, avoir, depuis cette date, recherché l'accord de Péloquin et Blanchett pour l'annulation des contrats. Ces allégations sont niées par la défense où on plaide, aux paragraphes 23 et 27, que l'appelante, au printemps 1949, a fait des instances auprès

1956

CIE J. A. GOSSELIN LTÉE v. PÉLOQUIN et al.

Fauteux J.

de Péloquin pour lui faire amender son contrat de société avec Blanchett et qu'au printemps 1951, elle a recherché de remplacer la stipulation des contrats voulant que les profits soient partagés dans une proportion de 40 pour cent pour elle et de 60 pour cent pour les défendeurs, par une royauté d'un montant fixe par machine. On plaide aussi, aux paragraphes 26 et 29, que la demanderesse continue la fabrication et la vente de la machine à des profits considérables. Aux termes des règles générales relatives à la plaidoirie écrite, il suffit d'énoncer les faits qui, sans cette énonciation, seraient de nature à prendre par surprise la partie adverse ou à soulever une contestation étrangère aux plaidoiries; le tout sans qu'il soit nécessaire d'employer une formule particulière et sans entrer dans une argumentation: arts. 105 *et seq.* C.P.C. Rien n'obligeait le défendeur à caractériser en droit la nature juridique des faits invoqués. Il est manifeste que ces allégations de faits, et particulièrement celle dans la déclaration indiquant la date de la connaissance acquise de la déception, ont été faites en raison du jeu de la théorie de la loi sur la confirmation tacite des contrats. C'est d'ailleurs ainsi que la contestation liée fut comprise par le juge de première instance; ceci ressort clairement de questions posées par lui au cours de l'enquête, aussi bien que du fait qu'au soutien de son jugement, il a jugé nécessaire de déterminer la question en décidant qu'il n'y avait pas eu confirmation.

Ce fait juridique est non seulement allégué mais, comme en a jugé la Cour d'Appel, il est établi au dossier et, à mon avis, de façon péremptoire. Il a été concédé à l'audition que c'est au début d'avril et non à la fin de mai 1949 que l'appelante acquit la connaissance de la convention Péloquin et Blanchett. Nonobstant ce fait, elle a continué et continue encore la fabrication et la vente de la machine et l'exploitation des brevets en protégeant l'invention, n'ayant en fait jamais eu l'intention de suspendre ses opérations. De ceci, elle a fait judiciairement l'aveu en admettant, au paragraphe 8 de sa réponse, l'allégation de ces faits au paragraphe 30 du plaidoyer. Sauf dans une lettre en date du 17 mai 1951, dans aucune pièce de correspondance échangée entre les parties peut-on apercevoir une intention de l'appelante d'annuler ces contrats. Dans cette

lettre du 17 mai 1951, soit un mois avant l'action, l'appelante, par son président, remercie Péloquin de ses services, lui inclut un chèque au montant de 100 dollars représentant ses honoraires pour le mois de mai et termine en disant: "Il nous reste maintenant à tirer au clair la question des royautés sur les machines Blanchett qui ont été fabriquées à venir jusqu'à maintenant". Il est inconcevable que si vraiment l'appelante a été victime de déception et qu'eut-elle connu l'existence de la convention Blanchett et Péloquin elle aurait refusé de négocier et signer les contrats attaqués, elle ait, l'ayant appris, retenu et gardé à son emploi les deux auteurs de cette fraude à moins de se résigner à confirmer ces contrats. Enfin, dans une lettre adressée, le 10 mai 1949, à une compagnie de Paris, en vue de lui accorder une franchise pour la vente de la machine en territoire européen et celui des colonies françaises, l'appelante, par son président, s'oblige, avec l'approbation de ses "associés Péloquin et Blanchett", à n'accorder aucune franchise pour une période de trois mois de la date de la lettre.

Tous ces faits sont plus que suffisants pour justifier la décision de la Cour d'Appel sur le point.

Je rejetterais l'appel avec dépens.

KELLOCK J.:—I am unable to say that, in concluding, upon all the evidence, that the appellant had elected to affirm the contract on discovering the relationship subsisting between the respondents at the time of its negotiation, the Court of Appeal was wrong. I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Foster, Hannen, Watt, Leggat & Colby, Montreal.

Solicitor for the defendant, respondent: E. Lafontaine, Montreal.

1956

*Nov. 29
Dec. 21

ROMAN BALCERCZYK.....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Admissibility—Res gestae—Conduct of accused driver immediately after accident—Relevance to issue of anterior negligence.

Criminal law—Criminal negligence—Admissibility of evidence of driver's conduct immediately after accident.

Evidence of the conduct of an accused person immediately after an accident, if it is of such a nature that it may reasonably be thought sufficient, if believed, to warrant an inference upon the issue of criminal negligence, may be properly received in evidence and considered by the jury in determining that issue.

On a trial for causing death by criminal negligence evidence was admitted that the accused's car, immediately after striking another car, "skidded and swerved up the street" and "as soon as it got under its right control it picked up speed" and disappeared. The trial judge told the jury that they were entitled to consider this evidence in determining whether or not the accused had been guilty of criminal negligence.

Held (Cartwright J. dissenting): The evidence was properly admitted and there was no misdirection. It was open to the jury, in the circumstances of the case, to draw an inference from the subsequent conduct of the accused as to his wantonness and reckless disregard for the lives or safety of other persons at the time of and immediately before the accident. The whole conduct was part of the *res gestae*.

Gudmondson v. The King (1933), 60 C.C.C. 332, distinguished.

Per Cartwright J., *dissenting:* Criminal negligence, as defined by s. 191 of the *Criminal Code,* must be shown to have existed prior to or at the instant of the accused's car striking the other car, and although the fact that the driver fled from the scene was a relevant item of circumstantial evidence, it was essential that it be made plain to the jury that his conduct after the accident was relevant only in so far as it assisted them to determine by inference the nature of his conduct before it, and whether or not he had, before the impact, been driving with wanton or reckless disregard for the lives or safety of others. Without such a warning (which was not given) there was grave danger of their convicting because in their opinion the accused had acted with that disregard after the impact.

APPEAL by the accused from the judgment of the Court of Appeal for Ontario, affirming his conviction, before Ferguson J. and a jury, of causing the death of one Lawrence Vipond by criminal negligence. Appeal dismissed.

*PRESENT: Kerwin C.J. and Kellock, Locke, Cartwright and Fauteux JJ.

J. G. J. O'Driscoll and *Patrick Galligan,* for the appellant.

W. B. Common, Q.C., for the respondent.

THE CHIEF JUSTICE:—This appeal should be dismissed. As to the second ground of appeal, I agree with the reasons of Mr. Justice Kellock and merely add that, in addition to the references by him to the charge of the trial judge, it might be pointed out that the latter, at several earlier stages, had referred to the fact that "this is a hit-and-run case"—and necessarily so, since one of the main matters in dispute was as to the identification of the driver of the automobile. The subsequent conduct of the driver relied upon by the Crown occurred immediately after the impact and could be treated as part of the *res gestae* as accompanying those earlier acts as to which it was contended that the driver had been criminally negligent in doing, or omitting to do, anything which it was his duty to do, showing wanton, or reckless, disregard for the lives or safety of other persons. Unquestionably no appreciable time elapsed between the automobile striking Vipond and the skidding, swerving and picking up speed.

The first point upon which leave to appeal was granted is:

> Was the verbal statement attributed to the appellant by the investigating police officer improperly admitted in evidence?

Whether or not one considers that at the time of the making of this statement the appellant was under arrest on any charge, the rule laid down by this Court in *Boudreau v. The King* (1), was not infringed. Although the evidence as to this verbal statement was given before the *voir dire,* and the trial judge was apparently of the view that it should not have been so given at that time, and although he ruled against the admissibility of a subsequent written statement, there is nothing, considering all the circumstances, to take the case out of the rule so established.

The judgment of Kellock, Locke and Fauteux JJ. was delivered by

KELLOCK J.:—When the sequence of events is properly understood, I do not think the ruling of the learned trial

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

1956

BALCERCZYK v. THE QUEEN

Kellock J.

judge, confirmed, as it was, by the Court of Appeal, as to the admissibility of the oral statement of the appellant to the police officer, can be questioned.

With regard to the second ground of appeal, it is contended that there was misdirection on the part of the learned trial judge in instructing the jury that in determining the issue as to criminal negligence, they were entitled to take into consideration the conduct of the appellant in leaving the scene after the accident.

The evidence was that of two witnesses, who testified as to seeing the appellant's car immediately after the accident, one of them stating that "it skidded and swerved up the street; as soon as it got under its right control it picked up speed" and disappeared. The learned trial judge instructed the jury:

> This, you see, is a hit-and-run case and you have to consider that in considering whether this was a reckless disregard for the lives and safety of other people. Is the conduct of the person who hit Vipond consistent with anything but a reckless disregard for the lives and safety of other people?

And again:

> Ask yourselves, how could he have failed to see this car; how did he get over in front of the door? You will ask yourselves about these questions. If he had any regard for the life and safety of people on the street would he not have stopped after he came in collision with this door? It is for you to say. In order to convict him you must be able to say that he showed a reckless and wanton disregard for the lives and safety of other people.

In my opinion, evidence of the conduct of an accused person immediately after an accident, if of such a nature that it may reasonably be thought sufficient, if believed, to warrant an inference upon the issue of criminal negligence, may be properly received in evidence. The appellant's subsequent conduct was, therefore, a proper consideration for the jury in the case at bar.

Counsel for the appellant referred to the decision of this Court in *Gudmondson v. The King* (1), as supporting a contrary view. In that case there was evidence on behalf of the Crown that the car which had struck the deceased kept on going after the accident and in order to get away, drove around another car which had been stopped in the middle of the highway in an effort to bring it to a stop.

(1) (1933), 60 C.C.C. 332.

In addition, there was evidence on behalf of the accused that his conduct in not stopping was due to panic and that in any event, his brakes were gone and he could not bring the car to a stop. The learned trial judge had charged the jury that the conduct of the accused after the accident was relevant on the issue of criminal negligence from the standpoint of "similar facts" and had told them: "There is no doubt he fails by hitting and running away in this case. As far as I am concerned I will tell you that has been established by the evidence." (1) It was in these circumstances that this Court said, at p. 333:

> Having said what he did upon this matter, he ought at least to have added a warning to the jury that such conduct, however reprehensible, could have no more than an indirect bearing upon the issue before them. He had already virtually withdrawn from them the charge of intoxication; but, in view of his other observations, he should have told them that they ought to be very cautious in imputing to the accused a consciousness of guilt, because of actions which, on reflection, they might think capable of explanation as due to panic.

In the case at bar there was no evidence with regard to the conduct of the appellant after the accident apart from that to which I have already referred. In my view, therefore, what the learned trial judge said to the jury was not objectionable from the standpoint which this Court considered objectionable in the case to which I have referred and, in my opinion, it was open to the jury in the circumstances of this case to draw an inference from the subsequent conduct of the appellant as to the wantonness and reckless disregard for the lives or safety of other persons at the time of and immediately prior to the accident here in question. The whole conduct was part of the *res gestae*.

I do not think the charge is open to the construction that the jury were told they could draw from the mere fact that the appellant ran away from the scene of the accident, the inference that his driving at the time of the accident amounted to criminal negligence. The learned judge had already instructed the jury with considerable care as to the elements of negligence of that character.

I would dismiss the appeal.

(1) 41 Man. R. 87 at 110, 59 C.C.C. 355; [1933] 1 W.W.R. 593.

1956

BALCERCZYK v. THE QUEEN

CARTWRIGHT J. (*dissenting*):—The appellant was tried at the assizes at Brantford before Ferguson J. and a jury and, on January 16, 1956, was convicted on the charge that at the town of Paris, on November 12, 1955, he did by criminal negligence cause the death of Lawrence Vipond, contrary to s. 192 of the *Criminal Code*. On April 9, 1956, the Court of Appeal for Ontario unanimously dismissed his appeal.

On April 24, 1956, Abbott J. granted leave to appeal on the following questions of law:

1. Was the verbal statement attributed to the appellant by the investigating police officer improperly admitted in evidence?

2. Did the learned Trial Judge misdirect the jury when he instructed them that in determining whether or not the appellant was guilty of criminal negligence they were entitled to take into consideration his subsequent conduct, namely, leaving the scene of the accident?

As in my opinion there should be a new trial I will refer to the evidence only so far as may be necessary to make clear the reasons for the conclusion at which I have arrived.

At about 11.20 p.m. on November 12, 1955 Lawrence Vipond and a Miss Pfeiffer were standing on Dundas Street in the town of Paris on the south or right-hand side of an automobile which was parked facing easterly on the north side of the street. The right-hand door of this automobile was open. A motor vehicle driven westerly struck the open door and the right rear fender of the stationary automobile with considerable violence. Vipond suffered injuries from which he died shortly afterwards. Miss Pfeiffer was seriously injured and was found 14 feet west of the stationary automobile. The motor vehicle which struck Vipond did not stop and none of the witnesses could identify its driver or say whether it was driven by a man or a woman.

The theory of the Crown was that the appellant was the driver of the motor vehicle which struck the deceased. There was circumstantial evidence to support this theory and the Crown also relied on an oral statement said to have been made by the appellant to a police officer after he had been arrested on a charge of vagrancy on the day following the fatality.

It is to the admissibility of this oral statement that the first question is directed. I do not find it necessary to answer this question. Unfortunately the statement in question was given in evidence by the police officer in the presence of the jury without any preliminary enquiry or ruling as to its admissibility. The learned trial judge appears to have been at first inclined to the view that the statement was inadmissible and that a mistrial would result; but as he did not discharge the jury and in his charge invited them to consider the statement, it must be taken that at the conclusion of the evidence he had decided that it was admissible, although he ruled against the admissibility of the written statement said to have been made by the appellant immediately afterwards. It will be for the judge presiding at the new trial to decide the question of admissibility upon the evidence then given as to the circumstances in which the statement was made.

Turning to the second question, it was, of course, incumbent upon the prosecution to prove beyond a reasonable doubt not only that the appellant was the driver of the car which struck Vipond but also that he was criminally negligent in driving it. In dealing with this question I will assume that the jury found that the appellant was the driver of the car.

Criminal negligence is defined in s. 191 of the *Criminal Code*, which reads as follows:

> 191. (1) Every one is criminally negligent who
>
> (*a*) in doing anything, or
>
> (*b*) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> (2) For the purposes of this section, "duty" means a duty imposed by law.

The appellant while driving was under a legal duty to take reasonable care to avoid injuring any persons on the highway; but, in view of the definition quoted, he could be found guilty only if the jury were satisfied not merely that he failed to perform this duty but also that his failure showed wanton or reckless disregard for the lives or safety of others. Such wanton or reckless disregard must be shown to have existed prior to or at the instant of the car striking Vipond.

1956

BALCERCZYK v. THE QUEEN

Cartwright J.

Counsel for the respondent argues that the jury were entitled to infer the existence of such disregard from the facts that it was a clear night, that the parking lights of the stationary car were on, that it was parked between two street lights, that there was nothing to prevent the driver of the car which struck Vipond from seeing the stationary car, that the impact was violent, and that the driver fled from the scene. I agree that all of these were relevant items of circumstantial evidence. But, in my opinion, it was of vital importance that the jury should be carefully instructed that they must consider the fact of flight only for the purpose of reaching a decision as to the manner in which the driver was driving up to the instant of the impact, and particularly as to whether up to that instant he was driving with wanton or reckless disregard for the lives or safety of other persons. Without such a warning there would be a grave danger of the jury convicting the appellant because in their opinion he had immediately after the impact acted with such wanton or reckless disregard. In other words, it was essential that it be made plain to the jury that the conduct of the accused subsequent to the impact was relevant only in so far as it assisted them to determine by inference the nature of his conduct prior to the impact.

Far from giving any such direction the learned trial judge used words which the jury may well have understood, and which, in my opinion, they would have understood, to mean that they might convict the appellant if satisfied that he had immediately after the impact acted with a reckless disregard for the lives or safety of others. I refer to the following passage in the charge of the learned trial judge, and particularly to the sentences which I have italicized:

> If you decide it was negligence, was it the kind of negligence I described? that is, was it criminal? *This, you see, is a hit-and-run case and you have to consider that in considering whether this was a reckless disregard for the lives and safety of other people.* Is the conduct of the person who hit Vipond consistent with anything but a reckless disregard for the lives and safety of other people? The car had crossed the bridge; there was not very much traffic on Dundas Street; the street lights were on; the driving conditions, as you have heard, were good; this is a fairly wide street; yet whoever drove this car crashed into the door of Kennedy's car and crushed these two young people.

Miss Verna Farr said they flew through the air, and Miss Pfeiffer was found fourteen feet beyond the rear of Kennedy's car, and Vipond was found with his feet sort of underneath the rear wheel. The car skidded, according to Miss Farr, and then speeded up when it righted and after swerving, passed on. You will ask yourselves how could a driver driving under those conditions with the car parked between these two lights—someone gave the exact distance the car was from the easterly light, and as you can see there is seventy-six feet from Burwell Street to the first light, and then there is some distance from the first light to the car—so that whoever passed Burwell Street and crossed this corner had, as I recall it, some ninety feet before he would come to this door. Ask yourselves, how could he have failed to see this car; how did he get over in front of the door? You will ask yourselves about those questions. *If he had any regard for the life and safety of people on the street would he not have stopped after he came into collision with this door? It is for you to say. In order to convict him you must be able to say that he showed a reckless and wanton disregard for the lives and safety of other people.*

I am unable to find anything elsewhere in the charge of the learned trial judge which would make it clear to the jury that they must not convict unless satisfied beyond a reasonable doubt that the accused was driving prior to or at the moment of impact with a wanton or reckless disregard for the lives or safety of other persons.

In considering the likelihood of the jury having been misled it is well to bear in mind the natural tendency towards a feeling of indignation at the conduct of a person who, having struck another down, leaves him lying on the roadway and flees from the scene. That Parliament takes a stern view of such conduct is evidenced by the penalty prescribed by s. 221 (2) of the *Criminal Code;* but the appellant was not on trial for an offence against that section.

In my opinion the second question on which leave to appeal was granted should be answered in the affirmative.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: Edmonds, Maloney & Edmonds, Toronto.

1956

*Oct. 16, 17, 18, 19 Dec. 21

LLEWELLYN M. ROBERTS AND GEORGE B. BAGWELL (*Suppliants*) . . . APPELLANTS;

AND

HER MAJESTY THE QUEEN (*Respondent*) . . . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Compensation—Injurious affection of land—Regulations governing height of buildings and use of land in vicinity of airport—Effect of subsequent repeal of part—The Aeronautics Act, R.S.C. 1927, c. 3, s. 4, as amended by 1950, c. 23, s. 3, and 1952, c. 14, s. 1.

By s. 4 of the *Aeronautics Act*, 1927, as amended, power was given to make regulations with respect to, *inter alia*, "the height, use and location of buildings . . . situated on lands adjacent to or in the vicinity of airports", and subs. (8) of the section provided for compensation to anyone "whose property is injuriously affected by the operation of a zoning regulation". The *Toronto Malton Airport Zoning Regulations* were made pursuant to this section in 1953, and they prescribed, in s. 4(1), the maximum height of buildings within specified distances of the airport. They further provided in s. 4(2) that if any building exceeded the stated limits the Minister might require the owner to remove, demolish or modify it, and s. 5 prohibited the operation of "any machine, device, contrivance or thing" likely to cause "a hazard or obstruction to aircraft using the airport". In 1955, ss. 4(2) and 5 of these Regulations were revoked.

Held: (1) Lands could be "injuriously affected by the operation" of the Regulations notwithstanding that no order for demolition or modification had in fact been made by the Minister. Vertical regulation was necessary in the vicinity of airports and the vesting of the powers mentioned operated with an immediate effect on the use and value of the land. It became at once a burden on the land and the resulting diminution in value was a proper subject of compensation.

(2) The revocation of ss. 4(2) and 5 in 1955 did not affect the amount of compensation to which owners of lands affected were entitled. The Regulations should be considered as a whole, and the Court should not attempt to determine the extent of the loss produced by one particular section, such as s. 5. It would be impossible to distribute the diminution in value among different individual sections. It was quite clear that the subsequent revocation of a regulation could not give rise to a claim against the owner for the return of any part of a compensation already paid, and that result could not be in effect reversed by withholding compensation until after the particular burden had been removed.

(3) Evidence of sales in the vicinity of the lands in question, made after the enactment of the Regulations, might have been admissible as relevant to the value prior to the enactment. If a subsequent sale was shown to be as free in all respects from extraneous factors such as prior sales, and made within a time in which, according to the evidence, prices had not changed materially from those before the

*PRESENT: Rand, Locke, Cartwright, Abbott and Nolan JJ.

critical date, it was a relevant consideration. The rule should allow the Court to admit evidence of such sales as it found, in place, time and circumstances, to be logically probative of the fact to be found. In the circumstances of this case, however, the exclusion of such evidence did not affect the result.

Town planning—Effect of adoption of official plan and subdivision by-law —Subsequent annexation of municipality by another—Whether subdivision by-law abrogated—The Planning Act, R.S.O. 1950, c. 277, s. 24(3)—The Municipal Act, R.S.O. 1950, c. 243, s. 31.

When a municipality having a subdivision by-law is annexed by another municipality, having no such by-law, it is extremely doubtful whether s. 31 of *The Municipal Act* has the effect of abrogating the by-law. By s. 24(3) of *The Planning Act* a subdivision can be altered or dissolved only with the approval of the Minister, and therefore a by-law establishing a subdivision cannot be repealed by the council that passed it. The by-laws contemplated by s. 31 are primarily of legislative character, applicable throughout the whole municipality, whereas zoning is essentially administrative, and not a matter of general legislation so applicable. An official plan, under the Act, is not limited to a single municipality, but may cover several or parts of several, and it would defeat the purpose in view if a realignment of township boundaries were to effect a disruption of planned development.

APPEAL by the suppliants from a judgment of Thorson P., of the Exchequer Court of Canada (1). Appeal dismissed.

A. S. Pattillo, Q.C., A. F. Rodger and *J. F. Howard,* for the appellants.

W. B. Williston, Q.C., and *D. S. Maxwell,* for the respondent.

The judgment of the Court was delivered by

NOLAN J.:—This is an appeal from the judgment of the learned President of the Exchequer Court of Canada (1) awarding the appellants the sum of $40,000 as compensation for the decrease in value of their lands which were injuriously affected by the enactment of the *Toronto Malton Airport Zoning Regulations.*

The *Aeronautics Act,* R.S.C. 1927, c. 3, as amended by 1950, c. 23, s. 3, and 1952, c. 14, s. 1 (now R.S.C. 1952, c. 2), authorized the Minister, subject to the approval of the Governor in Council, to make regulations for the control of air navigation over Canada and provided, in part:

4. (1) Subject to the approval of the Governor in Council, the Minister may make regulations to control and regulate air navigation over Canada and the territorial waters of Canada and the conditions under

(1) (1955), 1 D.L.R. (2d) 11, 73 C.R.T.C. 150.

1956

ROBERTS AND BAGWELL v. THE QUEEN

Nolan J.

which aircraft registered in Canada may be operated over the high seas or any territory not within Canada, and, without restricting the generality of the foregoing, may make regulations with respect to . . .

(*j*) the height, use and location of buildings, structures and objects, including objects of natural growth, situated on lands adjacent to or in the vicinity of airports, for purposes relating to navigation of aircraft and use and operation of airports, and including, for such purposes, regulations restricting, regulating or prohibiting the doing of anything or the suffering of anything to be done on any such lands, or the construction or use of any such building, structure or object.

(2) Any regulation made under subsection one may authorize the Minister to make orders or directions with respect to such matters coming within this section as the regulations may prescribe.

Subsections (3) and (4) of s. 4 provided penalties for the violation of the provisions of a regulation or of the order of the Minister made under a regulation. Subsections (5), (6) and (7) dealt with the publication and registration of the Regulations.

Subsection (8) provided:

(8) Every person whose property is injuriously affected by the operation of a zoning regulation is entitled to recover from Her Majesty, as compensation, the amount, if any, by which the property was decreased in value by the enactment of the regulation, minus an amount equal to any increase in the value of the property that occurred after the claimant became the owner thereof and is attributable to the airport.

Subsection (9) limited the time for the recovery of compensation to two years after a copy of the Regulations was deposited pursuant to subs. (6) or (7).

Regulations under this authorization were approved by the Governor General in Council on April 9, 1953 (1) and a copy was deposited in the Registry Office for the County of Peel on June 1, 1953, together with a plan and description of the lands affected by the Regulations. A copy was published in the Toronto Daily Star on July 13 and July 14, 1953, and in The Globe and Mail on July 11 and July 13, 1953.

The Regulations provided, in part:

4. (1) No person shall erect or construct, on any land to which these regulations apply, any building, structure or object or any addition to any existing building, structure or object, the highest point of which exceeds in elevation the elevation at that point of such of the surfaces hereinafter described as projects immediately over and above the surface of the land upon which such building, structure or object is located, namely,

(*a*) a horizontal surface, the outer limits of which are at a horizontal radius of 13,000 feet more or less;

(1) [1953] S.O.R. 285.

(b) the approach surfaces abutting each end of the strip designated as 10-28, the strip designated as 14-32 and the strip designated as 05-23, and extending outward therefrom, the dimensions of which approach surfaces are 600 feet on each side of the centre line of the strip at the strip ends and 2,000 feet on each side of the projected centre line of the strip at the outer ends, the said outer ends being 200 feet above the elevations at the strip ends, and measured horizontally, 10,000 feet from the strip ends; and

(c) the several transitional surfaces, each rising at an angle determined on the basis of a ratio of one foot vertically for every seven feet measured horizontally from the outer lateral limits of the strips and their abutting surfaces,

as shown on a Plan No. T724 dated December 17, 1952, and revised February 20, 1953, of record in the Department of Transport.

(2) Where any building, structure or object on any land to which these regulations apply exceeds the limits in elevation specified in subsection (1), the Minister may order the owner or occupier of the land to remove, demolish or modify such building, structure or object or do any act or thing necessary to ensure that such building, structure or object complies with the limits in elevation so specified and may, in any such order, specify the time within which such removal, demolition, modification, act or thing shall be done.

5. No person shall operate or cause to be operated on any lands to which these regulations apply any machine, device, contrivance or thing after being notified by the Minister that, in the opinion of the Minister, the machine, device, contrivance or thing causes or is likely to cause, by the emission of light, smoke, noise or fumes, a hazard or obstruction to aircraft using the airport.

By order in council P.C. 1955-1302, dated September 1, 1955 (1), the Regulations were amended by revoking subs. (2) of s. 4 and s. 5, and a copy of the order in council was deposited in the registry office on September 29, 1955. In order to remove any doubt as to the effectiveness of this amendment, a further order in council, P.C. 1955-1580, dated October 19, 1955 (2), was passed and deposited in the registry office on November 4, 1955.

The lands of the appellants consist of 100.09 acres of vacant property and form part of the north half of lot 8, 7th concession, of the township of Toronto (formerly Toronto Gore), county of Peel. They lie immediately east of Malton Airport and in the direct path of the east-west runway. The property has a frontage of 755 feet on the 6th line (known as the Airport Road), a depth of 4,460 feet, a rear frontage of about 807 feet on the unopened 7th line and a railway frontage of approximately 302 feet on the Canadian National Railway line, which crosses the north-east corner of the property.

(1) [1955] S.O.R. 1659. (2) [1955] S.O.R. 1799.

1956

ROBERTS AND BAGWELL v. THE QUEEN

Nolan J.

On March 26, 1951, one Harry R. Walker, the owner of the lands, in consideration of the payment of $600, granted to Alan R. Campbell an option until October 1, 1951, to purchase at a price of $400 per acre. On August 28, 1951, Campbell assigned the option to the appellant Roberts for a consideration of $600. The option, in consideration of a payment of $200, was extended to November 1, 1951, and was exercised by Roberts on October 29, 1951. By deed registered on November 30, 1951 Walker conveyed the lands to the appellants, who hold their interest in common in trust for certain others, the particulars of the trusteeship being set out in a deed of trust dated January 21, 1952. On November 28, 1951 the appellants entered into an agreement with Walker, who owned and operated a farm on the south half of lot 8, for the construction of a roadway between the two properties, which agreement was registered on November 30, 1951.

The lands were subject to two easements: one in favour of the Hydro-Electric Power Commission of Ontario to erect and maintain three poles across the north-east corner of the lands, about 150 feet from and parallel to the railway line; the other in favour of Her Majesty the Queen to erect and maintain eight approach light poles, a minimum distance of 200 feet apart, in a line running eastward from the west boundary of the lands. The easement is 15 feet wide and 2,398.67 feet deep.

The evidence is that Roberts wanted to purchase the lands for development, subdivision and resale for industrial and commercial use and, before exercising his option, in order that he might be certain that the land could be so used, engaged a surveyor, W. S. Winters, to prepare a plan of a proposed subdivision, and approval of the Department of Planning and Development was sought.

On October 24, 1951, the Department wrote to Winters that the draft plan of the subdivision had been approved, subject to certain conditions and amendments noted thereon. One of the conditions was: "1. That the owner observe the height restrictions shown on the attached draft plan." The maximum building height restrictions endorsed on the draft plan began at 19 feet, approximately 50 feet from the Airport Road frontage, and increased to 34 feet at approximately 725 feet from the front of the property.

The option was exercised after receiving the conditional approval of the plan and the condition quoted does not appear to have been objected to by the appellants.

The proposed plan of subdivision was not registered and in 1952 and 1953 the lands were leased to Walker for farming purposes.

Subsequently the appellants furnished one Lyons, a real estate agent, with a copy of the proposed plan and attempted, unsuccessfully, to sell the lands through him. In May 1952 the appellants listed the property for sale with Willoughby & Sons for a period of 60 days at a price of $110,000 and in April 1953 they again listed the lands for sale with Shortill & Hodgkins Limited for a period of 30 days at a price of $150,000. No offers to purchase were made.

On February 26, 1954, the appellants entered into an agreement with one Oliver to sell a portion of the lands 500 feet wide and 700 feet deep at a price of $40,000. A deposit of $1,000 was made and, although the transaction was not completed at the time of trial, the deposit had not been returned.

The learned President of the Exchequer Court, in his reasons for judgment, reviewed with great particularity the opinions both of the expert witnesses called by the appellants and of those called by the respondent to establish the value of the injuriously affected lands, together with the other evidence of value introduced by the parties. The learned President came to the conclusion that the valuations of the appellants' expert witnesses must be rejected as being much too high. He concluded that the valuation of $95,500 submitted by Mr. Davis, a witness for the respondent, while high, came nearest to reality and he adopted it as the value of the property immediately prior to the enactment of the Regulations on April 9, 1953, and was of the opinion that the sum of $95,500 was adequate to cover every factor of value to the owners as at that date.

The President further held that there was no evidence to support a finding that any increase in the value of the appellants' property after its acquisition by the appellants on October 29, 1951, was attributable to the airport and

1956

ROBERTS AND BAGWELL v. THE QUEEN

Nolan J.

that the revocation of subs. (2) of s. 4 and s. 5 of the Regulations, by order in council dated September 1, 1955, did not reduce the amount by which the lands had been decreased in value by the enactment of the Regulations. He further held that the term "zoning regulation" in s. 4(8) of the *Aeronautics Act* should be interpreted as meaning the *Toronto Malton Airport Zoning Regulations* in their entirety and that the section did not contemplate separate effects of the several sections of the "zoning regulation" referred to.

At trial there was conflict in the evidence adduced by the appellants and by the respondent as to whether the lands were ready for development and the valuations of the experts called on behalf of the appellants were, to a large extent, based on the assumption that they were ready immediately prior to April 9, 1953.

It appears from the evidence that the water supply, having regard to the demands upon it, was perilously close to inadequacy. The maximum capacity of the system was 1,250,000 gallons a day. Of this the A. V. Roe company required 1,000,000 gallons, Malton Subdivisions Limited a maximum of 125,000 gallons a day and the construction of water-mains in the village of Malton was under contemplation. Some additional water had been promised to one Levinter. There was evidence that the capacity of the water-main could be increased by further pumping facilities involving a large expenditure of money, but that immediately prior to the enactment of the Regulations no additional pumping stations had been installed and consequently water was not then available for use by developers of the property.

A great deal of evidence was adduced at trial as to whether or not a sewage system was available, which was a matter of importance because, without sewage facilities, the appellants could not sell their land by lots for industrial and commercial use. In the latter part of 1953 work had been begun by Malton Subdivisions Limited on a sewage-disposal plant sufficient to serve 3,000 people in the subdivision where approximately 2,400 people were expected to reside. When a large parcel of the land owned by Malton Subdivisions Limited was expropriated in February 1954, work on the sewage-disposal plant stopped

and there was no evidence to show that the appellants would have the right to connect their lands with this sewage-disposal plant even if it were completed.

On the whole of the evidence I agree with the conclusion of the learned President that the lands were not ready for development immediately prior to April 9, 1953, and would only become so gradually and when sewer and water facilities were available.

Moreover, as has been pointed out, the lands in question were situate at the end of a runway and land in such a position and underneath a flightway would be less desirable if other land were available. In addition, the A. V. Roe plant was situated nearby and one major industry had moved from the area because of difficulty in competing in the labour market with A. V. Roe because that company paid substantially higher wages than those paid in other industries. There was some evidence that the financial position of the Township of Toronto would be a discouragement to subdividers.

I have examined the evidence of the sales of other properties in the area prior to the enactment of the Regulations. This evidence discloses that there were five sales in 1951, the price per acre varying between $500 and $700. There were no sales of lots in concession 7 in 1952 or prior to April 9 in 1953. There was a sale of part of lot 7 in concession 8 on February 18, 1953, from one Levinter to Malton Subdivisions Limited, but this property was purchased for the purpose of building a sewage-disposal plant for a subdivision then being developed and was the sale of property in a particular place and for a particular purpose. In Etobicoke Township, which lies immediately west of Toronto Township, there were four sales in 1952.

In 1953 there were eight sales, five of which were to the Ontario Jockey Club. I am of the opinion that these sales are not a safe guide to the value of the lands in question, as it seems to have been common knowledge that the Ontario Jockey Club was buying land in the area for the purpose of building a race-track and it appears plain that the prices it paid were above the market price and are not indicative of the value of the lands of the appellants.

1956

ROBERTS AND BAGWELL v. THE QUEEN

Nolan J.

With regard to the value of the lands after the enactment of the Regulations, the learned President rejected the opinion of the experts for the appellants that they had no value other than for agricultural purposes and were only worth, in the opinion of the witness Bosley, $10,000, and, in the opinion of the witness Stewart, $20,000. The evidence discloses that within the area affected by the Regulations some sales were made for speculation or development and, while the effect of the enactment of the Regulations was to postpone the development of the lands, it did not preclude long-term speculative possibilities and the lands were more valuable than farm land. With regard to the decrease in value, the learned President found that the frontage on the Airport Road, for a distance back of about 400 feet, being approximately 4 acres, with a potential use for a service-station, or motel, or some similar use, had a value of not less than $26,000. He then placed a value on 14 acres up to a height restriction of 35 feet at $200 an acre, making a total of $2,800 for this acreage. The remaining 82 acres he valued at $350 an acre, or $28,000, bringing the total value of all the lands to $57,500. He then came to the conclusion that the decrease in value of the appellants' property could be fairly fixed at $40,000.

The appellants, in proof of the value of the lands prior to the enactment of the Regulations, tendered evidence of sales in the vicinity of those affected after that date, but such evidence was excluded. The Crown was subsequently permitted to adduce similar sales as evidence to refute the statements of the appellants' witnesses as to diminution of value resulting from the Regulations. If sales made after the enactment were totally excluded, obviously there could be no evidence whatever of sales affected by the Regulations in the Malton area and apparently there was no other airport area which afforded such instances.

In my view, evidence of a sale after the enactment can, in the absence of special circumstances, be relevant to the value prior to the enactment. The sale must be shown to be as free in all respects from extraneous factors such as prior sales and made within such time as the evidence shows prices not to have changed materially from those before the critical date. In other words, the mere circumstance of the sale being before or after a particular date cannot

nullify the relevance of subsequent sales while the general market conditions have remained the same. The rule should allow the Court to admit evidence of such sales as it finds, in place, time and circumstances, to be logically probative of the fact to be found. In my respectful view, however, the exclusion of the evidence in this case as evidence of value based upon the element of time alone, while technically erroneous, did not materially affect the finding of the learned President as to compensation to which the appellants should be held to be entitled.

As has been pointed out, subs. (2) of s. 4 and s. 5 were revoked by order in council P.C. 1955-1302 dated September 1, 1955. These Regulations provided:

4. (2) Where any building, structure or object on any land to which these regulations apply exceeds the limits in elevation specified in subsection (1), the Minister may order the owner or occupier of the land to remove, demolish or modify such building, structure or object or do any act or thing necessary to ensure that such building, structure or object complies with the limits in elevation so specified and may, in any such order, specify the time within which such removal, demolition, modification, act or thing shall be done.

5. No person shall operate or cause to be operated on any lands to which these regulations apply any machine, device, contrivance or thing after being notified by the Minister that, in the opinion of the Minister, the machine, device, contrivance or thing causes or is likely to cause, by the emission of light, smoke, noise or fumes, a hazard or obstruction to aircraft using the airport.

Two questions present themselves for determination in connection with the two Regulations. In the first place, the appellants contend that they are entitled to compensation for the diminution in value due to the effect of these revoked Regulations.

It was argued by counsel for the Crown that, until an order was actually made by the Minister, the property could not be said to have been "injuriously affected". Under s. 23 of the *Expropriation Act*, R.S.C. 1952, c. 106, injurious affection can result only from some positive act by the Crown, but that is because of the language contained in the section itself, which provides that the injurious affection must be caused by the "construction" of a public work. Under s. 4(8) of the *Aeronautics Act*, 1927, as amended, compensation is to be awarded to every person whose property is injuriously affected "by the operation of a zoning regulation". The question arises whether there

1956

ROBERTS AND BAGWELL v. THE QUEEN

Nolan J.

can be injurious affection giving rise to a claim for compensation when no order has actually been made by the Minister. If this question were answered in the negative, the Minister, by forbearing to make an order within two years, could effectually deprive an owner of compensation for what might render his land almost valueless. The purpose of the statute is clear. Vertical regulation is necessary in the vicinity of airports and the vesting of the powers mentioned operates with an immediate effect on the use and value of the land. It becomes at once a burden on the land and the resulting diminution in value is a proper subject for compensation.

The second question for consideration is, what is the effect of the revocation of the two Regulations in 1955 on the compensation?

In determining the extent of loss in value due to the Regulations, in my view, the Regulations as a whole should be considered, and not the extent of loss produced by one particular section such as s. 5, and it would be impossible to attempt to distribute the diminution in value among individual Regulations. It is quite clear that the subsequent revocation of the Regulation could not give rise to a claim against the owner for a return of any part of compensation already paid and that result cannot, in effect, be reversed by withholding compensation until after the particular burden has been removed. In any event, the revocation did not affect the quantum of the award of compensation in the present case, as the learned President states specifically that the revocation of ss. 4(2) and 5 was not taken into account in making the award.

Section 4(8) of the *Aeronautics Act*, 1927, provides that every person whose property is injuriously affected by the operation of a zoning regulation is entitled to recover from Her Majesty, as compensation, the amount, if any, by which the property was decreased in value by the enactment of the regulation, "minus an amount equal to any increase in the value of the property that occurred after the claimant became the owner thereof and is attributable to the airport". I agree with the learned President that there is nothing in the evidence to indicate that there has been an increase in the value of the property which is attributable to the airport.

A cross-appeal was made by the Crown against the award on the ground, to put it shortly, that at the time of the enactment of the restrictive Regulation there was already, on a portion of the land, a provincial height limitation which, on the evidence, reduced the value of the whole radically and to little more than was paid for it. This contention makes it necessary to go into the facts in some detail.

Under *The Planning Act*, R.S.O. 1950, c. 277 (now 1955, c. 61), provision is made for the formulation of what is called an "official plan" of an area in any municipality or municipalities. Its purpose is to exhibit a programme of development, in the language of the definition, "designed to secure the health, safety, convenience or welfare of the inhabitants of the area". The "development" of an area means its settlement, utilization and growth in all features and aspects of urban and suburban life. When a planning area has been defined by the Minister, a planning board is appointed by the council of the municipalitiy, or, in the case of two or more municipalities, that one designated by the Minister. The planning board thereupon applies itself to an investigation and a survey of the physical, social and economic conditions pertinent to the development; it prepares maps, statistical information and other material necessary for the "study, explanation and solution" of the problems presenting themselves, holds public meetings, draws up a plan and recommends it to the council for adoption. Upon adoption the plan is submitted to the Minister, and upon his approval it becomes the official plan of the planning area.

The plan necessarily deals broadly and somewhat generally with features of the development, such as the designation of industrial, commercial and residential sectors, and other prescriptions of the mode and character of use to which the area may be put. From time to time the planning board may recommend to the council the implementation of any of these features of the plan.

When an official plan comes into effect no public work shall be undertaken and, except for a qualification which is not material here, no by-law shall be passed by the council for any purpose that does not conform with it.

1956

ROBERTS AND BAGWELL v. THE QUEEN

Nolan J.

The effect of this is that wherever a by-law is required to enable private action to be taken, it must conform with the plan, but where a by-law is unnecessary, and in the absence of action by the Minister, who is authorized by s. 25 to exercise any of the powers conferred on councils by s. 390 of *The Municipal Act,* R.S.O. 1950, c. 243, the scope of action, so it is argued by the appellants, is at large.

Here an official plan for the township of Toronto Gore was approved by the Minister on March 5, 1951, and in an appendix to the map and as part of the plan it was stipulated as Item B. 1:

> Special height regulations are shown on the plan of the Department of Transport for one flightway and may be extended to others if required by the Department of Transport. These will apply to all structures. A maximum height limitation will be imposed on the whole urban area of 40 feet, to be measured from the present ground level to the highest point of the roof, not only as a flight safety factor, but also as a means of reducing the ultimate cost of fire fighting equipment.

Although the maximum height limitation "will be imposed on the whole urban area", it would seem that this is a specific feature of the plan and that it is as effective as if it were embodied in a by-law of the council or an order of the Minister.

There is next the matter of the subdivision of property. By s. 24 of *The Planning Act, supra,* the council may, by by-law, designate any area within the municipality as an area of subdivision control and thereafter no agreement to sell land and no conveyance of land can be made otherwise than by describing the land in accordance with a registered plan of subdivision. To this there are three exceptions: (a) where the land to be sold or conveyed is more than 10 acres in area; (b) where it is the whole part then remaining to the owner of one parcel described in a registered conveyance to him; or (c) where the consent of the planning board or the Minister is obtained.

The lands in question were formerly part of the township of Toronto Gore which, on the west, adjoined the township of Toronto. By a by-law of the Township of Toronto Gore dated November 15, 1948, the whole of the township was, under the provisions of the Act then in force, declared an urban development area. Prior to that, on August 4, 1948, a by-law of the Township of Toronto made a similar declaration, but described the area by a specification of

lots. By an amendment made to the Act in 1949, where a council had so designated such an area and the by-law was in force on March 9, 1949, the area was to be deemed to be one of subdivision control. By virtue of that enactment the land in question became part of a subdivision area.

By an order of the Ontario Municipal Board of June 18, 1951, effective June 30, 1951, the southerly portion of the township of Toronto Gore, embracing the area designated urban on the official plan and including the land in question, was annexed to the township of Toronto. By s. 31 of *The Municipal Act, supra*:

> Where a district or a municipality is annexed to a municipality, its by-laws shall extend to such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them.

Counsel for the appellants argued that the effect of that section was to nullify the by-law of the Township of Toronto Gore of November 15, 1948, and, as the by-law of the Township of Toronto of August 4, 1948, was specific and limited to the lots described, there was no by-law regulating the subdivision of the land in question from and after June 30, 1951. At the same time it was contended that the official plan created no restriction until implemented by by-law or order of which there was none.

Whether a subdivision by-law can be said to come within s. 31 of *The Municipal Act, supra,* is extremely doubtful. By s. 24(3) of *The Planning Act, supra,* a subdivision can be altered or dissolved only with the approval of the Minister: a by-law establishing a subdivision cannot, therefore, be repealed by the council which passed it. The by-laws contemplated by the section are primarily of legislative character which as general laws can apply throughout the municipality. But zoning is not a matter of general legislation in that sense; it is essentially administrative; it may be limited to a small portion of the township; there might be several areas so declared within a township with different features and it could not be said that any one or which of them extended to the annexed area.

1956

ROBERTS AND BAGWELL v. THE QUEEN

Nolan J.

An official plan is not bound by the limits of one municipality; it may cover several or parts of several; and it would defeat the purpose in view if realignment of township boundaries were to effect a disruption of a planned development. Under s. 14 a by-law that conforms with an official plan, and whether passed before or after the plan, is to be deemed to implement the plan. This means that the official plan of March 5, 1951, was implemented by the by-law of the Township of Toronto Gore of November 15, 1948. The effect of this was to continue the plan and the by-law as in force after the transfer of part of the township of Toronto Gore to the township of Toronto.

In that situation, the appellants, in September 1951, applied to have about 950 feet of this land, running back from the Airport Road, brought under a plan of subdivision. On October 24, 1951, the approval of the Minister to a draft plan was given, subject to certain conditions, among which was a height restriction endorsed on the plan. This fixed a maximum building height of 19 feet at a distance of 50 feet from the street line, of 24 feet at 275 feet, and of 34 feet at 725 feet. It was argued that these restrictions were beyond the power of the Minister to impose, but this would seem to be without substance in view of s. 26(4), which provides that in considering a draft plan of subdivision regard shall be had by the Minister to

> (*f*) the restrictions or proposed restrictions, if any, on the land, buildings and structures proposed to be erected thereon and the restrictions, if any, on adjoining lands.

Moreover, under s. 25(1)(*a*), the Minister, as already mentioned, has all the powers of a council under s. 390 of *The Municipal Act* and the imposition of the limitation here comes within the scope of that power. It was suggested that the limitation was in conflict with the official plan and so far violated s. 25(1)(*a*) which requires such an order to conform with the official plan. As the latter establishes only a maximum height of 40 feet, the limitations within that maximum made by the Minister are in conformity with it.

Although I have expressed my views on the legal questions raised, it is not necessary to make a definite holding on them. It is sufficient for the purposes of this appeal that the official plan, the by-law and the restrictions on

the draft plan of subdivision were in *de facto* existence with a strong presumption of their validity at the time of the imposition of the Dominion restrictions. That fact itself was sufficient to cast such a cloud upon what has been claimed to have been free land as to affect the market value almost as significantly as if their validity were unchallenged.

It is argued in support of the cross-appeal that the learned President has failed to give sufficient weight to the existence of this cloud, but I am not satisfied that this is so. He refers to the contention in some detail in his reasons and, in speaking of the draft plan conditionally approved in October 1951, says in part (1):

> One of the conditions was that the owner should observe the height restrictions shown on the draft plan. The height restrictions were marked on it. The maximum building heights were 19 feet at just a little back from the frontage on the Airport Road, 24 feet at about 225 feet further back and 34 feet at about 450 feet still further back. This plan with the height restrictions on it and Mr. Tyrrell's letter attached was filed as ex. 38. It was not until Mr. Roberts was satisfied that the draft plan was approved that he decided to exercise the option and he did so on October 29, 1951. He then listed the property. It is clear that he knew of the height restrictions and never tried to have them changed. They are, of course, somewhat less severe than those imposed by the Regulations.

I am unable to say that the learned President did not give this factor due consideration in arriving at his final figure.

It was a necessary step in ascertaining the amount of compensation in this matter to determine, first, the value of the land to the owners, freed of the restrictions. The principle to be applied is stated in the judgment of this Court in *Woods Manufacturing Company Limited v. The King* (2). The question is as to what amount a prudent person in the position of the owners, being in possession of the property but without title to it, would be willing to give sooner than fail to obtain it. The learned President has not applied this principle, but rather the one stated by him in his judgment in *The Queen v. Supertest Petroleum Corporation Limited* (3), decided since the date of the *Woods* judgment. I am, however, of the opinion that

(1) 1 D.L.R. (2d) at pp. 22-3.
(2) [1951] S.C.R. 504, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.
(3) [1954] Ex. C.R. 105, [1954] 3 D.L.R. 245, 71 C.R.T.C. 169.

1956

ROBERTS AND BAGWELL v. THE QUEEN

Nolan J.

the amount determined upon as the value of the property is adequate and that the sum of $40,000 allowed as compensation for injurious affection is sufficient.

I would dismiss the appeal and the cross-appeal both with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the suppliants, appellants: Chappell, Walsh & Davidson, Toronto.

Solicitor for the Attorney General of Canada, respondent and cross-appellant: F. P. Varcoe, Ottawa.

1956

*May 31
*Jun. 1, 4, 5
Dec. 21

GAGETOWN LUMBER CO. LTD. (*Defendant*) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN, on the information of the Deputy Attorney General of Canada (*Plaintiff*)..... RESPONDENT;

AND

THE ATTORNEY GENERAL FOR NEW BRUNSWICK (*Defendant*) ... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Compensation—Timber lands—Valuation of lands and unexpired licences on Crown lands—Licence as "interest" in land—The Expropriation Act, R.S.C. 1952, c. 106—Allowance for compulsory taking.

The Crown in right of Canada expropriated for military purposes a large tract of land in New Brunswick, including some 28,000 acres on which the appellant company had carried on lumbering operations. About half of this land was owned by the company and the other half consisted of Crown lands in respect of which the company held two different licences, one of which would expire in the ordinary course in 11 years, while the other had only 1 year to run. The Exchequer Court determined the value of the company's freehold lands at $330,000 (to which was added 10 per cent. for compulsory taking), the value of the licences at $42,000, and the value of the freehold in the Crown lands at $344,000. Adding other allowances, and deducting the value of the timber that the company had been permitted to cut after the expropriation, the Court fixed the total compensation at $394,177 for the company and $344,000 for the Province. Both the company and the Province sought increases in the amounts awarded.

---

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

Held, the company's appeal should be allowed with costs and the Province's cross-appeal should be dismissed with costs.

Per curiam: The company's rights under its licences constituted an "interest" in land for which it was entitled to compensation under the *Expropriation Act,* but only to the extent of the unexpired terms; the mere possibility of renewal in the future was not in itself an interest in land.

Per curiam: The additional allowance of 10 per cent. for forcible taking, having been rightly given in respect of the freehold lands, should also have been given in respect of the licences.

Per Locke, Fauteux and Nolan JJ.: The witness M, whose valuation of the land was accepted in the Court below, considered the matter solely from the standpoint of what a prospective purchaser might be willing to pay for the lands, and did not at all consider the value to the company or whether an informed owner would have agreed to sell at any such figure. He simply expressed his opinion as to the amount the lands would realize if the owner was under compulsion to sell for what they would bring on the open market. In determining the value to the owner all advantages, present or future, that the land possessed in his hands were to be taken into consideration, and he was entitled to have the price assessed in reference to those advantages that would give the land the greatest value. These lands, in the circumstances, clearly had a value to the appellant company that they would not have had to someone who did not have like facilities for converting the logs into lumber, and a long-established business designed and effective for disposing of the lumber at a profit. Applying these principles, the award to the company in respect of the freehold properties should be increased by $55,000. There was nothing in the record that would support a higher valuation than had been made of the Crown lands as freehold in the hands of the Province. The award in respect of the licences should be increased by $35,000, and there should be a reduction of $10,426.50 in the credit to be given for timber cut after the expropriation.

Per Rand J.: The value of the property to the owner, as a measure of compensation, had two aspects: (1) the present value of all the land's possibilities to the owner, as opposed to the value to the taker, with which the owner was not concerned; and (2) the value to the owner as a prudent man in a situation affected by conditions or relations from which buyers generally on the market would be free, representing the sum total of detriment suffered by reason of the disruption, over and above what the market price would take into account. Market value, *i.e.*, the price on which a prudent and willing vendor and a similar purchaser would agree, might or might not be the sole determinant of compensation. Where the position of the owner *vis-à-vis* the land was not different from that of any purchaser, that value would be the measure; where the owner was in special relations to the land, as in the case of an established business, the measure was the value to him as a prudent man—what he would pay rather than be dispossessed, that value thereafter representing the capital cost of the business to which the profits would be related. But the value of these special relations must be established by the claimant. Considered on this basis, and on the evidence adduced, the final valuations of the lands arrived at by the Court below were liberal and should not be disturbed.

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Evidence of settlements for lands taken from other owners in the area in the same expropriation proceedings was rightly rejected by the Court below. Evidence of sales to the Crown might be admissible if the Court found that they were the result of genuinely free negotiations, influenced only by the desire of the parties to reach agreement on a figure deemed to be the fair value of the property, and not by extraneous considerations, but here the act of expropriation covered all the land required for the project and what remained was settlement of the claims for compensation, which involved elements different in degree, if not in nature, from those in sales to the Crown, and of such a character as to exclude the necessary freedom. *Amory et al. v. Commonwealth* (1947), 321 Mass. 240 at 255, quoted with approval.

On all the evidence, the company was entitled to an increase of $15,750 in the amount awarded for the licences, a reduction of $10,587 in the amount deducted in respect of the timber cut after the expropriation, and half the cost of marking boundary-lines shortly before, making a total increase of $30,039.

Per Abbott J.: The valuations for both the freehold lands and the Crown lands in the hands of the Province were liberal, and should not be disturbed. The economic value of the licences could not exceed their profit potential after taxes, during the terms that they still had to run. Applying the evidence as to the prices at which licences for timber lands in New Brunswick were bought and sold, and the other matters considered in the judgment appealed from, the valuation of the licences should not be disturbed. There should, however, be an allowance of $4,200 for compulsory taking in respect of the licences, $3,702 in respect of the survey costs, and a reduction of $10,567 in the credit for wood cut after the expropriation.

APPEAL from the judgment of Thorson P., of the Exchequer Court of Canada, fixing the compensation to be paid on lands expropriated by the Crown in right of Canada. Appeal allowed in part.

A. B. Gilbert, Q.C., and *D. M. Gillis*, for the appellant.

A. McF. Limerick, Q.C., *C. J. A. Hughes, Q.C.*, and *K. E. Eaton*, for Her Majesty the Queen in right of Canada, respondent.

J. F. H. Teed, Q.C., for the Attorney General for New Brunswick, respondent and cross-appellant.

RAND J.:—This appeal arises out of an expropriation of approximately 28,000 acres of land in New Brunswick. Part was freehold, 13,413 acres, and part Crown lands under licences to cut, 14,424. The latter were embraced within two types of licence to the company by the Crown, one called a sawmill licence covering 9,027 acres and the other a timber licence for 5,397 acres. Of these in 1935 and 1950, 2,586 acres of the freehold and 1,818 acres of the

licensed, lands had been burnt over. The freehold had 151 acres of non-productive and 76 acres cleared; the licensed lands, 579 acres of non-productive and 2 cleared. The sawmill licence was sustained by legislation which was to expire in 1963 and the timber licence in 1953, and at the time of the expropriation, August 6, 1952, their terms were accordingly limited to 11 years and 1 year respectively. In each, where the conditions of the licences had been complied with, an annual renewal was stipulated. It was shown that, although they were so limited in time, the policy of the legislature by periodic authorizing enactments for the last 40 years had been to permit continued renewal.

The main claim made by both the company and the Province was on a basis of some simplicity of conception though of complexity in computation. The total quantities of wood, as at the moment of expropriation, from sapling to mature tree, classified by species and in categories of sawlogs, pulpwood, firewood and other uses, were estimated; from the market prices for products received in 1952 by the company and in other cases, estimated, operating costs of the company for the same year, operations extending over lands in another section of the Province, in corresponding units, were deducted; and the balances, the net returns, with minor adjustments, multiplied by the quantities produced the total value of the growth. To this was added that of the land related to its capacity to yield growth. The price, for example, of white pine in sawn lumber at shipping point (Saint John) was $94.16 per M (f.b.m.), and for spruce and fir, $75.15; the production costs, to that point, exclusive of stumpage fees payable to the Province, deducted from the selling-prices, left balances of $41.08 and $22.07 respectively. These amounts, embracing an unspecified element of profit, were said to represent the unit-value of the standing trees, although the actual figures used in the calculation of the claim were, for spruce and fir $20, and for white pine $25.

The total value was reduced to an acreage figure for the several categories. For sawlogs on the forested area of the Crown lands, $14.02; for growth of 5 inches and over available for sale in cords for pulpwood, firewood, spoolwood, etc., $53.18; for undersized trees, less than 5

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Rand J.

inches in diameter, dealt with on a maturity basis and the 1952 market price discounted at 4 per cent. compounded for the appropriate number of years for each species to obtain the present value, $12.02; the land's capacity for producing a crop of trees over a period of 64 years, $6.15: a total of $85.37. A similar calculation for the freehold lands yielded a total of $84.66 an acre. In each case $5 was allowed for reproducing burned and cleared land, and 5 per cent. deducted for inoperable growth. The grand total claimed before us was, for Crown lands, to the Province $451,551.54, to the company $555,011.92 (less an amount for cutting after the expropriation which is dealt with hereafter); and for the freehold, $877,911.50 (also less an amount for subsequent cutting).

This theoretical computation was argued to represent the value to an owner whose utilization of his property was by way of treating the annual growth of the trees as a crop in an indefinite continuity, as the most profitable mode of the exploitation on a large scale of woodlands; but as can be seen, it virtually ignores present market or exchange value and the element of profit which that involves.

It may be assumed that the general range of market values for freehold and for licensed lands in a Province where lumbering has played and now plays so large a part in the economy as in New Brunswick must long since have been established; and that in the case of licences the probability of indefinite renewal would, in some degree, have been a factor. But the expropriation, here, of the estate of the Province excludes that possibility, and the interest of the company as licensee must be taken as confined to the strict rights under the licences, including the limits of size for cutting, but not excluding the value, if any, placed by the market on the chance of being able to obtain leave under the regulations to cut undersized growth. The compensation for this interest must accordingly be referred to the periods in 1952 remaining unexpired of the licences.

It is, I think, beyond question that no sales and purchases of timber lands or licences have ever been carried out on the basis outlined. It was in fact rejected by Mr. Reid, an officer of the company; in speaking of the price at

which licences would be bought or sold, the President, examining the figure of $20 per M (f.b.m.) claimed for the standing spruce on the licensed lands, put this question:

> Is there any way of finding out how much would you pay to licence holders—will you pay them $12 and then pay the province $8 [the stumpage rate]? Is that how it would work out?

His answer was:

> I would not buy it on that basis; he would expect as much as he could from his lease . . . He might [expect to get $12] just according to how hard a bargain he could drive . . . He has the lease and wants to sell his licence to you, that is part of a dicker between the two parties.

The unexpressed element here which is concealed by the answer is the profit over the stumpage value which the purchaser would have in view, largely the determinant of the market price, the failure to face which is the serious defect in the argument presented.

Mr. Gilbert's exclusive concern with this basis results from an underlying misconception of the meaning of the form in which the principle of compensation is put, that the value of the property to the owner is the measure of compensation. Properly understood, that language is accurate but the meaning is not precisely what the appellant has in mind. It has two aspects, one that it is the present value of all the land's possibilities to the owner in contradistinction to the value to the taker, for with the latter the owner is not concerned; and the second, the value to the owner as a prudent man in a situation affected by conditions or relations from which buyers generally on the market would be free, as, for example, the special features involved in the ejection of an established business from possession of land. They represent the sum total of detriment suffered by reason of the disruption, over and above what the market price would take into account. The claim confuses the present exchange value of the land with the present value of the total return of its present growth; in substance it attributes to the land a value equal to the present value of what the owner would be able to realize from the existing growth over a growth cycle of say 64 years plus the residual or capacity value of the land. The mere recognition of some undetermined element of profit does not alter the basic structure of the claim. The

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Rand J.

defect of this formulation was long ago pointed out by the Exchequer Court in *The King v. Thompson* (1) and *The King v. Griffin* (2).

The conception so advanced conceals other vital items involved in exchange value: the multiple risks of the future, risks of fire—of which there is significant evidence here, the infestation of pests, fungi, etc., market variations, changes in operating-costs, seasonal conditions, the effect of competitive substitutes and other factors and uncertainties. In the broader sense, it disregards the price for re-establishing the owner in business, the price at which he could purchase comparable lands and continue his business.

Those variables and uncertainties, some in more or less vague appreciation, are the unexpressed factors operating on the minds of persons habituated to lumber dealings. Opinions, varying, of course, with the individual, are given weight roughly according to the experience and standing in the business of those who give them; and they may require modification in the application to the facts on which they are based of the principles governing compensation. From this point of view, we have little or no help from what was adduced on behalf of the company; what, instead, is given us is the ideal realization of an equally ideal body of values, reduced by 5 per cent. and an unestimated profit.

The confusion of the appellant's case may arise from the manner in which the rule in a number of cases has been examined and treated, and, distasteful as it is, a brief restatement appears to be called for. The task of the tribunal is primarily to determine compensation, not market or other values: these are items or elements that enter into or make up compensation. And it is compensation for the *taking of land.* By definition (3), "land" includes damages and these are not to be confined to the exercise of powers other than that of *taking* land. In developing the scope of compensation, such as, for example, the effects on remaining lands of the operation as distinguished from the construction of works placed upon the lands taken, and in injurious affection, we have followed the interpretation

(1) (1916), 18 Ex. C.R. 23. (2) (1916), 18 Ex. C.R. 51.

(3) The *Expropriation Act,* R.S.C. 1952, c. 106, s. 2(*d*).

given to the early English statutes granting, in more or less similar language, like powers. But, both by the express language of the statute and that interpretation, the compensation here is wrapped up in and is in respect of that act of appropriation, the taking.

Market value, that is, the price on which a prudent and willing vendor and a similar purchaser would agree, may be the sole determinant, exhausting compensation, but it may not be. Where the position of the owner *vis-à-vis* the land is not different from that of any purchaser, that value is the measure; where the owner is in special relations to the land, as in the case of an established business, the measure is the value to him as a prudent man, what he would pay, as the price of the land, rather than be dispossessed, that price thereafter, in effect, representing the capital cost of the business to which the profits would be related. But evidence of those relations issuing in special injury upon extrusion and their value in terms of money must be adduced. It is in this comprehensive view that in *Woods Manufacturing Company Limited v. The King* (1), by a unanimous judgment, the rule for compensation under the existing law was laid down definitively by this Court.

The President relied largely on the opinions of two experienced lumbermen, Mr. R. G. MacFarlane and Mr. Ashley Colter. The former is associated, in an executive position, with the largest pulp and paper organization in the Province, and the latter is engaged in large scale lumbering and contracting. Both show long and successful careers and their opinions, as the President held, are entitled to high respect.

Mr. MacFarlane, on the footing of an operation stripping the land in 3 years, and taking certain market prices of white pine, red pine, spruce, fir and hemlock in f.b.m. and cords, computed the net return from sawn lumber of 9 inches and over and from trees down to 5 inches available for pulpwood. From this he deducted 15 per cent. as representing inoperable growth. On that total net return he then considered a price which a prudent purchaser from a willing seller would risk in an operating venture. With

(1) [1951] S.C.R. 504, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Rand J.

interest of 10 per cent. on the price for the 3 years, and allowances for annual charges, taxes, warden service, etc., he sought a figure that would permit also an inducing profit. On this, his valuation of the freehold was $230,000 and the Crown lands, as freehold, $274,000. Mr. Colter used a somewhat different method. He estimated, in the light of his experience, the stumpage value of each class of product and using the same quantities but deducting 20 per cent. for inoperable growth he reached a price for the freehold of $251,978 and for the Crown lands, $284,276, including in each case $3 an acre for the land with its undersized growth.

The selling prices based on information received from what Mr. MacFarlane considered a reliable shipping source, were, in his judgment, warranted for a 3-year period from 1952. They were less than the highest prices obtained in that year by the company, peak prices in a period of abnormal demand, and it is objected that they were, as presented, hearsay. By Mr. MacFarlane's use of them, they carried the support of his own general opinion; it is obvious that the appellant's prices could not themselves be taken; lower figures must have been used and in the circumstances, including other evidence, and what was omitted from as well as adduced in that submitted on behalf of the claimants, I cannot say that the President was unwarranted in accepting generally Mr. MacFarlane's estimate and the unit figures on which it was based.

The values for stumpage used by the company were arbitrary. For example, that for spruce and fir sawn lumber was $20 per M (f.b.m.); the officers of the company, with no actual experience in New Brunswick, had "thought" that amount to be the going rate, but they could furnish no evidence in support of it. Drawn out of the void, it was observed to be $2\frac{1}{2}$ times the Government stumpage of $8: that factor was then applied to white pine which carried a Government stumpage of $9, making $22.50, but because of a greater return from pine it was increased to $25. Similarly the other figures were reached. But between the $8 and the $20 for spruce, as is seen by Mr. Reid's "dickering" view of purchases, an element of profit is hidden. The final estimates of the freehold forested land at $84.66 an acre and the licensed land at $85.37 an acre, as well as

those of $92.69 and $98.29 urged at the trial, fully justify their description by the President as unrealistic. They are to be contrasted with the estimates of $17.15 and $19 by Mr. MacFarlane and $20 and $20.54 respectively by Mr. Colter.

To Mr. MacFarlane's totals, the President made certain increased allowances. For the freehold lands they were, for pulpwood $31,939, residual value $40,239, and reductions in operating expense $27,829: for the licensed lands, pulpwood, $37,728, residual value $43,272, and expense reduction $31,003. The additions to the net operating returns would have affected the purchase-prices at which Mr. MacFarlane arrived but they would not wholly have been added to them. The final valuations so reached were, in my opinion, liberal and should not be disturbed.

The valuation of the interest of the company as licensee of the Crown lands remains. Mr. MacFarlane proceeded on the same general basis as for the freehold using as the individual net unit returns from each class of product those of the latter less the Government stumpage. Considerable evidence was given of prices paid for licences, the highest figure being $2,000 a square mile. Using that as the standard appplicable, the President awarded $42,000 on the basis of 21 square miles, or at the rate of $2.91 an acre for the actual acreage of 14,424. The balance of the total valuation enured to the Province. This resulted in an award to the latter of $344,000 or $23.85 an acre.

It would have been of some benefit to have had a theoretical estimate of the market value of the Provincial Government's interest on the footing of a continuing operation by licensees. The amount allowed to the Province considered in the light of its stumpage revenue from this area appears to be in sharp contrast to what those returns could justify and what the market would be prepared to pay. For the years 1934-1952 inclusive the total cut under the sawmill licence was 1018M: and from 1942-1952 under the timber licence 52M. At the prescribed stumpage rates this represents a negligible return.

In a table prepared by the forestry experts it is shown that the time required to bring the undersized trees, that is, trees 5 inches D.B.H. (diameter at breast height), to an increase of 4 inches D.B.H., ranged from 26 to 46 years.

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Rand J.

By 1963 on the sawmill-licensed land there would be 3722M spruce and fir sawlogs: 1212M red pine sawlogs: 1097M white pine sawlogs and 742M hemlock sawlogs. On the timber-licensed lands the quantities available for cutting in 1953 were: spruce and fir sawlogs 364M, red pine 45M, white pine 140M, and hemlock 28M. These quantities are of sizes within the regulations for cutting. The stumpage on spruce, fir and red pine in 1952 was $8 per M: on white pine $9 per M: and on hemlock $7 per M. At those rates the return would be less than $60,000. The difference between the acreage allowance to the Crown of $23.85 and to the company, $2.91, lies in the value attributed to the growth between 5 inches and the 12 inches for spruce and 16 inches for white pine at the stump to which the regulations limit cutting by the licensee, the value for the undersized growth and the land, and that stumpage.

Although the interests of ownership and licence in a settled relation are complementary in indefinite time, that of a specific licensee is of right limited strictly to the terms of his licence and the regulations: he enjoys it for only the fixed period of time and the prescribed modes and sizes for cutting. The Government may allow additional cutting but is not bound to; new legislation authorizing renewal licences to past licensees may or may not be passed; on neither consideration can a direct claim be rested. The market value of the licence, to be reached by ordinary bargaining, may, to some extent, take both into account; but only in that form can they be contemplated as factors.

For the price of $2,000 a square mile we know nothing of the growth which it purchased. Mr. MacFarlane reached a value of $2,800 a square mile, but this involved the cutting of smaller sizes than allowed by the regulations. Having in mind the total value reached and the other considerations mentioned, general prices over the years can properly be related to each situation. For these reasons I should think $2,500 a square mile would be more proportionate to the total value than the sum allowed. To this I would add 10 per cent. for the forcible taking. The President conceded that allowance on the freehold and I am unable to see how it can be withheld from the value of the licences. Mr. Colter did not essay an estimate on

the latter and I cannot think the abstention to have been wholly divorced from the difficulty of making it; but that circumstance is a reason for such an allowance.

The amount for 21 square miles at $2,500 plus 10 per cent. is $57,750, an increase over the amount allowed of $15,750. As the Dominion has not appealed, the award to the Province stands notwithstanding it was based on a total compensation as for a freehold minus the value attributed to the licences. As that total has been found to have been adequate, there is no ground for a supplementary percentage allowance to the Province.

Evidence of settlements for lands taken in the Gagetown area under the same expropriation proceedings was offered and rejected. Mr. Gilbert contended that the rejection was wrong and prejudicial to the proof of his claim. The respondents support the ruling; and as the question is involved with that of sales to the Crown or other expropriating authority for the purposes of a public or semi-public work before expropriation, an examination of both seems desirable.

Sales of land to the Crown prior to expropriation have, in a number of cases, been admitted in the Exchequer Court: *The King v. Condon* (1); *The King v. Hayes* (2); *The King v. Murphy* (3); *The King v. La Compagnie des Carrières de Beauport Limitée* (4); *The King v. King* (5); *The King v. Bowles* (6). Of these both *The King v. King* and *The King v. Bowles* were affirmed in this Court on December 11, 1916, but it should be said that in them no objection to the evidence seems to have been taken. The matter has been considered in innumerable instances by Courts in the United States, and as shown in Orgel on Valuation under Eminent Domain, 2nd ed. 1953, pp. 581 *et seq.*, much diversity of opinion is exhibited. The objection to admission is that the power on the one side to take and the necessity on the other ultimately to yield introduce factors that destroy freedom of action between the parties. But the ideal conception of a free vendor and a free purchaser is in many transactions infringed by

(1) (1909), 12 Ex. C.R. 275.
(2) (1909), 12 Ex. C.R. 395.
(3) (1909), 12 Ex. C.R. 401.
(4) (1915), 17 Ex. C.R. 414.
(5) (1916), 17 Ex. C.R. 471, 41 D.L.R. 374.
(6) (1916), 17 Ex. C.R. 482, 41 D.L.R. 254.

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Rand J.

factors personal or peculiar to the parties or their purposes and irrelevant to pure economic or market value. This is elaborated in a decision of the New Jersey Court of Appeals in *Curley et al v. Mayor and Aldermen of Jersey City* (1). The rule of admissibility is well stated in *Amory et al. v. Commonwealth* (2):

> If it is made to appear that the water rights taken from the petitioners are substantially similar to those taken from the other riparian owners, save only in the extent of the rights taken, and that the taking from them was not too far distant in space and time from the taking in question, then it is to be reasonably expected that the judge in the exercise of a sound discretion will find that the value of those rights will furnish a fair standard of the value of the petitioners' rights, provided it is shown by those having knowledge of the details involved, including the basis upon which the payments were in fact computed, that the transactions between the Commonwealth and these other riparian owners amounted in reality to a purchase and sale of water rights and nothing more, irrespective of the form in which these transactions were clothed and, finally, provided it is shown that these sales were voluntarily and freely made between these riparian owners and the Commonwealth.

As Holmes C.J. of the same Court, in the case of *O'Malley v. Commonwealth* (3), said:

> We cannot say merely because of the name of the purchaser that the sale was not a fair transaction in the market rather than a compulsory settlement.

The primary question is of freedom in the negotiation as a fact, and it is for the tribunal, in the light of the circumstances, to say whether the price was influenced by extraneous elements, or whether the parties were concerned only to reach agreement on a figure deemed to be the fair value of the property. This rule is in effect what appears to have been followed in the cases in this and the Exchequer Court cited.

But, as Mr. Teed pointed out, that is not the question here. The act of expropriation in this case covered all the land required for the project and what remained was settlement of the claims for compensation. This has been deemed generally to involve elements different if not wholly in nature at least in degree from those in sales to the Crown, and of such a character as likely to exclude the requisite freedom: *O'Malley v. Commonwealth, supra.* It was on this view that the President acted in this case, and in my opinion his ruling should not be disturbed.

(1) (1912), 83 N.J.L. 760. (2) (1947), 321 Mass. 240 at 255.
(3) (1902), 182 Mass. 196 at 198.

Some minor items remain. A sum of $25,000 was awarded for disturbance. No evidence was given sufficient to enable an estimate to be made with any degree of accuracy and the amount allowed cannot be said to be inadequate.

Following the expropriation, the company was permitted through the season 1952-1953 to carry on lumber operations on both tracts. In deducting the value of the stumpage to be charged for this, the President took the figures on which the claim had been presented but which he rejected. Mr. MacFarlane did not deal directly with stumpage value; Mr. Colter did, taking, for example, spruce logs for sawn lumber at $10 per M (f.b.m.), and white pine at $15. He allowed also $3 an acre for the land and residual growth for which there was no corresponding item on the MacFarlane calculation. The Colter total for the freehold was $251,978, including $37,728 for residue; the MacFarlane valuation, $230,000. For the Crown lands, the former found $284,276 with $41,520 for the land, and the latter $274,000. Mr. Colter deducted 20 per cent. for inoperable growth against Mr. MacFarlane's 15 per cent. Applying the latter to the Colter figures after deducting the allowances for land, the estimates are: freehold, Colter $227,641 against $230,000; Crown lands, $257,929 against $274,000. Assuming a similar element of profit, the stumpage rates thus appear to be, roughly, the same, and those used by Mr. Colter, with one-half of the additional amounts allowed by the President, *i.e.*, $1 a cord in addition to the return on spruce and fir pulpwood, and $1 per M (f.b.m.) for sawn lumber and 50c. a cord for pulpwood, from revised operating costs, can be used for the purpose here.

There was cut on the freehold 180,518 f.b.m. of spruce, 23,000 of fir, 10,000 of red pine, 47,379 of white pine and 24,000 of hemlock; on the Crown lands, the corresponding production was 1,501,918, 39,981, 621,909, 585,106 and 11,892. The pulpwood removed from the freehold was, spruce and fir 193 cords, red pine 66 and white pine 6. These quantities at the rates mentioned yield stumpage for the freehold, $4,531.65 and the Crown lands, $32,204.35, a total of $36,736 against $47,323 found by the President.

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Rand J.

A small item related to the cost of marking boundary-lines which had been done shortly before the expropriation, $7,404. This was disallowed on the ground that it had been taken into account in the estimates. I see nothing in the case to show that; and since its value to the lands is unquestioned some allowance should be made. Although not all the lands of the company so bounded were taken, new boundaries have been created. We do not know the cost represented by what was taken but at least 50 per cent. of the outlay should be allowed.

A final item concerned the value of a siding and appurtenant property owned by the company and used in connection with a sawmill at which the logs were sawn. The item was considered in detail by the President and the amounts awarded appear to be reasonable.

The question, whether the company has an "interest" in the land, within the meaning of the *Expropriation Act*, R.S.C. 1952, c. 106, was raised. On this I have no doubt: the licensee is in substantial possession; he may bring trespass or replevin in respect of standing trees or cut logs; he is vitally affected by any loss or damage to the growth in respect of not only the future operations but past payments to the Province both at the time of purchasing the licence and annually thereafter as bonus, mileage, fire fees, minimum stumpage, etc. A *profit à prendre* is admittedly an interest within the statute and the distinction in substance between the two, if any, is extremely fine. In this I am in agreement with the President.

The appeal of the company will therefore be allowed with costs and the judgment modified by adding to the amount awarded the company the sum of $30,039; in other respects it is affirmed. The cross-appeal of the Province will be dismissed with costs.

The judgment of Locke, Fauteux and Nolan JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Exchequer Court settling the compensation to be paid to the appellant as the owner of certain timber lands and as the licensee of other such lands held under licences from the Province of New Brunswick issued under the provisions of *The Crown Lands Act*, R.S.N.B. 1927, c. 30, title to

which was taken under the provisions of the *Expropriation Act*, R.S.C. 1952, c. 106, on August 7, 1952. The lands so taken were part of a much larger area taken by the Crown in right of Canada for military purposes. By the judgment from which the appeal is taken, the compensation payable to Her Majesty in right of the Province of New Brunswick, in respect of the lands subject to the licences granted to the appellant, was determined and the Province has cross-appealed against the amount of that award.

Different considerations apply in arriving at the value to the owner of the lands of the appellant, 13,413 acres in extent, of which it was the owner in fee simple, and the lands of the Province subject to the licences, 14,267 acres in extent, and to the interest of the appellant in those lands under the licences referred to.

The freehold lands of the appellant had been acquired by it and its predecessors in title over a period of some 50 years prior to the expropriation. They had been purchased mainly by a partnership carrying on business under the name of Reid Brothers, of which firm Richard R. Reid, who gave evidence at the trial, was a member. The appellant company was incorporated in the year 1948 to take over the lumber business theretofore carried on by this firm, and the freehold lands and the existing licences were thereafter transferred to it. Reid Brothers had built a lumber mill on the Saint John River at Gagetown in 1917 and, adjoining the mill, had established a lumber yard supplied with railway facilities by a spur line connecting with the Canadian National Railways Valley Line. The business was mainly the manufacture and export of lumber to the United States and Great Britain and was a successful and profitable undertaking.

The timber limits in question, including both the freehold and licensed lands, lay generally to the west of Gagetown. The nearest of these was distant about $1\frac{1}{2}$ miles from the mill and none was more than 15 miles away. According to Reid and to the witness Allingham, a brother-in-law of his who had been a member of the firm of Reid Brothers for many years and is the vice-president of the appellant, these limits had been obtained as a source of log supply for the mill at Gagetown. The mill itself, as distinct from the lumber yard and its facilities, had not

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

been acquired by the appellant company but remained the property of the partnership and manufactured lumber for the appellant on a custom basis. As the evidence showed, comparatively little cutting was done upon either the freehold or the licensed lands up to the time of the expropriation. These witnesses said, and there is no contradiction of their evidence or doubt expressed as to their veracity, that the appellant's intention in respect of these limits was to utilize them as a yearly and permanent source of supply of logs. Neither Reid Brothers nor the appellant had ever engaged in the production of pulpwood and there was no intention on the part of the appellant to cut any of the trees which were not sufficiently large to be logged for use as lumber for that purpose, but rather to allow them to mature.

The learned President arrived at his conclusion as to the quantum of the compensation in reliance mainly upon the evidence of the witness R. G. MacFarlane, an experienced lumberman employed by Fraser Companies, Limited, in New Brunswick in an executive capacity. MacFarlane was, I think, well qualified to express an opinion as to the value of these properties to a company such as the appellant having a well-established export lumber business at Gagetown, closely adjacent to these limits, with the information as to the timber standing on the properties afforded by the cruises which had been made. He, however, refrained from doing so.

Though this witness had said at the outset of his evidence that his instructions from the Department of National Defence had been to compile data as to what, in his opinion, a prudent and informed buyer would pay to an informed and willing seller, he apparently interpreted this as requiring him to express an opinion only as to what a prospective purchaser might be agreeable to pay for the lands. In a written report prepared several months prior to the trial and which was put in evidence, MacFarlane submitted an opinion to the Department which, he said, reflected "the value that in my opinion a prospective purchaser might place on the freehold lands and the Crown lands treated as freehold lands as of August 7, 1952". That his opinion was based entirely upon what he thought his

"prudent purchaser" would pay was made clear by his evidence. When asked by the learned trial judge if his figure of $230,000 for the freehold lands was his estimate of their value as of the date of expropriation, he answered:

> I would not say that. I would say I estimate that is the price that a prudent purchaser might pay.

In answer to a question put to him in cross-examination as to whether he had taken into consideration at all the value to the owner, he acknowledged that he had not and said:

> I am not in a position to assess what value the Gagetown Lumber Company might put on these lands over [*sic*] a long-termed project.

In the reasons for judgment delivered by the learned President, he approved this method of valuation, saying that he considered it to be basically sound. With respect, I disagree. Without using the term, MacFarlane, repudiating any idea that he had either considered its value to the owner or whether an informed owner in the position of the appellant would have agreed to sell at any such figure, simply expressed his opinion as to what was the market value of the property, meaning by that expression the amount it would realize if the owner was under compulsion to sell for what it would bring on the open market. He expressed no opinion as to the amount which would be agreed upon if the owner, willing but not obliged to sell, bargained with a purchaser, desirous but not required to purchase. This, in some of the decided cases, is referred to as a method of determining the market value and if it be assumed, as I think it should be, that in these circumstances the owner would not part with his property for less than its worth to him, the amount agreed upon might well be taken as the true value. Nothing of that kind was attempted by this witness, as his evidence made abundantly clear.

The witness Colter, also an experienced lumberman, called as a witness by the Crown, who valued the freehold limits at $251,978 was not asked and did not assume to express any opinion as to the value of these properties to the owner. According to him, his instructions were limited to being told by a representative of the Department that "he would like to have from me an idea of what I thought the property was worth".

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

It is unnecessary to repeat what was said in the judgment of this Court delivered by the Chief Justice of Canada in *Woods Manufacturing Company Limited v. The King* (1), where the principles to be applied in these matters, stated many times theretofore in this Court, were restated. In determining the value to the owner, all advantages which the land possesses, present or future, in his hands are to be taken into consideration, and he is entitled to have the price assessed in reference to those advantages which will give the land the greatest value. These timber limits, well served by roads situate so closely to the mill at Gagetown, had obviously a value to the appellant which they would not have to someone who did not have like facilities for converting the logs into lumber, and a long-established business designed and effective for disposing of the lumber at a profit. Other than the evidence of these two witnesses and some evidence as to the sales of other properties in the vicinity, no evidence was adduced by the Crown directed to the real question to be decided. On the other hand, the opinion as to value given by Roberts and other supporting witnesses called by the appellant, based on the assumption that over the years all the trees growing upon the properties would mature and might be cut into lumber and sold at profits similar to those which might have been realized from the sale of lumber at the time of the expropriation, cannot be accepted. Too many assumptions of fact as to matters which are, of necessity, uncertain were made, such as the future prices which may be realized for lumber and the cost of producing it, to make the resulting figure of value in arriving at a conclusion. The risk of damage or destruction of the timber by any of the perils to which it is subject appears also to have been ignored.

I have read and reread this extensive record in order to decide whether there is sufficient evidence to enable us to determine the compensation which should have been awarded, rather than to send this matter back for a new trial. In the *Woods* case, where the Court concluded that the evidence was sufficient for this purpose, that course was followed and I have come to the conclusion that it may properly be done in the present case.

(1) [1951] S.C.R. 504, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.

A most thorough cruise of both the freehold and licensed properties was made by the witness E. W. Roberts at the instance of the appellant and a detailed report was put in evidence. Unlike the ordinary timber cruise intended to ascertain only the merchantable timber upon the limit, Roberts made what was in effect an inventory of the trees growing upon the properties 5 inches in diameter and over. With a minor change due to the fact that, in error, he had not cruised a small area of the properties, the parties agreed on the accuracy of his figures. It was by the use of the information thus disclosed, and not by an independent examination, that the witness MacFarlane formed his opinion as to the value of the properties. He did this by assuming that his proposed purchaser, paying the amount of his estimate of the value of the property, would want to recover his money and realize his profit within 3 years. On this footing, he estimated the amount that would be realized from the logging of the trees suitable for manufacture into lumber and the subsequent sale of the lumber and from cutting the other trees too small to be used for lumber which were of sufficient size for sale as pulpwood. In forming his conclusion as to what such a purchaser would be prepared to pay, he made a calculation as to the costs of these operations, of necessity estimating the average prices which would be realized over the 3-year period for the lumber and pulpwood produced. According to him, if such a purchaser paid $230,000 for the freehold properties, he could expect to realize a profit of something more than $37,000 in the operation.

An examination of MacFarlane's figures in relation to the freehold property shows that he estimated a net profit from the sale of pulpwood of something more than $246,000 and from the sale of lumber approximately $110,000. The learned President considered that MacFarlane's estimate of the profit which would be realized on spruce pulpwood was too low and that the expenses which would be incurred in the operations on the property were in some respects too high. MacFarlane had valued the land itself after being completely logged and all the pulpwood cut at $2 an acre, and this, the learned President considered, should be increased to $3 an acre. He, however, accepted Mac-

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

Farlane's figure as to the prospective realization from the lumber produced. In the result, he added $100,000 to his estimate of the value of the freehold lands at the date of the expropriation.

In my opinion, MacFarlane's figure as to the amount which, it might be expected, would be realized from the sale of lumber was too low. The witness was not himself engaged in the lumber business and did not, of his own knowledge, know the average prices realized from the sale of lumber exported to the United Kingdom and the United States, in either the year 1951 or 1952. As to this, he was permitted to say that he had requested a lumber sales manager of Fraser Companies Limited to ask one of the oldest brokers in New Brunswick shipping to the United Kingdom market, and used the information thus obtained in estimating the realization from the lumber. He did not say what year the price related to or say what prices were realized on lumber exported to the United States or give any further information on the subject. The broker was one Colin MacKay of Saint John but he was not called as a witness. Relying upon this information, he estimated the price which would be realized by a purchaser for spruce, fir and red pine lumber at $62.50 per M f.o.b. St. John: for white pine $66 per M, for hemlock $57.50 per M. He estimated the overall cost of producing and delivering the lumber f.o.b. Saint John at $47.25 per M. Using these figures, he arrived at a prospective profit on 5,247,294 feet of spruce, fir and red pine lumber of $80,021.23: on 1,394,291 feet of white pine of $26,142.96 and on 362,752 feet of hemlock of $3,718.21.

As opposed to these figures the appellant called a chartered accountant, Clifford Warner, employed by the firm of MacDonald, Currie and Company, who had compiled from the books of the company a record of the actual sales and production costs of the company for the year 1952. This showed the average price being received for pine lumber at the time of the expropriation at $94.16 per M and for fir and spruce $75.15 per M. This was f.o.b. the mill. The actual cost of production per M was $53.08, which showed a profit for pine lumber of $41.08 per M and for fir and spruce of $22.07. Allingham, who was also the assistant secretary of the company, with the assistance of the

auditors, prepared a statement from the books of the company showing the average price realized per M of lumber of all grades, including spruce, pine and culls, for the year 1951 of $75.86: for 1952 $75.99 and for 1953 $76.96.

No question of credibility is involved and the complete accuracy of these figures was not questioned by anyone and, in a computation which is to be used in an endeavour to ascertain the value of the realization to the owner, this, in my opinion, should be accepted in preference to the price used by MacFarlane, obtained in the manner above indicated and relating only to sales for export to the United Kingdom. A very large part of the lumber produced was exported to the United States. It must, of course, be borne in mind that MacFarlane's estimate was as to the lumber prices which would be realized in the 3-year period commencing in August 1952. In making such calculation, however, the actual figures for the 3-year period given by the appellant are to be preferred to those given by MacFarlane. As representing prices realized in the years 1951, 1952 and 1953 by a lumber company operating at Gagetown, they were proved to be inaccurate.

It is to be noted that the actual costs of the appellant in 1952 for lumber produced at Gagetown exceeded MacFarlane's estimate of the total cost of the lumber f.o.b. Saint John by $5.83 per M. While the prices realized over the 3-year period for all species was $76.24, accepting as accurate the costs of the appellant in 1952 as disclosed by its books, rather than MacFarlane's computation, this would show an average profit per thousand feet of all grades of $23.16.

Substituting this figure for those used by MacFarlane, this would show a net profit from sales of lumber of $162,212.64 as opposed to MacFarlane's figure of $109,881. MacFarlane deducted 15 per cent. from his estimate of a profit on lumber as well as upon pulpwood, on the theory that at least 15 per cent. of the timber would be inoperable, due to the low stand per acre. I am not satisfied on the evidence that this is justified but, if this be accepted and this percentage deducted from the profit on lumber as estimated by him and the profit that would be realized accepting the average figure realized by the appellant, the difference is $44,474.

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

MacFarlane's estimate of $230,000 as what a prospective purchaser would pay for the freehold property was the amount which, he considered, a purchaser would be prepared to pay, on the assumption that the resulting profit from the production of lumber would be the lesser amount estimated by him. The increase of $100,000 made by the learned trial judge was simply added to the amount of MacFarlane's estimate and no attempt was made to determine what the prospective purchaser might be expected to pay on the footing that the profits to be realized would be $100,000 in excess of MacFarlane's estimate. With respect, if the basis adopted by MacFarlane was to be accepted as correct, this manner of dealing with the matter was inaccurate. I mention this as the fact that while, in my opinion, the amount to be realized from the 3-year operation contemplated by MacFarlane in making his estimate should be increased by $44,474, it does not follow that the prospective purchaser would pay this added amount for the property. Clearly, however, both additions would have substantially increased MacFarlane's estimate of the price to be obtained in this way.

While no one suggests (least of all MacFarlane) that the appellant, with its long-established lumber business, would have stripped its land in this manner, depriving itself of the annual log supply which, the evidence shows, the land would have afforded, MacFarlane's estimate is of some value in determining the value of the property to the owner. The estimate, with the additions made by the learned trial judge and, with the addition that should be made in regard to the realization from lumber, can, I think, properly be accepted as showing what the owner could have realized had he stripped the property in this manner. It may be said that it had at least a value of the amount that a prudent person in the position of the appellant would have paid rather than be dispossessed and deprived of the property.

The appellant, proceeding, in my opinion, on a proper basis, undertook to show the value of the properties to it by having a most accurate cruise made and by evidence as to the prospective annual cut of logs suitable for the manufacture of lumber which might be expected from the property. Roberts, whose competency on this aspect of the matter no one would question, estimated that the

owners could expect to cut annually, commencing in 1952, approximately 2,000,000 feet b.m. of logs from the freehold and licensed lands combined. Reid had estimated the annual cut would be between $1\frac{1}{2}$ and $2\frac{1}{2}$ million feet and Allingham agreed with this figure. Their evidence on this point stands wholly uncontradicted. They did not, however, estimate the amount to be expected from the freehold property as distinguished from the licensed lands. As to this, the most favourable view that can be put upon the matter from the standpoint of the appellant is that one-half of an anticipated annual cut of 2,000,000 feet might be expected from the freehold lands. Other than the figures which I have quoted as to the profits realized from the operations in 1951, 1952 and 1953, the appellant gave no evidence from which any accurate estimate might be made of the worth to it of such a source of supply. The cut at the Gagetown mill apparently averaged 5,000,000 feet and, on the assumption above stated, the freehold lands would have supplied 20 per cent. of these requirements for an indefinite period of time. As the evidence indicates, the source of supply of logs from farmers in the vicinity of Gagetown was progressively dwindling, which increased the value of this property to the company.

If it were to be assumed that the appellant might have obtained annually a million feet from these freehold properties and that a net profit equal to the average in the years 1951-1953 would be realized from the sale of the lumber, this would produce a net income of roughly $23,000 a year. There is a method of estimating compensation to an owner in possession by multiplying the highest annual value which he might expect to obtain from the land by the number of years' purchase which the special circumstances require. As stated by Cripps on Compensation, 8th ed. 1938, p. 187, the number of years' purchase depends upon the interest which the property should yield to a purchaser and should be taken from the recognized tables. Thus, if a property should yield to a purchaser 4 per cent., the number of years' purchase would be 25. If this principle were applied in the present matter and the return to be expected from these lands fixed at 4 per cent. and the annual return to be $23,000, the value of such a prospective income as of the date of the expropriation would

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

greatly exceed the compensation that has been awarded. I am, however, of the opinion that this method is not to be adopted in connection with the earnings of an enterprise such as this, subject to so many fluctuations that it is impossible to determine with accuracy what return may be depended upon.

As stated in *Pastoral Finance Association, Limited v. The Minister* (1), the problem is to determine what amount a prudent man in the position of the owner would have been willing to pay for this property sooner than fail to obtain it. This principle, as pointed out in the judgment of this Court in *Woods Manufacturing Company Limited v. The King* (2), has been adopted and consistently followed in this Court. Applying it in the present matter, the question is as to what amount a prudent person in the position of the appellant company, with its long-established lumber export business, its facilities at Gagetown for the manufacture and shipping of lumber situated so close to the property, with access to it by good roads, being in possession of the property but without title to it, would be willing to pay sooner than fail to obtain it.

That the property was of peculiar value to the appellant is too clear for argument. In the absence, however, of sufficient evidence to determine its value to the appellant as a permanent source of logs for its mill, if a rehearing is to be avoided the matter can only be dealt with by utilizing the available evidence as to what would be realized from marketing the timber and pulpwood on the property. Taking MacFarlane's estimate of the profit which could be realized over a period of 3 years from the sale of lumber and pulpwood, which was $302,951.03, and adding to this $100,000, being the increase made in the judgment at the trial, and the further sum of $44,474 as the increased profit which could be realized from the lumber, this shows an aggregate profit of $447,425. As the evidence shows, there was an ample supply of labour available and, with the facilities at the disposal of the appellant company, all of the timber suitable for the manufacture of lumber could have been cut and manufactured within a year from the date of expropriation. Upon an operation carried out in

(1) [1914] A.C. 1083 at 1088.

(2) [1951] S.C.R. 504 at 507, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.

this manner, the appellant could, as shown by the evidence as to the price realized by it on lumber for the years 1952 and 1953, have realized a profit in the amount above stated, while incurring only one year's taxes on the property and only one year's interest on the investment entering into the computation of net profits. In my opinion, a purchaser in the position of the appellant would be prepared to pay not less than $380,000, a figure which, it will be noted, would show a net profit on the realization from the lumber and pulpwood in excess of $65,000.

I would, accordingly, increase the amount of the award in respect of the freehold properties to $380,000.

The judgment appealed from determined the amount of compensation to be paid to the Province of New Brunswick for the lands subject to the licences at the sum of $344,000 and to the appellant as compensation for the loss of its interest in the lands under the licences at the sum of $42,000.

The licences held by the appellant were of two kinds. Under a sawmill licence which had been in force for many years and which was renewed for a further year on August 1, 1952, the appellant was licensed to cut all grades of timber, lumber and wood as permitted by the regulations relating to Crown lands in an area of 58½ square miles. Of this area, approximately 13 square miles were expropriated. This licence, on its face, was stated to be subject to renewal annually by yearly renewals to August 1, 1963. By the regulations made under the provisions of *The Crown Lands Act,* the licensee was required to operate a sawmill and to cut on the limits in each year such quantity of timber as might be fixed by the Minister and, in any event, not less than 10,000 feet b.m. from each square mile covered by the licence. Except with permission which might be granted upon application, no trees were to be cut of less than a specified diameter. The regulations effective as of August 1, 1952, fixed the stumpage payable in respect of spruce, fir, cedar and red pine logs at $8 per thousand, for hemlock at $7 and white pine at $9 per thousand. The timber licence issued to the appellant on August 1, 1953, covered an area of 35½ square miles, of which approximately 8 were expropriated. This licence was for a year certain, there being no contractual right of renewal as was

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

the case with the sawmill licence. As in the case of the other licence, the rights granted were to be exercised subject to the regulations made under *The Crown Lands Act*.

MacFarlane expressed the opinion that the value as freehold to a prospective purchaser of these lands "had the Province offered these lands for sale free of all encumbrances on August 7, 1952" was $274,000. By s. 78 of *The Crown Lands Act* such sales must be made at public auction and the lands or the interest sold to the highest bidder. His method of arriving at that figure was similar to that employed in arriving at his conclusion as to the freehold lands of the appellant. Asked to make a separate valuation of the licensee's interest to a prospective purchaser, he estimated there would be a profit of $113,092.95 from sales of pulpwood and lumber and that a prospective purchaser might pay $64,000 for the licensee's interest. This figure did not contemplate a sale at auction. The learned trial judge, apparently considering this to be excessive, allowed $42,000, being approximately $2,000 per square mile.

By the judgment at the trial, a sum of $112,000 was added to MacFarlane's figure for the Crown lands as freehold, the addition being in relation to the same matters for which the addition of $100,000 was made for the freehold lands. From this, the amount of $42,000 fixed as the value of the licensee's interest was deducted, resulting in the allowance to the Crown in right of the Province of the amount of $344,000. The Crown in right of the Dominion has not appealed from this finding. By the cross-appeal, the Province asks that the amount should be increased substantially and that the amount allowed to the appellant be reduced.

To deal first with the cross-appeal, it is clear from the evidence, and indeed it is the argument advanced by counsel for the Province, that its policy has been for a very long time and still is to license the timber lands owned by the Crown and to regulate the cutting of timber on them in a manner calculated to derive a perpetual annual income. Stumpage rates which were $1 per thousand feet b.m. in 1932 had increased to $8 in 1952 for spruce, fir and red pine logs. The stumpage on white pine logs was in the same period increased from $2 to $9 and on hemlock from $1 to

$7. Thus, the Province could look forward to receiving substantial annual payments from the lands in question in the years to come. It is true that the amounts received as stumpage during the 10 years preceding the expropriation had been negligible but this, it is apparent, would not have continued. It is, I think, proper to assume that, of the 2,000,000 feet estimated by Roberts, Reid and Allingham as the probable annual cut on the freehold and licensed lands combined, half of this should be assigned to the licensed lands. Assuming an average stumpage rate of $8, this would produce an annual income to the Province of $8,000 and, if further substantial increases in these rates which are fixed by the Province should be thought justifiable in the future, that amount might be largely exceeded.

MacFarlane was apparently not instructed and did not attempt to express an opinion as to the value of these lands to the Province of New Brunswick. While profuse details were given by him as to the manner in which he arrived at his conclusion as to the amount which a prospective purchaser who intended to strip the freehold lands during a 3-year period could realize, none such were given in regard to the licensed lands. The witness, however, apparently proceeded in the same manner as he had in connection with the freehold land by estimating the realization from stripping the land of both timber and pulpwood and, from that, estimating what his prospective purchaser would offer for the property. The learned trial judge added $112,000 to MacFarlane's figure in respect of the same matters as to which he had made the addition of $100,000 in the case of the freehold property.

The same principle is to be applied in deciding upon the value of this property as freehold in the hands of the Province, as in the case of the freehold lands of the appellant. No one would seriously suggest, I think, that those having the responsibility of administering the timber lands of the Province would think that the most favourable use to which these lands could be put was to cut all the merchantable timber and pulpwood, an operation which, according to the witness MacFarlane, would mean that nothing could be derived from the property for approximately 30 years. Unlike the appellant, the Province was not engaged in the manufacture of lumber and, accordingly, did not have the

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

facilities of the appellant to profitably operate the property, either as a source of log supply or in the conversion of the merchantable timber into lumber within a comparatively short period of time.

I am unable to find in this record any evidence to support a higher valuation than that placed by the learned President on these lands as freehold in the hands of the Province. It is to be remembered that I refer to their value as freehold unaffected by the rights of the licensee which, I agree, must be considered separately. As to the licences, I agree with the learned President that they gave the appellant an interest in the land for which it is entitled to compensation. In the case of the sawmill licence, the appellant was entitled, upon compliance with the regulations, to renewals for a period of substantially 11 years from the date of the expropriation. The timber licence, current at the time of the expropriation, expired on August 1, 1953, and renewing it was merely a matter of grace on the part of the Province. I also agree that the prospect that the Province would have continued to renew the licence from year to year is not in itself an interest in land for which compensation can be awarded.

MacFarlane followed the same method in coming to his conclusion as to the value of the licences to a prospective purchaser as he had adopted in regard to the freehold lands. Estimating that cutting all the logs suitable for lumber and for pulpwood over a 3-year period, a profit of $113,092.95 could be realized, he was of the opinion that such a purchaser would offer $64,000 for the licences. He made no attempt to estimate their value in the hands of the appellant and expressed no opinion as to whether or not the appellant, in bargaining with a prospective purchaser and being under no obligation to sell, would have agreed to any such amount.

In arriving at his conclusion as to the profit that would be realized, MacFarlane included an amount of $74,543.30 for the sale of 37,728 cords of spruce and fir pulpwood. In valuing the interest of the licensee, this must be omitted since the licences did not permit cutting any of the trees for this purpose and it is not to be assumed that the Province would grant a special permit to cut growing timber of a size suitable only for pulpwood when the stumpage rate

was only a fraction of that payable for sawlogs. Upon 6,023,258 feet of spruce, fir and red pine lumber, he estimated a profit of $7.25 per thousand, making $43,668.20. This profit was the estimate he had made in regard to the freehold property, less $8 stumpage payable on the licensed lands. Upon 1,426,362 feet of white pine lumber, he estimated a profit of $9.75 per thousand and on 286,744 feet of hemlock lumber $3.25 per thousand, in both cases deducting the appropriate stumpage from his previous estimate. From these two last-mentioned species, he estimated a profit of $14,848.95. As in the case of the lumber from the freehold lands, he deducted 15 per cent. from all of these figures in respect of timber growing upon lands which, he considered, would prove inoperable.

In making this computation, as I have said, MacFarlane used the price of lumber delivered at Saint John which he had used in his other calculation, relating only to export sales to the United Kingdom, and which was shown to be inaccurate, being roughly from $10 to $19 per thousand, according to the species, less than the average for all grades of lumber, including culls, realized by the appellant at Gagetown over the 3-year period 1951 to 1953. The error substantially decreased the anticipated realization from lumber. His computation contained a further error in that the figures used in estimating the profit on the lumber included logs from the land subject to the timber licence which, according to the evidence of the witness Brown, an official in the employ of the Department of Lands in the Province, were smaller than the size permitted to be cut by the regulations. According to him, the quantities of sawlogs larger than the diameter limits specified by the Timber regulations on these lands, as shown in the Roberts cruise, were 364 M spruce and fir, 45 M red pine, 140 M white pine and 28 M hemlock, a total of 577,000 feet. The figures of quantities used by MacFarlane in estimating the realization included 1,089 M of spruce, fir and red pine logs, 329 M of white pine and 286 M of hemlock logs, these figures omitting fractions of thousands. It cannot be assumed, in my opinion, that the Province would have permitted the cutting of these undersized logs during the year the timber licence was to run and I think it is only timber of the size which might have been cut under its terms which should be

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

included in the calculation. As to that part of the remainder of these quantities attributable to the sawmill licence, part at least was less than the permitted size but, as to this, since the licence had 11 years to run and since these figures are advanced on behalf of the Crown, it is proper to assume, in my opinion, that the quantities shown would be of a size which it was permissible to cut within a 3-year period.

With these alterations and estimating the profit which, it might be anticipated, would result by applying the costs and the average realization of the appellant over the above-mentioned 3-year period, MacFarlane's proposed operation would show a profit, after making the same 15 per cent. deduction, of $89,632.78. This figure does not exhaust the profit which the appellant might reasonably have expected to realize from the sawmill limits. Unlike the freehold land, these figures represent only realization upon the merchantable timber of sufficient size to be cut under the Timber Regulations and do not include pulpwood. As shown by Brown's computation, within a further period of 10 years at least 3,000,000 feet additional would mature sufficiently to permit the logging of the timber. I am, however, unable to find evidence in this regard sufficient to enable me to estimate the value that should be assigned to this timber in the hands of the appellant.

As pointed out by the learned President, very little other evidence was given which is of any assistance in valuing these licences. In 1942 Reid Brothers had purchased licences from another company for 11 square miles for $10,000 and approximately 2½ square miles from another person for $3,054. As at that time stumpage rates and, I must assume, the value of manufactured lumber were so very much less than they were in 1952, this evidence is of no value. As shown by Brown, there had been other sales for considerably less than the $2,000 per square mile allowed in the judgment appealed from but, as there was no information as to the nature of the timber upon these licences, the evidence is of no assistance.

In these circumstances, I consider that the compensation should be determined on the available evidence and, in my opinion, a purchaser in the position of the appellant would have been prepared to pay not less than $70,000 for these licences, at which price the operation would realize a net

profit in excess of $19,000 in addition to such amounts as might thereafter be realized during the life of the licence as the timber matured, which undoubtedly added very substantially to this value.

By arrangement with the Crown the appellant company, following the expropriation, entered upon the freehold and licensed lands and cut substantial quantities of logs and a smaller quantity of pulpwood. Details of the quantities cut were given in the exhibit Z5 which was introduced into evidence by the witness Allingham. In addition to stating the quantities cut, the appellant estimated the stumpage to be paid to the Crown, in the absence of any agreement on the point, at the figures which it claimed in computing its claim to compensation from the Crown. The estimate of value made by Roberts in which these figures were used was rejected by the learned trial judge as exorbitant but, in computing the amount of credit that the Crown was entitled to for the logs and pulpwood so cut, the appellant was charged at these rates. In my opinion, since the evidence of MacFarlane and Colter as to the value of the timber and pulpwood, with the additions made by the learned trial judge to which I have referred, was accepted, a stumpage rate based on these figures should be accepted rather than the rate found to be so excessive. In computing the amount payable, I would apply a stumpage rate of $10 per thousand for spruce, fir and red pine, $15 for white pine and $7 for hemlock. With an addition of $1 per thousand for fir, red pine and hemlock, these are Colter's figures as shown in ex. 15 prepared by him. As to the pulpwood, I would add $1 per cord to Colter's figure. Upon this basis the amount of credit to be applied on the appellant's claim is the sum of $36,896.50 in lieu of the credit of $47,323 allowed in the judgment appealed from.

As to the claim of the appellant for the cost of the survey made prior to the expropriation which consisted of running and painting lines around the defendant's freehold and licensed lands, I agree with the learned President that this was simply one of the factors to be taken into consideration in valuing the lands and should not be allowed. I find nothing in the evidence to indicate that their value was increased by this work.

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Locke J.

I can see no ground for interference in the amount of the award made for the loss on mill-yard equipment or for disturbance.

The learned President, while allowing 10 per cent. for compulsory taking in respect of the compensation fixed for the freehold lands, refused such allowance in respect of the interest of the appellant under the licences. I am unable to perceive any logical reason why it should be allowed as to the one and refused as to the other. In accordance with the decisions of this Court the allowance should, in my opinion, be made. I may add that I am far from being satisfied that the increased compensation I would allow in respect of these licences is the full measure of their value to the owner but, on the evidence in this record, I do not consider any larger sum should be awarded.

The amount awarded to the appellant at the trial in respect of the licences was deducted from the amount found to be the value of the lands as freehold in the hands of the Province. There has been no appeal from the award made to the Province and, accordingly, that matter being *res judicata* as between the Dominion and the Province, we are without jurisdiction to reduce the amount. Had the Dominion appealed, I would have directed that the amount of $77,000 rather than $42,000 be deducted from the value attributed to the land itself. Since, however, the litigation is between Her Majesty in right of Canada and Her Majesty in right of the Province of New Brunswick, I would assume that the matter would be adjusted between the two Governments by arrangement.

In the result, I would allow this appeal with costs and increase the amount of the award in respect of the freehold lands by $50,000 and a further sum of $5,000 for the 10 per cent. allowance for compulsory taking, in respect of the licences by the sum of $28,000 and a further sum of $7,000 for compulsory taking, and by the reduction of credit to be given on the material cut after the expropriation by $10,426.50, these amounts totalling $100,426.50. I would allow interest upon the award, amended to this extent, from the dates fixed in the judgment of the Exchequer Court.

I would dismiss the cross-appeal of the Province with costs.

ABBOTT J.:—I have had the advantage of considering the reasons of my brother Rand and I share his view that the final valuations reached by the learned President, for both the freehold lands and the Crown lands, were liberal and should not be disturbed. With respect, however, I differ from him as to the amount by which the valuation of appellant's interest as a licensee of Crown lands should be increased.

The economic value to the owner, of timber and sawmill licences such as those held by appellant, cannot exceed the profit potential of such licences after taxes, during the term which the licences still have to run. Difficult though it may be to determine accurately such an amount in advance, it seems clear that the maximum benefit which the holder of such a licence can derive from his licence, is the profit he is able to keep, as a result of cutting and selling the permitted grades of timber during the term of the licence.

I have used the phrase "profit potential after taxes" because in capitalizing the profit possibilities during the remainder of the term of the licence, which must be done for the purpose of fixing compensation, a Court cannot, in my opinion, ignore the fact that such profits are subject to tax and that the only benefit the owner gets from the exploitation of his licensed timber limits is his profit after tax.

It is in evidence that these timber licences are put up for sale at public auction by the Province and are also bought and sold by private holders. It would seem obvious that the price at which these licences are traded in, must reflect, to a large extent, the value of this profit potential after tax. That being so, evidence as to such prices is clearly of assistance in determining the value of these licences to the owner, in order to fix compensation for compulsory taking.

Evidence was given as to the price at which licences for timber lands in New Brunswick were bought and sold, and this evidence established that such prices varied a great deal. Mr. Colter, who stated he held some 500 square miles of timber lands under licence, testified that the

1956

GAGETOWN LUMBER CO. LTD. v. THE QUEEN AND A.G. FOR N.B.

Abbott J.

highest price he had ever paid was $2,000 per square mile. No evidence was given of any higher price ever having been paid although there was evidence of substantially lower prices. Mr. MacFarlane estimated the amount which a prospective purchaser would pay to appellant for its licensed lands at $64,000 or some $2,800 per square mile, but as has been pointed out by the learned President and by my brothers Rand and Locke, in arriving at this estimate he included the value of timber which appellant was not permitted to cut under the terms of its licence. This portion of Mr. MacFarlane's evidence was given during cross-examination by appellant, the witness stated he had not expected to be called upon to make such an estimate, and that the statement filed as an exhibit to support it, had been prepared by him only the night before. Moreover, I can find no indication in his testimony that, in making his estimate, Mr. MacFarlane took into account any tax payable on profits derived from the exploitation of the licences.

The learned President reviewed in detail all the evidence adduced as to the value of appellant's interest as licensee, and after doing so stated that he could find no justification in this evidence for valuing such interest at a figure higher than the highest amount established as having been paid for similar interests. He therefore fixed the compensation at $42,000. I am unable to say that he was wrong in so doing, and I do not think his finding should be disturbed.

The 10 per cent. allowance for a forcible taking was granted on the freehold and I agree with my brothers Rand and Locke that it should be allowed on the value of the licences. On the other matters raised on the appeal and the cross-appeal, I am in agreement with the conclusions of my brother Rand.

I would allow the appeal with costs; modify the judgment by adding to the amount of the award, (1) $4,200 allowance for compulsory taking in respect of the licensed lands; (2) $3,702, being 50 per cent. of the survey costs, and (3) $10,567 as a reduction in the credit for wood cut after expropriation: a total of $18,469, with interest from

the dates fixed in the judgment of the Exchequer Court. The cross-appeal of the Province should be dismissed with costs.

Appeal allowed with costs; cross-appeal dismissed with costs.

Solicitors for the appellant: Gilbert, McGloan & Gillis, Fredericton.

Solicitor for the plaintiff, respondent: A. McF. Limerick, Fredericton.

Solicitor for the respondent, The Attorney General for New Brunswick: C. F. Inches, Saint John.

WILFRID LORD (*Plaintiff*).....APPELLANT;

AND

SIMON GUIMOND (*Defendant*).....RESPONDENT.

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

Contracts—Potestative condition—Remuneration for occupation of property depending on the agreement of the parties—No agreement reached—Property occupied—Courts cannot fix rental but must award indemnity.

A purely potestative condition in a contract to the effect that after a certain period the monetary consideration will be fixed by agreement between the parties, will be without effect if at such time an agreement is not reached. When a property has thereafter continued to be adversely occupied following the making of such a contract, the Courts cannot supply such agreement and determine the consideration; but, since obviously the parties did not intend that one should give and the other receive free occupation, an indemnity, based on the prejudice suffered, should be awarded.

In 1922, the plaintiff sold his pharmaceutical stock to the defendant. The contract provided, *inter alia*, that the defendant would have the right to occupy part of a building owned by the plaintiff "pour toute période de temps durant laquelle il exploitera le commerce de la Pharmacie . . . aux conditions de soixante dollars par mois. Ce prix pourra être modifié après cinq ans". After 7 years the rental was raised to $90. The following year, the plaintiff tried unsuccessfully to have it raised to $125. Finally, in May 1949, the plaintiff notified the defendant that the "lease" would expire in September of that year unless the defendant agreed to a rental of $225 per month. No agree-

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

1956

LORD
v.
GUIMOND

ment was reached, and the defendant did not leave the premises. In August 1950, the plaintiff sued for, *inter alia,* an order of eviction and damages of $225 a month.

Held: The defendant's right to occupy the premises expired in September 1949, as no agreement was reached respecting the consideration to be paid after that date; the plaintiff was entitled to recover $200 per month as a fair indemnity for the occupation since that date.

Per Taschereau J.: The convention between the parties constituted a lease rather than the ancient and seldom used contract of use and habitation which, like antichresis, is rarely found to-day. All the elements of a lease were present in this case: the plaintiff granted to the defendant the enjoyment of part of his building, during a certain time, for a rent or price of $60 a month, which the latter obligated himself to pay and which could be modified, after 5 years, but only by mutual agreement.

Contracts—Interpretation—Civil Code, arts. 1013 et seq.

By virtue of art. 1019 of the *Civil Code,* a contract, in case of doubt, will be interpreted in favour of the party who contracted the obligation, but only if a doubt still remains after the Courts have tried to determine the common intention of the parties under arts. 1013 *et seq.*

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming the judgment at trial and dismissing the action. Appeal allowed.

R. E. Parsons, for the plaintiff, appellant.

G. Sylvestre, Q.C., and *J. Bertrand, Q.C.,* for the defendant, respondent.

TASCHEREAU J.:—Le 1er septembre 1922, le demandeur-appelant qui est médecin, a vendu à l'intimé tout son stock de marchandises pharmaceutiques qui se trouvait dans un immeuble situé sur la rue Principale à Granby, pour la somme de $6,000, payable comptant. Dans la convention intervenue entre les parties, il a aussi été stipulé que l'intimé aura droit d'occuper une certaine partie de l'immeuble dont l'appelant était propriétaire, tant pour continuer le commerce de pharmacie que comme logis pour lui-même et sa famille.

Le document signé par les parties est ainsi rédigé:

Granby, le 1er septembre 1922

Je reconnais par les présentes avoir vendu à Simon Guimond mon stock de Pharmacie et fixtures, le tout situé dans l'immeuble N° 121 rue Principale à Granby. Je reconnais avoir reçu paiement du plein montant du prix de vente, *soit six mille piastres du susdit acquéreur.*

(1) [1954] Que. Q.B. 589.

Il est entendu que je fournirai à l'acquéreur les avantages d'une licence de Pharmacie et que si toutefois l'Association des Pharmaciens de la Province lui causait du trouble au point de gêner l'exploitation du susdit stock de Pharmacie, je le rachèterai au prix d'un inventaire fait d'après les factures et les fixtures devront être cédées sans charges, comme je les vends par les présentes.

L'acquéreur aura droit à l'usage de la Pharmacie (soit le N° 121 et en cas de changement soit le N° 123 rue Principale) et au logis N° 119 rue Principale *pour toute période de temps durant laquelle il exploitera le commerce de la Pharmacie à lui vendue aux conditions de soixante dollars par mois. Ce prix pourra être modifié après cinq ans.* Je m'engage à aider l'acquéreur par des renseignements qui pourront lui être nécessaires pour l'exploitation de son commerce de Pharmacie.

L'acquéreur aura droit à l'usage de la cave et des installations faites pour recevoir les produits pharmaceutiques. Toutefois ce droit ne sera pas exclusif, mais raisonnable et basé sur bonne entente avec le propriétaire ou locataire de l'immeuble en partie loué à l'acquéreur. J'aurai le droit de communiquer à la grand'rue par la pharmacie, de mon bureau et vice versa, ainsi que mes clients.

WILFRID LORD, M.D.
SIMON GUIMOND

(Les italiques sont de moi.)

Des difficultés se sont élevées entre les parties, et au cours du mois d'août 1950, l'appelant a institué contre l'intimé une action dans laquelle il demande l'annulation de la convention du 1er septembre 1922, à compter du 1er septembre 1949, une déclaration à l'effet que depuis cette dernière date, le défendeur-intimé occupe illégalement les lieux, une ordonnance d'éviction, et enfin une somme de $2,925 pour loyer dû et dommages. Par demande incidente formulée en janvier 1951, l'appelant réclame additionnellement $1,125, soit le loyer à raison de $225 par mois depuis septembre 1950 jusqu'à janvier 1951 inclusivement.

L'intimé a contesté l'action principale ainsi que la demande incidente, et a consigné avec son plaidoyer $1,080 et $540, montants qu'il croyait devoir tant sur la demande principale que sur la demande incidente. La Cour Supérieure a rejeté les prétentions de l'appelant, a déclaré bonnes et valables les offres faites par l'intimé, et la Cour du Banc de la Reine (1) a unanimement confirmé ce jugement.

La convention ne manque pas d'ambiguïté, et les parties ne s'entendent guère quant à son interprétation. Il est en

(1) [1954] Que. Q.B. 589.

1956

LORD
v.
GUIMOND

Taschereau J.

preuve qu'au mois de septembre 1922, l'intimé a pris possession des lieux, et jusqu'au mois de septembre 1929, il a payé à l'appelant la somme de $60 par mois, montant stipulé à la convention. A cette dernière date, d'un commun accord, le prix d'occupation fut porté à $90 par mois. Subséquemment, soit le 21 mars 1930, l'appelant par lettre recommandée, a informé l'intimé qu'à partir du 1er mai 1930, le prix d'occupation serait de $125 par mois. Sur le refus de l'intimé de payer cette somme, le demandeur-appelant a pris une première action contre le défendeur-intimé pour lui réclamer la somme de $500, mais M. le juge Walsh de la Cour Supérieure a jugé que le délai mentionné à l'avis était insuffisant et a en conséquence rejeté l'action. Le 13 mai 1949, l'appelant a de nouveau fait parvenir à l'intimé un avis lui signifiant que le "bail" de septembre 1922, affectant la pharmacie et le logement, se terminerait le 1er septembre 1949. Il lui a aussi fait savoir que s'il continuait à occuper les lieux après cette date, le "loyer" serait de $225 par mois. L'intimé a répondu qu'il considérait le bail toujours en vigueur, et qu'il désirait s'en tenir exclusivement aux conditions qui y sont contenues. C'est alors qu'au mois d'août 1950, l'appelant a institué les présentes procédures.

C'est la prétention de l'appelant qu'il s'agit d'une convention qui a créé entre les parties des relations de locateur et de locataire, et que les dispositions du *Code Civil* relatives à ce contrat doivent s'appliquer. L'appelant soutient aussi que les mots "ce prix pourra être modifié après cinq ans" permettent non pas seulement une unique modification du prix, comme la chose a été faite en 1929, mais justifient aussi des modifications que des conditions changeantes et aléatoires peuvent exiger.

La conclusion de l'appelant est que le bail a pris fin à l'expiration des cinq premières années, soit en 1927, qu'il n'y a eu subséquemment qu'une occupation par tolérance, et qu'il était en conséquence justifié, ayant donné les avis nécessaires, devant avoir effet le 1er septembre 1949, de réclamer comme il le fait, depuis cette date, la somme de $225 par mois, soit la valeur de l'occupation des lieux.

L'intimé soutient qu'il s'agit non pas d'un contrat de louage, mais bien d'un contrat d'usage et d'habitation, où

les règles du louage ne trouvent pas leur application; que les mots "ce prix pourra être modifié après cinq ans" ne peuvent justifier qu'une seule modification, ce qui d'ailleurs a été fait quand, en 1929, de consentement mutuel, le prix de $90 a été déterminé. Ce prix serait donc final tant que le défendeur exploitera le commerce de pharmacie, et sa prétention est donc que le contrat n'a pas pris fin et qu'il subsiste toujours moyennant le paiement de cette mensualité.

Je suis clairement d'opinion que dans l'occurrence, il s'agit bien d'un bail, et que les éléments constitutifs de l'usage et de l'habitation ne se rencontrent nullement dans la convention intervenue. L'usage en effet est une sorte d'usufruit restreint, un démembrement de la propriété. C'est un droit réel temporaire et viager, qui se termine comme se termine l'usufruit. Il donne à l'usager la faculté de se servir de la chose d'autrui et aussi celle d'en percevoir les fruits, mais jusqu'à concurrence seulement de ses besoins et de ceux de sa famille. Ce droit d'usage prend le nom de droit d'habitation lorsqu'il est appliqué à la jouissance totale ou partielle d'une maison d'habitation. Le droit d'habitation se restreint à ce qui est nécessaire pour l'habitation de celui à qui ce droit est accordé et de sa famille. Comme le droit d'usage, il ne peut être ni cédé ni loué: *Code Civil,* arts. 487, 496 et 497.

Comme l'antichrèse, l'usage et l'habitation sont des vestiges d'un droit antique et suranné dont l'application se rencontre rarement de nos jours.

Quand le commerce de pharmacie a été vendu par l'appelant à l'intimé pour la somme de $6,000, et que par convention accessoire, l'intimé, moyennant paiement, a obtenu un droit d'occupation de certaines parties de l'immeuble, il s'agissait bien d'un bail. Le louage des choses en effet est un contrat par lequel l'une des patries appelée locateur, accorde à l'autre, appelée locataire, la jouissance d'une chose *pendant un certain temps,* moyennant un loyer ou prix que celle-ci s'oblige de lui payer.

Tous ces éléments se rencontrent dans le présent cas. L'appelant en effet a accordé à l'intimé la jouissance de partie de son immeuble, *pour un certain temps,* en considération du paiement de $60 par mois, que l'intimé avait

1956

LORD
v.
GUIMOND

Taschereau J.

l'obligation de payer. Le prix stipulé est de $60 par mois pour les cinq premières années seulement. Après cette période, le prix peut être modifié, mais seulement comme résultat d'une entente, d'un consentement mutuel. Aucune des parties ne peut arbitrairement et unilatéralement augmenter ou diminuer le prix de location. Il n'appartient pas en effet au locateur, et ce serait futile de le soutenir, d'en augmenter le prix, ni au locataire d'exiger une diminution. Il faut une entente, et à défaut d'entente, le locataire n'est plus tenu de rester dans les lieux, et le locateur est donc libéré de ses obligations, et de nouvelles relations prennent alors naissance entre les parties.

Le prix de location a été augmenté en 1929 à $90 par mois, et ceci comme résultat d'une commune volonté. Mais à mon sens, cette première augmentation n'épuise nullement le droit des parties de demander des revisions additionnelles de ce loyer, qui cependant, devra être déterminé par entente, et à défaut de quoi le prix cesse d'être déterminé.

Comme conséquence de l'accord intervenu en 1929, alors que le loyer a été porté à $90 par mois, il me semble indiscutable que les deux parties ont maintenu leurs relations légales de locateur et de locataire jusqu'en 1949, alors que le 13 mai 1949, l'appelant a fait signifier un nouvel avis à l'intimé. Il s'autorisait évidemment de la clause de la convention, relative à la revision du montant du loyer, et adressa alors à l'intimé la lettre suivante:

Granby le 13 mai 1949.

Monsieur SIMON GUIMOND,
Granby, Que.
Monsieur,

Votre bail pour le local de la pharmacie et du logis privé, lesquels portaient respectivement, autrefois, les numéros 123 et 119, et qui portent, maintenant, les numéros 145 et 141 de la rue Principale à Granby, se terminera le 1er septembre 1949.

Je vous donne, par les présentes, avis que si vous entendez occuper lesdits lieux, votre bail sera au mois et le loyer mensuel en sera $225, chauffage et taxe d'eau compris, payable tous les mois, d'avance, le premier de chaque mois.

Veuillez me dire par la malle, d'ici cinq jours, si vous acceptez ces conditions, et à défaut par vous de ce faire, vous aurez à quitter lesdits lieux, le ou vers le premier septembre 1949, votre bail devant être, alors, considéré comme terminé à toutes fins que de droit.

Votre tout dévoué,
DR. WILFRID LORD

A cause du refus de l'intimé de se rendre à cette demande, l'appelant lui adressa, le 2 septembre, la lettre suivante:

Granby, 2 septembre 1949.

Monsieur Simon Guimond,
Granby, P.Q.
Monsieur,

Pour faire suite à l'avis qui vous a été donné le 13 mai 1949, concernant le logement et le magasin que vous occupez en vertu d'un bail qui vous a été consenti le 1er septembre 1922, et afin d'éviter tout malentendu, je désire vous aviser de nouveau, par les présentes, que je m'oppose au renouvellement de ce bail par tacite reconduction.

Je veux qu'il soit, bien compris entre nous que si vous entendez continuer d'occuper les lieux loués ce sera pour le loyer mentionné dans la lettre que je vous adressais le 13 mai 1949, et cela à partir du 1er septembre 1949.

Je vous donne donc le présent avis conformément aux dispositions des articles 1609 et 1610 du code civil.

Votre dévoué,
WILFRID LORD, M.D.

A partir de la date que porte cette lettre, je crois que les relations de locateur et de locataire entre l'appelant et l'intimé ont pris fin. Comme conséquence des dispositions des arts. 1609 et 1610 du *Code Civil*, l'intimé ne peut invoquer la tacite reconduction, et quoiqu'il ait continué à occuper les lieux, le bail ne s'est pas renouvelé. L'occupation s'est faite contre le gré du locateur et nullement par tolérance. Il s'ensuit donc, parce qu'il n'y a pas eu d'entente quant au loyer après l'avis donné le 13 mai 1949, que le demandeur avait droit de mettre fin au bail comme il l'a fait, de faire constater par le tribunal cette résiliation, et de demander l'expulsion de l'intimé des lieux loués. A mon sens, c'est à tort que ces recours lui ont été refusés.

Voici ce que dit Planiol et Ripert, Droit Civil, 2e éd. 1952, Vol. 10, p. 602:

470. Caractère déterminable du prix.—Le prix du bail doit être non seulement sérieux, mais certain, c'est-à-dire déterminé ou tout au moins déterminable. Par suite, si les parties, après s'être mises d'accord sur le principe de la conclusion d'un bail, oublient d'en fixer le prix ou n'arrivent pas à se mettre d'accord à son sujet, le prétendu bail sera frappé d'une nullité absolue, faute de prix. C'est ainsi que sera nul le contrat prévoyant que les parties se mettront amiablement d'accord sur le prix, si cet accord n'intervient pas. Si le preneur s'était en fait mis en possession du bien, il ne devra au bailleur aucun loyer, mais une indemnité d'occupation représentative du préjudice subi.

1956

LORD
v.
GUIMOND

Taschereau J.

Il reste la question du montant que peut réclamer l'appelant. Il a sans doute droit à une compensation raisonnable pour l'occupation des lieux par l'intimé depuis le 1er septembre 1949, jusqu'au mois de janvier 1951 inclusivement, soit une période de 17 mois. Comme résultat de la terminaison du bail, cette compensation ne sera pas basée sur le prix fixé par consentement en 1929, mais doit être représentée par la valeur locative des lieux occupés. La preuve, et particulièrement le témoignage de monsieur Meunier, évaluateur en chef de la Cité de Granby, me convainc que les fins de la justice seront bien servies en fixant cette valeur locative à $200 par mois, ce qui fait un total de $3,400. De cette somme, cependant, il faudra déduire le montant consigné avec le plaidoyer à la demande principale, ainsi qu'à la demande incidente, soit $1,620, laissant une balance de $1,780.

L'appel doit donc être maintenu. Le bail intervenu entre les parties est résilié, à toutes fins que de droit; ordre est donné à l'intimé de quitter les lieux loués dans un délai de trente jours de la date du présent jugement. Les offres et consignations au montant de $1,620 que l'appelant est autorisé à retirer, sont déclarées insuffisantes, et l'intimé devra payer la balance de $1,780, plus les intérêts au taux de 5 pour cent, depuis la date du jugement de la Cour Supérieure. Tous les droits de l'appelant pour les montants échus depuis le mois de janvier 1951 sont réservés.

L'intimé paiera également les frais de toutes les Cours.

The judgment of Locke, Fauteux and Nolan JJ. was delivered by

FAUTEUX J.:—Le 1er septembre 1922, l'appelant, qui est médecin, reconnaissait avoir vendu les marchandises et fixtures d'une pharmacie par lui exploitée au rez-de-chaussée d'un immeuble lui appartenant, à l'intimé, son beau-frère, à qui il concédait, à titre onéreux, le droit d'occuper, tant qu'il y poursuivrait cette exploitation, le local de cette pharmacie et un logement y attenant; le tout aux termes et conditions apparaissant à un écrit rédigé par lui, signé par les deux parties et se lisant comme suit:

Granby, le 1er septembre/22

Je reconnais par les présentes avoir vendu à Simon Guimond mon stock de Pharmacie et fixtures, le tout situé dans l'immeuble N° 121 rue

Principale à Granby. Je reconnais avoir reçu paiement du plein montant du prix de vente, soit six mille piastres du susdit acquéreur.

Il est entendu que je fournirai à l'acquéreur les avantages d'une licence de Pharmacie et que si toutefois l'Association des Pharmaciens de la Province lui causait du trouble au point de gêner l'exploitation du susdit stock de Pharmacie, je le rachèterai au prix d'un inventaire fait d'après les factures et les fixtures devront être cédées sans charges, comme je les vends par les présentes.

L'acquéreur aura droit à l'usage de la Pharmacie (soit le N° 121 et en cas de changement soit le N° 123 rue Principale) et au logis N° 119 rue Principale pour toute période de temps durant laquelle il exploitera le commerce de la Pharmacie à lui vendue aux conditions de soixante dollars par mois. Ce prix pourra être modifié après cinq ans. Je m'engage à aider l'acquéreur par des renseignements qui pourront lui être nécessaires pour l'exploitation de son commerce de Pharmacie.

L'acquéreur aura droit à l'usage de la cave et des installations faites pour recevoir les produits pharmaceutiques. Toutefois ce droit ne sera pas exclusif, mais raisonnable et basé sur bonne entente avec le propriétaire ou locataire de l'immeuble en partie loué à l'acquéreur. J'aurai le droit de communiquer à la grand'rue par la pharmacie, de mon bureau et vice versa, ainsi que mes clients.

(signé) WILFRID LORD, M.D.
SIMON GUIMOND

Depuis le 1er septembre 1922, date de cette convention, à ce jour, l'intimé a exploité cette pharmacie et occupé ce logement. Il a payé à l'appelant $60 par mois jusqu'au 1er décembre 1929, alors que, d'un commun accord, la considération mensuelle fut portée à $90. Les quelques tentatives faites par l'appelant depuis lors, pour obtenir de l'intimé un autre accord sur le prix, ont été sans succès. Éventuellement, et par une lettre en date du 13 mai 1949, l'appelant avise l'intimé que "le bail" ayant pour objet la pharmacie et le logement prendra fin le 1er septembre suivant. Il précise les conditions et le prix auxquels l'intimé pourra, s'il le désire, continuer l'occupation des lieux et l'avise qu'à son défaut d'accepter ces conditions fixant le prix mensuel à $225, il devra, le 1er septembre 1949, évacuer les lieux. Dans une réponse dont le laconisme manifeste la profonde division entre les parties, l'intimé informe l'appelant qu'il ne consent pas "à l'annulation du bail" et qu'il s'en "rapporte à ces termes et conditions". Advenant le 2 septembre 1949, l'appelant avise l'intimé que s'il continue d'occuper les lieux, ce sera, à compter du 1er septembre 1949, au prix mentionné dans sa lettre du 13 mai 1949. A ceci l'intimé n'a jamais consenti.

1956

LORD
v.
GUIMOND

Fauteux J.

Le 25 août 1950, l'appelant prend une action en expulsion et en dommages contre l'intimé, joignant subséquemment une demande incidente à sa demande principale. Le tout est rejeté par la Cour Supérieure dont le jugement est maintenu par la Cour d'Appel (1). D'où le pourvoi devant cette Cour.

C'est la prétention de l'intimé que l'accord du 1er décembre 1929, portant le prix initial à $90, est et demeure depuis cette date la loi des parties; en stipulant, dit-on, *Ce prix pourra être modifié après cinq ans,* les parties n'ont envisagé qu'une seule modification et celle faite le 1er décembre 1929 est définitive. De son côté, l'appelant soumet qu'en raison de leurs relations, du caractère et des termes de leur convention, les parties n'ont voulu déterminer le prix d'occupation que pour une période de cinq années, entendant que, par la suite, ce prix initial prévaudrait jusqu'au moment où l'une des parties en rechercherait la modification alors qu'à l'amiable les parties devaient s'entendre sur la question, i.e. le prix et le terme pour lequel il prévaudrait.

La disposition de ce litige dépend donc (i) de l'interprétation de la convention et (ii) des conséquences juridiques en résultant.

L'interprétation.—Comme en a jugé la Cour d'Appel, il ne paraît pas nécessaire de décider, à l'instar du juge de première instance, si le droit d'occupation concédé à l'intimé est, de sa nature, un droit d'habitation ou un droit résultant d'une location. A la vérité, et dans les deux cas, ce droit d'occupation résulte d'une convention dans laquelle les parties se sont obligées réciproquement l'une envers l'autre, la première à fournir les lieux, la seconde à en payer le prix; c'est cette dernière obligation qui fait l'objet du litige et qui requiert, en conséquence, d'être précisée en interprétant la convention sur le point litigieux.

La commune intention des parties lorsque douteuse doit, suivant les directives données aux juges, être recherchée et déterminée par une interprétation plutôt que par le sens littéral des termes du contrat, dont toutes les clauses doivent s'interpréter les unes par les autres en donnant à chacune le sens qui résulte de l'acte entier; et ce n'est que

(1) [1954] Que. Q.B. 589.

si le doute survit à cet examen qu'il y a lieu de le résoudre en faveur du débiteur de l'obligation dont le créancier recherche l'exécution: *Code Civil,* arts. 1013 *et seq.*

En stipulant *Ce prix pourra être modifié après cinq ans,* les parties ont prévu, vu la longévité possible de leurs relations, l'éventualité qu'au cours d'icelles, l'une d'elles pourrait se croire lésée par le maintien d'un prix immuable; aussi bien, et animées par cet esprit de bonne entente manifesté dans d'autres dispositions de la convention, elles n'ont voulu se lier que pour cinq ans, entendant que si, par la suite, cette éventualité se présentait, elle devait être résolue par accord à l'amiable. Voilà, je crois, ce qui résulte de l'acte entier. L'intimé ne nie pas que l'accord du 1er décembre 1929, portant la mensualité à $90, eut lieu en exécution de la convention, mais pour prétendre que cet accord épuise la stipulation, il s'appuie en substance sur les deux raisons motivant le jugement de la Cour d'Appel, soit:—(i) Sur le fait que la stipulation commence par les mots "*Ce* prix" et non "*Le* prix" et qu'elle n'est pas suivie des mots "de temps à autre" ou autres au même effet; et (ii) sur l'impossibilité de concilier "l'obligation de l'appelant de fournir une sorte d'usage perpétuel des lieux" avec "le pouvoir exclusif et discrétionnaire d'exiger d'année en année une augmentation du prix".

En tout respect, je ne puis partager ces vues. Le premier motif s'inspire en partie d'une interprétation strictement littérale et par ailleurs non concluante. Si la stipulation n'est pas qualifiée par les mots "de temps à autre", elle ne l'est pas davantage par les mots "une seule fois". A la vérité, elle n'est qualifiée que par le texte de la convention dans laquelle elle se trouve et rien n'y indique qu'elle doive recevoir la limitation qu'on lui donne en méconnaissant, je crois, l'esprit conciliant qui préside à toute la convention et sur lequel on a cru sage de miser pour son maintien. Quant au second motif, il se fonde sur un caractère de permanence qu'on prête à l'obligation de l'appelant de fournir l'usage des lieux à l'intimé. Dès après cinq ans, rien ne devenait plus précaire que la durée de cette obligation. Pour s'en convaincre, on n'a qu'à considérer ce qui serait arrivé de la convention si les négociations conduisant à l'accord de 1929 eussent pris fin

1956

LORD
v.
GUIMOND

Fauteux J.

sans qu'une entente intervienne. Faute d'entente sur la considération de l'obligation, l'obligation elle-même eut disparu. Voilà pourtant ce dont les parties avaient convenu. Elles ont conditionné la survivance de leurs relations contractuelles à celle de leur esprit de conciliation. L'intimé, d'ailleurs, bien qu'invité à ce faire, n'a pu suggérer aucune raison supportant la proposition que les parties aient voulu écarter ce principe à la base de leur convention dès l'avènement d'une première modification du prix pour que, dès lors, ce dernier devienne définitif, que ce soit pour 10, 20 ou 30 ans à venir.

Conséquences de la convention ainsi interprétée.—La mensualité de $90 a prévalu, par entente, jusqu'au 1er septembre 1949; depuis lors, aucun accord n'est intervenu sur un prix. C'est à cette date qu'a pris fin la convention. C'est là, je crois, la conséquence de ce contrat en lequel les parties ont assujetti le maintien, après 5 ans, de leurs obligations réciproques à une condition purement potestative, soit celle de donner ou refuser un acquiescement à un prix modifié: *Code Civil,* art. 1081. Et c'est à bon droit que l'appelant a demandé l'expulsion de l'intimé et recherché contre lui, par son action, la condamnation au paiement d'une indemnité pour cette occupation adverse des lieux depuis le 1er septembre 1949.

Planiol et Ripert, Droit civil, 2e éd. 1952, vol. 10, p. 602, nº 470:

> C'est ainsi que sera nul le contrat prévoyant que les parties se mettront amiablement d'accord sur le prix, si cet accord n'intervient pas. Si le preneur s'était en fait mis en possession du bien, il ne devra au bailleur aucun loyer, mais une indemnité d'occupation représentative du préjudice subi.

Guillouard, Traité du contrat de louage, 3e éd. 1891, tome 1, p. 80, nº 66:

> Si aucun prix n'avait été déterminé, bien qu'il n'y ait pas convention valable de louage, celui qui aurait joui de l'immeuble pendant un certain temps, en vertu de cette convention imparfaite, devrait payer au propriétaire une indemnité qui serait fixée par les tribunaux. Il est certain que les parties n'ont pas entendu l'une concéder, et l'autre recevoir une jouissance gratuite, et s'il est impossible de suppléer à leur volonté en fixant le prix pour l'avenir, il est possible et légitime de fixer le taux de l'indemnité due pour le passé au propriétaire, dépouillé de la jouissance de son immeuble.

L'appelant mesure son préjudice sur la valeur locative des lieux qu'il estime à $225 par mois, chauffage et taxe d'eau y compris. Une revue de la preuve et, en particulier, du témoignage de l'évaluateur Meunier, justifie de réduire ce chiffre à $200. La période totale d'occupation adverse pour laquelle il a réclamé en son action est de 17 mois. Sur cette base, l'indemnité de l'appelant s'établit à $3,400. Il touchera $1,620, somme des montants consignés en Cour par l'intimé qui devra lui payer, en outre, la différence, soit $1,780. Le dossier ne permet pas d'accorder à l'appelant l'indemnité additionnelle de $225 réclamée pour perte anticipée de revenus durant le mois suivant l'évacuation des lieux.

Je maintiendrais l'appel et, réservant les droits de l'appelant, déclarerais que: (i) la convention du 1er septembre 1929 a pris fin le 1er septembre 1949 et, par la suite, l'intimé a occupé illégalement les lieux y mentionnés; (ii) l'indemnité est fixée à $3,400 et l'offre de la somme de $1,620, que l'appelant aura droit de retirer, est insuffisante; j'ordonnerais à l'intimé de quitter les lieux dans les 30 jours du jugement et le condamnerais en outre à payer à l'appelant la somme de $1,780, avec intérêts depuis le 19 décembre 1951, date du jugement de première instance. Le tout avec dépens de toutes les Cours.

ABBOTT J.:—I am in agreement with the reasons of my brothers Taschereau and Fauteux and would dispose of the appeal as proposed by my brother Fauteux.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Hugessen, Macklaier, Chisholm, Smith & Davis, Montreal.

Solicitor for the defendant, respondent: G. Sylvestre, St. Hyacinthe.

1956

*Mar. 7, 8
Dec. 21

MINETTE RACINE (*Defendant*) .....APPELLANT;

AND

DAME MINA J. BARRY AND DAME MINA GENE DELANY (*Plaintiffs*) } RESPONDENTS.

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

Liability to account—Trusts and trustees—Loan of company shares to be used as collateral and returned—Shares sold by borrower—Nature of recourse—Administration of property as foundation of liability to account—Civil Code, arts. 1763, 1765, 1766, 1777—Code of Civil Procedure, arts. 566 et seq.

A testatrix left all her property to her daughter M.J.B., "to be used for herself and daughter (M.G.D.) . . . and at the death of my daughter, what may remain is to go to her daughter (M.G.D.)". She appointed M.J.B., the defendant (her cousin) and the defendant's husband to be trustees under the will. Included in the succession were shares in two companies, and these shares were registered in the names of the three trustees and delivered to M.J.B. Subsequently M.J.B. lent the certificates to the defendant for the express purpose of being pledged with the defendant's broker, but with the understanding that M.J.B. would receive the revenue from the shares, and that the certificates would be returned to her at any time she wanted them. Some 18 years later M.J.B. learned that the shares had been sold and, with M.G.D., brought an action against the defendant for an accounting. The action was dismissed by the trial judge on the ground that the only appropriate remedy was a direct action for possession of the shares and their fruits, if any, or for their value. This judgment was reversed by the Court of Appeal.

Held (Rand and Kellock JJ. dissenting): The appeal should be allowed and the action should be dismissed, since the circumstances did not give rise to an action *en reddition de compte*. The account that could be claimed in such an action as this was an account of the administration of property on behalf of another, and the existence of such an administration was an essential foundation of the liability to account. Here the agreement between the parties constituted a loan rather than a mandate to administer the shares either for the estate or for the plaintiffs. The defendant was not a trustee, but a mere borrower. Even if she was liable to account for the dividends (which was doubtful), they had all been paid to M.J.B. It was not necessary to decide whether the loan was a prêt à usage, where the lender retained both the ownership and the legal possession of the thing lent, or a prêt de consommation, where the property in the thing passed to the borrower, whose obligation was to return an equivalent. In either case the sanction if the borrower did not perform his obligation to return was a condemnation in money, and this was not what was claimed in this action.

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

Per Rand J., *dissenting*: The transaction between the parties was that of a prêt à usage, where the lender retains the ownership and the legal possession of the property and where the borrower assumes vis-à-vis the lender duties of a mandatary. As borrower, the defendant was under a duty to conserve and restore the shares, together with all their fruits and accessories, and this obligation could be enforced only after its extent was ascertained by an accounting. The shares were to be held for the double purpose of benefiting both the plaintiff and the defendant, the borrower as mandatary assuming a relation to the plaintiff's interest which carried with it an accounting responsibility.

The same result followed on another view of the facts: the persons named by the will as trustees did actually take the legal title to the shares and by their dealings with each other set up at least a *de facto* trust in which each assumed toward M.J.B. and M.G.D. the obligation that the law would have imputed to them, that of fiduciaries.

As to M.G.D., her contingent interest in the substitution was sufficient to entitle her to take this conservatory measure. The dealing in the shares took place in the face of the fiduciary duty toward her, and it was beyond controversy that such a duty called for an accounting.

The rule observed in this Court that on a matter of procedure the opinion, here unanimous, of the highest Court of the Province should be accorded the greatest respect, helped to fortify the conclusion reached on the case as a whole.

Per Kellock J., *dissenting*: It was well settled that this Court would not interfere with the decisions of provincial Courts in a matter of procedure where no injustice had been suffered; and it could not be said that there could be any injustice to the defendant in upholding a right of action requiring her to account for her dealings with the shares, rather than an action for damages in respect of those same dealings.

The loan of the shares constituted a prêt à usage, which is not inconsistent with the right given here to pledge them. Any intention that the property in the shares would pass to the defendant was excluded in the contract. The only significant difference, for the purposes of this case, between a prêt à usage and a contract of dépot, is that the borrower can use the thing loaned whereas the depositary cannot do so without specific permission. But both the borrower and the depositary are bound to restore the identical thing received and, in the case of a chose frugifère, as here, to render to the owner all fruits and accessories, whether obtained as a result of their illicit act or not. They are, therefore, both accountable.

Since the shares ceased by reason of the wrongful sale on the part of the defendant to be in her possession and could not therefore be returned, the plaintiff became entitled to get the equivalent from the defendant and the purpose of the accounting demanded in this action was to establish that equivalent. Apart from the dividends, which might be taken to have been received, the defendant was liable to account for the original shares, for all the shares into which they were converted or for which other shares were substituted, and for the proceeds. It is well settled in the jurisprudence of the Province that where a defendant not only refuses to give an accounting but refrains from

1956

RACINE v. BARRY et al.

furnishing any information either before the action or during the proceedings, the Court may condemn the defendant to pay a liquidated sum.

Assuming that the will did not make the defendant a trustee of the shares and that they became the absolute property of the plaintiff, they were in fact conveyed by her to the three trustees, and the trust thus established was accepted by the trustees. On this point of view also the defendant must account.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment at trial and ordering an accounting. Appeal allowed.

V. Pager, Q.C., for the defendant, appellant.

A. E. Laverty, Q.C., and *C. D. Gonthier*, for the plaintiffs, respondents.

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

TASCHEREAU J.:—Dame Mina J. Barry, veuve de Ernest E. Delany, tant personnellement qu'en sa qualité de fiduciaire de la succession de Christina Ross Barry, et Mina Gene Delany, ont institué des procédures légales contre Dame Minette Racine, de la Cité de Westmount, tant en sa qualité personnelle qu'en sa qualité de fiduciaire de la même succession

Les conclusions de l'action sont à l'effet que Minette Racine soit destituée de ses fonctions de fiduciaire, qu'elle soit condamnée à rendre compte de tout l'actif de la succession de Christina Ross Barry dont elle aurait eu la possession, ou qu'elle aurait administré, et qu'elle soit également condamné à payer tout reliquat de compte, à moins qu'elle ne préfère payer à la demanderesse Mina J. Barry, la somme de $40,500, et que dans le cas de défaut de rendre compte, elle soit condamnée à payer ladite somme de $40,500.

La Cour Supérieure, présidée par M. le Juge J. Archambault a rejeté cette action avec dépens, mais la Cour d'Appel (1) l'a maintenue en partie. Elle a infirmé le jugement et a statué que l'intimée devait rendre compte aux demandeurs de tous les biens de la succession de feu Dame Christina Ross Barry dont elle a eu la gestion ou

(1) [1956] Que. Q.B. 576.

la possession, et en particulier du produit de la vente des actions de Steel Company of Canada Limited et de Montreal Light, Heat & Power Consolidated, et de tous les dividendes, boni ou actions supplémentaires qu'elle aurait pu recevoir, le tout sous un délai de trente jours de la date du jugement, à moins que la défendresse ne préfère payer, sous le même délai, la somme de $21,812.80 avec intérêt. A défaut par la défenderesse de rendre compte sous le délai fixé, la Cour a condamné la défenderesse à payer aux appelants, sous un délai de quinze jours après l'expiration du délai fixé pour la reddition de compte, la somme de $21,812.80 avec intérêt à compter de la date du 7 novembre 1947. La défenderesse a été condamnée à payer les dépens et en Cour Supérieure et en Cour d'Appel.

Les faits qui ont donné naissance à ce litige sont assez simples. Christina Ross Barry, cousine de la défenderesse-appelante, a fait un testament olographe le 29 octobre 1927, et elle a ainsi disposé de ses biens:

> To my daughter Mina Jane, wife of E. E. Delany, I leave & bequeath all I possess, to be used by her for herself and daughter (Mina Gene Delany) and not to be used, or disposed of, to her husband, or for him, or for any debt of his, and at the death of my daughter, what may remain is to go to her daughter (Mina Gene Delany), the trustees to be *Mina Jane Delany, Yvon Dupré and his wife Minette Dupré.*
>
> My remains to be cremated, and the least possible expense to be incurred for funeral.
>
> (Signed) Christina Ross Barry.
>
> Also I do not wish Mina ever to go West again, or her money to be used in any business scheme where Ernest is concerned.
>
> (Signed) C. R. Barry.

(Les italiques sont de moi.)

La testatrice est décédée le 6 janvier 1928, et ce testament a été vérifié conformément à la loi.

On voit donc que deux des "trustees", Minette Racine Dupré, la défenderesse, et Mina Jane Delany sont en cause. Le troisième "trustee" Yvon Dupré, mari de Minette Racine Dupré, est maintenant décédé.

Quelque temps après le décès de la testatrice, le Notaire Joron, qui apparemment s'occupait du règlement des affaires de la succession, a, le 16 mai 1928, remis à l'un des "trustees", M. Yvon Dupré, certaines valeurs mobilières, dont un certificat pour 119 actions de la Montreal Light,

1956

RACINE
v.
BARRY
et al.

Taschereau J.

Heat & Power Consolidated, et un autre certificat pour 71 actions ordinaires de Steel Company of Canada Limited. Ces deux certificats étaient enregistrés au nom des "trustees de la succession C. Ross Barry" et M. Dupré en a accusé réception sous sa signature. Peu après, M. Dupré a remis ces certificats à l'intimée qui les a gardés dans son coffret de sûreté. C'était bien une reconnaissance des droits de l'intimée à sa possession personnelle de ces valeurs suivant les termes mêmes du testament, où les mots significatifs "to be used by her" sont employés.

Ce sont les seules valeurs dont il soit question dans la présente cause. Subséquemment, Mina Jane Barry (Delany), la bénéficiaire, remit ces deux certificats à l'appelante qui s'en servit comme garantie collatérale de son compte au bureau de courtage de Shearson Hammill & Co. à Montréal. Il est bon de noter que les actions de Steel Company of Canada Limited furent subséquemment subdivisées en quatre, ce qui faisait que les héritiers détenaient en tout 284 actions de cette compagnie.

Aucun document bilatéral constate la nature de la transaction intervenue entre Mina Jane Delany et l'appelante Minette Racine Dupré. Deux exhibits importants ont été produits au dossier. Le premier, en date de juillet 1928, se lit ainsi:

Westmount, 210 Edgehill Road,

July 28

This is a note to my estate in case of death.

There is in Shearson, Hammill & Co. at their Montreal office (184 St. James Street) deposited as collateral, a certificate of seventy one shares of Steel Company of Canada, and one, of one hundred and nineteen shares of Montreal, Light Heat & Power Consolidated against account Yvon Dupre # 592 # 2. These certificates belong to the Estate of the late Mrs. C. R. Barry & should be returned to her heir Mrs. Mina J. Delany who lent them to me and to whom they belong.

(sgd) M. R. Dupre
" Yvon Dupre

Le second, en date du 24 janvier 1929, est rédigé dans les termes suivants:

Westmount, 210 Edgehill Road

January 24th, 1929.

This is to certify that I have in my possession certificates of one hundred & nineteen (119) shares of Montreal Light Heat & Power Consolidated, two hundred and eighty-four (284) shares of Steel Company of Canada

belonging to the Estate of the late Mrs. C. R. Barry which are deposited as collateral security at the office of Shearson Hammill & Co. Montreal (184 St. James Street).

These shares were lent to me by the heir of the late Mrs. Barry, Mrs. Mina J. Delany, to be used as such, and I agree to return same to her at any time she wants them back.

(sgd) M. R. Dupre
" Yvon Dupre

Dans le cours de l'année 1932, ces actions furent vendues sans doute pour combler le déficit du compte de l'appelante chez le courtier, et celle-ci fut en conséquence dans l'impossibilité de retourner ces valeurs à leur propriétaire, et de remplir l'obligation à laquelle elle s'était engagée. C'est en 1946 seulement que suivit l'action en reddition de compte. Cependant, avant que cette action ne fut intentée, l'appelante versa, comme elle s'y était d'ailleurs obligée à l'origine de la transaction, tous les dividendes déclarés par les deux compagnies, et un certain acompte sur le capital.

Le plaidoyer de la défenderesse-appelante est à l'effet qu'elle n'est pas comptable envers la demanderesse, et elle a en outre soutenu qu'il s'agit en l'occurrence d'un prêt à usage, et que si les certificats de valeurs mobilières qui font l'objet de ce prêt ne peuvent être remis, parce qu'ils ont été vendus, le seul recours de la créancière n'est pas une action en reddition de compte, mais bien une réclamation personnelle en argent pour la valeur des choses prêtées.

Il est certain que s'il s'agit d'un prêt, la transaction intervenue peut avoir le caractère d'un prêt à usage ou d'un prêt de consommation. Le prêt à usage est en effet un contrat par lequel l'une des parties livre une chose à une autre personne, qui peut s'en servir gratuitement pendant un temps, mais qui doit ensuite la rendre au prêteur: *Code Civil*, art. 1763. Dans ce cas, le prêteur entend conserver la propriété de la chose et a droit d'en exiger la restitution. Si la restitution devient une impossibilité, parce que l'emprunteur a disposé de la chose prêtée, le recours du créancier-prêteur est de réclamer la valeur de la chose qui a fait l'objet du contrat.

Au contraire, lorsqu'il s'agit d'un prêt de consommation, le prêteur livre à l'emprunteur une certaine chose qui se

1956

RACINE v. BARRY et al.

Taschereau J.

consomme par l'usage, à la charge par ce dernier de lui rendre une autre chose de même espèce et de même qualité: *Code Civil*, art. 1777.

Des opinions diverses ont été émises concernant la nature du prêt de valeurs mobilières. Ainsi, certains auteurs soutiennent que le prêt de valeurs mobilières constitue un prêt de consommation, vu qu'elles sont susceptibles d'être vendues, et particulièrement, comme dans le cas qui nous occupe. Dans le premier cas, la propriété demeure au prêteur; dans le second, vu qu'il y a consommation, la propriété est transférée à l'emprunteur: Dalloz, Petit Dictionnaire de Droit, p. 997; Dalloz, Nouveau Répertoire, vol. 3, p. 529; Dalloz, Encyclopédie, Droit Civil, vol. 4, p. 90, No 225; Ripert, Traité de Droit Civil, vol. 2, 3e ed. 1949, p. 881.

Je ne crois pas, pour la détermination de cette cause, qu'il soit nécessaire d'établir cette distinction, car, qu'il s'agisse d'un prêt à usage ou d'un prêt de consommation, la sanction à défaut par l'emprunteur de remplir son obligation, doit nécessairement être une condamnation pécuniaire.

Mais, ce n'est pas ce qui est réclamé dans la présente action. La demanderesse-intimée réclame une reddition de compte. Le compte, au sens de la reddition du compte, est l'exposé d'une gestion faite dans l'intérêt d'autrui. C'est la présentation à celui pour qui on a géré d'un état détaillé de ce qu'on a reçu et de ce qu'on a dépensé pour lui, à l'effet d'arriver à la fixation du reliquat, si la recette excède la dépense, ou de l'avance, si la dépense excède la recette. La reddition de compte est due par ceux qui ont administré le bien d'autrui, à quelque titre que ce soit. Ainsi doivent des comptes, tout mandataire ou gérant, le tuteur, l'héritier bénéficiaire, le curateur à une succession vacante, l'exécuteur testamentaire, le séquestre, les associés, le fiduciaire, etc. Il est essentiel, pour donner naissance au droit de l'oyant de réclamer un compte, que le rendant compte ait eu la détention de certains biens, et en ait eu l'administration: Dalloz, Petit Dictionnaire de Droit, p. 292.

L'action en reddition de compte est une action particulière que peut intenter celui dont les biens ont été gérés par un autre. Les règles qui en déterminent la nature sont prescrites par les arts. 566 et suivants du *Code de procédure*

civile. La première question qu'il faut déterminer est de savoir si le défendeur doit un compte; s'il n'en doit pas parce qu'il n'est pas comptable, l'action doit être rejetée. S'il en doit un, il doit être rendu à la personne qui y a droit, et doit contenir dans des chapitres distincts la recette et la dépense, et établir la balance qui peut exister. L'oyant compte est tenu de prendre connaissance du compte et des pièces justificatives au greffe et de produire ses débats de compte, s'il le conteste, dans un délai de quinze jours qui peut être prolongé par le juge sur requête. A défaut par le défendeur de rendre compte, le demandeur peut lui-même procéder à l'établir tel que prévu à l'art. 568 du *Code de procédure civile*, c'est-à-dire qu'il doit établir la recette et la dépense et déterminer la balance qui lui est due.

Cependant, la jurisprudence a accordé certains tempéraments à la rigueur des articles du *Code, lorsque les parties ont transformé l'action en reddition de compte* en un véritable débat de compte et qu'elles ont mis devant le tribunal toutes les pièces justificatives. Les cours ont prononcé que les règles du *Code de procédure civile* n'étaient pas impératives, et que l'obligation ultérieure de rendre compte après l'institution de l'action, devenait inutile lorsque par le débat engagé par le consentement des parties, on en était arrivé à une solution immédiate et définitive: *Cousineau v. Cousineau* (1).

C'est d'ailleurs l'opinion exprimée par la Cour d'Appel dans cette même cause de *Cousineau v. Cousineau* (non rapportée). Dans cette cause, M. le Juge Bissonnette exprimait son opinion de la façon suivante:

> Mais comme les *intimés ont laissé dévier la contestation de manière à transformer leur propre action en un débat de comptes et que les appelants en ont fait autant en mettant, devant le tribunal, livres et pièces justificatives* et en produisant tous les témoins aptes à déposer sur cette gestion sur laquelle n'existe aucun livre de comptabilité, il me paraît évident qu'il faut, dans cette espèce particulière, statuer que la gestion des appelants ne comporte aucun reliquat de comptes et les affranchir ainsi d'une obligation ultérieure de rendre compte, puisqu'un nouveau débat serait inutile.

(Les italiques sont de moi.)

Mais encore faut-il que les parties aient transformé l'action en un débat de compte. La demanderesse-intimée a bien tenté de le faire, mais non pas la défenderesse-appelante

(1) [1949] S.C.R. 694.

1956

RACINE v. BARRY et al.

Taschereau J.

qui n'a pas offert de preuve, n'a produit aucun compte, et qui a nié à la demanderesse le droit d'en réclamer un. La défenderesse a clairement limité le débat à la question de savoir si oui ou non elle était comptable.

A mon sens, la preuve révèle qu'il s'agit purement et simplement d'un prêt consenti par l'intimée à l'appelante, et non pas d'un mandat de gérer ni pour la succession ni pour l'intimée les valeurs mobilières qui ont été transportées. Il s'ensuit que l'appelante n'est pas comptable au sens de la loi vis-à-vis la succession, ni vis-à-vis l'intimée. Elle n'a rien eu à administrer pour personne. Elle n'a pas eu la possession de ces valeurs comme fiduciaire, *mais bien comme emprunteuse,* et c'est en cette qualité seule que sa responsabilité est engagée si la dette n'est pas encore payée.

On a soutenu à l'audience que si l'appelante n'est pas comptable du capital emprunté, elle l'est du moins en ce qui concerne les dividendes qu'elle aurait reçus. Je ne puis accueillir cette prétention, car même si l'appelante était comptable des dividendes, ce qui est fort douteux, ils ont tous été payés de l'avis même de l'intimée, ainsi qu'une substantielle partie du capital.

Je me vois donc à regret dans l'obligation de maintenir cet appel et de rejeter l'action. Le recours de la demanderesse n'était pas par action en reddition de compte, mais bien en remboursement du prêt consenti. C'est une application de la loi dans toute sa rigueur, et l'équité n'y peut apporter aucun tempérament.

Dans une cause de *Bouchard v. Perron* (1) où il s'agissait d'un dépôt, M. le Juge Prévost dit ce qui suit:

> En pareil cas, le recours approprié serait une action afin d'obtenir remboursement du dépôt et non pas une action en reddition de compte.

Vide également *Savard v. Charette* (2); *Boivin v. Rock Shoe Manufacturing Co.* (3); *Dallaire v. Doyon* (4).

Dans la cause de *Donoghue v. Lefebvre* (5), M. le Juge en chef Lamothe s'exprimait de la façon suivante:

> Dans l'action en reddition de compte, il faut prouver que le défendeur a administré des biens pour le demandeur (comme tuteur, curateur,

(1) (1934), 74 Que. S.C. 141 at 148.
(2) (1899), 5 R.L. N.S. 62.
(3) (1915), 49 Que. S.C. 24.
(4) (1930), 49 Que. K.B. 199.
(5) (1919), 29 Que. K.B. 1 at 5.

exécuteur testamentaire, etc.) et qu'il est comptable de cette administration. . . . le jugement doit être basé sur le fait que le défendeur a administré des biens pour le demandeur.

Dans un cas de prêt non remboursé, comme dans le cas qui nous occupe, l'action en reddition de compte n'est pas le remède approprié et ne peut être sanctionnée par les tribunaux. Cette obligation de rendre compte présuppose une administration. Sans doute, il est certain qu'il peut se présenter des cas, où l'emprunteur ou même le dépositaire, peut être tenu de restituer les fruits produits par la chose empruntée ou déposée, et même en rendre compte; mais dans le cas actuel, toute idée d'administration est exclue par la nature même de la convention intervenue. L'obligation contractée a été uniquement de remettre les actions et les dividendes, et ces derniers ont été intégralement transmis à l'intimée.

L'appel doit donc être maintenu, l'action rejetée, et le jugement du juge de première instance rétabli. L'appelante aura droit à ses frais devant la Cour du Banc de la Reine et devant cette Cour.

RAND J. (*dissenting*):—The ground taken on this appeal is essentially one of procedure. The facts are not seriously disputed and the documents which establish the primary allegations are given in the reasons of my brother Taschereau. The litigation, before the courts since 1946, has been befogged by irrelevant topics and the observation made by Bissonnette J. in the opening sentence of his reasons (1):

Cette cause a pris une ampleur, dans l'appréciation du fait et du droit, que le fond du litige, s'il est circonscrit à la seule question à résoudre, ne justifiait pas.

is highly appropriate. I should add that the affirmative defence to the effect that the proceeds of the shares were applied to speculation debts of the respondent Mina Barry is, on the evidence, without the slightest foundation. The issue, then, is whether the appellant, admitting that in 1929 she received the shares of stock from the respondent Mina Barry for the purpose of tiding over her own account with brokers during the market debacle of that period, is bound to furnish an account of the securities and their

(1) [1956] Que. Q.B. 576 at 578.

1956

RACINE v. BARRY et al.

Rand J.

fruits or that these proceedings disclosing all the facts are to be dismissed as abortive.

Bissonnette J., disregarding the question of a trust between the parties arising under the will, treated the controversy as concerned with a prêt à usage for which the conclusion of the declaration for an account to be rendered, was, in the circumstances, proper; and on this footing I will first consider it.

As between the respondent Mina Barry and the appellant the oral evidence and the letters of acknowledgment by the latter prove all the elements of a prêt à usage. The shares of stock were lent gratuitously for a special purpose; and the borrower agreed to return "these certificates", the individual things in specie, to the respondent when the latter should call for them.

That a share of stock can be the subject of such a transaction is evident both under the old law and the article of the *Code*. Pothier, vol. 5 at p. 7, art. 2, para. 14 says:

> 14. Toutes les choses qui sont dans le commerce, et qui ne se consomment point par l'usage qu'on en fait, peuvent être l'objet de ce contrat.

and the *Civil Code:*

> 1765. Everything may be loaned for use which may be the object of the contract of lease or hire.

In his description of the uses to which the property may be put, Pothier gives a number of examples to distinguish the prêt à usage from that of mutuum, from which it is clear that the same property may be the subject of the one or other, depending on the character of the use authorized. Here, where the actual certificates were to be returned, the terms contemplated their preservation; there was no right to use them otherwise than as a continuing security for so long only as the lender would not call for their return; but physically and as representing a share interest in a company, they were to remain intact.

The lender, in such a situation, retains both the ownership and the legal possession of the property: Pothier, *supra,* art. 3, para. 9, p. 6:

> 9. . . . au lieu que dans le prêt à usage, ce n'est pas la chose même que le prêteur donne, il n'en donne que l'usage; il conserve la propriété de la chose qu'il prête: il en conserve même la possession, comme nous l'avons vu supra, n° 5, et l'emprunteur s'oblige de la lui rendre.

and vis-à-vis the lender the borrower assumes duties at least of a mandataire. The significance of continuing to retain property "à titre d'emprunt" is that, in the absence of a statute, prescription does not run while the property remains in the hands of the borrower.

As borrower the appellant was under a duty to conserve and to restore to the lender the shares, together with all their fruits and accessories. Pothier, *supra*, at p. 31, art. 3, para. 73, deals with fruits:

> Un troisième objet accessoire de cette action, est la restitution des fruits qui sont nés chez l'emprunteur, lorsque la chose prêtée était une chose frugifère.

and in para. 74 with accessories:

> 74. Enfin, on doit mettre au rang des objets de l'action commodati, la restitution de toutes les autres choses accessoires de la chose prêtée;

Dalloz, Encyclopédie, vol. 4, p. 83, item 55, uses the following language:

> 55. Ainsi, lorsque des pièces de monnaie ont été prêtées à un changeur pour les exposer dans sa vitrine. Ou encore, lorsque les objets qui font l'objet du prêt n'ont été remis que pour que l'emprunteur puisse les donner en gage à un tiers, à charge de les rendre en nature. (Baudry-Lacantinerie et Wahl, n° 801).

Applying these conceptions to a share of stock, it is obvious that dividends, in cash or stock, share warrants, new shares representing the subdivision of prior issues, the sum received for an unauthorized sale, intervening profits made out of moneys received, would, apart from damages, all come into consideration. These fruits and accessories must, in Pothier's language, be "rendered" to the lender and being, as here, by their nature expressed in terms of money or money's worth, they are "rendered" only as they may be ascertained by an account and paid over.

The authorities support this view. Garsonnet, ed. 1888, vol. 3, pp. 140-1-2, summarizes the persons liable to be charged with administration of another's property as follows:

> Quiconque est chargé ou se charge volontairement d'administrer tout ou partie du bien d'autrui doit rendre un compte détaillé de sa recette et de sa dépense. Tels sont, à moins qu'ils n'aient prescrit, transigé ou obtenu dispense de rendre compte, les mandataires, tuteurs, associés, copartageants, héritiers bénéficiaires, exécuteurs testamentaires, dépositaires, séquestres, créanciers-gagistes et antichrésistes, envoyés en possession provisoire de biens d'absent, curateurs aux successions vacantes et

1956

RACINE v. BARRY et al.

Rand J.

aux immeubles délaissés par hypothèque, gérants d'affaires, possesseurs de bonne ou de mauvaise foi, comptables de deniers publics; tels sont aussi le père administrateur légal, et l'époux survivant commun en biens qui n'a pas fait inventaire; tels sont, enfin, les conseils judiciaires et curateurs aux mineurs émancipés qui se sont immiscés dans l'administration qui ne leur était pas confiée, ou qu'ils avaient pour unique mission de surveiller.

and in J.-Cl. Proc., art. 529, p. 3, para. 12, as a general indication of the class, most of these items are reproduced with a reference to Garsonnet et Cézar-Bru, Proc. civ. 3e ed. 1913, t. III, n° 815, p. 607 et suiv. My brother Kellock, whose reasons I have had the advantage of reading, has traced the treatment of a dépositaire by the courts of Quebec to a demonstration of their agreement with the view of Garsonnet approved in the volume cited of Juris-Classeur.

In *Whitney v. Kerr* (1), one who had agreed to buy shares of stock in a company was upheld by the Court of Queen's Bench in an action brought to compel the seller, in order to determine the price agreed upon, to render an account of what the shares had cost him. The latter did not hold any property of the purchaser; but he had agreed to sell his own property which in equity and good faith he was bound to keep for the purposes of performing his obligation; and that interest furnished the foundation for the proceeding.

A similar view was taken by Archibald J. in *Brunet v. Banque Nationale* (2), in which the plaintiff, alleging that he was employed to assist in the collection of certain moneys to a percentage of which he was entitled for commission, claimed an accounting by the principal to determine the amount received.

Several decisions in actions brought by commercial travellers for commission for an account by the principal of goods sold have been dismissed; but it is plainly evident that in that relation no semblance of interest in property of the agent is to be found in the possession of the principal, and the cases have no bearing on the situation before us. To the same effect is *La Corporation du Village d'Yamaska v. Sigefroy Lauzière* (3), in which the person called upon for an account was "un simple surveillant" of works carried out by the corporation.

(1) (1910), 20 Que. K.B. 289. (2) (1897), 12 Que. S.C. 287.
(3) (1923), 36 Que. K.B. 142.

This category of prêt is seen to be characterized by the circumstance that a person is charged with the conservation of a principal thing and the administration of its fruits and accessories, coupled with the right to use the thing for a benefit which does not impair its individuality. The shares were to be held for the double purpose of benefits to both the respondents and the appellant, examples of which in Roman law are mentioned in Buckland's Text-Book of Roman Law (1921), p. 471. Toward the interests of the respondents the borrower as mandataire sustained a relation which carried with it an accounting responsibility. That was the view of Bissonnette J. and I am in entire agreement with it.

But in another view of the facts here the same result follows. Whatever may be the proper interpretation of the will as to the vesting of the property in the beneficiaries or the trustees, the persons named as "trustees" did actually take upon themselves the legal title to the shares. It appears that the deceased husband of the appellant as one of the trustees obtained the certificates for these shares as well as others from a notary and they were registered on the books of the companies in the three names as "Trustees of the estate of the late Mrs. C. R. Barry". This was done undoubtedly in the belief that it was in accordance with the provisions of the will and from a reference in a receipt given to the notary to a legal opinion on the will, dated February 7, 1928, about a month after the testatrix's death, under legal advice.

The dividends for 1930 and the first two quarters in 1931 were paid by cheques made out to all three, sent to the deceased husband, endorsed by him and the appellant, and handed over to the respondent, Mina Barry, who cashed them as her own funds. Although the shares were sold in 1931 without the knowledge or consent of the respondent Mina, an account introduced on behalf of the respondents purports to indicate that the appellant remitted personal cheques in favour of the respondent on the shares of the Steel Company of Canada, in 1932 for the amount of $496.80, which represents a rate of $1.75 on 280 shares, and in 1933 and each year following until 1946 for the amount of $337.80 representing a rate of $1.20 on the 284

1956

RACINE v. BARRY et al.

Rand J.

shares less $3. Since the institution of the action, these shares have been split on the basis of five for one. A rate of $1.75 appears to have been declared by the Steel Company for 1931 and 1932, $1.20 in 1933, $1.75 in 1934, $3.17½ in 1935, $3.75 from 1931 to 1940 inclusive, and $3 from 1940 to 1946. A list of similar remittances is shown to represent the dividends from the Montreal Light, Heat & Power Company in the sum of $360 in each year from 1931 to 1946 inclusive; there were 238 shares and the rate $1.50, an annual dividend of $357. From 1937 to 1946 additional sums in even dollar amounts ranging from $200 to $2,550 are shown to have been received in each year, but their appropriation to the principal of either stock or to a contra-loan account is not indicated. The statements were not to show with precise accuracy the accounting result but a *prima facie* proof of the substance of the dealings between the parties and the justification for claiming an account to be rendered by the appellant. The respondent was a novice in business matters and although for some time she had entertained suspicions that the shares had been sold, it was not until 1947 that she learned definitely of that fact.

By and between the parties, therefore, there was set up at least a *de facto* trust in which each assumed towards the beneficiaries, the respondents, the obligation that the law would have imputed to them, that of fiduciaries. The mention of trustees by the testatrix was in all likelihood for the purpose of placing her daughter and granddaughter under a protection in particular against interference with the property by the daughter's husband. Whatever may be said of the ability of the respondent Mina to act for herself, what the testatrix had in mind and what the other two trustees voluntarily undertook was that they should use the wider business understanding especially of the appellant's husband to safeguard the interests of both beneficiaries.

But the respondent Gene, the granddaughter, is in a different and stronger position. She had a contingent interest in the substitution sufficient, in the words of Bissonnette J. "pour prendre cette sorte de mesure conservatoire, afin de préserver les biens qu'elle était censée

recueillir". At the death of her grandmother she was an infant of six or seven years and the dealing in this stock took place in the face of the fiduciary duty toward her; and that that relationship is within the class enumerated by Garsonnet is, in my opinion, beyond controversy.

In this conclusion on the case as a whole I am fortified by the rule observed in this Court that on a matter of procedure the opinion, here unanimous, of the highest Court of the Province should be accorded the greatest respect.

I would, therefore, dismiss the appeal with costs.

KELLOCK J. (*dissenting*):—This action was dismissed by the learned trial judge on the ground that the respondent Mina J. Barry was not entitled to bring an action for reddition de compte against the appellant but that her sole right of action was "a direct action to be given possession of the thing loaned and the fruits of thing if any". He also held that the respondent Mina Gene Delany had no right of action at all. The Court of Appeal (1) set aside this judgment, holding that the respondents were entitled to bring such an action.

The evidence established that the shares here in question were the subject of a loan to the appellant and her husband to be returned to the respondent Mina J. Barry at any time she might ask for them, and that instead of being returned, they were sold by the appellant. The sole issue in the appeal is as to whether the said respondent was entitled to bring an action for reddition de compte or whether her only right was some other form of action.

It is well settled that this Court, although having jurisdiction, will not interfere with the decision of the provincial Courts in a matter of procedure where no injustice has been suffered: *Roessel v. Perlo*, Feb. 10, 1921, cited in Cameron, 3rd ed. 1924, p. 86; *Finnie v. City of Montreal* (2). In the latter case this Court refused to interfere although the matter brought before the Court was "a *demande* almost different from the matter actually in controversy".

(1) [1956] Que. Q.B. 576. (2) (1902), 32 S.C.R. 335.

1956

RACINE v. BARRY et al.

Kellock J.

It cannot be said that there could be any injustice to the appellant involved in upholding a right of action requiring her to account for her dealings with the shares here in question as against an action for damages in respect of those same dealings. It is therefore clear, in my opinion, that the appeal ought to be dismissed on this ground alone. I am, however, also of opinion that the appeal ought to be dismissed on other grounds.

Leaving aside for the moment the question of trust, it is, in my opinion, clear that the loan of shares by the respondent, Mina J. Barry, to the appellant and her husband constituted a prêt à usage, the property loaned to be returned to the said respondent "at any time she wants them back". There is no question that demands for its return were made but never complied with. The obligation of the borrowers was not to return merely "a like quantity of things of the same kind and quality", which would have been the case had the loan been one for consumption within art. 1777 of the *Civil Code*. That it was the specific certificates loaned which were to be returned was expressly acknowledged in writing by the appellant and her husband. Accordingly, arts. 1763 *et seq.* are the relevant articles on the facts of this case. The distinction between the two kinds of contract is clearly stated in Dalloz, Petit Dictionnaire de Droit, p. 998, para. 9, as follows:

> Tout prêt de consommation, à la différence du prêt à usage, suppose l'aliénation de la chose au profit de l'emprunteur.

As the contract here in question did not permit of a sale, any intention that the property in the shares should ever pass to the borrowers was excluded.

> Et toutes les fois que les juges ne peuvent déceler cette intention de transférer la propriété et les risques, ils doivent décider qu'il y a prêt à usage, et non prêt de consommation.

Dalloz, Encyclopédie de Droit Civil, vol. IV, p. 90, para. 216. Again, Dalloz, Nouveau Répertoire, vol. III, p. 529, para. 5:

> Le prêt à usage diffère du *prêt de consommation* en ce que le prêteur conserve la propriété de la chose prêtée (art. 1877) (C.C. 1784), donc le droit de la revendiquer, à condition de respecter l'usage consenti à l'emprunteur. La distinction des deux sortes de prêt est parfois difficile; ainsi, lorsque le contrat porte sur des titres au porteur. Pour la résoudre, il convient de rechercher si le prêteur a entendu, lors du contrat, conserver la propriété de ses titres et en exiger la restitution à l'échéance. Ainsi, ne

constitue pas un prêt à usage, mais bien un prêt de consommation, le prêt de titres au porteur qui n'ont été revêtus d'aucune marque particulière permettant de les individualiser.

Unquestionably the certificates in the case at bar were numbered certificates.

It has been held by La Cour de Cassation, 11 May 1901, D.P. 1902.2.415, that the fact that the borrower of specific shares has the right under the contract to pledge them with a creditor of the latter is entirely consistent with a contract of prêt à usage. Similarly, Huc, Commentaire du Code Civil, vol. XI, p. 207; *S.* 1895, 1.160; *S.* 1906, 1.430.

There is therefore, in my opinion, no question but that the case at bar is one of prêt à usage, as the learned judge of first instance found.

There is no evidence, as the learned trial judge seems to have thought, that the shares were sold by the pledgees, although it may be assumed the latter would not have accepted the certificates from their clients, the appellant and her husband, without the endorsement of the registered shareholders. The only evidence as to why the certificates were not returned to the respondent is that of the latter, who testified that the appellant had told her, some years after the certificates had been loaned, that she had sold them, but no information was then or at any time given as to when the sale had taken place nor as to the amount of the proceeds.

In the course of his judgment dismissing the action, the learned judge of first instance said:

. . . if Plaintiffs have any recourse against Defendant, they can exercise that recourse by direct action, they can sue her as their debtor, asking the Court to condemn Defendant to give back to Plaintiffs the shares that she loaned them or the value of the said shares at the market price with the dividends that were distributed on those shares and that she did not receive, the whole with interest, but she cannot take an action for accounting;

The learned judge does not state his view as to the time as of which the "market price" is to be determined, whether at the date when the shares ought to have been returned or the date of their sale by the appellant or the date of the judgment; *vide* Pothier 5, p. 29, paras. 68, 72; *S.* 1850, 1.455; *S.* 1933, 1.87. As already mentioned, the only person

1956

RACINE v. BARRY et al.

Kellock J.

with knowledge of the date of sale is the appellant, who has not only refused the information but, by her pleading, denied any sale. Moreover, should it be held that the market price on any date other than the date of sale is the relevant date for the purpose of assessing the value by way of damages, the appellant would be enabled, if the price on that date should turn out to be less than the price actually realized by the sale, to put herself, by her own wrongful act, in a position of making a profit, while depriving the owner of the proceeds of her own property.

If such were considered to be a permissible result under the civil law of the Province, it would seem that an owner of property would be in a considerably less favourable position under the regime of that law than would be the case in similar circumstances in other jurisdictions where he may, at his option, sue for damages for the wrongful conversion of his property or for an accounting and recovery of the actual proceeds of sale: *United Australia, Limited v. Barclay's Bank, Limited* (1); *Trusts & Guarantee Co. v. Brenner* (2). Viscount Simon in the case first above mentioned refers, at p. 12, to the case of *Lamine v. Dorrell* (3), decided in the year 1705, where certain Irish debentures had been wrongfully sold, and where Powell J. said:

> But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as money received to his use.

Any suggestion that another result would be permissible under the civil law would seem to be negatived by the principle of unjust enrichment firmly embedded in that law to a much greater extent than in the common law. An interesting example of its application in circumstances not too remote in principle from the case at bar is the decision of the Cour de Cassation; Gaz. Pal. 1927.1.426.

It is of interest also, in this connection to observe that Bioche, in the second volume of his Dictionnaire de Procédure, under the head of "Compte de Fruits", in treating of fruits required to be rendered in specie, says, at p. 551, para. 45:

> 45. Si le débiteur ne possède pas de fruits, mais qu'il lui soit possible de s'en procurer, même à des prix plus élevés que le prix commun au

(1) [1941] A.C. 1. (2) [1932] O.R. 245 at 248, [1932] 2 D.L.R. 688.
(3) (1705) 2 Ld. Raym. 1216, 92 E.R. 303.

moment de la demande, il doit être forcé à la restitution en nature: l'impossibilité de payer en nature doit être réelle et absolue, elle ne peut être un prétexte pour enrichir un débiteur de mauvaise foi, au préjudice de son créancier. Toullier, 7, n° 63.

Coming to the ground upon which the learned judge of first instance proceeded, it may be that where the subject-matter of loan is a shovel or a machine or similar object, the result reached by the learned judge might be proper but where, as here, the property loaned consists of "une chose frugifère", other considerations apply.

For reasons which will appear, it is useful to compare the prêt à usage with the contract of dépôt. In the one the borrower is entitled to the use of the thing loaned for the purpose "intended by its nature or by agreement" (art. 1766), while in the other, the depositary "has no right to use the thing deposited without the permission of the depositor" (art. 1803). For present purposes there is no other significant difference between the two. Both the borrower and the depositary are bound to restore the identical thing received and to render to the owner all fruits and "accessories". Title remains, in both cases, vested in the owner. Pothier, in speaking of the prêt à usage, refers, in vol. 4, p. 3, para. 5; p. 5, para. 9; and p. 9, para. 20, note (1), to the fact that even the legal possession resides in the lender, the borrower having nothing more than physical possession. See also Mignault, vol. 2, p. 482.

With respect to the remedy by way of an action for reddition de compte, Dalloz, in his Répertoire Pratique, vol. 3, p. 406, defines "La reddition de compte" as:

la présentation, à celui pour qui l'on a géré, d'un état détaillé de ce qu'on a reçu et de ce qu'on a dépensé pour lui, à l'effet d'arriver à la fixation définitive de la situation des parties.

At p. 407, under the heading "Cas où il est dû un compte", Dalloz says, in para. 9:

9. 1. En principe, tous ceux qui ont administré la fortune d'autrui, à quelque titre que ce soit, *avec ou sans mandat,* sont obligés de rendre compte de leur gestion. Ainsi doivent des comptes . . . *le dépositaire.*

Again, Glasson-Tissier, Procédure Civile, 3rd ed. 1936, vol. 5, p. 207, para. 1734, under the heading "Des Redditions de Comptes":

1734. Généralités. Caractère facultatif de la procédure spéciale de la reddition de compte.—Un grand nombre de personnes: . . . *dépositaires* . . .

1956

RACINE v. BARRY et al.

Kellock J.

etc., peuvent avoir à rendre compte de leur gestion. S'ils ne remplissent pas à cet égard leur obligation, ils peuvent être poursuivis en reddition de compte; . . .

Similarly, Garsonnet, 3rd ed. 1913, vol. 3, s. IV, n. 815, p. 607:

Quiconque est chargé ou se charge volontairement d'administrer tout ou partie du bien d'autrui doit rendre un compte détaillé de sa recette et de sa dépense. Tels sont . . . *dépositaires* . . . *possesseurs* de bonne ou de mauvaise foi . . .

Further, Fuzier-Herman, V° Compte, p. 972, para. 14:

Sont donc comptables: toute personne qui accepte un mandat contractuel (C. civ., art. 1793); toute personne qui prend spontanément une gestion d'affaires (C. civ., art. 1372); les envoyés en possession provisoire des biens de l'absent (C. civ., art. 125); le père, administrateur légal des biens de ses enfants mineurs (C. civ., art. 389; V. supra, v° Administration légale, n. 137 et s.); le tuteur (V. infra, v° Compte de tutelle); le curateur d'un mineur émancipé (C. civ., art. 482); le curateur d'une succession vacante (C. civ., art. 813 et s.); l'administrateur provisoire donné à celui qu'on veut faire interdire (C. civ., art. 497); l'exécuteur testamentaire (C. civ., art. 1031); *le dépositaire* (C. civ., art. 1936); le séquestre (C. civ., art. 1956, 1963); le créancier gagiste (C. civ., art. 2079, 2081); le créancier antichrésiste (C. civ., art. 2085-2086); le curateur au délaissement par hypothèque d'un immeuble (C. civ., art. 2174 et s.). Les envoyés en possession définitive des biens d'un absent n'ont pas à rendre compte, puisqu'ils restituent les biens dans l'état où ils se trouvent (C. civ., art. 132).— V. supra, v° Absence.

To the same effect Rolland de Villargues "Répertoire de la Jurisprudence du Notariat", vol. III, p. 17, div. 1, paras. 1 and 2:

En général, ceux qui ont administré les biens d'autrui, à quelque titre que ce soit, avec ou sans mandat, sont obligés de rendre compte de leur administration.

Ainsi, . . . le simple possesseur (549 et 2060, 2°).

Again, Pigeau, "Procédure Civile", 2nd ed. 1811, vol. II, p. 365, under the heading "Compte en Général":

On doit compte toutes les fois qu'on a administré le bien d'autrui, lors même qu'on est propriétaire d'une portion de ce bien . . .
6° Lorsqu'on a géré comme mandataire, *ou même sans mandat.*

As already pointed out, the position of a borrower cannot be distinguished from that of a depositary and in so far as a possessor has no rights to fruits, he is in a similar position.

In Quebec the law is stated in the same sense by Sir F.-X. Lemieux C.J., in *Boivin v. Rock Shoe Manufacturing Co.* (1):

> Sont donc comptables, toute personne qui accepte un mandat contractuel, toute personne qui prend spontanément une gestion d'affaires, le tuteur, le curateur, le dépositaire, le séquestre, le curateur au délaissement, à l'hypothèque de l'immeuble, etc. C'est là le langage des auteurs.

The learned Chief Justice founds himself on a number of authors, including Fuzier-Herman, v° Compte, Nos. 11, 13 and 14. The last mentioned paragraph I have reproduced above.

In *Bouchard v. Perron* (2), Prévost J., without any discussion of doctrine or jurisprudence, purported to found a contrary opinion upon, *inter alia,* the *Boivin* case, overlooking that that case was decided by Chief Justice Lemieux on a view of the law to the direct contrary. *Savard v. Charette* (3), also referred to by Prévost J., contains no discussion of the law and does not advance matters. The other two cases referred to by Prévost J., namely *Donoghue v. Lefebvre* (4) and *Dallaire v. Doyon* (5), are, neither of them, authority for his view.

The point under discussion is expressly covered in the case of a dépôt by Pothier, vol. 5, p. 141, para. 47, as follows:

> 47. Les fruits de la chose donnée en dépôt, que le dépositaire a perçus, sont aussi un des objets de la restitution du dépôt. Soit qu'il ait encore par devers lui la chose qui lui a été donnée en dépôt, soit qu'il ne l'ait plus, il doit tenir compte des fruits qu'il en a perçus, à celui qui la lui a donnée en dépôt; car un dépositaire ne doit profiter en rien du dépôt.
>
> Par exemple, lorsqu'on a donné à quelqu'un des vaches en dépôt, le dépositaire doit tenir compte à celui qui les lui a données en dépôt, du lait et des veaux, sous la déduction des frais qu'il a faits pour la nourriture et la garde
>
> Le dépositaire, tant qu'il n'a pas été en demeure de rendre la chose qui lui a été donnée en dépôt, n'est tenu de rendre que les fruits qu'il a perçus: il n'est pas tenu de ceux qu'on eût pu percevoir, et qu'il n'a pas perçus: mais depuis qu'il a été mis en demeure, il est tenu de tenir compte de tous ceux qu'on a pu percevoir, quoiqu'il ne les ait pas perçus; c'est un effet de la demeure, suivant les principes établis en notre *Traité des Obligations,* n° 143.

(1) (1915), 49 Que. S.C. 24 at 26.
(2) (1934), 74 Que. S.C. 141 at 148.
(3) (1899), 5 R.L. N.S. 62.
(4) (1919), 29 Que. K.B. 1.
(5) (1930), 49 Que. K.B. 199.

1956

RACINE
v.
BARRY
et al.

Kellock J.

Glasson in his "Procédure Civile", vol. 1, p. 542, para. 503, points out that:

> Il y a un certain nombre de cas dans lesquels la loi ordonne une restitution de fruits, et cette restitution peut être accessoire à une demande principale ou faire, elle-même, l'objet exclusif du procès; dans les deux cas, le système de la loi est le même.

And further:

> Tout jugement qui condamne à une restitution de fruits nécessite trois opérations: 1° il faut d'abord fixer la quantité de fruits recueillis et qui doivent être restitués. Le jugement qui ordonne la restitution n'en opère pas en principe la liquidation; il ordonne de s'engager pour cette liquidation dans la procédure de reddition de compte (art. 526 C. pr.); mais cette procédure n'est pas prescrite à peine de nullité, et les juges pourraient, sans recourir à la procédure de reddition de compte, opérer cette liquidation par le jugement, s'ils en trouvaient les éléments dans les pièces du procès (Req., 23 février 1859, D.P. 59. 1. 386; req., 12 décembre 1882, D.P. 83. 1. 188); 2° une fois connue la quantité des fruits à rendre. il faut déterminer la valeur de ces fruits; 3° ensuite on en déduit la dépense; c'est ce qui fait l'objet de la seconde et de la troisième opération (art. 129 C. pr.).

Such being the position with regard to fruits and accessories coming into the hands of a borrower or depositary, is the situation any different where the fruits or accessories come into existence as the result of an illicit act on the part of the borrower or depositary? As one might expect, the law is that the obligation is to render all fruits howsoever obtained.

Pothier, in vol. 5, p. 31, para. 73, in discussing the obligation of the borrower, says:

> Pareillement, si celui à qui j'avais prêté une chose afin qu'il s'en servît pour son usage, l'a louée à un autre et en a retiré un loyer, *ce loyer* qu'il en a retiré est un fruit civil de ma chose, qui doit m'appartenir et qu'il doit me rendre . . .

To the same effect Trudel in his "Traité de Droit Civil du Québec" by Hervé Roch, vol. 13, p. 171:

> Dans le cas, toutefois, où l'emprunteur tire un profit de l'usage illicite de la chose, ce profit appartient au prêteur.

As put by Story on Bailments, 9th ed. 1878, p. 240, para. 269:

> If, by any improper use of the thing loaned, the borrower has made a profit, that profit also belongs to the lender.

The position is the same in the case of a wrongful sale.

Pothier, in treating of dépôt, vol. 5, p. 140, para. 43, says:

> Néanmoins, si c'était par son dol qu'il ne l'eût plus, ou par quelque faute, de l'espèce de celles dont il est tenu; en ce cas, il ne serait pas

déchargé de son obligation de rendre la chose. Faute d'y pouvoir satisfaire, il serait tenu d'en rendre le prix; et même, selon les circonstances, il pourrait être, *en outre*, tenu des dommages et intérêts de celui qui la lui a donnée en dépôt.

Le dépositaire qui a vendu de mauvaise foi la chose qui lui a été donnée en dépôt, n'est pas déchargé de l'obligation de la rendre, quoiqu'il ait racheté la chose pour la garder comme auparavant, et qu'elle soit depuis périe chez lui sans sa faute.

Pothier distinguishes the case of the person who has innocently sold the thing deposited. At the foot of the same page he says:

Un autre exemple, c'est lorsque l'héritier du dépositaire, ignorant le dépôt, a vendu la chose donnée en dépôt, qu'il croyait être de la succession du défunt: cet héritier qui l'a vendue de bonne foi, n'est pas obligé, à la vérité, de rendre la chose à celui qui l'a donnée en dépôt au défunt; mais il est obligé de lui rendre la somme qu'il a reçue pour le prix de cette chose; à moins que celui qui avait donné la chose en dépôt, n'aimât mieux la revendiquer sur l'acheteur par devers qui elle est; auquel cas ce serait à cet acheteur que l'argent devrait être rendu.

It could not be suggested that the right of action of the depositor is on any lower footing as against the depositary who fraudulently sells the subject-matter of the deposit. The liability of the innocent vendor for the price of the thing sold received by him is embodied in art. 1806 of the *Civil Code*. With respect to all of the articles dealing with the obligations of the depositary, namely, arts. 1802 to 1811, the Codifiers, in their sixth report, say, at p. 20:

The contract which forms the subject of this title, like that of the preceding one, (loan) is founded upon principles derived from the Roman law. The ancient law of France as expressed by Pothier in his treatise upon *dépôt* and *séquestre*, following that of Rome with little or no deviation, affords a clear and complete system of rules; these have been, for the most part, adopted in the modern code, . . .

As the property loaned in the case at bar was company shares, the use of which was granted to the appellant for the limited purpose of pledging with the appellant's broker but with the duty of preventing any sale, the appellant was charged with the receipt and rendering to the lender of all "fruits" and "accessories", including dividends and shares to which the shareholder might become entitled by way of bonus or conversion of the existing shares, in a word, any profit whatever which might accrue to the shareholder as such during the currency of the loan. In support of their action in the case at bar, the respondents have pro-

1956

RACINE v. BARRY et al.

Kellock J.

duced evidence under the hand of the appellant that there was a substitution or conversion of the Steel Company shares.

In view of the clear obligation to account described by Pothier, as above set out, it is not necessary to say more but it may be asked how a depositor or lender may ascertain what have been the fruits and accessories while the subject-matter of the loan or deposit was in the custody of the borrower or depositary unless he can call for an account. Without such a remedy he could never put himself in a position to claim or even to give evidence that there had been fruits or accessories, whether properly or illicitly acquired, where the only knowledge of their having come into existence resides with the defendant. As stated by Rinfret J., as he then was, in *Johnston v. Channell* (1):

> 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.

It is, moreover, provided by art. 406 of the *Civil Code* that

> Ownership is the right of enjoying and of disposing of things in the most absolute manner. . . .

and by art. 408 of the *Civil Code*:

> Ownership in a thing whether moveable or immoveable gives the right to all it produces, and to all that is joined to it as an accessory whether naturally or artificially. This right is called the right of accession.

It cannot be said that the obligation to return the thing loaned rested, for example, upon a borrower by art. 1763 of the *Code*, places the lender in any inferior position to that of an owner whose property is in the possession of a mere possessor similarly obliged by art. 411 to return to the owner the thing and, subject to the terms of that article and art. 412, its fruits.

In *Johnston v. Channell, supra,* the action was brought by the respondent, a married woman, against a firm of brokers, who had received certain moneys and securities

(1) [1937] S.C.R. 275 at 281, [1937] 3 D.L.R. 214.

from her as security for a brokerage account she was operating with them without her husband's consent. The respondent had asked for an account of all moneys and securities delivered to the appellants and, in default, that they be condemned to pay the respondent the sum of $162,000. It was held that the appellants were under obligation to render an accounting, the double purpose of which was as already stated in the passage above quoted. Rinfret J., as he then was, had said earlier in his judgment (1):

> 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.

In the case at bar, the securities which were the subject-matter of the loan were the property of the respondent. They ceased by reason of the wrongful sale on the part of the appellant to be in her possession and thus it became impossible for her to return them. The respondent, therefore, became "entitled to get the equivalent from the appellant" and the purpose of the accounting demanded in this action is to establish that equivalent.

Leaving out of consideration the matter of dividends, which the respondent may be taken to have received in full, the appellant is accordingly liable to account for original shares, for all shares into which they were converted or for which other shares were substituted and for the proceeds. She has not only refused to give an accounting but has refrained from furnishing any information to the respondent either before action or in these proceedings as to the amount which she received on the sale. It is well settled in the jurisprudence of the Province that in such case the Court may condemn the defendant to pay a liquidated sum. The authorities are reviewed and followed in *Whitney v. Kerr* (2); *Bird v. Canadian Car & Foundry Co. Ltd.* (3).

(1) [1937] S.C.R. 275 at 281. (2) (1910), 20 Que. K.B. 289.
(3) (1922), 33 Que. K.B. 166.

1956

RACINE v. BARRY et al.

Kellock J.

With respect to the question of trust, the learned trial judge considered that there was no conveyance by the will of any property to the "so-called trustees" as required by art. 981(*a*) of the *Civil Code*, and that accordingly the appellant was never a trustee of the shares in question.

Assuming, but without deciding, such to be the proper construction of the will, that does not end the matter. If, as the learned trial judge determined, the shares and other assets disposed of by the will became "the absolute property" of the respondent Mina J. Barry under the will, those shares were in fact conveyed by her to the three trustees. The simple fact is that the shares which, at the date of death stood in the name of the deceased Christina Ross and which devolved upon the respondent Mina J. Barry as her property, with substitution in favour of the latter's daughter, were transferred to the three trustees by the respondent Barry, and the trust thus established, of which the beneficiaries were the respondents or one of them, was accepted by the trustees. There is no question therefore, in my opinion, that from this point of view also, the appellant must account.

I would therefore dismiss the appeal with costs.

Appeal allowed with costs, Rand and Kellock JJ. dissenting.

Solicitors for the defendant, appellant: Brais, Campbell, Mercier & Leduc, Montreal.

Solicitors for the plaintiffs, respondents: Hackett, Mulvena, Laverty, Drummond, Willis & Hackett, Montreal.

LOUIS BEAVER (*Appellant*) .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1957

*Feb. 18
Feb. 19

MOTION FOR LEAVE TO APPEAL

Criminal law—Leave to appeal to the Supreme Court of Canada—Extension of time—"Special reasons"—The Criminal Code, 1953-54 (Can.), c. 51, s. 597(1)(b), as re-enacted by 1956, c. 48, s. 19.

The discretionary power given to the Supreme Court, or a judge of that Court, to extend the time within which leave to appeal may be obtained under s. 597(1)(*b*) of the *Criminal Code,* as re-enacted in 1956, is conditional upon the existence of "special reasons". A mere agreement between counsel, made for their own convenience, as to the date on which an application for leave will be made does not come within the meaning of these words.

APPLICATION for leave to appeal from two judgments of the Court of Appeal for Ontario (1), dismissing appeals from convictions.

C. L. Dubin, Q.C., for the appellant, applicant.

W. M. Martin, Q.C., for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—The appellant applied for leave to appeal from two judgments of the Court of Appeal for Ontario. The first, pronounced on October 17, 1956 (1), affirmed his conviction on an indictment charging him with possession and sale of a drug, contrary to the provisions of the *Opium and Narcotic Drug Act.* The second, delivered on the 24th of the same month, affirmed his conviction as being an habitual criminal. The grounds, upon which leave to appeal is applied for, admittedly raise important questions of law involving conflicting judgments of other Courts of Appeal.

The application, however, is made under s. 597(1)(*b*) of the *Criminal Code,* 1953-54 (Can.), c. 51, as re-enacted in 1956 by 4-5 Eliz. II, c. 48, s. 19. The section provides for a right of appeal on any question of law, if leave is granted by the Supreme Court of Canada *within 21 days* after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, *for special reasons,* allow. Counsel for the

*PRESENT: Fauteux, Abbott and Nolan JJ.

(1) [1956] O.W.N. 798, 116 C.C.C. 231, 25 C.R. 53.

1957

BEAVER v. THE QUEEN

Fauteux J.

applicant was therefore invited to indicate what special reasons, if any, could afford a justification for this Court to extend, for a period of nearly three months, the period of time within which the application for leave was made in this case. It was intimated to us that immediately subsequent to the pronouncement of these judgments, counsel for the appellant informed counsel for the respondent of an intention to appeal and suggested that the application for leave should be made at a time convenient to both. To this suggestion, counsel for the Crown assented in view of the importance of the questions and of the sentence of preventive detention.

It must be noted that the exercise of the discretionary power given to this Court or to a member thereof to extend the period of time within which an application for leave may be made under s. 597(1)(*b*), is conditional upon the existence of special reasons. Mere agreements which, for their own convenience, counsel may care to make, do not come within the meaning of special reasons and are foreign to the diligence required in the administration of justice and which the expression "special reasons" is particularly meant to foster. It may be, as it was intimated by both counsel, that there was a misapprehension as to the practice before this Court. However, with the concurrence of the Chief Justice, it is now emphasized that this should no longer be the case in the future. Under all the circumstances, we feel that to do justice to this case, leave should not be refused on this point which was raised by the Court.

Leave to appeal from the judgment of the Court of Appeal for Ontario affirming, on October 17, 1956, the conviction of the appellant, is granted on the grounds numbered 1, 2, 3 and 4 of the application.

With respect to the judgment of October 24, 1956, affirming the conviction of being an habitual criminal, leave to appeal is granted conditionally upon the appeal from the judgment of October 17, 1956, being successful.

Leave to appeal granted.

Solicitors for the appellant, applicant: Kimber & Dubin, Toronto.

THE CORPORATION OF THE DISTRICT OF SURREY, THE CORPORATION OF THE TOWNSHIP OF CHILLIWHACK, THE CORPORATION OF THE CITY OF CHILLIWACK ..... APPELLANTS;

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED ..... RESPONDENT.

1956
*Dec. 10
1957
Jan. 22

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—Jurisdiction of Public Utilities Commission to issue certificate of public convenience and necessity without consent of municipality affected—The Public Utilities Act, R.S.B.C. 1948, c. 277, ss. 12, 14—The Gas Utilities Act, 1954 (B.C.), c. 13, s. 3—The Municipal Act, R.S.B.C., c. 232, as amended.

The Public Utilities Commission of British Columbia has jurisdiction, under the *Public Utilities Act* and the *Gas Utilities Act*, to grant a certificate of public convenience and necessity for the operation of a public utility within the boundaries of a municipality, without the consent of the municipality affected.

Per Rand, Locke and Nolan JJ.: The words "if required" at the conclusion of the first sentence of s. 14 of the *Public Utilities Act*, must be construed as meaning "if required by law", and there is no provision requiring the municipality's consent in such circumstances.

APPEAL by the three municipalities from a judgment of the Court of Appeal for British Columbia (1), affirming the decision of the Public Utilities Commission of British Columbia to grant the respondent company a certificate of convenience and necessity. Appeal dismissed.

T. G. Norris, Q.C., for the municipalities, appellants.

Hon. J. W. deB. Farris, Q.C., A. Bruce Robertson, Q.C., and *R. Dodd*, for the respondent.

THE CHIEF JUSTICE:—This is an appeal by leave of the Court of Appeal for British Columbia from its decision (1) dismissing an appeal from a certificate of public convenience and necessity, dated December 13, 1955, granted by the Public Utilities Commission of that Province to the respondent, British Columbia Electric Company Limited.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.

(1) 19 W.W.R. 49, 4 D.L.R. (2d) 29.

1957

DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Kerwin C.J.

Although the application by the respondent to the Commission states that it was made under s. 12 of the *Public Utilities Act*, which is R.S.B.C. 1948, c. 277, it is quite apparent from what will be stated shortly and from a perusal of the two clauses of that section that that part of the application with which we are concerned is really under s. 12(*b*).

The respondent, among other things, carries on the business of manufacturing gas and has entered into a contract for the purchase of natural gas, with a view to its distribution. The territory in respect of which the respondent applied was divided into the Greater Vancouver area and the Fraser Valley area. A certificate of public convenience and necessity was granted as to the former on July 29, 1955, but decision was reserved with respect to the Fraser Valley area. Ultimately a certificate was also granted as to that area, subject to certain conditions, and the real dispute is as to the power of the Commission to grant this certificate without the consent of the appellant municipalities.

The only provisions of the *Public Utilities Act* requiring consideration are s. 12 and the first sentence in s. 14, which read as follows:

> 12. Except as hereinafter provided:—
>
> (*a*) No privilege, concession, or franchise hereafter granted to any public utility by any municipality or other public authority shall be valid unless approved by the Commission. The Commission shall not give its approval unless, after a hearing, it determines that the privilege, concession, or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest. The Commission, in giving its approval, shall grant a certificate of public convenience and necessity, and may impose such conditions as to the duration and termination of the privilege, concession, or franchise, or as to construction, equipment, maintenance, rates, or service, as the public convenience and interest reasonably require:
>
> (*b*) No public utility shall hereafter begin the construction or operation of any public utility plant or system, or of any extension thereof, without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction or operation (in this Act referred to as a "certificate of public convenience and necessity").
>
> 14. Every applicant for a certificate of public convenience and necessity under either of the clauses of section 12 shall, in case the applicant is a corporate body, file with the Commission a certified copy of its memorandum and articles of association, charter, or other document of incorporation, and in all cases shall file with the Commission such evidence

as shall be required by the Commission to show that the applicant has received the consent, franchise, licence, permit, vote, or other authority of the proper municipality or other public authority, if required. . . .

It is clear that the relevant part of respondent's application was not made under clause (*a*) of s. 12, because it had no "privilege, concession, or franchise" from the appellant municipalities. That part of the application being under s. 12(*b*), and the opening words of s. 14 referring to an application for a certificate under either of the clauses of s. 12, it is too clear for argument that the latter part of s. 14 refers only to a "consent, franchise, licence, permit, vote, or other authority" when one of them is required on an application under s. 12(*a*). The matter does not lend itself to extended discussion and it is unnecessary to deal with the judgment of the Court of Appeal for British Columbia in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1). Notwithstanding the various provisions of the *Municipal Act* to which counsel for the appellants drew our attention, the matter is left to the Commission to take into account the interests of all parties concerned, public and private, and this is corroborated by the provisions of the *Gas Utilities Act,* 1954 (B.C.), c. 13.

The appeal should be dismissed with costs.

The judgment of Rand, Locke and Nolan JJ. was delivered by

LOCKE J.:—The respondent company is a public utility within the meaning of that term, as defined in s. 2 of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, and by a letter dated May 15, 1955, applied to the Public Utilities Commission, constituted under that statute, for a certificate of public convenience and necessity for a project for the supply of natural gas for a portion of the lower mainland area of British Columbia, which included the District of Surrey and the Township of Chilliwhack and the City of Chilliwack.

The application to the Commission was opposed by the present appellants. Lengthy public hearings were held, at which a similar application by a competing gas distributing company was also considered.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

1957

DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Locke J.

The respondent has for many years sold manufactured gas through various subsidiary companies in a number of municipalities in the greater Vancouver area. The project proposed was for the supply in additional areas in the lower mainland of the Province of natural gas brought by a pipeline company from the Peace River areas of Alberta and British Columbia.

By s. 2 of the *Gas Utilities Act*, 1954 (B.C.), c. 13, a "gas utility" is defined as a corporation which owns or operates in the Province facilities for, *inter alia*, the production, transmission or delivery of gas, a word defined to include natural gas, and the respondent company falls within this definition. By s. 3 of that Act, every such company to which a certificate of public convenience and necessity is thereafter granted under the *Public Utilities Act* shall in the municipality or area mentioned in such certificate be empowered to carry on, subject to the provisions of that Act, its business as a gas utility, including power to transmit, distribute and sell gas and to place its pipes and other equipment and appliances under any public street or lane in a municipality upon such conditions as the gas utility and the municipality may agree upon. If the parties fail to agree upon these terms, the Public Utilities Commission is empowered by s. 40 of the *Public Utilities Act* to settle them.

Section 12 of the *Public Utilities Act* provides for applications to the Commission for a certificate of public convenience and necessity in cases where a franchise has been granted to a public utility by any municipality or other public authority after the coming into force of the Act, and also in cases where no such franchise has been granted, these being dealt with in clauses (*a*) and (*b*) respectively. The respondent had not applied to any of the appellant municipalities for any concession or franchise to supply gas within their boundaries and, while the written application to the Commission merely states that it was being made under the provisions of s. 12 of the Act, it is clear that the application was made under clause (*b*) of that section.

According to s. 14 of the statute, upon an application for such a certificate under either of the clauses of s. 12, the applicant, if a corporate body, shall file a certified copy of its memorandum and articles of association or other docu-

ment of incorporation, and such evidence as shall be required by the Commission to show that the applicant has received the consent or permission of the municipality or other public authority *if required.*

It was the contention of the appellants that their prior consent or permission was a condition precedent to the right of the Commission to grant the certificate applied for and they contend that this construction of the statute is supported by the language of the section. For the company, it is said that the words "if required" should properly be construed as meaning "if required by law" and that, by virtue of the provisions of the *Public Utilities Act* and the *Gas Utilities Act,* no such consent is required.

The contention that the utility cannot carry on its activities in a municipality without its consent is based upon certain provisions of the *Municipal Act,* R.S.B.C. 1948, c. 232, which, standing alone, would indicate that such consent was required. By s. 58 of that statute a municipality is authorized to pass by-laws regulating the operations of a wide variety of businesses and other activities and prohibiting the carrying on of certain of them, other than by leave and licence of the municipality. Thus, by cl. 55 of that section, by-laws may be passed

> For regulating the construction, installation, repair and maintenance of pipes, valves, fittings, appliances, equipment, and works for the supply and use of gas:

and by cl. 109 for licensing and regulating any gas company and authorizing the use of the public highways by such company. Section 328 of the Act, by cl. 29, fixes the payment to be made by gas companies semi-annually for the licences held by them, failure to pay which renders the licence liable to cancellation. The provisions for the licensing and regulation of gas companies by municipalities in British Columbia have been for many years part of the municipal law of the Province: see *Municipal Clauses Act,* R.S.B.C. 1897, c. 144, s. 50(36); *Municipal Act,* R.S.B.C. 1911, c. 170, s. 53(92); *Municipal Act,* R.S.B.C. 1936, c. 199, s. 59(99).

The *Public Utilities Act* was first enacted in 1938 and was designed to place the operations of persons engaged in the production, generation, transmission or sale of gas and electricity and a wide range of other undertakings designed

1957

DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Locke J.

to render service to the public, under the control of a commission constituted by the Act. The statute imposes upon every public utility the obligation, *inter alia,* to supply to all persons who apply therefor and are reasonably entitled thereto suitable service without discrimination or delay, to maintain its property and equipment in proper condition to enable it to furnish adequate, safe and reasonable service, to obey all orders of the Commission made pursuant to the Act in respect of its business or service and to refrain from demanding unjust or discriminatory rates for its service. By Part V of the Act the Commission is given general supervision of all public utilities falling within the definition in the Act and is empowered, *inter alia,* to make such regulations or orders regarding equipment, appliances, safety devices and extensions of works as are necessary for the safety, convenience or service of the public. Further wide powers of supervision and control are given over the rates which may be imposed, the manner in which money can be raised by the sale to the public of shares or bonds and over the mortgage, sale or licensing of the utilities' property. No utility to which a certificate of public convenience and necessity has been issued and which has commenced operations may cease operating without the Commission's consent.

The whole tenor of the Act shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and as to the manner in which they should operate, was a duty vested in the Commission. It is quite impossible, in my opinion, to hold that these powers and those which might be asserted by a municipality to regulate the operations of such companies under s. 58, cls. 55 and 109, were intended to co-exist.

It is unnecessary for the determination of this matter to decide whether, apart from the provisions of the *Gas Utilities Act,* the appellant municipalities might insist that a licence under the licensing provisions of the *Municipal Act* was a condition precedent to the granting of a certificate under s. 12(*b*) of the *Public Utilities Act.* The language of s. 3 of the *Gas Utilities Act* is clear and free from ambiguity.

The words "if required" at the conclusion of the first sentence of s. 14 must be construed, in my opinion, as meaning "if required by law". The municipality, of necessity, being a statutory body could only require its licence or consent if authorized by statute to do so and, from the date the *Gas Utilities Act* became the law, no such licence or consent was necessary. The effect of s. 3 of that statute was, in my opinion, to impliedly repeal the licensing provisions of the *Municipal Act* relating to such utilities.

In discharging its important duties under the *Public Utilities Act* the Commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, *inter alia,* to the right of municipalities of insuring a supply of gas by municipal enterprise of the nature referred to in the reasons delivered by the Chairman of the Public Utilities Commission. This right the Commission was careful to preserve.

Reliance was placed by the appellants on certain passages from the judgments delivered by the Court of Appeal in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1), but I think what was there said does not affect the present matter. The provisions of the *Gas Utilities Act* of 1954 are decisive, in my opinion.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—At the conclusion of the argument I had doubts as to whether the provisions of the *Gas Utilities Act* and the *Public Utilities Act* manifest a clear intention on the part of the Legislature to confer power on the Public Utilities Commission to authorize the respondent to carry on operations in the appellant municipalities without their consents, which consents would otherwise have been necessary under sections of the *Municipal Act* which have not been expressly amended or repealed.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

1957

DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Cartwright J.

I cannot say that these doubts have been entirely dispelled but as the other members of this Court and the unanimous Court of Appeal are satisfied that the relevant statutory provisions should be so construed, I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the Corporation of the District of Surrey, appellant: Norris & Cumming, Vancouver.

Solicitor for the Corporation of the Township of Chilliwhack and the Corporation of the City of Chilliwack, appellants: F. Wilson, Chilliwack.

Solicitor for the respondent: A. Bruce Robertson, Vancouver.

1956

*Nov. 13

1957

Jan. 22

ISRAEL GHIMPELMAN AND STUART IDELSON (*Defendants*) ..... } APPELLANTS;

AND

DAME TAUBE BERCOVICI, BARUCH HALPERN AND ISRAEL HALPERN (*Plaintiffs*) ..... } RESPONDENTS.

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

Companies—Officers—Appointed by directors—Term of office not specified—Same directors re-elected—Failure to appoint new officers due to deadlock among directors—Claim of holding over—Quo warranto against president and secretary—No longer choice of majority—Mandataries—Termination of mandate on election of new board—The Quebec Companies Act, R.S.Q. 1941, c. 276, ss. 82, 86—Civil Code, arts. 1701, 1711—Code of Civil Procedure, art. 987.

The issued shares of a company, incorporated under the *Quebec Companies Act*, were held by two groups, one of which was headed by the defendant G, and the other by H, one of the plaintiffs. Each group was represented on the board of directors by three directors. In 1952, the board appointed G and I to the offices of president and secretary, respectively, without specifying their terms of office. In 1953 the same directors were re-elected, but, by reason of a deadlock, failed to appoint new officers, whereupon G and I claimed that so long as no new officers were appointed, they continued to hold their offices by virtue of the doctrine of "holding over". The plaintiffs

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

successfully petitioned the Superior Court for a writ of *quo warranto* on the ground that G and I were illegally occupying and exercising their offices. This judgment was affirmed by the Court of Appeal.

Held (Rand J. dissenting): The appeal should be dismissed; G and I had ceased to be the choice of the majority of the directors and *quo warranto* was the appropriate procedure to remove them from their offices.

Per Kerwin C.J. and Taschereau and Fauteux JJ.: By virtue of the *Quebec Companies Act,* the directors, in the absence of other provisions in the letters patent or by-laws, are elected for a year, and, once elected, they become immediately and exclusively vested with the duty and right to elect among themselves a president. The period for which such an officer is thus elected cannot extend beyond the expiration of the maximum lawful term of the directors, for then the right to elect new officers will become vested in the directors freshly elected or re-elected. Thus the tenure of the office of president will expire contemporaneously with that of the directors, at which time it may be extended or renewed, if this be the manifest will of the new board of directors. In the present case, not only was the will of the majority not indicated either expressly or tacitly, but the deadlock left no possible doubt that G and I had ceased to be the choice of the majority.

The "holding over" doctrine had no application and, in any event, would appear to be inconsistent with the spirit of the Act, particularly as it would sanction the perpetuation in office of officers who had failed to obtain the confidence of the majority. Furthermore, a lawful title to the offices could not be derived from the provisions of the Act contemplating the necessity of such offices being held continuously by someone, nor could the Courts, on the basis of practical consideration, sanction the assertion of an unfounded legal position.

Per Abbott J.: The board of directors and the officers of a company incorporated under the *Quebec Companies Act* are respectively the agents or mandataries of the company, and as such their mandate expires when a new board of directors is elected. But it is not accurate to say that the officers are substituted mandataries within the meaning of art. 1711 of the *Civil Code*. Where newly-elected directors fail to meet immediately and appoint new officers, there is no doubt, in most cases, of the implied authority from the new board to the existing officers, to continue to act as such, pending the first meeting of the directors. When, however, as in the present case, the directors did meet, and by reason of a deadlock failed to appoint officers, it became obvious that the previous incumbents no longer possessed the confidence of the newly-elected board. In that case, equal shareholding does not justify one group taking advantage of the *status quo* in order to maintain its representatives in office indefinitely

Per Rand J., *dissenting*: The statute implies a continuity in the offices of president, vice-president and secretary, subject only to a change of personnel elected or appointed to succeed existing incumbents. The practical necessities of maintaining the activities of the company require that continuity, and from the beginning of limited liability companies in analogy to public and semi-public offices that principle has been recognized. The holding over rule is contemplated

1957

GHIMPELMAN *et al.* v. BERCOVICI *et al.*

by the companies legislation in its latest form, is based on the convenience of business and is supported also by the formal structure of the company, of which the board and the offices are part.

Assuming that the offices of president and secretary are held at the will of the directors, they obviously require a continuance in office of an incumbent until his incumbency is terminated by action of the board. There was no such action here. The statute does not require an annual election of officers; their tenure is a question of fact arising from their appointment, which being impliedly from time to time, requires simply that a continuing presidency be provided. Furthermore the president and secretary are independent and direct officers of the company and cannot be taken to be substitutes of the board.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming a judgment maintaining a petition for a writ of *quo warranto* against two officers of a company. Appeal dismissed.

P. F. Vineberg, for the defendants, appellants.

A. J. Campbell, Q.C., for the plaintiffs, respondents.

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

FAUTEUX J.:—This is an appeal, by leave, from a unanimous decision of the Court of Queen's Bench for the Province of Quebec (1) affirming a judgment of the Superior Court declaring that the appellants, Ghimpelman and Idelson, illegally occupy and exercise the offices of president and secretary respectively of Rockhill Apartments Limited and dispossessing them of the same.

The dispute bears on the tenure of such offices and there is no controversy as to the facts which may be outlined as follows:

Rockhill Apartments Limited is a company incorporated in 1949 by letters patent issued under the *Quebec Companies Act,* R.S.Q. 1941, c. 276. The assets of the corporation consist mostly in an apartment house situated in Montreal and its shares are held equally by two groups, *i.e.,* the Ghimpelman and Halpern families, which are related and here respectively represented by appellants and respondents.

Up to July 1949, the board managing the affairs of the company was composed of five directors, then increased to six, of whom four constituted a quorum. There is no

(1) [1956] Que. Q.B. 130.

casting vote in the event of a tie, a contingency which materialized when the six directors, elected at the annual general meeting held on June 23, 1953, then and at a subsequent meeting called and held for that purpose on the 30th of the same month, divided equally on any attempt aiming at the appointment of the president and secretary of the company. These attempts were exclusively those of the Halpern group; the Ghimpelman faction, which up to that year had held these offices, persistently refused to put any motion in this respect, on the then alleged ground that it would meet with a similar fate, a fact which would have supplied further evidence that they no longer were the choice of the majority. Since that time and because of a strict adherence to this division, the deadlock resulting therefrom has been perpetuated.

It is common ground that, under the provisions governing this company, (i) "the election of directors shall take place yearly, and all the directors then in office shall retire, but, if otherwise qualified, they shall be eligible for re-election": s. 86 (1); and (ii) "the directors shall elect among themselves a president and if they see fit a chairman of meetings and one or more vice-presidents of the company, and may also appoint all other officers thereof": s. 86 (4).

The provisions of s. 86 (1) were complied with, but those of s. 86 (4) were not and, as intimated at the hearing, by counsel for all parties, they will not be if the legal position asserted by the appellants receives the sanction of the Court.

I do not find it necessary to deal with the jural nature of the function of directors nor of their relationship with the corporation, its shareholders or officers, for the question here arising is not related to directors but is whether the appellants, in view of all the circumstances of this case and under the law applicable thereto, are entitled to retain their respective offices, as they claim.

With respect to the office of president. In providing that, in the absence of other provisions in such behalf in the letters patent or by-laws,—which is the case here—the directors are elected for a year and must elect among themselves a president, the Quebec Legislature made clear

1957

GHIMPELMAN *et al.* v. BERCOVICI *et al.*

Fauteux J.

that once the directors are elected, at the annual general meeting of the shareholders, they become immediately and exclusively vested with the duty and right to elect among themselves the president. And it is also manifest that the maximum period of time for which the president is thus elected cannot extend beyond the expiration of the maximum lawful term of the directors, for then the right to elect the president will become vested in the directors freshly elected or re-elected by the shareholders then qualified to do so. Evidently the law does not contemplate that the former and the latter group of directors be, at any one time, both in office and possessed with a duty and right of a nature designed for one group. The circumstance that all the former directors are re-elected is foreign to and cannot affect the interpretation of these sections which must operate whether such circumstance is or is not present. There cannot be two interpretations. Thus the maximum term of the tenure of the office of president expires contemporaneously with that of the directors, at which time it may be extended or renewed, if this be the manifested will of the majority of the directors freshly elected or re-elected. In the present instance this will of the majority was neither expressly nor tacitly indicated; on the contrary the cleavage appearing immediately after the election of the directors and persisting ever since leaves no possible doubt that Ghimpelman has ceased to be the choice of the majority.

The "holding-over" doctrine, allowing the continuance in possession of an office and of the exercise of its functions after the end of its lawful term, was invoked. To the extent that this doctrine has a recognition under the law it is dealt with exhaustively in s. 82 reading: . . .

> If, at any time, an election of directors is not made or does not take effect at the proper time, the company shall not be held to be thereby dissolved, but such election may take place at any subsequent general meeting of the company called for that purpose, and the retiring directors shall continue in office until their successors are elected.

The circumstance conditioning the operation of the section, *i.e.*, the failure to hold the election of directors at the proper time, is not present here; and furthermore the office covered by the provision is that of director and not that

of president. The letters patent or by-laws of the company make no reference to the doctrine. Finally it would appear to be highly inconsistent with the spirit of the Act and particularly with the paramount majority rule principle attending the appointment of persons entrusted, in any capacity, with the management of the affairs of a company and attending also such management, to sanction the perpetuation in office of officers who have failed to obtain the confidence of the majority.

With respect to the office of the secretary. Ever since the existence of this company, the secretary was elected each year. The terms of the resolution adopted for that purpose always indicated that such officer was elected "for the ensuing year", except for the election held in 1952, when these words do not appear. Whether or not this was the result of an oversight, counsel for the parties could not say. But the failure to mention a term is not indicative of an intention to depart from the practice invariably followed, in previous years, of electing the secretary for the ensuing year only. Indeed it is clear—and significant—from the minutes of the meeting of June 30, 1953 that the attitude of the Ghimpelman group to the election of a secretary was identical to that they had taken to the election of the president. This and what was said at the hearing before us evidences that Idelson, as secretary, like Ghimpelman, as president, was not the choice of the majority.

There remain to be considered two points advanced in support of appellants' position. Their removal from office, it is said, would be inconsistent with these provisions of the Act, which, for the proper operation of the business of the company, contemplate the necessity of such offices being held continuously by someone. In this argument, I find no assistance; for from such necessity a lawful title to these offices, which is here lacking, cannot be derived. The other point is that the relief sought for and obtained by respondents will not solve the deadlock and the situation resulting therefrom. This remains to be seen; and in any event the function of the Court is not to suggest or to bring solutions in like matters but to determine the con-

1957

GHIMPELMAN *et al.* v. BERCOVICI *et al.*

Fauteux J.

troversy raised by the pleadings. It cannot, on the basis of practical considerations, sanction the assertion of an unfounded legal position.

It may finally be noted that no precedent in point has been quoted in the matter and that there are no provisions, either in the *Quebec Companies Act* or in the *Winding up Act*, R.S.Q. 1941, c. 278, dealing with a like situation. This, however, does not imply the absence of any useful remedy.

I would dismiss the appeal with costs.

RAND J. (*dissenting*):—This is a proceeding by way of *quo warranto* to the appellants who claim to be the president and secretary respectively of Rockhill Apartments Limited, a company incorporated under the *Quebec Companies Act*, R.S.Q. 1941, c. 276.

The facts giving rise to the controversy are these. The shares are held equally by two groups represented by the appellants and the respondents. In 1952 the board of directors, being all such six persons, elected Ghimpelman president and Idelson secretary without reference to duration. On June 23, 1953 the annual meeting was held at which all six were re-elected. Later on the same day the board met, a motion to place the affairs of the company under two managers was defeated, and the meeting ended. At a further meeting on June 30 a motion to elect the respondent Baruch Halpern president was on an equal division defeated. No election was proposed for any other office. The meeting apparently adjourned to July 15, but nothing further is shown to have taken place and on October 7, 1953 the action was instituted.

On May 31, 1954 the Superior Court held that the term of office of the president and the secretary elected in 1952 had expired on June 30, 1953, and that both offices thereupon became vacant. On appeal the judgment was affirmed (1).

It does not appear what, if any, are the duties and authority of the president in respect of the management of the affairs of the company or what powers, if any, Ghimpelman and Idelson were in fact exercising. No suggestion is made of a likely change of attitude on the part

(1) [1956] Que. Q.B. 130.

of any member of either group, and the protagonists of the two groups, president Ghimpelman and vice-president Baruch Halpern receive the same remuneration; nor was any made of any unauthorized acts on the part of either officer. The application of art. 987 of the *Code of Civil Procedure* to a private corporation was not challenged; nor was it disputed that the discretion attaching to the issue of a prerogative writ extends to such a case. There is no claim by any respondent to either office nor is the company itself complaining. The judgment seems to assume that in the state in which the company finds itself its interests and those of the shareholders will best be served by the declaration that it is also destitute of officers.

That in such circumstances of frustration the Courts are powerless to afford a remedy is not put forward nor could it be sustained. In view of the substance of the dispute a question might have been raised on the appropriateness of the remedy sought in view of its futility, but it was not, and the issue is that of the technical title to the offices regardless of all other considerations.

The Companies Act has followed the practice of legislation in the United States in creating the office of president; in England it seems scarcely to be known. This is pointed out in Mitchell, Canadian Commercial Corporations, at p. 1114. By s. 86, subs. (4) of the Act, the directors

> shall elect from among themselves a president and, if they see fit, a chairman of meetings and one or more vice-presidents of the company, and may also appoint all other officers thereof.

Prior to 1925 this was in the words of one of the earliest enactments providing joint stock companies with general clauses, c. 31 (Can.), 1860, "The directors shall from *time to time* elect", etc. When the phrase "from time to time" was dropped in the revision of 1925 it was omitted also from s. 164, subs. (3) dealing with by-laws. These omissions were obviously intended as mere improvements in text and the present language is to be construed in the same sense as before.

The offices of president, vice-president and secretary are offices of the company recognized and required by the statute. That they are contemplated to be filled continuously is evidenced by the following considerations: that by

1957

GHIMPELMAN *et al.* v. BERCOVICI *et al.*

Rand J.

s. 49 which provides that every shareholder is entitled to a certificate under the common seal of the company and by a by-law which requires the president to sign all certificates, an act which he may be called upon to do at any time; by s. 68 providing for the entry in the register of transfers to be made by the secretary, transfers that are not valid except as between the parties until that entry is made; that transmissions effected by law will call for similar action by both officers; that the books of the company by s. 101 are in the custody and under the control of the secretary; that s. 94 requires that at least 10 days' notice of meetings shall be given by registered letter to each shareholder, to be done primarily by the secretary, a duty placed upon him specifically by s. 96 in the case of the requisitioning of a meeting; by s. 97, that in the absence of a chairman of meetings—and there was none here—the president presides *de jure;* that a register of mortgages is required by s. 102 and this, together with the other books mentioned in s. 101, are, by s. 103, required to be kept open during the reasonable business hours of every day except Sundays and holidays; by s. 105 declaring that "every company which neglects to keep such book or books as aforesaid" shall be liable to a penalty; that s. 107 provides for an inspection of the affairs of the company by the Provincial Secretary and at that time it is the duty of "all officers and agents of the company to produce" all books and documents called for; that s. 120 provides a general penalty against any officer of a company who commits any act contrary to the provisions of Part I of the Act "or fails or neglects to comply with such provisions".

Here is the implication of a continuity in incumbency subject only to a change of personnel elected or appointed to succeed existing incumbents. The practical necessities of maintaining the activities of the company require that continuity and from the beginning of limited liability companies in analogy to public and semi-public offices that principle has been recognized.

Legislation in Canada dealing with such companies found its origin in England and the United States. The earliest mode was by way of incorporation by special Act. Then in 1844 in England, the *Companies Clauses Act* was

passed which provided general clauses for every corporation thereafter so incorporated. A similar enactment in the province of Canada in 1860 has already been mentioned. The enactment in England of the *Companies Act* of 1862 followed. Since then our legislation, including that of Quebec, has kept the same general pattern. We are, therefore, dealing with corporate conceptions as they are embodied in modern legislation, and no special principle or feature of the civil law is involved.

It is of some interest that the original enactment of the *Railway Act,* 14-15 Victoria (Can.), c. 51, s. 16(6), provided that:

> The Directors shall, at their first or at some other meeting, after the day appointed for the annual general meeting, elect one of their number to be the President of the Company, who shall always, when present, be the Chairman of and preside at all meetings of the Directors, and shall hold his office until he shall cease to be a Director, or until another President shall be elected in his stead; and they may in like manner elect a Vice-President, who shall act as Chairman in the absence of the President.

This appears in almost identical language in R.S.Q. 1941, c. 291, s. 21(3). A review of a number of statutes passed between 1850 and 1860 discloses similar provisions though not containing the whole of the specific reference to the presidency: for example, 13-14 Victoria, c. 28, providing for the incorporation of companies for manufacturing, mining, mechanical or chemical purposes, by s. 7 enacted that each company should have a chairman or president to be elected by the trustees (which the directors were there called) from among themselves and also such subordinate officers as the company by its by-laws might require; the same appears in c. 65, s. 18, of the Consolidated Statutes (1859) dealing with companies for supplying gas and water to municipalities; c. 67 of the same consolidation, respecting electric telegraph companies, by s. 7 provided a more general clause authorizing the company to appoint such directors, officers and agents "and make such prudential rules, regulations and by-laws" as might be necessary to the transaction of its business; and s. 25 of c. 68 respecting companies engaged in the transmission of timber down rivers:

> The directors may elect one of their number to be the president and may nominate and appoint such officers and servants as they may deem necessary . . . .

1957

GHIMPELMAN *et al.* v. BERCOVICI *et al.*

Rand J.

The language of c. 31 (Can.), 1860, has already been mentioned. These provisions show obviously that although dealing with the same matter they were drafted independently and without precise consistency of form, though of substance, with one another, but that of the *Railway Act*, preserved to this day, evidences beyond any doubt the convenience and practicability of the rule of continuity.

Similar provisions in identical language with that with which we are concerned, except in the first two the added phrase "from time to time", are contained in the company legislation of the Dominion and at least two of the Provinces: R.S.C. 1952, c. 53, s. 90(*d*); R.S.O. 1950, c. 59, s. 89(*c*); R.S.N.B. 1952, c. 33, s. 93(*d*).

The embarrassment of the company in the absence of a president is indicated here by the fact that in a deadlock it could be of the utmost importance that the company be represented by counsel at such a meeting as that held on June 30; but it does not seem that an engagement of counsel could have been made except by the president *de jure: Standard Trust Company v. South Shore Railway Company* (1).

In the American work of Thompson on Corporations, 3rd ed. 1927, vol. 2, p. 463, para. 1059, the holding over by a duly elected officer is dealt with and the authorities there cited make it clear that when the appointment of an officer is not expressly limited to a date or period of time or event, and even where the time is in general terms, the tenure of an incumbent continues until his successor is appointed. As representative instances of this the following cases are cited: *McCall v. Byram Manufacturing Company* (2), holding that the secretary of a company continues in office until his successor is appointed when the appointment is "for the year ensuing, commencing on the first instant", in which it is said, on the authority of *Foot v. Prowse* (3):

> Now it is settled, even with respect to officers who are required by law to be elected annually, that they may hold over after the year until others are chosen and sworn.

The Congregational Society of Bethany v. Sperry (4), where the language of the previous decision is approved and

(1) (1903), 5 Que. P.R. 257.
(2) (1827), 6 Conn. 427.
(3) (1725), 1 Stra. 625, 93 E.R. 741, affirmed *sub. nom. Prowse v. Foot* (1725), 2 Bro. Parl. Cas. 167, 1 E.R. 950.
(4) (1834), 10 Conn. 200 at 206.

declared to be equally applicable to society officers; *Sparks et al. v. Farmers' Bank* (1), an action against a surety for a cashier, an office to which election was to be made annually at the meeting of the general board of directors in the month of January in each year, the appointee to qualify by furnishing a bond, holding that, assuming it to be an "annual" office, its tenure did not *ipso facto* expire at the end of the year or at the annual meeting of the board or even upon an election, but only by election plus qualification, and at p. 296 stating the principle to be

> . . . that if the term of an officer, civil or corporate, created by statute or charter, is not limited to expire at a fixed time, or upon a specified event, but there is simply a direction for the annual election of the officer, his original term continues, though after the year, until a successor is duly elected and qualified.

The same and many other authorities are cited in support of the same rule in the article on Corporations in 14*a* Corpus Juris at pp. 72-73.

These decisions indicate the background and origin of the rule which so far from being nullified is seen to be contemplated by the legislation in its latest form. Based upon the convenience of business, the rule is supported also by the formal structure of the company. The managing agency of a corporation, the board of directors, a body subject to such control by the shareholders as the law of the company prescribes, and the offices, apart from the incumbents of either, are part of that structure; and being such the enactments presuppose them at all times, except in unavoidable contingencies, to be occupied.

In the Court of Queen's Bench (2), Hyde J. seems to take the view that the office of president is held at the will of the directors. Assuming that to be the case, it obviously requires a continuance in office of an incumbent until his incumbency is terminated by action of the board. Nothing of that sort took place here; no board action has affected the last legal appointment to the presidency and the incumbent has not suffered any disqualification. McDougall J. does not come to a definite conclusion on the date when the tenure ceased; it was either upon the election of the new board on June 23, 1953 or at least on June 30 when the meeting of the board proved abortive. That it did not take place on the election of the new board follows from

(1) (1869), 3 Del. Ch. 274.

(2) [1956] Que. Q.B. 130.

1957

GHIMPELMAN *et al.* *v.* BERCOVICI *et al.*

Rand J.

the fact that the president presides *de jure* over the annual meeting. How far, then, does the office continue beyond that? What is there in the statute that necessarily fixes any point of time before the election of a new president or remove the existing incumbent? I see nothing. Section 86, subs. (4) does not require an annual election of officers; the word "directors" does not describe each newly elected personnel of the board; the express reference in subs. (1) to the annual election of directors excludes that expression from subs. (4). This is implied also in the language of the latter to "all other officers"; their tenure admittedly is a question of fact arising from the circumstances of their appointment. The appointment, impliedly from time to time, of a president requires simply that a continuing presidency be provided; it bears no implication of an annual election.

McDougall J. refers to art. 1711 of the *Civil Code* which deals with a substitute of a mandatary. I am quite unable to see how the president can be taken to be a substitute of the board. When appointed pursuant to the statute, he becomes an independent and direct officer of the company. The board is not answerable for his actions nor does he execute the mandate of the board: he carries out such authority and duty as are his by virtue of the statute, the by-laws and the executive action of the company, acting by the board: he is in office as much by the statute as the board itself.

What is said of the president applies *a fortiori* to the secretary: it would be with astonishment that dominion companies should learn that their secretary, appointed for an indefinite tenure, ceases to hold his office upon every periodic election of a board of directors.

I would, therefore, allow the appeal, set aside the judgments and dismiss the action with costs throughout.

ABBOTT J.:—I am in substantial agreement with the reasons of McDougall and Hyde JJ. in the Court of Queen's Bench (1) and there is little that I can usefully add to them.

I share the view which they have expressed that the board of directors and the officers of a company incorporated under the *Quebec Companies Act,* are respectively

(1) [1956] Que. Q.B. 130.

the agents or mandataries of the company . As such they are subject to the provisions of the Title "Of Mandate" in the *Civil Code,* except in so far as these are rendered inapplicable by any general or special law relating to corporations as such: see Mignault, "Droit Civil Canadien", vol. 2 at p. 348. In my opinion, however, it is not accurate to say that persons elected or appointed as officers of such a company, are substituted mandataries within the meaning of art. 1711 of the *Civil Code.* Such officers are, of course, the agents or mandataries of the company, but under the terms of the governing statute, the directors, and the directors alone, are empowered to appoint them. The directors themselves are also agents or mandataries of the company, but in their case the statute prescribes that (except to fill a vacancy for an unexpired term) they shall be named by the shareholders. In the present case, however, this distinction as to the method of election or appointment would appear to have no practical significance.

Where newly-elected directors of a limited liability stock company fail to meet immediately and appoint new officers, there is no doubt, in most cases, implied authority from the new board of directors to the existing officers, to continue to act as such, pending the first meeting of directors. When, however, as in the present case, the directors did meet, and by reason of a deadlock failed to appoint officers, it became obvious that the previous incumbents no longer possessed the confidence of the newly-elected board.

Equal shareholding in a limited liability company invites difficulty, of course, under certain circumstances. It does not, however, justify one group taking advantage of the *status quo* in order to maintain its representatives in office indefinitely.

The appeal should be dismissed with costs.

Appeal dismissed with costs, RAND J. *dissenting.*

Solicitors for the defendants, appellants: Phillips, Bloomfield, Vineberg & Goodman, Montreal.

Solicitors for the plaintiffs, respondents: Brais, Campbell, Mercier & Leduc, Montreal.

1956
*Oct. 5
1957
Jan. 22

SAMUEL VAN ALSTYNE AND DORIS VAN ALSTYNE (*Defendants*) ..... APPELLANTS;

AND

LINDSEY D. RUCK, EDMOND E. GOWETT, THOMAS P. COMPEAU AND JOHN H. SCOTT (*Plaintiffs*) ... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Effect of plan of subdivision—Right of way shown on plan but not included in subdivision—"Access"—The Registry Act, R.S.O. 1950, c. 336, ss. 84(1), (5), (14), 89(1)—The Surveys Act, R.S.O. 1950, c. 381, s. 11(2).

One T, the owner of land bordering on the St. Lawrence River, subdivided part of it in 1943 and registered a plan showing lots numbered from 1 (on the west) to 7, all bounded on the south by the river and lots 1 to 6 bounded on the north by a "Right of Way 20' wide". This right of way ran from the west boundary of the plan to a private road leading from the river north to highway no. 2. Lots 1 to 6 were to the west of this private road and lot 7 was to the east. The plan bore the notation "lands registered outlined Red" and there was a red outline surrounding lots 1 to 6 and lot 7, but not the private road or the 20-foot strip. T conveyed lots 1 and 2 and a parcel to the north of these lots to the defendants and lots 3 and 6 to the plaintiffs or their predecessors in title. All the deeds of lots 1 to 6 included the use of the right of way and private road "shown on said plan". The defendants built a garage and fence immediately to the north of lot 2 which had the effect of blocking the 20-foot right of way to the west of lot 3. The plaintiffs sued for the removal of this obstruction.

Held: The action must fail.

Section 84(14) of *The Registry Act* did not assist the plaintiffs. Section 84 dealt with the preparation of plans, their contents and the formalities attending their registration, and it was only "for the purposes of" that section that "a public or private . . . way . . . being the only access to a lot or lots laid down on a plan . . . shall be deemed to be a street or highway". The subsection did not create rights in individuals or the public generally. This wording was to be contrasted with that of s. 11(2) of *The Surveys Act* which expressly provided that the roads, streets, etc., there referred to "shall be public highways", etc. The 20-foot strip here in question did not fall within s. 11(2) of *The Surveys Act* since it was described merely as "a right of way" and it was clear from the conveyances that the right intended to be given to the plaintiffs was in the nature of an easement.

Nor could the plaintiffs rely on the general principle that where lots were sold according to a particular plan the purchasers acquired an interest in the streets or lanes shown on that plan. These conveyances had not simply described the lots with reference to the plan but had

*PRESENT: Kerwin C.J. and Taschereau, Kellock, Cartwright and Nolan JJ.

expressly given rights of way over the 20-foot strip and on a proper construction of the deeds that right of way did not extend to the part of the 20-foot strip lying to the west of lot 3.

Per Kellock J.: It followed by implication from the wording of s. 89(1) of *The Registry Act* (which must be read with s. 84(14)) that when a sale had been made according to a plan the plan became binding, but the plaintiffs obtained no assistance from the statute in this case since the word "access" in s. 84(14) contemplated a means of approach connecting the lot or lots to some street or way over which the public were entitled to travel. The 20-foot strip here in question did not connect with any such public street or way but merely with a private road. It was also to be observed that s. 84(5) required that a plan should show all roads and streets "within the limits" of the land subdivided. This plan was expressly confined to the numbered lots and excluded both the 20-foot strip and the private road to highway no. 2. It could therefore not be contended that either of these areas was "on" the plan.

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing a judgment of Reynolds Co.Ct.J., of the County Court of the County of Frontenac. Appeal allowed.

J. J. Robinette, Q.C., for the defendants, appellants.

W. B. Williston, Q.C., and *C. M. Smith,* for the plaintiffs, respondents.

The judgment of Kerwin C.J. and Taschereau, Cartwright and Nolan JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to special leave granted by the Court of Appeal for Ontario, from a judgment of that Court (1) reversing, by a majority, a judgment of His Honour Judge Reynolds and restraining the appellants from maintaining a fence and building on certain lands over which the respondents claimed to be entitled to a right of way and ordering the appellants to remove the fence and building.

In order to make the issues clear it is necessary to state the facts in some detail.

In and prior to the year 1943 one William Turcotte was the owner of the west half of lot 32 in concession 2 of the township of Pittsburgh in the county of Frontenac. In 1943 Turcotte had a plan of part of his land prepared by an Ontario Land Surveyor. This plan is dated October 12, 1943 and was registered in the Registry Office for the

(1) [1955] O.R. 738, [1955] 4 D.L.R. 41.

1957

VAN ALSTYNE *et al.* v. RUCK *et al.*

Cartwright J.

County of Frontenac on October 28, 1944 as plan 338. The plan shows seven lots numbered consecutively from 1 at the west to 7 at the east. The southerly boundary of all the lots is the northerly bank of the River St. Lawrence and the northerly boundary of lots 1 to 6 is a straight line drawn on a bearing south 88 degrees, 43 minutes east from a point in the westerly boundary of lot 32 concession 2 to a point in the westerly limit of a road marked with the words "Road to Highway No. 2". The plan shows only the southerly portion of this road. There is a note on the plan reading:

> Private Road from Highway No. 2 South along West limit Lot 32 Concession 3 for 1,100' and along West limit Lot 32 Concession 2 to the valley which it follows to the level a total of 2,600'.

It is common ground that this is a private road. To the east of this road is lot 7. There is a broken line shown on the plan running parallel to the line which marks the northerly boundary of lots 1 to 6 and distant 20 feet northerly therefrom; between these lines there is a notation "Right of Way 20' wide". Lots 1 to 6 inclusive and lot 7 are outlined in red and on the face of the plan there is a note as follows: "Note—lands registered outlined Red." At all material times there was a fence erected on the line between lots 32 and 31 in concession 2, lot 31 being to the west of lot 32. The lands to the west of this fence were owned by one Paddle and occupied by him as a farm. This fence formed the west boundary of lot 1 plan 338 and continued northerly therefrom for a considerable distance. At its westerly end the strip of land marked "Right of Way 20' wide" was blocked by this fence and at its easterly end it opened into the private road above referred to.

By deed dated August 24, 1944 Turcotte conveyed to the respondent Lindsey Ruck and his wife as joint tenants:

> ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being part of the west half of lot 32, in the second concession of the Township of Pittsburgh, in the County of Frontenac, and more particularly being lot six, according to a plan on fyle in the Registry Office for Kingston and Frontenac as No. 338, together with a right-of-way as shown on said plan over said lot to the King's Highway No. 2.

By deed dated September 17, 1945 Turcotte conveyed to the appellant Doris Van Alstyne:

> ALL AND SINGULAR these certain parcels or tracts of land and premises situate, lying and being in the township of Pittsburgh in the County of

Frontenac and being composed of Lots # 1 and # 2, according to a plan of part of the front of the West half of Lot # 32 in the second concession of said township on file in the Registry Office for Kingston and Frontenac as # 338. Together with the use of the right of way shown on said plan and together with [another right of way with which we are not concerned].

By deed dated August 10, 1946 Turcotte conveyed lot 3 to one Isabelle Connor, and by deed dated July 11, 1949 she conveyed this lot to the respondents Gowett, Scott and Compeau; the descriptions of the lands conveyed in these two deeds are identical and read as follows:

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the Township of Pittsburgh, in the County of Frontenac and being composed of Lot number Three (3) according to a plan of the front of the west half of Lot number 32, in the Second Concession of said township on file in the Registry Office for Kingston and Frontenac as No. 338. Together with the use of a right-of-way and private road to and from Highway No. 2, shown on said plan.

By deed dated May 17, 1949 Turcotte conveyed to the appellant Samuel Van Alstyne a parcel of land containing 1.58 acres bounded on the south by the northerly limits of lots 1 and 2 plan 338, on the west by the west limit of lot 32, concession 2, on the north by a line 149½ feet in length drawn on a bearing south 88 degrees 51 minutes east from a point in the west limit of lot 32 distant 520 feet northerly from the north-west angle of lot 1 plan 338 to a post and on the east by a line drawn from this post to the north-east angle of lot 2. The description in this deed concludes as follows:

Together with and subject to a right-of-way in common with those others entitled thereto over, on and across said Lot # 32, Concession Two and Lot # 31 in the Third Concession of said Township from Highway No. 2 to and from the land hereby conveyed.

In the spring of 1953 the appellants erected a garage and a fence which extend across the strip of land marked "Right of Way 20′ wide" on plan 338. These were still there at the date of the trial and prevent any of the respondents making use of that part of the said strip which lies to the west of the production northerly of the line between lots 2 and 3 on plan 338. The action was brought to compel the removal of these obstructions.

Paragraphs 3, 4 and 5 of the statement of claim read as follows:

3. In or about the months of April or May, 1953, the defendants or either of them, erected a building on the right-of-way running along the rear of Lots 1 to 6 inclusive as laid out on a plan of subdivision of part of

1957

VAN ALSTYNE *et al.* *v.* RUCK *et al.*

Cartwright J.

Lot 32 in the Second Concession of the Township of Pittsburgh and registered in the Registry Office for the Registry Division of Kingston and Frontenac as Plan Number 338.

4. The Defendants have also erected, and maintain a fence, across the said right-of-way, at the easterly end of their lands.

5. The said building erected by the defendants, or either of them, and the fence built by the defendants, or either of them, obstruct the right-of-way of the Plaintiffs and deprives them of their use and enjoyment of the said right-of-way to which they are entitled by their deeds of ownership.

In their statement of defence the appellants refer to the conveyances mentioned above and plead that the right of way granted to the respondents is to and from highway no. 2 and not over the lands of the appellants. It was on the issue so defined that the action went to trial. At the trial there was no serious dispute as to the facts. The respondents gave evidence to show that prior to the erection of the fence and garage they had used that part of the 20-foot strip lying to the west of the boundary between lots 2 and 3 for the purpose of going to the Paddle farm to make purchases and sometimes to go through the Paddle farm to highway no. 2 but there was no suggestion that they had any right to travel over any part of the Paddle farm for this purpose or any right to climb the fence which formed the easterly boundary of the Paddle farm.

The learned trial judge construed the conveyances to the respondents as granting to them a right of way over the 20-foot strip from their lots to the private road, the southerly end of which is shown on plan 338, and over this private road to highway No. 2, but not as giving them any right of way over that part of the 20-foot strip lying to the west of the production of the boundary between lots 2 and 3. For the reasons given by Laidlaw J.A. in the Court of Appeal I agree with this construction.

Roach J.A., who delivered the reasons of the majority in the Court of Appeal, was of opinion that the plaintiffs were entitled to succeed on one or other of two grounds.

The first of these is that s. 84 (14) of *The Registry Act*, R.S.O. 1950, c. 336, is decisive of the rights of the parties. That subsection reads as follows:

(14) Any public or private street, way, lane or alley or block, tract or lot, being the only access to a lot or lots laid down on a plan of survey and subdivision, shall, for the purposes of this section, be deemed to be a street or highway.

The learned trial judge had rejected this argument on the grounds (i) that the strip marked "Right of Way 20' wide" was excluded from the plan because it was not outlined in red, and (ii) that the plan was improperly registered because its registration had not been consented to by the proper municipal council or the Ontario Municipal Board. Assuming, without deciding, that Roach J.A. was right in refusing to give effect to either of these grounds, I find myself unable to agree with his view as to the operation of the subsection.

Section 84 appears to me to deal with the method of the preparation of plans, their contents, and the formalities which attend their registration. It is only "for the purposes of this section" that "a public or private . . . way . . . being the only access to a lot or lots laid down on a plan . . . shall be deemed to be a street or highway". To construe the subsection as having the effect of creating rights in individuals or the public generally or imposing liabilities as to maintenance and repair upon municipalities seems to me to fail to give effect to the words "for the purposes of this section".

The wording of s. 84 (14) may usefully be contrasted with that of s. 11 (2) of *The Surveys Act,* R.S.O. 1950, c. 381, which reads as follows:

> (2) Subject to the provisions of *The Registry Act* and *The Land Titles Act* as to the amendment or alteration of plans, all allowances for roads, streets, lanes or commons, surveyed in any such city, town, village, lot, mining claim, mining location or any parcel or tract of land or any part thereof, which has been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof shall be public highways, streets, lanes and commons.

From this it appears that where the intention of the Legislature is to create public highways or streets that intention is plainly expressed.

The reason that I think that s. 11 (2) of *The Surveys Act* does not assist the respondents is that the 20-foot strip shown on plan 338 seems to me not to fall within the words "allowances for roads, streets, lanes". All of these words are appropriate to describe highways but the words "right of way" are more apt to describe an easement. When the conveyances above referred to are looked at it is clear that the right intended to be given to the respondents was in

1957

VAN ALSTYNE *et al.* v. RUCK *et al.*

Cartwright J.

the nature of an easement. I did not understand any of the parties to contend that the 20-foot strip had become a public highway and it would be surprising to find a public highway running from a private road to a dead-end. If it had been contended that the 20-foot strip had become a public highway it might have been necessary to consider whether an action to so declare would be properly constituted without the Attorney-General for the Province and the municipality in which the lands are situate being made parties. I do not pursue this question as what is claimed by the respondents is not that the 20-foot strip has become a public highway but that they are entitled to a right of way over all of it "by their deeds of ownership".

The second ground on which Roach J.A. proceeded is summarized in the following paragraph in his reasons (1):

> The lots were sold by Turcotte to the several purchasers according to a plan which showed a right of way extending all the way across in front of those lots. The law is well settled that if a person sells lots according to a particular map or plan, even though it is not registered, the purchasers acquire an interest in the streets or lanes shown upon it adjoining the lots sold, which places them beyond the vendor's future control to their injury.

As a general proposition this is not disputed; but in the case at bar the conveyances on which the respondents rely define their rights to the use of the strip of land in question. We do not have to decide what the rights of the parties would have been if their deeds had simply described their lots with reference to plan 338 and had made no mention of the 20-foot strip. The applicable rule of construction is that set out in the reasons of Strong J. in *Grasett v. Carter* (2) as follows:

> When lands are described, as in the present instance, by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then, the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question of law by the judge, and not as a question of fact by the jury.

I have already indicated my agreement with Laidlaw J.A. in holding that on the construction of their deeds, read with the plan therein referred to, the respondents are

(1) [1955] O.R. at p. 751. (2) (1884), 10 S.C.R. 105 at 114.

not entitled to a right of way over that part of the 20-foot strip lying west of the production of the line between lots 2 and 3.

I would allow the appeal and direct that the judgment of the learned trial judge be restored. The appellants are entitled to their costs of the action and of the appeal to the Court of Appeal but, in view of the terms of the order of the Court of Appeal granting leave to appeal, the only order as to costs in this Court should be that the appellants pay to the respondents the reasonable cost of preparing and printing their factum, a reasonable counsel fee and the reasonable expenses of their counsel in attending at Ottawa during the argument of the appeal.*

KELLOCK J.:—I have had the advantage of reading the judgment of my brother Cartwright and agree with his view, which was also that of Laidlaw J.A., as to the construction to be placed upon the conveyances here in question. I also agree that these conveyances define the rights of the parties as to the use of the strip in question.

I desire, however, to express my own view with regard to the effect of s. 84 (14) of *The Registry Act,* R.S.O. 1950, c. 336, which reads as follows:

> (14) Any public or private street, way, lane or alley or block, tract or lot, being the only access to a lot or lots laid down on a plan of survey and subdivision, shall, for the purposes of this section, be deemed to be a street or highway.

The respondents contend, and I think rightly, that regard must be had to s. 89 (1) of the statute, which provides that a plan, although registered, shall not be binding on the person registering it, or upon other persons unless a sale has been made according to the plan. This clearly indicates, I think, that where such a sale has been made the plan is binding.

I think, however, that the respondents obtain no assistance from the statute in the circumstances of the present

* The order granting leave to the defendants to appeal provided that the leave should "be conditional upon the defendants undertaking to pay to the plaintiffs in any event of the disposition of the appeal by the Supreme Court of Canada, the reasonable cost of preparation and printing of a factum, a reasonable counsel fee for counsel for the plaintiffs, plus the reasonable expenses of counsel for the plaintiffs in attendance in Ottawa during the argument of the appeal"

1957

VAN ALSTYNE *et al.* v. RUCK *et al.*

Kellock J.

case, as, in my view, the word "access", which is defined by the Oxford Dictionary as "a way or means of approach", contemplates that the means is one which connects the lot or lots to some street or way over which *the public* are entitled to travel. As pointed out by my brother Cartwright, the strip here in question does not connect with any such public street or way but, so far as the evidence shows, merely with a private right of way. I think the word "access" in the statute is used in the same sense as in the statute which was under discussion in *Oakley v. Merthyr Tydfil Corporation* (1).

I think it could hardly be contended, and it has not been contended in the case at bar, that that part of the "Road to Highway No. 2", which is the private right of way to which I have referred and which is sketched in outside the red lines which depict the limits of the subdivided lands, is to be regarded as a public highway by virtue of s. 84 (14). So far as *the plan* is concerned, this particular road or way ends "in the air". In my view, the status of this road or way differs in no way from that of the strip here in question.

It is to be observed that subs. (5) of the section, which is mandatory, requires that the plan shall show all roads and streets "within the limits" of the land subdivided. Plan 338 is expressly confined to the numbered lots and excludes both the strip and the "Road to Highway No. 2". I therefore think it cannot be contended that either of these areas may be considered as being "on" the plan and that in any event the strip to the north of lots 1 to 6 does not come within the word "access" within the meaning of s. 84 (14).

By s. 453 (1) of *The Municipal Act*, R.S.O. 1950, c. 243, the burden of repairing all highways within its jurisdiction is placed upon a municipality. In my opinion, it would be impossible to contend that the local municipality here in question has any such responsibility with respect to a strip of land to which the municipality itself has no right of access. That strip, therefore, cannot "be deemed to be a street or highway".

(1) [1922] 1 K.B. 409.

1957

VAN ALSTYNE *et al.* *v.* RUCK *et al.*

Kellock J.

The appeal should be allowed and the judgment of the learned trial judge restored. I agree with the order as to costs proposed by my brother Cartwright.

Appeal allowed.

Solicitors for the defendants, appellants: Gibson, Sands & Flanigan, Kingston.

Solicitors for the plaintiffs, respondents: Smith & Smith, Kingston.

STANLEY JOHN CROCKER AND CROQUIP LTD. (*Defendants*) ... APPELLANTS;

AND

LIBBIE CLEO TORNROOS AND ALFRED HALL TORNROOS (*Plaintiffs*) ..... RESPONDENTS.

1956

*Dec. 3, 4, 5, 6

1957

Jan. 22

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trusts and trustees—Alteration of terms of trust by Court—Limits on jurisdiction—"Salvage" rule—Whether trustee guilty of breach of trust.

The shares in a British Columbia company were owned equally by C, D and T. According to the articles of association of the company, any shareholder who wished to sell or transfer his shares was required to give written notice to the directors who would thereupon give the other shareholders a first opportunity to purchase. T died in 1936, leaving a will whereby he appointed his wife, D and C as his executors and trustees and devised and bequeathed to them the residue of his estate on trust for conversion and investment in trustee investments. The trustees were given a power to postpone conversion and a specific power to hold the shares in the private company. Three months later D died and his widow became entitled to his shares. She did not wish to retain the shares and they were bought by C in 1945. In this action, the trustees of T's estate (C having retired and been replaced in 1948) alleged that as to one-half of the shares bought by him C had been guilty of a breach of trust, although they disclaimed any charge of fraud.

Held, there had been no breach of trust and the action must be dismissed.

It was clear that under T's will the estate would not have been entitled, without an order of the Court, to buy the shares, which were purely speculative and not a trustee investment. The Court would have had no jurisdiction to authorize such a purchase under the "salvage" rule, since it could not have been contended that the offer of D's shares

*PRESENT: Kerwin C.J. and Kellock, Locke, Cartwright and Nolan JJ.

1957

CROCKER *et al.* *v.* TORNROOS *et al.*

presented a situation which might "reasonably be supposed to be one not foreseen or anticipated" by T or one where his trustees were "embarrassed by the emergency". *In re New,* [1901] 2 Ch. 534 at 544, quoted and applied.

T's estate had nothing either to sell or to assign and C in buying the shares as he did was doing no more than exercise a contractual right vested in him under the articles of association of the company. The fact that the estate could not be a buyer was not due to anything for which C, by reason of any act or default on his part as trustee, was responsible.

APPEAL by the defendants from the judgment of the Court of Appeal for British Columbia (1), reversing a judgment of Whittaker J. Appeal allowed.

Alfred Bull, Q.C., and *C. C. I. Merritt,* for the defendant Crocker, appellant.

Jacob S. Ziegel, for the defendant Croquip Ltd., appellant.

Hon. J. W. deB. Farris, Q.C., A. D. Poole and *Kenneth Farris,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

KELLOCK J.:—This litigation relates to certain shares in the British Columbia Equipment Company Ltd., incorporated in January 1931 under the laws of British Columbia, in which the deceased Gunnar Tornroos, one Dietrich and the appellant Crocker held an equal number of shares. All three were active in the business of the company.

The articles of association which, by virtue of s. 37 of the *Companies Act,* R.S.B.C. 1948, c. 58, have the force of a contract binding both the members and the company, require any shareholder desiring to sell or transfer his shares to give written notice to the directors, specifying the fair value of the shares, and constituting the board his agent for sale to any member or members of the company who might desire to purchase at the price so fixed or at a price to be agreed upon or settled by arbitration.

The board is thereupon required to notify the other shareholders of the notice and invite them to state within 10 days whether they desire to purchase any and, if so, how many of such shares. The board is required to apportion the shares so offered among the shareholders desiring to purchase *pro rata* according to the number of shares already held by them respectively. If only one shareholder desires

(1) 3 D.L.R. (2d) 9.

to purchase, he is entitled to purchase the whole. It is only shares not taken up by the other shareholders which may be sold to non-shareholders, but at a price not less than that at which they have already been offered to the shareholders.

By his will, dated January 9, 1936, the testator, who died on April 29, 1940, appointed his wife, the respondent Libbie Tornroos, the said Dietrich and the appellant Crocker his executors and trustees, and devised and bequeathed to them the residue of his estate upon trust for conversion and investment in trustee investments. The widow is entitled to the income during her life or until remarriage, with remainder to the testator's children. In the event of the widow remarrying, however, she shares equally in the corpus with the children. The will contains a power of postponement of conversion of any part or parts of the estate and a specific power to hold the shares in British Columbia Equipment Company Ltd. for such period as the trustees should deem in the best interests of the estate, even should this involve their remaining unconverted at the period of distribution.

The death of Tornroos was followed three months later by that of Dietrich, whose widow became entitled to the shares previously belonging to her husband. These shares she ultimately sold to the appellant Crocker in April 1945, and it is the latter's purchase which is the subject-matter of these proceedings, which were instituted in September 1953 by the respondents, the then trustees, the appellant Crocker having retired from the trust in 1948, been discharged and succeeded as trustee by the respondent Alfred Hall Tornroos.

In the statement of claim the respondents allege that the appellant Crocker "failed to exercise the right of pre-emption which enured to the benefit of the [Tornroos] Estate, and, in breach of trust, bought all of the shares so offered for sale for himself and retained them or alternatively transferred them or caused them to be transferred to" the appellant Croquip Ltd. The respondents' claim for relief is confined to one-half of the Dietrich shares so acquired by Crocker, as well as the proceeds of any shares redeemed, and dividends. The respondents do not charge fraud on the part of either appellant and, in fact, disclaim any such charge.

1957

CROCKER *et al.* *v.* TORNROOS *et al.*

Kellock J.

Before entering into the purchase, the appellant Crocker and the respondent Libbie Tornroos had each been advised by their respective solicitors that under the terms of the Tornroos will, it was not open to the estate to acquire any part of the Dietrich shares. In my opinion this advice was sound.

In these circumstances, the learned trial judge absolved the appellant Crocker from any breach of trust as well as from any abuse of his fiduciary position. Consequently he dismissed the action. This judgment was, however, reversed on appeal, Bird J.A. dissenting (1), but it was directed that the respondent Libbie Tornroos should receive no beneficial interest in such shares. The majority were of opinion, in the first place, that as the estate was entitled under the company's articles to buy from Dietrich, a duty rested upon the appellant Crocker as trustee to apply to the Court for leave to purchase one-half of the Dietrich shares and that there was jurisdiction in the Court to have authorized such a purchase on the principle of salvage. Davey J.A., who delivered the judgment of himself and O'Halloran J.A., entertained "no doubt that it [the application] could have been supported plausibly as a salvage operation designed to avert depreciation in the value of the estate's principal asset from the unforeseen sale of the Dietrich shares" (2). This depreciation he considered would flow from the fact of control of the company being acquired by one shareholder.

The learned judge was also of opinion that it was the duty of Crocker to endeavour to persuade Mrs. Dietrich not to sell her shares, or, failing this, to have endeavoured to have the trustees make an "agreement with Crocker for him to pay the estate to surrender its rights or allow them to lapse, so that he could get control" or to bring about some agreement with him "to protect the estate against an oppressive exercise of control, such as guaranteeing representation on the board of directors, limitation of executives' salaries and like matters" (3). Davey J.A. also considered that in any event before purchasing himself, Crocker ought to have applied to the Court for directions, and for "leave to allow the estate's rights of pre-emption to lapse if no

(1) 3 D.L.R. (2d) 9. (2) 3 D.L.R. (2d) at p. 24.
(3) *Ibid.*, at p. 24.

other course was open, and for leave to exercise the rights which would accrue to him personally by that lapse" (1).

It is, of course, well settled that a trustee may not place himself in a situation where his interest and his duty conflict. The question which arises at the threshold of this litigation is, therefore, whether the appellant Crocker, as trustee of the Tornroos estate, had any duty toward the estate in connection with the purchase of any part of the Dietrich shares.

It is common ground, as already pointed out, that the trustees were debarred by the direction of the testator himself from investing any of the funds of the estate in these shares. To have done so would have been a breach of trust on the part of the trustees, and Davey J.A. agrees that this is so. Leaving aside any question as to whether or not the estate could have financed the purchase or whether such an investment would have been considered suitable at the time owing to its undoubted speculative character, in my opinion the authorities are clear that in the circumstances of this case, there is no foundation for a contention that the Court, if it had been applied to, had jurisdiction to authorize the purchase on the basis of "salvage".

Before referring to the salvage rule itself, it will be useful to refer to one or two instances held to be outside its scope. In *In re Montagu; Derbishire v. Montagu* (2), the Court of Appeal dismissed an appeal by the trustees of a settlement from a decision of Kekewich J. refusing an application for an order authorizing them to raise money out of the settled estate for the purpose of pulling down and rebuilding houses on the property. The following from the judgment of Lopes L.J., at p. 11, contains the gist of the judgment:

> I have no doubt that what is proposed is beneficial, and would increase both the income and the capital value of the property. The question is whether the Court has jurisdiction to sanction it. There is no provision in the settlement which would authorize the works in question, nor do they fall within any of the improvements sanctioned by the Settled Land Acts. It is urged that the Court, having control over trust property, can sanction them, as it would be vastly for the benefit of the persons interested that it should do so. That is not enough. If the buildings were falling down it would be a case of *actual salvage* and would stand differently. Even in cases of repairs the Court has been very careful in the exercise of its jurisdiction. In the case of *In re Jackson* (1882), 21 Ch.D.,

(1) 3 D.L.R. (2d) at p. 25.
(2) [1897] 2 Ch. 8.

1957

CROCKER *et al.* v. TORNROOS *et al.*

Kellock J.

786, 789, Kay J., in dealing with a case of repairs, said: "I think that this jurisdiction should be jealously exercised, and only in cases which amount to actual salvage." The present cannot be said to be a case of actual salvage, and the learned judge was right in refusing to exercise a jurisdiction which he in fact did not possess.

(The italics are mine.)

In *In re Morrison; Morrison v. Morrison* (1), it was held that the Court had no jurisdiction to sanction an agreement under which executors or trustees proposed to concur in converting into a limited company a business in which their testator had been a partner, and under which the testator's share would be exchanged for shares and debentures which the executors and trustees were not authorized by the will to hold. Buckley J. referred to the previous decision of North J. in *Re Crawshay; Dennis v. Crawshay* (2), on somewhat similar facts and expressed himself as follows at p. 707:

> In my opinion there does not reside in this Court any power to authorize trustees to take, on the ground that it is beneficial, an investment which the testator has not authorized.

The rule was authoritatively expressed by Romer L.J. in *In re New; In re Leavers; In re Morley* (3), as follows:

> As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorized by its terms. The cases of *In re Crawshay*, decided by North J., and *In re Morrison*, decided by Buckley J., are instances where the Court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorize. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. *In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen* and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to.

(The italics are mine.)

(1) [1901] 1 Ch. 701. (2) (1888), 60 L.T. 357.
(3) [1901] 2 Ch. 534 at 544.

The facts existing in the above case afford a useful contrast to situations of the character existing in the other cases to which I have referred. In the *New* case the Court gave its sanction to the concurrence of trustees in a scheme for the reconstruction of a prosperous limited company, shares in which had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares for more realizable shares and debentures in the proposed new or reconstructed company, but the Court required that the evidence before it should be supplemented with respect to the importance of further capital being provided by the proposed reconstruction and the difficulties that would arise if the trustees should be obliged to stand aloof and take no part in it. The proposed plan of reconstruction had been put forward because of "the constantly increasing dividends earned by the company and the large outlays which it had been necessary to make from time to time out of profits in developing the [company's] collieries". Counsel for the trustees pointed out that if they did not assent to the scheme, they would "be at the mercy of the other shareholders, who could still wind up the company, and under s. 161 of the Companies Act, 1862, could buy the trustees out".

There were three separate trust estates involved and it was directed that where the trustees were not by the terms of the trust authorized to invest in the shares or debentures of such a company as the proposed new company, they must undertake to apply to the Court for leave to retain them. The shares and debentures of the new company when received by the trustees in pursuance of the authorization of the Court, would, of course, be considered on the same footing as if they had been original assets. If their retention was not authorized by the terms of the trust instruments the trustees would be under obligation to dispose of them.

The rule as laid down in *New's Case* was followed in *In re Tollemache* (1), where that decision was described as "the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts". The rule so laid down received the approval of the House of Lords in *Chapman et al. v. Chapman et al.* (2).

(1) [1903] 1 Ch. 955. (2) [1954] A.C. 429, [1954] 1 All E.R. 798.

1957

CROCKER *et al.* *v.* TORNROOS *et al.*

Kellock J.

The jurisdiction of the Court on the ground of salvage being as above defined, it is impossible to contend in the case at bar that the offer of the Dietrich shares presented a situation which, in the language of Romer L.J., might "reasonably be supposed to be one not foreseen or anticipated" by the testator, or one where his trustees were "embarrassed by the emergency".

In drawing his will, the testator clearly had present to his mind his shareholding in the company in question, as he specifically mentions these shares. He must equally be taken to have been well aware of the provisions of the articles of the company, of which he was one of the founders, and that in the event of the death of either Dietrich or Crocker occurring while his own estate was undergoing administration, the shares of either might be offered for sale, in which event his trustees would be entitled to buy. In settling the terms of his will and giving directions to his trustees, it is plain he did not desire that his estate should exercise the right to purchase but was content that his own shares should continue as a minority holding in a company controlled by the one or other of his former business associates, in whom he had such confidence that he desired they should be his trustees. This being so, the case is entirely outside the rule in *New's Case*. Accordingly, there was no duty resting upon the appellant Crocker as suggested by the majority in the Court of Appeal.

It may be pointed out, also, that had any duty as trustee rested upon Crocker with respect to the Dietrich shares on the footing that the estate had something to sell or assign, it would have involved him in a purchase from an estate of which he was trustee, if he had brought about an agreement "to pay the estate to surrender its rights or to allow them to lapse so that he could get control", as the majority in the Court below considered he ought to have endeavoured to do.

In truth, however, the estate had nothing either to sell or to assign, and Crocker, in purchasing the shares as he did, was exercising nothing but a contractual right vested in himself personally under the articles of association to buy all the shares offered where there was no other competing shareholder. The respondents admit that the appellant was entitled to buy one-half of the Dietrich shares but it is

plain that he was entitled to buy all of those shares when no other shareholder appeared in the market. The fact that the Tornroos estate could not be a buyer was not due to anything for which the appellant Crocker, by reason of any act or default of his, as trustee, was responsible. Crocker, accordingly, had a right to buy upon the footing of the articles or if, as was contended, the time for acceptance of the Dietrich offer had gone by, then just as any other member of the public.

While certain further grounds of defence were put forward on behalf of the appellant company, some of which, at least, would appear to present objections of a somewhat formidable nature to the judgment of the majority in the Court below, it is not now necessary, in view of the conclusion to which I have come as above, to consider them.

I would allow the appeal and restore the judgment of the learned trial judge with costs in this Court and in the Court of Appeal.

Appeal allowed and trial judgment restored, with costs throughout.

Solicitors for the defendant Crocker, appellant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitors for the defendant Croquip Ltd., appellant: Guild, Yule, Lane & Collier, Vancouver.

Solicitors for the plaintiffs, respondents: Farris, Stultz, Bull & Farris, Vancouver.

1956
*Nov. 15
1957
Jan. 22

INDUSTRIAL FUEL AND REFRIGERATION CO. LTD. (*Defendant*) .. APPELLANT;

AND

PENNBORO COAL COMPANY (*Plaintiff*) RESPONDENT.

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

Agency—Whether contract made with agent or principal—Reasonable cause given for belief in mandate—To what extent estoppel recognized in Quebec law—Evidence of telephone conversation—Civil Code, arts. 1235(3), 1727, 1730.

The defendant company instructed P to buy coal in the United States and have it shipped to a customer for the defendant's account. The plaintiff company was asked by P to supply and ship the coal, and it shipped 552.05 tons. The defendant received payment from the customer for this coal, but refused to pay the plaintiff, on the ground that the defendant had contracted to buy the coal from P as principal and that there was no privity of contract between the two companies. In its action to obtain payment from the defendant, the plaintiff contended that P had represented himself as the defendant's agent and was buying the coal on its behalf. Evidence of the contract between the defendant and P was rejected by the trial judge, but he found as a fact that the defendant, in a telephone conversation with the plaintiff, had authorized the shipment and undertaken to pay for it, and gave judgment for the plaintiff. This judgment was affirmed by a majority in the Court of Appeal. The defendant appealed.

Held: The appeal should be dismissed.

Per Taschereau and Abbott JJ.: The liability of the defendant was clearly established. It arose under art. 1727 of the *Civil Code* if P was in fact the defendant's mandatary. It also arose under art. 1730, which is the only case in the *Code* of the application of the English theory of "estoppel", when P clearly represented himself as a mandatary and the telephone conversation between the officers of the defendant and the plaintiff (the latter being in good faith) gave the latter reasonable cause for believing that representation.

The contract between P and the defendant was clearly *res inter alios acta,* and was rightly rejected by the trial judge.

The evidence of the telephone conversation was not inadmissible under art. 1235(3) of the *Civil Code,* since it was not tendered to show that the defendant had made representations to enable P to obtain goods or personal credit, but rather to establish that the defendant had given reasonable cause to believe that P was its mandatary and that it would pay its own debt.

Per Locke, Fauteux and Nolan JJ.: The question whether the defendant had dealt with P *qua* principal was directly in issue and the written contract between them tendered in evidence was improperly rejected. The ground of the objection made to its admission that it was *res inter alios acta* was irrelevant.

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

The concurrent findings that the defendant had contracted directly with the plaintiff should not, however, be disturbed, the improper rejection of the evidence not affecting the determination of that issue.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming, Rinfret J. dissenting, the judgment at trial. Appeal dismissed.

A. Laurendeau, Q.C., and *J. Dupré, Q.C.*, for the defendant, appellant.

S. Fenster, for the plaintiff, respondent.

The judgment of Taschereau and Abbott JJ. was delivered by

TASCHEREAU J.:—In its statement of claim the plaintiff company, respondent in the present case, alleged that acting upon the appellant's instructions, it agreed to ship to the Canadian National Railways, for the account of the defendant, 552.05 tons of coal for which defendant agreed to pay plaintiff respondent the sum of $3.85 per ton, making a total of $2,125.39.

The plaintiff respondent further alleged that it shipped to the Canadian National Railways as aforesaid, a total of 552.05 tons of coal for which it was enttiled to claim from the defendant appellant the sum of $2,125.39. It is not contested that the Canadian National Railways received delivery of this shipment and paid to the appellant the sum of $2,125.39 plus profits, making a grand total of $2,558.78.

The Superior Court, Chief Justice Scott presiding, maintained the action and this judgment was affirmed by the Court of Queen's Bench (1), Mr. Justice Rinfret dissenting.

The respondent is a coal producer operating in the State of Pennsylvania and the appellant has its place of business in the city of Montreal. After having his name placed on the list of prospective sellers of coal to the Canadian National Railways, Mr. Alexis Nihon of Montreal incorporated the appellant in 1948, and in the year 1949, his company received a large order for the sale of coal to the Canadian National Railways. The appellant then got in touch with H. C. Parse, a coal dealer of Pittsburg, Pennsylvania, for the purpose of obtaining the necessary coal, and

(1) [1955] Que. Q.B. 607.

1957

INDUSTRIAL FUEL AND REFRIGERATION CO. LTD. v. PENNBORO COAL CO.

Taschereau J.

it appears that the latter approached the respondent company asking it to supply the coal in order to fulfil the contract. It is as a result of that interview between Parse and the respondent in Pennsylvania, and of telephone conversations between the appellant and the respondent, that the first shipment above mentioned was made to the Canadian National Railways.

The respondent instituted legal proceedings against the appellant to obtain payment for this first shipment, which had remained unpaid and which constituted the only expedition of coal.

It is the contention of the appellant that there is no privity of contract, no legal relationship existing between the litigants; that the appellant entered into an agreement with Parse to purchase coal from him personally, and that it was the latter's own concern and responsibility to purchase the coal wherever he desired. It is against Parse who ordered and bought the coal, that the respondent should exercise its legal rights, if it has any.

Mr. Alexis Nihon, president of the appellant company, testified; but, he was not allowed to produce as evidence the contract entered into between his company and Parse as to the legal relationship that existed between both parties. That contract was obviously *res inter alios acta,* and was therefore irrelevant to the issue.

I have reached the conclusion that the appellant's liability to pay the amount claimed in the action is clearly established. If Parse was in fact the appellant's mandatary to purchase the coal for the former, the respondent's claim cannot be contested: *Civil Code,* art. 1727. If he was not the mandatary, the appellant is also liable because the former represented that he was, and the respondent was given reasonable cause for such belief: *Civil Code,* art. 1730.

When Parse was instructed by the appellant company to buy coal in the United States, to be shipped to the Canadian National Railways, he went to Barsboro, Pennsylvania, and met the officers of the Pennboro Coal Company. He represented to them that he was buying coal for the Industrial Fuel Refrigeration Co. Ltd. of Montreal, the appellant in the present case. At that meeting were present Mr. Hazard, fuel inspector for the Canadian National Railways, Mr. Watters, Mr. Tibbott and Mr. Weakland, all

three officers of the respondent company. Mr. Hazard was not available as a witness on account of absence nor was Mr. Watters. But, Mr. Weakland and Mr. Tibbott are very positive that *such representation was made.* This has not been denied. Parse, having disappeared, could not be called.

Parse was well known to the officers of the respondent company. His credit was bad, and it was found necessary to contact the appellant in Montreal. Mr. Weakland, president of the respondent company, telephoned Mr. McMaster, vice-president of the appellant company, who confirmed the order that had been given by Parse. Weakland testifies that McMaster said further that the company would naturally pay the bill, and it is therefore to the appellant only that credit was given. That is also the understanding of Mr. Tibbott, the vice-president of the respondent company. When the case had been heard, the enquête was reopened to allow McMaster to give evidence, as he had not previously testified. He admitted having had telephone conversations with the plaintiff company, but denied ever promising to pay for the shipment of 552.05 tons, but his evidence was not believed by the trial judge, and this finding was confirmed by the Court of Appeal. On this point, Chief Justice Scott said:

> The manner in which McMaster gave his evidence and his demeanour in the witness box created a bad impression as to his recollection of what he did say.
>
> On the other hand, the manner in which Weakland gave his evidence and his demeanour throughout created a most favourable impression. I am satisfied that Weakland told the truth in saying that McMaster instructed this shipment to be made for the price above mentioned and promised that the defendant company would pay for it. *I find as a fact Weakland's story is the true story.*

This naturally brings into play art. 1730 of the *Civil Code* which reads as follows:

> 1730. The mandator is liable to third parties who in good faith contract with a person not his mandatary, under the belief that he is so, when the mandator *has given reasonable cause for such belief.*

This is the only case where we find in the Quebec *Civil Code* the application of the English theory of "estoppel". Parse clearly, according to the evidence, represented himself to the respondent who was in good faith, as the mandatary of the appellant. The conversation with McMaster

1957

INDUSTRIAL FUEL AND REFRIGERATION CO. LTD. v. PENNBORO COAL CO.

Taschereau J.

surely gave to the respondent reasonable cause for such belief. The responsibility of the appellant therefore arises.

It has been argued that Weakland's evidence as to his conversation with McMaster was inadmissible, as being a violation of art. 1235(3) of the *Civil Code* which is as follows:

> 1235. In commercial matters in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former, in the following cases:
>
> * * *
>
> 3. Upon any representation, or assurance in favor of a person to enable *him to obtain credit, money or goods thereupon;*

I do not think that this objection can prevail. The evidence given by Weakland is not to show that McMaster, on behalf of the appellant, made representations to enable Parse to obtain goods or personal credit. It was merely to establish that the appellant company, through McMaster, had given reasonable cause to believe that Parse was acting as mandatary for the appellant, and that the latter would pay its *own debt*. This evidence, therefore, does not fall within the ban of art. 1235(3).

I am, for the above reasons, of the opinion that the appeal should be dismissed with costs.

The judgment of Locke, Fauteux and Nolan JJ. was delivered by

LOCKE J.:—In support of its contention that it had shipped the coal in question to the Canadian National Railway on the appellant's instructions, the respondent tendered evidence that the coal had been purchased by one Parse, who represented himself as the representative of the appellant company and that he was buying the coal on its behalf to be shipped to the railway company.

There was no evidence that Parse was authorized in any way to contract on behalf of the appellant or that the appellant either authorized or knowingly permitted him to hold himself out as its representative or agent. The fact apparently was that the appellant company had entered into a contract with Parse *qua* principal to supply the coal required to fill a contract which it had entered into with the railway company. The written contract which, according to statements made at the time it was tendered in evidence

would have proven this fact, was rejected. This, in my opinion, was error since on this aspect of the matter the question as to whether the relations existing between the appellant and Parse were those of principal and agent, or whether they were principals contracting with each other for the purchase of the coal, was directly in issue.

The question as to whether Parse was in fact the appellant's agent or whether he was held out or permitted by the appellant to hold himself out to the respondent as such were distinct questions. In considering the first, the contract was clearly relevant. The ground alleged for its rejection appears to have been that it was *res inter alios acta*. This was, of course, quite true, but in deciding the first of the above-mentioned questions the ground of the objection was irrelevant: indeed if that were not so, any person sued on an obligation which a dishonest third person had assumed to contract on his behalf would be precluded from proving by way of defence what was the true relationship existing between him and such person.

The respondent had not in its declaration given the date upon which it received the instructions for the shipment of the coal and, apparently, the appellant did not ask for particulars. In these circumstances, the respondent was permited to give evidence of a conversation which took place after Parse had ordered the coal between its president Ralph Weakland and J. A. McMaster who, at the time in question, was vice-president of the appellant company. According to Weakland, he was instructed by McMaster to make the shipment of coal in question to the Canadian National Railway Company, McMaster agreeing on the appellant's behalf to pay for the shipment. According to Weakland, Parse was of no finacial worth and his company would not have shipped any coal, relying on his credit. McMaster denied that he had made any such agreement on the appellant's behalf.

The learned trial judge who had the advantage of seeing the witnesses accepted Weakland's evidence, finding as a fact that McMaster had instructed the respondent to make the shipment at the price of $3.85 a ton, and agreed that the defendant would pay for it and that, relying on this promise, the coal had been shipped, the respondent giving

1957

INDUSTRIAL FUEL AND REFRIGERATION CO. LTD. v. PENNBORO COAL CO.

Locke J.

credit to the appellant alone and not to Parse. The coal was shipped to the railway company and the purchase-price paid by it to the appellant.

The present appellant appealed and the majority of the Court, Rinfret J. dissenting, dismissed the appeal (1). Marchand J. did not give reasons for his opinion that the appeal should be dismissed. Casey J. agreed with the conclusion of the learned trial judge that McMaster had instructed the respondent to make the shipment and had undertaken to pay the respondent for the coal.

As will be seen, nothing turned upon what took place between Parse and the respondent company in Pennsylvania, liability having been found upon the footing that the appellant had contracted directly with the respondent. The question to be determined is one of fact and there are concurrent findings. While I do not think that I would have reached the same conclusion on the evidence which, in my opinion, indicates that what McMaster gave was an oral guarantee of Parse's liability to the respondent which would be unenforceable, I am not prepared to reverse these findings.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Duranleau, Dupré & Duranleau, Montreal.

Solicitors for the plaintiff, respondent: Gameroff & Fenster, Montreal.

---

(1) [1955] Que. Q.B. 607.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

CONSOLIDATED GLASS LIMITED ....RESPONDENT.

1955
*Oct. 13, 14
1956
Mar. 2
Jun. 11
**Oct. 15
1957
Jan. 22

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income Tax—Undistributed income of company—Capital losses and gains—The Income Tax Act, 1948 (Can.), c. 52, s. 73A(1)(a)(iii), enacted by 1950, c. 40, s. 32 (R.S.C. 1952, c. 148, s. 82).

The respondent, having elected under 95A of the *Income Tax Act*, 1948, as enacted in 1950, proceeded to compute its undistributed income in accordance with 73A(1)(*a*). In doing so it deducted some $114,000 representing a loss in value on shares owned by it in another company which was still in business. This deduction was disallowed by the Minister but restored by the Income Tax Appeal Board. The Minister appealed to the Exchequer Court and after service of his notice of appeal obtained, with the respondent's consent, an order permitting him to raise a new ground of appeal to the effect that if the respondent had sustained a capital loss in respect of these shares that loss was more than offset by a capital gain on other assets during the same period. The Exchequer Court held that it was too late to raise this new ground and affirmed the decision of the Income Tax Appeal Board.

Held (Taschereau and Cartwright JJ. dissenting): The judgment of the Exchequer Court should be set aside and the original assessment should be restored.

Per Kerwin C.J. and Locke J.: It was clear that the shares in question had depreciated to the extent claimed by the respondent and it was not necessary that they should actually have been sold before it could be said that a capital loss had been sustained. The capital gain alleged by the Minister, however, more than offset this capital loss and since capital losses and gains must be treated on the same basis the original notice of assessment was correct. In the circumstances it was not too late for the Minister to raise this ground on the appeal to the Exchequer Court.

Per Rand, Kellock, Fauteux and Nolan JJ.: While it was not necessary that an asset should have been sold or disappeared in order to constitute a capital loss, it was necessary that the loss be absolute and irrevocable. Such a loss was realized upon a sale or in the case of stock in a company which was hopelessly insolvent and had ceased business. If, however, the business was maintained and all that could be said was that the shares would probably never exceed a maximum value, this was still a mere estimate and not the actual determination of the loss. Partial but indeterminate loss in the value of stock could not be treated as absolute and irrecoverable under the language of section 73A(1)(*a*)(iii).

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

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

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Per Abbott J.: So long as a capital asset remained in existence with the possibility of fluctuation in value up or down the owner of that asset could not be said to have sustained a capital loss or made a capital profit or gain within the meaning of the subsection. Such a loss or gain must be established by (i) a sale of the asset, (ii) proof that the asset was valueless, or (iii) proof that it was no longer susceptible of any fluctuation in value. Even, however, if this depreciation was to be interpreted as a capital loss within the meaning of the subsection, the original assessment was still right on the ground that the respondent had failed to discharge the onus of establishing that the capital losses sustained by it in the relevant period exceeded capital profits or gains made during that period.

Per Taschereau and Cartwright JJ., *dissenting:* While it was correct to say that a loss, to come within the meaning of the subsection, must be final in the sense of being irrecoverable, it was not necessary that it be total. On the evidence, the respondent had established not only that the shares in question had decreased in value to the extent claimed by it but also that there was no possibility of any increase in their value beyond that figure. By a parity of reasoning, it followed that for a capital gain in respect of an asset still held in specie by the taxpayer to come within the meaning of the subsection it must appear not only that there had been an increase in the value of that asset but that there was no possibility of a corresponding decrease while it continued to be so held. This was not established in the case at bar and there was therefore no proved capital gain to offset the capital loss.

APPEAL from the judgment of the Exchequer Court of Canada (1), affirming a decision of the Income Tax Appeal Board, which set aside a notice of assessment by the appellant. (The appeal was originally heard by a Court of five judges, and reasons for judgment were delivered (2), but subsequently an order was made for a reargument before the full Court.) Appeal allowed.

Peter Wright, Q.C., and *T. Z. Boles,* for the appellant.

J. J. Robinette, Q.C., J. G. Edison, Q.C., and *D. A. Berlis,* for the respondent.

THE CHIEF JUSTICE:—This is an appeal by the Minister of National Revenue from a judgment of the Exchequer Court (1) affirming a decision of the Income Tax Appeal Board. Section 95A (1) of the *Income Tax Act,* 1948 (Can.), c. 52, enacted by s. 32 of c. 40 of the statutes of 1950, provides:

95A. (1) A private company may elect, in prescribed manner and in prescribed form, to be assessed and to pay a tax of 15% on an amount equal to its undistributed income on hand at the end of the 1949 taxation year minus its tax-paid undistributed income as of that time.

(1) [1954] Ex. C.R. 472. (2) (1956), 2 D.L.R. (2d) 529.

The respondent prepared a form, P.C. 2-1949, which together with the schedules thereto has been accepted by the appellant as an election by the respondent "in prescribed form" under this provision. This document was prepared in accordance with a resolution of the directors of the respondent at a meeting held on June 6, 1950 (before the amendment to the statute was assented to on June 30, 1950), and was received by the appellant on July 31, 1950. In schedule 2 under the heading "Capital Losses Sustained", appeared the following item—"1948 loss on Canadian Libbey-Owens Sheet Glass Co. Ltd. shares, $114,510.25" and the net undistributed income was stated to be $79,439.07 on which the respondent paid 15 per cent. or $11,915.86.

Subsection (8) of s. 95A provides:

(8) The Minister shall, with all due dispatch, examine each election made under this section, assess the tax payable and send a notice of assessment to the company.

In accordance therewith the appellant examined the election, disallowed the deduction of $114,510.25 and added that amount to the total of the respondent's undistributed income on hand at the end of the 1949 taxation year and sent a notice of assessment accordingly. The disallowance of the sum of $114,510.25 was made on the appellant's construction of the definition of "undistributed income on hand" as it appears in s. 73A, enacted by s. 28 of the statutes of 1950, c. 40, reading, so far as applicable, as follows:

73A. (1) In this Act

(a) "undistributed income on hand" of a corporation at the end of, or at any time in, a specified taxation year means the aggregate of the incomes of the corporation for the taxation years beginning with the taxation year that ended in 1917 and ending with the specified taxation year minus the aggregate of the following amounts for each of those years:

(i) each loss sustained by the corporation for a taxation year,

(ii) each expense incurred or disbursement made by the corporation during one of those years that was not allowed as a deduction in computing income for the year under this Part other than an expense incurred or disbursement made in respect of the acquisition of property (including goodwill) or the repayment of loans or capital,

(iii) the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds all capital profits or gains made by the corporation in those years before the 1950 taxation year,

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Kerwin C.J.

(iv) the amount by which all capital losses sustained by the corporation in those taxation years after the 1949 taxation year exceeds all capital profits or gains made by the corporation in those years after the 1949 taxation year.

The argument has proceeded mainly upon the meaning to be attached to the words "all capital losses sustained" in clause (iii).

The history of the investments by the respondent in Canadian Libbey-Owens Sheet Glass Company Limited shares has been detailed in the reasons for judgment in the Exchequer Court. It is unnecessary to repeat it because undoubtedly the shares were not disposed of before the election was made and it is for that reason that the appellant argues that no capital losses with respect thereto were sustained. Reliance is placed upon the decisions in the United States where a tax is imposed on the net balance of capital gains and losses and particularly upon the judgment in *DeLoss v. Commissioner of Internal Revenue* (1), where Learned Hand J., at p. 804, states the established rule:

> However, while the security remains in esse and its value may fluctuate, it is well settled that only by a sale can gain or loss be established. *Eisner v. Macomber*, 252 U.S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570; *Miles v. Safe Deposit Co.*, 259 U.S. 247, 253, 42 S. Ct. 483, 66 L. Ed. 923; *N.Y. Life Ins. Co. v. Edwards*, 271 U.S. 109, 116, 46 S. Ct. 436, 70 L. Ed. 859; *U.S. v. White Dental Mfg. Co.*, [274 U.S. 398 at 401, 47 S. Ct. 598].
>
> Moreover, we understand this to be not merely a rule of convenience, but to inhere in the essence of income arising from capital gains or losses. Nevertheless, we think it inapplicable when the security can no longer fluctuate in value, because its value has become finally extinct. In such cases a sale is necessarily fictitious; it establishes nothing, and cannot be intended to do so, for there is no variable to determine.

It will be noticed that even in the United States an exception is made where the value of a security has entirely disappeared, but, in any event, we are concerned with the proper construction of an entirely different enactment.

In my opinion the Exchequer Court and the Income Tax Appeal Board came to the right conclusion that an actual sale of assets was not necessary in order that it might be said that a capital loss was sustained. The evidence is clear that the value of the shares had depreciated to a sum less than the $40,000 at which the respondent valued them. I am unable to gain any assistance in coming to

(1) (1928), 28 F. (2d) 803.

this conclusion from the decisions relied upon by the late Mr. Justice Potter in connection with applications under various *Companies Acts* where the enquiries were as to "capital which is lost", but I am of opinion that, upon a fair reading of all the relevant provisions, the capital losses to the extent mentioned were sustained by the respondent in the years before the 1950 taxation year.

The appellant has an alternative claim as to which nothing was said until he filed an amended notice of appeal to the Exchequer Court from the decision of the Income Tax Appeal Board. This is based upon the circumstance that within the meaning of s. 73A(1)(*a*)(iii) capital profits or gains had been made by the respondent in the years before the 1950 taxation year in the value of its share-ownership in Bennett Glass Company Limited and in the value of certain fixed assets. The latter appears in the respondent's books after a reappraisal of certain real estate and buildings. The Exchequer Court decided that it was too late for the appellant to take this position but with deference I am unable to agree. There is no suggestion that any available evidence was not produced and therefore this Court is in a position to dispose of the matter finally. Capital losses and gains must, I think, be treated on the same basis and the former being more than offset by the latter the notice of assessment by the appellant stands although for a different reason from that advanced by him at the time of assessment or before the Income Tax Appeal Board.

The appeal should be allowed and the assessment restored. The appellant is entitled to his costs in this Court but under the circumstances there should be no costs in the Exchequer Court.

The judgment of Taschereau and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—Two questions arise in this appeal. The first is whether the decrease in value of certain shares of Canadian Libbey-Owens Sheet Glass Company Limited acquired by the respondent in the years 1920, 1921 and 1922 at a cost of $154,510.25 and written down in its books to $40,000 in 1948 was a capital loss

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Cartwright J.

sustained by the respondent within the meaning of s. 73A (1)(*a*)(iii) of the *Income Tax Act*. The second is whether the appreciation in value of certain shares of Bennett Glass Company Limited and certain fixed assets owned by the respondent and written up in its books during the same period was a capital profit or gain made by the respondent within the meaning of the same subsection.

The relevant facts and statutory provisions are set out in the reasons of other members of the Court.

The main submissions of the appellant are (i) that a decrease or an increase in the value of a capital asset still retained in specie by a taxpayer does not constitute a capital loss sustained or a capital gain made until the amount of such loss or gain is established by the sale of the asset and (ii) alternatively, that if a decrease in value of one unrealized capital asset is to be treated as a loss then an increase in value of another unrealized capital asset must be treated as a gain; that is to say, the taxpayer cannot blow hot and cold.

I agree with the conclusion of my brother Rand that a loss to come within the meaning of the subsection must be final in the sense of being beyond doubt irrecoverable; but in my opinion a loss in value of a retained asset may be shown to be final although it is not total. On the evidence, it appears to me that the respondent established not only that the shares of Canadian Libbey-Owens Sheet Glass Company Limited had decreased in value to $40,000 but also that there was no possibility of any increase in their value beyond that figure. To make such proof in regard to the shares of a company still carrying on business will usually be difficult and may often be impossible but in the case at bar it is shown that the company had parted with all its fixed assets, that its liabilities substantially exceeded its assets and that its only source of income was a commission contract expiring in 1961 yielding a revenue such that an increase in value of the stock above the figure mentioned was beyond the bounds of practical possibility. Proof that, at the critical date, the shares had decreased in value to $40,000 would not have been sufficient to establish a loss within the meaning of the subsection; but, in my opinion, the respondent has satisfied the further onus of negativing

the possibility of an increase beyond that figure. I conclude that the first question should be answered in favour of the respondent.

As to the second question, I think that, by parity of reasoning, it follows that for a capital gain in regard to an asset still held in specie by the taxpayer to come within the meaning of the subsection it must appear not only that there has been an increase in the value of such asset but that there is no possibility of a corresponding decrease while it continues to be so held. Whether this could in any case be made to appear I do not stop to inquire, as, in the case at bar, the evidence as to the nature of the assets in respect of which it is alleged by the appellant that a capital gain has been made shows that it is possible, and indeed probable, that their value will fluctuate so long as they are retained. I conclude therefore that the second question should also be answered in favour of the respondent.

For the above reasons I would dismiss the appeal with costs.

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

RAND J.:—The narrow issue in this appeal is whether in the determination of "undistributed income" as defined by s. 73A of the *Income Tax Act,* as enacted in 1950, the amount by which the value of a capital investment has depreciated can be deducted under subs. (1)(*a*)(iii) which reads:

> the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds [*sic*] all capital profits or gains made by the corporation in those years before the 1950 taxation year.

The deduction is one of a number to be made from the aggregate of incomes for the tax years from 1917 to 1949, including, among others, under cl. (i) income losses and cl. (vi) all dividends paid. The phrase "capital losses sustained" or its equivalent appears in several provisions of the statute in a context from which it is apparent that, within the conceptions of accountancy underlying the Act, it means actually realized. For example, in s. 26 (*d*) "business losses sustained"; s. 39 (1)(*a*) "loss sustained"; s. 75, subss. (6) and (7) "losses sustained".

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Rand J.

These instances, however, afford only a limited assistance to the question raised. What is much more significant, if not decisive, is that the capital losses sustained under cl. (iii) are the net capital losses, those that exceed the "capital profits or gains made" during the same period. "Losses sustained" and "profits and gains made" are clearly correlatives and of the same character; but how can profits and gains be considered to have been made in any proper sense of the words otherwise than by actual realization? This is no inventory valuation feature in relation to capital assets. That the words do not include mere appreciation in capital values is, in my opinion, beyond controversy. It is difficult if not impossible to say that where only value is being considered in which a variable inheres you can have any other than a fluctuating estimate. The word "loss" in the context means absolute and irrevocable, finality. That state of things is realized upon a sale; it can also be said to be realized in the case of stock in a company which is hopelessly insolvent and has ceased business. When, on the other hand, the business is maintained and all that can be said is that in the most likely prospect the value of the shares cannot exceed a maximum, there is still no more than an estimate: the actual loss cannot in fact be so determined and unless there is that determination the statute is not satisfied. The element of appreciation illustrates the quality of fluctuation more clearly perhaps than that of depreciation, but they are essentially of the same nature. If, then, appreciation must be ruled out, as I think it must be, similarly mere loss of some value while a company remains in business must be treated in the same manner.

A number of authorities were cited from the Courts of the United States where capital losses are deductible from taxable capital gains. So far as these decisions are helpful, they seem to support the contention of the Crown. For example, *The People of the State of New York ex rel. Conway Company v. Lynch et al.* (1), a case of insolvency and worthlessness of the stock. In the course of his reasons

(1) (1932), 258 N.Y. 245.

Lehman J., speaking for the Court which included Cardozo C.J., used this language (1):

> True, even with that variable factor [the price obtainable on a sale] taken into consideration, the taxing authority may be able to determine that some loss is inevitable, yet when the variable factor affects the *amount* of the inevitable loss, it may be difficult or even impossible to devise a practical test to determine that any definite part of that loss has been sustained till by complete liquidation or sale the loss is definitely established . . . No variable factor enters into the determination of loss which is inevitable.

DeLoss v. Commissioner of Inland Revenue (2) likewise was an instance of worthless stock. Learned Hand J., giving the reasons of the Circuit Court of Appeals, says:

> It might have been possible to regard fluctuations in the value of securities as present losses or gains, regardless of any sale. The power immediately to realize their value in money might have been considered as equivalent to possession of the money itself, though this would, it is true, have resulted in much difficulty in administration. However, while the security remains in esse and its value may fluctuate, it is well settled that only by a sale can gain or loss be established. . . .
>
> Moreover, we understand this to be not merely a rule of convenience, but to inhere in the essence of income arising from capital gains or losses. Nevertheless, we think it inapplicable when the security can no longer fluctuate in value, because its value has become finally extinct. In such cases a sale is necessarily fictitious; it establishes nothing, and cannot be intended to do so, for there is no variable to determine.

Several other cases from similar Courts were cited but they also involved insolvency and worthlessness.

These decisions, of course, are on different statutory language directed to a different purpose, *i.e.*, the ascertainment of capital income. As is frequently the case, the language of the provisions has, in the course of the years, been modified in the light of experience, and as it appears in Montgomery's Federal Taxes on Corporations, 1945-46, vol. 1, at pp. 361 and 383, federal corporate income taxation law in the United States by 1945 had reached the point of crystallizing the rulings of the Courts in a precise specification of losses resulting from sale or exchange of capital assets and from shares of stock having become worthless, as being deductible items.

The statute clearly indicates that the time of sustaining a loss or making a profit is of primary importance and in my opinion that means the time when an entry embodying

(1) (1932), 258 N.Y. at pp. 255-6. (2) (1928), 28 F. (2d) 803.

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Rand J.

the loss sustained or the gain made must, in proper accounting, be made in the accounts. Until then, entries in the accounts appear to be irrelevant. Here, if the commencement date under s. 73A had been 1924 instead of 1917, the loss, on the view of the respondent, would have been excluded although the same entries would have been continued until 1949 when the changes were made. In the case of the gain, it happens that an appraised value made in 1920 was continued in the accounts until the reappraisal in 1949: but if the cost-prices paid before 1917 had been maintained, as in ordinary accounting they generally are, the increased value up to 1917 would have been deductible from the total increase to 1949, a computation which seems to me to be beyond any contemplation of the statute. What an allowance of both loss and gain in this case means is that the capital assets are dealt with on an inventory basis which makes the actual time of the happening of either irrelevant and makes optional or voluntary accounting entries controlling. If, for example, in 1960 a loss or both a loss and an appreciation in value are entered for capital assets, will it be necessary to inquire whether that loss or increase did or did not accrue prior to 1950? And if in 1970 an appraisal takes place, what of an asset that was maintained throughout the years at its original cost? If one asset only is sold or appraised at a loss over cost and over subsequent appraisal and they are different, which is to be taken as the measure? And must all assets at that time be dealt with to ascertain whether there have been gains? Is cost superseded by appraisal as a basis of determining loss or gain? If mere appraisal is sufficient, the selection of the time for claiming a loss could nullify the purpose of the statute. All of these difficulties point clearly to the conclusion that only an actual or virtual extinction of the asset, including disposal, necessitating an appropriate alteration of the accounts, is what the section provides for.

Partial but indeterminate loss in the value of stock cannot, then, under the language of cl. (iii) be treated as absolute and irrecoverable. Any other view would, apart from all other considerations, introduce substantial administrative anomalies that cannot have been contemplated. The amount of undistributed income must be determined

not only for the purpose of election for distribution but also in cases of liquidation, reorganization, stock dividends and redemptions as provided in the present ss. 81 and 82 of the *Income Tax Act*, R.S.C. 1952, c. 148: and the conceptions underlying losses and gains in their application to these cases are incompatible with any other interpretation.

But whatever may be said of the loss here, on any basis other than that of inventory it is quite impossible, in my opinion, to treat the appreciated value of the fixed assets as "profits or gains made" by the company. Beyond any doubt, the value written up by the company is a fluctuating value, in its essence it is variable, and being so, no part of it comes within the area of "profit or gain made".

I would, therefore, allow the appeal, set aside the judgments below, and restore the assessment of the Minister with costs in this and the Exchequer Court.

LOCKE J.:—The sole question to be decided by Mr. Fordham, Q.C., by whom the appeal to the Income Tax Appeal Board was heard, was as to whether the present respondent, in computing the amount of its "undistributed income" at the end of the taxation year 1949 (within the meaning of that expression in s. 73A (1)(*a*) of the *Income Tax Act* of 1948), was entitled to deduct the amount by which its investment in the preference and common shares of Canadian Libbey-Owens Sheet Glass Company Limited had decreased in value by that date.

The respondent, a private company, claimed to deduct the sum of $114,510.25 from the total amount paid by it for these shares as a capital loss. By the notice of assessment dated May 22, 1951, the respondent was informed that this deduction had been disallowed. Some other changes were made in the figures submitted by the company in computing the amount of its undistributed income but no question arose as to these in the proceedings before the Income Tax Appeal Board. The respondent filed its notice of objection on July 12, 1951, complaining only of the disallowance of the amount of the loss claimed in respect of these shares and, in the notice of appeal to the Board dated February 1, 1952, the objection to the assessment was limited to this ground alone.

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Locke J.

It was the contention of the Minister that there could be no allowance for capital losses under the provisions of para. (*a*)(iii) of s. 73A(1), unless the loss had theretofore been ascertained by the sale or realization upon the assets. In my opinion, this position is untenable and the matter was rightly decided by Mr. Fordham, Q.C., when the appeal of the taxpayer was allowed.

The amendment to the *Income War Tax Act*, which first permitted private companies to pay a tax on their "undistributed income", as defined, and to distribute it in the form of dividends free of tax to the shareholders, was enacted as ss. 94 and 96 by c. 23, s. 8, of the statutes of 1945. If there were ambiguity in the language of para. (*a*)(iii) of s. 73A(1) of the *Income Tax Act* or doubt as to the meaning to be assigned to the expressions "all capital losses sustained" or "capital profits or gains made", and I think that, read in the context, there is none, the history of the external circumstances which led to the enactment of the legislation might be considered to assist in ascertaining the evil or defect which the amendment was intended to remedy as an aid to interpretation: *The Eastman Photographic Materials Company, Limited v. The Comptroller-General of Patents, Designs and Trade-Marks* (1); *The River Wear Commissioners v. Adamson et al.* (2).

The 1945 legislation was enacted following the report of the Royal Commission on the Taxation of Earned Surpluses of Private or Closely Held Corporations, presided over by Mr. Justice Ives and commonly known as the Ives Report. The nature of the problem which the Commissioner was directed to consider was described in the report in the following terms:

> The problem with which we have to deal relates to the combined effect of income taxes and succession duties arising on the death of any of the principal shareholders of closely-held corporations with accumulated surpluses. In many instances the principal asset of the deceased is represented by his equity in the company and, in order to pay succession duties, it is found necessary to distribute a substantial part, if not all, of the accumulated surplus as a dividend. The impact of the income taxes at the prevailing rates on such a distribution is extremely serious and when combined with Federal and Provincial Succession Duties may result in the confiscation of almost the entire estate.

(1) [1898] A.C. 571 at 575. (2) (1877), 2 App. Cas. 743 at 764.

The "undistributed income" of the 1945 amendment might have been more appropriately called "undistributed gains" since it included not only accumulations of income, as that expression was defined by s. 3 of the *Income War Tax Act,* but capital profits which did not fall within the definition and, in making the computation, capital losses, not otherwise deductible in computing income, might be deducted. Clearly, a loss has been sustained when a capital asset has permanently lost all or part of its value. In my opinion, what was contemplated by the section as enacted in 1945 and as re-enacted in substantially the same language as para. (*a*)(iii) of s. 73A (1) of the *Income Tax Act* of 1948, was that the capital losses or gains, the amount of which had not already been ascertained by realization upon the asset, should be determined by making a valuation. Indeed, if this were not so, I think one of the main purposes of the legislation would be defeated since, in order to take advantage of the privilege afforded by the section, it might well be necessary to sell capital assets actively used in carrying on the company's business which might have either lost their value in part or appreciated in value. This would, no doubt, mean that, in the case of many private companies where the estate of a deceased majority shareholder wished to obtain the moneys necessary to pay succession duties from the undistributed income, this could be done only by having the company realize upon a material part of its capital assets and cease operations. In the case of the present respondent, where it is contended for the Crown that its capital assets consisting of real estate and buildings had increased very largely in value and that this increase must be taken into account in computing its "undistributed income", it would be necessary to sell them to determine the amount of the appreciation. This, presumably, would mean a cessation of operations. I cannot think that any such construction of the legislation was intended by Parliament. The fact that the shareholder here concerned is a corporation is, of course, an irrelevant circumstance in determining the meaning to be assigned to the language of the Act.

It was proven on the appeal before the Income Tax Appeal Board that the value of the Canadian Libbey-Owens

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Locke J.

shares was not more than $40,000 at the end of the fiscal year of the company in 1949. That the investment in the shares of this company was a capital investment on the part of the taxpayer was not questioned. I respectfully agree with Mr. Fordham, Q.C., that, since this capital investment had depreciated in value to at least the amount claimed by the taxpayer and there being clearly no hope of any appreciation in value thereafter, the loss had been sustained within the meaning of the section.

This, however, does not dispose of the present appeal. Had the appeal before Potter J. been limited to the question considered before the Income Tax Appeal Board, it should properly have failed. However, other matters were put in issue on the appeal from that decision. Following the judgment of the Board, the Minister gave a notice of appeal to the Exchequer Court on July 27, 1953. The ground of appeal, as stated by that notice, was that no loss had been sustained on the investment in the Canadian Libbey-Owens shares prior to December 31, 1949. Thereafter, however, the respondent consented to an order being made under subs. 3 of s. 91 of the *Income Tax Act*

directing that the appellant be permitted to plead further facts and refer to a further statutory provision in the terms of the document attached hereto and entitled "Further Facts and Statutory Provisions upon which the Appellant Relies" and permitting the appellant to amend its Notice of Appeal accordingly and on condition that the respondent be permitted to make a reply to the amended Notice of Appeal.

In the attached document further grounds of appeal were set out which raised, in the alternative, the ground that, if the respondent had suffered the capital loss referred to, it had made capital profits in those years exceeding the amount claimed:

and particularly made capital profits or gains in the value of its share ownership of Bennett Glass Company Limited and in the value of its fixed assets as shown by an appraisal in 1948 and in its books and accounts for that year.

A further ground raised was that, in consequence of the foregoing, there was no amount which could be deducted from the undistributed income on hand under s. 73A(1)(*a*)(iii) of the *Income Tax Act*.

While the respondent had consented to this amendment being made, by its reply it contended that the matters referred to were irrelevant. The case for the Minister was

put in first at the hearing before Potter J. As part of that case, the income tax return of the respondent for the year 1948 was put in, together with the report of the company's auditors. That report dated April 30, 1949, said in part:

> The real estate and buildings were appraised during the year by the Dominion Appraisal Company Limited, at depreciated replacement value of $414,199.75. The book value of these assets has been increased by $217,309.22 to give effect to this appraisal. Of this sum $114,510.25 has been applied to the book value of the investment in Canadian Libbey-Owens Sheet Glass Co. Limited reducing this account to $40,000.
>
> The investment in Bennett Glass Company Limited is shown at cost $32,177.39 plus $84,688.14 for profits earned since acquisition of the capital stock and $26,286.38 surplus resulting from appraisal of Real Estate and Buildings in 1948.

The balance-sheet of the company for that year showed the Canadian Libbey-Owens shares at the reduced valuation and the real estate and buildings at the appreciated value assigned to them by the Dominion Appraisal Company.

The respondent called as a witness Mr. A. G. Hayes and, during the course of his examination-in-chief, produced a copy of the minutes of a directors' meeting of the respondent held on October 5, 1948, approving what was called the "writing up" of the book value of its Montreal property by an amount in excess of $119,000, the increase to be carried to the depreciation and property reserve account, and the charging against that account of the amount of the loss in value of the Canadian Libbey-Owens shares. This resolution was passed subject to the approval of the auditors, who later approved the entry in the company's books as the value of its real estate and buildings of the figure fixed by the appraisal company, which represented an increase of $217,309.22 in the book value of these assets. The financial statements giving effect to these changes were thereafter approved at a shareholders' meeting held on June 16, 1949.

While I think the reference to the investment in Bennett Glass Company Limited is not clear, there can be no doubt that the directors, the auditors and the shareholders were all of the opinion that the value of the real estate and buildings of the company had by the end of 1948 increased by an amount considerably in excess of the loss claimed upon the Canadian Libbey-Owens shares. Just as, in my

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Locke J.

view, the investment in the shares of Canadian Libbey-Owens was capital investment, I think the investment in the real estate and buildings acquired, it may properly be assumed, for the purpose of carrying on the company's business activities, was a capital investment and, its appreciation in value thus recognized, a capital profit or gain within the meaning of the subsection.

Mr. Justice Potter, pointing out that the question as to whether there had been capital profits or gains in the value of the shares of the Bennett Glass Company Limited and of its fixed assets had not been considered in making the assessment and, consequently, not dealt with by the Income Tax Appeal Board, considered that he should not deal with the matter, saying that, while he expressed no opinion on the merits of the claim, he did not think that the assessment could be varied or a new assessment made by such procedure.

Had it been proposed on behalf of the Minister that a new assessment be made, or one varying that of which notice had been given on May 22, 1951, I would be in agreement with this, but that is not what was proposed. It was with the consent of the respondent that the order was made permitting the Minister to raise the issue on the appeal as to the appreciation in value of the real estate and buildings and, as shown, evidence was tendered both by the Minister and the respondent on the point. The issues were tried by the learned judge, not on the facts disclosed on the appeal to the Income Tax Appeal Board but on the evidence adduced before him, which appears to me to demonstrate that the loss in value of the Canadian Libbey-Owens shares had been more than made up by the appreciation in value of the other capital assets. The objection that the evidence was irrelevant cannot be supported, in view of the course of the proceedings.

In the result, I would allow the appeal and restore the assessment of May 22, 1951. I would allow the appellant his costs in this Court and, in my opinion, there should be no costs allowed of the appeal to the Exchequer Court.

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

ABBOTT J.:—Pursuant to s. 95A of the *Income Tax Act*, 1948, as enacted by 1950, c. 40, s. 32, appellant elected to pay a tax of 15 per cent. on its undistributed income on hand at the end of the 1949 year as prescribed in the Act. In its election it claimed as a deduction from total income the sum of $114,510.25, as being a capital loss alleged to have been sustained with respect to shares still owned by it in another company which was still in existence and still operating.

In making his assessment the Minister disallowed this deduction and the sole issue in this appeal is whether he was right in so doing. This turns upon the interpretation to be given to s. 73A(1)(*a*)(iii) of the said Act, which reads as follows:

> (iii) the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds all capital profits or gains made by the corporation in those years before the 1950 taxation year.

This subsection authorizes one of a number of deductions which are permitted from the aggregate of the incomes of a corporation for a period, beginning with the taxation year that commenced in 1917, and ending with the year in which election is made to pay the 15 per cent. tax under s. 95A of the Act.

I have had the advantage of considering the reasons given by my brother Rand and I agree with the view which he has expressed that so long as a capital asset remains in existence, with the possibility of fluctuation in value up or down, the owner of such asset cannot be said to have sustained a capital loss or made a capital profit or gain within the meaning of the subsection. Such loss or gain, as the case may be, must be established by (i) a sale of the asset, (ii) the asset being proved valueless, or (iii) the asset being proved to be no longer susceptible of any fluctuation in value.

If I am mistaken in this view and the subsection in question is to be interpreted as providing that for the purpose of claiming the deduction in question, a capital loss or gain with respect to a particular asset still owned by a taxpayer can be established by a revaluation and the making of an appropriate bookkeeping entry to record such loss or gain, the appeal should still be allowed.

1957

MINISTER OF NATIONAL REVENUE v. CONSOLIDATED GLASS LIMITED

Abbott J.

The evidence in the present case showed that on the "write up write down" basis of establishing capital gains or losses used by the respondent, the respondent's "gains" exceeded its "losses" in the relevant period prior to 1950. In my opinion the respondent failed to discharge the onus imposed upon it by the subsection, of establishing that the capital losses sustained by it prior to the 1950 taxation year exceeded capital profits or gains made during that period.

I would allow the appeal with costs here and in the Exchequer Court; declare that the deduction of $114,510.25 claimed by respondent was properly disallowed by appellant; and restore the assessment.

NOLAN J.:—My first view was (1) that a capital loss had been sustained, even though the investment was not completely written off, but (2) that this was more than offset by capital gains. However, in order that there may be a majority in favour of one view of the relevant statutory provisions, I have finally decided to agree with my brother Rand that, for the reasons given by him, the appeal should be allowed, the judgments below set aside and the assessment of the Minister restored with costs here and in the Exchequer Court.

Appeal allowed with costs, TASCHEREAU *and* CARTWRIGHT JJ. *dissenting.*

Solicitor for the appellant: T. Z. Boles, Ottawa.

Solicitors for the respondent: Edison, Aird & Berlis. Toronto.

UNION GAS COMPANY OF CANADA LIMITED ..... APPELLANT;

AND

SYDENHAM GAS AND PETROLEUM COMPANY LIMITED..... RESPONDENT.

1956
*Oct. 12
1957
Jan. 22

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Franchises—Supply of natural gas—Powers and discretion of Ontario Fuel Board—"Public convenience and necessity"—Powers of Court on appeal—The Municipal Franchises Act, R.S.O. 1950, c. 248, ss. 8, 9, as amended and enacted by 1954, c. 60, ss. 2, 3—The Ontario Fuel Board Act, 1954 (Ont.), c. 63.

The respondent company applied to the Ontario Fuel Board for approval of a proposed by-law giving the respondent a franchise under *The Municipal Franchises Act* to construct works for the transmission of natural gas to the premises of one company in the town. This application was opposed by the appellant company, which held a franchise from the same municipality to bring in gas and distribute it in the town. The Board refused to approve the by-law, holding that the respondent had not established that public convenience and necessity required the approval. The respondent then appealed to the Court of Appeal under s. 8(4) of the Act, as enacted in 1954. The Court of Appeal reversed the finding of the Board and ordered that a certificate issue.

Held (Locke J. dissenting): The order of the Court of Appeal must be set aside and the order of the Board must be restored.

Per Kerwin C.J. and Abbott J.: The Court of Appeal had no power to substitute its opinion for that of the Board, treating the question of public convenience and necessity as a question of fact subject to review on the appeal. The right of appeal was limited to "any question of law or fact" and the Court was therefore confined to such particular questions as might be set out in the order granting leave to appeal. The jurisdiction of the Court did not include the substitution of its views as to public convenience and necessity for those of the Board.

Per Rand and Kellock JJ.: What the Court did was to exercise an administrative jurisdiction, substituting its judgment on the application for that of the Board. The determination of public convenience and necessity was not a "question of fact" but the formulation of an opinion, and the opinion must be that of the Board alone.

Per Locke J. (*dissenting*): The approval of the Board was required under subs. 2(*a*) of s. 9 of the Act, enacted in 1954, and not under subs. 2(*b*). The reasons delivered by the Board indicated that they did not appreciate this distinction but considered the matter as if the application had been made under subs. 2(*b*). The question whether public convenience and necessity required the approval of the application was one of fact in respect of which the Court of Appeal had jurisdiction and in this case it had rightly exercised that jurisdiction.

*PRESENT: Kerwin C.J. and Rand, Kellock, Locke and Abbott JJ.

1957

UNION GAS CO. OF CANADA LTD. v. SYDENHAM GAS & PETROLEUM CO. LTD.

APPEAL from a judgment of the Court of Appeal for Ontario (1), allowing an appeal from an order of the Ontario Fuel Board. Appeal allowed.

J. J. Robinette, Q.C., and *L. S. O'Connor, Q.C.*, for the appellant.

J. Sedgwick, Q.C., and *H. M. Carscallen*, for the respondent.

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

THE CHIEF JUSTICE:—This is an appeal by leave of this Court by Union Gas Company of Canada Limited, from a judgment of the Court of Appeal for Ontario (1) reversing a decision of the Ontario Fuel Board, dated October 19, 1954. The respondent, Sydenham Gas and Petroleum Company Limited, had applied to the Board, as required by s. 9 of *The Municipal Franchises Act*, R.S.O. 1950, c. 249, as enacted by s. 3 of c. 60 of the statutes of 1954, for approval of By-law 1907 of the Town of Wallaceburg. The council of that municipality had given first and second reading to the by-law, which gives the respondent a franchise under *The Municipal Franchises Act* to enter on highways and construct works for the transmission of natural gas to the premises of Dominion Glass Company Limited. By By-law 1602 of the Town of Wallaceburg, which was read a third time and finally passed on April 1, 1947, after it had been assented to by the ratepayers of the municipality, the appellant secured the right and authority to enter upon the highways within the municipality to bring in gas to its distributing-system of mains and pipes and to distribute and sell it in the town, and for such purposes to lay, maintain, operate, renew and repair mains and pipes under the Town's highways. These rights were granted for the term of 25 years from April 1, 1947, or such less time as it should continue to provide an adequate supply of gas to the citizens of the municipality.

The respondent is a subsidiary of Dominion Glass Company Limited, and the latter desired to obtain a supply of gas for its works, if possible at cheaper rates than those charged by the appellant, although all rates are subject

(1) [1955] O.W.N. 781, [1955] 4 D.L.R. 41.

to approval of a provincial authority. The appellant's rates had been fixed by Mr. R. S. Colter, Q.C., who had been natural gas referee, by an order of November 26, 1948, pursuant to *The Natural Gas Conservation Act*, R.S.O. 1937, c. 49, s. 7. That Act was repealed by *The Ontario Fuel Board Act*, c. 63 of the statutes of 1954, but by s. 37 thereof every regulation and order made under *The Natural Gas Conservation Act* is to remain in force until rescinded or amended by the Board which was created pursuant thereto.

The respondent's application to the Board was refused on the ground that the proposal would be a fundamental departure from the principles that had governed the gas industry in Ontario for at least the last 40 years, and that the respondent had not established that public convenience and necessity appeared to require that such approval be given. This was in pursuance of s. 8 of *The Municipal Franchises Act*, subss. (1) to (6) of which, as amended by s. 2 of c. 60 of the statutes of 1954, are as follows:

8. (1) Notwithstanding anything in this or in any other general or special Act, no person shall construct any works to supply or supply,

(*a*) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(*b*) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Fuel Board and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

(2) The approval of the Ontario Fuel Board shall be in the form of a certificate.

(3) The Ontario Fuel Board shall have and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may deem to be interested or affected and otherwise as the Board may direct.

(4) With leave of a judge thereof, an appeal shall lie upon any question of law or fact to the Court of Appeal from any decision of the Ontario Fuel Board granting or refusing to grant a certificate under this section; provided application for leave to appeal is made within 15 days from the time when such decision is given.

1957

UNION GAS CO. OF CANADA LTD. v. SYDENHAM GAS & PETROLEUM CO. LTD.

Kerwin C.J.

(5) The Ontario Fuel Board shall not issue any certificate under this section until after the expiration of 15 days from the time its decision to grant the same is given or in the event of an appeal from such decision until after the time when such appeal is determined or leave to appeal is refused.

(6) Upon an appeal to the Court of Appeal its judgment thereon shall be final and not subject to further appeal therefrom, and the Ontario Fuel Board shall, if and as may be necessary, amend or vary its decision to conform to such judgment and grant or refuse to grant a certificate under this section accordingly.

An order was made by a judge of the Court of Appeal giving the respondent "leave to appeal to the Court of Appeal from the decision of the Ontario Fuel Board dated the 19th day of October, 1954 on the grounds set out in the motion for leave to appeal and on such further or other grounds as may be set out in the notice of appeal herein". Pursuant thereto a notice of appeal was given, asking for a reversal of the Board's order on the following grounds:

(1) The decision is wrong in law, and is against the evidence and the weight of evidence.

(2) The Board erred in holding on the evidence that there was any scarcity or potential scarcity of natural gas in this Province.

(3) The Board erred in taking into consideration, as affecting public convenience and necessity, the potential loss of revenue to the respondent, and in any event there was no evidence on which the Board could hold that the revenue derived from the appellant or its parent Company would, or could, affect the general rate structure of the respondent.

(4) The findings of the Board as to natural gas scarcity and as to the effect of the application on the rate structure of the respondent are inconsistent.

(5) The Board should have found on the evidence that "public convenience and necessity" required the approval by the Board of the application.

(6) Upon such further and other grounds as may appear from the evidence and the reasons of the Board and as counsel may advise and this Court may permit.

The Court of Appeal apparently considered that it had power to substitute its opinion for that of the Board, treating the question of public convenience and necessity as a question of fact. I am unable to agree with that view. While the Board had been newly formed and we were told that the respondent's application to it was the first to be heard since its creation, the Board was the successor, in many respects, to the jurisdiction formerly exercised by the referee. Its members would be in a position to exercise their judgment, in view of their general

knowledge, and, while provision is made for an appeal from its decision, it is, in the wording of the relevant statutory enactment, "upon any question of law or fact". The provision that the Court of Appeal's judgment should be final and not subject to further appeal could not, of course, affect the jurisdiction of this Court to grant leave to appeal from its decision. The Court of Appeal was confined to such particular questions of law or fact as might be set out in the order of the judge of the Court of Appeal, as required by subs. (4) of s. 8 of *The Municipal Franchises Act*. It is not merely a matter of procedure; it goes to the jurisdiction of the Court of Appeal, and that jurisdiction does not include the substitution of that Court's views as to public convenience and necessity for those of the Board, but is restricted to the determination of those questions of law or fact which have been particularized by the order of the judge of that Court.

The appeal should be allowed and the judgment of the Court of Appeal set aside. Since the order of the Board was made over two years ago, it is preferable that that order be restored, leaving it to the respondent, if so advised, to make a new application. The appellant is entitled to its costs of the appeals to the Court of Appeal and to this Court.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.:—The Ontario Fuel Board, acting under the authority of *The Municipal Franchises Act*, R.S.O. 1950, c. 249, as amended by 3 Elizabeth II (1954), c. 60, s. 3, refused an application by the Town of Wallaceburg for the approval of a by-law authorizing construction by the respondent of a pipeline to convey gas through the streets of the town on the ground that public convenience and necessity for the work were not shown.

An appeal from that refusal was taken to the Court of Appeal under s. 8(4) of *The Municipal Franchises Act*, which allows an appeal, with leave of a judge of the Court, on any question of law or fact. The Court in dealing with the matter entered upon a re-examination of the facts and considerations before the Board, and a reassessment of their weight and value, and came to the opinion

1957

UNION GAS CO. OF CANADA LTD. v. SYDENHAM GAS & PETROLEUM CO. LTD.

Rand J.

that a case of public convenience and necessity had been made out. The judgment accordingly directed the Board to issue the certificate.

What the Court did was to exercise an administrative jurisdiction and to substitute its judgment on the application for that of the Board. In this I think it exceeded its powers. We were referred to no precise or material issue in the appeal on any question of fact or law on which the Court was asked to or did make a finding or a ruling. It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. In the notice of appeal references to certain findings were made, but what the present respondent sought and obtained was a judgment on the entire controversy. That remedy was, in my opinion, misconceived and the judgment likewise.

I would, therefore, allow the appeal and restore the order of the Board with costs in this Court and in the Court of Appeal.

LOCKE J. (*dissenting*):—Sydenham Gas and Petroleum Company Limited was incorporated in Ontario by letters patent issued under the provisions of *The Companies Act* of that Province in the year 1952. Among its declared objects was the transportation of natural gas. The company is a wholly-owned subsidiary of Dominion Glass Company Limited which owns and operates very extensive works for the manufacture of glass and glass products in the town of Wallaceburg, Ontario. It is the principal industry in that place, furnishing employment to a substantial proportion of the inhabitants, and its continued and successful operation is a matter of moment to the community.

Natural gas is the most desirable fuel for glass manufacture in Ontario and for several years the Dominion Glass company carried on an extensive search in an endeavour to locate natural gas in the portion of Ontario adjacent to its factories. This proved unsuccessful. The

natural gas required for its operations meanwhile was purchased by it from the appellant, a company having available supplies and a franchise from the Town entitling it to supply this commodity to the inhabitants of Wallaceburg. This franchise had been granted by a by-law of the Town approved by the ratepayers. It is to be noted that the franchise or right granted was not exclusive and thus did not preclude the granting of similar rights to others.

On May 14, 1954, the Sydenham company entered into a contract with Imperial Oil Limited, which held oil and gas leases in the township of Sombra, for the supply from the Bickford Pool of a minimum of 237,250 thousand cubic feet of natural gas yearly until December 31, 1966, or until 12,800,000 m.c.f. of gas had been delivered. The purpose of the company in entering into the contract was to supply the needed natural gas for the operations of the Dominion Glass company, and for that purpose alone. The Sydenham company did not propose to enter into the business of either selling to or transporting natural gas for persons or corporations other than what may be described as its parent company.

The Bickford Pool is situate some 10 miles from Wallaceburg and, in order to transport the gas to the Dominion Glass company plant, it was necessary to lay pipelines through two intervening municipalities and through part of the town of Wallaceburg. The necessary by-laws permitting the construction of the pipeline through the townships of Sombra and Chatham were duly passed by the councils of these municipal bodies and on July 6, 1954, the council of the town of Wallaceburg passed a by-law granting to the Sydenham company:

> a franchise within the meaning of The Municipal Franchises Act, to enter upon the highways within the corporate limits of the Town of Wallaceburg, for the purpose of laying down, maintaining and using pipes and other necessary works for the transmission of natural gas on, in, under, along and across any such highway, for the purpose of conveying natural gas to the lands of Dominion Glass Company Limited situate within the said Town of Wallaceburg, upon and subject to the conditions, hereinafter mentioned or contained.

By s. 3 of *The Municipal Franchises Act,* R.S.O. 1950, c. 249, it is provided, *inter alia,* that a municipal corporation shall not grant to any person the right to construct or operate any public utility in the municipality or to

1957

UNION GAS CO. OF CANADA LTD. v. SYDENHAM GAS & PETROLEUM CO. LTD.

Locke J.

supply to the corporation or to the inhabitants of the municipality or any of them, gas, steam or electric light, heat or power, unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted has been assented to by the municipal electors.

Section 8 provided that no person should, without the approval of the Lieutenant-Governor in council, construct any works to supply or supply

(*a*) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas

and that no approval should be given under the section unless the Ontario Municipal Board should certify in writing to the Lieutenant-Governor that public convenience and necessity appeared to require that such approval be given.

The Municipal Franchises Act was amended by c. 60 of the statutes of 1954. Subsections 1 and 2 of s. 8 which contained the provisions last above referred to were repealed and the following was substituted:

(1) Notwithstanding anything in this or in any other general or special Act, no person shall construct any works to supply or supply,

(*a*) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(*b*) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Fuel Board and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

(2) The approval of the Ontario Fuel Board shall be in the form of a certificate.

By the amendment, s. 9 was added which, so far as relevant to the issue, reads as follows:

(2) No by-law granting,

(*a*) the right to construct or operate works for the distribution of natural gas;

(*b*) the right to supply natural gas to a municipal corporation or to the inhabitants of a municipality;

(*c*) the right to extend or add to the works mentioned in clause *a* or the services mentioned in clause *b*;

(*d*) a renewal of or an extension of the term of any right mentioned in clause *a* or *b*,

shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted, renewed or extended have first been approved by the Ontario Fuel Board.

The Ontario Fuel Board referred to in these amendments was constituted by c. 63 of the statutes of 1954 which repealed, *inter alia, The Natural Gas Conservation Act,* R.S.O. 1950, c. 251, and the Acts which amended that statute. The Board thus constituted under the new statute was given broad powers which included those given to the natural gas referee under the repealed statute.

The application made by the Sydenham company to the Ontario Fuel Board if made in writing does not appear in the printed record but, according to the order of J. K. Mackay J.A. granting leave to appeal to the Court of Appeal, it was for approval of the by-law above referred to, "being a by-law authorizing the transportation and distribution of natural gas to the lands of Dominion Glass Company Limited". While approval was apparently also asked for the by-laws of the townships of Sombra and Chatham, that was decided to be unnecessary since there was to be no distribution of gas within their boundaries and it is unnecessary to further refer to these matters.

While the Sydenham company did not, in the terms of s. 3 of *The Municipal Franchises Act* as amended, propose to supply natural gas to "a municipal corporation or to the inhabitants of a municipality", but merely to transport gas to the parent company the Dominion Glass company, the application was dealt with not merely as involving permission to the Sydenham company to lay its gas-mains under the streets of Wallaceburg in order to obtain access to the glass company's premises, but also involving the question as to whether, in view of the fact that the Union Gas company was then supplying the Dominion Glass company with natural gas at a price theretofore approved as reasonable by the natural gas referee under the provisions of *The Natural Gas Conservation Act,* R.S.O. 1937, c. 49, public convenience and necessity appeared to require that the by-law be approved.

The word "gas" as defined in s. 1(*b*) of *The Municipal Franchises Act* includes natural gas and, as s. 3 requires the approval of the electors to a by-law granting permission to any person to supply gas to "the inhabitants of

1957

UNION GAS CO. OF CANADA LTD. v. SYDENHAM GAS & PETROLEUM CO. LTD.

Locke J.

a municipality *or any of them*", it was necessary that the by-law should be submitted to them. By virtue of subs. 2(*a*) of s. 9 the approval of the Ontario Fuel Board was required. This procedure, it may be noted, would have been necessary if the Dominion Glass company had proposed to lay the pipeline itself from the Bickford Pool rather than to have that done by its wholly-owned subsidiary.

Subsection 2(*b*) of s. 9 deals with a quite different right, being the right to supply natural gas to a municipal corporation "*or to the inhabitants of a municipality*". The words "or any of them" which appear after the word "inhabitants" in s. 3 were omitted in s. 9(2)(*b*). I have no doubt that this was by design and not by accident. Where a corporation proposes to exercise a franchise to operate a public utility selling gas to a municipal corporation or to a community generally, many matters would require consideration by the Fuel Board which would be quite irrelevant in deciding upon an application under subs. 2(*a*). The reasons delivered by the Fuel Board in refusing its approval indicate, in my opinion, that the members of that body did not appreciate this distinction. The application was for the approval of the by-law and all that was proposed by it was that the Sydenham company might lay its pipelines under certain of the streets of the town to connect with the premises of the glass company. A passage in the reasons delivered reads:

> In effect, the granting of this application would be to create the situation of two distributing companies in the same area . . .

But this, in the sense that the term "distributing company" was used, was, with respect, inaccurate. The term would have been apt had the Sydenham company's application been made under subs. 2(*b*) of s. 9 to approve a by-law authorizing the supply of gas to the municipal corporation or to its inhabitants generally. The by-law in question granted no such rights.

The Board is an administrative body and wide powers are vested in it by the statute of 1954 by which it was established. These include power to control and regulate drilling for, distributing and using natural gas for industrial purposes and to make regulations subject to the approval of the Lieutenant-Governor in council, *inter alia*, as to the

manner in which pipelines for the transmission of gas may be laid, for the conservation of natural gas and oil and for the issue of permits for the use of natural gas for industrial purposes. The regulations made by the Board pursuant to these powers include a provision that natural gas shall be supplied to consumers in a defined order of precedence and, in the order thus prescribed, gas required for residential purposes and the heating of dwellings and commercial buildings takes precedence over that required for industrial purposes.

There is nothing in the record to suggest that any order of the Board or of the Minister made under *The Natural Gas Conservation Act,* R.S.O. 1950, c. 251, restricted in any way the purchase by the Sydenham company of gas from the Bickford Pool and its transmission to Wallaceburg for industrial use by the plant of the Dominion Glass company, or that there was any shortage of natural gas in Ontario, or that the gas from this pool was required for any preferred purpose of the nature referred to in the regulations.

No considerations of this nature affected the determination by the Board of the application in question. There was on the other hand, as pointed out in the unanimous judgment of the Court of Appeal, ample evidence that obtaining a supply of natural gas for its operations at approximately half the rate the Dominion Glass company now pays to the appellant company was a matter of great importance in ensuring the continued operation of all the manufacturing activities of that company and that these operations provide employment to a substantial proportion of the inhabitants of the town of Wallaceburg.

Subsection 4 of s. 8 of *The Municipal Franchises Act,* as amended, provides that an appeal shall lie to the Court of Appeal from any decision of the Ontario Fuel Board granting or refusing to grant a certificate under the section upon any question of law or fact. These provisions are made applicable to applications for approval under s. 9 by subs. 4 of that section. The order of Mr. Justice Mackay granted leave to the Sydenham company to appeal upon *inter alia* the grounds that the decision was wrong in law, that it was contrary to the evidence and that public convenience and necessity required the approval of the application.

1957

UNION GAS CO. OF CANADA LTD. v. SYDENHAM GAS & PETROLEUM CO. LTD.

Locke J.

I respectfully agree with the learned Chief Justice who delivered the unanimous judgment of the Court of Appeal allowing the appeal and directing that the required certificate should issue, that the latter question is one of fact. If there were doubt as to the meaning to be assigned to the expression "public convenience and necessity" in the statute, and I think there is none, the question as to its interpretation would be one of law which the legislation would also require the Court to determine.

The fact that the main functions of the Ontario Fuel Board are administrative cannot limit the jurisdiction of the Court of Appeal to determine a question such as this. Like other boards constituted by various statutes, both Dominion and Provincial, in discharging its functions the Fuel Board must come to its conclusions upon its view of the facts and of the law affecting the matters before it. The Legislature has seen fit to impose upon the Court of Appeal the duty of deciding questions brought before it of either nature.

In this matter the Board, apparently considering that the by-law was of the nature referred to in subs. 2(*b*) of s. 9, decided that public convenience and necessity did not require it to give its approval. The principal ground assigned for doing so was the Board's opinion that the appellant was one of the public utility distributing companies in Ontario which had built up their systems under a fixed rate structure "on the basis that they had and would continue to have a monopoly in their respective franchise areas". This was followed by the statement that the result of granting the application would be that there would be two distributing companies in the same area. As to the argument that the Dominion Glass company must effect economies in its operations to enable it to continue the manufacture of certain of its lines of glassware in Wallaceburg, the Board expressed the opinion that it ought to pursue some other course in order to obtain relief.

To give effect to this reasoning, as pointed out by the learned Chief Justice of Ontario, would be to give the franchise of the appellant the effect of being exclusive in the area, whereas in fact and in law the respondent had no such exclusive right and a further effect would be to

deprive the municipality of the power to permit another public utility to supply industrial natural gas in the area, notwithstanding the local necessity for it. As I have pointed out, the Dominion Glass company had made extensive efforts to locate natural gas by drilling and, had those efforts proven successful, to apply the principle acted upon by the Board would have prevented the use of the gas so found if it was in a location which would require the laying of pipes under the streets of Wallaceburg in order to utilize it.

The distinction between by-laws granting rights of the nature referred to under subss 2(*a*) and 2(*b*) of s 9 is not referred to in the reasons for judgment, but all of the reasons advanced for the unanimous conclusion of the Court that public convenience and necessity required the approval of the Board to be given to the by-law apply with even greater force to an application under subs. 2(*a*).

I respectfully agree with the conclusion reached by the Court of Appeal and with the reasons assigned for those conclusions by the learned Chief Justice of Ontario and I would dismiss this appeal with costs.

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

Solicitors for the appellant: McNevin, Gee & O'Connor, Chatham.

Solicitor for the respondent: Joseph Sedgwick, Toronto.

1956
*Apr. 24, 25, 26
*Nov. 19, 20

1957
Jan. 22

IN THE MATTER OF A REFERENCE RESPECTING THE FARM PRODUCTS MARKETING ACT, R.S.O. 1950, CHAPTER 131, AS AMENDED.

Constitutional law—Regulation of trade and commerce—Provincial marketing schemes—Validity of The Farm Products Marketing Act, R.S.O. 1950, c. 131, as amended, and regulations and orders thereunder.

The Governor General in council referred to the Court certain questions as to the validity of parts of *The Farm Products Marketing Act* (Ontario) and orders and regulations made under it in relation to "schemes" for the marketing of hogs, peaches and vegetables. By an amendment passed after the order of reference the Legislature declared that the purpose and intent of the Act were "to provide for the control and regulation in any or all respects of the marketing within the Province of farm products including the prohibition of such marketing in whole or in part". The principal attack on the legislation was based upon the contention that it was an infringement of the power of the Parliament of Canada in relation to the regulation of trade and commerce. It was also argued that the licensing provisions involved indirect taxation and that the legislation conflicted with parts of the *Combines Investigation Act*, R.S.C. 1952, c. 31, the *Criminal Code*, 1953-54 (Can.), c. 51, the *Agricultural Products Marketing Act*, R.S.C. 1952, c. 6, and the *Live Stock and Live Stock Products Act*, R.S.C. 1952, c. 167.

The questions were answered by the Court as follows:

1. Section 3(1)(*l*), as re-enacted in 1955, empowers the Farm Products Marketing Board to authorize a marketing agency "to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and [require] any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him".

Per Kerwin C.J. and Rand J.: On the assumption that the Act applies only to intraprovincial transactions as defined in the reasons, this clause is not *ultra vires*.

Per Taschereau, Fauteux and Abbott JJ.: The clause is *intra vires*.

Per Locke and Nolan JJ.: If the pool is limited to products marketed for use within the Province and excludes products marketed or purchased for export either in their natural state or after treatment the clause is *intra vires*.

Per Cartwright J.: The clause is *ultra vires*, since it empowers the Board to authorize a marketing agency to make an equalization of returns to producers, taking from some a part of the price they have received and paying it to others who have obtained a less favourable price.

2. Regulation 104 of C.R.O. 1950, as amended, purports to set up a "scheme" for the marketing of hogs for processing and providing for a local board and a committee in each of seven districts of the Province.

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

Per Kerwin C.J., Taschereau, Rand, Locke, Fauteux, Abbott and Nolan JJ.: This regulation is *intra vires*.

Per Cartwright J.: The regulation is invalid because it does not constitute a "scheme" within the meaning of the Act.

3. Regulation 102/1955 provides for compulsory licensing of all processors (*i.e.*, persons who slaughter hogs or have hogs slaughtered for them) and shippers, and for the creation of a marketing agency through which all hogs must be marketed.

Per Kerwin C.J.: Assuming that this regulation deals only with control of the sale of hogs for consumption within the Province, or to packing plants or other processors whose products will be consumed therein, the regulation is *intra vires*.

Per Taschereau, Fauteux and Abbott JJ.: The regulation is *intra vires*.

Per Rand J.: The licences provided for by this regulation are trade regulating licences and not for revenue purposes only, and since there is nothing in the regulation to restrict the ordinary meaning of its language it is in excess of the powers given to the Board by the statute and is therefore *ultra vires*.

Per Locke and Nolan JJ.: The regulation is *ultra vires* except to the extent that it authorizes the control of the marketing of hogs sold for consumption within the Province or to packing plants or other processors purchasing them for the manufacture of pork products within the Province. The provision for licensing is *intra vires* so long as the power is not used to prevent those desiring to purchase hogs or pork products for export.

Per Cartwright J.: The regulation is invalid for the reason given under question 2.

4. An order of the marketing agency prescribes a "service charge" for each hog marketed under the scheme.

Per Kerwin C.J., Taschereau, Rand, Locke, Fauteux, Abbott and Nolan JJ.: This order is *intra vires*.

Per Cartwright J.: The order is invalid for the reason given under question 2.

5 and 6. Regulation 145/54, dealing with the marketing of peaches, requires every grower to pay licence fees at a stated rate for each ton or fraction thereof of peaches delivered to a processor and requires the processor to deduct these licence fees and forward them to the local board. Regulation 126/52 contains similar provisions in respect of the marketing of vegetables for processing.

Per Kerwin C.J., Taschereau, Rand, Locke, Fauteux, Abbott and Nolan JJ.: These orders are *intra vires*.

Per Cartwright J.: On the material before the Court it is impossible to determine the validity of these orders.

7. A proposed amendment to the Act would empower the Board to authorize a local board "(i) to inquire into and determine the amount of surplus of a regulated product, (ii) to purchase or otherwise acquire the whole or such part of such surplus of a regulated product as the marketing agency may determine, (iii) to market any surplus of a regulated product so purchased or acquired, (iv) to require processors who receive the regulated product from producers to deduct from the moneys payable to the producer any licence fees payable by the producer to the local board and to remit such licence fees to the local

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

board, (v) to use such licence fees to pay the expenses of the local board and the losses, if any, incurred in the marketing of the surplus of the regulated product and to set aside reserves against possible losses in marketing the surplus of the regulated product, and (vi) to use such licence fees to equalize or adjust returns received by producers of the regulated product".

Per Kerwin C.J. and Rand J.: This amendment as interpreted in the reasons is not *ultra vires*.

Per Taschereau, Fauteux and Abbott JJ.: Clauses (i) to (iv) are *intra vires* but clause (v), except to the extent that it authorizes the use of licence fees to pay the expenses of the local board, and the whole of clause (vi), are *ultra vires*.

Per Locke and Nolan JJ.: The amendment is *intra vires* except that that part of clause (v) which authorizes the imposition of licence fees to provide moneys to pay for the losses referred to and to set up reserves and for the purposes referred to in clause (vi), is *ultra vires*.

Per Cartwright J.: Clauses (v) and (vi) are *ultra vires* but the other clauses are *intra vires*.

8. *Per curiam:* The Board would not have power under the proposed amendment to authorize a local board to impose licence fees and to use those licence fees to equalize or adjust returns to the producers.

REFERENCE under s. 55 of the *Supreme Court Act*. The terms of the order of reference are set out in the reasons of Locke J., *post*, p. 220.

F. P. Varcoe, Q.C., and *E. R. Olson*, for the Attorney General of Canada.

C. R. Magone, Q.C., for the Attorney-General for Ontario.

M. M. Hoyt, for the Attorney General for New Brunswick.

J. O. C. Campbell, Q.C., for the Attorney-General of Prince Edward Island.

J. R. Dunnet, for the Attorney-General for Saskatchewan.

H. J. Wilson, Q.C., for the Attorney General for Alberta.

R. H. Milliken, Q.C., and *R. A. Milliken*, for Canadian Federation of Agriculture and others.

H. E. Harris, Q.C., for Ontario Federation of Agriculture and others.

J. J. Robinette, Q.C., and *P. B. C. Pepper*, counsel appointed by the Court to represent persons opposed to the legislation.

N. McFarland, Q.C., for Theodore Parker.

After the argument the Court called for further argument and directed that notice be given by the Attorney-General for Ontario to all other parties represented on the original hearing and to the Attorneys-General of Quebec, Manitoba, British Columbia and Newfoundland. The direction of the Court was as follows:

On the assumption that the Act and the three schemes with the regulations applicable to them extend to the marketing of all hogs, peaches and designated vegetables delivered to a processor in the province to be processed, the Court directs the following question to be argued on Monday, November 19, 1956:

Is the regulation of trade so prescribed, controlling production, transportation and sale, including the designation of an exclusive selling agency and fixing the price, to the processor, of these products, within the authority of the Province in respect of such of them as are, in the usual course of production and trade, intended or destined to be or will be exported from the Province in interprovincial or foreign trade? Would the power of the Province extend to the control of the manufacture or processing? For example: liquor may be distilled in a Province solely for export; is the purchase, including the price to be paid therefor, of locally grown grain or other ingredients, within such Provincial regulation? Similarly in the case of wheat grown locally and sold to a miller within the Province whose market is both within and without the Province; of hogs sold to a packer for curing and intended in whole or in part for shipment without the Province; of pulpwood sold to pulp or paper manufacturers for similar disposal; of fish processed by canners for similar disposal; and many other products in the same category of processing and distribution. Can the holding of a licence or the payment of a licence fee by a processor of products for export be made a condition of the processing in the case of (a) a Dominion company, or (b) a Provincial company? Is there a jurisdictional difference between the manufacture of liquor from grain and the processing of hogs into pork, ham or bacon and the similar contrasting treatment of other products, in relation, for example, to the control of marketing and price to the manufacturer or processor? If a distinction is to be made, what is the test or principle to be applied?

F. P. Varcoe, Q.C., and *E. R. Olson*, for the Attorney General of Canada.

C. R. Magone, Q.C., and *H. E. Harris, Q.C.*, for the Attorney-General for Ontario and the Attorney-General of Prince Edward Island.

C. A. Seguin, Q.C., for the Attorney-General of Quebec.

M. M. Hoyt, for the Attorney General of New Brunswick.

W. Burke-Robertson, Q.C., for the Attorney-General for British Columbia.

J. R. Dunnet, for the Attorney-General for Saskatchewan.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

H. J. Wilson, Q.C., for the Attorney General for Alberta.

R. H. Milliken, Q.C., for Canadian Federation of Agriculture and others.

H. E. Harris, Q.C., for Ontario Federation of Agriculture and others.

J. J. Robinette, Q.C., and *P. B. C. Pepper*, counsel appointed by the Court.

THE CHIEF JUSTICE:—This is a reference by His Excellency the Governor General in Council as to the validity of one clause of one section of *The Farm Products Marketing Act* of the Province of Ontario, R.S.O. 1950, c. 131, of certain regulations made thereunder, of an order of The Ontario Hog Producers' Marketing Board, of a proposed amendment to the Act, and of a suggested authorization by the Farm Products Marketing Board if that amendment be held to be *intra vires*. On such a reference one cannot envisage all possible circumstances which might arise and it must also be taken that it is established that it is not to be presumed that a Provincial Legislature intended to exceed its legislative jurisdiction under the *British North America Act*, although the Court may, on what it considers the proper construction of a given enactment, determine that the Legislature has gone beyond its authority.

Subsequent to the date of the order of reference, the Act was amended by c. 20 of the statutes of 1956, which came into force the day it received Royal Assent, s. 1 of which reads as follows:

> 1. *The Farm Products Marketing Act* is amended by adding thereto the following section:
>
> 1*a*. The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the marketing within the Province of farm products including the prohibition of such marketing in whole or in part.

Without entering into a discussion as to what is a declaratory law, since the term may have different connotations depending upon the matter under review, it is arguable that, for present purposes, this amendment should be read as part of *The Farm Products Marketing Act*, but, in any event, the first question submitted to us directs us to assume that that Act as amended down to the date of the reference applies only in the case of "intra-provincial transactions". This term means "existing or occurring within a

province"; see Shorter Oxford English Dictionary, including "intraparochial" as an example under the word "intra". As will appear later, the word "marketing" is defined in the Act, but, in accordance with what has already been stated, I take it as being confined to marketing within the Province.

Question 1 is as follows:

> 1. Assuming that the said Act applies only in the case of intra-provincial transactions, is clause (*l*) of subsection 1 of section 3 of *The Farm Products Marketing Act*, R.S.O. 1950 chapter 131 as amended by Ontario Statutes 1951, chapter 25, 1953, chapter 36, 1954, chapter 29, 1955, chapter 21, *ultra vires* the Ontario Legislature?

Clause (*l*) of subs. (1) of s. 3 referred to, as re-enacted by 1955, c. 21, s. 2, provides:

> 3. (1) The Board may, . . .
>
> (*l*) authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

For a proper understanding of the terms used in this clause and of the provisions of the Act it is necessary to refer to what is proposed by the latter.

The Board is the Farm Products Marketing Board and " 'farm products' includes animals, meats, eggs, poultry, wool, dairy products, grains, seeds, fruit, fruit products, vegetables, vegetable products, maple products, honey, tobacco and such articles of food or drink manufactured or derived in whole or in part from any such product and such other natural products of agriculture as may be designated by the regulations" (s. 1(*b*)). " 'Regulated product' means a farm product in respect of which a scheme is in force" (s. 1(*g*)). Provision is made for the formulation of a scheme for the marketing or regulating of any farm product upon the petition of at least 10 per cent. of all producers engaged in the production of the farm product in Ontario, or in that part thereof to which the proposed scheme is to apply. " 'Marketing' means buying, selling and offering for sale and includes advertising, assembling, financing, packing and shipping for sale or storage and transporting in any manner

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Kerwin C.J.

by any person, and 'market' and 'marketed' have corresponding meanings" (s. 1(*e*), as re-enacted by 1955, c. 21, s. 1). The scheme may provide for a "marketing agency" designated by the Board in its regulations. Once the scheme is approved by the Board the latter's regulations will apply according to the farm products dealt with thereby.

It seems plain that the Province may regulate a transaction of sale and purchase in Ontario between a resident of the Province and one who resides outside its limits; that is, if an individual in Quebec comes to Ontario and there buys a hog, or vegetables, or peaches, the mere fact that he has the intention to take them from Ontario to Quebec does not deprive the Legislature of its power to regulate the transaction, as is evidenced by such enactments as *The Sale of Goods Act,* R.S.O. 1950, c. 345. That is a matter of the regulation of contracts and not of trade as trade and in that respect the intention of the purchaser is immaterial. However, if the hog be sold to a packing plant or the vegetables or peaches to a cannery, the products of those establishments in the course of trade may be dealt with by the Legislature or by Parliament depending, on the one hand, upon whether all the products are sold or intended for sale within the Province or, on the other, whether some of them are sold or intended for sale beyond Provincial limits. It is, I think, impossible to fix any minimum proportion of such last-mentioned sales or intended sales as determining the jurisdiction of Parliament. This applies to the sale by the original owner. Once a statute aims at "regulation of trade in matters of inter-provincial concern" (*The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons* (1)), it is beyond the competence of a Provincial Legislature. The ambit of head 2 of s. 91 of the *British North America Act,* "The Regulation of Trade and Commerce" has been considerably enlarged by decisions of the Judicial Committee and expressions used in some of its earlier judgments must be read in the light of its later pronouncements, as is pointed out by Sir Lyman Duff in *Re Alberta Statutes* (2). In fact, his judgment in *Re The*

(1) (1881), 7 App. Cas. 96 at 113.

(2) [1938] S.C.R. 100 at 121, [1938] 2 D.L.R. 81, affirmed *sub nom. Attorney-General for Alberta v. Attorney-General for Canada et al.,* [1939] A.C. 117, [1939] 4 D.L.R. 433, [1939] 3 W.W.R. 337.

Natural Products Marketing Act, 1934 (1), which is justly considered as the *locus classicus,* must be read in conjunction with and subject to his remarks in the later case. The concept of trade and commerce, the regulation of which is confided to Parliament, is entirely separate and distinct from the regulation of mere sale and purchase agreements. Once an article enters into the flow of interprovincial or external trade, the subject-matter and all its attendant circumstances cease to be a mere matter of local concern. No change has taken place in the theory underlying the construction of the *British North America Act* that what is not within the legislative jurisdiction of Parliament must be within that of the Provincial Legislatures. This, of course, still leaves the question as to how far either may proceed, and, as Lord Atkin pointed out in the *Natural Products Marketing Act* case, *supra,* at p. 389, neither party may leave its own sphere and encroach upon that of another.

Mr. Robinette suggested that there was an inconsistency between the judgment of Mr. Justice Duff in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (2), and his judgment in *The King v. Eastern Terminal Elevator Company* (3). However, all that was decided in the latter case was that Parliament had exceeded its jurisdiction while in the former it was held that the British Columbia statute under review was *ultra vires.*

It was contended by Mr. Pepper that the *Combines Investigation Act,* R.S.C. 1952, c. 314, and ss. 411 and 412 of the *Criminal Code,* 1953-54 (Can.), c. 51, and the *Agricultural Prices Support Act,* R.S.C. 1952, c. 3, are relevant and prevent the Ontario Legislature from enacting clause (*l*) of subs. (1) of s. 3 of *The Farm Products Marketing Act* and therefore the administrative agencies provided for by that Act, from operating. The point is determined against that contention as to the *Combines Investigation Act* by the decision of this Court in *Ontario Boys' Wear*

(1) [1936] S.C.R. 398, [1936] 3 D.L.R. 622, 66 C.C.C. 180, affirmed *sub nom Attorney-General for British Columbia v. Attorney-General for Canada et al.,* [1937] A.C. 377, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.

(2) [1931] S.C.R. 357, [1931] 2 D.L.R. 193.

(3) [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Kerwin C.J.

Limited et al. v. The Advisory Committee et al. (1). With respect to that Act and also to the sections of the *Criminal Code* referred to, it cannot be said that any scheme otherwise within the authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province. The *Agricultural Prices Support Act* and in fact all Acts of Canada of a similar nature contain merely provisions for the assistance of agriculture. A final argument was advanced to the effect that the legislation conflicted with s. 25 of the *Live Stock and Live Stock Products Act*, R.S.C. 1952, c. 167, which reads:

> 25. Notwithstanding anything in this Part, any farmer or drover may sell his own live stock at a stockyard on his own account.

This is merely a provision in ease of the other sections of that particular Act.

In view of the wording of question 1, I take clause (*l*) of subs. (1) of s. 3 of *The Farm Products Marketing Act* as being a successful endeavour on the part of the Ontario Legislature to fulfil its part while still keeping within the ambit of its powers. On the assumption directed to be made and reading the clause so as not to apply to transactions which I have indicated would be of a class beyond the powers of the Legislature, my answer to the first question is "No".

Question 2 asks whether a certain regulation as amended respecting the marketing of hogs is *ultra vires* the Lieutenant-Governor in Council. The order in council was made in pursuance of the statute and, as the wording may be construed as contemplating only local trade, the objection, in view of what has already been stated, is without foundation. Nor can I agree (a) that the scheme does not contain substantive terms and therefore is really not a scheme at all; (b) that it is necessary that there should be prior approval by the producers.

I assume that the regulation of the Farm Products Marketing Board referred to in question 3 deals only with the control of the sale of hogs for consumption within the Prov-

(1) [1944] S.C.R. 349, [1944] 4 D.L.R. 273, 82 C.C.C. 129.

ince, or to packing plants or other processors whose products will be consumed therein. The provision for licensing is not *ultra vires* and a company incorporated by letters patent under the *Companies Act* of Canada, with power to carry on the business of a packing plant throughout the nation, is bound to comply with a general licensing law.

My answer to question 4 is that the order of The Ontario Hog Producers' Marketing Board fixing the service charges to be imposed by the marketing agency is not *ultra vires* the Board, as the matter is covered by the decision of the Privy Council in *Shannon et al. v. Lower Mainland Dairy Products Board* (1). For the same reason, I think similar answers must be given to questions 5 and 6, the first relating to the marketing of peaches for processing and the latter to the marketing of vegetables for processing.

As to questions 7 and 8, I agree with the reasons of my brother Rand.

My answers to the questions are as follows:

Question 1: On the assumption that the Act is restricted to intraprovincial transactions as defined in these reasons, the answer is No.

Question 2: No.

Question 3: Assuming that the Regulation deals only with the control of the sale of hogs for consumption within the Province, or to packing plants or other processors whose products will be consumed therein, the answer is No.

Question 4: No.

Question 5: No.

Question 6: No.

Question 7: On the interpretation given to the proposed amendment the answer is No.

Question 8: No.

TASCHEREAU J. agrees in the answers of Fauteux and Abbott JJ.

RAND J.:—This reference raises questions going to the scope of Provincial authority over trade. They arise out of *The Farm Products Marketing Act,* R.S.O. 1950, c. 131, as amended, which deals comprehensively with the matter

(1) [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Rand J.

connoted by its name and out of certain schemes formed under it. Its object is to accord primary producers of farm products the advantages of various degrees of controlled marketing, for which it provides provincial and local machinery.

General jurisdiction over its administration is exercised by the Farm Products Marketing Board; regulation is by way of schemes for the marketing of any product; under a scheme, a local board, district committees and county groups are organized; and the marketing may be carried out exclusively by an agency designated by the Board upon the recommendation of the local board.

The questions put, which assume the Act to be limited in application to local trade, call for answers which make it necessary to examine and define the scope of local trade to the extent of the regulation provided. The enquiry must take into account regulatory power over acts and transactions which while objectively appearing to be consummated within the Province may involve or possess an interest of interprovincial or foreign trade, which for convenience I shall refer to as external trade.

The products embraced include

> animals, meats, eggs, poultry, wool, dairy products, grains, seeds, fruit, fruit products, vegetables, vegetable products . . . and . . . articles of food or drink manufactured or derived in whole or in part from any such product.

"Marketing" means buying, selling, assembling, packing, shipping for sale or storage and transporting in any manner by any person. The marketing board may establish negotiating agencies which may adopt or determine by agreement minimum prices and other features of marketing, and prohibit the marketing of any class, variety, grade or size of a product. It may require a licence to be taken out by every person for producing, marketing or processing a product with fees payable at various times and in different amounts. The Board may authorize an agency to control the times and places for marketing, the quantity, grade, class and price of products to be marketed, and to exercise other powers conferred by the statute on the Board.

Although not specifically mentioned in s. 92 of the *British North America Act,* there is admittedly a field of trade within provincial power, and the head or heads of s. 92 from

which it is to be deduced will be considered later. The power is a subtraction from the scope of the language conferring on the Dominion by head 2 of s. 91 exclusive authority to make laws in relation to the regulation of trade and commerce, and was derived under an interpretation of the Act which was found necessary

> in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess

(*per* Duff J. in *Lawson v. Interior Tree, Fruit and Vegetable Committee of Direction* (1)). In examining the legislation for the purpose mentioned we should bear in mind Lord Atkin's admonition in *Attorney-General for British Columbia v. Attorney-General for Canada et al.* (2), that

> the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

The definitive statement of the scope of Dominion and Provincial jurisdiction was made by Duff C.J. in *Re The Natural Products Marketing Act, 1934* (3). The regulation of particular trades confined to the Province lies exclusively with the Legislature subject, it may be, to Dominion general regulation affecting all trade, and to such incidental intrusion by the Dominion as may be necessary to prevent the defeat of Dominion regulation; interprovincial and foreign trade are correspondingly the exclusive concern of Parliament. That statement is to be read with the judgment of this Court in *The King v. Eastern Terminal Elevator Company* (4), approved by the Judicial Committee in *Attorney-General for British Columbia v. Attorney-General for Canada, supra,* at p. 387, to the effect that Dominion regulation cannot embrace local trade merely because in undifferentiated subject-matter the external interest is dominant. But neither the original statement nor its approval furnishes a clear guide to the demarcation of the

(1) [1931] S.C.R. 357 at 366, [1931] 2 D.L.R. 193.

(2) [1937] A.C. 377 at 389, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.

(3) [1936] S.C.R. 398 at 414 *et seq.*, [1936] 3 D.L.R. 622, 66 C.C.C. 180, affirmed *sub nom. Attorney-General for British Columbia v. Attorney-General for Canada et al., supra.*

(4) [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Rand J.

two classes when we approach as here the origination, the first stages of trade, including certain aspects of manufacture and production.

That demarcation must observe this rule, that if in a trade activity, including manufacture or production, there is involved a matter of extraprovincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond Provincial power. This is exemplified in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, supra,* where the Province purported to regulate the time and quantity of shipment, the shippers, the price and the transportation of fruit and vegetables in both unsegregated and segregated local and interprovincial trade movements.

A producer is entitled to dispose of his products beyond the Province without reference to a provincial marketing agency or price, shipping or other trade regulation; and an outside purchaser is entitled with equal freedom to purchase and export. Processing is one of a number of trade services that may be given products in the course of reaching the consumer: milling (as of grain or lumber), sorting, packing, slaughtering, dressing, storing, transporting, etc. The producer or purchaser may desire to process the product either within or beyond the Province and if he engages for that with a local undertaking (using that expression in a non-technical sense), such as a packing plant—and it would apply to any sort of servicing—he takes that service as he finds it but free from such Provincial impositions as are strictly trade regulations such as prices or the specification of standards, which could no more be imposed than Provincial trade marks. Regulation of that nature could directly nullify external trade vital to the economy of the country. Trade arrangements reaching the dimensions of world agreements are now a commonplace; interprovincial trade, in which the Dominion is a single market, is of similar importance, and equally vital to the economic functioning of the country as a whole. The Dominion power implies responsibility for promoting and maintaining the vigour and growth of trade beyond Provincial confines, and the discharge of this duty must remain unembarrassed by local trade impediments. If the processing is restricted to external trade, it becomes an instrumentality of that trade

and its single control as to prices, movements, standards, etc., by the Dominion follows: *Re The Industrial Relations and Disputes Investigation Act* (1). The licensing of processing plants by the Province as a trade regulation is thus limited to their operations in local trade. Likewise the licensing of shippers, whether producers or purchasers, and the fixing of the terms and conditions of shipment, including prices, as trade regulation, where the goods are destined beyond the Province, would be beyond Provincial power.

Local trade has in some cases been classed as a matter of property and civil rights and related to head 13 of s. 92, and the propriety of that allocation was questioned. The production and exchange of goods as an economic activity does not take place by virtue of positive law or civil right; it is assumed as part of the residual free activity of men upon or around which law is imposed. It has an identity of its own recognized by head 2 of s. 91. I cannot agree that its regulation under that head was intended as a species of matter under head 13 from which by the language of s. 91 it has been withdrawn. It happened that in *The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons* (2), assuming insurance to be a trade, the commodity being dealt in was the making of contracts, and their relation to head 13 seemed obvious. But the true conception of trade (in contradistinction to the static nature of rights, civil or property) is that of a dynamic, the creation and flow of goods from production to consumption or utilization, as an individualized activity.

The conclusive answer to the question is furnished by a consideration of s. 94 which provides for the uniformity in Ontario, New Brunswick and Nova Scotia of "all or any of the laws relative to property and civil rights". It is, I think, quite impossible to include within this provision regulation of local trades; that appears to be one feature of the internal economy of each Province in which no such uniformity could ever be expected. What the language is directed to are laws relating to civil status and capacity, contracts, torts and real and personal property in the common law Provinces, jural constructs springing from the

(1) [1955] S.C.R. 529, [1955] 3 D.L.R. 721. (2) (1881), 7 App. Cas. 96.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Rand J.

same roots, already more or less uniform, and lending themselves to more or less permanence. In some degree uniformity has been achieved by individual Provincial action in such legislation, for instance, as that of contributory negligence.

Head 16 contains what may be called the residuary power of the Province: *Attorney-General for Ontario v. Attorney-General for the Dominion et al.* (1), and it is within that residue that the autonomy of the Province in local matters, so far as it might be affected by trade regulation, is to be preserved. As was recognized in the *Parsons* case, *supra,* this points up the underlying division of the matters of legislation into those which are primarily of national and those of local import. But this is not intended to derogate from regulation as well as taxation of local trade through licence under head 9 of s. 92, nor from its support under head 13.

It is important to keep in mind, as already observed, that the broad language of head 2 of s. 91 has been curtailed not by any express language of the statute but as a necessary implication of the fundamental division of powers effected by it. The interpretation of this head has undergone a transformation. When it was first considered by this Court in *Severn v. The Queen* (2) and *The City of Fredericton v. The Queen* (3), the majority views did not envisage the limitation now established; that was introduced by the judgment in the *Parsons* case, *supra.* The nadir of its scope was reached in what seemed its restriction to a function ancillary to other Dominion powers; but that view has been irretrievably scotched.

The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function

(1) [1896] A.C. 348 at 365. (2) (1878), 2 S.C.R. 70.
(3) (1880), 3 S.C.R. 505.

inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.

The reaches of trade may extend to aspects of manufacture. In *Attorney-General for Ontario v. Attorney-General for the Dominion et al., supra,* the Judicial Committee dealt with the question whether the Province could prohibit the manufacture within the Province of intoxicating liquor, to which the answer was given that, in the absence of conflicting legislation of Parliament, there would be jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the Province. This involves a limitation of the power of the Province to interdict, as a trade matter, the manufacture or production of articles destined for external trade. Admittedly, however, local regulation may affect that trade: wages, workmen's compensation, insurance, taxes and other items that furnish what may be called the local conditions underlying economic activity leading to trade.

The federal character of our constitution places limits on legislative acts in relation to matters which as an entirety span, so to speak, the boundary between the two jurisdictions. In *The King v. Eastern Terminal Elevator Company, supra,* for example, there was a common storage of grain destined both to local and external trade. The situation in *City of Montreal v. Montreal Street Railway* (1) was equally striking: there Parliament was held incapable of imposing through rates over a local railway on traffic passing between points on that line and points on a connecting Dominion railway; the only regulation open was declared to be parallel action by Legislature and Parliament, each operating only on its own instrumentality. Although by that means the substantial equivalent of a single administration may be attained, there is a constitutional difference between that co-operating action and action by an overriding jurisdiction.

(1) [1912] A.C. 333, 1 D.L.R. 681, 13 C.R.C. 541.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Rand J.

It follows that trade regulation by a Province or the Dominion, acting alone, related to local or external trade respectively, before the segregation of products or manufactures of each class is reached, is impracticable, with the only effective means open, apart from conditional regulation, being that of co-operative action; this, as in some situations already in effect, may take the form of a single board to administer regulations of both on agreed measures.

On the foregoing interpretation of the scope of Provincial regulation of trade, the questions put to us may now be considered.

Three of them go to the validity of two provisions of the Act, s. 3(1)(*l*), authorizing the marketing of a product by means of a pool, and a proposed amendment, para. (*ss*), to s. 7(1) authorizing the purchase of the surplus of a regulated product and its marketing and the use of licence fees to recoup any loss suffered. The remaining five questions go to regulations made in one case by the Lieutenant-Governor in council, in three cases by the Farm Products Marketing Board, and in one by The Ontario Hog Producers' Marketing Board.

Clause (*l*) of subs. (1) of s. 3 of the statute reads:

> The Board may, . . .
> authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

Co-operative disposal may take different forms: it may be that of an exclusive local marketing by an agency, either as owner or agent, by which the products are disposed of and the returns equalized, a form, I should say, within the authority of the Province; or, in the interest of convenience and economy, the producers, as contemplated by the Act here, would make their own sales with all moneys made returnable to the agency, for the recovery of which it may bring suit, and by it equalized and distributed. Since prices can be fixed by the agency, at the point of collecting them the result in both forms becomes the same, and I cannot

see any jurisdictional difference between the equalization in the two cases. The exclusion of such an ordinary device of co-operative marketing from Provincial power would be a curtailment which I cannot think warranted. As it appears elsewhere in these reasons, indirect taxation is not, under a licensing scheme, a disqualifying factor and in co-operative marketing the essential condition of indirect taxation, the general tendency to pass the tax on to another, is excluded.

Question 7 deals with marketing the surplus of a regulated product. I take "surplus", as determined, to be what remains in the hands of producers after the local market is satisfied. Subclauses (i), (ii), (iii) and (v) of the proposed s. 7(1)(*ss*) deal exclusively with a "surplus"; (iv) and (vi) do not expressly mention it, but in the context I am unable to interpret the language as applying to any other subject. Subclause (ii) authorizes purchase by the local board from a voluntary seller; there is no compulsion on either. The clause as a whole sets up a separate feature of regulation which would extend to disposal in external trade. But the producer remains free to enter that trade as he pleases; if he elects to sell to the marketing agency, he does so under the terms of the statute as a matter of agreement; and the provision for a licence fee and its application to the purposes mentioned are valid as contractual compensation for services. Any dealing with the product by the local board or others in external trade would obviously be subject to Dominion regulation.

Question 8 I take to ask this: Could the Farm Products Marketing Board, under the proposed amendment, impose fees on *all producers* of the regulated product destined to the local market to equalize the returns received for the *surplus* with those received for the product generally, that is, can the surplus be gathered in with that marketed locally and the whole equalized in returns? It would be adding the returns from the surplus to the equalization under clause (*l*) dealt with in question 1. That could not be done because the amendment is confined to dealings with the surplus; nor could it be done by an independent provision because, under the machinery of regulation provided, it

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Rand J.

would be within the decision in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited* (1).

On question 2 it is contended that the hog scheme is defective because only a skeleton of machinery is provided, that it does not contain substantive terms without which it is not a scheme at all. What the vote taken under s. 4 of the statute is intended to decide is whether or not the product shall be brought under a scheme; and the initial creation of its formal structure appears to be the intendment of the statute. Its approval by the Lieutenant-Governor in council and the regulations made by the Farm Products Marketing Board furnish its content, similarly envisaged by the statute. The schedule, by its heading, relates the scheme to the Act; and as the language is capable of being confined to local trade it should, in the context, be so construed.

Question 3 deals with an order of the Farm Products Marketing Board providing by s. 2 that no processor shall commence or continue in the business of processing except under the authority of a licence which the Board may, for any reason deemed by it sufficient, refuse; and by s. 4 prohibiting any person from engaging as a shipper without a licence which a local board may revoke or refuse to renew for failure to observe any order or regulation. This extends to processors or shippers engaged partly or exclusively in external trade. These are trade-regulating licences and not for revenue purposes only; and since there is nothing in the regulation to restrict the ordinary meaning of its language, reaching as it does beyond the limits of the statute itself, it is likewise beyond the power of the Farm Products Marketing Board to make.

Section 6 provides for the appointment of a marketing agency through which "all hogs" shall be marketed. This exceeds the authority given the Board. Paragraphs (c) and (*d*) of s. 8 authorize the imposition of "such service charges as may from time to time be fixed by the local board" and their payment to the local board by the marketing agency. The fees are to be applied to the expenses of administration.

(1) [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.

This was challenged as involving indirect taxation, a point taken on questions 4, 5 and 6 as well, and these objections will now be examined together.

Under the hog producers' scheme, the charges are fixed "at the sum of 24¢ per hog and a pro rating charge in the sum of 20¢ per producer settlement statement". The scheme for marketing peaches fixes a licence fee at 50¢ for each ton or fraction of a ton of peaches delivered to a processor by a grower; and by the vegetable processing scheme at the rate of ½ of 1 per cent. of the total sale-price due a grower for each ton or fraction of a ton of vegetables delivered to a processor.

On these questions two judgments of the Judicial Committee must be noticed: *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited, supra,* and *Shannon et al. v. Lower Mainland Dairy Products Board* (1). In the former the Judicial Committee passed upon legislation of British Columbia which purported to authorize a special exaction from all milk producers in a district proportioned to the quantity of fluid milk sold by them for the purpose of raising a fund to be distributed among the producers whose production was converted into milk products, with a view to equalizing the returns from milk production generally and of bringing about the advantageous distribution of these two classes of commodities. The Committee viewed the issue to be whether the Province, by the means provided, could take money from one group in order to enrich the other, and held the impost invalid as indirect taxation. A similar view was taken of the recovery on the same basis of the expenses of the committee in administering the Act.

The reasons of Lord Thankerton contain no reference to trade regulation: the statute is dealt with as one providing taxation to enable an equalization of price return. The impingement of the tax, related as it was to the volume of products marketed, undoubtedly bore the badge ordinarily held to mark indirect taxation.

(1) [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Rand J.

In contrast to this was the formulation of the issue in *Shannon*. At p. 721 Lord Atkin sums it up:

> If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, *i.e.*, by a system of licences, must also be admissible.

There the administering board was empowered, as here, to control generally the marketing of the regulated product, including the time for marketing, the quantities to be offered by any producer, prohibition of the marketing of any grade, quality or class, the fixing of prices, and marketing through a licensed shipper. Finally there was the authority to collect fees:

> 4A(*d*) to fix and collect yearly, half-yearly, quarterly, or monthly licence fees from any or all persons producing, packing, transporting, storing, or marketing the regulated product; and for this purpose to classify such persons into groups, and fix the licence fees payable by the members of the different groups in different amounts; and to recover any such licence fees by suit in any court of competent jurisdiction. . . .
>
> (*j*) To use in carrying out the purposes of the scheme and paying the expenses of the board any moneys received by the board.

On the contention that this was indirect taxation within s. 92(2), Lord Atkin said at p. 721:

> Without deciding the matter either way, they [their Lordships] can see difficulties in holding this to be direct taxation within the Province. But on the other grounds the legislation can be supported.

The other grounds were heads 9, 13 and 16 of s. 92.

Passing to the licence fees he remarked:

> A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes.

Duff J. in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, supra,* had dealt with such licences and at p. 364 had said:

> On the other hand, the last mentioned head authorizes licences for the purpose of raising a revenue, and does not, I think, contemplate licences which, in their primary function, are instrumentalities for the control of trade—even local or provincial trade.

On this Lord Atkin commented:

> It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern

licences to say that the regulation of the trade was not at least as important as the provision of revenue. And, if licences for the specified trades are valid, their Lordships see no reason why the words "other licences" in s. 92(9) should not be sufficient to support the enactment in question.

It is pertinent to recall that in *Russell v. The Queen* (1), Sir Montague E. Smith answers the argument there made that the legislation challenged came under s. 92(9):

> With regard to the first of these clauses, No. 9, it is to be observed that the power of granting licenses is not assigned to the Provincial Legislatures for the purpose of regulating trade, but "in order to the raising of a revenue for provincial, local, or municipal purposes".

The language of Lord Atkin seems to involve the conclusion that fees incidental to Provincial regulation of trade by licence are to be considered without reference to the restriction of s. 92(2); and this appears to have been the opinion of Duff J. in *Lawson* where he says, at p. 364:

> and that accordingly imposts which would be classed under the general description "indirect taxation" are not for that reason alone excluded from those which may be exacted under head 9.

The power to regulate embraces incidental powers necessary to its effective exercise; and the exaction of fees to meet the expenses of such an administration as that of the schemes, regardless of their incidence, is within that necessity.

The fees in *Shannon* were justified on a second ground which supports and supplements the preceding considerations; that they were charges made for services rendered. That is the case here. What the producers receive are the benefits of a control that aims at an orderly marketing. The benefit of the organized apparatus is a service rendered by the scheme; and the fees related to either the quantity or the total return are directly proportioned to it.

Mr. Pepper argued that the regulation was in conflict with the provisions of the *Combines Investigation Act* and s. 411 of the *Criminal Code*, but with that I am unable to agree. The Provincial statute contemplates coercive regulation in which both private and public interests are taken into account. The provisions of the *Combines Investigation Act* and the *Criminal Code* envisage voluntary combinations or agreements by individuals against the public

(1) (1882), 7 App. Cas. 829 at 837.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Rand J.

interest that violate their prohibitions. The public interest in trade regulation is not within the purview of Parliament as an object against which its enactments are directed.

Another conflict was suggested with s. 25 of the *Live Stock and Live Stock Products Act*, R.S.C. 1952, c. 167, which provides:

> 25. Notwithstanding anything in this Part, any farmer or drover may sell his own live stock at a stockyard on his own account.

This simply enables a farmer or drover to sell at the stockyard notwithstanding the provisions of that Act; it does not purport to give an absolute right as against other enactments, which if it did it might, as an attempt to control local trade, be so far invalid.

On the assumption that the Act is restricted to intra-provincial transactions as defined in these reasons, I therefore answer the questions put as follows:

Question 1: No.

Question 2: No.

Question 3: Yes, as indicated.

Question 4: No.

Question 5: No.

Question 6: No.

Question 7: On the interpretation given to the proposed amendment, no.

Question 8: No.

LOCKE J.:—The order of reference made in this matter by His Excellency the Governor General in council, after reciting that questions have arisen respecting the constitutional validity of certain sections of *The Farm Products Marketing Act*, R.S.O. 1950, c. 131, as amended, and the schemes, regulations and orders passed pursuant thereto, and that the Government of the Province of Ontario has requested that certain legislation, schemes, regulations and orders be referred to this Court for hearing and consideration, reads:

> AND WHEREAS the Minister of Agriculture for Ontario advises: that under The Farm Products Marketing Act of Ontario there are at present in operation 14 marketing schemes covering 21 farm products; that the various schemes are financed by the methods indicated in the questions set out hereunder; that the marketing agency referred to in question number 4 is a co-operative corporation incorporated under Part V of The Corporations Act of Ontario 1953, c. 19, and that the by-laws of the marketing agency provide that any surplus of service charges after providing

for reserves shall be allocated, credited or paid to those marketing hogs through the agency computed at a rate in relation to the value of the hogs marketed for such person; that in connection with question number 5 one ton of peaches makes 144 dozen 20 ounce cans of peaches or 1728 cans;

THEREFORE His Excellency the Governor General in Council, under and by virtue of the authority conferred by section 55 of the Supreme Court Act, is pleased to refer and doth hereby refer to the Supreme Court of Canada for hearing and consideration, the following questions:

1. Assuming that the said Act applies only in the case of intra-provincial transactions, is clause (*l*) of subsection 1 of section 3 of The Farm Products Marketing Act, R.S.O. 1950 chapter 131 as amended by Ontario Statutes 1951, chapter 25, 1953, chapter 36, 1954, chapter 29, 1955, chapter 21 *ultra vires* the Ontario Legislature?

2. Is Regulation 104 of Consolidated Regulations of Ontario 1950 as amended by O.Reg.100/55 and O.Reg.104/55 respecting the marketing of hogs, *ultra vires* the Lieutenant Governor in Council either in whole or in part and if so in what particular or particulars and to what extent?

3. Is Ontario Regulation 102/55 respecting the marketing of hogs, *ultra vires* the Farm Products Marketing Board either in whole or in part and if so in what particular or particulars and to what extent?

4. Is the Order dated the 8th day of June, 1955, made by The Ontario Hog Producers Marketing Board fixing the service charges to be imposed by the marketing agency, *ultra vires* the said Board?

5. Is regulation 7 of Ontario Reg.145/54 respecting the marketing of peaches for processing, *ultra vires* the Farm Products Marketing Board?

6. Is regulation 5 of Ontario Reg.126/52 respecting the marketing of vegetables for processing, *ultra vires* the Farm Products Marketing Board?

7. Is the following draft amendment to subsection (1) of Section 7 of The Farm Products Marketing Act, *ultra vires* the Ontario Legislature either in whole or in part and if so in what particular or particulars and to what extent?

"Subsection (1) of Section 7 of The Farm Products Marketing Act as amended by Section 4 of The Farm Products Marketing Amendment Act, 1951, Section 6 of The Farm Products Marketing Amendment Act, 1954 and Section 7 of The Farm Products Marketing Act, 1955 is amended by adding thereto the following paragraph:

(ss) authorizing a local board.

(i) to inquire into and determine the amount of surplus of a regulated product,

(ii) to purchase or otherwise acquire the whole or such part of such surplus of a regulated product as the marketing agency may determine,

(iii) to market any surplus of a regulated product so purchased or acquired,

(iv) to require processors who receive the regulated product from producers to deduct from the moneys payable to the producers any licence fees payable by the producer to the local board and to remit such licence fees to the local board,

(v) to use such licence fees to pay the expenses of the local board and the losses, if any, incurred in the marketing of the surplus of the regulated product and to set aside reserves against possible losses in marketing the surplus of the regulated product,

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

(vi) to use such licence fees to equalize or adjust returns received by producers of the regulated product."

8. If the answer to question No. 7 is in the negative, could the Farm Products Marketing Board under the proposed amendment, authorize the local board to impose licence fees on all producers in the Province of the regulated product based upon the volume of the product marketed and to use such licence fees to equalize or adjust returns to the producers?

After the order in council was made, the Legislature of Ontario, by c. 20 of the statutes of 1956, assented to on March 28, 1956, amended the Act in question by the addition of the following:

1*a*. The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the marketing within the Province of farm products, including the prohibition of such marketing in whole or in part.

The case in this matter contains a copy of an order in council made on November 16, 1955, under the provisions of the *Agricultural Products Marketing Act,* R.S.C. 1952, c. 6, whereby certain powers were vested in the Ontario Farm Products Marketing Board, The Ontario Hog Producers' Marketing Board and the Ontario Hog Producers Co-operative, in relation to the marketing of hogs and other products. Since, however, this order is not retrospective in its operation and all of the orders and regulations referred to in questions 2 to 6 inclusive were made prior to its date, they can derive no support from it and must depend for their validity entirely upon the provisions of *The Farm Products Marketing Act* as amended.

It should be said at the outset that no useful answer can be made to questions 1, 3 and 4 in the absence of some further explanation of what is meant by "intra-provincial transactions" other than that which is to be found in the amendment to the statute made in 1956. This merely says that the purpose and intent of the Act is to provide for the control and regulation of the marketing within the Province of farm products, including the prohibition of such marketing in whole or in part.

"Intra" means within but none of the learned counsel supporting the legislation and the regulations contend that the Legislature is competent to prohibit the marketing of live hogs or other farm products for export. An agreement made in Carleton County between a farmer residing there and a buyer for a packing company operating in Hull,

Quebec, is an intraprovincial transaction since it is initiated and completed when the sale is agreed upon and the hog delivered. The farmer is not exporting the hog and it is presumably a matter of indifference to him whether the buyer exports the hog, whether alive or dead, to the Province of Quebec. Yet this transaction would be prohibited if the language of the statute and of the regulation is to be construed literally.

However ineffective the language of the 1956 amendment may be to exclude from the operation of the Act transactions of very great importance and with very wide ramifications which the Province is powerless to regulate (and I think it is quite insufficient), the questions should, in my opinion, be dealt with on the footing that, regardless of the language employed, it was the intention of the Legislature to confine its operation to matters within its own competence. However this procedure may depart from the rules of law applicable to the construction of statutes, this is a reference and, in view of the language of the first question, it is the duty of this Court to endeavour to answer the questions on that basis.

While it is my conclusion that what *The Farm Products Marketing Act* authorizes and what the various boards constituted under its provisions have attempted to do include matters wholly within the jurisdiction of Parliament, all of the necessary powers may be vested in these boards by separate action taken in unison under Dominion and Provincial powers and, in answering the questions, I propose to express my opinion as to the respective limits of the jurisdiction of these legislative bodies in matters of this kind, so far as they may be relevant to the matters for consideration.

The main question that has arisen for determination in these matters has been as to the jurisdiction of Parliament under head 2 of s. 91 and that of the Provinces under heads 13 and 16 of s. 92 of the *British North America Act*. A succession of attempts has been made by various Provincial Legislatures and one by Parliament to regulate and control the sale of natural products and, before attempting to answer the questions, it is of some assistance to consider the principal cases in which the respective powers of the legislative bodies under these heads have been considered.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Locke J.

In *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1), the *Produce Marketing Act* of British Columbia, being c. 54 of the statutes of 1926-27, was considered by this Court. The proceedings were initiated by an action and evidence was given as to the activities of the committee of direction constituted under the statute, which showed that the committee interpreted its powers as enabling it, *inter alia,* to control the marketing and sale of fruit and vegetable products sold by growers and purchased by others for export from the Province or exported by the growers direct. The principal judgment delivered in this Court was written by Duff J. (as he then was).

Section 10 of the British Columbia Act purported to vest in the Committee power, "so far as the legislative authority of the Province extends", of controlling and regulating the marketing and shipment of natural products and the fixing of prices, very similar to, though not identical with, those authorized to be exercised by a marketing agency by s. 7 of the Ontario Act. The following passage from the reasons for judgment is to be considered (pp. 364-5):

> As I have said, the respondent Committee has attempted (in professed exercise of this authority) and in this litigation asserts its right to do so—to regulate the marketing of products into parts of Canada outside British Columbia. It claims the right under the statute to control (as in fact it does), the sale of such products for shipment into the prairie provinces as well as the shipment of them into those provinces for sale or storage. The moment his product reaches a state in which it becomes a possible article of commerce, the shipper is (under the Committee's interpretation of its powers), subject to the Committee's dictation as to the quantity of it which he may dispose of, as to the places from which, and the places to which he may ship, as to the route of transport, as to the price, as to all the terms of sale. I ought to refer also to the provision of the statute which prohibits anybody becoming a licensed shipper who has not, for six months immediately preceding his application for a licence, been a resident of the province, unless he is the registered owner of the land on which he carries on business as shipper. In a statute which deals with trade that is largely interprovincial, this is a significant feature. It is an attempt to control the manner in which traders in other provinces, who send their agents into British Columbia to make arrangements for the shipment of goods to their principals, shall carry out their interprovincial transactions. I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not also directly and substantially the concern of the other provinces, which constitute in fact the most extensive market for these prod-

(1) [1931] S.C.R. 357, [1931] 2 D.L.R. 193.

ucts. In dictating the routes of shipment, the places to which shipment is to be made, the quantities allotted to each terminus *ad quem,* the Committee does, altogether apart from dictating the terms of contracts, exercise a large measure of direct and immediate control over the movement of trade in these commodities between British Columbia and the other provinces.

It may be noted further that the Act thus found to be invalid assumed to control products in their natural state, as shown by the definition in s. 2 of the Act. The Ontario legislation under consideration goes further in that it assumes to control not only a great variety of farm products but also "such articles of food or drink manufactured or derived in whole or in part from any such product".

The reasons delivered by Duff J. were concurred in by Rinfret and Lamont JJ. Newcombe J. agreed that the legislation was in reference to the regulation of trade and commerce, while reserving his opinion on other matters discussed. Cannon J., who concurred in the result, assigned other reasons for his conclusion that the legislation was invalid.

The remarks of Lord Atkin in *Shannon et al. v. Lower Mainland Dairy Products Board* (1), as to what had been said upon the subject of the licences authorized by the statute considered in *Lawson's Case,* do not affect this consideration.

In *Attorney-General for British Columbia v. Attorney-General for Canada et al.* (2), the *Natural Products Marketing Act, 1934,* of the Parliament of Canada, was held beyond the powers of Parliament by the Judicial Committee. The Dominion legislation was designed to regulate the sales of similar products to those referred to in the British Columbia Act. Lord Atkin by whom the judgment was delivered said (p. 386) that there could be no doubt that the provisions of the Act covered "transactions in any natural product which are completed within the Province, and have no connection with inter-provincial or export trade".

(1) [1938] A.C. 708 at 721, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.
(2) [1937] A.C. 377, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

The matter had been considered in this Court and a passage from the judgment of the Court delivered by Duff C.J. (1) was approved which read:

> The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority.

This appears to assist in explaining what Lord Atkin intended by the expression "transactions which are completed within the Province" in the earlier passage.

As in the case of the British Columbia legislation considered in *Lawson's Case,* s. 26 of the Act provided that if it should be found that any part of the Act was *ultra vires,* effect should be given to such parts as should be held to be within the powers of Parliament. It was held, however, that the whole texture of the Act was inextricably interwoven and that, as the main portion of the legislation was invalid as being in pith and in substance an encroachment upon provincial rights, the sections which were within the Dominion powers must fall as being in part merely ancillary to it.

In *Shannon v. Lower Mainland Dairy Products Board, supra,* the *Natural Products Marketing (British Columbia) Act, 1936,* as amended by c. 41 of the statutes of British Columbia in 1937, was held to be within Provincial powers.

The judgment of the Judicial Committee was again delivered by Lord Atkin. The definition of "marketing" did not differ materially from that in the statute considered in *Lawson's Case,* and the statute contained in subs. (1) of s. 4 a declaration to the same effect as that contained in the 1956 amendment to the Ontario Act. By the amendment of 1937 it was declared that the purpose and intent of the Legislature was to confine the provisions of the Act within the competence of the Legislature and that all the provisions thereof should be construed so as to give effect to this purpose and intent. The amendment further provided in some detail that should any part of the Act be held *ultra*

(1) [1936] S.C.R. 398 at 412, [1936] 3 D.L.R. 622, 66 C.C.C. 180 (*sub nom. Re Natural Products Marketing Act, 1934*).

vires this should not affect those portions which were within the powers of the Legislature, the intention being to give separate and independent effect to the extent of its powers to every provision of the Act.

The matter came before the Courts by way of reference by the Lieutenant-Governor in council. The trial judge had found the Act *ultra vires* but this was reversed in the Court of Appeal and the appeal was taken direct to the Judicial Committee. The report of the argument shows that it had been admitted on the part of the appellant that the purpose of the Act was to regulate the marketing of natural products only to the extent the jurisdiction of the Province extended. Dealing with the argument that the legislation encroached upon the power of Parliament under s. 91(2), Lord Atkin said that it was sufficient to say that:

> . . . it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province.

Later, he said that it was plain that the transportation which was controlled was "confined to the passage of goods whose transport begins within the Province to a destination also within the Province" and that the appellant did not dispute that it was the intention of the Legislature to confine itself to its own sphere and had not established that there had been any encroachment. Concluding his consideration of this aspect of the matter, he said:

> The pith and substance of this Act is that it is an Act to regulate particular businesses *entirely within the Province* and is, therefore, *intra vires* of the Province.

(The italics are mine.)

In my view, the Judicial Committee did not intend by the language above quoted to depart from what Lord Atkin had said in the Dominion *Marketing Act* case and its approval of the language of Duff C.J. in that case above quoted.

Some assistance may be found in the earlier cases upon the point. In *Hodge v. The Queen* (1), where the *Liquor License Act* of 1877 of Ontario was upheld, the power to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns was held not to interfere with the general regula-

(1) (1883), 9 App. Cas. 117.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

tion of trade and commerce vested in the Dominion. The Act was held to be "entirely local" in its character and operation.

In *Attorney-General for Ontario v. Attorney-General for the Dominion et al.* (1), where the validity of the *Canada Temperance Act,* 1886, was considered, Lord Watson said (p. 365), referring to the powers of the Provincial Legislature, that it was practically conceded that it must have power to deal with the restriction of the liquor traffic *from a local and provincial point of view.* As to the argument that s. 18 of the existing Ontario Act conflicted with the provisions of the Dominion Act, he said (p. 368):

> . . . the prohibitions which s. 18 authorizes municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario.

I do not find any other material assistance in the decided cases as to the extent of the powers of the Legislature to regulate trade other than that which is to be obtained from the cases in which the extent of the powers of Parliament under s. 91(2) has been declared.

In *The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons* (2), Sir Montague E. Smith, delivering the judgment of the Judicial Committee, after pointing out (p. 112) that the words "regulation of trade and commerce" in their unlimited sense were sufficiently wide to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, down to minute rules for regulating particular trades, and that a consideration of the Act showed that the word was not used in this unlimited sense, said that their Lordships did not attempt to define the limits of the authority. He said that the words would include political arrangements in regard to trade requiring the sanction of Parliament, *regulation of trade in matters of interprovincial concern,* and perhaps general regulation of trade affecting the whole Dominion.

While in *Bank of Toronto v. Lambe* (3), reference was made to the passage above referred to from *Parsons' Case,* Lord Hobhouse merely said that it had been there suggested

(1) [1896] A.C. 348. (2) (1881), 7 App. Cas. 96.
(3) (1887), 12 App. Cas. 575 at 586.

that the power of regulation given to the Parliament meant some general or interprovincial regulations, but no further attempt to define the subject need be made.

While the extent of the power was considered in two early cases in this Court: *Severn v. The Queen* (1) and *The City of Fredericton v. The Queen* (2), no attempt was there made to define the limits of the power.

What has been at times considered as a limitation of the power appears to have resulted from a passage in the judgment in *Parsons' Case* (p. 113) which says that the authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular trade or business such as the business of fire insurance in a single Province.

In *Attorney-General for Canada v. Attorney-General for Alberta et al.* (3), Viscount Haldane said that the power did not extend to legislate for "the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces".

In *In re The Board of Commerce Act, 1919,* and *The Combines and Fair Prices Act, 1919* (4), it appears to be stated somewhat more broadly (p. 198). There it is said that the authority of Parliament did not enable interference with particular trades in which Canadians would, apart from any right of interference conferred by the heading, be free to engage in the Provinces.

The result of the cases in the Judicial Committee appears to me to be most clearly summarized in the judgment of Lord Atkin in *Shannon's Case, supra,* where it is said (p. 719):

> It is now well settled that the enumeration in s. 91 of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Province.

The Farm Products Marketing Act continues in existence the Farm Products Marketing Board, a body corporate theretofore constituted, the members of which are

(1) (1878), 2 S.C.R. 70. (2) (1880), 3 S.C.R. 505.

(3) [1916] 1 A.C. 588 at 596, 26 D.L.R. 288, 10 W.W.R. 405, 25 Que. K.B. 187.

(4) [1922] 1 A.C. 191, 60 D.L.R. 513, [1922] 1 W.W.R. 20.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

appointed by the Lieutenant-Governor in council. Reference has been above made to the various farm products which the Board is given power to control. The extensive powers vested in the Board include power to establish negotiating agencies which may adopt or determine by agreement minimum prices for the regulated product, terms of purchase and sale, and conditions and forms of contract for the purchase and sale of such product; and, except where a marketing agency has been designated for the marketing of a regulated product to "prohibit the marketing of any class, variety, grade or size of any regulated product" and to authorize a marketing agency to conduct a pool of the nature referred to in the first question submitted.

The Board is, in addition, given power to make regulations with respect to any regulated product, including the prohibiting of persons from engaging in marketing or processing any such product except under the authority of a licence issued by the Board (s. 7(1)(*b*)), and "providing for the refusal to grant a licence for any reason which the Board or the local board may deem sufficient" (s. 7(1)(*c*)).

Other than in the manner in which this is attempted in the amendment made in 1956 above referred to, the statute does not limit the exercise of the powers which may be vested in the Board under its provisions to natural products marketed for consumption in the Province, but includes in its sweeping terms such products which might be sold for export or exported by a producer or one purchasing from him from the Province.

The first question is directed to clause (*l*) of subs. (1) of s. 3 of the Act. This authorizes the Board to

> authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

Construing the reference to intraprovincial transactions in the question and the words "control and regulation in any or all respects of the marketing within the Province of

farm products including the prohibition of such marketing in whole or in part" in the 1956 amendment, as referring to purchases and sales of the controlled product, whether hogs, fruit or vegetables in their natural form, for consumption in the Province, and sales to processors, manufacturers or dealers proposing to sell such products, either in their natural form or after they have been processed by canning, preserving or otherwise treating them, for consumption within the Province, I consider the clause to be within the powers of the Province.

Such transactions are, in my opinion, matters of a merely local or private nature in the Province within head 16 of s. 92, and such regulation is in relation to property and civil rights in the Province within head 13.

The pools authorized by clause (*l*) appear to be designed to obtain the most favourable prices for the producers as a whole by selling the regulated product through the medium of a marketing agency, a procedure which, it is apparently hoped, will result in better prices being realized for the crop as a whole than would otherwise be possible. I do not consider that the decision of the Judicial Committee in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited* (1) supports a contention that the authority to authorize the proposed pools is beyond Provincial powers. In my view, the fact that some of the producers might under such regulations receive less for their product than they would if they were at liberty to sell when the opportunity offers and that others might receive more than they would otherwise receive does not mean that a tax is imposed upon one producer for the benefit of others. The design is apparently to realize what will be over the years better prices for all producers and this, in my opinion, is within the powers given by heads 13 and 16.

In answering this question I exclude sales of produce where the producer himself ships his product to other Provinces or countries for sale by any means of transport, or sells his product to a person who purchases the same for export. To illustrate, I exclude a shipment by a hog producer of his hogs, alive or dead, to the Province of Quebec

(1) [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Locke J.

and transactions between such producer and a buyer for a packing plant carrying on business in Hull who purchases the hog intending to ship it to Hull, either alive or dead, and transactions between a hog producer and a packing plant operating in Ontario purchasing the hog for the purpose of producing pork products from it and exporting them from the Province to the extent that the carcass is so used.

The passage from the judgment in *Lawson's Case* which is above quoted makes it clear that to attempt to control the manner in which traders in other Provinces will carry out their transactions within the Province, or to prohibit them from purchasing natural products for export, is not a matter of merely Provincial concern but also directly and substantially the concern of the other Provinces. I cannot think that from a constitutional standpoint the fact that the buyer for the packing house elects to have the hog killed before it is exported or cut up and, after treatment, exported as hams, bacon or other pork products, can affect the matter.

The order in council referred to in the second question approved the scheme under the powers conferred by s. 4(2) of the Act. The objections to the validity of this order are that the scheme is not confined to marketing in Ontario and envisages marketing extraprovincially and, further, that the Lieutenant-Governor has no power to create a local board. As to the first, the scheme itself, while defining the farm product to which it applies, does not deal with the manner in which the marketing is to be carried on, but merely provides the agencies which are to carry on the proposed activities. It is by the regulations passed subsequently by the Board that the manner of operation is defined and the first objection is really directed against them. As to the power of the Lieutenant-Governor to appoint the Board, the section referred to expressly authorizes the approval of a scheme and part of the scheme is the establishment of such a board. Section 1(*d*) of the Act defines the expression "local board" as meaning a board constituted under a scheme, and power to approve the scheme carries with it, of necessity, in my opinion, the power to approve the constitution of the board.

Ontario Regulation 102/55, referred to in the third question, contains the regulations made by the Board under the powers vested in it by s. 7 of the Act. The regulation in question was made prior to the amendment of 1956 but, in order that the answers made should be of assistance, it is my opinion that the matter should be treated as if this had been made under the statute as amended.

Section 6 of *The Interpretation Act,* R.S.O. 1950, c. 184, provides that where an Act confers power to make orders or regulations, unless the contrary intention appears, expressions used in them shall have the same meaning as in the Act conferring the power. Accordingly, where the word "marketing" is used in the regulation, it is to be given the meaning attributed to the word in s. 1(*e*) of the Act which defines it as meaning, *inter alia,* buying, selling and offering for sale, packing and shipping for sale and transporting in any manner, and assigns to the words "market" and "marketed" corresponding meanings.

The regulation applies to all hogs produced in Ontario, with certain defined exceptions. "Producer" is defined as one engaged in the production of hogs. "Processing" is defined as meaning the slaughtering of hogs and "processor" as one who slaughters hogs or has hogs slaughtered for him.

The regulation provides for the appointment of the Ontario Hog Producers' Co-operative as the marketing agency through which all hogs shall be marketed and declares that no person shall market hogs except through that agency, and authorizes the marketing agency, *inter alia,* to direct and control the marketing of hogs, including the times and places at which they may be marketed, to fix the prices to be paid to producers, to require the price to be paid to be forwarded to the marketing agency and to collect from any person by suit the price or prices of hogs owing to the producer.

On the face of it, the regulation assumes to control the marketing of hogs which the producer might wish to export from the Province on his own account, prohibits him, by way of illustration, from selling his hogs to the representative of a packing company in Quebec who proposes to export them from the Province, prohibits the Quebec packing house from buying the hogs from him and packing com-

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

panies operating in Ontario from purchasing hogs from him for the purpose of manufacturing pork products and exporting them, and from purchasing hogs from any person in Ontario other than the marketing agency and except at prices which may be fixed by the marketing agency and at times determined by them. This, as I have said, is, in my opinion, assuming to regulate trade and commerce in matters which are not merely of concern to the people of Ontario but are directly and substantially the concern of the people of other Provinces and thus beyond the powers which may be vested by the Province in such a board.

To the extent, however, that the regulation assumes to control in this manner hogs sold for consumption within the Province or to packing plants or other processors purchasing the animals for the manufacture of pork products to be consumed within the Province, the regulation is, in my opinion, *intra vires* as dealing with matters which are merely of a local or private nature in the Province.

The regulation also provides for the licensing of persons shipping or transporting hogs or slaughtering them and, so long as this power is exercised under the licensing power given by head 9 of s. 92 and is not used to prevent those desiring to purchase hogs or pork products for export and thus to regulate interprovincial trade, I consider it to be within Provincial powers. This appears to me to be settled by *Brewers' and Maltsters' Association of Ontario v. The Attorney-General for Ontario* (1). It will be noted that the Board, by s. 3 of the regulation, may refuse to grant a licence as a processor "for any reason which the Board may deem sufficient". As every packing company in Ontario must, of necessity, be a processor within the definition contained in the regulation, and since many of the large packing companies are presumably incorporated by letters patent under the *Dominion Companies Act* and have been granted power to carry on their business in all of the Provinces of Canada, the decisions of the Judicial Committee in *John Deere Plow Company, Limited v. Wharton* (2) and in *Great West Saddlery Company, Limited v. The King* (3), would in the case of such companies be obstacles in the way

(1) [1897] A.C. 231.
(2) [1915] A.C. 330, 18 D.L.R. 353, 7 W.W.R. 706.
(3) [1921] 2 A.C. 91, 58 D.L.R. 1, [1921] 1 W.W.R. 1034.

of the exercise of such a power. The judgments delivered in the Court of Appeal for Saskatchewan in *In re The Grain Marketing Act 1931* (1) contain a valuable review of authorities on the question as to the right of the Province to interfere with export by a producer of grain. I refer particularly to the judgments of Turgeon J.A. at p. 155 (W.W.R.), McKay J.A. at p. 167 and Martin J.A. at p. 182.

The fourth question relates to an order made by The Ontario Hog Producers' Marketing Board on June 8, 1955, which reads:

> THAT the service charges to be imposed by the Ontario Hog Producers Co-operative for the marketing of hogs under the said scheme be and the same are hereby fixed at until further order of the Board the sum of 24¢ per hog and a pro rating charge in the sum of 20¢ per producer settlement statement.

Section 8(*c*) of the regulations authorizes the Board to empower the marketing agency to impose service charges on the marketing of hogs and, by para. (*d*), to pay to the local board from the charges so imposed its expenses in carrying out the purposes of the scheme. It is the local board that fixes the amount of these charges under s. 9. I do not know what the expression "pro rating charge" means and answer this question on the footing that the charge of 20¢ is for preparing and rendering the statement referred to in s. 10(2).

Assuming that the charges are made in respect of hogs sold for consumption in Ontario as mentioned in the answer to question 3, in the absence of any evidence to the contrary, it is, in my opinion, to be assumed that these are fair charges for services to be rendered by the marketing agency and the local board. On this footing, I consider the regulation to be a proper exercise of the powers given by heads 13 and 16 of s. 92 and *intra vires*: *Shannon et al. v. Lower Mainland Dairy Products Board, supra,* at p. 722.

Question 5 relates to s. 7 of Ontario Regulation 145/54 dealing with the marketing of peaches for processing which reads:

> (1) Every grower shall pay to the local board licence fees at the rate of 50 cents for each ton or fraction thereof of peaches delivered to a processor.

(1) 25 Sask. L.R. 273, [1931] 2 W.W.R. 146.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Locke J.

(2) The processor shall deduct the licence fees payable by a grower from the sum of money due to the person from whom the peaches were received.

(3) The processor shall forward to the local board the licence fees deducted not later than the 1st of December in any year.

The scheme to which the regulation in question applies constitutes a local board to be known as "The Ontario Peach Growers' Marketing Board" and, in addition, a committee in each of the defined districts in Ontario to be known as "The District Peach Growers' Committee".

Regulation 145/54 defines "peaches" as meaning those produced in Ontario which are subsequently used for processing, and the latter word is defined as including canning, dehydrating, drying, freezing or processing. "Processor" includes every person carrying on in the Province the business of processing peaches. Section 2 requires persons engaged in the business of growing peaches, so defined, to have a licence to be issued by the Board, and every grower is deemed to be the holder of such a licence. Processors and dealers in such peaches are also required to obtain licences. The term "dealer", as defined, would include persons representing purchasers outside of the Province who propose to export the fruit to be processed elsewhere than in Ontario.

The power vested in the Province to legislate in relation to licences in order to the raising of a revenue for provincial, local or municipal purposes under head 9 of s. 92, in my opinion, authorizes this section, even though their imposition in an amount which varies with the quantity sold may tend to increase the sale-price. It must, I think, be taken as decided by the judgment of the Judicial Committee in *Shannon's Case* that it is not a valid objection to a licence, plus a fee, that it is directed both to the regulation of trade and to the provision of revenue. While the functions of the marketing board and the growers' committee are not defined in the material, it is proper to assume, in my opinion, that these licence fees are to defray the expenses of these bodies in discharging their duties under the scheme. The fact that the licence fee may be charged in respect of peaches processed for export does not, in my opinion, invalidate the section.

Question 6 relates to Ontario Regulation 126/52 referring to the marketing of vegetables for processing.

The licence fee payable by a grower is at the rate of one-half of 1 per cent. of the total sale-price due to him for each ton or fraction thereof of peaches delivered to a processor and processed by the latter. In other respects, the provisions are similar to those of O.Reg. 145/54 referred to in the last question.

For the same reasons, I consider the imposition of these licence fees to be *intra vires* the marketing board.

Question 7 relates to a proposed amendment to s. 7 of *The Farm Products Marketing Act* which reads:

> Subsection (1) of Section 7 of The Farm Products Marketing Act as amended by Section 4 of The Farm Products Marketing Amendment Act, 1951, Section 6 of The Farm Products Marketing Amendment Act, 1954 and Section 7 of The Farm Products Marketing Act, 1955 is amended by adding thereto the following paragraph:
>
> (ss) authorizing a local board
>
> (i) to inquire into and determine the amount of surplus of a regulated product,
>
> (ii) to purchase or otherwise acquire the whole or such part of such surplus of a regulated product as the marketing agency may determine,
>
> (iii) to market any surplus of a regulated product so purchased or acquired,
>
> (iv) to require processors who receive the regulated product from producers to deduct from the moneys payable to the producers any licence fees payable by the producer to the local board and to remit such licence fees to the local board,
>
> (v) to use such licence fees to pay the expenses of the local board and the losses, if any, incurred in the marketing of the surplus of the regulated product and to set aside reserves against possible losses in marketing the surplus of the regulated product,
>
> (vi) to use such licence fees to equalize or adjust returns received by producers of the regulated product.

Clauses (i), (ii) and (iii) appear to require no comment since there is no compulsion on the part of the producer to sell to the local board.

Clause (iv) appears to me to be unrelated to the previous clauses since if the local board buys from the producer the latter would presumably have nothing to do with the processors. Processors who have purchased the regulated product from producers may be required, in my opinion, to deduct any licence fees lawfully payable by the producer from the purchase-money and remit the amounts to the local board.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

Clauses (v) and (vi), to the extent that they authorize the use of moneys realized from licence fees to pay the operating expenses of the local board, are, in my opinion, *intra vires*. The proposed amendment is to be construed in the same manner as the section of the Act referred to in the first question and so applying to products marketed or purchased for consumption within the Province. On the assumption that the producer sells his own product on the market, a licence designed to raise moneys not merely for the expenses of the Board but to cover losses incurred by it in its market operations or to equalize or adjust returns received by all the producers would, in my opinion, be *ultra vires*. So-called licence fees or charges imposed for this purpose would, in my opinion, be taxes the nature of which could not be distinguished from the adjustment levies referred to in the *Crystal Dairy* case above referred to.

It will be seen from the report of that case that, on behalf of the respondent, it was contended not merely that the levies were bad as constituting indirect taxation but also that imposing them was an attempt to regulate trade which was, at least partly, interprovincial. The Judicial Committee, finding that the levies, being in the nature of indirect taxes, could not be supported, did not consider the argument based upon head 2 of s. 91. From the fact that the point was argued, however, and the further fact that the fluid milk market referred to was obviously within the Province, it is proper to conclude, in my opinion, that, though this substantial part of the product was sold for local consumption, the objection that the method adopted to equalize the returns of the producers was beyond Provincial powers must be given effect to. This aspect of the matter appears to me to be concluded by the judgment in that case.

I would not construe clauses (v) and (vi) as contemplating that the imposition and use of such licence fees for the last-mentioned purposes would be a matter of agreement between the local board and the producers. To do so would be to render the question itself pointless.

What I have said as to clauses (v) and (vi) of the proposed amendment referred to in question 7 applies to question 8.

In my opinion, neither the provisions of the *Combines Investigation Act,* R.S.C. 1952, c. 314, nor of s. 411 of the *Criminal Code,* 1953-54 (Can.), c. 51, are objections to the schemes in question to the extent that they are within the powers which may be validly granted by the Legislature under the terms of the *British North America Act.* It cannot be said, in my opinion, that within the terms of para. (*a*)(vi) of s. 2 of the *Combines Investigation Act* the scheme "is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others". Rather is it a scheme the carrying out of which is deemed to be in the public interest. Furthermore, the offence defined by s. 2 which renders a person subject to the penalties prescribed by s. 32 is a crime against the state. I think that to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state.

The same reasoning applies, in my opinion, to s. 411 of the *Criminal Code.* I consider that the section has no application to a scheme authorized by a Legislature under its powers conferred by the same statute which, by s. 91, gave to Parliament the power to pass laws in relation to the criminal law. If, indeed, the section could be construed as applying to such an act, I think it would be impossible to say that a scheme deemed by the Legislature to be in the public interest could be held to unduly limit or prevent competition within the meaning of the section.

I have not dealt with the sufficiency of the Hog Producers' Marketing Scheme or any question of severability as it might affect either the statute or the regulation as, in view of the form of the questions, to do so would, in my opinion, serve no useful purpose.

My answers to the various questions are as follows:

Question 1: If the pool for the distribution of moneys received from the sale of the regulated product is limited to such products marketed for use within the Province and excludes such products marketed or purchased for export in their natural state or after treatment, clause (*l*) of subs. (1) of s. 3 of *The Farm Products Marketing Act* is not *ultra vires* of the Legislature.

Question 2: No.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Locke J.

Question 3: Yes, except to the extent that the regulation authorizes the control of the marketing of hogs sold for consumption within the Province or to packing-plants or other processors purchasing the animals for the manufacture of pork products for use within the Province. The provision for licensing is *intra vires,* subject to what is said as to the refusal of such a licence.

Question 4: No.

Question 5: No.

Question 6: No.

Question 7: That part of clause (v) which authorizes the imposition of licences for the purpose of providing moneys to pay for the losses referred to, to set up reserves, and for the purposes referred to in clause (vi) is *ultra vires.*

Question 8: No.

CARTWRIGHT J.:—The questions referred to the Court by His Excellency the Governor General in council and a summary of the provisions of *The Farm Products Marketing Act* of Ontario, hereinafter referred to as "the Act" are set out in the reasons of other members of the Court.

Clause (*l*) of subs. (1) of s. 3 of the Act to which the first question refers is as follows:

> The Board may, . . .
>
> (*l*) authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

The main argument urged by Mr. Robinette against the validity of this clause is that it does not contemplate a pooling and sale of the regulated product by a marketing agency but rather purports to empower the Board to authorize the agency to take from the sellers of a regulated product a portion of the price for which they have sold the product and to pay such portion over to other sellers of the product who have obtained a less favourable price; and that such legislation is beyond the powers of the Provincial Legislature for the reasons given by the Judicial Committee in *Lower*

Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited (1). Whether the clause does purport to authorize such compulsory equalization is a question of the construction of the words used by the Legislature read with due regard to the other related provisions of the Act. The argument against the construction for which Mr. Robinette contends is put as follows in the factum of the Attorney General of Canada:

> The interpretation to be adopted must, of course, be based on the assumption that there was a *bona fide* intention by the province to confine itself to its own sphere. It is submitted that the paragraph in question is open to the interpretation that it does not contemplate any "equalization", and, consequently, does not fall within the criticism adopted in the *Crystal Dairy* case. The pooling of the product and the provision for the distribution of the sum realized should be interpreted as meaning that each producer will receive his *aliquot* share according to the amount, variety, size, grade and class of the product delivered by him. Upon this interpretation, it is submitted that the provision is valid.

and as follows in the factum of the Attorney-General for Ontario:

> It is submitted that the above clause (*l*) of subsection (1) of Section 3 merely authorizes the mixing or pooling of the regulated product received by the marketing agency from various producers and selling the product in bulk instead of selling each individual producer's commodity separately, and the distribution of the proceeds after deducting all necessary and proper disbursements and expenses.

It will be observed that the clause makes no reference to pooling the product or to conducting a pool for the sale of the product; what is to go into the pool is all the money received from the sale of a regulated product. The operation of the clause appears to be confined to cases in which a marketing agency has been appointed under cl. (*m*) of s. 7 (1) of the Act which, as re-enacted by 1955, c. 21, s. 7, reads:

> 7 (1) The Board may make regulations generally or with respect to any regulated product, . . .
>
> (*m*) upon the recommendation of the local board, designating a marketing agency through which a regulated product shall be marketed and requiring the regulated product to be marketed through the marketing agency.

Clause (*o*) of the same subsection is as follows:

> (*o*) where a marketing agency is designated for a regulated product, authorizing the marketing agency,
>
> (i) to direct and control, by order or direction, the marketing of the regulated product including the times and places at which the regulated product may be marketed,

(1) [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Cartwright J.

(ii) to determine the quantity, grade and class of the regulated product that shall be marketed by each producer,

(iii) to prohibit the marketing of any class, variety, grade or size of the regulated product,

(iv) to fix from time to time the price or prices that shall be paid to producers for the regulated product or any class, variety, grade or size of the regulated product and to fix different prices for different parts of Ontario,

(v) to impose such service charges as may from time to time be fixed by the local board for the marketing of the regulated product,

(vi) to pay to the local board from service charges imposed under subclause v its expenses in carrying out the purposes of the scheme,

(vii) to require the price or prices to be paid to the producer for the regulated product to be forwarded to the marketing agency,

(viii) to collect from any person by suit in any court of competent jurisdiction the price or prices of the regulated product owing to the producer.

It would appear from the provisions of clause (*o*), and particularly subclauses (vii) and (viii) thereof, that the Act envisages situations in which while the regulated product is to be marketed through the designated marketing agency it is the producer and not the agency who becomes the vendor with whom the contract of sale is made and to whom the purchaser becomes indebted for the price. It also appears, particularly from subclause (iv), that the price received during the operation of a scheme by one producer, "A", for a quantity of the regulated product of a certain variety, size, grade and class may vary from time to time and from place to place from the price received by another producer, "B", for an equal quantity of the product of the same variety, size, grade and class. In such a situation the plain words of cl. (*l*) appear to me to empower the Board to authorize the marketing agency to distribute the total moneys received by it from the purchasers from "A" and "B" between "A" and "B" not having regard to the prices contracted to be paid to each of them but having regard only to the amount of the regulated product sold by each of them, in other words to make an equalization as was sought to be done by the legislation found to be invalid in the *Crystal Dairy* case.

I am not unmindful of the rule that if the words of an enactment so permit they shall be construed in accordance with the presumption which imputes to the legislature the

intention of limiting the operation of its enactments to matters within its allotted sphere; but this rule does not permit the adoption of a forced construction at variance with the plain meaning of the words employed.

Using the example I have given above, the clause in question appears to me to empower the Board to authorize a marketing agency to deduct from the moneys received from the purchasers of the product of producer "A" not only "all necessary and proper disbursements and expenses" but also such amount as it may be necessary to add to the moneys received from the purchasers of the product of producer "B" to equalize the price received by "A" and "B" for products of like variety, size, grade and class. The fact that the amount required to make the equalization will be deducted from moneys received by the marketing agency on behalf of the producers instead of being collected from them as an "adjustment levy" does not appear to me to enable us to distinguish the clause in question from the legislation declared to be invalid in the *Crystal Dairy* case.

In my opinion, question 1 should be answered in the affirmative.

Questions 2, 3 and 4 may conveniently be dealt with together, as Mr. Robinette and Mr. McFarlane have raised a fundamental objection to the validity of these orders which, in my opinion, must prevail. This is that the so-called scheme set out in sched. 1 to Regulation 104 of C.R.O. 1950 as amended and which is approved and declared to be in force by the Lieutenant-Governor in council is not a scheme within the meaning of the Act.

It is common ground that, if it exists, the authority of the Lieutenant-Governor in council to make Regulation 104 is derived from s. 4(2) of the Act, as amended by 1955, c. 21, s. 3, reading in part as follows:

> The Lieutenant-Governor in Council may,
>
> (*a*) approve any scheme or any part thereof with such variations as he may deem proper and declare it to be in force in Ontario or any part thereof; and
>
> (*b*) notwithstanding subsection 1*d*, amend any approved scheme as he may deem proper.

By s. 1 (*i*) of the Act it is provided:

> In this Act, . . .
>
> (*i*) "scheme" means any scheme for the marketing or regulating of any farm product which is in force under this Act.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Cartwright J.

Some of the meanings of the word "scheme" given in the Concise Oxford Dictionary and the Shorter Oxford English Dictionary are "systematic arrangement proposed or in operation", "plan for doing something", "a plan of action devised in order to attain some end". To come within the definition given in the Act the "scheme" must at least set out a plan for the marketing or for the regulating of some farm product. The name of the so-called scheme suggests that it is a plan for the marketing of hogs but it contains no plan for marketing at all. It simply purports to set up a local board and seven committees and while it prescribes in some detail the manner in which the members of these bodies are to be chosen, nothing is said as to their powers, purposes or duties; the scheme contains no word as to how the marketing is to be carried out; no plan is formulated. In my opinion it cannot be said to be a scheme.

The form of question 2 suggests that the regulation referred to was a consolidation or re-enactment in 1950 of an earlier regulation and was amended twice in 1955 but the material before the Court does not indicate the form of the "scheme" before such consolidation and amendments. However, its previous form does not appear to be material as the regulation in its present form, as printed in the case, is a complete enactment and it was not suggested that there is any scheme in force in Ontario for the marketing or regulating of hogs other than that set out in sched. 1 to the Regulation 104 which is before us.

If I am right in my conclusion that sched. 1 does not contain a scheme within the meaning of that term as used in the Act, it follows that the Lieutenant-Governor in council was not empowered to approve it or to declare it to be in force.

It must also follow that hogs are not a "regulated product" as cl. (*g*) of s. 1 of the Act provides that that expression means "a farm product in respect of which a scheme is in force". It results from this that the Farm Products Marketing Board had no authority to make O.Reg. 102/55 referred to in question 3. This regulation purports to be made in exercise of the powers given to the Board in s. 7 of the Act and all of these which are apt to

enable the Board to make the regulation in question are predicated on the existence of a scheme and a regulated product.

The order dated June 8, 1955 made by The Ontario Hog Producers' Marketing Board referred to in question 4 purports to be made in exercise of the powers granted to it by s. 9 of O.Reg. 102/55 and that regulation being, in my opinion, invalid it follows that The Ontario Hog Producers' Marketing Board had no authority to make the order in question.

In dealing with questions 5 and 6 there is this preliminary difficulty, that neither the order of reference nor the material in the case contains any information as to the terms of the schemes for the marketing of the products dealt with or as to how they are in fact carried out. During the argument, the Court was furnished with printed copies of:

(i) Regulation 109 of C.S.O. 1950 as amended by O.Reg. 144/54 purporting to approve "The Ontario Peach Growers' Marketing-for-Processing Scheme".

(ii) Ontario Regulations 146/54 dealing with marketing of peaches for processing, setting up "The Negotiating Committee for Peaches for Processing" and "The Negotiating Committee for Selling and Transporting Peaches for Processing" and providing for the constitution of a negotiating board in the event of the committees or either of them failing to arrive at an agreement on or before July 28 in any year. The purposes of the negotiating committees are set out in s. 3(1) and (2) as follows:

> 3. (1) The Negotiating Committee for Peaches for Processing may adopt or determine by agreement
>
> (*a*) minimum prices for peaches or for any class, variety, grade or size of peaches,
>
> (*b*) terms of purchase and sale for peaches,
>
> (*c*) storage charges for peaches or for any class, variety, grade or size of peaches, and
>
> (*d*) conditions and form of contracts for the purchase and sale of peaches.
>
> (2) The Negotiating Committee for Selling and Transporting of Peaches for Processing may adopt or determine by agreement handling, transporting or selling charges by dealers for peaches which the dealers handle, transport or sell.

(iii) Ontario Regulations 125/52, purporting to approve "The Ontario Vegetable Growers' Marketing-for-Processing Scheme".

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

(iv) Ontario Regulations 131/52, as amended by O.Reg. 119/53 and O.Reg. 43/54, setting up a "Negotiating Committee" having objects similar to those of the two committees referred to in O.Reg. 146/54, above, and a negotiating board.

Cartwright J.

The introduction of this material appears to me to place the Court in a dilemma. If the material is regarded as being before us as a basis for answers to the questions referred to us then for the reasons I have given above in answering questions 2, 3 and 4, "The Ontario Peach Growers' Marketing-for-Processing Scheme" and "The Ontario Vegetable Growers' Marketing-for-Processing Scheme" would both appear to be invalid and the regulations referred to in questions 5 and 6 would fall with the schemes. If on the other hand the material is regarded as not being before us we have no sufficient basis on which to form an opinion as to whether the regulations referred to in questions 5 and 6 can be upheld, as was argued, as the imposition of fees for services rendered by the authorized instrumentalities of the Province: *vide Shannon et al. v. Lower Mainland Dairy Products Board* (1). I am of opinion that there is not sufficient material before the Court to enable us to answer either question 5 or question 6.

As to question 7, cls. (i), (ii), and (iii) of the proposed para. (*ss*) do not appear to be open to objection.

In dealing with cl. (iv) it must, I think, be assumed that the words "any licence fees payable by the producer" contemplate true licence fees such as the Legislature has power to impose or authorize and on this assumption the clause merely provides a method of collection of such fees and is unobjectionable.

Clause (v) purports to authorize the local board to use moneys compulsorily collected from producers of a product to make up the losses sustained by the board in purchasing the surplus of such product from other producers and reselling the same. In effect the board would be using such moneys to bring about an equalization, or a partial equalization, of the very sort which the Judicial Committee, in the *Crystal Dairy* case, held to be beyond the powers of the Legislature. The circumstance that the loss for which

(1) [1938] A.C. 708 at 722, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.

equalization is to be brought about is sustained by the local board in purchasing from the less fortunate producers and then reselling rather than by such producers themselves does not enable the nature of the legislation to be differentiated from that considered in the *Crystal Dairy* case; nor does giving to the moneys which the producers are required to pay for this purpose the name of licence fees afford a sufficient ground of distinction. In my view clause (v) is *ultra vires* of the Legislature; and for similar reasons I am of the same opinion as to cl. (vi).

From the wording of the opening clause of question 8, it would seem that, in view of my answer to question 7, it is not necessary for me to answer question 8, but it follows from the reasons I have given in answering question 7 that, in my opinion, the answer to question 8 would clearly be in the negative.

The answers which I would make to the questions submitted depend on the construction which I put upon the words of the statute, particularly s. 3(1)(*l*) and the word "scheme", and upon the para. (*ss*) proposed to be added by amendment to s. 7(1). As the other members of the Court do not share my views on these matters of construction I desire to add that if I were able to construe the statute as my brother Rand does, I would, for the reasons which he has given, answer all the questions as he has done.

My answers to the questions referred to the Court are as follows:

Question 1: Yes.

Question 2: Yes, in whole.

Question 3: Yes, in whole.

Question 4: Yes.

Questions 5 and 6: On the material before the Court I find it impossible to answer either of these questions.

Question 7: Clauses (v) and (vi) of the proposed para. (*ss*) are *ultra vires* of the Ontario Legislature.

Question 8: No.

FAUTEUX J.:—By an order of His Excellency the Governor General in council (P.C. 1955-1865), dated December 14, 1955, eight questions, with respect to the validity (i) of *The Farm Products Marketing Act,* R.S.O. 1950, c. 131,

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

as up to then amended, (ii) of certain regulations and orders purported to be passed thereunder, and (iii) of a proposed amendment thereto, have been referred to this Court for consideration and answer. Subsequent to the date of this order of reference and prior to the hearing thereof, the Legislature of Ontario, by an amendment sanctioned on March 28, 1956 (1956, c. 20, s. 1), added to the Act s. 1*a* declaring that:

> The purpose and intent of the Act is to provide for the control and regulation, in any or all respects, of the marketing *within the Province* of farm products, including the prohibition of such marketing in whole or in part.

(The italics are mine.)

It is as thus amended that the validity of the Act is now being considered.

The scheme of the Act may be summarily described as follows: Ten per cent. of the producers engaged, within a given area, in the production of a farm product, may propose the adoption of a compulsory scheme for marketing or regulating the farm product. If the scheme is approved by a certain majority of producers, the Farm Products Marketing Board, whose members are appointed by the Lieutenant-Governor in council, may recommend its adoption to the latter who may approve it with such variations as deemed proper and declare it in force. Marketing operations under the scheme are conducted by a local board in accordance with the terms of the scheme but the Board may also designate marketing agencies. The scheme may include a system of licensing of persons engaged in producing, marketing or processing the regulated product. This licensing is done under the regulations made by the Board which may prohibit persons from engaging in such operations, except under the authority of a licence. Licence fees, to be used by the local board for the purpose of carrying out and enforcing the Act, the regulations and the scheme, may be authorized by the Board. The actual direction of the marketing is done by either the Board, a local board or a marketing agency which, appointed by and acting pursuant to the regulations of the Board, directs and controls the marketing of the product. The marketing agency may be authorized to conduct a pool for the distribution of all moneys received from sales of the product and having

deducted its necessary and proper disbursements and expenses, to distribute the proceeds of sales in such a manner that each person receives a share in relation to the amount, variety, size, grade and class of the regulated product delivered by him. Violators of any provisions of the Act, of the regulations, of the schemes declared to be in force, or of any order or direction of the Board, local board or marketing agency, shall be guilty of an offence and liable to monetary penalties.

There are at present in operation 14 marketing schemes covering 21 farm products. Three of these schemes, relating to hogs, peaches and vegetables respectively, have been referred to this Court.

Certain general principles, related to the validity of marketing legislation, may expediently be stated before entering into the individual consideration of each of the questions.

The regulation of the marketing of farm products within the Province exclusively is within the legislative competence of the Provincial Legislature and not of Parliament. In *Attorney-General of British Columbia v. Attorney-General of Canada et al.* (1), the *Natural Products Marketing Act, 1934,* enacted by Parliament, was held to be *ultra vires* substantially for the reason that it covered transactions completed within the Province and having no connection with interprovincial or export trade. Later, in *Shannon et al. v. Lower Mainland Dairy Products Board* (2), the *Natural Products Marketing (British Columbia) Act,* 1936, providing for the regulation of marketing within the Province, was held *intra vires.* Such valid regulatory scheme may be carried out and enforced through the means of a licence scheme provided for by a Provincial Legislature for, as stated by Lord Atkin in the *Shannon* case, *supra,* at p. 721:

> If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, *i.e.,* by a system of licences, must also be admissible.

Under its licensing power, derived from heads 9, 13 and 16 of s. 92 of the *British North America Act,* a Provincial Legislature may raise money to defray the costs of opera-

(1) [1937] A.C. 377, [1937] 1 D.L.R. 691, [1937] 1 W.W.R. 328, 67 C.C.C. 337.
(2) [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

tion of such valid regulatory scheme. Lord Atkin, immediately following the passage quoted above from his reasons in the *Shannon* case, says:

> . . . if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes.

Again, in the same case, at p. 722, the learned lord continues:

> The impugned provisions can also . . . be supported on the grounds accepted by Martin C.J. in his judgment on the reference—namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92(13) and (16) . . . On these grounds, the attack based on the powers to exact licence fees must be held to fail.

Under the authority of the *Shannon* case, *supra*, this Court in *Ontario Boys' Wear Limited et al. v. The Advisory Committee et al.* (1), dealing with a compulsory levy to help to defray the expenses of administering codes of working conditions under *The Industrial Standards Act*, R.S.O. 1937, c. 191, stated at p. 359:

> If the assessment be a tax, it is a direct tax within the meaning of the decisions of the Judicial Committee and of this Court; and, in any event, it may be justified as a fee for services rendered by the Province or by its authorized instrumentalities under the powers given provincial legislatures by section 92(13) and (16) of the *British North America Act*.

Finally, and as such licence-fees need not meet the test of direct taxation, the variable character of the amount of the payment is not objectionable. This was affirmed by the Ontario Court of Appeal and the correctness of this affirmation was not questioned by the Privy Council in *Brewers' and Maltsters' Association of Ontario v. The Attorney-General for Ontario* (2).

Dealing now with the submissions made at hearing with respect to each of the questions referred:

The first and the only question bearing on the Act itself is directed to cl. (*l*) of subs. (1) of s. 3, enabling the Farm Products Marketing Board to

> authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a

(1) [1944] S.C.R. 349, [1944] 4 D.L.R. 273, 82 C.C.C. 129.
(2) [1897] A.C. 231.

share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

As formulated, the submission of invalidity as to this clause is that the deduction of all necessary and proper disbursements and expenses involves taxation of each producer and that there being allegedly a tendency for the tax to be passed on, the taxation is indirect and therefore the clause is *ultra vires* the Legislature. Compulsory equalization of payment and compulsory deduction, it is said, amount to indirect taxation. To support these views, reliance is placed on the decisions (i) of the Judicial Committee in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited* (1), and of this Court in (ii) *Lower Mainland Dairy Products Board et al. v. Turner's Dairy Limited et al.* (2) and (iii) in *The Prince Edward Island Potato Marketing Board v. H. B. Willis Incorporated* (3).

The factual situation which the Legislature of British Columbia intended to correct, as well as the remedial laws it passed for that purpose and which were impugned in the *Crystal Dairy* and the *Turner's Dairy* cases, have no relevant similarity to the factual and legal situations here involved. It being more profitable to dairy farmers to sell milk in a fluid form than to sell products manufactured from it, the market for fluid milk became glutted. To remedy this situation, the Legislature compelled traders in fluid milk to transfer a portion of the returns obtained by them in the fluid milk market to the traders in the manufactured products market. These contributions of the fluid milk traders, called "adjustment levies", as well as the collection of moneys for the operation of the scheme, designated as "expense levies", were held to be *ultra vires*: the adjustment levies, because they amounted to indirect taxation, and the expense levies, being ancillary thereto, were held to share the same jural nature. In both the *Crystal Dairy* and *Turner's Dairy* cases, though achieved by different methods, there was compulsory equalization of returns, traders of processed milk products receiving more, at the expense of traders in the fluid milk products. Under the

(1) [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639.
(2) [1941] S.C.R. 573, [1941] 4 D.L.R. 209.
(3) [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Fauteux J.

Act here considered, there is no pooling of returns but a pooling of products aiming at more advantageous marketing and, hence, returns: each producer remaining entitled to receive out of the total returns—all necessary and proper disbursements and expenses being deducted—his share according to the amount, variety, size, grade and class of the product he pooled with the other producers. The object of the compulsory equalization and compulsory deduction is not here the same as in the *Crystal Dairy* and *Turner's Dairy* cases, *supra*. In its normal operation, and this under the authorities is the test, the Act, in pith and substance, does not contemplate that one producer or one class of producers should contribute part of his or its returns to another producer or class of producers.

In the *Prince Edward Island* case, *supra*, order no. 6, related to order no. 2, of the Potato Board, was held *ultra vires* because the impugned provisions thereof were found by some members of the Court to be referable to interprovincial or export trade and, by others, to involve indirect taxation; there being in both cases no proper federal legislative provisions enabling the Board to so provide. This decision is here only invoked in support of the contention that cl. (*l*) involves indirect taxation. Assuming that the deduction authorized under this clause would amount to taxation, the opinions expressed in the *Prince Edward Island* case cannot, in my view, support the proposition that it amounts to indirect taxation for there is no similarity in the operation of the two schemes with respect to the charge. Under the normal operation of cl. (*l*), the total return received by the agency from the sale of the pooled regulated product, as well as the total amount of the necessary and proper disbursements and expenses incurred by the agency for its marketing are both unknown until after completion of the marketing operation. The portion of the total expenses which is subsequently determined and charged against the return to which each producer is entitled on the basis of the quantity and quality of the product he pooled with other producers cannot be compared to the charge considered in the *Prince Edward Island* case and, of its nature and character, cannot acquire a tendency to enter as such into the price of the commodity.

These deductible expenses are expenses actually incurred for the operation of a marketing scheme designed to bring to each producer a benefit ultimately measured by the amount, variety, size, grade and class of the regulated product pooled for more effective marketing and hence better returns; they are meant to be in lieu of the expenses which, in the absence of the scheme, each producer would have to incur to market, under comparable conditions, his own product. They do not involve taxation but are tantamount to a service charge and as such it is quite immaterial, under the authority of the *Shannon* case, *supra,* whether or not the charge has a tendency to enter into the price of the commodity. This test has been formulated simply to distinguish direct from indirect taxation. We were also referred to *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1), but it must be noted that the views therein expressed must now be read in the light of those stated by the Judicial Committee in the *Shannon* case.

The next three questions—questions 2, 3 and 4 of the reference—are related to the hog scheme. The original provisions with respect to this scheme appear in O.Reg. 52/46, subsequently amended and then replaced by O.Reg. 93/49 and O.Reg. 94/49, both of which, with some modifications intervening, were consolidated in 1950 to become C.R.O. 1950, nos. 104 and 105 respectively. Summarily, the scheme provides for: the establishment of a local board; the regulating of the marketing by regulations made by the Provincial Board; the licensing by the boards of processors and shippers, but not producers; the setting up of an agency through which exclusively hogs have to be marketed; the authority of the agency to direct marketing, to fix from time to time prices to be paid to producers and to impose service charges; the reception by the agency of the sales-price and its remittance to producers less service charges; and the imposition by the agency of a service charge fixed, by order of the local board, at 24¢ per hog and a pro rating charge of 20¢ per settlement account.

(1) [1931] S.C.R. 357, [1931] 2 D.L.R. 193.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

The first question related to this scheme is whether Regulation 104 of C.R.O. 1950, as amended by O.Reg. 100/55 and O.Reg. 104/55, is *ultra vires* the Lieutenant-Governor in council, either in whole or in part, and if so, in what particular or particulars and to what extent.

The main submission is that the scheme is applicable to the sale of hogs generally, for import and export as well, and as such regulates trade within the meaning of head 2 of s. 91 of the *British North America Act* and therefore is *ultra vires*. In support of this submission, reference was made to ss. 1*a* and 1*b* of sched. 1, reading:

INTERPRETATION

1*a*. In this scheme

(*a*) "hogs" means hogs produced in Ontario except that part thereof comprising the territorial districts and the Provisional County of Haliburton;

(*b*) "processing" means the slaughtering of hogs; and

(*c*) "producer" means a producer engaged in production of hogs.

APPLICATION OF SCHEME

1*b*. This scheme applies to hogs marketed either directly or indirectly for processing but does not apply to

(*a*) hogs sold by a producer
  (i) to a producer, or
  (ii) to a consumer, or
  (iii) to a retail butcher, and

(*b*) hogs resold by a processor who bought the hogs under this scheme.

With respect to importation: It is clear from the above provisions that hogs produced elsewhere than in Ontario are not covered by the scheme. It is equally clear from s. 1*a*(*c*) read with the provisions of s. 4 of the scheme, which for the whole purpose thereof provides for the grouping of hog producers by districts within the Province, that producers beyond its boundaries are not affected either. In the result, anyone in Ontario is free to import therein and anyone beyond its boundaries to export thereto the regulated product.

With respect to exportation: Were the words "within the Province", expressed or held to be implied after each of the words "marketed" and "processing" appearing in the opening provision of s. 1*b*, the submission that an Ontario producer is barred from marketing the regulated product elsewhere than in the Province would fail; and in my view it must be so held for the following reasons.

Reference has already been made to the declaratory provision, added to the Act by the Legislature in 1956, and formally stating that: "The purpose and intent of the Act is to provide for the control and regulation, in any or all respects, of the marketing *within the Province* of farm products, including the prohibition of such marketing in whole or in part." This provision imports an all-embracing rule of construction with respect to the Act and also with respect to the legislative provisions authorized to be made thereunder, for expressions used in orders in council, orders, schemes and regulations are to be given "the same meaning as in the Act conferring the power" to make them: *The Interpretation Act,* R.S.O. 1950, c. 184, s. 6. Thus, the word "marketing" defined in s. 1(*e*) of the Act means "marketing within the Province" and a similar meaning attends the word "marketed" appearing in the opening provisions of s. 1*b* of Reg. 104. As clearly appears in the latter provision, the operation, to which the scheme applies, is not that of marketing or that of processing, both *simpliciter,* but that of "marketing for processing", *i.e.,* a form of marketing operation, which cannot here be interpreted as one carried beyond the Province without disregarding the formal statement of the 1956 amendment. The amendment is subsequent to the impugned regulation, but the presumption against construing statutes retrospectively, which was invoked, is inapplicable to an Act which, like the amending Act of 1956, is declaratory in its nature; such Acts, unless providing the contrary, have relation back to the time when the prior Act was passed: *Attorney-General v. Theobald* (1); see also Craies on Statute Law, 5th ed. 1952, p. 364. The marketing in Ontario of hogs produced in Ontario for processing, *i.e.,* slaughtering, in Ontario, is the sole transaction or particular business controlled and regulated under the scheme.

Other considerations also attend such interpretation. There is a *presumptio juris* as to the existence of the *bona fide* intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature. These presumptions are not displaced by the language

(1) (1890), 24 Q.B.D. 557.

1957

REFERENCE *re* THE FARM PRODUCTS MARKETING ACT

Fauteux J.

used in the relevant legislative provisions applicable to this scheme when read as a whole. Indeed such provisions consistently imply the intention of the Legislature to restrict the application of the scheme to intraprovincial transactions. Section 2(1) of Reg. 102/55 prohibiting processors from commencing or continuing in the business of processing except under the authority of a licence surely cannot be said to be applicable to processors beyond the limits of the Province of Ontario.

Having reached the view that the transaction covered by the scheme is intraprovincial, I do not find it necessary or expedient to define in general terms what constitutes an intraprovincial transaction. The suggestion that to be intraprovincial a transaction must be completed within the Province, in the sense that the product, object of the transaction, must be ultimately and exclusively consumed or be sold for delivery therein for such consumption, is one which would, if carried to its logical conclusion, strip from a Province its recognized power to provide for the regulation of marketing within such Province in disregard of the decisions of the Judicial Committee in *Attorney-General for British Columbia v. Attorney-General for Canada et al., supra,* and in *Shannon v. Lower Mainland Dairy Products Board, supra.*

That joint action of Parliament and of the Legislature may better solve the difficulties arising in particular cases is well known to those entrusted with the government of the nation and the Provinces but provides no answer to the questions here referred for consideration.

The invalidity of the regulation is also contended for on the basis that: (i) It does not constitute a scheme under the Act but merely provides for the establishment of a local board; (ii) it is *ultra vires* the Lieutenant-Governor in council to create a local board and to adopt this scheme, constituting an entirely new scheme, without prior approval of producers. As already indicated, the original hog scheme was set up by O.Reg. 52/46, the reading of which shows compliance with statutory prerequisites for its adoption by the Lieutenant-Governor in council. Ever since the adoption of O.Reg. 52/46, the scheme related to hogs was maintained, though the original legislative provisions related

thereto were amended, replaced, and consolidated to become ultimately, in form and substance, what they now are. None of the arguments advanced substantiates these objections and, on further consideration, nothing was found to support the proposition that the wide powers given, under the Act, to the Lieutenant-Governor in council, particularly under s. 4(2)(*b*), have been exceeded.

The second question related to the hog scheme, question 3 of the reference, is whether O.Reg. 102/55 respecting the marketing of hogs is *ultra vires* the Farm Products Marketing Board either in whole or in part and, if so, in what particular or particulars and to what extent. This regulation of the Board, approved by the Lieutenant-Governor in council, replaced C.R.O. 1950, No. 105, consolidating O.Reg. 94/49, O.Reg. 99/50 and O.Reg. 215/50.

Here again it was submitted that there is nothing in the regulations to confine the marketing to marketing within the Province. This point has already been considered and disposed of.

The next attack is related to s. 6 of the regulations providing that all hogs shall be marketed, and that no person shall market hogs except, through the marketing agency therein designated. The argument is that s. 6 is repugnant to s. 25 of the *Live Stock and Live Stock Products Act*, R.S.C. 1952, c. 167, enacting that:

> Notwithstanding anything in this Part, any farmer or drover may sell his own live stock at a stockyard on his own account.

Section 25 appears in Part I of the Act referred to, which part deals with the internal operation of stockyards. In its very terms, the section is not attributive but protective of the right farmers or drovers may otherwise have to sell their own livestock at a stockyard on their own account. The fact that, on proper provincial marketing legislation, this right is to be exercised through the instrumentality of a marketing agency is entirely a different matter. The provisions of s. 6 are not, in my view, repugnant to those of s. 25; but, were they held to be so, the question of the validity of those of s. 25 would then immediately arise, for under undisputed principles, regulating the marketing of farm products within a Province is within the exclusive legislative competence of the Legislature and not of Parliament.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

The next attack is directed to s. 8 of the regulations which, it is said, involves delegation unauthorized by s. 7(1)(*o*) of the Act. The latter section enumerates a number of functions which the Board may, by regulation, authorize a designated marketing agency to perform. Pursuant to that power, the Board, by s. 8, allotted to the marketing agency therein designated certain functions, all being referable to, and couched in similar language as in, s. 7(1)(*o*). This is not a delegation to legislate but an authority to perform administrative duties. The case of *The Attorney General of Canada v. Brent* (1), quoted in support of this objection, has no relevancy.

Following the line of argument adopted with respect to questions 1 or 2 of the reference, similar points were raised with respect to O.Reg. 102/55. Thus it was said that ss. 9 and 10 involve indirect taxation, that in making these regulations, the authority of the Board was exceeded, mainly for the reason that a new scheme, unapproved by the producers, is set up. As to these points, reference is made to what has already been said.

It was also argued that these marketing legislative provisions conflict with certain federal laws, namely, (i) the *Combines Investigation Act,* R.S.C. 1952, c. 314, and the provisions of the *Criminal Code* relating to combines; and (ii) the *Agricultural Prices Support Act,* R.S.C. 1952, c. 3. As to (i): A like submission was unsuccessfully made in *Rex v. Cherry* (2) and *Ontario Boys' Wear Limited et al. v. The Advisory Committee et al., supra.* The object of Parliament in legislating with respect to private agreements involving monopolies is to protect the public interest in free competition. The adoption by Parliament of an "Act to assist and encourage co-operative marketing of agricultural products", 3 Geo. VI, c. 28, now R.S.C. 1952, c. 5, does not suggest that marketing schemes devised by Parliament or a Legislature within their respective fields, are *prima facie* to be held to come within the scope of the anti-monopoly legislation. As to (ii): Under the *Agricultural Prices Support Act,* a Board constituted of members appointed by the Governor General in council is,

(1) [1956] S.C.R. 318, 2 D.L.R. (2d) 503, 114 C.C.C. 296.

(2) [1938] 1 W.W.R. 12, [1938] 1 D.L.R. 156, 69 C.C.C. 219 (*sub nom. Cherry v. The King ex rel. Wood*).

under certain conditions, given authority to fix the prices at which it may itself either purchase agricultural products or pay to the producers thereof the difference between such fixed price and the average market-price, thus, as the title of the Act suggests, supporting the price of such products. The intent and purpose of both Acts alleged to be in conflict are quite different. Both are intended to assist producers. One, however, *i.e.*, the Act here considered, aims at procuring maximum returns by means of orderly marketing, while the other aims at assuring minimum returns, under certain circumstances and conditions. The Ontario Legislature cannot be presumed to have intended its legislation to be operative beyond the limits of its own sphere and contrary to any federal legislation validly adopted.

The last question related to the hog scheme, the fourth in the reference, is whether the order dated June 8, 1955, made by The Ontario Hog Producers' Marketing Board, fixing the service charges to be imposed by the marketing agency, is *ultra vires* the said board. This order, made by the local board, *i.e.*, The Ontario Hog Producers' Marketing Board, under s. 9 of O.Reg. 102/55, fixed the service charges to be imposed by the marketing agency, *i.e.*, the Ontario Hog Producers Co-operative, at "the sum of 24¢ per hog and a pro rating charge of 20¢ per producer settlement statement". On the statement of facts appearing in the order of reference, the said marketing agency is a co-operative corporation incorporated under Part V of *The Corporations Act*, 1953 (Ont.), c. 19, and its by-laws provide that any surplus of service charges, after providing for reserves, shall be allocated, credited or paid to those marketing hogs through the agency, and computed at a rate in relation to the value of hogs marketed by such person. It is said that the order is invalid for the reason that neither the Act nor the regulation contemplates a service charge of that nature and that, in any event, indirect taxation is involved. The contention that the service charges, authorized under the Act and the regulation, involve any form of taxation has already been considered and found to be unsupported; and nothing that was said substantiates the proposition that the service charges fixed by order of the local board are of a different nature than those authorized under the Act and the regulation. The argument for the

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

contrary view stems from the fact that the by-laws of the marketing agency provide for setting up reserves before a distribution of surplus service charges, if any, is made. As stated in the *Shannon* case, *supra,* fees for services rendered by the Province or by its authorized instrumentalities may validly be charged, under the powers given in s. 92(13) and (16) of the *British North America Act*. Such service charges are not invalid merely because they may exceed the actual expenses of the recipient. The nature of the use thereafter made of such surplus might, in certain cases, indicate a colourable attempt to tax or do indirectly what could not validly be done directly, but nothing that was submitted to us supports the contention that any such use is here contemplated.

By questions 5 and 6 in the order of reference, we are asked to consider the validity of s. 7 of O.Reg. 145/54 and s. 5 of O.Reg. 126/52, both sections imposing "licence fees" to be paid to the local board by every grower engaged in the production for processing of peaches and vegetables respectively. Invalidity of these two sections is contended for on the basis that they are a colourable attempt to raise money under the guise of a licence and that their true effect is to raise money by taxation. The marketing of peaches and vegetables for processing is controlled by regulations of the Provincial Board which prohibit any person from engaging in the business of a grower, processor or dealer, in the case of peaches, and of processor, in the case of vegetables, unless he is or is deemed to be, under the regulations, the holder of a licence from the Board, for which no specific charge is made to the grower. Under the regulations, each grower of peaches or vegetables for processing is "deemed to be the holder of a licence in form I". The "licence fees" imposed upon the grower of peaches are at the rate of 50¢ for each ton or fraction thereof of peaches delivered to a processor; under the scheme related to vegetables, the "licence fees" imposed upon every grower are at the rate of one-half of 1 per cent. of the total sale-price due him for each ton or fraction thereof of vegetables delivered to and processed by, the processor. These "licence fees" are collected by the processor by deducting them from the sum of money due to the person from whom peaches or vegetables were received, and are remitted to the local board. What

functions are performed by The Ontario Peach Growers' Marketing Board and The Ontario Vegetable Growers' Marketing Board, being, respectively, the local boards appointed under these schemes, is not clear from the material submitted; however, we were given, at the hearing, the unchallenged information that the local boards negotiate the price to be paid for these products and that the fees charged to growers were meant to defray expenses thus incurred for the operation of the schemes. On the facts stated in the order of reference, one ton of peaches makes 144 dozen 20-ounce cans of peaches or 1,728 cans. For reasons already given, these "licence fees" are, in my view, tantamount to a service charge which can validly be imposed under the authority of the Province. Furthermore, there is no evidence as to the extent of the expenses incurred by these local boards for the operation of the schemes; and the amount of fees which each grower has to pay, when related to his returns, does not suggest that taxation is involved in the service charge.

The last two questions, questions 7 and 8 of the reference, are related to the proposed amendment of the Act adding to subs. (1) of s. 7 para. (*ss*), conferring upon a local board the additional powers described in subparagraphs numbered from (i) to (vi) inclusively. Under subparas. (v) and (vi), one of the purposes for which the use of licence fees is authorized, is to make some form of equalization payment. To that extent the provisions of these subparagraphs cannot be validly adopted by the Province, in view of the decisions of the Judicial Committee and of this Court in the *Crystal Dairy* and the *Turner's Dairy* cases respectively.

My answers to the questions referred to the Court are therefore as follows:

Question 1: No.

Question 2: No.

Question 3: No.

Question 4: No.

Questions 5 and 6: No.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Fauteux J.

Question 7: Subparagraph (v) except to the extent that it authorizes the use of licence fees to pay expenses of the local board, and the whole of subpara. (vi), of the proposed para. (*ss*), are *ultra vires* the Ontario Legislature.

Question 8: No.

ABBOTT J.:—I have had an opportunity of considering the able and exhaustive reasons prepared by my brother Fauteux and I am in agreement with the views which he has expressed. I desire only to add a few brief observations.

The Farm Products Marketing Act, R.S.O. 1950, c. 131, is in the usual form of marketing legislation in Canada. With the inclusion of s. 1*a*, added in March 1956, the Act contains, in substance, the same provisions as the *Natural Products Marketing (British Columbia) Act,* R.S.B.C. 1936, c. 165, which was before the Judicial Committee in *Shannon et al. v. Lower Mainland Dairy Products Board* (1), and the *Agricultural Products Marketing (Prince Edward Island) Act,* 1940 (P.E.I.), c. 40, which was before this Court in *The Prince Edward Island Potato Marketing Board v. H. B. Willis Incorporated* (2).

It might be noted, perhaps, that the British Columbia Act covered "any product of agriculture, or of the forest, sea, lake, or river". The Ontario Act is somewhat more limited in its application and relates only to farm products.

In its essential features, the Ontario Act is, in my opinion, indistinguishable from the British Columbia Act, which was held by the Judicial Committee in *Shannon's Case* to be an Act to regulate particular businesses entirely within the Province and therefore *intra vires* of the Province. Presumably because of the decision in *Shannon's Case* no question as to the validity of the Prince Edward Island Act was raised on the reference to this Court and it was assumed to be *intra vires* for the purposes of that reference. Each marketing scheme adopted under an Act such as the one under consideration, and the regulations applicable to such scheme, must, of course, be looked at to see whether they come within the authority conferred by the Act, but, as I have stated, I share the view expressed by my brother

(1) [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938] 2 W.W.R. 604.
(2) [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

Fauteux that *The Farm Products Marketing Act* of Ontario, including cl. (*l*) of subs. (1) of s. 3, is *intra vires* the Ontario Legislature.

Turning now to the three schemes which are the subject-matter of the present reference, the hog scheme applies only to hogs produced in Ontario and marketed, *i.e.*, sold, for processing in Ontario. The compulsory features of the scheme are (1) licensing requirements and the imposition of licence fees and service charges and (2) prohibition of the sale of live hogs produced in Ontario to a processor in Ontario except through a designated marketing agency. *The hog scheme regulates only the sale of live hogs produced in Ontario to a processor in Ontario for slaughtering in that Province.* It does not purport to interfere with either (a) the sale of live or dressed hogs to anyone in Ontario other than a processor in Ontario, or (b) the importation or exportation of live or dressed hogs by anyone in Ontario. In the scheme "processing" is defined as meaning the slaughtering of hogs.

The peach scheme and the vegetable scheme are primarily licensing schemes, with powers given to what is described as a negotiating committee, to negotiate minimum prices, to establish contract conditions and the like. The only compulsory provisions appear to be the licence requirements and the imposition of licence fees. There are no compulsory marketing provisions as in the case of the hog scheme. What is regulated under all three schemes is the sale of locally-produced hogs, peaches and vegetables, to a processor for processing in the Province. All three schemes contemplate the regulation of dealings in particular commodities in a particular way, not of trade in such commodities as a whole.

It has long been settled that rights arising out of or in connection with contracts, such as a contract of sale made in a Province between a producer and a processor, are civil rights within the meaning of head 13 of s. 92 of the *British North America Act* and as such within the legislative power of a Province: *The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons* (1).

(1) (1881), 7 App. Cas. 96.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Abbott J.

In *John Deere Plow Company, Limited v. Wharton* (1), Viscount Haldane L.C., referring to the words "civil rights", said:

> An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases.

In my opinion it would be equally impracticable and undesirable to attempt an abstract logical definition of what constitutes interprovincial or export trade. Each transaction must be looked at, in order to ascertain whether or not, in fact, it involves such trade. It is also dangerous, I think, on a reference such as this to go beyond the terms of the reference and to attempt to decide, by analogy, questions which are not submitted for the opinion of the Court.

Aside from the attack made on the licence fees imposed under the three schemes, as being indirect taxation, which has been fully dealt with by my brother Fauteux, the principal attack made on the validity of these schemes was that they purport to regulate extraprovincial trade.

It is hard to conceive of any important article of commerce, produced in any Province, which would not, to some extent at least, enter into interprovincial or export trade. Certainly milk, which was the product regulated in *Shannon's Case,* in its processed form at any rate, must be exported from British Columbia. Similarly it is common knowledge that potatoes in substantial quantities are shipped out of Prince Edward Island.

The power to regulate the sale within a Province of specific products, is not, in my opinion, affected by reason of the fact that some, or all, of such products may subsequently, in the same or in an altered form, be exported from that Province, unless it be shown, of course, that such regulation is merely a colourable device for assuming control of extraprovincial trade. Similarly, the power to regulate the wages of those engaged in processing such products within a Province, is not affected by the fact that the resulting product may be exported, although it is obvious that the scale of such wages would have a significant effect upon the export price. It is the immediate effect, object or purpose, not possible consequential effects, that are rele-

(1) [1915] A.C. 330 at 339, 18 D.L.R. 353, 7 W.W.R. 706.

vant, in determining whether *The Farm Products Marketing Act* of Ontario and the three schemes adopted under it, which are the subject of the present reference, are laws in relation to a matter falling within Provincial legislative competence. As Viscount Simon said in *Attorney-General for Saskatchewan v. Attorney-General for Canada et al.* (1):

> Consequential effects are not the same thing as legislative subject-matter. It is "the true nature and character of the legislation"—not its ultimate economic results—that matters.

What is regulated under these schemes is not the farm product itself but certain transactions involving that product, and the transaction which is regulated is completed before the product is consumed either in its original or in some processed form. Processing may take many forms and the original product may be changed out of all recognition. The place where the resulting product may be consumed, therefore, is not in my opinion conclusive, as a test to determine by what legislative authority a particular transaction involving such farm product may validly be regulated.

As I have stated, the fact that some, or all, of the resulting product, after processing, may subsequently enter into extraprovincial or export trade does not, in my view, alter the fact that the three schemes submitted in this reference, regulate particular businesses carried on entirely within Provincial legislative jurisdiction, and are therefore *intra vires*.

My answers to the questions referred to the Court are therefore as follows:

Question 1: No.

Question 2: No.

Question 3: No.

Question 4: No.

Question 5: No.

Question 6: No.

(1) [1949] A.C. 110 at 123, [1949] 2 D.L.R. 145, [1949] 1 W.W.R. 742.

1957

REFERENCE re THE FARM PRODUCTS MARKETING ACT

Abbott J.

Question 7: Subparagraph (v), except to the extent that it authorizes the use of licence fees to pay expenses of the local board, and the whole of subpara. (vi) of the proposed para. (*ss*) are *ultra vires* the Ontario Legislature.

Question 8: No.

NOLAN J. agrees in the reasons and answers of LOCKE J.

1957

*Jan. 28, 29, 30 Feb. 15

HER MAJESTY THE QUEEN .....APPELLANT;

AND

JAMES CAREY .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Parties to offences—Carrying out common unlawful purpose —Attempt to commit robbery—Killing by one participant—Charge to jury—The Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 24, 201, 202.

G and C were jointly indicted for the murder of a police constable, the Crown's case being that while the two men were engaged in an attempt to rob the premises of W. Co., G shot the constable and that C, "in complicity with [G], was a party with [G] to the said crime of murder". Both accused were convicted and appealed. G's appeal was dismissed but a new trial was ordered for C on grounds of misdirection. The Crown appealed.

Held (Locke and Cartwright JJ. dissenting): The appeal should be allowed and the conviction should be restored.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: There was evidence that G and C formed an intention in common to carry out the unlawful purpose of robbery with violence, and to assist each other therein, that in carrying out that common purpose G committed murder, and that C knew, or ought to have known, that murder would be a probable consequence. It was unnecessary to decide whether the words "in carrying out the common purpose" in s. 21(2) of the *Criminal Code* should be construed as requiring acts going beyond mere preparation for an offence and amounting to an attempt as defined in s. 24, because in this case the evidence disclosed that the acts of the two accused did in fact amount to an attempt to rob.

Section 24(2) requires the presiding judge to determine, as a matter of law, whether or not the acts of the accused constitute an attempt, but that determination must be in substance a finding of fact. His function is not merely to decide, in a given case, that there is no evidence of an attempt and therefore withdraw that issue from the jury, but

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

also to decide, as a question of fact and law, whether what was done, if found by the jury, amounted to an attempt. *Regina v. Miskell*, [1954] 1 W.L.R. 438 at 440, does not express the law of Canada as laid down in s. 24(2).

There was no evidence from which the jury could have found that the common intention had been abandoned before the constable was shot. In any event, this issue was not withdrawn from the jury; it was left to them to find whether it had been proved beyond a reasonable doubt that the common intention persisted.

Per Rand J.: Assuming that the Crown, because of the position taken by counsel in opening, was bound to prove an intent to rob W. Co. rather than a mere intent to reconnoitre with or without an intent to rob generally, the trial judge had made it clear to the jury that the intent that they must find was the specific one to rob W. Co. It was by no means clear that s. 21(2) was restricted to cases where an attempted offence had been reached but, in any event, the trial judge's finding that the acts alleged, if the jury found them to have been done, amounted to an attempt, could not be successfully challenged. Although there was no direct evidence that it was part of the common intention to overcome all resistance by force of arms, that intention could be found as an inference from the total circumstances of the case. The question of an abandonment of the intent to rob had not been withdrawn from the jury.

Per Locke J., *dissenting*: It is not a necessary element of liability under s. 21(2) that the acts done in carrying out the common purpose should be such as to amount to an attempt, as defined in s. 24, but what was said by the trial judge in this case amounted to taking away from the jury the decision of the question of fact as to whether there had been an attempt.

Further, there was evidence on which the jury might have found that, even assuming that there had been an attempt, it had been abandoned at the time of the shooting. Although the trial judge told the jury that this question was for them, he also told them on two occasions that there was no evidence that the attempt had been abandoned, and the effect of this would be that the jury would not consider the matter.

Per Cartwright J., *dissenting*: If, as was probable from the charge, the jury were directing their minds to s. 202(*d*)(i) in connection with C's guilt, it was of vital importance that they should consider whether G caused the constable's death while committing or attempting to commit robbery. Assuming, without deciding, that the trial judge was right in telling the jury that if they found the facts which he outlined to them they must accept his ruling that both the accused had committed the offence of attempted robbery, he was wrong in withdrawing from them (as in fact he did) the question whether the attempt had been abandoned before the firing of the fatal shots. What he told them in effect was that if they once found that the attempt to rob was made, they had no choice but to find that that attempt continued up to the time of the shooting. Since there was evidence on which the jury might have found that the attempt, if made, had been abandoned, the verdict could not stand.

1957

THE QUEEN v. CAREY

APPEAL from the judgment of the Court of Appeal for British Columbia (1), setting aside the conviction of the respondent for murder, and ordering a new trial. Appeal allowed.

William A. Schultz, Q.C., for the appellant.

Norman D. Mullins, for the respondent.

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

THE CHIEF JUSTICE:—This is an appeal by the Attorney-General for British Columbia from a decision of the Court of Appeal for that Province (1) setting aside the conviction of murder of the respondent Carey and directing a new trial. The appeal is based upon the grounds of dissent of Mr. Justice Sidney Smith.

Carey and Gordon were jointly indicted for the murder of police constable Sinclair on December 7, 1955, at the city of Vancouver, the allegation being that Gordon fired the bullet, or bullets, which killed Sinclair and that Carey "in complicity with the said Joseph Gordon, was a party with the said Joseph Gordon to the said crime of murder". A motion by Carey for a separate trial was denied. Gordon called witnesses and testified himself in an endeavour to prove an alibi but Carey elected to call no witnesses and did not go into the witness-box. At the conclusion of a very lengthy trial both accused were found guilty. Gordon's conviction was affirmed by the Court of Appeal and his application for leave to appeal to this Court was dismissed.

In his factum Mr. Mullins, counsel for the respondent, set forth the three matters of dissent to which the Crown was restricted in its appeal as:

(1) misdirection by the trial judge "with respect to preparation as opposed to attempt";
(2) misdirection by the trial judge "in failing to distinguish between intent to rob generally and intent to rob Watkins Winram";
(3) misdirection by the trial judge "with respect to abandonment".

Mr. Schultz, for the Crown, may have put the points of dissent in a different form but the substance is the same.

(1) (1956), 20 W.W.R. 49, 116 C.C.C. 252, 25 C.R. 13.

So far as the events of December 7, 1955, are concerned, the main, but not the only, evidence against the respondent depended upon the testimony of Mr. and Mrs. Nielson and of one Goll; and also upon the testimony, apparently given unwillingly, as might be expected, of (a) Noreen Lewry, who was living with the respondent although not married to him, and (b) Robert Smith, a friend of both accused who accompanied them, together with Mrs. Lewry and the six weeks' old child of her and the respondent, to the vicinity of the fatal shooting. There was evidence that, within the meaning of subs. (2) of s. 21 of the *Criminal Code,* 1953-54 (Can.), c. 51, Gordon and the respondent formed an intention in common to carry out an unlawful purpose (*i.e.,* to rob with violence) and to assist each other therein. There was also evidence that in carrying out that common purpose Gordon committed the offence of murder and that the respondent knew or ought to have known that murder would be a probable consequence of carrying out the common purpose. Mr. Justice Davey considered that the trial judge erred in omitting reference to the suggestion that Gordon had a strong personal motive to kill and that, therefore, the shooting was not part of a common purpose. While it is necessary for a trial judge to put to the jury any defence which is open, I am unable to find in the present case any evidence to found such a contention.

About 5.30 o'clock in the afternoon of December 7, 1955, Gordon arrived at the premises where the respondent lived with Mrs. Lewry and their child. The respondent and Mrs. Lewry had just finished eating a meal when Gordon arrived. Shortly thereafter the respondent left his suite and during his absence Gordon picked up a duster, tied a knot in the top, and placed it over his head and Mrs. Lewry cut out two eyeholes, thereby making a mask. Gordon stated to Mrs. Lewry that he needed $2,000 by the afternoon of December 8, on which day he expected to be committed for trial on a bank robbery charge and that he intended to obtain the $2,000 by armed robbery. Gordon had in his possession a .38-calibre Webley revolver and wrapped it in the mask and placed both in one pocket of his overcoat. A .45-calibre semi-automatic pistol, which it was proved had been in the possession of the respondent in the previous month, appeared on December 7 on the kitchen table in

1957

THE QUEEN v. CAREY

Kerwin C.J.

the respondent's premises, although Mrs. Lewry testified that she did not know how it had got there. Upon the respondent's return to the kitchen Gordon took the .45 pistol from the table and put it in the other pocket of his overcoat.

Mrs. Lewry, the baby and the respondent left the latter's premises in an automobile driven by Gordon. On the trip Mrs. Lewry noticed an automobile driven by Robert Smith, who left his car and entered Gordon's. She had already testified that it had been agreed between her and the accused that they should go to a friend's house for dinner in Burnaby, but that would be to the east, whereas the car proceeded west. It stopped at Skilling Brothers fuel office. Whatever may be the description of the attention paid to those premises Gordon drove farther west and parked his car under the new Granville Street bridge about 200 feet directly west of the rear of Watkins-Winram fuel office, the front of which faced Granville Street. Before parking the car Gordon had driven north on Granville Street past the front of the Watkins-Winram premises, which were lighted and wherein two employees working in the office could be seen, together with a vault and a safe.

Mr. and Mrs. Nielson saw two men, who the jury might believe were Gordon and the respondent, examining the rear of the Watkins-Winram premises. One of the men drew on a pair of white gloves and the other man was seen to perform movements which indicated that he was doing the same thing. One of the men placed a mask on his head. Two men proceeded north on what is described as the north-south lane to Third Avenue. It was as a result of a telephone message by Nielson that the police were alerted and police constable Sinclair was shot and killed. After the shots which killed Sinclair were fired, the respondent and Gordon ran in different directions. Gordon's car which, in the meantime, had been moved by Smith to a different location, but still generally speaking at the rear of the Watkins-Winram premises, was, with Mrs. Lewry and the infant as passengers, driven by Smith from its last position to Fourth Avenue where it stopped and shortly thereafter was entered by the two accused. The car then proceeded to the north-west corner of Fifth Avenue and Fir Street where the two accused alighted from the car and ran in different directions.

Before entering an apartment building on west Fifth Avenue the respondent threw the .45-calibre semi-automatic pistol on the lawn of adjoining premises, whence it was recovered within a half-hour and bore no fingerprints. Gordon was taken into custody that same night but the respondent was not located until a long time later in Toronto, Ontario.

The evidence was overwhelming and the trial judge, in a charge that was necessarily lengthy, left it to the jury to find, as regards the respondent, what was necessary in order to substantiate his guilt, including an intention in common with Gordon to carry out an unlawful purpose of robbing with violence, in general. In the course of his able argument Mr. Mullins contended that the words in subs. (2) of s. 21 of the *Criminal Code* "in carrying out the common purpose" should be construed in the same way as the words in subs. (1) of s. 24, "does or omits to do anything for the purpose of carrying out his intention", and should be related to subs. (2) of s. 24:

> The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

It is not necessary to determine that point because, even if the argument be sound, the evidence discloses that in carrying out the common purpose of robbery much more than mere preparation took place and in fact that there was an attempt. The charge to the jury was sufficient upon the question of "carrying out the common purpose" of robbery in general.

Because of the fact that the accused and Gordon were being tried jointly and because of Gordon's defence of an alibi, it was necessary that the trial judge should deal with the charge against the two accused in a comprehensive manner. As to point no. 2, that he failed to distinguish between intent to rob generally and the intent to rob Watkins-Winram, some members of the Court of Appeal considered that in his charge the trial judge after itemizing a number of events dealt with the matter in such a way as to confuse the jury. In my opinion, with respect, this is not so and the trial judge did in fact distinguish between the two cases. As to the carrying out of the intention to rob Watkins-Winram,

1957

THE QUEEN v. CAREY

Kerwin C.J.

the trial judge told the jury that in accordance with subs. (2) of s. 24 of the Code, he had determined as a matter of law that certain facts relied upon by the Crown were not too remote to constitute an attempt to commit the offence of robbing Watkins-Winram with violence. Following the listing of the events referred to, the trial judge said this, which is particularly objected to: "It is not necessary that you find positively all but at least if you find substantially all these facts have been established beyond a reasonable doubt, then my instruction to you is that there was an attempted robbery." In my opinion the subsection requires the presiding judge to determine as a matter of law the point mentioned but that determination must be in substance a finding of fact. Mr. Justice Coady considered that this would invade the province of the jury and referred to a number of cases, none of which, however, in my view, so holds. In *Regina v. Miskell* (1), Hilbery J. stated:

> Once it is decided by the court that what the accused has done can be an attempt to commit the crime, it is a question of fact for the jury whether what was done should be decided to have been an attempt.

Even if that be so at common law, it is not the position under subs. (2) of s. 24 of the *Criminal Code*. The jury must, of course, decide the question of intention and consider any other defence raised on behalf of the accused, but the question of attempt or no attempt is for the judge. His function is not merely to decide in a given case that there is no evidence of an attempt and, therefore, withdraw that issue from the jury, but also to decide as a question of fact and a question of law whether what was done, if found by the jury, was an attempt. There is nothing inconsistent with this in the decision in *Henderson v. The King* (2), or in any of the other cases referred to. Here it was left to the jury to determine whether the facts had been proved beyond a reasonable doubt. It is said that the effect of his charge was to withdraw from the jury the consideration of all the other circumstances but upon a careful reading of the charge, in which at several points it was made clear that the jury was the arbiter of facts, in my opinion this is not so.

(1) [1954] 1 W.L.R. 438 at 440, [1954] 1 All E.R. 137 at 138-9, 37 Cr. App. R. 214 at 217.

(2) [1948] S.C.R. 226, 91 C.C.C. 97, 5 C.R. 112.

As to the third ground of dissent, Mr. Justice Coady considered that there was some evidence for the jury to consider, assuming the intention and attempt to rob Watkins-Winram was established, that the two accused were not continuing their attempt but had abandoned it. With respect, I can find no evidence of abandonment. Even if there be such evidence, I am satisfied that it was left to the jury to find whether it had been proved beyond a reasonable doubt that the common intention either to rob generally or to rob Watkins-Winram persisted down to the time of the firing of the shots by Gordon. The last sentence of the following extract is relied upon as indicating that this point was removed from the consideration of the jury:

> Then counsel takes another position: He says, "If you think I was there and this venture was more than a preparation, was actually an attempt, then we abandoned it; we didn't go through with it, and if we have abandoned it, then the section won't apply, because we were not engaging in attempting to commit a robbery." Well, that is a matter for you. The only evidence we have on that point is that two men were seen, one with the mask, and then after they had looked in the window of Watkins-Winram they came around the corner and along Third Avenue. We have no evidence except the gun shot after that, two bullets. If you conclude there was an attempt, we have no evidence that it was ever abandoned; at least, I think that is the situation; it is a matter for you. But, to be frank, I could not quite follow Mr. LePage in his argument that there was an abandonment. I can recall no evidence that there was—if there was an attempt, there was no evidence that that attempt was abandoned.

However, in view of the earlier part where the judge told the jury that it was a matter for them and in view of the many other places in the charge where he made it clear that they were the judges of the facts, my conclusion is that the matter was not withdrawn from their consideration.

When the trial judge was dealing with the defences of provocation, accident and self-defence he left no doubt that he was withdrawing them from the jury, as is shown by the following:

> I accept the responsibility of directing you that there is no evidence here that the offender acted in the heat of passion caused by sudden provocation. Now, if there was some evidence I would have to leave the matter with you. If I am convinced that there is no evidence, then I take the responsibility, and I do take the responsibility, there was no provocation. I likewise direct you that there is no evidence that the shooting was done by accident or in self-defence. You are relieved from considering provocation, accident and self-defence.

1957

THE QUEEN v. CAREY

Kerwin C.J.

The jury could not fail to be impressed by a comparison between that language and what was said by the trial judge in connection with the point of abandonment.

It was argued that the opening by counsel for the Crown indicated that the Crown was proposing to prove only that the common intention was to rob Watkins-Winram and not to rob generally and that if that had not been understood the accused might have been put in the witness-box. When one reads the indictment and the opening address of Crown counsel it is impossible to say that the scope of the case alleged against the respondent was restricted.

Mr. Mullins, as he was entitled to do, referred to the following additional points which had been raised by him on behalf of the respondent before the Court of Appeal but which were not dealt with by the members of that Court, in view of the disposition made of the appeal:

(a) *Comment on the character of the accused.* None of the matters referred to in this heading appear to me to have any substance.

(b) *Comment on the failure of the accused to testify.* Having considered the extracts relied on in connection with the entire charge, I am of opinion that there was no such comment.

(c) *Misdirection by twisting, misinterpretation, and misconception of evidence.* I can find no evidence of this in the charge of the trial judge. If there was any slight error as to what had been said by any of the witnesses, the trial judge made it abundantly clear that the members of the jury were to rely upon their own recollection as to the evidence and he pointed out that in case of any question arising, reference could be had to the notes of the reporter.

(d) *Misdirection by deprecating and rebutting defence submissions and failing to put the defence as fully and fairly as the Crown's case.* I can find no basis for this objection.

The appeal should be allowed, the order of the Court of Appeal set aside and the conviction of the respondent restored.

RAND J.:—I agree generally with the reasons and conclusions of the Chief Justice, but in the particular circumstances I think it desirable to state in my own words the considerations which to me seem controlling.

Mr. Mullins contended that the prosecution had, on opening the case, bound itself to the view that both Gordon and Carey, in carrying out their purpose, that is, to rob Watkins-Winram, had been guilty of an attempt to commit that offence. As a result, it was said, of having taken this position, the accused was not called as a witness and, on the footing that attempt had not been reached, the Crown could not now urge that the death could be inferred as a probable consequence of a general purpose to rob.

I find it unnecessary to examine this contention. I will assume, though I do not accept it, that the Crown is so bound but for the reasons which follow the point ceases to be material.

The ground on which Davey J.A. proceeded was based upon the absence in the charge of an adequate distinction between the intent to reconnoitre with or without an intent to rob generally, and the intent specifically to rob Watkins-Winram, and the relation of that failure both to the question of attempt and of murder being a probable consequence under s. 21(2). He seems, also, to have assumed the Crown to have committed its case to the specific intent and that the acts done amounted to an attempt. Thus he says (1):

> If there had been only an intent to rob such likely victim as the prisoners might find during the reconnaissance, and that intent had not crystallized into an intention to rob Watkins Winram Ltd.—and it was open to the jury to so find—it would necessarily follow that there had been no atempt to rob Watkins Winram Ltd. upon which the Crown based its case against Carey, for without such intent there could be no attempt to carry it out as required by s. 24(1).

When Manson J., in considering s. 24, stressed the intent to commit an offence, he made it abundantly clear that what he meant was the offence of robbing Watkins-Winram; and his finding that an attempt had been made was made equally clearly to depend upon that crystallized and accompanying intent. The other interpretation of the facts, that, in the critical period and circumstances, there was mere reconnaissance for some future purpose, was also brought out plainly and distinctly. That was the substantial defence and to imagine the jury to have lacked full appreciation of it would be doing much less than justice to the intelligence of its members. Limited to the specific

(1) 20 W.W.R. at pp. 57-8.

1957

THE QUEEN v. CAREY

Rand J.

sense of intent and to the attempt, what was given the jury on the question of probable consequence under s. 21(2)—and it was given on no other basis—was in fact more favourable to the accused than seems to have been called for, because it is by no means clear that s. 21(2) is restricted to cases where an attempted offence has been reached. Assuming, as I think to be the case, the charge in relation to intent in both aspects to have been unobjectionable, the finding by Manson J. that the acts done did amount to an attempt cannot, in my opinion, be successfully challenged.

Coady J.A. comments first upon the statement in the opening address

> . . . that it was a part of the common intention to overcome all resistance by force of arms either whether that resistance was encountered outside the premises or inside the premises and to prevent arrest or detention by the police by shooting if necessary.

It is said that no evidence relating to such an intention was offered; nothing direct, certainly, but that it could not have been found as an inference from the total circumstances is, in my opinion, untenable.

He then proceeds to consider the manner in which the matter of attempt was dealt with and he concludes that the trial judge improperly took that question from the jury. What the latter did was to summarize the material facts with the direction that if they were found against Carey and his acts had been carried out with the intent to rob Watkins-Winram, they constituted an attempt to do that. It is said that other matters, not specified, but relevant to the intent, were in effect excluded. The interpretation of the main or significant facts as well as the intent obviously had to be determined in the light and background of the entire situation. That was reviewed in its details and their relevance to the determinative facts was obvious. Under s. 24(2) it is for the judge to rule whether the act "is or is not mere preparation", and having ruled that it was not, it necessarily followed here that there was an attempt. What the judge determines is the point, in the line of events between the first motion towards a criminal act and its commission, at which preparation ceases; that done, in such circumstances as we have here, I know of no intervening area between that stage and attempt. The acts must be done in carrying out the purpose, admittedly, but no question of that arises here

where the intent to rob specifically was required and has been found: with that intent accompanying them, there could have been no other object than the specific purpose in doing them. The direction in this respect is what is given every day to juries that if they find certain facts, including intent, their verdict will be so and so.

The final submission was that if there had been an attempt it had been abandoned. I cannot agree that that question was withdrawn from the jury. What Manson J. said was that, in his opinion, there was no evidence of it—a view in which I concur—but that it was for them, the jury, to decide. The last remark in the paragraph quoted by my brother Cartwright simply repeats what had previously been said and was expressly qualified to be the trial judge's opinion only.

Unnecessary complication seems to have been injected into the case. The broad features are simple and it tends only to confusion to treat them as being subtly and intricately involved. The second essential question, whether what happened was a probable consequence in the carrying out of the common and unlawful purpose of robbing Watkins-Winram, was left with the jury on these, among other, significant matters of evidence: that the two men had been together alone for some minutes shortly after Gordon entered Carey's home, that they had passed the front of the office of Watkins-Winram on Granville Street through the window of which a safe and vault were visible, that together, after parking their car a short distance to the west, they had reached the scene of the alleged purpose in the rear of the premises, that gloves were put on, that one at least was armed with a revolver, that they looked through a rear window, that the accused had remained near a rear door for several minutes with a hood on his head though not drawn down over his face while Gordon went a short distance northerly toward adjoining premises, that upon his return they walked northerly together on a lane to Third Avenue and turned east toward Granville Street on which, as mentioned, fronted the Watkins-Winram premises, a direction opposite to that of their car, and that both had fled the point of the shooting. A mask was found on a pile of tires a few feet from that point, and the gun from which the bullet was fired was traced to Gordon who was in possession

1957

THE QUEEN v. CAREY

Rand J.

of it at the time to the knowledge of Carey. On these damaging facts, supported as they were by those going back to the arrival of Gordon at the Carey home, the charge, although susceptible of minor criticism in parts of its order or structure, presented the determinative issues in such a manner as could be grasped adequately by the jury.

I would, therefore, allow the appeal and restore the conviction.

LOCKE J. (*dissenting*):—The charge of murder against the respondent Carey was based upon subs. (2) of s. 21 of the *Criminal Code* which reads:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

It is not, in my opinion, a necessary element of the offence thus defined that the acts done in carrying out the common purpose referred to are such as to amount to an attempt, within the meaning of that expression in the *Criminal Code*. It was, however, made clear in the opening address to the jury on behalf of the Crown that it was contended that the unlawful purpose was to hold up and rob the premises of the Watkins-Winram company, to overcome any resistance by force of arms, whether that resistance was encountered inside or outside the premises, and to prevent arrest by the police by shooting if necessary and that at the time Gordon and Carey encountered Sinclair the offence of attempted robbery had been committed. In the concluding argument of counsel for the Crown the matter was put rather differently, the unlawful purpose being then stated as that of robbery generally, but it was repeated that an attempt had been or was being made when it was interrupted by the arrival of the police officer.

Counsel for the present respondent contended before the jury that it was an essential element of the offence alleged that there had been an attempt to rob the Watkins-Winram company and that the murder was committed while such attempt was being made and argued that Gordon, who

actually fired the shots which killed Sinclair, was only making a reconnaissance of the premises, presumably with the purpose of robbing them later.

It was necessary under these circumstances that the jury should be charged as to what constituted in law an attempt to commit an offence and it is the manner in which this was done which constitutes one of the two main grounds upon which the Court of Appeal has proceeded in directing that there should be a new trial.

Subsection (1) of s. 24 declares that every one who, having an intent to commit an offence, does anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence. Subsection (2) declares that whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence and too remote to constitute an attempt is a question of law.

Before dealing with ss. 21 and 24 the learned trial judge explained to the jury the provisions of ss. 201 and 202. In so far as the accused Gordon was concerned, it would appear upon the evidence that nothing more was required than to explain s. 201. In Carey's case, however, s. 202 was of vital importance if there had been in fact an attempt to rob, within the meaning of s. 24, and that attempt was continuing at the time the men were intercepted by Constable Sinclair. Carey was shown to have been aware that Gordon carried a loaded revolver and, if the attempt were in progress when Sinclair was shot or if he and Gordon were in flight after attempting to commit the offence of robbery, he would have been a party to the offence defined in cl. (*d*) of s. 202, whether or not he knew that the commission of the offence would be a probable consequence of carrying out the common purpose within subs. (2) of s. 21.

The learned trial judge informed the jury that it was necessary for them to find whether or not there had been an attempt in which Carey was involved and, after saying that an intention to commit the offence of robbery was necessary in order to find guilt, explained the difference between what was mere preparation and what would be in law an attempt. The explanation given was in accordance with that given

1957

THE QUEEN v. CAREY

Locke J.

by Blackburn J. in *Regina v. Cheeseman* (1), and that approved in the judgment of this Court in *John v. The Queen* (2). Thereafter, after reciting a number of the acts of Carey and Gordon before they arrived at the premises of the Watkins-Winram company and while they were there, the learned judge instructed the jury that if they found that substantially all those facts had been established there had been an attempted robbery. He did not include among the facts enumerated the fact that, after whichever of the two men had worn the mask had removed it, they had gone north in the lane and turned east on Third Avenue, a means by which they might have reached the front of the premises, as an act done in the course of the attempt.

With the greatest respect for the learned and experienced trial judge, I think that, for the reasons given by Coady J.A., this really amounted to taking the decision of the question of fact as to whether there had been an attempt from the jury. Whether the actions of Carey and Gordon when they were at the rear of the premises and when they were going east on Third Avenue when they met the police officer were merely to reconnoitre the premises with the view of coming at some later time and robbing the place, or whether they actually intended then and there to attempt to rob, were matters for the jury alone.

I am further in agreement with the majority of the learned judges of the Court of Appeal that the issue as to whether, assuming there had been an attempt, that attempt had been abandoned at the time of the shooting was in effect taken away from the jury. The passage from the charge dealing with this matter is quoted in other reasons to be delivered and it is unnecessary to repeat it. It is true that the learned judge said that the matter was one for the jury, but the question as to whether there was any evidence of abandonment was one of law and for him and not for the jury and, in the passage quoted, the jury was told twice that there was no evidence that the attempt was abandoned. In my opinion, the effect of this would be that the jury would not consider the matter. While the evidence was that when the two men reached Third Avenue they turned

(1) (1862), Le. & Ca. 140 at 145, 169 E.R. 1337 at 1339.
(2) (1888), 15 S.C.R. 384 at 387.

to the east, which was away from the direction in which their waiting car stood, it was at least arguable that by proceeding to the corner and going from there south on Granville Street they could more quickly reach their car than by proceeding west on Third Avenue. In my view, the evidence of abandonment was weak, but there was some, and that was a matter for the jury.

I would accordingly dismiss this appeal.

CARTWRIGHT J. (*dissenting*):—The respondent was tried, jointly with one James Gordon, before Manson J. and a jury on the following charge:

JOSEPH GORDON AND JAMES CAREY stand charged:

THAT at the City of Vancouver, in the County and Province aforesaid, on the seventh day of December, in the year of our Lord one thousand nine hundred and fifty-five, they, the said JOSEPH GORDON and the said JAMES CAREY, unlawfully did murder Gordon Sinclair, contrary to the form of the Statute in such case made and provided, and against the peace of our Lady the Queen her Crown and Dignity, in that, at the place and on the date aforesaid, the said JOSEPH GORDON did in fact fire the bullet or bullets which killed the said Gordon Sinclair and did thereby commit murder, contrary to the Criminal Code, while the said JAMES CAREY, in complicity with the said Joseph Gordon, was a party with the said Joseph Gordon to the said crime of murder.

Both accused were convicted.

A summary of the subsequent proceedings and of the effect of portions of the evidence is given in the reasons of other members of the Court and I shall endeavour to avoid repetition.

In his factum, counsel for the appellant summarizes the errors of law which he alleges are to be found in the reasons of the majority in the Court of Appeal as follows:

It is submitted that the Court of Appeal, the Honourable Mr. Justice Sidney Smith dissenting, erred in holding:—

(1) That the learned trial Judge misdirected the jury in his instructions on "attempt" under section 24(2) of the Criminal Code, when the learned trial Judge directed the jury that if the jury found certain enumerated facts to have been proved beyond a reasonable doubt, then the acts constituted an attempt to commit robbery, as distinguished from mere preparation to commit the offence and too remote to constitute an attempt.

(2) That the learned trial Judge misdirected the jury by instructing the jury that there was an attempt to commit robbery under section 24(1) of the Criminal Code.

(3) That the Appellant's case against the Respondent, under section 21(2), upon which the Appellant chose to go to the jury was (a) that the common intention to carry out an unlawful purpose

1957

THE QUEEN
v.
CAREY

Cartwright J.

was to rob Watkins Winram Ltd. and (b) that murder of Sinclair occurred during an attempt to rob Watkins Winram Ltd., so that the learned trial Judge misdirected the jury on section 24(1) of the Criminal Code by failing to instruct the jury that the jury must find an intent to rob Watkins Winram Ltd. specifically before the jury was required to determine the facts of preparation or attempt under section 24(2), in order to find an attempt to rob Watkins Winram Ltd.

(4) That the learned trial Judge failed to put the theory and evidence of the defence relating to (3) in the manner required by *Azoulay v. The Queen*, [1952] 2 S.C.R. 495.

(5) That the learned trial Judge withdrew from the jury the theory of "abandonment" of an attempt to commit robbery.

(6) That there was any evidence to support the theory of "abandonment" of an attempt to commit robbery.

(7) That the foregoing (1) to (6), inclusive, or any of them, constituted misdirection going to the substance of any vital issue in the case of the Respondent under section 21(2) of the Criminal Code, or misled the jury, so as to constitute a substantial wrong or miscarriage of justice, for which the Respondent should be granted a new trial.

While Sidney Smith J.A. did not deal separately with each of these points, he expressed the view that the charge of the learned trial judge was accurate and adequate; and the right of the Attorney-General to appeal to this Court pursuant to s. 598(1)(*a*) of the *Criminal Code* was not challenged.

After having put to the jury the theory of the Crown that Gordon fired the fatal shots under such circumstances that he was guilty of murder under s. 201(*a*)(i) of the *Code* in that he meant to cause Sinclair's death, the learned trial judge also dealt with s. 202 and in so doing related the terms of that section particularly to the respondent. He said in part:

> Now we pass on to s. 202. That is the section that you would fall back on so far as Gordon is concerned if you had any doubt at all about his guilt under s. 201. Mind you, if you find that Gordon was present and that he fired the shots, then you do not need to worry about anything after 201, it seems to me. It is for you, of course. Gordon would be, I am sure, found to be a person who intended to kill Sinclair. However, he is not the only man who is charged here, and for that reason I want to correlate 202 to the evidence.

The learned trial judge instructed the jury that if Gordon while attempting to commit robbery used a revolver or had it upon his person and the death of Sinclair ensued as a consequence then Gordon was guilty of murder. This instruction was doubtless correct under s. 202(*d*)(i).

When the learned judge came to deal with s. 21(2) he made it plain to the jury that if they found that Gordon and Carey formed a common intention to rob and to assist each other in so doing and, while they were engaged in an attempt to rob, Gordon used a revolver and Sinclair's death ensued as a consequence, then Carey as well as Gordon would be guilty of murder if he knew or ought to have known that the commission by Gordon of murder, as defined in s. 202(*d*)(i), would be a probable consequence of carrying out the common purpose to rob. After reading and rereading the charge I think it most probable that it was on this view of the evidence that the jury proceeded in finding Carey guilty. Certainly this may have been the view on which they proceeded, for they had, in the passage quoted above, been invited to direct particular attention to s. 202(*d*)(i) in considering their verdict as to Carey.

If, as I think probable, the jury were directing their minds to s. 202(*d*)(i) it was of vital importance that they should consider the question whether Gordon caused Sinclair's death while committing or attempting to commit robbery. It is obvious that if the jury concluded that, at the crucial moment, the two accused were still engaged in an attempt to rob they would answer this question adversely to the respondent.

Assuming, without deciding, that the learned trial judge was right in telling the jury that, if they found the list of facts stated by him, they must accept and follow his ruling that both accused had committed the offence of attempted robbery, he was, in my respectful opinion, wrong in withdrawing from them the question whether the attempt had been abandoned before the firing of the fatal shots.

I agree with the conclusion of the majority in the Court of Appeal that the learned trial judge did withdraw this question from the jury. He deals with it in only one passage in his charge, which is as follows:

> Then counsel takes another position: He says, "If you think I was there and this venture was more than a preparation, was actually an attempt, then we abandoned it; we didn't go through with it, and if we have abandoned it, then the section won't apply, because we were not engaging in attempting to commit a robbery." Well, that is a matter for you. The only evidence we have on that point is that two men were seen, one with the mask, and then after they had looked in the window of Watkins Winram they came around the corner and along Third Avenue.

1957

THE QUEEN v. CAREY

Cartwright J.

> We have no evidence except the gun shot after that, two bullets. If you conclude there was an attempt, we have no evidence that it was ever abandoned; at least, I think that is the situation; it is a matter for you. But, to be frank, I could not quite follow Mr. LePage in his argument that there was an abandonment. I can recall no evidence that there was—*if there was an attempt, there was no evidence that that attempt was abandoned.*

It is true that twice in this passage the learned judge tells the jury that it is a matter for them; but, in my opinion, the concluding words which I have italicized would be taken by the jury as the final word of the judge that there was no evidence of abandonment for them to consider and would prevent them from giving any further consideration to the matter.

It appears to me that the learned trial judge told the jury, in effect, that if they once found that the attempt to rob was made, they had no choice but to find that such attempt was continuing at the crucial moment.

I share the view of the majority in the Court of Appeal that on the evidence in the record it was open to the jury to find that if an attempt had been made it had been abandoned and so at the moment the fatal shots were fired the accused were neither committing nor attempting to commit robbery; and, consequently, I agree with their conclusion that the verdict cannot stand.

This renders it unnecessary for me to deal with any of the other matters which were discussed before us.

I would dismiss the appeal.

Appeal allowed and conviction restored, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

Solicitor for the appellant: William A. Schultz, Vancouver.

Solicitor for the respondent: Norman D. Mullins, Vancouver.

JOHN SWITZMAN (*Defendant*) .....APPELLANT;

AND

FREDA ELBLING (*Plaintiff*) .....RESPONDENT;

AND

ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC (*Intervenant*) ..... } RESPONDENT.

1956

*Nov. 7, 8, 9

1957

Mar. 8

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

Constitutional law—Criminal law—Property and civil rights—Matters of local or private nature in Province—Act Respecting Communistic Propaganda, R.S.Q. 1941, c. 52.

The *Act Respecting Communistic Propaganda* of the Province of Quebec, R.S.Q. 1941, c. 52, is *ultra vires* of the Provincial Legislature. *Fineberg v. Taub* (1939), 77 Que. S.C. 233, overruled.

Per Kerwin C.J. and Locke, Cartwright, Fauteux and Nolan JJ.: The statute is legislation in respect of criminal law which, under head 27 of s. 91 of the *British North America Act,* is within the exclusive competence of the Parliament of Canada. *Bédard v. Dawson et al.,* [1923] S.C.R. 681, distinguished.

Per Rand, Kellock and Abbott JJ.: The subject-matter of the statute is not within any of the powers specifically assigned to the Provinces by s. 92 of the *British North America Act* and it constitutes an unjustifiable interference with freedom of speech and expression essential under the democratic form of government established in Canada.

Per Taschereau J., *dissenting*: The legislation is not in respect of criminal law but deals with property in the Province, under head 13 of s. 92 of the *British North America Act.* It is calculated to suppress conditions favouring the development of crime and to control properties in order to protect society against illegal uses that may be made of them. *Bédard v. Dawson et al., supra,* applied.

Courts—Supreme Court of Canada—Jurisdiction—Whether lis remains between parties—Intervention of Attorney-General.

The plaintiff sued for cancellation of a lease on the ground that the defendant, the lessee, had committed a breach of a provincial statute. The defendant, in his plea, contested the validity of the statute and gave notice of this contestation to the Attorney-General under art. 114 of the Quebec *Code of Civil Procedure.* The Superior Court gave judgment for the plaintiff on the claim for cancellation but dismissed a further claim made by her for damages; it also maintained the intervention and declared the statute valid and effective. This judgment was affirmed by a majority of the Court of Queen's Bench, Appeal Side. The defendant then appealed, by leave of the

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

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

provincial Court, to the Supreme Court. The plaintiff took no part in the appeal, stating by her counsel that she would rely on the argument to be adduced on behalf of the intervenant.

Held (Taschereau J. *dissenting*): The Court had jurisdiction to hear the appeal and should dispose of it. The appellant's claim in the intervention should be considered on the merits and, since the result of that claim affected the plaintiff's claim in the original action, it also should be decided. *Coté v. The James Richardson Company* (1906), 38 S.C.R. 41; *Bédard v. Dawson et al.*, *supra*, applied.

Per Taschereau J., *dissenting*: Since the lease from the plaintiff to the defendant had expired long before the appeal was brought to this Court, and the claim for damages had been dismissed, the only issue that remained between the original parties was as to costs. The intervenant claimed nothing except a declaration that the statute was *intra vires* of the Province and this was not a reference in which the Court was called upon to express its opinion as to the validity of the statute in an abstract way but an ordinary action where the statute was challenged only in relation to the main action. The intervention was not an "aggressive" one as in *Coté v. Richardson, supra.*

APPEAL from a judgment of the Court of Queen's Bench for Quebec (1), affirming (Barclay J. dissenting) the judgment of Collins J. at trial. Appeal allowed.

Abraham Feiner, F. R. Scott and *J. Perrault,* for the defendant, appellant.

L. Emery Beaulieu, Q.C., and *Lucien Tremblay, Q.C.,* for the intervenant, respondent.

THE CHIEF JUSTICE:—This appeal was brought by John Switzman pursuant to leave granted by the Court of Queen's Bench (Appeal Side) for the Province of Quebec from its judgment (1) confirming that of the Superior Court cancelling and annulling a certain lease between the plaintiff, Freda Elbling, and the defendant Switzman and maintaining the intervention of the Attorney-General of the Province of Quebec and declaring "An Act to Protect the Province against Communistic Propaganda", R.S.Q. 1941, c. 52, to be *intra vires* of the Legislature of the Province of Quebec. It is quite true that if no *lis* exists between parties this Court will decline to hear an appeal, even though leave has been granted by a provincial Court of Appeal: *Coca-Cola Company of Canada Limited v. Mathews* (2), where the earlier cases are collected. While, in the present case, it is suggested that the time has elapsed when the appellant had any interest in the lease to him from Freda Elbling,

(1) [1954] Que. Q.B. 421. (2) [1944] S.C.R. 385, [1945] 1 D.L.R. 1

and therefore as between those two parties it is argued that there was nothing left in dispute except the questions of costs, the intervention of the Attorney-General of the Province of Quebec, pursuant to art. 114 of the Quebec *Code of Civil Procedure,* raises an issue between him and the present appellant as to the constitutionality of the statute mentioned.

The plaintiff Freda Elbling presented no factum and took no part in the appeal, a letter being filed in this Court from her counsel to the attorneys for the appellant stating that he would rely upon the argument to be adduced on behalf of the intervenant. Mr. Beaulieu did not argue that we had no jurisdiction, or that we should not deal with the constitutionality of at least part of the statute, but both points were considered by the members of this Court and all except Mr. Justice Taschereau are of opinion that the appeal is competent and should be disposed of. No question as to the amount or value in controversy arises since the appeal is brought by leave and it cannot be said that there is no issue between the appellant and the Attorney-General of the Province of Quebec. The decision in *Coté v. The James Richardson Company* (1) is important as there it was decided that the demand as between the intervenant and the opposite party is that contained in the intervention. Here the appellant's claim in the intervention should be considered on the merits and, as the result therein affects the claim of the plaintiff in the original action, it also, under the circumstances, should be decided.

I am unable to agree with Mr. Beaulieu's contention that there is in issue the constitutional validity of only part of the statute. The order signed by the Attorney-General of the Province of Quebec, dated January 27, 1949, recites the provisions of both ss. 3 and 12 of that Act and in his intervention the Attorney-General asked the Court to declare the said Act in its entirety constitutional and valid and in full force and effect.

Section 1 provides:

This Act may be cited as *Act Respecting Communistic Propaganda.*

(1) (1906), 38 S.C.R. 41.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Kerwin C.J.

Sections 3 and 12 read:

3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.

12. It shall be unlawful to print, to publish in any manner whatsoever or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism.

Sections 4 to 11 provide that the Attorney-General, upon satisfactory proof that an infringement of s. 3 has been committed, may order the closing of the house; authorize any peace officer to execute such order, and provide a procedure by which the owner may apply by petition to a judge of the Superior Court to have the order revised. Section 13 provides for imprisonment of anyone infringing or participating in the infringement of s. 12. In my opinion it is impossible to separate the provisions of ss. 3 and 12.

The validity of the statute was attacked upon a number of grounds, but, in cases where constitutional issues are involved, it is important that nothing be said that is unnecessary. In my view it is sufficient to declare that the Act is legislation in relation to the criminal law over which, by virtue of head 27 of s. 91 of the *British North America Act,* the Parliament of Canada has exclusive legislative authority. The decision of this Court in *Bédard v. Dawson et al.* (1) is clearly distinguishable. As Mr. Justice Barclay points out, the real object of the Act here under consideration is to prevent propagation of communism within the Province and to punish anyone who does so—with provisions authorizing steps for the closing of premises used for such object. The *Bédard* case was concerned with the control and enjoyment of property. I am unable to agree with the decision of Greenshields C.J. in *Fineberg v. Taub* (2). It is not necessary to refer to other authorities, because, once the conclusion is reached that the pith and substance of the impugned Act is in relation to criminal law, the conclusion is inevitable that the Act is unconstitutional.

(1) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

(2) (1939), 77 Que. S.C. 233.

The appeal should be allowed, the judgments below set aside and the action dismissed with costs, but there should be no costs as between the appellant and the respondent Elbling in the Court of Queen's Bench (Appeal Side) or in this Court. The intervention of the Attorney-General should be dismissed and it should be declared that the statute is *ultra vires* of the Legislature of the Province of Quebec *in toto*. The appellant is entitled, as against the Attorney-General, to his costs occasioned by the intervention in all Courts.

TASCHEREAU J. (*dissenting*):—La cause qui est soumise à la considération de cette Cour, a pris naissance de la façon suivante: L'intimée, demanderesse en Cour Supérieure, a loué un immeuble situé dans la cité de Montréal à un nommé Max Bailey, avec droit de sous-louer. Ce dernier, s'autorisant de ce droit, a cédé son bail à l'appelant dans la présente cause, et défendeur en Cour Supérieure.

L'intimée allègue dans son action en résiliation de bail, que l'appelant, sous-locataire, s'est servi et a permis qu'on se serve de l'immeuble en question, pour la diffusion de la doctrine communiste, et qu'il a ainsi violé une loi provinciale d'ordre public, intitulée "Loi protégeant la province contre la propagande communiste", S.R.Q. 1941, c. 52.

Le 27 janvier 1949, le procureur général de la province de Québec a en effet émis une ordonnance, tel que la loi l'autorise, prescrivant la fermeture de la maison pour toute fin quelconque, pour une période d'une année. La maison fut donc "cadenassée", et c'est maintenant la prétention de l'intimée qu'à cause de l'usage illégal que l'appelant en a fait, elle est en droit d'exiger la résiliation du bail, l'éviction de l'occupant, et des dommages qu'elle a évalués dans ses conclusions à $2,170.

L'appelant a admis s'être servi de l'immeuble pour la propagation de la doctrine communiste, mais a spécifiquement plaidé que ladite loi (S.R.Q. 1941, c. 52) est *ultra vires* de la législature de Québec, et qu'elle constitue un empiétement sur le pouvoir législatif de l'autorité fédérale qui seule pourrait légiférer en la matière. Comme la constitutionnalité d'une loi provinciale était attaquée, avis a été donné au procureur général de la province de Québec,

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

suivant les dispositions de l'art. 114 C.P.C., et ce dernier a produit une intervention, où il a soutenu la validité complète de la législation.

M. le Juge Collins de la Cour Supérieure a maintenu l'action, annulé le bail, déclaré bien fondée l'intervention du procureur général, et a reconnu en conséquence la validité de la loi. Ce jugement a été confirmé par la Cour du Banc de la Reine, avec la dissidence de M. le Juge Barclay.

Il se présente dans cette cause une première question très sérieuse qui mérite quelques observations. L'action en résiliation de bail a été instituée au mois de février 1949, et le bail se terminait, en raison de la clause de renouvellement dont on a pris avantage, le 30 avril 1950. Il s'ensuit que quand l'appel a été portée devant cette Cour en juillet 1954, le bail se trouvait expiré, et quant à l'appelant et l'intimée, il ne restait qu'à déterminer une question de frais. Il n'y a aucune somme d'argent en jeu, vu que le juge de première instance n'a pas accordé de dommages. Le *"substratum"*, ce sur quoi reposait le litige, était donc disparu. C'est la jurisprudence constante qu'en pareil cas, cette Cour refuse d'entretenir l'appel vu qu'il ne reste rien à être décidé entre les parties: *Glasgow Navigation Company v. Iron Ore Company* (1); *Moir v. The Village of Huntingdon et al.* (2); *McKay v. The Township of Hinchinbrook* (3); *Commissioner of Provincial Police v. The King* (4); *Coca-Cola Company of Canada Limited v. Mathews* (5).

On soutient cependant qu'un autre litige subsiste entre l'appelant et l'intervenant, dans lequel doit être déterminée la validité de la législation contestée. Il s'agirait bien dans l'occurrence d'une intervention aggressive, dans laquelle l'intervenant soutient ses propres droits, et non pas d'une simple intervention accessoire faite dans l'interêt de l'une des parties et qui doit nécessairement tomber quand disparaît le *"substratum"* entre les principaux litigants, soit le demandeur et le défendeur: *La Société Immobilière Maisonneuve Limitée v. Les Chevaliers de Maisonneuve* (6).

(1) [1910] A.C. 293.
(2) (1891), 19 S.C.R. 363.
(3) (1894), 24 S.C.R. 55.
(4) [1941] S.C.R. 317, [1941] 3 D.L.R. 204, 76 C.C.C. 148.
(5) [1944] S.C.R. 385, [1945] 1 D.L.R. 1.
(6) [1952] 2 S.C.R. 456.

Cette dernière cause, et la cause actuelle, se présentent sous un jour entièrement différent. Dans la cause des *Chevaliers de Maisonneuve, supra,* les intervenants réclamaient pour leur bénéfice, la propriété de certains biens, et demandaient qu'un titre leur soit consenti à cet effet. Il importait peu, par conséquent, qu'il n'y eut point d'appel sur l'action principale qui avait été rejetée, vu que la contestation devenait exclusivement entre le demandeur et les intervenants.

Ici, tel n'est pas le cas; l'intervenant ne réclame rien, sauf une déclaration que la loi est constitutionnelle, dans le but unique de faire déclarer la résiliation d'un bail. Il ne s'agit en aucune façon d'une "référence", où cette Cour serait appelée à se prononcer sur la validité ou sur l'invalidité d'une loi d'une façon purement abstraite, mais bien d'un cas concret, d'une action ordinaire, où n'est contestée la loi en question que par rapport à l'action principale. Dans ces cas, nous ne devons retenir que les points essentiels à la détermination de la cause: *Winner v. S.M.T. (Eastern) Limited* (1). Comme dans le cas présent, il n'y a rien à déterminer dans l'action principale, il me semble rationnel de dire que nous ne pouvons juger de la validité de l'intervention et que nous ne devrions pas entretenir le présent appel. Je ne vois pas de matière essentielle nécessaire à un litige civil; il n'y a pas de fond dans ce procès.

Le seul point en litige est la résiliation du bail, et si l'appel était maintenu, il faudrait déclarer que le bail n'est pas résilié et, cependant, il y a six ans qu'il n'existe plus. Il ne s'agirait donc que *d'une question de frais.* Comme le disait Sir Lyman Duff dans *Commissioner of Provincial Police v. The King, supra*:

> From that point of view the appeal had no practical object. Even if the appellant's technical objection to the proceeding by way of *mandamus* had been well founded, the licenses and number plates would still remain in the hands of the respondent; the purported suspension would still remain a void act and the only question for discussion on the appeal would be the academic technical question with regard to the propriety of proceeding by *mandamus* and *the question of costs.*

(1) [1951] S.C.R. 887, [1951] 4 D.L.R. 529, varied *sub nom. Attorney-General for Ontario et al. v. Winner,* [1954] A.C. 541, 13 W.W.R. 657 (*sub nom. S.M.T. (Eastern) Limited v. Winner*).

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

Je n'oublie pas la décision de cette Cour dans la cause de *Coté v. The James Richardson Company* (1), où il a été décidé que l'intervention ne tombe pas nécessairement, si, à cause d'un défaut de juridiction, cette Cour ne peut être saisie de l'action principale. Il s'agissait dans cette cause non pas d'un débat purement académique, mais bien d'un cas où l'intervenant *réclamait comme étant sa propriété,* une certaine quantité de bois que le demandeur avait saisie entre les mains du défendeur, et qui avait une valeur d'au delà de $2,000. *Il s'agissait, contrairement au cas qui nous occupe, d'une intervention agressive, où l'intervenant ne supportait pas les droits du défendeur, mais, au contraire, affirmait uniquement les siens.*

Dans *Coté v. Richardson, supra,* le jugé est le suivant:

An intervention filed under the provisions of the Code of Civil Procedure of the Province of Quebec is a "judicial proceeding" within the meaning of section 29 of the Supreme and Exchequer Courts Act, *and a final judgment thereon is appealable to the Supreme Court of Canada where the matter in controversy upon the intervention amounts to the sum or value of $2,000 without reference to the amount demanded by the action in which such intervention has been filed.*

Sir Charles Fitzpatrick, alors juge en chef, parlant pour la majorité de la Cour, s'exprime d'une façon bien catégorique lorsqu'il dit, à la page 44:

The intervening party stands in the same position as a plaintiff. *L'intervention n'est que l'exercice d'une action;* Rousseau & Laisney, Vol. 5, p. 494, n. 8. When, as in the present case, the intervenant is a third party who comes into the case, *not to maintain nor contest the principal demand, but to assert a right personal to himself,* new issues are raised which may be disposed of independently of the main suit: *Walcot v. Robinson,* 11 L.C. Jur. 303.

A la page 46, il souligne qu'il s'agit d'une revendication de la part de l'intervenant, par conséquent, d'une intervention agressive, créant nécessairement un *lis* entre ce dernier et l'une des parties. Voici ce qu'il dit:

Here the proceeding in intervention is to all intents and purposes an action in revendication. *Miller v. Déchène,* 8 Q.L.R. 18.

Dans la même cause, à la page 52, l'honorable juge Girouard dit:

If an intervention is a mere incident, it seems to me impossible to conceive that it can survive the principal demand.

(1) (1906), 38 S.C.R. 41.

Dans *Mulholland v. Benning et al.* (1), approuvé par cette Cour dans la cause de *Coté v. Richardson, supra,* la Cour du Banc de la Reine de la province de Québec, a décidé que le désistement de la demande principale ne peut mettre fin à une intervention, lorsque cette intervention a pour objet de revendiquer la chose saisie dans la demande principale. On voit donc que la Cour du Banc de la Reine de la province de Québec, conditionne l'existence d'une intervention à la revendication par l'intervenant d'un droit susceptible d'une appréciation pécuniaire.

La présente cause doit être distinguée de celle de *Bédard v. Dawson et al.* (2). Dans cette dernière, la question de juridiction entre l'appelant et l'intervenant a été soulevée, à cause de l'absence devant cette Cour d'un appel sur le litige principal. Mais il existait tout de même un *"substratum"*, car le litige principal subsistait toujours, vu que le dossier avait été retourné par la Cour d'Appel à la Cour Supérieure, pour preuve additionnelle, et était en conséquence susceptible d'être entendu de nouveau pour être déterminé finalement à la lumière du jugement rendu par la Cour Suprême sur l'intervention.

Même si j'entretenais encore quelque doute sur l'interprétation à être donnée à cette dernière cause, il devrait nécessairement disparaître après les jugements rendus dans la cause des *Chevaliers de Maisonneuve, supra,* et surtout dans la cause de *Winner, supra,* d'où il ressort clairement, que quand il ne s'agit pas d'une référence, mais bien d'une intervention comme celle qui nous est soumise, il ne faut en retenir que ce qui est nécessaire pour la détermination de l'action principale.

Parce que les points que je viens d'exprimer ne rencontrent pas les vues de la majorité de cette Cour, je crois qu'il devient nécessaire de dire ce que je pense de la validité de la loi dont on conteste la constitutionnalité.

Il ne fait pas de doute qu'en vertu de l'art. 91 de l'*Acte de l'Amérique britannique du Nord* (s. 27), le droit criminel est une matière qui relève exclusivement de l'autorité fédérale, sur laquelle cette dernière seule a le pouvoir de

(1) (1864), 15 Low. Can. R. 284.

(2) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

légiférer. Et dans un cas comme celui-là, la théorie dite de l'"unoccupied field" ne peut trouver son application, et ne peut justifier une législature provinciale de s'arroger un pouvoir que la constitution lui refuse: *The Fisheries Case* (1); *Attorney General for Alberta v. Attorney General for Canada et al.* (2).

La loi dite *"Loi protégeant la province contre la propagande communiste"* stipule qu'il est illégal pour toute personne qui possède ou occupe une maison dans la province, de l'utiliser ou de permettre à une personne d'en faire usage pour propager le communisme ou bolchévisme par quelque moyen que ce soit. La loi autorise le procureur général, sur preuve satisfaisante d'une infraction, d'ordonner la fermeture de la maison pour une période n'excédant pas une année. Le recours conféré par la loi au propriétaire de la maison, est de présenter une requête à la Cour pour faire reviser l'ordonnance, en prouvant qu'il était de bonne foi, qu'il ignorait que la maison fût employée en contravention à la loi, ou que la maison n'a pas été employée pour les fins qu'on lui reproche.

L'appelant prétend que cette législation relève exclusivement du droit criminel, et qu'en conséquence, elle dépasse la compétence législative de l'autorité provinciale. Je m'accorderais volontiers avec lui, si la législature avait décrété que le communisme était un crime punissable par la loi, car il y aurait là clairement un empiétement dans le domaine fédéral, qui frapperait la législation d'illégalité et la rendrait *"ultra vires"* de la province. Mais tel n'est pas le cas qui se présente à nous. La législature, en effet, n'a érigé aucun acte au niveau d'un crime, et elle n'a nullement donné le caractère de criminalité à la doctrine communiste. Si la législature n'a pas le droit de créer des offenses criminelles, elle a le droit de légiférer pour prévenir les crimes, les désordres, comme la trahison, la sédition, les attroupements illégaux, déclarés des crimes par l'autorité fédérale, et pour faire disparaître les conditions qui sont de

(1) *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia; Attorney-General for Ontario v. Attorney-General for Canada; Attorneys-General for Quebec and Nova Scotia v. Attorney-General for Canada,* [1898] A.C. 700 at 715.

(2) [1943] A.C. 356 at 370, [1943] 1 All E.R. 240, [1943] 1 W.W.R. 378, 24 C.B.R. 129.

nature à favoriser le développement du crime. Pour atteindre ces buts, je n'entretiens pas de doute qu'elle peut validement légiférer sur la possession et l'usage d'un immeuble, car ceci est exclusivement du domaine du droit civil, et relève en vertu de l'art. 92 de l'*Acte de l'Amérique britannique du Nord* (s. 13) de l'autorité provinciale.

La cause de *Bédard v. Dawson et al., supra,* présente beaucoup de similitude avec le litige actuel. Là encore la validité d'une loi provinciale intitulée "Loi concernant les propriétaires de maisons employées comme maisons de désordre", 10 Geo. V (1920), c. 81, a été attaquée. Cette loi déclarait qu'il était illégal pour toute personne qui possède ou occupe une maison ou bâtisse de quelque nature que ce soit, de l'utiliser ou de permettre à une personne d'en faire usage comme maison de désordre. Une copie certifiée de tout jugement déclarant une personne coupable d'un acte criminel, ou d'une infraction en vertu des arts. 228, 228*a*, 229 ou 229*a* de l'ancien *Code criminel,* constituait une preuve à première vue que la maison avait servi aux fins pour lesquelles la condamnation a été obtenue. Après avis donné à la partie intéressée, si cette maison continuait d'être employée comme maison de désordre, une injonction pouvait être dirigée contre le propriétaire ou le locataire, leur défendant de s'en servir ou de tolérer l'usage de cette bâtisse pour les fins susdites. La Cour pouvait ordonner, après un délai de dix jours, *la fermeture de cette maison.*

La Cour Suprême du Canada, confirmant la Cour d'Appel de la province de Québec (1), a décidé que cette loi était constitutionnelle, et bien que la loi criminelle et les règles de procédure qui s'y rapportent soient du ressort exclusif du Parlement fédéral, le Parlement provincial avait droit de légiférer sur toutes les matières civiles en rapport avec le droit criminel, et de sanctionner ses lois par une pénalité. Le jugé (2) de cette cause est le suivant:

> The Quebec statute entitled "An Act respecting the owners of houses used as disorderly houses," 10 Geo. V, c. 81, authorizing a judge to order the closing of a disorderly house, is *intra vires* the provincial legislature, *as it deals with matter of property and civil rights by providing for the suppression of a nuisance* and not with criminal law by aiming at the punishment of a crime.

(1) (1921), 33 Que. K.B. 246, 39 C.C.C. 175.
(2) [1923] S.C.R. at 681.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

M. le juge Idington s'exprime dans ses raisons de la façon suivante (1):

I have long entertained the opinion that the provincial legislatures have *such absolute power over property and civil rights,* as given them by section 92 of the B.N.A Act, item 13 thereof, that so long as they did not in fact encroach upon the powers assigned by the said Act to the Dominion Parliament *it would be almost impossible to question any such exercise of power so given unless by the exercise of the veto power given the Dominion Government.* That veto power was originally designed to prevent an improper exercise of legislative power by the provincial legislatures.

M. le juge Duff exprime ainsi son opinion (2):

The legislation impugned seems to be aimed *at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime.* This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

De son côté, M. le juge Anglin trouve la loi constitutionnelle et s'exprime ainsi (3):

The judgment of the Superior Court maintaining the intervention of the Attorney General on the other hand was confirmed and in that proceeding there is a final judgment upholding the constitutionality of the Quebec Statute (10 Geo. V, c. 81). Substantially for the reasons stated by Mr. Justice Greenshields, *I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right.* In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

M. le juge Brodeur partage les mêmes vues et dit (4):

Le parlement fédéral peut déclarer criminelle une action quelconque; mais cela ne saurait empêcher les provinces de légiférer sur la même matière *en tant que les droits civils sont concernés.*

Enfin, M. le juge Mignault n'est pas moins catégorique lorsqu'il affirme (5):

C'est cette loi que l'appelante attaque prétendant qu'elle empiète sur la juridiction du parlement canadien sur le droit criminel. A mon avis, il n'y a pas là législation criminelle. *La législature veut empêcher qu'on ne se serve d'un immeuble pour des fins immorales; elle ne punit pas l'offense elle-même par l'amende ou l'emprisonnement, mais elle ne fait que statuer sur la possession et l'usage d'un immeuble.* Cela rentre pleinement dans le droit civil.

(1) [1923] S.C.R. at 683. (2) At p. 684.
(3) At p. 685. (4) At p. 686.
(5) At p. 687.

Dans une cause de *Lymburn et al. v. Mayland et al.* (1), le Conseil Privé a eu à décider de la constitutionnalité de la "Security Frauds Prevention Act, 1930, of Alberta". Cette loi stipulait que personne ne pouvait faire le commerce de valeurs mobilières, à moins d'être enregistré au département du procureur général. Effectivement cette loi défendait à une compagnie publique de vendre ses actions à moins que ce ne fut par l'intermédiaire d'une personne enregistrée, ou que la compagnie elle-même fut enregistrée. En vertu de la loi, le procureur général, ou son délégué, pouvait enquêter si quelque acte frauduleux *avait été ou était sur le point d'être commis.* La loi imposait des pénalités pour toute violation de ses dispositions, et, en vertu de l'art. 20 de la loi, c'était une offense de commettre un acte frauduleux qui n'était pas punissable en vertu des dispositions du *Code criminel* du Canada. Le Conseil Privé en est venu à la conclusion que cette loi était dans les limites des pouvoirs de la législature provinciale en vertu de l'art. 92 de l'*Acte de l'Amérique britannique du Nord,* qu'elle n'était pas invalide en ce qui concerne les compagnies fédérales parce qu'elle ne leur défendait pas de vendre à moins qu'elles ne soient enregistrées, mais les assujétissait simplement à certaines règles applicables à toutes les personnes faisant le commerce des valeurs mobilières. Le Conseil Privé a aussi conclu qu'il ne s'agissait pas là d'une tentative détournée pour empiéter sur le pouvoir législatif fédéral, en ce qui concerne le droit criminel.

Lord Atkin s'exprime de la façon suivante, à la page 323:

> It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. *It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded.* If the legislation be otherwise *intra vires,* the imposition of such an ordinary condition in a bond taken *to secure good conduct* does not appear to invade in any degree the field of criminal law.

Et plus loin, à la page 327, il dit ce qui suit:

> In any case it appears to their Lordships, after reviewing the whole Act, that there is no ground for holding that the Act is a colourable attempt to encroach upon the exclusive legislative power of the Dominion as to criminal law. They have already given their reasons for holding that the Act cannot be considered invalid as destroying the status of Dominion

(1) [1932] A.C 318, [1932] 2 D.L.R. 6, 57 C.C.C. 311, [1932] 1 W.W.R. 578.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

companies. The provisions therefore of Part II of the Act appear to be competent Provincial enactments dealing with property and civil rights and have to be obeyed by persons subject to them.

Enfin, dans la cause *The Provincial Secretary of Prince Edward Island v. Egan* (1), la Cour Suprême du Canada a décidé que l'art. 84(1) du *Highway Traffic Act, 1936* de l'Île du Prince Édouard était valide, malgré qu'il autorisait la confiscation par l'autorité provinciale de la licence de conducteur de toute personne conduisant son véhicule, alors qu'elle était sous l'influence de liqueurs enivrantes. On a soutenu qu'il s'agissait d'une offense criminelle prévue par l'art. 285(4) du *Code criminel,* et que cette loi provinciale imposait une sanction additionnelle. La Cour a rejeté ces prétentions et Sir Lyman Duff, alors juge en chef, a dit ce qui suit (2):

> It is, of course, beyond dispute that where an offence is created by competent Dominion legislation in exercise of the authority under section 91(27), the penalty or penalties attached to that offence, as well as the offence itself, become matters within that paragraph of section 91 which are excluded from provincial jurisdiction.
>
> There is, however, no adequate ground for the conclusion that these particular enactments (section 84(1)(*a*) and (*c*)) are in their true character attempts to prescribe penalties for the offences mentioned, rather than enactments in regulation of licences.

Rinfret J. parlant pour lui-même et pour Crocket et Kerwin JJ. s'est exprimé de la façon suivante, à la page 414:

> It cannot be open to contention for a moment that the imposing of such a penalty for enforcing a law of the competency of Prince Edward Island is an interference with criminal law, under section 91, subs. 27. *Regina v. Watson* (1890), 17 Ont. A.R. 221, at 249. *It is not an additional penalty imposed for a violation of the criminal law. It provides for a civil disability arising out of a conviction for a criminal offence.*

Et, plus loin, à la page 415, il ajoute:

> It does not create an offence; it does not add to or vary the punishment already declared by the *Criminal Code*; it does not change or vary the procedure to be followed in the enforcement of any provision of the *Criminal Code. It deals purely and simply with certain civil rights in the Province of Prince Edward Island.* Such legislation can rely upon the decision, in this Court, of *Bédard v. Dawson and the Attorney-General for Quebec* [*supra*].

Hudson J. partage les mêmes vues à la page 417:

> The section in question does not create a new offence but makes provision in regard to the licence which has been issued under the provincial authority. *I do not think that this can be regarded as an addition*

(1) [1941] S.C.R. 396, [1941] 3 D.L.R. 305, 76 C.C.C. 227.

(2) At p. 403.

to any punishment or penalty provided for in section 285 of the Criminal Code. The situation seems to be analogous to that dealt with by the Judicial Committee in *Lymburn v. Mayland* [*supra*].

Et, à la page 418, Taschereau J. dit:

This section merely provides for a civil disability arising out of a conviction for a criminal offence. *The field of criminal law is in no degree invaded by this legislation which is aimed at the suppression of a nuisance on highways.* There can be no doubt that the control of the roads and highways and the regulation of traffic thereon is assigned by the *B.N.A. Act* to the Legislatures of the Provinces.

Je suis clairement d'opinion que si une province peut validement légiférer sur toutes les matières civiles en rapport avec le droit criminel, si elle peut *adopter des lois destinées à supprimer les conditions qui favorisent le crime,* et contrôler les propriétés afin de protéger la société contre tout usage illégal qu'on peut en faire, si elle a le pouvoir incontestable de réglementer les courtiers dans leurs transactions financières pour protéger le public contre la fraude, si, enfin, elle a le droit d'imposer des incapacités civiles comme conséquence d'une offense criminelle, je ne vois pas pourquoi elle n'aurait pas également le pouvoir de décréter que ceux qui prêchent et écrivent des doctrines de nature à favoriser la trahison, la violation des secrets officiels, la sédition, etc., soient privés de la jouissance des immeubles d'où se propagent ces théories destinées à saper à ses bases, et renverser l'ordre établi.

L'expérience, il nous est permis d'en prendre une connaissance judiciaire, nous enseigne, en effet, que des Canadiens, il y a moins de dix ans, malgré les serments d'allégeance qu'ils avaient prêtés, n'ont pas hésité au nom du communisme à violer les secrets officiels, et à mettre en péril la sécurité de l'État. La suppression de la diffusion de ces doctrines subversives par des sanctions civiles, est sûrement aussi importante que la suppression des maisons de désordre. Je demeure convaincu que le domaine du droit criminel, exclusivement de la compétence fédérale, n'a pas été envahi par la législation en question, *et qu'il ne s'agit que de sanctions civiles établies pour la prévention des crimes et la sécurité du pays.*

On a aussi prétendu que cette législation constituait une entrave à la liberté de la presse et à la liberté de parole. Je crois à ces libertés: ce sont des droits indéniables dont bénéficient heureusement les gens de ce pays, mais ces

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Taschereau J.

libertés ne seraient plus un droit, et deviendraient un privilège, si on permettait à certains individus d'en abuser et de s'en servir pour diffuser des doctrines malsaines, qui conduisent nécessairement à de flagrantes violations des lois établies. Ces libertés, dont jouissent les citoyens et la presse, d'exprimer leurs croyances, leurs pensées et leurs doctrines, sans autorisation ou censure préalables, ne sont pas des droits absolus. Elles sont nécessairement limitées, et doivent s'exercer dans le cadre de la légalité. Quand les bornes sont dépassées, elles deviennent abusives, et la loi doit alors intervenir pour exercer une action répressive, et protéger les citoyens et la société.

Le même raisonnement doit nécessairement servir à rencontrer l'objection soulevée par l'appelant à l'effet que la loi attaquée, est une entrave à la libre expression de pensée de tout individu, candidat à une élection. Les idées destructives de l'ordre social et de l'autorité établie, par des méthodes dictatoriales, n'ont pas plus de droits en temps électoraux qu'en aucun autre temps. Cette loi, dans l'esprit de certains, peut paraître sévère, il ne m'appartient pas d'en juger la sagesse, mais la sévérité d'une loi adoptée par le pouvoir compétent ne la marque pas du caractère d'inconstitutionnalité.

Pour toutes ces raisons, je suis d'avis que le présent appel doit être rejeté avec dépens payables par l'appelant à l'intervenant. Je ne crois pas qu'il doit y avoir d'ordonnance en ce qui concerne les frais devant cette Cour entre l'appelant et l'intimée.

RAND J.:—By 1 Geo. VI, c. 11, passed by the Legislature of the Province of Quebec and entitled "An Act to Protect the Province against Communistic Propaganda" (now R.S.Q. 1941, c. 52), the following provisions are enacted:

3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.

* * *

12. It shall be unlawful to print, to publish in any manner whatsoever or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism.

The word "house" is defined to extend to any building or other construction whatever. By s. 4 the Attorney-General,

> . . . upon satisfactory proof that an infringement of section 3 has been committed, may order the closing of the house against its use for any purpose whatsoever for a period of not more than one year; the closing order shall be registered at the registry office of the registration division wherein is situated such house, upon production of a copy of such order certified by the Attorney-General.

When a house is closed, an owner who has not been in possession may apply to the Superior Court to have the order revised upon proving that in good faith he was ignorant of the use being made in contravention of the Act or that the house has not been so used during the twelve months preceding the order. Conversely, after an order has been so modified or terminated, the Attorney-General may, on application to the same Court, obtain a decree reviving it. No remedy by resort to a Court is extended to the person in possession against whom the order has become effective. The Attorney-General may at any time permit reoccupation on any conditions thought proper for the protection of the property and its contents or he may revoke the order.

The action in this appeal was brought by an owner against a tenant to have a lease set aside and for damages on the ground of the use of the leased premises for the illegal purpose so defined and their closure under such an order. As the validity of the Act was challenged by the defence, the Attorney-General intervened and that issue became the substantial question in the proceedings.

In addition to the closure, a large quantity of documentary matter was seized and removed. In the order both ss. 3 and 12 are recited and the concluding paragraph is in these terms:

> Je, soussigné, procureur général de la province de Québec, croyablement informé des infractions et violations ci-dessus, vous enjoins de fermer pour toutes fins quelconques, pendant un an à compter de l'exécution de cet ordre, la maison portant le numéro civique 5321 de l'avenue du Parc, dans la cité de Montréal, et de plus, vous êtes par les présentes autorisé, et je vous donne les instructions en conséquence, à saisir et confisquer tout journal, revue, pamphlet, circulaire, document ou écrit quelconque imprimé, publié ou distribué en contravention à la dite loi, en particulier et sans restrictions à saisir et à détruire les exemplaires du journal "Combat".

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Rand J.

From this it is clear that the order was based upon both sections.

In the intervention, conclusion C was in these words:

> Adjuger que la dite loi, et toutes les dispositions d'icelle, sont constitutionnelles et valides, et en pleine force et vigueur.

In conformity with this and the conclusions in the action, the judgment of the Superior Court declared the statute in all respects to be valid, allowed the claim for resiliation, but dismissed that for damages because they had not been sufficiently proved. On appeal by the defendant that judgment was affirmed.

Mr. Beaulieu, for the Attorney-General, as a preliminary point, urged that the dismissal of the claim for damages removed the relevancy of s. 12 to the issue on the intervention and that this Court should consider only s. 3, a point which, if upheld, would entail a modification of the judgments below. But the validity of the entire statute was put in issue by the intervention and maintained by the Courts below; and in the circumstances of the case, apart from any question of severance and of prejudice to the rights of the appellant in relation to the judgment on the claim as well as against those executing the order should it not be upheld, I see no sufficient warrant at this stage to limit the scope of the appeal.

The first ground on which the validity of s. 3 is supported is head 13 of s. 92 of the *British North America Act*, "Property in the Province", and Mr. Beaulieu's contention goes in this manner: by that head the Province is vested with unlimited legislative power over property; it may, for instance, take land without compensation and generally may act as amply as if it were a sovereign state, untrammelled by constitutional limitation. The power being absolute can be used as an instrument or means to effect any purpose or object. Since the objective accomplishment under the statute here is an Act on property, its validity is self-evident and the question is concluded.

I am unable to agree that in our federal organization power absolute in such a sense resides in either legislature. The detailed distribution made by ss. 91 and 92 places limits to direct and immediate purposes of provincial action. Under head 13 the purpose would, in general, be a

"property" purpose either primary or subsidiary to another head of the same section. If such a purpose is foreign to powers vested in the Province by the Act, it will invade the field of the Dominion. For example, land could not be declared forfeited or descent destroyed by attainder on conviction of a crime, nor could the convicted person's right of access to provincial Courts be destroyed. These would trench upon both criminal law and citizenship status. The settled principle that calls for a determination of the "real character", the "pith and substance", of what purports to be enacted and whether it is "colourable" or is intended to effect its ostensible object, means that the true nature of the legislative act, its substance in purpose, must lie within s. 92 or some other endowment of provincial power. That a power ostensibly as here under a specific head cannot be exercised as a means directly and immediately to accomplish a purpose not within that endowment is demonstrated by the following decisions of the Judicial Committee: *Union Colliery Company of British Columbia, Limited et al. v. Bryden* (1), holding that legislative power in relation to employment in a coal mine could not be used as a means of nullifying the civil capacities of citizenship and, specifically, of persons qualifying under head 25 of s. 91, Naturalization and Aliens; *Canadian Federation of Agriculture v. Attorney-General for Quebec et al.* (2), holding that the Dominion, under its power in relation to criminal law, could not prohibit the manufacture of margarine for the purpose of benefiting in local trade one class of producer as against another. The heads of ss. 91 and 92 are to be read and interpreted with each other and with the provisions of the statute as a whole; and what is then exhibited is a pattern of limitations, curtailments and modifications of legislative scope within a texture of interwoven and interacting powers.

In support of the legislation on this ground, *Bédard v. Dawson et al.* (3) was relied on. In that case the statute provided that it should be illegal for the owner or occupier of any house or building to use it or allow it to be used as a disorderly house; and procedure was provided by which the

(1) [1899] A.C. 580.
(2) [1951] A.C. 179, [1950] 4 D.L.R. 689.
(3) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Rand J.

Superior Court could, after a conviction under the *Criminal Code*, grant an injunction against the owner restraining that use of it. If the use continued, the Court could order the building to be closed for a period of not more than one year.

This power is seen to have been based upon a conviction for maintaining a public nuisance. Under the public law of England which underlies that of all the Provinces, such an act was not only a matter for indictment but in a civil aspect the Court could enjoin its continuance. The essence of this aspect is its repugnant or prejudicial effect upon the neighbouring inhabitants and properties.

On that view this Court proceeded in *Bédard*. Idington J. at p. 684 says:

> Indeed the duty to protect neighbouring property owners in such cases as are involved in this question before us renders the question hardly arguable.
>
> There are many instances of other nuisances which can be better rectified by local legislation within the power of the legislatures over property and civil rights than by designating them crimes and leaving them to be dealt with by Parliament as such.

Anglin J. at p. 685:

> . . . I am of the opinion that this statute . . . is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right. In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

Brodeur J. at pp. 685-6:

> La législature provinciale de Québec, sachant que ces maisons affectaient considérablement la valeur des propriétés du voisinage et rendaient plus difficile la réglementation policière, a jugé à propos d'ordonner leur fermeture si, après avis, les propriétaires ne voyaient pas à y faire cesser le commerce immoral qui s'y faisait.
>
> * * *
>
> Il est incontestable que si une personne maintient une maison ou fait une chose qui constitue une nuisance, et que cet acte soit considéré criminel par le parlement fédéral, nos tribunaux peuvent être autorisés par des lois provinciales à émettre une injonction pour mettre fin à ces violations du droit public.

That the scene of study, discussion or dissemination of views or opinions on any matter has ever been brought under legal sanction in terms of nuisance is not suggested. For the past century and a half in both the United Kingdom and Canada, there has been a steady removal of

restraints on this freedom, stopping only at perimeters where the foundation of the freedom itself is threatened. Apart from sedition, obscene writings and criminal libels, the public law leaves the literary, discursive and polemic use of language, in the broadest sense, free.

The object of the legislation here, as expressed by the title, is admittedly to prevent the propagation of communism and bolshevism, but it could just as properly have been the suppression of any other political, economic or social doctrine or theory; and the issue is whether that object is a matter "in relation to which" under s. 92 the Province may exclusively make laws. Two heads of the section are claimed to authorize it: head 13, as a matter of "Civil Rights", and head 16, "Local and Private Matters".

Mr. Tremblay in a lucid argument treated such a limitation of free discussion and the spread of ideas generally as in the same category as the ordinary civil restrictions of libel and slander. These obviously affect the matter and scope of discussion to the extent that it trenches upon the rights of individuals to reputation and standing in the community; and the line at which the restraint is drawn is that at which public concern for the discharge of legal or moral duties and government through rational persuasion, and that for private security, are found to be in rough balance.

But the analogy is not a true one. The ban is directed against the freedom or civil liberty of the actor; no civil right of anyone is affected nor is any civil remedy created. The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. There is nothing of civil rights in this; it is to curtail or proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.

It is then said that the ban is a local matter under head 16; that the social situation in Quebec is such that safeguarding its intellectual and spiritual life against subversive doctrines becomes a special need in contrast with that for a general regulation by Parliament. A similar contention was made in *Re Section 6 of The Farm Security Act*

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Rand J.

(1944) of Saskatchewan (1). What was dealt with there was the matter of interest on mortgages and a great deal of evidence to show the unique vicissitudes of farming in that Province was adduced. But there, as here, it was and is obvious that local conditions of that nature, assuming, for the purpose of the argument only, their existence, cannot extend legislation to matters which lie outside of s. 92.

Indicated by the opening words of the preamble in the Act of 1867, reciting the desire of the four Provinces to be united in a federal union with a constitution "similar in principle to that of the United Kingdom", the political theory which the Act embodies is that of parliamentary government, with all its social implications, and the provisions of the statute elaborate that principle in the institutional apparatus which they create or contemplate. Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Caanda, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his

(1) [1947] S.C.R. 394, [1947] 3 D.L.R. 689, affirmed *sub nom. Attorney-General for Saskatchewan v. Attorney-General of Canada et al.*, [1949] A.C. 110, [1949] 2 D.L.R. 145, [1949] 1 W.W.R. 742.

status of citizenship. Outlawry, for example, divesting civil standing and destroying citizenship, is a matter of Dominion concern. Of the fitness of this order of government to the Canadian organization, the words of Taschereau J. in *Brassard et al. v. Langevin* (1) should be recalled:

> The object of the electoral law was to promote, by means of the ballot, and with the absence of all undue influence, the free and sincere expression of public opinion in the choice of members of the Parliament of Canada. This law is the just sequence to the excellent institutions which we have borrowed from England, institutions which, as regards civil and religious liberty, leave to Canadians nothing to envy in other countries.

Prohibition of any part of this activity as an evil would be within the scope of criminal law, as ss. 60, 61 and 62 of the *Criminal Code* dealing with sedition exemplify. Bearing in mind that the endowment of parliamentary institutions is one and entire for the Dominion, that Legislatures and Parliament are permanent features of our constitutional structure, and that the body of discussion is indivisible, apart from the incidence of criminal law and civil rights, and incidental effects of legislation in relation to other matters, the degree and nature of its regulation must await future consideration; for the purposes here it is sufficient to say that it is not a matter within the regulation of a Province.

Mr. Scott, in his able examination of the questions raised, challenged also the validity of ss. 4 *et seq.* which vest in the Attorney-General the authority to adjudicate upon the commission of the illegal act under s. 3 and to issue the order of closure; but in view of the conclusions reached on the other grounds, the consideration of this becomes unnecessary.

I would, therefore, allow the appeal, set aside the judgments below, dismiss the action and direct a declaration on the intervention that the statute in its entirety is *ultra vires* of the Province. The appellant will be entitled to the costs of the action in the Superior Court against the respondent Elbling and the costs occasioned by the intervention in all Courts against the Attorney-General.

(1) (1877), 1 S.C.R. 145 at 195.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Kellock J.

KELLOCK J.:—I have had the advantage of reading the judgment of my brother Rand, with which I agree. I only desire to add a reference to my own judgment in *Saumur v. The City of Quebec* (1), and particularly to the statement there reproduced from Mr. Justice Mignault's work, vol. 1, p. 131, as follows:

> Les droits sont les facultés ou avantages que les lois accordent aux personnes. Ils sont *civils, politiques* ou *publics* . . .
>
> Certains droits existent qui, à proprement parler, ne sont ni *civils* ni *politiques;* tels sont les droits de s'associer, de s'assembler paisiblement et sans armes, de pétitionner, de manifester sa pensée par la voie de la presse ou autrement, la liberté individuelle et enfin la liberté de conscience. Ces droits ne sont point des droits *civils,* car ils ne constituent point des rapports de particulier à particulier; ce ne sont pas non plus de véritables droits *politiques,* puisqu'on les exerce sans prendre aucune part au gouvernement du pays. Quelques personnes les rangent dans une classe particulière sous la dénomination de *droits publics.*

In my opinion, legislation of the character of that here in question cannot be supported as being in relation to civil rights in the Province within the meaning of head 13 of s. 92 of the *British North America Act,* and equally, it cannot be said to be in relation to matters of a merely local or private nature in the province.

No objection was raised by the Attorney-General to the entertaining of this appeal on the ground that there no longer remained any *lis* as between the appellant and the respondent Elbling, but the point should perhaps be noticed. In my view, any such objection, had it been made, would be completely answered by the decision of this Court in *Bédard v. Dawson et al.* (2). There the action had been taken by the respondent Dawson with regard to certain premises alleged to have been used or allowed to be used by the appellant contrary to a statute of the Quebec Legislature entitled "An Act respecting the Owners of Houses used as Disorderly Houses". The constitutional validity of the statute having been brought into question by the appellant, the Attorney-General intervened. The Superior Court maintained the action and the intervention, but by the judgment of the Court of King's Bench, Appeal Side, the main action between the plaintiff and the defendant was remitted to the Superior Court to permit of further proof

(1) [1953] 2 S.C.R. 299 at 348 *et seq.,* [1953] 4 D.L.R. 641, 106 C.C.C. 289.

(2) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

being adduced in regard to the defendant's ownership of the property in question. That judgment, not being a final judgment, was not the subject of appeal to this Court. On the other hand, the judgment of the Superior Court maintaining the intervention of the Attorney-General was confirmed by the Court of King's Bench. This was a final judgment and was the subject of the appeal to this Court, which overruled an objection to the entertaining of the appeal on the ground that the main action, having been referred back, had still to be dealt with by the trial Court. I am unable to distinguish, in substance, the circumstances of that case from the present.

I would allow the appeal, set aside the judgments below, dismiss the action and direct a declaration on the intervention that the statute in its entirety is *ultra vires* of the Province. The appellant should have the costs of the action in the Superior Court against the respondent Elbling and the costs occasioned by the intervention in all Courts against the Attorney-General.

The judgment of Locke and Nolan JJ. was delivered by

NOLAN J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) (1) dismissing an appeal from the judgment of the Superior Court and maintaining the intervention of the Attorney-General for the Province of Quebec.

By a lease dated December 29, 1947, the respondent Freda Elbling leased to one Max Bailey the premises bearing civic number 5321 Park Avenue in the city of Montreal for the term of 15½ months from January 15, 1948.

On December 30, 1947, the respondent Elbling granted to the lessee Bailey an option to renew the lease for an additional period terminating on April 30, 1950.

On February 5, 1948, the lessee Bailey assigned the lease and option to the appellant.

The option was exercised and the appellant, on January 27, 1949, was in possession of the premises under a lease which expired on April 30, 1950.

On February 15, 1949, the respondent Elbling commenced an action against the appellant, praying for cancellation of the lease and for damages in the amount of $2,170. The

(1) [1954] Que. Q.B. 421.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Nolan J.

ground of action was the alleged use of the premises for the purpose of propagating communism contrary to the provisions of "An Act to protect the Province against Communistic Propaganda", R.S.Q. 1941, c. 52, hereinafter referred to as the *Padlock Act*.

The appellant admitted that the premises were used to propagate communism, but pleaded that the *Padlock Act* was wholly *ultra vires* of the Legislature of the Province of Quebec. In accordance with art. 114 of the Quebec *Code of Civil Procedure*, notice of his intention to contest the constitutionality of the legislation was given to the Attorney-General, who intervened in the action.

The learned trial judge ordered cancellation of the lease and rejected the claim for damages. There was no appeal on the question of damages.

The learned trial judge also held that the Act was constitutional and, in pith and substance, was not criminal law and was not related to any matters exclusively reserved to the Dominion Parliament. He found that it was related to property and civil rights in the Province and was a matter of merely local or private nature.

This judgment was affirmed by the Court of Queen's Bench (Appeal Side), Barclay J. dissenting.

On January 27, 1949, the Attorney-General of the Province of Quebec ordered the director of the provincial police to close the premises for a period of one year from the execution of the order and to seize and confiscate all newspapers, reviews, pamphlets, circulars, documents or writings published in contravention of the *Padlock Act*.

The pertinent sections of the *Padlock Act* read as follows:

3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.

4. The Attorney-General, upon satisfactory proof that an infringement of section 3 has been committed, may order the closing of the house against its use for any purpose whatsoever for a period of not more than one year; . . .

* * *

12. It shall be unlawful to print, to publish in any manner whatsoever or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism.

13. Any person infringing or participating in the infringement of section 12 shall be liable to an imprisonment of not less than three months nor more than twelve months, in addition to the costs of prosecution, and, in default of payment of such costs, to an additional imprisonment of one month. . . .

14. Any constable or peace officer, upon instructions of the Attorney-General, of his substitute or of a person specially authorized by him for the purpose, may seize and confiscate any newspaper, periodical, pamphlet, circular, document or writing whatsoever, printed, published or distributed in contravention of section 12, and the Attorney-General may order the destroying thereof.

The main question for determination on this appeal is whether or not the enactment in question is in relation to "Criminal Law" as that term is used in head 27 of s. 91 of the *British North America Act*. It has been held by the Judicial Committee in *Attorney-General for Ontario v. The Hamilton Street Railway Company et al.* (1) and by this Court in *Re Section 498A of the Criminal Code* (2) that the term "Criminal Law" means criminal law "in its widest sense" and is in no way confined to what was criminal law by the law of England or of any Province in 1867. It must extend to the power to make new crimes.

It was contended on behalf of the appellant before this Court that the legislation, judged by its true nature and purpose, is related to public wrongs rather than private rights and is, therefore, criminal law within the exclusive jurisdiction of the Parliament of Canada.

The respondent took the position that the legislation was in no sense criminal law, but was related to property and civil rights and to matters of a local or private nature in the province.

The history of the legislation is not without interest. In 1919 the *Criminal Code* was amended (9-10 Geo. V, c. 46, s. 1) by adding thereto ss. 97A and 97B, which provided that any assoication the purpose of which was to bring about any governmental, industrial or economic change within Canada by the use of force was an unlawful association. Penalties were imposed on anyone who acted as an officer or member

(1) [1903] A.C. 524, 7 C.C.C. 326, 2 O.W.R. 672.

(2) [1936] S.C.R. 366, [1936] 3 D.L.R. 593, 66 C.C.C. 161, affirmed *sub nom. Attorney-General for British Columbia v. Attorney-General for Canada,* [1937] A.C. 368, [1937] 1 D.L.R. 688, 67 C.C.C. 193, [1937] 1 W.W.R. 317.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Nolan J.

thereof, or who published or imported any literature on their behalf. Sections 97A and 97B later became s. 98 in R.S.C. 1927, c. 36.

In 1930 s. 133A (which is substantially embodied in the present s. 61) was added to the *Criminal Code* (by 20-21 Geo. V, c. 11, s. 2) and ameliorated the sedition laws.

In 1934 the Legislature of Quebec enacted "An Act respecting certain public meetings endangering public, social or religious order", entitled the *Certain Meetings Advertising Act* (24 Geo. V, c. 51), which forbade the distribution of certain circulars in towns or villages unless prior approval had been obtained from the chief of police, and prohibited approval if the printer, maker or author of the circular was not domiciled in the Province.

In 1936 s. 98 of the *Criminal Code* was repealed by 1 Edw. VIII, c. 29, s. 1, and by s. 4 of the same Act a new subs. (4) was added to s. 133 of the *Criminal Code* (now s. 60, subs. (4)) as follows:

> 133 (4) Without limiting the generality of the meaning of the expression "seditious intention" everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada.

In 1937 the Legislature of Quebec enacted the *Padlock Act* (1 Geo. VI, c. 11) and on the same day repealed the *Certain Meetings Advertising Act* (by 1 Geo. VI, c. 79).

At the outset it becomes necessary to consider the judgment of this Court in *Bédard v. Dawson et al.* (1), which held that another padlock law, namely, "An Act respecting the Owners of Houses used as Disorderly Houses" (now R.S.Q. 1941, c. 50), was *intra vires*.

Section 3 of that Act provides:

> 3. It shall be illegal for any person, who owns or occupies any house or building of any nature whatsoever, to use or to allow any person to use the same as a disorderly house.

Section 9 of the Act authorizes a judge to order the closing of a disorderly house. This Court held that the legislation was *intra vires* of the Provincial Legislature, as

(1) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

it dealt with a matter of property and civil rights by providing for the suppression of a nuisance and not with criminal law by aiming at the punishment of a crime.

Anglin J. (later C.J.C.) said at p. 685:

> I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right. In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

In my view *Bédard v. Dawson et al.* may be distinguished on the ground that the statute there considered was concerned with the control or enjoyment of property and with safeguarding the community from the consequences of an illegal or injurious use being made of property, whereas that in the present case is aimed at the prevention of the propagation of communism. The question of the suppression of a local nuisance does not arise.

In *Johnson v. The Attorney General of Alberta* (1) Locke J., referring to *Bédard v. Dawson et al., supra,* said at p. 157:

> (1) [1954] S.C.R. 127, [1954] 2 D.L.R. 625, 108 C.C.C. 1.
>
> . . . it was the opinion of all the members of the Court that the real purpose of the statute [the *Disorderly House Act*] was the control and enjoyment of property and that it was not directed to the punishment of a crime.

Moreover, in *Bédard v. Dawson et al.* the offence was created under the *Criminal Code* of Canada (ss. 228, 228*a*, 229 and 229*a*) and not under the provincial legislation (the *Disorderly House Act*). The provincial legislation merely provided what would be the civil effect on the owner of a house in which such an offence had been committed.

The facts that in *Bédard v. Dawson et al.* the offence committed was defined in the *Criminal Code,* whereas in the present case it is not; that the nature of the offence dealt with in *Bédard v. Dawson et al.* was so different from that under consideration in the present case as to preclude comparison; and that there is a radical difference in the procedural aspects of the two cases, all impel me to the conclusion that the two cases are clearly distinguishable.

(1) [1954] S.C.R. 127, [1954] 2 D.L.R. 625, 108 C.C.C. 1.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Nolan J.

Bédard v. Dawson et al. was followed by Greenshields C.J. in *Fineberg v. Taub* (1). In that case the constitutionality of the Act now under consideration in the present case, was subjected to attack on similar grounds. In upholding the constitutionality of the legislation Greenshields C.J., at p. 237, said:

> The underlying purpose of the incriminated statute is to protect the Province of Quebec against communistic propaganda. Nowhere in the Act is a crime or criminal offence created. The purpose of the Act is to prevent and not to punish. Clause (3) of the Act declares it to be illegal for any person who possesses or occupies a house within the Province to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatever. That is clearly a declaration affecting the use of property within this Province.

With respect, I am unable to agree that the legislation under attack is purely and simply to determine the civil consequences of a criminal act. Clearly it affects the use of property within the Province, but, in my view, it is not related to property and civil rights or to matters of a local or private nature in the Province, but its true nature and purpose is the suppression of communism by creating a new crime with accompanying penal provisions.

The respondent the Attorney-General contended that only the constitutionality of s. 3 should be passed upon by this Court on the ground that, admittedly, the offence committed was in propagating communism in a house and consequently s. 12 was not in issue.

It should be pointed out that both ss. 3 and 12 were specifically referred to in the order of the Attorney-General closing the house. Moreover, the appellant in his notice of plea of unconstitutionality, given pursuant to art. 114 of the *Code of Civil Procedure,* stated that he had pleaded the unconstitutionality of the whole of the statute and the Attorney-General intervened on the ground that the whole of the statute was *intra vires* of the Provincial Legislature. In my view, therefore, the constitutionality of both ss. 3 and 12 is properly before this Court for adjudication.

It was also contended by the respondent the Attorney-General that ss. 3 and 12 of the Act created two separate and independent illegalities imposing different penalties and that consequently the sections were severable and the invalidity of one would not affect the validity of the other. On this point I agree with the contention of the appellant

(1) (1939), 77 Que. S.C. 233.

that the two separate sections in the statute are so interconnected that they must be read together as expressing a single legislative purpose. In addition the question of severability could only arise if one or other of these sections were held to be *intra vires,* so that the valid might be severed from the invalid. If both are invalid there can be no severance.

The respondent the Attorney-General contended that, there being no provision in the *Criminal Code,* or in any law passed by the Parliament of Canada, which made communism a crime or which forbade the propagation of communism, the field was unoccupied and the provincial legislation was valid. I do not agree with this contention.

In *Union Colliery Company of British Columbia, Limited et al. v. Bryden* (1), Lord Watson, in delivering the judgment of the Judicial Committee, made it clear that the abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any Provincial Legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867. Attention is also drawn to *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia; Attorney-General for Ontario v. Attorney-General for Canada; Attorneys-General for Quebec and Nova Scotia v. Attorney-General for Canada* (2), and to *Attorney-General for Alberta v. Attorney-General for Canada et al.* (3), both to the same effect.

The appellant took the position before this Court that the legislation in question deals with sedition and seditious literature and is an encroachment upon ss. 133 and 133A of the *Criminal Code,* R.S.C. 1927, c. 36. It was contended that these sections provide a complete series of rules governing freedom of discussion and governing the publication of printed matter dealing with political and governmental affairs and consequently the theory of the unoccupied field was inapplicable.

(1) [1899] A.C. 580.

(2) [1898] A.C. 700 at 715.

(3) [1943] A.C. 356 at 370, [1943] 1 All E.R. 240, [1943] 1 W.W.R. 378, 24 C.B.R. 129.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Nolan J.

In my view of the matter it is unnecessary to decide upon the merit of this contention because, whether or not the Dominion Parliament has made communism a crime or forbidden its propagation, it has the exclusive jurisdiction so to do.

Holding, as I do, that the legislation under attack, judged by its true nature and purpose, is within the exclusive jurisdiction of the Parliament of Canada, it is unnecessary to consider the other grounds put forward by the appellant in support of the appeal.

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

CARTWRIGHT J.:—The question in this appeal is whether c. 52 of R.S.Q. 1941, formerly c. 11 of the statutes of Quebec, 1937, 1 Geo. VI, entitled "Act to protect the Province against Communistic Propaganda", hereinafter referred to as the Act, is *intra vires* of the Legislature. The relevant circumstances and the nature of the arguments addressed to us sufficiently appear in the reasons of other members of the Court.

In my opinion the Act is invalid *in toto*, as being in pith and substance legislation in relation to the criminal law, a matter assigned by s. 91, head 27, of the *British North America Act* to the exclusive legislative authority of the Parliament of Canada.

The nature and purpose of the legislation clearly appear from the words of the Act. The propagation of communism or bolshevism is regarded as an evil and such propagation, by any means whatsover in a house within the Province and by any writing whatsoever elsewhere in the Province, is forbidden under punitive sanctions.

The circumstance that the penalty prescribed for a breach of the provisions of s. 3 is the closing of a house within the Province has not the effect of making the enactment one in relation to property and civil rights in the Province, and I find myself unable to relate the Act to any provincial purpose falling within head 13 or 16 of s. 92 of the *British North America Act*. The purpose and effect of the Act are to make criminal the propagation of communism or bolshevism which the Legislature in the public interest intends

to prohibit. It is legislation in relation to what is conceived to be a public evil not in relation to civil rights or local matters.

Having reached this conclusion I do not find it necessary to deal with any of the other grounds upon which the validity of the Act was impugned.

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

FAUTEUX J.:—L'action en résiliation de bail, intentée par l'intimée à l'appelant, se fonde uniquement sur la *Loi concernant la propagande communiste,* S.R.Q. 1941, c. 52. La constitutionnalité de cette loi a été attaquée par ce dernier, soutenue par le procureur général et maintenue, en première instance, par un jugement confirmé par une décision majoritaire de la Cour d'Appel. Subséquemment, et considérant que la question en était une de "considérable importance", la Cour d'Appel autorisa un pourvoi devant cette Cour.

La loi attaquée est intitulée "Loi protégeant la province contre la propagande communiste" et peut être citée sous le titre de *Loi concernant la propagande communiste* (art. 1). Le statut comporte deux dispositions de substance: (i) l'art. 3 déclare illégale l'utilisation d'une maison pour la diffusion du communisme ou du bolchévisme; et (ii) l'art. 12 déclare illégales l'impression, la publication, la distribution de tout écrit quelconque propageant ou tendant à propager l'une ou l'autre de ces doctrines. La violation de l'une ou l'autre de ces dispositions constitue une infraction sanctionnée, dans le premier cas, par la fermeture de la maison pour toutes fins quelconques pendant une période n'excédant pas un an (art. 4) et, dans le second cas, par un emprisonnement d'au moins trois mois et d'au plus douze mois (art. 13). Bref, et sauf la propagande verbale à ciel ouvert, la loi prohibe toute propagande des doctrines indiquées, que ce soit au moyen d'écrits ou de la parole.

D'autres dispositions de la loi incriminée assurent, par des définitions compréhensives et par une procédure exceptionnelle et expéditive, l'atteinte en plénitude des fins visées aux deux articles de substance. C'est ainsi que (art. 2):

Le mot "maison" désigne tout bâtiment, abri, appentis, hangar ou autre construction, sous quelque nom qu'elle soit connue ou désignée, attachée au sol ou portative, érigée ou placée au-dessus ou au-dessous du

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Fauteux J.

sol, de façon permanente ou temporaire; et lorsqu'il s'agit d'une maison au sens du présent paragraphe située partie dans le territoire de la province et partie hors de ce territoire, le mot "maison" désigne la partie située dans le territoire de la province de Québec;

et c'est ainsi que l'émission des ordonnances de fermeture, de saisie, de confiscation et de destruction des écrits, échappe à la juridiction normale des tribunaux pour demeurer de la compétence exclusive du procureur général (arts. 4 et 14). Enfin, les autres articles donnent, dans certaines circonstances et à certaines conditions, un pouvoir de revision de l'ordonnance de fermeture à la Cour Supérieure ou au procureur général.

De cet examen, il apparaît qu'il ne s'agit pas ici d'une loi complexe, c'est-à-dire une loi ayant des dispositions embrassant plusieurs matières, au sens des arts. 91 et 92 de l'*Acte de l'Amérique britannique du Nord,* 1867. Il s'agit au contraire d'une loi simple et dont les deux articles de substance, les arts. 3 et 12, ne portent que sur une même matière, manifestant ainsi l'unité de leur objet et de celui de la loi entière, soit: la prohibition de la propagande communiste. Et ce, dans la mesure et par des sanctions précisées.

Pour déterminer la nature et le caractère véritable de la loi, on ne saurait conséquemment—soit dit en toute déférence pour ceux qui entretiennent une opinion contraire—sous le prétexte que le litige se fonde uniquement sur l'art. 3 ou qu'il ne s'agisse pas ici d'une référence, limiter le champ de la considération à ce dernier article, à l'exclusion de l'art. 12. On ne saurait de plus, pour déterminer l'objet de cet art. 3, l'extraire du contexte de la loi où il se trouve pour, le considérant ainsi isolément, lui assigner un objet différent de celui que sa présence dans le cadre de la loi et que le titre d'icelle doivent normalement lui donner. C'est d'ailleurs conformément à ces vues que le problème a été compris et envisagé, en première instance, tant par l'appelant, le procureur général et le juge: ils ont considéré l'art. 3 comme faisant partie d'un tout en attaquant, soutenant et maintenant respectivement la constitutionnalité de la loi dans son entier.

Que l'unique objet légal de cette loi soit de prohiber, avec sanctions pénales, la propagande communiste, ou plus précisément, de faire de la propagande communiste un acte criminel, la chose, je crois, ne peut être plus manifeste.

Quiconque "commet une *infraction* à l'article 12", dit l'art. 13, est passible d'emprisonnement. Ici, la punition prend la forme d'une main-mise de l'État sur la personne du coupable; c'est la restriction de la liberté. Le procureur général "sur preuve satisfaisante d'une *infraction* à l'article 3", dit l'art. 4, peut ordonner la fermeture de la maison utilisée en contravention de cet article. Ici, la punition prend la forme d'une main-mise de l'État sur les biens; c'est l'atteinte au droit de propriété, d'usufruit ou d'usage, du coupable ou d'une personne qui ne l'est pas mais que la loi présume l'être jusqu'à preuve de sa bonne foi (art. 6(*a*)). Dans les deux cas, la violation de la loi constitue une infraction qu'elle punit. Peu importe la forme de la loi, l'agencement des articles et les mots employés. Comme le signale le Lord Chancelier, le Vicomte Caldecote, dans *Board of Trustees of The Lethbridge Northern Irrigation District et al. v. Independent Order of Foresters; The King v. Independent Order of Foresters* (1), au premier paragraphe de la page 534: "The substance and not the form of the enactment in question must be regarded." Dans cette dernière cause, le Comité Judiciaire du Conseil Privé n'a pas hésité, pour rechercher l'essence et la véritable substance, "the pith and substance", d'une législation, à faire entrer dans la considération de la question, l'examen des lois contemporaines de la même Législature, examen qui révéla l'unité d'objet, d'essence et de substance de ces différentes législations; et en déclarant *ultra vires* la législation sous considération, on a appliqué le principe qu'on ne peut faire indirectement ce qu'on n'a pas le pouvoir de faire directement. Bref, la loi incriminée prohibe et punit la propagande communiste par la perte temporaire d'un droit —celui de la liberté ou de la propriété—et non par la perte d'un privilège. En cela, elle rencontre intégralement les conditions de la formule classique établie par Lord Atkin aux pages 324-5 dans *Proprietary Articles Trade Association et al. v. Attorney-General for Canada et al.* (2), pour conclure à la nature criminelle d'un acte: "Is the act prohibited with penal consequences?"

(1) [1940] A.C. 513, [1940] 2 All E.R. 220, [1940] 2 D.L.R. 273, [1940] 1 W.W.R. 502.

(2) [1931] A.C. 310, [1931] 2 D.L.R. 1, 55 C.C.C. 241, [1931] 1 W.W.R. 552.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Fauteux J.

Qu'une Législature provinciale ait le pouvoir de prohiber avec sanctions pénales certaines actions ou omissions, la chose est élémentaire. C'est là un pouvoir que le para. 15 de l'art. 92 établit, mais limite dans les termes suivants:

> 15. The Imposition or Punishment by Fine, Penalty, or Imprisonment *for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.*

Manifestement, ce pouvoir donné à une Législature d'infliger des punitions est, de son essence—contrairement à ce qui est le cas du pouvoir du Parlement d'établir des crimes—un pouvoir auxiliaire, *"ancillary"*. Aussi bien, la validité d'une disposition législative d'ordre pénal décrétée par une Législature, en vertu du para. 15 de l'art. 92, est subordonnée à la validité de la disposition législative principale dont la disposition auxiliaire tend à assurer l'exécution. En l'espèce, la matière de la disposition principale—prohibition de la propagande communiste—n'en est certes pas une qui en soi tombe dans la catégorie des sujets énumérés en l'art. 92 comme étant de la compétence de la Législature. Seul le Parlement, légiférant en matière criminelle, a compétence pour décréter, définir, défendre et punir ces matières d'un écrit ou d'un discours qui, en raison de leur nature, lèsent l'ordre social ou la sécurité de l'État. Tels sont, par exemple, les libelles diffamatoires, obscènes, blasphématoires ou séditieux. Dans ces cas, il ne s'agit plus de lésion de droits individuels donnant droit à compensation monétaire. Il s'agit de lésion des droits de la société, emportant punition. Ceci n'implique pas évidemment que la Législature ne peut validement adopter aucune disposition législative d'ordre pénal affectant indirectement la liberté d'expression; telle serait, par exemple, une prohibition avec sanctions pénales de la tenue de toute assemblée publique dans les 24 heures précédant le jour du scrutin. En ce cas, la disposition législative est une disposition auxiliaire à une disposition principale portant sur une matière qui est de la compétence de la Législature, soit la réglementation des élections dans la province. Aussi bien, les tribunaux tiendront comme n'étant pas des empiétements sur le droit criminel les dispositions pénales d'ordre provincial établies dans le but d'assurer l'exécution d'une loi de la Province, sur une matière également tenue comme

étant de sa compétence. C'est là le fondement des décisions de cette Cour dans *Bédard v. Dawson et al.* (1) et dans *The Provincial Secretary of Prince Edward Island v. Egan* (2).

On a soumis, en invoquant la décision de *Bédard v. Dawson et al., supra,* que la matière de l'art. 3 tombait sous le para. 13 de l'art. 92: "13. La propriété et les droits civils dans la province." L'article 3, dit-on, ne vise qu'à réglementer la possession et l'usage des maisons. Pour ainsi interpréter l'art. 3, on l'a isolé du texte de la loi entière intitulée "Loi protégeant la province contre la propagande communiste". A la vérité, l'objet véritable de l'art. 3, aussi bien que la technique législative adoptée pour réaliser cet objet, ne pouvaient être dénoncés en des termes plus clairs que ceux apparaissant à l'extrait suivant des raisons de jugement de l'un des juges de la majorité en Cour d'Appel, dans la présente cause:

> Dans l'espèce, la loi sous attaque ne définit pas le communisme pour une excellente raison, c'est qu'elle n'entend pas en faire un crime. Ce qu'elle veut réprimer, ce sont les activités de ce mouvement subversif. Il est évident que la Législature se serait réjouie de pouvoir mettre le communisme hors la loi en faisant, des adeptes de cette doctrine, des criminels au sens du droit criminel. Elle savait fort bien qu'elle n'avait pas ce pouvoir, mais elle n'ignorait pas non plus qu'elle avait la responsabilité, dans le cadre de sa compétence législative, de chercher, par tous moyens de réglementation, à paralyser l'action de ces gens et à réprimer la propagation de cette doctrine. Le champ de la propriété et des droits civils lui était ouvert et elle s'en est prévalue.

Mais, ainsi qu'on l'affirme implicitement dans la dernière phrase de cette citation, la Législature pouvait-elle validement utiliser son pouvoir de légiférer sur la propriété et les droits civils comme moyen pour arriver à sa fin véritable, soit à faire une législation relativement à une matière échappant à sa compétence? La négative n'est pas douteuse: *Attorney-General for Ontario v. Reciprocal Insurers et al.* (3); *Attorney-General for Alberta v. Attorney-*

(1) [1923] S.C.R. 681, [1923] 4 D.L.R. 293, 40 C.C.C. 404, [1923] 3 W.W.R. 12.

(2) [1941] S.C.R. 396, [1941] 3 D.L.R. 305, 76 C.C.C. 227.

(3) [1924] A.C. 328, [1924] 1 D.L.R. 789, 41 C.C.C. 336, [1924] 2 W.W.R. 397.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Fauteux J.

General for Canada et al. (1). Dans *Ladore et al. v. Bennett et al.* (2), Lord Atkin, à la page 482, déclare:

> It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail.

En tout respect, aucune raison ne permet de différencier, quant à leur nature et à leur caractère véritable, "pith and substance", les dispositions de l'art. 3 de celles de l'art. 12 qui prohibe, avec sanctions pénales, l'impression, la publication et la distribution d'écrits propageant ou tendant à propager le communisme, pour en déduire que la Législature n'a visé, par l'art. 3, qu'à réglementer la possession et l'usage des maisons.

Signalons, de plus, deux différences fondamentales entre la présente loi et la "Loi concernant les propriétaires de maisons employées comme maisons de désordre", dont la constitutionnalité fut affirmée par cette Cour dans *Bédard v. Dawson et al, supra.* Dans la *Loi des maisons de désordre,* il n'y a pas, comme dans la présente loi, une disposition de l'ordre de l'art. 12, mais simplement une de l'ordre de l'art. 3, c'est-à-dire une disposition déclarant illégale l'utilisation d'une maison comme maison de désordre. De plus, dans la *Loi des maisons de désordre,* on a, par référence, adopté comme définition de "maison de désordre", la définition de cette expression au *Code criminel.* On a ainsi intégralement subordonné, dans son principe et dans sa mesure, l'existence et l'opération de la loi provinciale sur l'existence et l'opération des dispositions établies au *Code criminel.* Aussi bien a-t-on jugé que la Législature n'avait pas créé un crime mais simplement décrété des conséquences civiles résultant de la commission d'un crime établi par l'autorité compétente, et supprimé les conditions conduisant à la commission de ce crime. Voilà bien la base qui manque en l'espèce; ici, ce n'est pas le Parlement mais c'est la Législature qui a créé le crime. Cet aspect de la question ne se présentait pas dans la cause de *Bédard v. Dawson et al., supra;* il se présentait, mais n'a pas été considéré, dans celle de *Fineberg v. Taub* (3). Pour ces raisons,

(1) [1939] A.C. 117, [1938] 4 D.L.R. 433, [1938] 3 W.W.R. 337.
(2) [1939] A.C. 468, [1939] 3 All E.R. 98, [1939] 3 D.L.R. 1, [1939] 2 W.W.R. 566, 21 C.B.R. 1.
(3) (1939), 77 Que. S.C. 233.

ni la décision de cette Cour dans la première cause, ni la décision de la Cour Supérieure dans la seconde, ne peuvent être invoquées au soutien de la proposition qu'il s'agit ici de "La propriété et les droits civils dans la province", tombant sous le para. 13 de l'art. 92.

On a soutenu aussi que la matière de la loi incriminée tombait sous le para. 16 de l'art. 92: "16. Généralement toutes les matières d'une nature purement locale ou privée dans la province". Ce serait une tâche insurmontable que d'assumer de démontrer que la propagande communiste est une matière locale. Dans son essence, la doctrine elle-même a un caractère international. Mais, dit-on, il existe dans la province de Québec, contrairement à ce qui pourrait être la situation dans le reste du Canada, une nécessité particulière de protéger la population de la province contre la propagande communiste. Cette affirmation est peut-être plus ingénieuse que flatteuse, mais elle n'a pas été démontrée.

On invoque aussi la déclaration de Lord Watson dans *Attorney-General for Ontario v. Attorney-General for the Dominion et al.* (1). A la page 365, le savant juriste indique qu'au para. 16 de l'art. 92 est compris un pouvoir pour la Législature de faire des lois pour la paix, l'ordre et le bon gouvernement de la province relativement aux matières d'une nature purement locale ou privée dans la province. On reconnaît, cependant, aux raisons du jugement faisant l'objet du présent appel, que ce pouvoir ne justifie pas la Législature d'établir des crimes; et tel que déjà indiqué, la matière de la loi n'en est pas une "d'une nature purement locale ou privée dans la province".

Qu'il y ait ou non, au pays, une propagande communiste agissante; que les invitations des propagandistes soient ou non fructueuses; qu'il en résulte ou non un danger ou une possibilité de danger; qu'il y ait lieu ou non pour le législateur de conjurer ce danger ou sa possibilité en ajoutant aux mesures visant déjà la sédition, des mesures coercitives de censure et de main-mise sur la personne et sur les biens, tel que pourvu en la loi incriminée, plutôt que de laisser à la conscience éclairée des citoyens le soin de rejeter ou combattre les invitations de cette propagande: voilà autant de questions qui, en raison de la séparation des pouvoirs, échappent aux tribunaux pour être et demeurer exclusive-

(1) [1896] A.C. 348.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Fauteux J.

ment de la juridiction du législateur. Dans notre système fédératif de gouvernement où la compétence législative se partage, suivant la matière de la loi, entre le Parlement, d'une part, et les Législatures de dix provinces, d'autre part, le corps législatif qui, d'après la constitution, a exclusivement cette compétence législative, la responsabilité et le droit d'établir et contrôler les moyens pour y satisfaire, seul a jurisdiction pour considérer et décider de ces questions. Ces questions, qui s'élèvent aux dimensions de la sécurité de l'État, ne peuvent être considérées comme une matière "d'une nature purement locale ou privée dans la province", ni être tenues comme étant en relation avec "la propriété et les droits civils dans la province". Le pouvoir qu'une Législature peut avoir de decréter les conséquences civiles d'un crime établi par l'autorité compétente, ou de supprimer les conditions qui conduisent à ce crime, n'inclut pas celui de créer un crime pour la prévention d'un autre crime validement établi, tel, par exemple, celui de la sédition.

Étant d'avis que la matière véritable de la loi incriminée est une matière de droit criminel et, comme telle, de la compétence exclusive du Parlement, il n'est pas nécessaire de considérer les autres moyens soulevés par l'appelant pour disposer de cet appel et conclure à l'inconstitutionnalité de la loi.

Sur le point soulevé par mon collègue M. le Juge Taschereau, en préliminaire et en marge du mérite de la question constitutionnelle, j'adopterais les raisons de jugement de mon collègue M. le Juge Kellock. Sur le mérite, je rendrais l'ordonnance proposée par M. le juge en chef.

ABBOTT J.:—The sole question in issue in this appeal is the constitutional validity of a statute of the Province of Quebec commonly known as the *Padlock Act,* the official title of which is "An Act to protect the Province against Communistic Propaganda". The Act in question was passed in 1937 and was 1 Geo. VI, c. 11, of the statutes of Quebec of that year. It is now R.S.Q. 1941, c. 52.

Section 3 of the Act declares it to be illegal for any person who possesses or occupies a house within the Province, to use it or allow it to be used to "propagate communism or bolshevism by any means whatsoever". Section 12 declares it to be unlawful to print, publish or distribute in the Prov-

ince any newspaper, periodical, pamphlet, circular, document or writing "propagating or tending to propagate communism or bolshevism".

No attempt has been made in the Act to define communism or bolshevism but the term "house" is defined in the broadest possible terms and under s. 4 the Attorney-General "upon satisfactory proof" that a house has been used to propagate communism (as to which he is to be the sole judge) may order it closed for a period of not more than one year. This is the only sanction provided for the contravention of s. 3. Contravention of s. 12 renders the offender liable to prosecution and penalties under the *Quebec Summary Convictions Act*.

Appellant was the tenant of premises in Montreal, which were the subject of a padlock order by the Attorney-General under the Act referred to. Sued by his landlord for cancellation of the lease and damages under art. 1624 of the *Civil Code* on the ground that the premises were used for illegal purposes, namely the propagation of communism, appelant in defence pleaded the unconstitutionality of the *Padlock Act* and, as required by art. 114 of the *Code of Civil Procedure,* gave notice to the Attorney-General of Quebec of the questions that he intended to raise. The Attorney-General, intervened in the action, as he was entitled to do under the provisions of arts. 114 and 220 C.C.P., and in the conclusions of his intervention asked that the *Padlock Act,* in its entirety, be declared to be within the legislative competence of the Province. The learned trial judge maintained the action and cancelled and annulled appellant's lease but did not award damages on the ground that these had not been proved. In the same judgment he maintained the intervention of the Attorney-General, and this judgment was confirmed in the Court below, Barclay J. dissenting.

Appellant has attacked the constitutional validity of this legislation upon a number of grounds of which I find it necessary to deal with one only.

The first question to be determined is whether the impugned legislation, in pith and substance, deals with the use of real property or with the propagation of ideas. As Mr. Scott put it to us in his very able argument: (1) the *motive* of this legislation is dislike of communism as being

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Abbott J.

an evil and subversive doctrine, motive, of course, being something with which the Courts are not concerned; (2) the *purpose* is clearly the suppression of the propagation of communism in the Province, and (3) one *means* provided for effecting such suppression is denial of the use of a house.

In my opinion the Act does not create two illegalities which are separate and independent, as was suggested to us by Mr. Beaulieu, it creates only one, namely, the propagation of communism in the Province. Both s. 3 and s. 12 are directed to the same purpose, namely, the suppression of communism, although different means are provided to achieve that end. The whole Act constitutes one legislative scheme and in my opinion its provisions are not severable.

Since in my view the true nature and purpose of the *Padlock Act* is to suppress the propagation of communism in the Province, the next question which must be answered is whether such a measure, aimed at suppressing the propagation of ideas within a Province, is within the legislative competence of such Province.

The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours. Moreover, it is not necessary to prohibit the discussion of such matters, in order to protect the personal reputation or the private rights of the citizen. That view was clearly expressed by Duff C.J. in *Re Alberta Statutes* (1), when he said:

> Under the constitution established by *The British North America Act*, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and

(1) [1938] S.C.R. 100 at 132-3, [1938] 2 D.L.R. 81, affirmed *sub nom. Attorney-General for Alberta v. Attorney-General for Canada et al.*, [1939] A.C. 117, [1938] 4 D.L.R. 433, [1938] 3 W.W.R. 337.

answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth,* [1936] A.C. 578, at 627, "freedom governed by law."

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

* * *

. . . Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of *The British North America Act,* by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in *Great West Saddlery Co. v. The King,* [1921] 2 A.C. 91 at 122, "legislation directed solely to the purposes specified in section 92"; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron v. The King,* [1924] A.C. 999 at 1005-6.

The *Canada Elections Act,* the provisions of the *British North America Act* which provide for Parliament meeting at least once a year and for the election of a new parliament at least every five years, and the *Senate and House of Commons Act,* are examples of enactments which make specific statutory provision for ensuring the exercise of this right of public debate and public discussion. Implicit in all such legislation is the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.

1957

SWITZMAN v. ELBLING AND A.G. OF QUEBEC

Abbott J.

This right cannot be abrogated by a Provincial Legislature, and the power of such Legislature to limit it, is restricted to what may be necessary to protect purely private rights, such as for example provincial laws of defamation. It is obvious that the impugned statute does not fall within that category. It does not, in substance, deal with matters of property and civil rights or with a local or private matter within the Province and in my opinion is clearly *ultra vires*. Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

For the reasons which I have given, I would allow the appeal and dismiss the action against the respondent Elbling with costs in the trial Court, dismiss the intervention of the Attorney-General with costs occasioned by such intervention in all Courts, and declare the Act I Geo. VI, c. 11, now R.S.Q. 1941, c. 52, *ultra vires* of the Legislature of Quebec. The respondent Elbling was a party to the appeal in the Court below and in this Court but was not represented by counsel at the hearing before us. In the circumstances, there should be no order as to costs against her here or in the Court of Queen's Bench.

Appeal allowed, TASCHEREAU J. *dissenting.*

Solicitors for the defendant, appellant: Marcus & Feiner, Montreal.

Solicitor for the intervenant, respondent: L. E. Beaulieu, Montreal.

Solicitor for the plaintiff, respondent: Louis Orenstein, Montreal.

IN THE MATTER OF LYNN SCOTT BICKLEY AND ANN FELTON BICKLEY, INFANTS;

ERVIN FELTON BICKLEY, JUNIOR (*Applicant*) ..... APPELLANT;

1957

*Mar. 1, 4, 5, 6 Mar. 22

AND

BETTY CARSON BICKLEY AND RAYMOND W. BLATCHLEY (*Respondents*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Infants—Custody—Matters to be considered by Court—Separation of parents—Residence in foreign jurisdiction—The Equal Guardianship of Infants Act, R.S.B.C. 1948, c. 139.

A husband and wife, both citizens of and resident in the United States of America, separated, and the wife obtained in the State of Nevada (which was not the State in which the parties were domiciled) a decree of divorce and an award of the custody of the two children of the marriage aged 9 and 11. The wife immediately remarried in Nevada. Shortly after this marriage, the second husband, who was also an American citizen, obtained a position in British Columbia, and he, the wife and the two children moved there in May 1955. The father made an application in the Courts of British Columbia for custody of the children and the trial judge, after hearing *viva voce* evidence for 8 days, awarded custody to him. The Court of Appeal reversed this order and awarded custody to the mother, primarily on the grounds that (1) the father had, by his own conduct, shown that he thought the children should be in their mother's custody rather than in his and (2) the evidence showed that the mother had so far brought them up with affection and care.

Held: The order of the trial judge should be restored. It was impossible to say that he had not made full judicial use of the opportunity given to him, and denied to the appellate Courts, of seeing and hearing the parties. This was particularly important in a case of this sort where so much depended upon the character of the parents whose claims were in conflict. It was not suggested that the trial judge misdirected himself on any question of law and the Court of Appeal was not warranted in setting aside his decision that it was in the best interest of the children that they should be in their father's custody.

As to the particular circumstances relied on by the Court of Appeal, it could not be said that the trial judge failed to give due weight to the second consideration, and on all the facts and circumstances of the case, the first had ceased to be of importance.

It was unnecessary in the circumstances to decide whether, under the law of British Columbia, the father of an infant had, as against the mother, a *prima facie* right to custody, if all other things were equal.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Fauteux JJ.

1957

BICKLEY v. BICKLEY AND BLANCHLEY

APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing an order of Manson J. in respect of the custody of two infants. Appeal allowed.

W. B. Williston, Q.C., and *M. M. McFarlane, Q.C.*, for the applicant, appellant.

A. S. Pattillo, Q.C., and *J. F. Howard*, for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to special leave granted by this Court, from a judgment of the Court of Appeal for British Columbia (1) pronounced on June 7, 1956, reversing an order of Manson J. made on February 9, 1956, and awarding the custody of the above-named infants to the respondent Betty Carson Blatchley.

The facts are fully stated in the reasons for judgment in the Courts below and a comparatively brief recital will be sufficient to make clear the reasons for the conclusion at which we have arrived.

The appellant and the respondent Betty Carson Blatchley, to whom reference will sometimes hereinafter be made as "the father" and "the mother", are the parents of the two girls whose custody is in question, Lynn Scott Bickley born on October 12, 1945, and Ann Felton Bickley born on October 20, 1947. All the parties are citizens of the United States of America.

The father and mother were married on February 19, 1944, at Newark, New Jersey. After the father's return in 1946 from overseas service with the American army they lived in various places in the eastern United States. They agree that from 1947 their married life was not entirely happy, and that it gradually deteriorated from year to year. The father is a hard-working and successful business-man. In ten years he has risen to the position of general sales manager of his company, with a remuneration of approximately $20,000 a year. The demands of business frequently required him to be absent from home for the greater part of each week, and one of the mother's complaints is that he sacrified his home life to success in his work.

For some time prior to July 1954 the Bickleys had been close friends of the respondent Raymond W. Blatchley and his wife. The Blatchleys' marriage was also deteriorating.

(1) 6 D.L.R. (2d) 199.

The respondents say that on July 7, 1954, they both realized for the first time that they were in love with each other. Mrs. Bickley at once informed the appellant and told him that she and Blatchley proposed to get divorces and to marry. The appellant asked her to defer action for a time in the hope that their marriage could be saved. They continued marital relations until September 1, 1954, and lived together until some time in October 1954 when the mother told the father that she intended to proceed at once with her plan for divorce and to marry Blatchley at some indefinite time thereafter. The appellant reluctantly acquiesced in this, and also in allowing the mother to have the custody of the children, although holding a lingering hope that in the new surroundings she might see things differently.

The appellant discussed the proposed divorce with the mother's attorney, and apparently agreed to attorn to the jurisdiction of the Nevada Courts in which she intended to proceed. According to the evidence such an attornment would have had the result that the Courts of the State of Pennsylvania would have recognized as valid a divorce granted by the Nevada Court. The parties appear to have assumed that prior to their separation the domicile of the Bickleys was in Pennsylvania. It may well be, as Mr. Pattillo argues, that their domicile was not clearly proved, but no one has suggested that it was in the State of Nevada at that time.

On October 19, 1954, after having made a division of their furniture and effects, the appellant took his wife and children to a hotel where they all stayed over night, and on the following morning put them on a plane for Reno, Nevada. On arrival the mother and the children took up residence there with the expectation that the appellant would instruct a Nevada attorney to appear for him, thus submitting to the jurisdiction of the Nevada Courts and enabling her to get her decree early in December and to return to the eastern States by Christmas.

In the meantime, Blatchley had left his wife early in July 1954. He had been transferred by his employer to work which allowed him to reside at Hot Springs, Arkansas. While there he retained a lawyer to effect a financial settlement with his wife.

1957

BICKLEY v. BICKLEY AND BLANCHLEY

Cartwright J.

Meanwhile, Bickley had delayed sending instructions to appear. Late in November or early in December he learned for the first time that his wife had committed adultery in the fall of 1951 with one Buckner, and he determined not to submit to the jurisdiction of the Nevada Courts. Buckner and his wife had been close friends of the Bickleys in and prior to 1951.

Early in December 1954, having completed six weeks' residence in Nevada, the mother commenced divorce proceedings, effected personal service on the appellant in Pennsylvania, and secured an undefended decree of divorce in Reno on December 31, 1954. This decree awarded her custody of the two children.

When the mother decided to proceed in this way, she telephoned Blatchley at Hot Springs. He immediately resigned his position with his company and left for Reno where he took up residence and commenced divorce proceedings against his wife. He secured his decree on February 17, 1955, and on that day married Mrs. Bickley.

Blatchley tried unsuccessfully to get satisfactory employment in Nevada. Early in 1955 he was appointed controller of a company in British Columbia at a substantial salary. His position with this company required him to live in Vancouver. He and the mother and children moved there early in May 1955, and established a home in which, at the date of the hearing before Manson J., the children were happily settled. While the motion for custody was not launched until December 5, 1955, it appears that the appellant had given instructions some time earlier and it cannot be said that he was guilty of undue delay in commencing proceedings.

The hearing of the application before Manson J. occupied eight days. Twenty-four affidavits were filed. Of the twenty-two deponents who made these affidavits, five were called as witnesses at the hearing, these being Dr. Whitman, Dr. Davidson, the appellant and the two respondents. There was no cross-examination upon the other affidavits. A total of fifteen witnesses were examined at the hearing. The father and the mother each gave evidence on three different days. It is obvious that the learned trial judge had an unusually full opportunity of observing the manner and demeanour of the parties. The mother of the appellant

was called as a witness and the learned trial judge had the advantage of forming from personal observation an impression as to her suitability for the task of assisting in bringing up the children.

On reading and rereading the reasons of the learned trial judge in the light of all the evidence in the record we find it impossible to say that he did not make full judicial use of the opportunity given to him, and denied to the appellate Courts, of seeing and hearing the parties; the advantage thus afforded to the trial judge is always great but peculiarly so in a case of this sort where so much depends upon the character of the parents whose claims are in conflict. It is not suggested that the learned judge misdirected himself on any question of law; and, in our respectful opinion, the Court of Appeal were not warranted in setting aside his decision that it was in the best interest of the children that they should be given into the custody of their father.

It may be that the strictures of the learned trial judge upon the conduct of the mother were expressed in terms unnecessarily severe, but the facts upon which they are mainly based are not controverted.

The evidence supports the view of the conduct and character of the father and of the suitability of his mother to assist him in caring for the children which the learned trial judge expressed in the following terms:

> As to [Bickley] I have had the advantage of seeing and hearing him under oath. I find him to be a quiet, sincere individual completely frank and honest. He admitted his shortcomings and his occasional flash of temper. . . . In my judgment there is nothing in the evidence to suggest that the applicant is cruel or a bully. There is probably no such thing as a perfect husband and father nor a perfect wife and mother. I find nothing in the evidence to support the view that the applicant is motivated by vindictiveness towards the mother of the children or by any other motive than a sincere affection for his children. He is in receipt of a good income as pointed out above. He rents a large home with two or three acres about it in a suburban residential area. School and church are within easy reach. Relatives are not too far distant, including both the grandmothers and the maternal grandfather. The applicant seems to be on very good terms with the maternal grandmother and it is noteworthy that the maternal grandmother has not taken any part in these proceedings. No affidavit of hers has been filed and the inference is that she does not think ill of her son-in-law. [It should be noted that we were informed by counsel that the maternal grandfather has since died.]

1957

BICKLEY v. BICKLEY AND BLANCHLEY

Cartwright J.

> If the children are given into his [*i.e.*, the appellant's] custody his mother, a woman of 64 and in good health and a sincere person of deep religious convictions whom I have had the advantage of seeing and hearing in the witness-box, will take up residence with her son and with the assistance of one or two servants to do the housework, will undertake the guidance and upbringing of the children during such hours as her son is at work. I am entirely satisfied that with her son the children in his home would have excellent care and upbringing.

In reaching the conclusion that the order of the learned trial judge should be reversed the Court of Appeal found two circumstances to be decisive, (1) that the father's opinion, expressed by his conduct, was that the children should be in their mother's custody rather than in his, and (ii) that the mother has so far brought them up with affection and care as is evidenced by the opinion of all the witnesses that the children are happy and well-behaved.

In our opinion, it cannot be said that the learned trial judge failed to give due weight to the second of these considerations. As to the first, it is quite true that, after all his efforts to persuade the mother to keep their home together and to give up Blatchley had failed, the father unwillingly agreed to her taking proceedings for divorce and keeping the children, with, we think, the lingering hope previously mentioned; but it must be remembered that at this time he was quite unaware of the mother's relationship with Buckner in 1951. It is not surprising that when he learned of it he took a different view of the proposed arrangement and of the mother's suitability to bring up the children. The Court of Appeal put aside this explanation for the reason that (1),

> even after learning of that [the Buckner incident] he did not think it made his wife unfit to have the children, because he made no effort to disturb the existing arrangement, but merely sought to preserve his freedom of action should he consider later that it was better to remove them from the mother's custody.

This passage appears to overlook the fact that as the children were then in Nevada, the only effective action which the father could have taken would have been in the Court of that State where the mother's action was pending, and by applying to that Court he would have attorned to its jurisdiction which was the very thing which he had determined not to do. The mother cannot be heard to say that she was lulled into security by his inaction for, on

(1) 6 D.L.R. (2d) at p. 204.

December 14, 1954, some days after the father had told her he was not going to attorn to the jurisdiction of the Nevada Court, she swore that he had on numerous occasions threatened to come to Nevada and surreptitiously obtain physical control of the children and that she was in fear that he would remove them from her care and custody unless restained from so doing, and on December 17, 1954, her attorney had written to his attorney as follows:

> Last week Mr. Bickley was served at his home with the summons in divorce. I rather assume he will not participate in the divorce proceedings since an appearance was not entered for him in Nevada; and since the agreements were delivered upon condition that an appearance was to be entered for him there, it is my understanding, and I believe we agree, that the agreements are void.
>
> Would you kindly, therefore, return the agreements to me as they are now cancelled.

In his reasons for judgment the learned trial judge stated that the spirit of the *Equal Guardianship of Infants Act*, R.S.B.C. 1948, c. 139, is that in all matters of custody the parents shall stand on equal footing. Mr. Williston argues that under the law of British Columbia, while the welfare of the infants is the paramount consideration, if all other things are equal the father has as against the mother a *prima facie* right to custody. We do not find it necessary to deal with this argument as the learned trial judge, while assuming an exact equality of *prima facie* right as between the parents, reached the conclusion that on the facts of this case the welfare of the children clearly required that their custody should be given to the father, and we have already expressed our opinion that that conclusion should not be disturbed.

It remains to consider whether we should make an order as to access. In our opinion it is desirable that the mother should have reasonable access to the children and that the children should not be deprived altogether of the companionship and society of the mother to whom they are so attached. But the practical difficulties of arranging such access are great and, as the result of our order will be that the children return to their father's home and the determination of such matters will thereafter lie within the jurisdiction of the Courts of their residence, we have concluded that Manson J. was right in deciding to leave the question of access to the decision of those Courts, in the event of the

1957

BICKLEY v. BICKLEY AND BLATCHLEY

Cartwright J.

parties not being able to reach an agreement. We observe that the formal order of Manson J. contained the following paragraph:

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Respondents be at liberty to apply regarding the right of access to the said infants or either of them by either parent.

In our opinion this paragraph is unnecessary and should be struck out.

For the above reasons the appeal is allowed, the paragraph above quoted is ordered to be struck out and the order of Manson J. is otherwise restored. The appellant is entitled to his costs in the Court of Appeal and in this Court, including the costs of the motion for leave to appeal.

Appeal allowed with costs.

Solicitors for the appellant: Lawrence, Shaw, McFarlane & Stewart, Vancouver.

Solicitors for the respondents: Davis, Hossie, Lett, Marshall & McLorg, Vancouver.

1957

*Feb. 14, 15
Mar. 27

THE TOWNSHIP OF MARKHAM .....APPELLANT;

AND

LANGSTAFF LAND DEVELOPMENT LIMITED, GEORGE SELKIRK, SAMUEL GOTFRID, DAVID SHER AND ROWLAND FRANCIS MAY ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Town planning—Approval of plan by Minister—Subsequent withdrawal of approval—Application for reinstatement—Jurisdiction of Minister and Ontario Municipal Board—The Planning Act, R.S.O. 1950, c. 277, ss. 26(9), 29(1).

A plan of subdivision which had been approved by the Minister of Planning and Development was not registered within one month and the Minister withdrew his approval under s. 26(9) of *The Planning Act*, 1950. A letter was subsequently written by one T, of the Department of Planning and Development, saying that if the plan was submitted again for approval the applicants must "start *ab initio* and submit a

*PRESENT: Kerwin C.J. and Rand, Kellock, Locke and Cartwright JJ.

completely new plan". Application was later made by mortgagees and lienholders for reinstatement of the plan and the Minister referred this application to the Ontario Municipal Board.

Held: The Board had jurisdiction to deal with the application and to approve the plan, subject to the conditions imposed by it.

Per Kerwin C.J.: Although the Minister withdrew his approval of the plan, he did not require that a new application be made and was therefore entitled to refer the matter to the Municipal Board which acquired jurisdiction to approve the plan.

Per Rand and Kellock JJ.: An application for approval of a plan, until expressly or impliedly recalled, remained a request for permission to develop the land for the purposes indicated. The mention of a new application in T's letter was neither a termination of the application nor the exhaustion of the Minister's authority. Its only effect was to prevent the registration of the plan until a new final approval had been given. The Minister was entitled to form opinions, which might be reversed, modified or changed, so long as they did not become fixed, temporarily or permanently, by the statute or by the action of others.

Per Locke and Cartwright JJ.: For the reasons given by the Court of Appeal, it should be held that, although the Minister withdrew his approval of the final plan, he did not require the making of a new application. It was unnecessary to determine whether the Minister, if he had required a new application, would thereby have become *functus officio* and without authority to refer the matter to the Municipal Board. That question should, therefore, be left open.

APPEAL from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from the Ontario Municipal Board. Appeal dismissed.

The facts are fully stated in the reasons for judgment of the Court of Appeal. For the purposes of this report, they may be summarized as follows:

One Selkirk, owner of all except qualifying shares in Langstaff Land Development Limited, applied, in the name of the company, for approval of a plan of subdivision. This application was made in 1954 under the provisions of *The Planning Act,* R.S.O. 1950, c. 277. After consultations and negotiations, the Minister approved the plan on October 6, 1954. Selkirk had proceeded with the construction of houses before approval of the formal plan.

The plan was not registered within one month and on December 13, 1954, the Minister's approval of the plan was withdrawn under s. 26(9) of *The Planning Act* (now s. 26(12) of 1955 (Ont.), c. 61). On February 10, 1955, one Tyrrell, of the Department of Planning and Development

(1) 1956 O.R. 164, 2 D.L.R. (2d) 84.

1957

TOWNSHIP OF MARKHAM v. LANGSTAFF LAND DEVT. LTD. et al.

(who had signed both the letter setting out the Minister's approval of the plan and that announcing that the approval had been withdrawn) wrote the following letter:

> As you are aware, the Minister withdrew this plan of subdivision on December 13, 1954.
>
> In the event that the applicants, the Langstaff Development Co., should decide to submit the plan again it will be necessary for them to start ab initio and submit a completely new plan.
>
> We are sending carbon copies of this letter to everyone concerned in order that there may be no mistake.

In the spring of 1955, Selkirk and his creditors sought to have the plan reinstated as approved. The council of the municipality declined to approve the plan except on conditions which were not acceptable to Selkirk and the trustees for his creditors. The trustees thereupon appealed to the Minister under s. 29 of the Act and the Minister referred the matter to the Ontario Municipal Board.

Before the Board, and in the Court of Appeal, it was argued that the Board lacked jurisdiction to approve the plan on two grounds:

(1) The Minister, having exercised his powers under s. 26(9) by withdrawing his approval of the plan, had no power under s. 29(1) to refer to the Board a subsequent application for reinstatement of his earlier approval.

(2) If the Minister had the power, he could exercise it only on the application of the original applicant or the owner for the time being, and not, as in this case, on the application of a mortgagee or a lienholder.

Both the Board and the Court of Appeal rejected these arguments. The Court of Appeal, in reasons delivered by Roach J.A., held that Tyrrell's letter stating that a new application must be made was not the act of the Minister and that the Minister, although he had withdrawn his approval of the plan, had not required that a new application be submitted. He had not disposed of the original application and it remained pending and in the same state as if the plan had never been approved. The Minister was therefore entitled to refer the application for reinstatement to the Board under s. 29(1) and he was entitled to act on the application of the mortgagees or lienholders.

Donald M. Fleming, Q.C., and *K. D. Finlayson*, for the appellant.

G. F. Henderson, Q.C., for the respondents Langstaff and Selkirk.

R. F. May, Q.C., for the respondents Gotfrid, Sher and May.

THE CHIEF JUSTICE:—I agree with the reasoning of Roach J.A. that, although the Minister withdrew his approval of the plan, he did not require that a new application be submitted. This is sufficient to dispose of the matter, as the Board had jurisdiction to authorize the conditions imposed by its order, and the appeal is, therefore, dismissed with costs.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.:—By s. 26(9) of *The Planning Act,* R.S.O. 1950, c. 277, and s. 26(12) of 1955 (Ont.), c. 61, when a final plan is approved by the Minister but is not registered within one month, the latter may withdraw his approval and may require a new application to be submitted.

Roach J.A. interpreted this to mean that once the Minister called for the new application, by that fact he became *functus* of the existing application and could not act thereafter upon it except on its being placed again in the course of an application *de novo*. In the circumstances, however, he found the letter of February 10, 1955 from the Department not to have been authorized by and, therefore, not the act of the Minister and that consequently it did not bring to an end the existing application.

I am unable to agree that the circumstances of the letter are to be so found; *prima facie* this correspondence carried on in the manner in which it was is of an official character and as from the Minister himself; but in the view I take of the statutory provisions, that does not affect the result at which Roach J.A. arrived.

What the legislation provides for is an administration of a subject that has become one of importance in municipal government, a matter of planning a structure of sectional allocation of the various conditions and functions of community life, *i.e.*, homes, schools, shops, industries, public places, etc., that will best serve the interests of that life as it grows and develops. By the factual particulars required by s. 26 to be shown on the draft plan, the matters to be

1957

TOWNSHIP OF MARKHAM v. LANGSTAFF LAND DEVT. LTD. et al.

Rand J.

regarded by the Minister, the sources of information to which he may resort, his discretion to withdraw his approval of the draft plan at any time before that of the final plan, and his power to withdraw final approval if the plan is not registered within one month of the date of that approval, a procedure is furnished of a continuing nature until final decision and action taken on it effects a determination.

An application for approval until expressly or impliedly recalled remains a request for permission to develop the land for the purposes indicated. Behind it is the urgency to bring to an end the suspension of the use of the land desired. But the owner remains in control: he is not bound to act even on an approval; he may disregard it or withdraw the application and hold the land for such other use as is not within the statute and for so long as he pleases.

The mention of a new application in the letter in question was not, then, in any technical sense, either a termination of the application or the exhaustion of the Minister's authority; it created a pause in the process: its only effect was to prevent the registration of the plan until a new final approval had been given.

That there was no intention on the part of the owner to withdraw the application is seen by the position taken by him before the Municipal Board; and prior to that hearing communications had been passing between the applicant and the Department. On such a matter the Minister forms opinions which may be reversed, modified or changed so long as they do not become fixed temporarily or permanently by the statute or by the action of others.

The reference to the Board was, then, within the Minister's discretion. The conditions annexed to the approval by the Board were such as were deemed to respect and protect the interests of the Township, the purpose for which the Board has been given administrative jurisdiction.

The appeal must, therefore, be dismissed with costs.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—In this appeal I agree with the decision of Roach J.A. and also with his reasons, subject only to the one following reservation. As, for the reasons given by Roach J.A., I agree with his conclusion that although the

1957

TOWNSHIP OF MARKHAM v. LANGSTAFF LAND DEVT. LTD. et al.

Cartwright J.

Minister withdrew his approval of the final plan he did not "require that a new application be submitted", I find it unnecessary to determine whether if the Minister had so required he would thereby have become *functus officio* and without authority to refer the matter to the Municipal Board. I wish to reserve my opinion upon that question until it becomes necessary to decide it.

I agree with the Chief Justice that the Board had jurisdiction to impose the conditions contained in its order.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Kingsmill, Mills, Price & Fleming, Toronto.

Solicitors for the respondents Langstaff Land Development Limited and Selkirk: Parkinson, Gardiner, Roberts, Anderson & Conlin, Toronto.

Solicitors for the respondents Gotfrid, Sher and May: McLaughlin, Macaulay, May & Soward, Toronto.

PRICE v. CARGIN AND CARGIN

1957

*Mar. 27

Infants—Custody—Welfare of child—Award of custody to strangers in blood rather than to father.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming the judgment of Barlow J.

George T. Walsh, Jr., and *George H. Davies*, for the appellant.

John Mirsky, Q.C., for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE (orally):—Mr. Mirsky, it is unnecessary for us to call upon you. Mr. Walsh and Mr. Davies have said everything possible on behalf of the appellant, but we are unable to disagree with the result arrived at by the two Courts below.

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

(1) [1956] O.W.N. 410, 4 D.L.R. (2d) 652.

1957

PRICE v. CARGIN AND CARGIN

Kerwin C.J.

The appeal is, therefore, dismissed with costs, but there will be no costs of the motion for leave to appeal.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: George H. Davies, Toronto.

Solicitor for the defendants, respondents: J. C. M. German, Cobourg.

1957

*Apr. 1

BRENNAN AND WHALE v. NELLIGAN AND NELLIGAN

Architects—Liability to client—Installation of defective heating system—Reliance on heating contractor—Duty of architect to investigate and exercise own judgment.

APPEAL by the defendants from a judgment of the Court of Appeal for Ontario (1) affirming the judgment of McRuer C.J.H.C. (2).

J. T. DesBrisay and *P. Genest,* for the appellants.

J. P. Nelligan (*in person*) and *R. J. Colonnier,* for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE (orally):—It is unnecessary to call upon the respondents. On the particular facts of this case we all agree with the reasons of the Court of Appeal and say nothing about the reasons of the trial judge, as to which Mr. DesBrisay raised some question. The appeal is dismissed with costs.

We agree with the Court of Appeal that the appellants had not discharged their duty of investigating and exercising their own judgment on the heating-system installed. Mr. DesBrisay suggested that the Chief Justice of the High Court at trial ruled that the architects warranted the sufficiency of the heating system. We doubt that his

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Fauteux JJ.

(1) [1956] O.W.N. 366, 3 D.L.R. (2d) 300.

(2) [1955] O.R. 783, [1955] 5 D.L.R. 305.

language is capable of that construction, but we find it unnecessary to deal with that question and it is not to be taken to have been in any way passed upon.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Cassels, Defries & DesBrisay, Toronto.

Solicitors for the plaintiffs, respondents: Edmonds, Maloney & Edmonds, Toronto.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

PETER KARPINSKI .....RESPONDENT.

1957

*Mar. 28
Apr. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Offence triable in two ways—Effect of withdrawal of information—Charge laid more than 6 months after commission of offence—Rights of Crown counsel and accused.

The accused was charged with failing to remain at the scene of an accident, which offence, under s. 221(2) of the *Criminal Code*, is triable either on indictment or on summary conviction. The offence was alleged to have been committed on March 16, 1955, and the information was laid on January 17, 1956.

When the accused was brought before a magistrate, Crown counsel, on being asked, stated that he wished to proceed summarily. The accused pleaded not guilty and his counsel immediately moved for dismissal of the charge on the ground that the prosecution was barred under s. 693(2), the information having been laid more than 6 months after the commission of the offence. The magistrate permitted counsel for the Crown to withdraw the information and to lay a new one on which a preliminary hearing was held, resulting ultimately in the conviction of the accused.

The Court of Appeal set aside the conviction on the ground that what had taken place before the magistrate amounted to an acquittal on the first information and that the accused was therefore entitled to succeed on a plea of *autrefois acquit*.

Held (Cartwright J. dissenting): The conviction should be restored.

Per Kerwin C.J.: The Crown had a right to withdraw the information and to change its election. There was no formal acquittal by the magistrate and what occurred at that time did not amount to an acquittal; to have this effect the first trial must have been concluded by an adjudication or its equivalent.

Per Taschereau J.: The withdrawal of the first information did not amount to an acquittal and the Crown could consequently proceed by indictment as it did. The accused was not placed in jeopardy on the first occasion.

---

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

1957

THE QUEEN
v.
KARPINSKI

Per Fauteux and Abbott JJ.: The first information, considered as the institution of proceedings by summary conviction, was bad on its face, and the Crown therefore had no right to proceed by way of summary conviction, and the magistrate had no jurisdiction to accept the Crown's election and act upon it by receiving a plea. The election and plea were therefore void and did not constitute a bar to the subsequent proceedings by indictment.

Per Cartwright J., *dissenting*: In the circumstances of the case, the withdrawal of the first information was tantamount to an acquittal, since counsel for the defence was not raising a technical objection which would be a bar to the magistrate adjudicating upon the charge but was bringing forward a defence in law to which there was no answer. The magistrate should have dismissed the charge and his action in permitting it to be withdrawn was, in the circumstances, the equivalent of a dismissal.

APPEAL from a judgment of the Court of Appeal for Ontario (1) setting aside a conviction. Appeal allowed.

W. B. Common, Q.C., and *E. R. Pepper*, for the appellant.

Stanley Smither, for the respondent.

THE CHIEF JUSTICE:—The Crown had the right to change its election before the magistrate and also the right to withdraw the information. Assuming that the respondent raised the plea of *autrefois acquit* before His Honour Judge Forsyth, there had certainly not been a formal acquittal by the magistrate on January 24, 1956, and in my opinion what occurred at that time did not amount to an acquittal. The first trial must have been concluded by an adjudication, or what amounts thereto: *Regina v. Charlesworth* (2); *Re Rex v. Ecker; Re Rex v. Fry* (3). It has been held that where a trial had commenced and the jury had been discharged and a new one empanelled, the plea could not avail even if the discharge of the first jury had been improper or if a Court of Error or Appeal considered that under the circumstances the first jury should not have been discharged: *Regina v. Charlesworth, supra; Winsor v. The Queen* (4); *Rex v. Lewis* (5).

The appeal should be allowed, the conviction restored and the case remitted to the Court of Appeal so that the respondent's application for leave to appeal from the sentence may be dealt with.

(1) [1957] O.W.N. 21.
(2) (1861), 1 B. & S. 460, 121 E.R. 786.
(3) 64 O.L.R. 1, 51 C.C.C. 409, [1929] 3 D.L.R. 760.
(4) (1866), L.R. 1 Q.B. 289, 390.
(5) (1909), 2 Cr. App. R. 180.

TASCHEREAU J.:—I am of the opinion that the withdrawal by the Crown of the first information did not amount to an acquittal, giving rise to the plea of *autrefois acquit,* and that the Crown could consequently proceed by indictment as it did. The respondent was not in jeopardy.

I would allow the appeal and restore the conviction, and remit the case to the Court of Appeal so that the respondent's application for leave to appeal from the sentence may be dealt with.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario pronounced on November 29, 1956, quashing the conviction of the respondent on September 21, 1956, at the General Sessions of the Peace for the County of York and directing a verdict of acquittal to be entered.

The proceedings against the respondent were commenced by the swearing of an information on January 17, 1956, charging:

> that on the 16th day of March in the year 1955, at the City of Toronto, in the County of York, owing to the presence of a vehicle bearing license number 139675 (Saskatchewan) for the year 1954 on the highway, to wit, on Dundas St. W. an accident had occurred to SAM PECALIS and that PETER KARPINSKI the person having the care, charge or control of the vehicle with intent to escape liability, either civil or criminal, failed to stop his vehicle, offer assistance and give his name and address, contrary to the *Criminal Code,* section 221, sub-section 2.

On January 24, 1956, the respondent appeared before His Worship Magistrate Bigelow to answer the charge. As the offence created by s. 221(2) may be dealt with either as an indictable offence or as an offence punishable on summary conviction, the clerk of the Court after reading the charge to the respondent asked Crown counsel how he wished to proceed and he elected to proceed summarily. The clerk then called upon the respondent to plead and he pleaded "not guilty". After this plea and before any evidence had been given counsel for the respondent moved to dismiss the charge on the ground that the proceeding had been instituted more than six months after the time when the alleged offence was committed and was consequently barred by the provisions of s. 693(2) of the *Criminal Code.* The learned magistrate then permitted counsel for the Crown to

1957

THE QUEEN v. KARPINSKI

Cartwright J.

withdraw the information against the protest of counsel for the respondent who submitted that he was entitled to have the charge dismissed.

A new information was then laid and read to the respondent and Crown counsel elected to proceed by way of indictment. The respondent, having refused to elect as to his method of trial on the ground that the proceedings were improper, was committed for trial after a preliminary inquiry had been held by the learned magistrate. In due course Crown counsel preferred a bill of indictment. The grand jury returned a true bill. The trial was held on September 20 and 21, 1956, before His Honour Judge Forsyth and a jury.

At the opening of the trial and before pleading counsel for the respondent moved to quash the indictment on grounds which are summarized as follows in the factum of counsel for the appellant:

(a) The Crown had no right to change their election before the magistrate.

(b) The Crown had no right to withdraw the information.

(c) If the Crown withdrew the information without the consent of the accused, that withdrawal was tantamount to a dismissal and the accused can successfully plead *autrefois acquit*.

The learned trial judge declined to give effect to the motion and proceeded with the trial which resulted in the conviction which was quashed by the Court of Appeal.

While the point was not pressed, it was suggested that the respondent had failed to raise the plea of *autrefois acquit* before His Honour Judge Forsyth. There appears to have been some lack of formality in the proceedings, but the record shows that before entering a plea of not guilty, counsel for the respondent made it clear that he relied on the submission that his client was entitled to be discharged on the plea of *autrefois acquit* and the matter was argued at length before the learned trial judge. In my view the plea was sufficiently raised.

It is argued for the appellant that the respondent was not in jeopardy in the summary proceedings before the magistrate, "that there was no adjudication on the merits or otherwise, nor could there have been, since the learned Magistrate was without jurisdiction". I am unable to give effect to this argument.

Section 693(2) which limits the time within which proceedings in respect of offences punishable on summary conviction may be instituted is as follows:

(2) No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose.

The effect of this subsection is not, in my opinion, to deprive the magistrate of jurisdiction in a case in which the subject matter of the proceedings in fact arose more than six months before their institution but rather to afford a defence to the charge. While no such difficulty arises in the case at bar, the decisions collected in 21 Halsbury, 2nd ed. 1936, at p. 598 show that questions of fact and law may well arise as to when the six months' period commences to run in a particular case.

In the case at bar, after the information had been read, the Crown had elected to proceed summarily, the respondent had been called upon to plead and had pleaded "not guilty", the learned magistrate had jurisdiction over the accused and over the offence with which he was charged and, as is pointed out by Laidlaw J.A., the trial had commenced. *Prima facie,* it was the duty of the learned magistrate to proceed with the trial as provided by s. 708(3) and s. 711 of the *Criminal Code,* reading as follows:

708(3) Where the defendant pleads not guilty or states that he has cause to show why an order should not be made against him, as the case may be, the summary conviction court shall proceed with the trial, and shall take the evidence of witnesses for the prosecutor and the defendant in accordance with the provisions of Part XV relating to preliminary inquiries.

711. When the summary conviction court has heard the prosecutor, defendant and witnesses it shall, after considering the matter, convict the defendant or make an order against him or dismiss the information, as the case may be.

The provisions of s. 697(3) emphasize the importance of the respondent having pleaded. That subsection reads as follows:

(3) Subject to section 698, in proceedings under this Part no summary conviction court other than the summary conviction court by which the plea of an accused is taken has jurisdiction for the purposes of the hearing and adjudication, but any justice may

(*a*) adjourn the proceedings at any time before the plea of the accused is taken, or

(*b*) adjourn the proceedings at any time after the plea of the accused is taken for the purpose of enabling the proceedings to be continued before the summary conviction court by which the plea was taken.

1957

THE QUEEN v. KARPINSKI

Cartwright J.

I do not find it necessary to determine in what circumstances, if any, a charge may properly be withdrawn against the objection of the accused after the commencement of a trial before a summary conviction court, as I have concluded that Mr. Smither is right in his submission that in the case at bar the withdrawal was tantamount to an acquittal.

On the argument before us both counsel referred to the judgment of the Nova Scotia Supreme Court in *Re Bond* (1), and relied upon the following passage from the judgment of Graham J. at p. 515:

> It remains to consider whether the withdrawal should be construed under any other rule of law to be an acquittal. The cases in other jurisdictions are not easy to reconcile, and we are, therefore, thrown back on reason and the application of principles.
>
> The withdrawal of a charge before any evidence is given may be tantamount to a trial, and so may put an end to the complaint; but that can only be so when the true inference from the circumstances is, that the magistrate permitted the withdrawal, because he decided that there was not a proper case for trial or that trial was unnecessary, and so passed upon the merits. The general law is that to support the plea of *autrefois acquit* there must have been a trial and an acquittal on the merits.

In *Haynes v. Davis* (2), Lush J. said:

> I quite agree that "acquittal on the merits" does not necessarily mean that the jury or the magistrate must find as a matter of fact that the person charged was innocent; it is just as much an acquittal upon the merits if the judge or the magistrate were to rule upon the construction of an Act of Parliament that the accused was in law entitled to be acquitted as in law he was not guilty, and to that extent the expression "acquittal on the merits" must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge upon some technical ground which had been a bar to the adjudicating upon it. That is why this expression is important, however one may qualify it, and I think the antithesis is between an adjudication of not guilty upon some matter of fact or law and a discharge of the person charged on the ground that there are reasons why the Court cannot proceed to find if he is guilty.

Applying the reasoning of the above passages to the facts of the case at bar, it appears that in the course of the trial Mr. Smither brought to the attention of the learned magistrate the undisputed fact that the alleged offence was committed more than six months before the commencement of the proceedings. In so doing he was not raising a technical ground which would be a bar to the magistrate adjudicating upon the charge; he was bringing forward a

(1) 10 M.P.R. 506, 66 C.C.C. 271, [1936] 3 D.L.R. 769.
(2) [1915] 1 K.B. 332 at 338-9.

defence in law to which there was no answer. To use the words of Graham J., quoted above, any further trial "was unnecessary"; the learned magistrate was in a position to pass upon the merits as no evidence could have been given that would have altered the result. In my respectful view, the learned magistrate ought to have dismissed the charge, and his action in permitting it to be withdrawn was, in the circumstances, the equivalent of a dismissal.

It may be mentioned in passing that in actions for malicious prosecution the withdrawal of a charge in open Court by the Crown Attorney, otherwise than in pursuance of a compromise or agreement between the parties, has consistently been held to constitute a termination of the criminal proceedings in favour of the accused; see for example *Fancourt v. Heaven* (1), and the cases there cited.

If it should be suggested that, in the result, a man who was convicted on sufficient evidence before a properly instructed jury goes free because of the decision, perhaps made inadvertently, to proceed summarily before the magistrate, I would recall the words of Viscount Sankey L.C. in *Maxwell v. The Director of Public Prosecutions* (2), which although used in different circumstances are of general application:

> But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed. . . . It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

The general rule on which the respondent relies was not questioned. It is stated in the following terms in Broom's Legal Maxims, 10th ed. 1939, p. 223:

> The maxim *nemo debet bis vexari pro una et eadem causa* expresses a great fundamental rule of our criminal law, which forbids that a man should be put in jeopardy twice for one and the same offence. It is the foundation of the special pleas of *autrefois acquit* and *autrefois convict*. When a criminal charge has been once adjudicated upon by a Court of competent jurisdiction, that adjudication is final, whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a subsequent prosecution for the same offence . . . Provided that the adjudication be by a Court of competent jurisdiction, it is immaterial whether it be upon a summary proceeding before justices or upon a trial before a jury.

(1) (1909), 18 O.L.R. 492. (2) [1935] A.C. 309 at 323-4.

1957

THE QUEEN v. KARPINSKI

Cartwright J.

I have already indicated my view that, in the circumstances of the case at bar, the withdrawal of the charge before the learned magistrate was tantamount to an acquittal.

I would dismiss the appeal.

The judgment of Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—The circumstances giving rise to this appeal are fully stated in the reasons for judgment of my brother Cartwright and need not be related here to a similar extent.

A first information, laid and sworn to on January 17, 1956, charged respondent with having, on March 16, 1955, failed to stop at the scene of an accident, contrary to s. 221(2) of the *Criminal Code*. Such an offence may be prosecuted by way of indictment or of summary conviction at the option of the complainant. The information here having been laid and sworn to more than six months after the date of the alleged violation, proceedings in the latter form were then barred by the provisions of s. 693(2) reading:

> 693(2). No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose.

Notwithstanding the clear terms of this statutory prohibition, counsel for the Crown was requested, upon arraignment of respondent, to elect and elected to proceed by way of summary conviction. Whereupon respondent pleaded not guilty, and, promptly invoking the statutory prohibition, moved for the dismissal of the charge. The magistrate refused to grant this motion, permitting instead the withdrawal of the information. Respondent was immediately arraigned upon a fresh information, couched in terms similar to those of the first, and was ultimately indicted and convicted.

The submission of respondent, rejected by the trial judge but accepted in the Court of Appeal, is that, the Crown having no right to change its election and withdraw the information after the plea of not guilty, such withdrawal was therefore tantamount to a dismissal giving rise to a plea of *autrefois acquit*.

1957

THE QUEEN v. KARPINSKI

Fauteux J.

In my respectful view, it is unnecessary to deal with the merits of the conclusion of this proposition, for the premises upon which it rests are not established. In the circumstances of this case, there were no right for the Crown to elect to proceed by way of summary conviction and no jurisdiction for the magistrate to accept and act upon the election by receiving a plea. On the face of the information itself, it was manifest that more than six months had elapsed from the date when the subject matter of the proceedings had arisen; and of its nature the offence charged was not capable of being one having a continuing character. Non-compliance with the statutory requirement of s. 693(2) was fatal to the validity of the election and plea, both of which were void.

Other grounds of appeal were raised by the accused in the Court of Appeal but were abandoned at the hearing before us.

I would dispose of the appeal as proposed by my Lord the Chief Justice.

Appeal allowed, CARTWRIGHT J. *dissenting.*

Solicitor for the appellant: C. P. Hope, Toronto.

Solicitors for the respondent: Smither & Rose, Toronto.

1957

*Mar. 29
Apr. 12

WILLIAM MIZINSKI (*Plaintiff*) .....APPELLANT;

AND

WILBERT ROBILLARD AND JACK McLAUGHLIN (*Defendants*) .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trial judge dispensing with jury—Nature of order—Discretion—The Judicature Act, R.S.O. 1950, c. 190, s. 57(3)—The Supreme Court Act, R.S.C. 1952, c. 259, s. 44.

When a trial judge, in the course of a trial by jury, decides to discharge the jury and complete the trial himself, under s. 57(3) of the Ontario *Judicature Act,* his order is a discretionary one and was therefore not appealable to the Supreme Court of Canada under s. 44 of the Supreme Court Act as it was before its amendment in 1956.

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

1957

MIZINSKI v. ROBILLARD AND MCLAUGHLIN

APPEAL from a judgment of the Court of Appeal for Ontario affirming the judgment of Barlow J. at trial. Appeal dismissed.

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

David J. Walker, Q.C., for the defendant McLaughlin, respondent.

W. Gibson Gray, for the defendant Robillard, respondent.

The judgment of the Chief Justice and Cartwright, Fauteux and Abbott JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario pronounced on May 12, 1954, dismissing an appeal from the judgment of Barlow J. dated October 1, 1953, whereby the appellant's action was dismissed with costs.

The appellant suffered serious injuries in an automobile accident which occurred on May 22, 1952. He brought action against the respondents alleging that each of them had been guilty of acts of negligence which had caused the accident. The action came on for trial before Barlow J. and a jury in September 1953. The respondents were separately represented. Evidence was called on behalf of the respondent McLaughlin but not on behalf of the respondent Robillard and consequently at the conclusion of the evidence Mr. Walker, counsel for McLaughlin, addressed the jury first followed by Mr. MacDonald, counsel for the appellant, who would in the ordinary course have been followed by counsel for Robillard.

At the conclusion of Mr. MacDonald's address Mr. Walker moved the learned trial judge to discharge the jury and continue the trial himself without a jury. Counsel for the respondent Robillard supported this motion. The motion, which was argued at length, was based on the allegations (i) that counsel for the appellant had mis-stated the effect of the evidence to the jury in several respects of which eight were specified, and (ii) that the address was inflammatory. In opposing the motion, Mr. MacDonald said in part:

> My address was not inflammatory in any sense of the word. All I tried to do was to discharge my duty as a plaintiff's counsel to his client. I would think that from the vast experience which your Lordship has had,

you would have stopped me if I had been delivering an inflammatory address. I am not prepared to take the quotations which Mr. Walker read to your Lordship as being my utterances, and if there is any doubt about it I think there should be a transcript.

To this the learned trial judge replied: "I took them down as Mr. Walker has stated them." But on the argument before us counsel for the appellant in a careful analysis of the transcript of Mr. MacDonald's address and of the complaints which had been made against it showed that a number of the alleged mis-statements of fact complained of before the learned trial judge had not in fact been made. In this connection it may be noted that in the factum of the respondent McLaughlin filed in this Court only four mis-statements are specified.

At the conclusion of the argument of the motion the learned trial judge said:

Counsel for the defendants ask that I take this case from the jury on the ground of mis-statement of facts by counsel for the plaintiffs, and also that the address was inflammatory.

It is the duty and the right of a trial judge to deal with such a motion, the purpose being that justice may be done between the parties. If, in the opinion of the trial judge, he considers that the address of counsel for the plaintiffs is of such a nature that it may lead to a verdict which is not warranted by the evidence, then it is quite proper for him to take the case from the jury.

There is no doubt in my mind that the address was of an inflammatory nature, and there were also various mis-statements of fact made by counsel for the plaintiffs. I made a note of some of them, and I made a note of some of the inflammatory statements, such as, for example, "I suggest to you that there was guilt in his soul", meaning Mr. McLaughlin; "he knew in his heart that he had caused the accident"; "was that the act of a man who had something on his conscience?" Those are only some of the statements that are quite improper, in my opinion, so far as the inflammatory nature of it is concerned.

For that reason, and also by reason of the mis-statements of facts which are of such a nature that I could never expect to correct them, and ought not to have to correct them in my charge to the jury, I think that I would only be doing what is right and proper in the administration of justice in taking this case from the jury and concluding it myself.

The learned judge then discharged the jury.

The appellant in his notice of appeal to the Court of Appeal set up only the following grounds:

1. His Lordship, the trial judge, erred in ruling that Counsel for the Plaintiffs had mis-stated evidence in his jury address and that the said jury address was of an inflammatory nature.

1957

MIZINSKI v. ROBILLARD AND MCLAUGHLIN

Cartwright J.

2. His Lordship, the trial judge, erred in ordering the jury dismissed and concluding the trial himself, and his action, in so doing, was an improper exercise of his judicial discretion, and a denial to the Plaintiffs of their right to have their causes tried by a jury.

No other ground was advanced in the appellant's factum or in his argument in this Court.

At the opening of the argument before us Mr. Walker raised the preliminary objection that, the only ground of appeal being that the learned trial judge erred in taking the case from the jury, no appeal lies to this Court as the order discharging the jury was one made "in the exercise of judicial discretion", and the right of appeal is denied by s. 44 of the *Supreme Court Act*. The Court decided to delay consideration of this preliminary objection until after the argument of the appeal. It will be observed that if this preliminary objection is entitled to prevail this Court could not give leave to appeal as the action was commenced before the amendment of s. 41(1) by 4-5 Eliz. II (1956), c. 48, s. 3: see *La Cité de Verdun v. Viau* (1).

In Ontario the power of a judge presiding at a trial before a jury to discharge the jury and complete the trial himself is found in subs. (3) of s. 57 of *The Judicature Act*, R.S.O. 1950, c. 190, reading as follows:

(3) Notwithstanding the giving of the notice [*i.e.*, a jury notice] the issues of fact may be tried or the damages assessed without the intervention of a jury if the judge presiding at the sittings so directs or if it is so ordered by a judge.

The subsection has existed in its present form since 1913 when it appeared as sub. (3) of s. 56 of 3 and 4 Geo. V, c. 19.

Its predecessors were s. 18 of *The Administration of Justice Act* of 1873, 36 Vic., c. 8, and s. 255 of *The Common Law Procedure Act*, R.S.O. 1877, c. 50, which read respectively as follows:

18. All other issues shall be tried as heretofore, unless the court in which the action or proceeding is pending, or a judge thereof, upon application being made before trial, or unless the presiding judge upon the trial, directs or decides that the issue or issues shall be tried and damages assessed without the intervention of a jury.

255. Notwithstanding anything in the two next preceding sections contained, the Judge presiding at the trial may in his discretion direct that any such action shall be tried or the damages assessed by a jury; And upon application to the Court in which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without the intervention of a jury.

(1) [1952] 1 S.C.R. 493.

The power given to the trial judge by the subsection in its present form does not appear to me to differ in kind from that conferred by the sections last quoted above. In Ontario, it has consistently been held that the exercise of this power is committed to the discretion of the judge at the trial.

In *Brown v. Wood* (1), Armour J. at the trial had struck out the jury notice and tried the case without a jury against the protests of counsel for the defendant. On appeal Boyd C., with whom Ferguson and Robertson JJ. concurred, said, at p. 200:

> The difficulty is to get over sec. 255 of the C.L.P. Act. If this were an appeal from the order of a Judge in Chambers striking out a jury notice, before the trial, the cases cited by Mr. Read would be overwhelming in his favour, but the discretion of a Judge at the trial is much larger . . . As no affidavit of merits has been filed, and the defendant has not brought and does not seek to bring the amount of the verdict into Court, and as the motion is against a discretion that the trial Judge undoubtedly has to determine the method of trial, it should be dismissed, with costs.

In *Wise v. Canadian Bank of Commerce* (2), Middleton J., as he then was, said at p. 345:

> It has been held that the discretion conferred upon the Judge presiding at the trial is an absolute discretion, not subject to review: *Brown v. Wood* (1887), 12 P.R. 198.

In *Currie v. Motor Union Insurance Co.* (3), Latchford C.J., giving the judgment of the Appellate Division in a case in which the trial judge had dispensed with the jury, said at pp. 99-100:

> Even before the enactment of sec. 56(3) the discretion of a trial Judge in dispensing with a jury was not interfered with by an appellate Court: *Brown v. Wood* (1887), 12 P.R. 198. It was within the power of the trial judge to determine the method of trial, and his determination was not open to review.

In *Owens v. Martindale* (4), Ferguson J.A. with whom the majority of the Court agreed left open the question whether such an order could be reviewed by the Court of Appeal. He said at p. 97:

> I am clearly of the opinion that the circumstances disclosed in evidence and particularly the situation pointed out by Mr. Slaght in his second proposition justified the learned trial Judge in exercising his discretion in the manner he did, and that it is therefore unnecessary to express an opinion as to our right to review an order made by a trial Judge striking out a jury notice.

(1) (1887), 12 P.R. 198.
(2) 52 O.L.R. 342, [1923] 3 D.L.R. 1163.
(3) (1924), 27 O.W.N. 99.
(4) 63 O.L.R. 87, [1928] 4 D.L.R. 932.

1957

MIZINSKI v. ROBILLARD AND MCLAUGHLIN

Cartwright J.

In *Telford v. Secord; Telford v. Nasmith* (1), judgment had been entered for the plaintiff at the trial pursuant to the verdict of a jury; the Court of Appeal set this judgment aside and directed that a new trial be had without a jury. This Court affirmed the judgment of the Court of Appeal in so far as it set aside the trial judgment but directed that the new trial should be before a jury. Kellock J. in giving the unanimous judgment of this Court said at p. 282:

> There rests with the trial judge sufficient power and authority to conduct the trial as it should be conducted, and, should he see reason to try the action without a jury or to dispense with the jury at any stage, his discretion is not subject to review.

I have quoted from the above judgments, and there are many others containing expressions to the same effect, for the purpose of indicating that the order of a trial judge dispensing with a jury during the course of the trial is consistently treated as the exercise of a discretion vested in him by the statute. There may be cases in which the order could be shown to have been made otherwise, as for example if the judge in his reasons made it clear that he had discharged the jury only because he had erroneously decided that he was bound as a matter of law to do so. *Logan et al. v. Wilson et al.* (2) was a case of this sort.

In the case at bar counsel for the appellant contends that it has been shown (i) that in reaching his decision to discharge the jury the learned trial judge was proceeding, in part at least, on a mistaken view as to what had in fact been said by Mr. MacDonald in his address as to the evidence, and (ii) that there was nothing in that address which could properly be held to be inflammatory. From this he seeks to draw the conclusion that the order was not one made in the exercise of judicial discretion.

I am unable to reach that conclusion. The reasons of the learned trial judge quoted above show that he directed his mind to the question whether the address of the plaintiff's counsel was of a nature which might lead the jury to an unwarranted verdict and for that reason he should dispense with the jury. His conclusion that he should do so

(1) [1947] S.C.R. 277, [1947] 2 D.L.R. 474.

(2) [1943] 4 D.L.R. 512.

was based on some mis-statements actually, although no doubt unintentionally, made by the plaintiff's counsel and on several passages which in my opinion it was open to the learned judge to regard as "inflammatory". The circumstances that the learned judge mistakenly thought that there had been additional mis-statements and that on reading the written record an appellate tribunal might regard the passages said to be inflammatory as not going beyond the bounds permitted to counsel do not make the order one made otherwise than in the exercise of his discretion. At the most those circumstances, assuming their existence, would afford grounds for submitting that the learned judge had exercised his discretion mistakenly.

The decision which the learned trial judge was called upon to make appears to me to have required the exercise of discretion within the definition of that term in Bouvier's Law Dictionary which was adopted by Cannon J. in *Glesby v. Mitchell* (1):

> That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.
>
> The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

I have concluded that the order of the learned trial judge was made in the exercise of the judicial discretion given to him by s. 57(3) of *The Judicature Act* and that we have no jurisdiction to entertain the appeal, even if we should be of opinion that his discretion was exercised mistakenly.

I do not intend by anything I have said above to express an opinion as to whether the discretion of the learned judge was or was not rightly exercised in the particular circumstances of this case.

I would dismiss the appeal with costs as of a motion to quash.

(1) [1932] S.C.R. 260 at 276.

1957

MIZINSKI v. ROBILLARD AND MCLAUGHLIN

LOCKE J.:—In my opinion, the order complained of was made in the exercise of a judicial discretion within the meaning of s. 44 of the *Supreme Court Act* and, accordingly, we are without jurisdiction.

I would dismiss this appeal with costs.

Appeal dismissed.

Solicitor for the plaintiff, appellant: W. E. MacDonald, New Toronto.

Solicitors for the defendant Robillard, respondent: Borden, Elliot, Kelly, Palmer & Sankey, Toronto.

Solicitor for the defendant McLaughlin, respondent: David J. Walker, Toronto.

1957

*Feb. 13, 14
Apr. 12

ACCESSORIES MACHINERY LIMITED .APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND CANADIAN ELECTRICAL MANUFACTURERS' ASSOCIATION ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs and excise—Electric motor imported as replacement to be installed in electric shovel—Whether dutiable under item 445g or 427a of Sched. "A" of the Customs Tariff, R.S.C. 1952, c. 60—Whether "otherwise provided for".

An electric motor imported from the United States by the appellant as a replacement motor to be installed in an electric shovel was classified by the Tariff Board, affirming the decision of the Deputy Minister, as an "electric motor" dutiable under item 445*g* of Sched. "A" of the *Customs Tariff*, and not as a "complete part" of machinery under item 427*a* as the appellant contended. The resulting duty under the latter item is less than under item 445*g*. The decision of the Board was affirmed in the Exchequer Court.

Held (Taschereau and Kellock JJ. dissenting): The Tariff Board did not err in law in classifying the motor under item 445*g*.

---

*PRESENT: Kerwin C.J. and Taschereau, Kellock, Abbott and Nolan JJ.

Per Kerwin C.J. and Abbott and Nolan JJ.: The specific classification in item 445*g* was intended by Parliament to override and does override the general provision "complete parts of the foregoing" in item 427*a*. Parliament, in item 445*g*, has singled out a special piece of machinery, not specially dealt with elsewhere in the tariff, whereas in item 427*a*, it has imposed a lower rate of duty on machinery generally, not specifically dealt with elsewhere, and complete parts thereof.

Per Taschereau and Kellock JJ., *dissenting*: By its plain meaning, item 427*a* includes any parts of the class of machinery the item describes, whether it be a motor or any other component of the complete machine, and consequently the electric motor, constituting a part of the machinery, was "otherwise provided for" within the meaning of item 445*g*. If it be conceded, as it must be, that a part falls within item 427 or 427*a*, it is then otherwise provided for. An electric motor, taken by itself, is a machine, but from the standpoint of item 427*a*, the motor in question here is only a "part" and, as such, is within that item and not within item 445*g*. It is not necessary that the "provision otherwise" must be couched in any particular language but it is sufficient that another tariff item, properly construed, does, in fact, make provision otherwise, as does item 427*a*.

APPEAL from the judgment of Cameron J. of the Exchequer Court of Canada (1), affirming the decision of the Tariff Board. Appeal dismissed.

G. F. Henderson, Q.C., and *R. H. McKercher*, for the appellant.

K. E. Eaton and *G. W. Ainslie*, for the respondent the Deputy Minister.

R. I. Martin, for the respondent Canadian Electrical Manufacturers' Association.

The judgment of Kerwin C.J. and Abbott and Nolan JJ. was delivered by

ABBOTT J.:—This is an appeal from a judgment of the Honourable Mr. Justice Cameron of the Exchequer Court of Canada (1), rendered on March 6, 1956, dismissing the appellant's appeal from a declaration of the Tariff Board dated March 1, 1955, by which the appellant's appeal to the Board from a decision of the Deputy Minister respondent dated August 10, 1954, under the *Customs Act*, R.S.C. 1952, c. 58, as to the tariff classification of an electric motor, imported by the appellant from the United States, had been dismissed.

The article imported was a replacement motor for a five cubic yard electric shovel, and the question in issue is

(1) [1956] Ex. C.R. 289.

1957

ACCESSORIES MACHINERY LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE et al.

Abbott J.

whether this motor should be classified as a complete part of machinery under item 427*a* of Sched. "A" of the *Customs Tariff*, or as an electric motor under item 445*g*.

The appeal to the Exchequer Court and to this Court, pursuant to leave granted, was on the following question of law:

> Did the Tariff Board err as a matter of law in deciding that a part, namely a 125 h.p. open ball bearing vertical shaft motor, for P & H Model 1500 5-cubic yard Electric Shovel, imported under Montreal Customs Entry No. 121526-C, February 3, 1954, is dutiable under tariff item 445*g*, rather than tariff item 427*a*?

The tariff items in question read as follows:

> 427*a*. All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing . . .
>
> 445*g*. Electric motors, and complete parts thereof, n.o.p. . . .

Briefly stated appellant's contention is that giving effect to the plain meaning of tariff item 427*a*, the electric motor in question is clearly covered by the words "complete parts of the foregoing" in that item and that in consequence item 445*g* cannot apply by reason of the n.o.p.* provision contained therein.

Electric motors are machines in themselves and the Tariff Board found as a fact (and this finding is conclusive so far as this Court is concerned) that electric motors are in their very nature generally intended to be incorporated in or attached to machinery or equipment. This being so, it was urged by respondents that unless the symbol "n.o.p." in item 445*g* is interpreted as excluding from the operation of that item only electric motors provided for by special mention in other items in the tariff, there would be little room for the application of tariff item 445*g*. The Tariff Board stated in its decision that "since the legislators have provided for electric motors *eo nomine* in tariff item 445*g*, we must conclude that this classification is intended to override any 'basket' provision such as 'parts' in tariff item 427*a*; otherwise tariff item 445*g* is virtually ineffective". Respondents argued that such a result, *i.e.*, that item 445*g* would be virtually ineffective, is not one that could have been intended by Parliament.

* Not otherwise provided for.

I believe this argument to be well founded. In item 445*g* Parliament has singled out a special piece of machinery, not specially dealt with elsewhere in the tariff, and has imposed a special rate of duty upon it, presumably to protect the Canadian manufacturers of that type of machine.

In item 427*a*, on the other hand, Parliament has imposed upon machinery generally, which is *not specifically dealt with elsewhere* and "complete parts" thereof another and a lower rate of duty than that imposed upon the special machines provided for in 445*g* and in other like items where specific types of machinery or equipment are singled out for special and higher rates of duty.

In my opinion the specific classification provided in 445*g* was intended to override and does override the general provision "complete parts of the foregoing" contained in item 427*a*.

For this reason, as well as for those given by Cameron J., with which I am in respectful agreement, in my opinion the Tariff Board did not err as a matter of law in classifying the motor in question as subject to duty under tariff item 445*g*.

I would therefore dismiss the appeal with costs.

The judgment of Taschereau and Kellock JJ. was delivered by

KELLOCK J. (*dissenting*):—This appeal comes to this Court by leave from the Exchequer Court upon the following question of law:

> Did the Tariff Board err as a matter of law in deciding that a part, namely, a 125 h.p. open ball bearing vertical shaft motor, for P & H Model 1500 5-cubic yard Electric Shovel, imported under Montreal Customs Entry No. 121526-C, February 3, 1954, is dutiable under tariff item 445*g*, rather than tariff item 427*a*?

As stated in the factum of the respondent Deputy Minister, "the article imported was a *replacement* motor". The motor is so constructed that its shaft fits the shaft of a generator which it is the function of the motor to drive. The Tariff Board held that item 445*g* of Sched. "A" of the *Customs Tariff* was the governing item and not item 427*a*

1957

ACCESSORIES MACHINERY LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE *et al.*

Kellock J.

as the appellant contends. An appeal to the Exchequer Court (1) was dismissed. The tariff items in question are as follows:

> 427*a*. All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing. . . .
>
> 445*g*. Electric motors, and complete parts thereof, n.o.p. . . .

In the view of the Board, item 445*g*, as it provides specifically for electric motors, should be considered as overriding a "basket" provision such as item 427*a*. The Board considered that if that were not so, item 445*g* would be rendered virtually ineffective. The Board therefore held that the "not otherwise provided for" provision in item 445*g* must be deemed to include all electric motors not elsewhere provided for in the tariff specifically "as motors".

In the Exchequer Court, this view was interpreted not as meaning that the actual words "electric motors" must occur but that any words clearly indicating "electric motors —that is, machinery providing motion", would be sufficient.

It is properly conceded in the case at bar that a complete shovel of the type here in question, including its motors, of which there are at least four, each performing a different function, is entitled to entry under 427*a* as "machinery" whether it arrives at the border completely assembled, or in its various components to be assembled in Canada. This involves the consequence that the motors are "parts" but there would remain nothing upon which the words "complete parts of the foregoing" in the item could operate unless they are to be applied to the importation of any of these components for replacement purposes. Accordingly, item 427*a*, construed in its ordinary plain meaning, includes all the parts of the class of machinery the item describes, whether the part in question is a motor, a generator, a scoop, or any other component of the complete machine.

Accordingly, an electric motor constituting a part of such machinery is "otherwise provided for" within the meaning of item 445*g*. By force of its own terms, therefore, the last-mentioned item cannot extend to such an article. It is not necessary, in my opinion, that the "provision otherwise"

(1) [1956] Ex. C.R. 289.

must be couched in any particular language but it is sufficient that another tariff item, properly construed, does, in fact, make provision otherwise, as does item 427*a*.

To construe item 445*g* as it has been construed by the Tariff Board and the Exchequer Court involves, in my opinion, the addition to it of words not to be found therein. This is not a legitimate means of construing the statute.

It is contended that unless an electric motor, although it is a component part of a machine falling within item 427*a*, is to be considered as none the less falling within item 445*g*, notwithstanding the n.o.p. provision of that item, the last-mentioned item will be rendered virtually ineffective, particularly in view of the presence in the tariff of item 427, which is couched in language similar to 427*a* save that it does not include the words "of a class or kind not made in Canada". This contention involves a contradiction in its mere statement for the reason that if it be conceded that a part falls within item 427 or 427*a*, it is otherwise provided for within the meaning of item 445*g*.

Overlooking this contradiction, it may be, as stated by the Tariff Board, that electric motors are generally intended for incorporation in or attachment to machinery or equipment, but the only electric motors which fall within items 427 and 427*a* are those which can properly be regarded as parts of a machine which itself falls within one or other of these items. Unless a motor comes within the meaning of "parts" as that word is used in these items, they have no application to it. It would seem obvious that there must be many electric motors of which it cannot be said at the time of the importation into Canada, by a dealer, for example, that they are a "part" or a "replacement part" of any machine whatever. No doubt they may ultimately be used in conjunction with some machine, but that would not, in my opinion, of itself, render them "parts" of such machine within the meaning of either 427 or 427*a*.

A further argument was advanced by counsel for the Deputy Minister, namely, that as the electric motor here in question is itself "a machine", it falls within item 427*a* *qua* "machinery" and not *qua* "parts", while it is also within 445*g* as an electric motor. It is then said that, this being so, the n.o.p. provisions of these items cancel each other out

1957

ACCESSORIES MACHINERY LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE et al.

Kellock J.

with the result that item 445*g*, as the more specific provision, governs. It is quite true that an electric motor, taken by itself, is a machine, but from the standpoint of item 427*a*, such a motor as that here in question is only a "part" and, as such, is within that item and not within item 445*g* at all.

I would therefore allow the appeal, set aside the judgment of the Exchequer Court and the order of the Tariff Board and direct an appropriate declaration to be made in accordance with the above reasons. The appellant should have its costs throughout.

Appeal dismissed with costs, TASCHEREAU *and* KELLOCK JJ. *dissenting.*

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent, The Deputy Minister: K. E. Eaton, Ottawa.

Solicitors for the respondent, Canadian Electrical Manufacturers' Association: Hume & Martin, Toronto.

1956

CANADIAN PACIFIC RAILWAY COMPANY (*Plaintiff*) ..... APPELLANT;

AND

THE TOWN OF ESTEVAN (*Defendant*) ..... RESPONDENT.

*Dec. 11, 13

1957

Apr. 12

CANADIAN PACIFIC RAILWAY COMPANY (*Plaintiff*) ..... APPELLANT;

AND

THE RURAL MUNICIPALITY OF CALEDONIA No. 99 (*Defendant*) RESPONDENT.

CANADIAN PACIFIC RAILWAY COMPANY (*Plaintiff*) ..... APPELLANT;

AND

THE RURAL MUNICIPALITY OF SWIFT CURRENT No. 137 (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Railways—Exemption from taxation—Special agreement—Construction—Properties on branch lines "required and used for the construction and working" of main line.

By clause 16 of an agreement dated October 21, 1880, between the Government of Canada and the proposed builders of the Canadian Pacific Railway, it was provided that the railway "and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof" should be exempt from taxation by the Dominion, by any Province, or by any municipal corporation. Clause 14 of the agreement provided for the construction of branch lines. In 1951, the Supreme Court of Canada, on appeal from the judgment on a reference under *The Constitutional Questions Act*, now R.S.S. 1953, c. 78, held that the exemption did not apply to properties of the kind enumerated used for the working of branch lines "except such properties, if any . . . as are entitled to the benefit of the exemption from taxation as being required and used for the construction and working of the railway described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14". No specific properties were considered on the reference and the railway now sued three municipalities for declarations that properties within those municipalities were exempt from taxation under clause 16.

---

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright and Nolan JJ.

1957

C.P.R.
v.
TOWN OF ESTEVAN
et al.

Held: The action must fail. The properties in question, all situated on branch lines, were not "required and used for the construction and working" of the main line of the company, which was "the railway" described in the Act of 1874. It could not be said that the functions of the branch lines were so related to the main line as to be embraced within the expression "Canadian Pacific Railway" in clause 16 of the contract, which clearly distinguished between the main line and branch lines and granted the exemption from taxation to the main line only.

Judgments and orders—Effect of judgment on reference—The Constitutional Questions Act, R.S.S. 1953, c. 78—The Supreme Court Act, R.S.C. 1952, c. 259, s. 55.

Per Kerwin C.J. and Taschereau, Locke and Cartwright JJ.: The judgment of the Court on the reference referred to above was not binding on the parties to this litigation, since matters referred to the Court of Appeal for Saskatchewan under *The Constitutional Questions Act* did not differ from references to the Supreme Court under what was now s. 55 of the *Supreme Court Act*.

APPEALS by the plaintiff from the judgments of the Court of Appeal for Saskatchewan (1), varying the judgments of Davis J. (2), in three actions tried together.

C. F. H. Carson, Q.C., Allan Findlay, Q.C., and *H. M. Pickard,* for the plaintiff, appellant.

E. C. Leslie, Q.C., and *Roy S. Meldrum, Q.C.,* for the defendants, respondents.

THE CHIEF JUSTICE:—I agree with Mr. Justice Locke and Mr. Justice Nolan.

TASCHEREAU J.:—I agree with Mr. Justice Locke and Mr. Justice Nolan.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.:—The facts of this controversy are set out in detail in the reasons of my brother Nolan; I agree with his conclusion but I desire to add a few paragraphs on the general contention of Mr. Carson.

It is conceded that all of the branches were constructed as independent lines of railway, each serving its own territory and in the course of it carrying products, chiefly grain, to the main line for furtherance to many points in Canada and abroad. The proposition is that by reason of the particular activities on the branch lines described in the

(1) 17 W.W.R. 497, 2 D.L.R. (2d) 166, 73 C.R.T.C. 279.
(2) 15 W.W.R. 673.

evidence the latter have become facilities—"other things required and used"—of the main line, auxiliary adjuncts which, so long as those activities continue, and for the purposes of clause 16, are embraced within the expression "Canadian Pacific Railway" or the main line.

Both the main line and the branch lines are expressly dealt with in the charter and are specifically distinguished from one another. With a full appreciation of this distinction the tax exemption was limited to the main line. The items mentioned in clause 16 are merely a detailed enumeration of what, besides the right-of-way, roadbed and trackage of the main line, are its ordinary and necessary facilities. That they are required to be contained within the normal right-of-way is not suggested. Joint facilities may present questions of some nicety; they will, in any event, call for an appreciation of their particulars, and their inclusion in any degree will depend upon considerations which we are not called upon here to deal with.

That the same scope of property on the branch lines, that is, right-of-way, trackage, etc., can, in the manner claimed, be brought within clause 16 as mere facilities of the main line and thus effect the exemption of virtually the entire branch-line system throughout Saskatchewan and Alberta seems scarcely to call for serious comment. Nothing that has been brought up in the argument could have been absent from the minds of those who drafted the clause as well as the charter and the legislation bringing the enterprise into existence. It was contemplated that these subsidiary lines would be the instrumentalities for opening up the prairies; that there would necessarily be associated operation over both divisions of the railway system; and that there would be interrelated functioning. Foreseeing all this, the negotiators agreed that the trunk line should be exempt and the branch lines not exempt. Once a branch line is constructed as such and so long as it retains the functions which it was designed to perform, it is subject to taxation as all other property within the Province.

I would, therefore, dismiss the appeals with costs.

1957

C.P.R. v. TOWN OF ESTEVAN et al.

LOCKE J.:—The matter to be determined is as to the construction of clause 16 of the agreement of October 21, 1880, which, so far as it is necessary to consider its terms, reads:

> The Canadian Pacific Railway, and all stations: and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof . . . shall be forever free from taxation by the Dominion, or by any Province hereafter to be established or by any Municipal Corporation therein.

The question as to whether this exemption extends not only to the railway as described in the Act 37 Vict., c. 14, or whether it extends to the branch lines constructed either under the powers conferred by clause 14 of the contract or by other authority, was not rendered *res judicata* as between the parties to this litigation by the decision of this Court upon the reference (1), or by the judgment of the Judicial Committee (2), dismissing the appeal taken by the Attorney General for Saskatchewan by special leave upon two of the questions involved in that reference. In so far as the defendant municipalities are concerned, they were not parties to and were not heard upon the reference and, in so far as the present appellant is concerned, even though it was represented on the hearing before the Court of Appeal for Saskatchewan when the matter was considered (3) and appealed to this Court from the judgment of the Court of Appeal and was represented in the proceedings before the Judicial Committee, I think it is not bound either by the opinions expressed by the Judicial Committee or by this Court. In this respect, matters referred to the Court of Appeal for Saskatchewan under *The Constitutional Questions Act* of that Province (now R.S.S. 1953, c. 78) do not differ from references to this Court under what is now s. 55 of the *Supreme Court Act*,

(1) *Canadian Pacific Railway Company v. The Attorney General for Saskatchewan*, [1951] S.C.R. 190, [1951] 1 D.L.R. 721, 67 C.R.T.C. 203, [1951] C.T.C. 26.

(2) *Attorney-General for Saskatchewan v. Canadian Pacific Railway Company*, [1953] A.C. 594, [1953] 3 D.L.R. 785, [1953] C.T.C. 281, 10 W.W.R. (N.S.) 220.

(3) *Re Taxation of Canadian Pacific Railway Company*, [1949] 1 W.W.R. 353, [1949] 2 D.L.R. 240, 63 C.R.T.C. 145.

R.S.C. 1952, c. 259. As to references under the last-mentioned statute, see *In re References by the Governor-General in Council* (1), *per* Duff J. at p. 588; *In Re Criminal Code* (2), *per* Duff J. at p. 451.

While upon the reference, by consent of the parties who were represented, a number of documents which came into being prior to the making of the contract in question were received in evidence as an aid to the interpretation of clause 16 and these documents were not put in evidence in the present actions, I remain of the opinion expressed by all of the members of the Court that the exemption, except to the extent hereinafter stated, does not extend to the branch lines of the Canadian Pacific Railway in the Province of Saskatchewan. The qualification to the answer to the first question excepted

> such properties, if any, real or personal, enumerated in clause 16, situate upon the branch lines in Saskatchewan as are entitled to the benefit of the exemption from taxation as being required and used for the construction and working of the railway described in sections 1, 2 and 3 of the Act 37 Vict. c. 14.

This answer, so expressed, was adopted by the majority of the members of the Court hearing the reference.

While it does not affect any of the questions to be determined upon the present appeal, I think it should be pointed out that question 1 was directed only to property of the nature referred to situate on the branch lines, and it was to this alone that the answer was directed. No opinion was expressed as to whether the right to the exemption might be asserted as to properties not situate upon a branch line such as the Milestone pumping-station but which might be, within the meaning of clause 16, required and used for the operation of the main line of the Canadian Pacific Railway.

In my opinion, the "stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working" of "the Canadian Pacific Railway" include property of the nature referred to, whether situate upon the main line or elsewhere, including branch lines. I am

(1) (1910), 43 S.C.R. 536, affirmed *sub nom. Attorney-General for Ontario et al. v. Attorney-General for Canada et al.*, [1912] A.C. 571, 3 D.L.R. 509.

(2) (1910), 43 S.C.R. 434, 16 C.C.C. 459.

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Locke J.

unable, with great respect for the differing opinions expressed in the Court of Appeal by Mr. Justice Gordon and by the learned trial judge, to agree that this enumeration applies only to properties of this nature situate upon the branch lines. While undoubtedly capable of that interpretation, my conclusion is that the enumeration was included for the purpose of making it clear that it was not merely the right-of-way of the main line but all of the properties and facilities needed for working it as an entity that were to be exempted from taxation.

At the hearing of the present matter, evidence was given of a fact that is self-evident—that, without the traffic supplied by the branch lines which connect with the main line of the Canadian Pacific Railway, the operation would be financially an impossibility. It is not, however, contended on the argument addressed to us that the exemption extends to any of the properties in question by reason of the fact that the traffic they provide is necessary in this sense for the operation of the railway. The ground advanced may be stated broadly as being that the various properties the taxation of which is in question are necessary and used for the physical operation of the main line.

While in the action against the Town of Estevan, only some $2\frac{1}{2}$ miles of the roadway of the Portal subdivision and $1\frac{1}{2}$ miles of the roadway of the Estevan subdivision are involved, the appellant claims that the roadway of both of these subdivisions, from Roche Percee to Pasqua and from Estevan to Kemnay, is exempt. The various other properties at Estevan, which include the station grounds some 82 acres in extent, are claimed to be exempt on the footing that they are used for the various purposes of keeping the roadway and tracks of the two subdivisions in proper operating order, in handling the receipt and delivery of freight traffic, providing accommodation for section-men, maintaining and repairing locomotives used to haul coal from Roche Percee and Bienfait, storing coal other than lignite for locomotives operating in and around Estevan, or passing through Estevan on their way to and from the main line, and for switching and marshalling trains, including cars of coal, coming from Bienfait and Roche Percee.

As shown by the evidence of Mr. C. E. Lister, the general manager of the Prairie Region of the railway company, the Estevan subdivision was built in the year 1892 and the Portal subdivision in the following year. Neither of these subdivisions follows the most direct route to the main line, the Portal subdivision running in a northwesterly direction from North Portal at the border to Pasqua, while the Estevan subdivision runs for a considerable part of the route almost due east to Napinka in Manitoba, and thence in a northerly direction to Kemnay. It is not suggested that either of these branches was built for the purpose of securing lignite coal from any of the coal fields in the vicinity of Estevan for use by the railway company. The coal found at Bienfait and Roche Percee is lignite and unsuitable for use in locomotives. There was, however, a market in Winnipeg for this coal, commonly described as Souris coal, as early as 1887, and very large quantities have been supplied to that market as well as to other places in western Canada since the branches were built. The main line had been completed in 1885 and it was, according to Mr. Lister, not until about the year 1930 that this coal was used for company purposes at Winnipeg, which was one of the first places on the main line where it was so used. The coal has since been used in stationary boiler-plants in roundhouses on the main line from Fort William to Swift Current to produce steam power for its shops and heat for its railway cars and station buildings.

Of the lignite coal hauled from these fields over these two branches, about 9 per cent. is, according to Mr. Lister, carried for these uses on the main line: the remainder is carried for commercial purposes at the instance of others. Of the total traffic carried over these lines, the coal so carried for company purposes is an insignificant percentage.

The function discharged by the Portal and Estevan branches in carrying this coal for company service is the main basis of the claim for exemption. It will be apparent from the above statement of facts that no such claim could have been advanced between the years 1892 and 1893, when these branches were respectively built, and the year 1930, being the earliest date at which it is suggested that the coal was carried for these purposes. Presumably before 1930, the coal used in the roundhouses and stations on this

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Locke J.

portion of the railway was bituminous coal, of which there are great quantities in western Canada, obtained elsewhere. It is the action of the company itself in making the necessary changes in its stationary boiler-plants to enable lignite coal to be used, and the consequent demand for this fuel from Bienfait and Roche Percee which are the basis of the claim for the exemption. If the argument advanced were to be carried to its logical conclusion, then long after the construction of an extensive branch line connecting with the main line in Saskatchewan built for the usual purpose of obtaining profitable traffic for the company, the whole line could be rendered exempt from taxation by the utilization of timber at the point on the line furthest distant from the main line suitable for the production of railway ties, material in constant use upon the main line of the railway, and the transport of these to the main line. Similarly, the establishment of a small metal-fabricating plant at such a point, producing material required and used on the railway tracks on the main line, might be made the basis of a claim for exemption of the whole line. The contract should not, in my opinion, be construed in a manner which would result in upholding any such claim.

We have been told that these are in the nature of test cases but, while this may be so, it is undesirable, in my opinion, to attempt to lay down any rule applicable in all circumstances for the construction of clause 16. Speaking generally, the extension of the exemption granted to the main line to other properties required and used for its construction and working was, I think, designed to cover such situations as would result by the placing of railway shops or roundhouses off the principal right-of-way and connected by a spur line with the main line, or gravel pits or quarries situate at a distance from the main line from which material could be obtained for the construction and maintenance of the right-of-way. I agree with Mr. Justice Procter that, if the pumping-station at Milestone on Moose Jaw Creek had been built or was maintained in order to obtain a supply of water to be conveyed to the main line for use in locomotives or other company purposes, this would fall within the exemption, even though some of the water were diverted for use on the Portal subdivision.

The common and universal principle for the interpretation of an agreement is that it should receive that construction which its language will admit which will best effectuate the intention of the parties (Chitty on Contracts, 21st ed. 1955, p. 144) and, applying this rule to the construction of the contract in question, it is my opinion that the intention of the parties to this contract was that the exemption should extend only to stations, workshops and other properties of the nature referred to, the primary purpose of the acquisition or construction or maintenance of which was to be of use in the construction or operation of the main line as an entity. In the case of the right-of-way of these two branch lines, it is quite clear from the evidence that the purpose of bringing them into being was to obtain profitable traffic for the undertaking of the railway company, and the various stations, workshops and other buildings erected at various points along the subdivisions were designed to handle such traffic as should develop. Neither at the time the subdivisions were built nor at any time thereafter has the primary purpose of their operation or maintenance been to carry the comparatively small quantity of traffic resulting from the use of this lignite coal upon the main line.

The claim to exemption of the roundhouses, stations and other buildings referred to is made upon the ground that they are required and used for the working of the main line since they are used variously for the maintenance of the roadway of the two subdivisions, the servicing of rolling stock required and used for the working of the main line, to provide facilities for company employees who perform the work of billing the traffic and the marshalling of trains which are destined for the main line, work which must be done, it is said, on the subdivisions in order to avoid congestion, delays and confusion on the main line.

In my opinion, none of these claims can be sustained. The services referred to are made necessary not by reason of the operation of the main line as an entity but by reason of the operation of that line and of the subdivisions in question and of traffic coming on to them from other sources, such as the Soo Line and the Neptune and other branches. The primary purpose of the construction and maintenance of these facilities was and is the handling of

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Locke J.

traffic of the nature thus referred to and of incoming traffic brought to places upon the subdivisions from elsewhere.

As to the Municipality of Caledonia, the claim to exemption for that part of the railway line of the Portal subdivision within its boundaries should, in my opinion, fail for the reason I have stated. As to the water-supply site and pump-house, the water made available is not used by locomotives operating upon the main line and these facilities were not constructed nor are they maintained for the purpose of its operation as such, but rather of the Portal subdivision.

As to the basis of the claim for exemption advanced against the Rural Municipality of Swift Current, while the Empress subdivision and, to a lesser extent, the Vanguard and Shamrock subdivisions are used as alternate routes for main line traffic, it is perfectly plain from the evidence that this was not the primary purpose for the construction of these branches, nor is it of their maintenance as branch lines of the railway described in the statute of 1874. The Empress branch, according to the evidence, is one of the best producers of profitable traffic in the western system of the railway company and the fact that at times main line trains are routed over its right-of-way, or that a particularly fine variety of sand required for use generally upon the main line is found and transported to that line from one of the places upon the branch, cannot justify the claim for exemption, in my opinion, for the reasons I have stated.

I would dismiss these appeals with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brothers Locke and Nolan and would dispose of the appeals as they propose.

NOLAN J.:—The Canadian Pacific Railway Company, as plaintiff, brought three actions against the respondent municipalities, which were tried together, and the Company now appeals from the judgments of the Court of Appeal for Saskatchewan, which, by a majority (Gordon J.A. dissenting), dismissed the appeals of the Company from the judgments of the trial judge and allowed the cross-appeals of the respondents the Town of Estevan and the Rural Municipality of Caledonia.

In each of the actions the Canadian Pacific Railway Company (hereinafter sometimes referred to as "the Company") claimed exemption from assessment and taxation for the years 1948 to 1953 inclusive in respect of certain railway properties situate within the boundaries of the respondent municipal corporations. The basis of the claim was that such property was exempted from taxation by reason of the provisions of clause 16 of the agreement entered into between the Government of Canada and George Stephen and others dated October 21, 1880, and ratified by the Parliament of Canada in 1881 by 44 Vict., c. 1, which agreement will be hereinafter referred to as "the contract".

The appellant further claimed an injunction restraining the respondent municipalities from levying, or attempting to levy, any taxes in respect of certain properties situate in the respondent municipalities and claimed repayment from the Rural Municipality of Swift Current of sums of money paid in respect of taxation levied against it during the years in question. The relief sought by way of injunction applied to the years 1948 to 1953, as well as to subsequent years.

Clause 16 of the contract provides as follows:

16. The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

Before dealing with the reasons for judgment in the Courts below it should be pointed out that in 1948, by order in council, the Government of Saskatchewan referred to the Court of Appeal for Saskatchewan (1) four questions concerning the exemption of the Company under clause 16 of the contract and its application in the Province of Saskatchewan.

(1) *Re Taxation of Canadian Pacific Railway Company*, [1949] 1 W.W.R. 353, [1949] 2 D.L.R. 240, 63 C.R.T.C. 145.

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Nolan J.

On appeal to this Court (1) the first question and the answer given by the majority were as follows:

1. Does clause 16 of the contract set forth in the Schedule to Chapter 1 of the Statutes of Canada, 44 Victoria (1881), being an Act respecting the Canadian Pacific Railway, exempt and free from taxation the stations and station grounds, work shops, buildings, yards, and other property, used for the working of the branch lines of the Canadian Pacific Railway Company situated in Saskatchewan?

Answer: No, except such properties, if any, real or personal, enumerated in clause 16, situate upon the branch lines in Saskatchewan as are entitled to the benefit of the exemption from taxation as being required and used for the construction and working of the railway described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14.

The third question and the answer given by the majority were as follows:

3. Are the provisions of the said *The Village Act, 1946, The Rural Municipalities Act, 1946, The Local Improvement Districts Act, 1946, The City Act, 1947,* and *The Town Act, 1947,* all as amended, relating to the assessment and taxation of the real estate of railway companies, operative in respect of branch lines of Canadian Pacific Railway Company in the Province of Saskatchewan constructed pursuant to clause 14 of the said contract?

Answer: Yes, except in respect of such real estate, if any, situate upon branch lines constructed pursuant to clause 14 of the contract as is entitled to the benefit of the exemption from taxation under clause 16 as being required and used for the construction and working of the railway as described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14.

Questions 2 and 4 related to questions of business tax and are irrelevant to the matters under discussion.

On the appeal to this Court on the reference it was unnecessary to consider particular properties and the present actions instituted by the appellant were in an endeavour to have the answers of this Court applied to particular properties of the appellant.

On appeal before this Court the appellant did not contend that all of its properties within the respondent municipalities were entitled to exemption as coming within the words "required and used" for the working of the Canadian Pacific Railway. It thus becomes necessary to discuss the particular properties in detail.

(1) *Canadian Pacific Railway Company v. The Attorney General for Saskatchewan,* [1951] S.C.R. 190, [1951] 1 D.L.R. 721, 67 C.R.T.C. 203, [1951] C.T.C. 26.

The Portal subdivision of the appellant extends from Pasqua, on the main line near Moose Jaw, to the Canada-United States border, where it connects with the Soo Line. It runs through the town of Estevan.

The Estevan subdivision runs from Estevan to Kemnay, on the main line near Brandon.

The evidence discloses that large quantities of lignite coal come from the Souris Valley coal fields at Roche Percee and Bienfait near Estevan. This coal is hauled over the Portal and Estevan subdivisions for use in stationary boiler-plants in roundhouses at Fort William, Ignace, Kenora, Winnipeg, Brandon, Broadview, Regina, Moose Jaw and Swift Current, all situate on the main line of the Company. It is not used at Estevan or at any station on the Estevan or Portal subdivisions. These stationary boiler-plants generate steam power for railway shops and steam heat for railway cars, stations and other railway buildings. The plants are adapted to the use of lignite coal, which is the most economical available and obtainable only in the Souris area.

Coal from the Bienfait and Roche Percee coal fields, which is to be delivered to main line points to the west of Broadview, comes into Estevan and moves north over the Portal subdivision to Pasqua and then along the main line to its destination. Coal from these fields, which is to be delivered to main line points east of Broadview, moves over the Estevan subdivision to Kemnay, on the main line, and then to its destination.

The appellant contends that the roadway of the Portal and Estevan subdivisions is exempt as being required and used for the working of the main line.

The Company also contends that 2.55 miles of roadway of the Portal subdivision and 1.51 miles of roadway of the Estevan subdivision, together with the station, station grounds, work shops, buildings, yards and other properties situate in and assessed by the respondent Town of Estevan are required and used for the working of the main line and are, therefore, exempt from taxation under the provisions of clause 16 of the contract.

The Company also contends that 8.333 miles of roadway situate in and assessed by the respondent Rural Municipality of Caledonia are required and used for the working

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Nolan J.

of the main line and are, therefore, exempt. A claim for exemption on the same grounds is made in respect of the Milestone water-supply site and pumphouse, an area of 26.98 acres on Moose Jaw Creek, from which water is pumped approximately 2 miles into a water tower alongside the tracks in the town of Milestone, which is the last watering place before Moose Jaw and is used by all locomotives proceeding to the main line of the Company.

The Empress subdivision commences at Java on the main line of the Company west of Swift Current and runs in a north-westerly direction to Empress, Alberta. At that point it connects with the Bassano subdivision and runs to Bassano, Alberta, thus forming a single-track loop with the main line of the Company. It is submitted by the Company that the Empress subdivision is exempt as being required and used for the working of the main line.

The Company also contends that 8.707 miles of the roadway of the Empress subdivision, together with the station and station grounds, the section, tool and bunk houses at Cantuar, situate in and assessed by the respondent Rural Municipality of Swift Current, are required and used for the working of the main line and are, therefore, exempt from taxation.

The Vanguard subdivision runs southerly from the city of Swift Current to Meyronne and the Shamrock subdivision runs east from Hak on the Vanguard subdivision to Archive on the Expanse subdivision, which runs northerly to the main line of the Company near Moose Jaw. The Company contends that the roadway of the Vanguard subdivision north of Hak, consisting of 17.539 miles of roadway within the respondent Rural Municipality of Swift Current, together with the roadway of the Shamrock subdivision, consisting of 3.504 miles of roadway, and the station and station grounds, section, bunk and tool houses at Wymark and the station and station grounds at Dunelm, situate in and assessed by the respondent Rural Municipality of Swift Current, are also exempt from taxation as being required and used for the working of the main line.

The learned trial judge dismissed the action against the respondent Rural Municipality of Swift Current and held that none of the property enumerated in the statement of

claim in the action against that respondent was required and used for the construction and working of the Canadian Pacific Railway, as that railway is defined in the contract. The learned trial judge further held in the action against the respondent Town of Estevan that all the properties claimed by the appellant to be exempt from taxation, other than the roadway consisting of 4.5 miles, were not presently subject to taxation and were not so subject during the years 1948 to 1953 inclusive. The learned trial judge also held in the action against the respondent Rural Municipality of Caledonia that the water-supply site and the pump-house were exempt from taxation, but that the roadway of the appellant within the respondent municipality consisting of 8.333 miles was subject to taxation.

In the Court of Appeal Martin C.J.S., with whom McNiven J.A. and Culliton J.A. concurred, dismissed the appeals of the appellant and allowed the cross-appeals of the respondents the Town of Estevan and the Rural Municipality of Caledonia and held that the properties in question were not required and used for the construction and working of the Canadian Pacific Railway, as that railway is defined in the contract, and that the appellant was, therefore, not entitled to the benefit of the exemption provided in clause 16 thereof. With this view Procter J.A. agreed. Gordon J.A. would have allowed the appeals and dismissed the cross-appeals and was of the opinion that a station on the main line of the railway of the appellant would be entitled to the exemption even if no longer required and used for the construction and working of the main line. The learned judge further held that the stations and station grounds, buildings, yards and other properties referred to in clause 16 of the contract refer to those on the branch lines and, when required and used for working of the main line, are exempt from taxation. With regard to the roadbed and right-of-way of the branch lines themselves, Gordon J.A. held that they were exempt from taxation, under whatever authority they were built, if required and used in the working of the main line.

The appellant contended before this Court that all of the properties indicated above, situate within the respondent municipalities, together with the roadway of the branch lines, were required and used for the working of the

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Nolan J.

Canadian Pacific Railway, as that railway is defined in the contract, and came within the exemption in clause 16.

As has been set out above, questions 1 and 3 on the reference to the Court of Appeal for Saskatchewan, *supra,* and to this Court, *supra,* pertain particularly to clause 16 of the contract. In answer to question 1 this Court and the Court of Appeal for Saskatchewan both stated that the station and station grounds, work shops, buildings, yards and other property used for the working of the branch lines of the Canadian Pacific Railway Company situate in Saskatchewan were subject to taxation. This Court, however, went on to make an exception of those properties, if any, real or personal, enumerated in clause 16, situate upon the branch lines in Saskatchewan, which are entitled to the exemption as being required and used for the construction and working of the railway as described in ss. 1, 2 and 3 of the Act 37 Vict., c. 14. A similar exception was included by this Court in the answer to question 3.

On appeal to the Privy Council (1), the judgment of the Judicial Committee was largely limited to the constitutional aspect of the matter and to the application of the exemption to business taxes.

The judgment of this Court was affirmed and the answers given by this Court were in no way varied by the judgment of the Judicial Committee.

It will be seen that, while the judgment of the Judicial Committee is, in the main, irrelevant to the issues involved in this appeal, nevertheless the judgment of this Court was affirmed and it remains to be decided what specific property of the Company falls within the exception set out in the answers given by this Court to questions 1 and 3.

By the Statutes of Canada 1874, 37 Vict., c. 14, the Parliament of Canada passed *An Act to provide for the construction of the Canadian Pacific Railway.* The preamble refers to the agreement with the Province of British Columbia with respect to the construction of the railway and also to a resolution of the House of Commons that the railway should be constructed and worked by private enter-

(1) *Attorney-General for Saskatchewan v. Canadian Pacific Railway Company,* [1953] A.C. 594, [1953] 3 D.L.R. 785, [1953] C.T.C. 281, 10 W.W.R. (N.S.) 220.

prise, assisted by such liberal grants of land and such subsidy in money, or other aid, as the Parliament of Canada should thereafter determine.

Section 1 provides that a railway, to be called the "Canadian Pacific Railway", shall be constructed from some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean, both of the points to be determined and the course and line of the railway to be approved by the Governor in council.

Section 2 provides that the whole of the said railway, for the purpose of its construction, shall be divided into four sections; the first section to begin at a point near to and south of Lake Nipissing, and to extend towards the upper or western end of Lake Superior; the second section to begin at some point on Lake Superior, to be determined by the Governor in council, and connecting with the first section, and to extend to Red River, in the Province of Manitoba; the third section to extend from Red River, in the Province of Manitoba, to some point between Fort Edmonton and the foot of the Rocky Mountains, to be determined by the Governor in council; the fourth section to extend from the western terminus of the third section to some point in British Columbia on the Pacific Ocean.

Section 3 provides for the construction of two branch lines:

First.—A branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the said points to be determined by the Governor in Council.

Secondly.—A branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina on the southern boundary thereof.

Section 4 provides that these two branch railways shall be considered as forming part of the Canadian Pacific Railway, and as so many distinct sections of the said railway, and shall be subject to all the provisions thereafter made with respect to the said Canadian Pacific Railway, except in so far as otherwise provided by the Act. It is to be observed that the branch railways referred to in s. 3 of the Act, *supra,* are not in the Province of Saskatchewan.

By the Statutes of Canada 1881, 44 Vict., c. 1, an Act was passed respecting the Canadian Pacific Railway. By s. 1 of the Act the contract, appended thereto as a schedule, was

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Nolan J.

approved and the Government was authorized to carry out the conditions contained in the contract.

Section 2 authorized the Government to incorporate the persons named in the contract with the corporate name of the "Canadian Pacific Railway Company" and to grant to them a charter conferring upon them the powers contained in the contract.

Under s. 4 the Government was authorized to permit the admission, free of duty, of steel rails and other material to be used in the original construction of the Canadian Pacific Railway, as defined in 37 Vict., c. 14.

Clause 1 of the contract, annexed as a schedule to the Act, after defining Eastern, Lake Superior, Central and Western sections, concludes as follows: "And that the words 'the Canadian Pacific Railway', are intended to mean the entire railway, as described in the Act 37th Victoria, chap. 14." Clause 1 of the contract is also declared to be "for the better interpretation of this contract" and it seems clear that wherever the words "Canadian Pacific Railway" occur in the contract they must be construed to mean the main line, consisting of the four sections referred to above, together with the two branch lines described in 37 Vict., c. 14, unless the language used in any clause plainly indicates some other construction.

The construction of branch lines is referred to in two clauses of the contract, namely, clauses 11 and 14. In clause 11 the Company is authorized to locate a part of the land grant "on each side of any branch line or lines of railway to be located by the Company" in substitution for sections found to be "not fairly fit for settlement".

Clause 14 provides that the Company shall have the right, from time to time, to construct branch lines of railway and that the Government shall grant to the Company the lands required for the roadbed of such branches and for the stations, station grounds, buildings, work shops, yards and other appurtenances requisite for the efficient construction and working of such branches. Clause 14 contains no obligation on the part of the Company to construct any branch lines, nor is such an obligation contained in any other part of the contract.

It should be observed at the outset that s. 24 of the *Saskatchewan Act,* 1905, 4-5 Edw. VII (Can.), c. 42, provided that the powers granted to the Province established thereby "shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company".

I have made no reference to the provisions of the various taxing statutes of the Province of Saskatchewan, empowering the respondent municipalities to assess and to impose the taxes in question. I assume that it is not in dispute that the respondent municipalities have the power to make the assessments and levy the taxes in question, assuming that the exemption is not applicable.

It is clear that for the purposes of these appeals the relevant words of clause 16 of the contract, in part, are:

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the . . . working thereof . . . shall be forever free from taxation . . .

Before this Court the points which were presented in support of the claim for exemption were:

(a) the carriage of materials or supplies originating at a point on a branch line and used for the operation of facilities on the main line;

(b) furnishing supplies at points on the branch lines to enable rolling stock to carry on their operations on the main line;

(c) branch lines furnishing alternative routes for running trains between points on the main line, either because of breakdowns or for the more efficient dispatch of traffic.

Before dealing with the specific properties or roadways for which exemption is claimed, it should be stated that it is conceded that the branch lines of the Company are lines of railway primarily serving their own territory and, in the course of their own operations, carrying traffic, both freight and passenger, to the main line, to be transported to points in Canada and elsewhere. The proposition is that the functions of the branch lines are so related to the main line that they have become subordinate facilities and are "other property" which, so long as these functions continue, are embraced, for the purposes of clause 16 of the contract, within the expression "Canadian Pacific Railway", meaning the main line of the system.

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Nolan J.

By the Act of 1874, providing for the construction of the Canadian Pacific Railway, and the subsequent legislation of 1881 with the contract annexed, both main line and branch lines are expressly dealt with and distinguished one from the other. With a full appreciation of this distinction, the tax exemption was limited to the main line and the branch lines named in s. 3 of the statute. As has been shown, the words "the Canadian Pacific Railway" are stated in clause 1 of the contract as being intended to mean the entire railway as described in the Act of 1874.

Nothing that has been brought up in the argument could have been absent from the minds of those who drafted the legislation bringing the enterprise into existence. It must have been contemplated that branch lines would be the instrumentalities opening up the vast prairie region and that there would necessarily be integrated operation over both portions of the railway and interrelated functioning. With all this in mind the negotiators agreed that the main line would be exempt and that once a branch line was constructed as such, and so long as it functioned for that purpose, it would be subject to taxation.

It is plain on the appeal to this Court on the reference, *supra,* that there was nothing in the statute 1874, c. 14, which could be taken to include branch lines and that the words "Canadian Pacific Railway" are restricted in their meaning to include only the main line and the branch lines named in s. 3 of the statute.

The remaining matter for determination is the meaning of the words "required and used for the . . . working" of the railway described in ss. 1, 2 and 3 of the Act 37 Vict., c. 14, a question which arises by reason of the limitation placed by this Court in the answers to the questions on the reference with respect to properties, if any, real or personal, situate on branch lines in Saskatchewan.

The appellant contends that by clause 7 of the contract the Company is obligated to work and run the railway efficiently and that any property which would assist the Company in efficiently operating the railway should be exempt. It was further contended that the property which might be required for such efficient operation must largely be a matter of judgment and the judgment must be that of the Company; also it was said that the test of what is

required is not what is absolutely necessary or indispensable, but what is reasonably required, and that good faith is a necessary element. Reliance was placed by the appellant on *City and South London Railway Company v. London County Council* (1). In my view this authority may be distinguished on the ground that it involved an original taking of land, which is not the case here.

It may be useful to apply the arguments of the appellant to the properties in question situate within the respondent municipalities.

It is contended by the appellant that the coal required for stationary boiler-plants is hauled to the main line in substantial quantities from the Souris area over parts of the roadway of the Portal and Estevan subdivisions, which runs through Estevan, and that consequently the roadway of the Portal and Estevan subdivisions is "required and used" for the working of the main line and is exempt.

The evidence discloses that the main line boiler-plants have been adapted to the use of lignite coal, which is produced in the Souris area and is an economical form of fuel. The haulage of coal over the Portal subdivision represents a small proportion of the total freight traffic over that branch line. Nevertheless a large tonnage is hauled. The evidence discloses that the Portal subdivision was built in 1893 and the principal purpose of its construction was to give the Company the shortest route between the cities of Minneapolis and St. Paul and the Pacific north-west. A secondary purpose was to carry coal commercially from the developing Souris coal field. As early as 1887 coal from that field was being carried down the Souris River to Winnipeg, but it was not until 1930 or 1935 that coal from this field was first used by the Company in its main line boiler-plants.

I am unable to agree with the contention that the Portal and Estevan subdivisions are "required and used" for the working of the main line because lignite coal is carried over those branch lines to provide fuel for stationary boiler-plants on the main line. To agree would be to extend the argument for exemption to other branch lines transporting

(1) [1891] 2 Q.B. 513.

1957

C.P.R. v. TOWN OF ESTEVAN et al.

Nolan J.

material and supplies to main line points. Neither do I agree with the contention that the roadway in the Portal and Estevan subdivisions, together with the stations, station grounds, houses and other buildings located in the respondent Town of Estevan, can be said to be exempt. Clearly they are used for the convenience of passengers, for the maintenance of the roadway of the two subdivisions and for the servicing of rolling stock, but, in my view, it cannot be said that they are also required and used for the working of the main line.

What I have said regarding the roadway of the Portal subdivision applies equally to the roadway in the respondent Rural Municipality of Caledonia, which roadway is part of the Portal subdivision. Milestone water-supply site and pumphouse, situate in this respondent municipality, although the last watering point before Moose Jaw, are, in my view, not entitled to exemption as being required and used for the working of the main line.

As has been pointed out, in the Rural Municipality of Swift Current an alternative route for main line traffic was built in 1914 between Java, near Swift Current, and Bassano in Alberta. It is used to take care of overflow main line traffic and transports a special kind of subsequently discovered sand from the Empress area to the main line. This alternative route is some distance from the main line. The evidence is that it was constructed as a branch line and, in my opinion, is not a part of the Canadian Pacific Railway which the contractors were obligated to build under the contract and is not required and used for the working of the main line.

What I have said regarding the liability to taxation in respect of properties in the town of Estevan applies equally to those properties in the Vanguard, Shamrock and Stewart Valley subdivisions in the respondent Rural Municipality of Swift Current and, in my view, they are not exempt. The reasoning which I have applied to the Empress subdivision applies equally to the roadway of the Vanguard and Shamrock subdivisions, running south from Swift Current to Hak, then east to Archive, then north to Curle, which, while it is not a regular alternative route to the

main line, is used as an emergency route when there are breakdowns in the main line. It is a branch line and is not entitled to exemption from taxation.

I would dismiss the appeals with costs.

Appeals dismissed with costs.

1957
C.P.R.
v.
TOWN OF ESTEVAN *et al.*
Nolan J.

Solicitor for the plaintiff, appellant: E. H. M. Knowles, Regina.

Solicitors for the defendants, respondents: MacPherson, Leslie & Tyerman, Regina.

1956
*Dec. 15, 19
1957
Apr. 12

ELVEN J. BERKHEISER (*Defendant*) ..APPELLANT;

AND

GLADYS BERKHEISER AND FLORENCE GLAISTER (*Defendants*).. } RESPONDENTS;

AND

LEONARD B. THOMSON, RAY NEWSON AND DOUGLAS CAMPBELL (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mines and minerals—Petroleum and natural gas "lease"—Terms and effect of document—Ademption of legacy.

A document whereby the owner of land "doth grant and lease . . . all the petroleum and natural gas . . . within, upon or under the lands . . . together with the exclusive right and privilege to explore, drill for, win, dig, remove, store and dispose of, the leased substances", with special terms as to duration, operations and payments, is not an out-and-out conveyance of the minerals *in situ*, and does not have the effect of adeeming *pro tanto* a devise of the land. *McColl-Frontenac Oil Company Limited v. Hamilton et al.*, [1953] 1 S.C.R. 127, distinguished.

Per Rand and Cartwright JJ.: The document under consideration in this case had the effect that the title to the oil and gas remained in the owner subject to the incorporeal right of the "lessee", which right was extinguished on the termination of the lease. The rents and royalties were obviously profits and, like rent from a leasehold, were embraced in the devise. The instrument created either a *profit à prendre* or an irrevocable licence to search for and to win the substances named. It was unnecessary in this case to decide whether petroleum and natural gas *in situ* were to be classed as corporeal hereditaments and sold as land.

*PRESENT: Rand, Kellock, Locke, Cartwright and Nolan JJ.

1957

BERKHEISER v. BERKHEISER AND GLAISTER

Per Kellock, Locke and Nolan JJ.: While it was quite competent for an owner of land so to convey minerals lying in or under it that thereafter there were two separate estates in fee, that was not the result of the instrument here in question. Reading all the terms of the "lease", they were quite inconsistent with any conception of a grant in fee, whether of the minerals *in situ* or of a *profit à prendre*. The instrument was to be construed as a grant of a *profit à prendre* for an uncertain term which might be brought to an end upon the happening of any of the various contingencies for which the "lease" provided.

APPEAL by the defendant Elven J. Berkheiser from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of Graham J. (2), on an originating notice of motion.

E. C. Leslie, Q.C., for the defendant, appellant.

J. P. Nelligan, for the defendants, respondents.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J.:—The facts in this appeal are these. By will dated May 2, 1947, a testatrix devised to the appellant a quarter-section of land in Saskatchewan; under date of December 18, 1951, with an incorporated company, she entered into what is called a "lease" of all petroleum and natural gas "within, upon or under" the quarter-section for a term of 10 years "and so long thereafter as the leased substances or any of them are produced" from the land; on July 9, 1953, she died. The lease called for a down payment of $320; it provided, in the event of deferred operations, for an annual acreage rental of $160, for certain royalties related to the oil and gas as they were produced, and for other matters mentioned later. Following the death of the lessor a payment of the rental was made to the executors which deferred drilling to December 18, 1954. Under a clause headed "Surrender", the lease was terminated by notice given after the death but before April 15, 1955, when these proceedings were launched. The respondents are the residuary beneficiaries under the will, and the substantial question raised is whether the interest of oil and gas is now vested in them or in the appellant.

(1) 16 W.W.R. 459, [1955] 5 D.L.R. 183 (*sub nom. re Sykes Estate; Thomson et al. v. Berkheiser et al.*)

(2) 16 W.W.R. 172.

In the Courts below the transaction was treated as an out-and-out sale or agreement of sale of minerals *in situ*, the sale of a corporeal hereditament; the title to the minerals in fee simple was thereby severed from the rest of the fee; this worked an ademption of the devise to the extent of the oil, gas and royalties, and on termination the title fell into the residue. Apart from any question of the effect of a "termination" by notice of an estate, legal or equitable, in fee simple, or any question of a determinable fee or a fee on condition, the controversy hinges on the validity of that interpretation of the lease and it becomes necessary to examine its terms.

The operative words in the premises are:

> THE LESSOR . . . DOTH HEREBY GRANT AND LEASE . . . all the petroleum and natural gas . . . within, upon or under the lands . . . together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of, the leased substances and . . . to drill wells, lay pipe lines, and build and install such tanks, stations, structures and roadways as may be necessary . . . .

Provisos were stipulated, (a) in effect, that if the drilling of a well was not commenced within the second year (the first year having been carried over by the down payment) the lease should terminate unless the lessee should pay the rental which would defer the work for a further year, with like payments for like deferred periods thereafter; (b) that if, at any time within the 10-year period and prior to discovery, a dry well or wells should have been drilled, or if after the discovery, during that term, production should cease, the lease should terminate at the next anniversary date unless operations for further drilling had been commenced or the rental paid, in which event thereafter the rental proviso would continue in force; and (c) that if at any time after the 10-year period production had ceased but the lessee had begun further work, the lease should remain in force so long as the operations were prosecuted and, if successful, so long thereafter as production continued. In any case, the time of any cesser of drilling, working or production from any cause beyond the lessee's control should not be counted against it. Royalties were provided, (1) on crude oil, of 12½ per cent. of the current market value at the point of measurement; (2) on natural gas, of 12½ per cent. of the current value at the point of measurement, and on gas treated in a plant, that percentage

1957

BERKHEISER v. BERKHEISER AND GLAISTER

Rand J.

of the residual gas therefrom marketed; (3) on plant products, related to the current market-price at the plant where produced on a basis, the details of which are not material. The lessor might, in lieu of the cash royalty, on notice, take one-eighth of the oil, for collecting which the lessee would provide free of cost tanks for not more than 10 days' accumulation. The lessee agreed to drill offset wells whenever and wherever they might be required by reason of production on lands laterally adjoining the quarter-section and not owned by the lessor.

The language of the provision for surrender read:

> Notwithstanding anything herein contained, the Lessee may at any time or from time to time determine or surrender this Lease and the term hereby granted as to the whole or any part or parts of the leased substances and/or the said lands, upon giving the Lessor written notice to that effect, WHEREUPON this Lease and the said term shall terminate as to the whole or any part or parts thereof so surrendered and the annual acreage rental shall be extinguished or proportionally reduced as the case may be, but the Lessee shall not be entitled to a refund of any such rent theretofore paid.

If within 90 days of notice of default given by the lessor for breach, non-observance or non-performance by the lessee of any covenant, proviso, condition, restriction or stipulation, the default was not remedied, the lease would thereupon terminate.

Whether petroleum and natural gas *in situ* are to be classed as corporeal hereditaments and sold as land has been the subject of a great deal of consideration by Courts, particularly in the United States, and the application of common law conceptions to substances of such character, whose utility was little appreciated before this century, has produced a wide variance of opinion; but for the reasons following, the determination of that question here becomes unnecessary.

A corporeal hereditament was looked upon at common law as property of a permanent and indestructible character. When land was spoken of there was in mind not only the substances of the soil but also the space in which the substances were contained. To the ownership of land applied the maxim *cujus est solum, ejus est usque ad coelum.* In this conception of space filled with substance there is, for the purposes of law, an indestructible base to which incorporeal rights can be related.

But as stated in Challis's Real Property, 3rd ed. 1911, at p. 54, the classification of minerals—and the illustration there given of coal indicates the kind of mineral in mind—as corporeal hereditaments, is, in the foregoing respect, an anomaly; the use of minerals has, as its primary object, their removal from the soil and to that extent, their destruction as part of it. *A fortiori* would that consideration operate in respect of the fugacious minerals we are dealing with.

What as a practical matter is sought by such a lessor is the undertaking of the lessee to explore for discovery and in the event of success to proceed with production to its exhaustion. Neither presence nor absence of the minerals was here known, and the initial task was to verify the existence or non-existence of the one or the other. The fugitive nature of each is now well known; a large pool of either, underlying many surface titles, may in large measure be drained off through wells sunk in one of them; tapping the reservoir against such abstraction may, then, become an urgent necessity of the owner.

In that situation the notion of ownership *in situ* is not the likely thing to be suggested to the mind of any person interested because primarily of the difficulty of the factual conception itself. The proprietary interest becomes real only when the substance is under control, when it has been piped, brought to the surface and stored. Any step or operation short of that mastery is still in the stage of capture. To the ordinary producer that course of action is compatible with the risk of discovering nothing, but an initial grant of a title to something that may prove to be non-existent can scarcely be said to be so.

The language of the lease confirms this. The word "grant" is no more significant to a fee title than to an easement or a *profit à prendre* or, apparently, under the land law of Saskatchewan, an irrevocable licence to take. Indeed it is more appropriate to incorporeal than it is to corporeal rights. At common law a grant of a freehold title was ineffectual unless accompanied by livery of seisin, and, in the case of a tenement, attornment. Livery in relation to mines involves difficulties and, in later conveyancing, a transfer of minerals of an open mine appears to have been limited in practice to a bargain and sale under the statute

1957

BERKHEISER v. BERKHEISER AND GLAISTER

Rand J.

of uses, or a lease of the surface and a release of the minerals, or by a statutory deed: *Challis, op. cit.*, p. 58. An unopened mine has been referred to as an incorporeal hereditament, but that is considered by Challis to be an unsound view. The word "lease" in its ordinary meaning implies in relation to land the possession of an indestructible substance (although at common law the lessee for years held the seisin or possession for the freeholder). For oil or gas, livery would seem to be out of the question and for the reasons mentioned other modes of conveyance appropriate to a corporeal hereditament would not accord with the notion of ownership of those substances.

The idea suitable to the partial use of the surface of lands as a necessary means of seeking for and drawing off these fluid substances, apart from the influence by analogy of existing concepts related to different substances, is that of operations to reduce to possession something by its nature generally ready for flight, which, as embodying a property interest, is adequately symbolised by the general term incorporeal right. The word "grant", then, not being significant of title and the word "lease" not carrying with it the possession with which it is ordinarily associated, we look to the detailed description of the acts authorized for the true intendment of the instrument and doing that here I interpret it as either a *profit à prendre* or an irrevocable licence to search for and to win the substances named.

This view is strengthened by the provision for payment of taxes. The lessor is to pay "all taxes, rates and assessments" levied directly or indirectly against her by reason of her interest in production or *her ownership of mineral rights,* as well as those assessed against the surface of the land. On the other hand, the lessee is to pay all taxes levied in respect of the undertaking and operations and of the lessee's interest in production. The effect of this is not modified by the stipulation that the lessee shall reimburse the lessor for seven-eighths of any taxes imposed on the latter by reason of being the registered owner of the leased substances. This treats the legal title to the substances as remaining in the lessor and the interest of the lessee as analogous to that of an ordinary lessee of land, that is, as having only an interest in relation to them.

Rights of this nature have long been recognized in coal and other minerals and profits. In *Muskett v. Hill et al.* (1), the instrument was construed to be a licence coupled with a grant and the interest of the assignee held to be assignable. Tindal C.J. quoted the following language from *Thomas v. Sorrell* (2):

> But a licence to hunt in a man's park, and carry away the deer kill'd to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer kill'd and tree cut down, they are grants.

In *Wilkinson v. Proud et al.* (3), the decision went on the distinction between such a right and title; in the language of Parke B.:

> This is not a claim of a prescriptive right to take coal in the plaintiff's close, but a prescription for all the strata and seams of coal lying under it, that is, for a part of the soil itself, and not for the right to get the coal, which would be the subject of a grant.

In *Martyn v. Williams* (4), a licence was granted to the defendant "to dig, work, and search for china clay, and to raise, get, and dispose of the same . . . for the term of 21 years". The grantee covenanted, among other things, that at the expiration of the term he or his assigns would deliver up the works to the grantor in good repair. The grantor assigned and an action was brought by the assignee against the grantee on the covenant. It was held that the grant created an incorporeal hereditament, the covenants relating to which under 32 Hen. VIII, c. 34, ran with the land. Martin B., in delivering the judgment, made observations which are of special interest here:

> These cases [*Doe d. Hanley v. Wood* (1819), 2 B. & Ald. 724, 106 E.R. 529, and *Muskett v. Hill et al., supra*] establish that it is an incorporeal hereditament, a property, and an estate capable of being inherited by the heir, and assigned to a purchaser, or otherwise conveyed away. It is in truth "a tenement" within the definition of Lord Coke in the First Institute, 20 a., who says that the word "tenement includeth not only corporate inheritances, but also all inheritances issuing out of them, or concerning or annexed to, or exerciseable within them, as rent, estovers, common, or other profits whatever, granted out of land." . . . The statute in express terms therefore extends to incorporeal hereditaments and tenements, and is not confined merely to lands. If, therefore, there had been an estate in fee of the right or interest created by the indenture

(1) (1839), 5 Bing. N.C. 694, 132 E.R. 1267.

(2) (1673), Vaugh. 330 at 351, 124 E.R. 1098 at 1109.

(3) (1843), 11 M. & W. 33, 152 E.R. 704.

(4) (1857), 1 H. & N. 817, 156 E.R. 1430.

1957

BERKHEISER v. BERKHEISER AND GLAISTER

Rand J.

mentioned in the declaration, and the owner in fee of the right had demised it for twenty-one years, and there had been a covenant such as that secondly declared on, we should have been of opinion, that the assignee of the reversion could have sued upon it for a breach committed in his own time. But in the present case no estate in fee in the right to take the china clay has been created. The owners of the fee simple merely granted the right for a term of years, and after the expiration of this term, the plaintiff, who was then the owner of the land, was entitled to do all which the defendant was authorised and licensed by the indenture to do, not by virtue of the same estate which the defendant had, having reverted and continuing an existing estate, but by virtue of his ownership of and dominion over his own land; (for the owner of land exercises his right over it, not by virtue of any licences or liberties or easements, but by virtue of his ownership in which all interests of this kind merge: *Greathead v. Morley,* 3 M. & G. 139); and the question is, whether the conveyance or assignment of the land to the plaintiff, during the existence of the term in the incorporeal tenement, was an assignment of the reversion within the statute of 32 H. 8. We think that it was. There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease.

In *Hooper et al. v. Clarke* (1), an exclusive right and licence to take and kill game on certain land with the use of a cottage was similarly treated: Blackburn J. at pp. 202-3 said:

> The first question is, this being the demise of an incorporeal hereditament, do convenants which would run with a demise of land, run with it? *Martyn v. Williams* [*supra*] decides that they do.

To the like effect was the decision in *Lord Hastings v. North Eastern Railway Company* (2), where a covenant to pay for the privilege of a way-leave on which to make and use a railway, based on a rate on the coal carried to a certain port, was held to run with the reversion.

In such cases the title to the substances as part of the land remains in the owner and upon it is imposed the incorporeal right which the termination of the lease, as in this case, extinguishes. As stated in Jarman on Wills, 8th ed. 1951, p. 939 (vol. 2), an immediate devise of land in fee to a person *in esse,* carries the rents and profits of the land from the death of the testator. The rents and royalties here are obviously profits and like rent from a leasehold, in the absence of a specific bequest of them, which, if an assignment of the lessor's interest in the lease, would require a grant of the minerals themselves, are embraced in the

(1) (1867), L.R. 2 Q.B. 200. (2) [1898] 2 Ch. 674.

devise. It follows that both the right to the payment of $160 and the reversionary interest in the petroleum and gas enured to the appellant.

The interpretation given the instrument is not at all affected by the judgment of this Court in *McColl-Frontenac Oil Company Limited v. Hamilton et al.* (1). In the majority reasons written by Kellock J. at pp. 136-7, dealing with that question, he says:

> Whether the proper construction of the instrument is that, with respect to minerals, it is a grant of the minerals as land, as in *Gowan's* case (2), or a demise of the surface to which is super-added a *profit à prendre*, the result is, in my opinion, the same.

The finding that the agreement was a sale of property within the Act there being examined was satisfied by the transfer of title as the oil or gas was obtained in production; but that piecemeal sale and acquisition is the completion of the exercise of the right to win them, in contrast to the out-and-out conveyance of them *in situ*.

I would, therefore, allow the appeal, set aside the judgment below by declaring the petroleum and natural gas rights to be vested in the appellant and that the appellant is entitled to the sum of $160 received by the executors. The costs in this Court will be according to the terms on which leave to appeal was granted; those in the Courts below will be as directed by their judgments respectively.

The judgment of Kellock, Locke and Nolan JJ. was delivered by

KELLOCK J.:—It is quite competent for an owner of land so to convey mineral lying in or under the land that thereafter two separate estates in fee exist, the one in the mineral conveyed and the other in that which is retained. The respondents contend that this is the result of the instrument here in question.

Under the instrument the late Esther Elizabeth Sykes (described as "Lessor") "doth hereby grant and lease" to the Canadian Devonian Petroleums Limited (described as "Lessee")

> . . . all the petroleum and natural gas and related hydrocarbons except coal and valuable stone, (hereinafter referred to as the "*leased* substances"), within, upon or under the lands hereinbefore described and all the right,

(1) [1953] 1 S.C.R. 127, [1953] 1 D.L.R. 721.

(2) *Gowan v. Christie et al.* (1873), L.R. 2 Sc. & Div. 273.

1957

BERKHEISER v. BERKHEISER AND GLAISTER

Kellock J.

title, estate and interest of the Lessor in and to the *leased* substances or any of them within, upon or under any lands excepted from, or roadways, lanes, rights-of-way adjoining the lands aforesaid, together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of, the leased substances and for the said purposes to drill wells, lay pipe lines, and build and install such tanks, stations, structures and roadways as may be necessary, and, insofar as the Lessor has the right so to grant, and for the said purposes, the right of entering upon, using and occupying the said lands or so much thereof and to such an extent as may be necessary or convenient.

TO HAVE AND ENJOY the same for the term of Ten (10) years from the date hereof and so long thereafter as the *leased* substances or any of them are produced from the said lands, subject to the sooner termination of *the said term* as hereinafter provided.

(The italics are mine.)

The document further provides that if operations for the drilling of a well are not commenced within one year from its date the lease shall thereupon terminate unless the lessee shall have paid or tendered to the lessor $160, called "annual acreage rental", which payment shall "confer the privilege" of deferring the commencement of drilling operations for a period of one year. There may be further extensions upon "like payments or tenders", but, so far as this provision is concerned, the lease would terminate, at the latest, at the expiration of the 10-year term.

It is also provided that if at any time during the 10-year term and prior to "discovery of production" on the lands, the lessee should drill a dry well or wells, or if at any time during the term and after the discovery of production, such production should cease, the lease shall terminate "at the next ensuing anniversary date" unless drilling operations for a further well have been commenced or unless further tender of the annual acreage rental is made, in which latter event the earlier provision as to payment or tender of such rental is to be deemed to have continued in force. Again, there is nothing in this provision which, in my view, would allow the extension of the term beyond the 10-year period.

It is further provided, however, that if at any time after the expiration of the 10-year term the "leased substances" are not being produced but the lessee is then engaged in drilling or working operations on the land, the lease shall remain in force for so long as such operations are prosecuted and for so long as any resulting production continues. Provision is also made for payment of a royalty to the lessor upon any and all production.

The instrument also contains a clause that the lessee may, at any time, terminate or surrender the lease "as to the whole or any part or parts of the leased substances and/or the said lands" upon written notice to the lessor to that effect. Provision is also made for termination of the lease by the lessor upon notice to the lessee of any default on its part under the instrument and failure to remedy such default within a period of 90 days from receipt of such notice.

In Armour on Real Property, 2nd ed. 1916, the following is stated on p. 47:

> . . . a grant of all the coal or other mineral in or upon certain land, is a grant of part of the land itself, and passes complete ownership in the mineral to the grantee.

But the learned author continues:

> But a grant of the right to enter, search for and dig coal, and carry away as much as may be dug, is a grant of an incorporeal right to enter and dig, and passes the property in such coal only as shall be dug.

As stated in 11 Halsbury, 2nd ed. 1933, p. 386, s. 678:

> A *profit à prendre* may be created for an estate in perpetuity analogous to an estate in fee simple, or for any less period or interest such as a term of years . . . .

In the case at bar the Courts below have construed the instrument as a conveyance in fee. The basis of this view is sufficiently indicated in the following extracts from the judgment of Martin C.J.S., speaking for the Court of Appeal (1):

> Authorities are to the effect that petroleum and natural gas leases in the form of the one under review are sales of a portion of the land with liberty to enter upon the land for the purpose of searching for and carrying away the petroleum and natural gas within, upon or under the land. . . .
>
> Applying these authorities the testatrix disposed of an interest in the land when she entered into the petroleum and natural gas lease and the lease was in effect at the time of her death on July 9, 1953, but came to an end on December 18, 1954. The will of the testatrix spoke from her death, namely July 9, 1953, and as the sale of the petroleum and natural gas was then in effect just as she had made it on December 18, 1951, the devise of the interest in the land consisting of petroleum and natural gas was adeemed. Where there is a specific legacy and the subject-matter does not remain the property of the testator at his death the legacy is said to be adeemed. . . .
>
> . . . I cannot agree that the testatrix, so far as petroleum and natural gas are concerned, had anything left at the time of her death which she could dispose of. Section 19 of *The Wills Act*, R.S.S. 1953, ch. 120, cannot be

(1) 16 W.W.R. at pp. 461-2.

1957

BERKHEISER v. BERKHEISER AND GLAISTER

Kellock J.

applied because the testatrix had no estate in the petroleum and natural gas which she had "power to dispose of by will at the time of her death." . . . I am unable to distinguish the sale of minerals—an interest in land—from the case where a testator in his will makes a specific devise of land but subsequently sells the land under agreement for sale.

While what is referred to as a "mining lease" commonly amounts to a "sale of land", so to characterize any given instrument does not necessarily equate it with either a grant in fee simple of the mineral in place or of a *profit à prendre*. For example, the grant in question in *Gowan v. Christie et al.* (1), was only for a term of 21 years. Nevertheless, the oft-quoted citation from the judgment of Lord Cairns, on pp. 283-4, was quite properly applicable to it. Lord Cairns was there differentiating a mineral from an agricultural lease in that the agricultural lessee, while entitled to "fruits", is not entitled to either a corporeal or an incorporeal interest in the lands.

The words of Lord Cairns were also cited in *Joggins Coal Company Limited v. The Minister of National Revenue* (2), but the decision of the issue there arising did not require the Court to determine anything more with respect to the instrument before the Court than that the appellant had such an interest in the mineral that it was entitled to claim a share in depletion allowance as a "lessee" within the meaning of the *Income War Tax Act*.

The question which arose in *McColl-Frontenac Oil Company Limited v. Hamilton, et al.* (3), was whether the instrument before the Court was "a contract for the sale of property" within the meaning of the Alberta *Dower Act*. Whether the agreement was one for the sale of the mineral in place or of a *profit à prendre* was immaterial. In either case the Court considered the language of the statute to apply.

In the case at bar it is necessary to decide whether the interest in the mineral created in favour of the grantee was of such a nature that the devise to the appellant was, *pro tanto*, adeemed. In my opinion, this is not so. The provisions of the instrument as analyzed above are, in my

(1) (1873), L.R. 2 Sc. & Div. 273.
(2) [1950] S.C.R. 470, [1950] 3 D.L.R. 1, [1950] C.T.C. 149.
(3) [1953] 1 S.C.R. 127, [1953] 1 D.L.R. 721.

opinion, quite inconsistent with any conception of a grant in fee whether of the minerals in place or of a *profit à prendre*. In my opinion, the instrument is to be construed as a grant of a *profit à prendre* for an uncertain term which might be brought to an end upon the happening of any of the various contingencies for which it provides. It did not bring about that separation of the estate in the minerals from the estate in the land apart from the minerals which is the necessary basis for the operation of the doctrine of ademption.

In *Martyn v. Williams* (1), a *profit à prendre* in certain minerals had been granted to the defendant for a term of years by the owner in fee, who subsequently conveyed all his estate to the plaintiff. Martin B., delivering the judgment of the Court, said, at p. 829:

> But in the present case no estate in fee in the right to take the china clay has been created. The owners of the fee simple merely granted the right for a term of years, and after the expiration of this term, the plaintiff, who was then the owner of the land, was entitled to do all which the defendant was authorised and licensed by the indenture to do, not by virtue of the same estate which the defendant had, having reverted and continuing an existing estate, but by virtue of his ownership of and dominion over his own land; (for the owner of land exercises his right over it, not by virtue of any licences or liberties or easements, but by virtue of his ownership in which all interests of this kind merge: *Greathead v. Morley*, 3 M. & G. 139); and the question is, whether the conveyance or assignment of the land to the plaintiff, during the existence of the term in the incorporeal tenement, was an assignment of the reversion within the statute of 32 H. 8. We think that it was. There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease.

Accordingly, upon the termination of the interest of the grantee under the lease here in question, the estate of the appellant in the lands was no longer subject to it. The doctrine of ademption does not apply. Equally the appellant is entitled to the amount paid for acreage rental by the lessee following the death of the testatrix.

(1) (1857), 1 H. & N. 817, 156 E.R. 430.

1957

BERKHEISER v. BERKHEISER AND GLAISTER

Kellock J.

The appeal should, therefore, be allowed. I agree with the order as to costs proposed by my brother Rand.

Appeal allowed.

Solicitors for the defendant Elven J. Berkheiser, appellant: MacPherson, Leslie & Tyerman, Regina.

Solicitors for the defendant Glaister, respondent: McIlraith & McIlraith, Ottawa.

Solicitors for the plaintiffs: Donnelly & Polley, Swift Current.

1957

*Mar. 6, 7
Apr. 12

THE TOWN OF LUNENBURG .....APPELLANT;

AND

THE MUNICIPALITY OF LUNENBURG RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Infants—Neglected children—Determination of child's settlement—Whether determination may be reopened on further application for declaration that child defective—The Child Welfare Act, R.S.N.S. 1954, c. 30, ss. 30(1), 83(2).

When the settlement of a child has been determined under s. 30(1) of the *Child Welfare Act* at the time that the child is found to be neglected, that determination cannot be reopened on a subsequent application under s. 83 for a declaration that the child is defective, even if the circumstances have changed between the two applications.

The purpose of s. 83 is limited to an inquiry into the alleged new condition of the child, *i.e.*, its defectiveness, in order that new and extended authority may be given to the Children's Aid Society as its guardian. Subsection (2) of s. 83 is designed to enable the judge to "deal with" the matter of its newly-alleged condition only, and does not entitle him to embark upon a new inquiry as to the settlement of the child.

APPEAL by the Town of Lunenburg from the judgment of the Supreme Court of Nova Scotia, *in banco* (1), affirming, on an equal division of the Court, the judgment of Currie J. (2), dismissing an application for a writ of certiorari.

---

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

(1) 38 M.P.R. 353, 4 D.L.R. (2d) 740 (*sub nom. In re Cooper*).

(2) 1 D.L.R. (2d) 771.

C. R. Coughlan, Q.C., and *Archibald Burke,* for the appellant.

R. A. Kanigsberg, Q.C., for the respondent.

The judgment of the Court was delivered by

RAND J.:—The question raised in this appeal is that of the settlement of a child committed to the care and custody of a Children's Aid Society as a neglected child who, later, on an application to the Court, is found also to be a defective child.

When under Part III of the *Child Welfare Act,* R.S.N.S. 1954, c. 30, a child is brought before a judge or magistrate for a declaration that it is a neglected child, the judge, under s. 30(1) must, among other things, determine its place of settlement. On the application in this case that was found to be the town of Lunenburg.

Subsequently an application was made under s. 83 to have the child declared a defective. On that hearing the magistrate ruled that the settlement already found was binding on him and he declined to enter upon a reconsideration of it.

Mr. Coughlan's contention is that on the subsequent application the question of settlement must, by subs. (2) of s. 83, be inquired into anew and be decided in the light of the then existing circumstances. The subsection reads:

> In the case of a defective child, or a child believed to be a defective child, who has been delivered to a Society or to the Director under Part III, the judge may hold the examination as in subsection (1)* and may deal with the case and may make any order or finding on the report of a psychiatrist and the reports of the Society or the Director without the necessity of hearing any further or other persons or evidence.

The new circumstance was that between the two applications the settlement of the father had changed from the town to the municipality of Lunenburg.

It is argued that the original finding does not establish a fixed statutory settlement; that settlement is to be determined from time to time by the appropriate law, in which

*Subsection (1) of s. 83 reads as follows:

"(1) When any defective child, or a child believed to be a defective child has been brought before a judge for examination, the judge shall investigate the facts of the case and ascertain the age of the child, and his settlement, the name and religion of his parents or guardian, and the judge may authorize an examination of the child by a psychiatrist, who shall make an examination as to the physical and mental condition of the child and shall report the same to the judge, and at the same time file a copy of the report with the Director."

1957

TOWN OF LUNENBURG v. MUNICIPALITY OF LUNENBURG

Rand J.

case it would change with that of the parent or guardian. But it is agreed that there is nothing in the statute which permits the original finding on an application for that purpose to be reopened. That means that, apart from the effect of s. 83, the settlement of the child so found remains fixed regardless of the residence of his parent. It is then only the accident of a further application being made under s. 83 for the declaration of defectiveness that is said to permit a new determination; and this, it is argued, is required by the language of the section.

I am unable to accept that contention. The purpose of s. 83 is limited to an enquiry into the alleged new condition of the child, its defectiveness, in order that the society, the guardian, may be invested with a new and extended authority in relation to its custody. Subsection (2) is designed to enable the judge to act upon the reports of a psychiatrist and the Society or Director "without the necessity of hearing any further or other persons or evidence". Certainly this *ex facie* excludes evidence on the question of settlement. That the judge "may deal with the case" means no more than to deal with the matter of its newly-alleged condition. The word "examination" harks back to the same word in line 3 of subs. (1), not to the requirement that the judge shall "investigate the facts of the case and ascertain the age of the child and his settlement". The word is used consistently throughout the section in contradistinction to "investigate" and in spite of the conflict of opinion in the Court below I am unable to feel any doubt upon the meaning the language was intended to bear.

This in substance was the view of the statute taken by Currie J. on the appeal from the magistrate and by MacQuarrie J. and MacDonald J. in the Court below, and in my opinion it is the sound view.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: C. R. Coughlan, Bridgewater, and Archibald Burke, Lunenburg.

Solicitors for the respondent: R. A. Kanigsberg, Halifax, and R. C. Sterne, Lunenburg.

HOWARD SMITH PAPER MILLS LIMITED AND OTHERS ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

1956
*Oct. 29, 30, 31
Nov. 1, 2, 5, 6, 7

1957
May 13

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Conspiracy in restraint of trade—Defences—Whether intended prevention or lessening of competition "undue"—Validity of indictment—Whether different offences created by the Criminal Code, R.S.C. 1927, c. 36, s. 498(1)(d)—Application and effect of the Combines Investigation Act, R.S.C. 1927, c. 26, s. 41, enacted by 1949 (2nd sess.), c. 12, s. 3, renumbered and amended by 1952, c. 39, ss. 6, 8—The Interpretation Act, R.S.C. 1952, c. 158, s. 19.

It is not necessary, to support a charge under s. 498(1)(*d*) of the *Criminal Code*, 1927, that the prosecution should establish any detriment to the public from the agreement made, nor is it a defence to such a charge that the agreement resulted in public benefit, through reasonable prices and profits. The section is designed to protect free competition, and any agreement for the prevention or lessening of that competition, to an extent that is "undue" within the authorities, is punishable. The section proceeds on the footing that the preventing or lessening of competition is in itself an injury to the public, and is not concerned with public injury or public benefit from any other standpoint.

An indictment alleging that the accused conspired "to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply" of goods is not bad for duplicity, or as charging several offences in the alternative. A single conspiracy is contemplated by s. 498(1)(*d*), *viz.*, one to "prevent or lessen competition", and the words following are merely means by which that competition may be prevented or lessened. For the same reason, it is not correct to strike out the words "production" and "manufacture" from the conviction merely on the ground that there was no evidence of a conspiracy expressly directed to the prevention or lessening of competition in these two respects.

Section 41 of the *Combines Investigation Act*, 1927, as enacted in 1949 and amended and renumbered in 1952, applies on a prosecution for a conspiracy completed before the coming into force of the 1952 amendment. The effect of the section is to render admissible in evidence written communications, described as "inter-office memoranda", from one servant of an accused corporation to another even if they never left the premises of the company in whose possession or on whose premises they have been found. Such documents, when admitted, are *prima facie* evidence not only against the corporation in whose possession they were found but against other alleged conspirators mentioned in them.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* v. THE QUEEN

APPEAL by 22 companies and one individual from the judgment of the Court of Appeal for Ontario (1), affirming the conviction of the appellants and one other company by Spence J. (2) on an indictment under s. 498(1)(*d*) of the *Criminal Code*, R.S.C. 1927, c. 36 (one other company and another individual, also indicted and convicted, did not appeal to the Court of Appeal), and a cross-appeal by the respondent. Appeal dismissed and cross-appeal allowed.

Leave was granted by Cartwright J. on November 22, 1955, to appeal on the following questions of law:

1. Did the Courts below err in holding that section 41 of the Combines Investigation Act, R.S.C. 1952, Ch. 314 as enacted by, 1949 (Second Session) Ch. 12, section 3, and as amended by 1952, 1 Elizabeth II, Ch. 39, was applicable to this case?

2. Did the Courts below err in law in holding that a number of documents consisting of written communications from one servant of an accused corporation to another servant of the same corporation, which documents were referred to at the trial as "inter-office memoranda", were admissible in evidence against all the accused?

3. Did the Court of Appeal for Ontario err in not holding that the indictment and/or the conviction was void for duplicity in that it states two separate offences in the alternative under section 498(1)(*d*) of The Criminal Code namely the offence of agreeing to unduly lessen competition and the offence of agreeing to unduly prevent competition?

4. Did the Court of Appeal for Ontario err in not holding that the indictment and/or the conviction was void for duplicity in that it states in the alternative the several offences under section 498(1)(*d*) of agreeing as to manufacture, purchase, barter, sale, transportation or supply?

5. Did the Court of Appeal err in law in not holding that the effect of wartime control orders, directives and requests, proven in evidence, was to constitute a break in the continuity of any alleged agreement or agreements between the accused and in not holding that the conviction was bad in law as being a conviction on one count with reference to two alleged agreements which are distinct in time?

6. Did the Courts below err in holding that the element of "undueness" required by section 498(1)(*d*) may be proved by reference only to the scope and extent of the agreement or arrangement complained of and without proof of detriment to the public?

7. Did the Courts below err in ruling that they were precluded from having regard to evidence tending to show public benefit, reasonableness of prices and profits, and, particularly, did the learned Trial Judge err in the ruling which he expressed (at 1954, O.R. p. 572) in the following words, "In considering the evidence adduced I am not free to find that the lessening intended was not undue on the basis of any necessity of the industry, reasonableness of prices resulting or reasonableness of profits obtained"?

(1) [1955] O.R. 713, 112 C.C.C. 108, 22 C.R. 205, [1955] 4 D.L.R. 225.
(2) [1954] O.R. 543, 109 C.C.C. 65, 19 C.R. 1, [1954] 4 D.L.R. 161.

The application for leave to appeal was opposed. Counsel for the respondent moved for leave to cross-appeal but stated that such leave was sought only if the application of the appellants should be allowed. Leave was granted to cross-appeal on the following question of law:

Did the Court of Appeal for Ontario err as a matter of law in varying the conviction by striking out the words "production" and "manufacture"?

Joseph Sedgwick, Q.C., John J. Robinette, Q.C., Hazen Hansard, Q.C., John D. Pickup, Q.C., A. Laurendeau, Q.C., D. K. MacTavish, Q.C., and *John M. Coyne,* for the appellants.

N. L. Mathews, Q.C., and *B. J. MacKinnon,* for the respondent.

THE CHIEF JUSTICE:—I agree with Mr. Justice Kellock and desire merely to make a reference to the refusal by this Court of leave to appeal from the decision of the Court of Appeal for British Columbia in *Regina v. Morrey* (1). There the accused had been found guilty of an indictment preferred under the *Combines Investigation Act,* but the Court of Appeal set aside the conviction. The Crown did not appeal to this Court on any dissent expressed by Mr. Justice Davey, but desired leave in order to raise a number of questions. This Court thought that, irrespective of these questions, the order made by the Court of Appeal setting aside the conviction and, if the Crown so desired, ordering a new trial could be justified on other grounds, and that if any of the points suggested by the Crown arose in the present appeal they could be dealt with when judgment was delivered. It is apparent, however, that none is involved in the present determination.

TASCHEREAU J.:—The appellants were charged under s. 498(1)(*d*) of the *Criminal Code,* as in force prior to November 1, 1952, on an indictment, the material portion of which, for the purposes of the present appeal, reads as follows:

During the period from 1933 to the 31st day of October, 1952, both inclusive, . . . did unlawfully conspire, combine, agree or arrange together and with one another and with . . . [others named in the indictment] to

(1) (1956), 19 W.W.R. 299, 115 C.C.C. 337, 24 C.R. 319, 6 D.L.R. (2d) 114.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Taschereau J.

unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply . . . of articles or commodities which may be the subject of trade or commerce, to wit, book papers including general printing and converting papers, fine papers including rag content and sulphite writing paper, coated papers, miscellaneous fine papers including blotting and bristols, groundwood printing and specialty papers containing more than 50% groundwood and other fine papers, and did thereby commit an indictable offence contrary to the provisions of the Criminal Code, section 498, subsection (1)(*d*).

The appellants were found guilty by Mr. Justice Spence, sitting without a jury, and this judgment was unanimously confirmed by the Court of Appeal for Ontario. Mr. Justice Cartwright granted leave to appeal to this Court on questions of law, and leave was also granted to cross-appeal on the following question:

> Did the Court of Appeal for Ontario err as a matter of law in varying the conviction by striking out the words "production" and "manufacture"?

The facts are not in dispute, and as they have been summarized by my colleagues, it is unnecessary to deal with them once more.

I agree with Kellock and Cartwright JJ. and I am of the opinion that this appeal should be dismissed.

I wish however to add a few observations concerning the necessity of showing detriment to the public, and as to the meaning of the word "unduly" found in s. 498(1)(*d*) of the old *Criminal Code,* under which the charge is laid.

It has been argued on behalf of the appellants that the offence is not complete, unless it has been established by the Crown beyond a reasonable doubt, that the agreement was detrimental to the public, in the sense that the manufacture or production was effectively lessened, limited or prevented, as a result of the agreements entered into. It has also been suggested that there is no offence, if it is shown that the acts complained of were beneficial to the public. With these submissions I entirely disagree. Conspiracy is a crime by itself, without the necessity of establishing the carrying out of an overt act. Stephen (Digest of the Criminal Law, 9th ed. 1950, p. 24), basing his opinion on *Regina v. Whitchurch et al.* (1), goes as far as saying:

> When two or more persons agree to commit any crime, they are guilty of a misdemeanour called conspiracy whether the crime is committed or not, and though in the circumstances of the case *it would be impossible to commit it.*

(1) (1890), 24 Q.B.D. 420.

The public is entitled to the benefit of *free competition,* and the prohibitions of the Act cannot be evaded by good motives. Whether they be innocent and even commendable, they cannot alter the true character of the combine which the law forbids, and the wish to accomplish desirable purposes constitutes no defence and will not condone the undue restraint, which is the elimination of the free domestic markets.

It is my strong view that traders, manufacturers and producers cannot, as the law now stands, monopolize a substantial part of the markets of the country in given industries, to promote their own business interests, and then set themselves up as public benefactors, by saying to the Courts that the conspiracy was organized in order to achieve the stabilization of prices and production.

I believe that the law has been clearly expressed by Mr. Justice Mignault in *Stinson-Reeb Builders Supply Company et al. v. The King* (1):

> Injury to the public *by the hindering or suppressing of free competition,* notwithstanding any advantage which may accrue to the business interests of the members of the combine, is what brings an agreement or a combination under the ban of section 498 Cr. C.

Vide also *Container Materials, Limited et al. v. The King* (2) where Sir Lyman Duff, then Chief Justice, said at p. 152:

> The enactment before us, I have no doubt, was passed for the protection of the specific *public interest in free competition.* That, in effect, I think, is the view expressed in *Weidman v. Shragge* (1912), 46 S.C.R. 1, in the judgments of the learned Chief Justice, of Mr. Justice Idington and Mr. Justice Anglin, as well as by myself. This protection is afforded by stamping with illegality agreements which, when carried into effect, prevent or lessen competition unduly and making such agreements punishable offences; and, as the enactment is aimed at protecting the public interest in free competition, it is *from that point of view* that the question must be considered whether or not the prevention or lessening agreed upon will be undue . . . That is only another way of putting what was laid down in *Stinson-Reeb v. The King* [*supra*], which, it may be added, was intended to be in conformity with the decision in *Weidman v. Shragge,* as indicated in the passages quoted in the judgment.

Weidman et al. v. Shragge (3) and *Rex v. Elliott* (4) are also to the same effect.

(1) [1929] S.C.R. 276 at 280, 52 C.C.C. 66, [1929] 3 D.L.R. 331.
(2) [1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529.
(3) (1912), 46 S.C.R. 1, 20 C.C.C. 117, 2 D.L.R. 734, 2 W.W.R. 330.
(4) (1905), 9 O.L.R. 648, 9 C.C.C. 505.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Taschereau J.

I have therefore reached the conclusion that this appeal should be dismissed, and I would dispose of the cross-appeal as proposed by my brother Kellock.

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

KELLOCK J.:—As the questions submitted to this Court are questions of law, our jurisdiction being limited to such questions, the findings made by the Courts below upon the evidence are not in question. It will be convenient to deal first with questions 6 and 7.

The offence of which the appellants have been convicted is provided for by s. 498(1)(*d*) of the *Criminal Code*, R.S.C. 1927, c. 36, which provides that:

> Every one is guilty of an indictable offence . . . who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, . . .
>
> (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

"Such" refers back to the earlier paragraphs in which the article or commodity is described as "any article or commodity which may be a subject of trade or commerce".

It is contended that as the word "prevent" is used in s. 498(1)(*d*) in the sense of absolute elimination, the word "unduly" is meaningless unless it be interpreted as involving injury to the public. It is therefore argued that it is a defence to a charge under the section if it be shown that the agreement entered into by the accused had in view the interests of the parties or public benefit such as "reasonableness of prices" or obviation of the "hardships of a depression by keeping all mills working part-time as a result of which a real public advantage is gained", to use language employed by the appellants in their factum. While "prevent" quite commonly is used in the above sense it is also used in the sense of "hinder" or "impede". In the French version the word is "prévenir" which also is commonly used in the sense of "empêcher". In this sense the word "unduly" is appropriate in connection with both "prevent" and "lessen".

The appellants further contend that the word "unduly" in the statute should be interpreted by calling in aid the provisions of the definition of "combine" in the *Combines Investigation Act*, R.S.C. 1927, c. 26, as amended by 25-26 Geo. V. (1935), c. 54, s. 2, where it is defined for the purposes of that statute as, *inter alia*, a combination which "has operated or is likely to operate to the detriment or against the interests of the public whether consumers, producers or others". It is contended that if s. 498(1)(*d*) of the *Criminal Code* is to be construed without reading similar words into it "parties to the same agreement might be found guilty if charged under section 498(1)(*d*), without proof of public detriment, while they would go free on the same evidence if charged under the Combines Investigation Act".

I cannot accept this contention. If there is a difference between the offences described in the two statutes, Parliament has deliberately so intended. It will be seen, however, that s. 498(*d*) does have in view injury to the public but injury to the public of a character expressly specified by the section itself.

In the course of his judgment in *Container Materials, Limited et al. v. The King* (1), Duff C. J. C. said:

> The second point arises from the contention of the appellants that the essence of the offence is an agreement to do something injurious to the public; that such injury to the public must appear from the evidence and must be found as a fact in order to establish a legal basis for a conviction.

At p. 152, the learned Chief Justice dealt with this contention as follows:

> The enactment before us, I have no doubt, was passed for the protection of the specific public interest in free competition. That, in effect, I think, is the view expressed in *Weidman v. Shragge* (1912), 46 S.C.R. 1, in the judgments of the learned Chief Justice, of Mr. Justice Idington and Mr. Justice Anglin, as well as by myself. This protection is afforded by stamping with illegality agreements which, when carried into effect, prevent or lessen competition unduly and making such agreements punishable offences; and, as the enactment is aimed at protecting the public interest in free competition, it is *from that point of view* that the question must be considered whether or not the prevention or lessening agreed upon will be undue . . . That is only another way of putting what was laid down in *Stinson-Reeb v. The King*, [1929] S.C.R. 276, which, it may be added, was intended to be in conformity with the decision in *Weidman v. Shragge*, as indicated in the passages quoted in the judgment.

The other members of the Court who took part in the judgment expressed in other words the same principle.

(1) [1942] S.C.R. 147 at 151, 77 C.C.C. 129, [1942] 1 D.L.R. 529,

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Kellock J.

When it is considered that in the course of his dissenting judgment in the Court of Appeal in the above case (1) Henderson J.A. had said at pp. 195-6(D.L.R.):

> In many of the cases the purpose or objective of the alleged conspiracy has been, *per se*, a crime. A very different situation arises where the purpose of the agreement is a proper one on its face and entered upon in good faith in the belief not only that it is within the legal rights of the parties, but in the case of a trade agreement, is for the good of the particular industry and the public who are concerned.

At p. 196:

> The Crown accepts the view that there having been an association of manufacturers in this industry prior to 1931, and the industry being in a bad way financially, having taken heavy losses and being in danger of collapse, the object of the accused was to form an association which would stabilize the industry, put it on a sound footing and make it prosperous.
>
> It is charged by the Crown that in effecting this object the accused did unduly stifle competition . . . No evidence is offered in support of the view that in standardizing their products the accused did any injury to the public or to their consumers. For all that appears to the contrary, one is entitled to conclude that this stabilization and standardization was all for the benefit both of the industry and of the consuming public . . .

At 204:

> I do not find in this huge record . . . evidence to prove injury to trade and commerce. To the contrary, I find that the evidence indicates that Canadian manufacturers in this industry have, by their efforts, stabilized the industry, greatly increased its sales to the benefit of shareholders, employees and the public interest,

it is plain that the contention now put forward by the appellants was effectively negatived by the judgment of this Court.

Anglin J., as he then was, in *Weidman et al. v. Shragge* (2) had said at pp. 42-3:

> . . . the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive, or oppressive restrictions upon that competition the benefit of which is the right of every one? *The King v. Elliott*, 9 C.C.C. 505, at p. 520.

This judgment received the approval of this Court in *Stinson-Reeb Builders Supply Company v. The King* (3), *per* Mignault J. at p. 278. At p. 280 Mignault J. said:

> Injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine, is what brings an agreement or a combination under the ban of section 498 Cr. C.

(1) *Rex v. Container Materials Ltd. et al.*, 76 C.C.C. 18, [1941] 3 D.L.R. 145.
(2) (1912), 46 S.C.R. 1, 20 C.C.C. 117, 2 D.L.R. 734, 2 W.W.R. 330.
(3) [1929] S.C.R. 276, 52 C.C.C. 66, [1929] 3 D.L.R. 331.

It is therefore clear that the Courts below dealt with the matter before them from the proper point of view. The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.

It was contended that the case at bar was distinguishable from all previous cases of a similar character which had reached this Court in that the agreement constituting the conspiracy was not to be found within the four corners of a written document but had to be deduced from oral evidence, correspondence, minutes and other writings. This contention is, in my opinion, untenable. It relates merely to a matter of evidentiary proof.

The answer to questions 6 and 7 must, therefore, be in the negative.

With respect to question 5, it is not necessary, in my opinion, to discuss the argument which was addressed to us in so far as that argument was founded upon matters of evidence. The essence of the argument is that although the agreement, which the Courts below have found to contravene the provisions of s. 498(1)(*d*), continued without break throughout the period mentioned in the indictment, and although s. 498(1)(*d*) remained unrepealed, the agreement ceased to come within the ban of the section during the period of the wartime controls for the reason that all possibility of competition in fine papers was eliminated by virtue of the legislation then in effect.

In my opinion the short answer to this contention is contained in part of the reasons for judgment of Duff C.J.C. in the *Container Materials* case, *supra*. At p. 153 the learned Chief Justice, after pointing out that the Court of Appeal had held that the aim of the parties to the agreement there in question had been to secure effective control of the market in Canada and that they had been very largely successful in effectuating that aim, went on to say: "But the fact that *such was the agreement* affords in point of law a sufficient basis" for a finding that the section had been contravened.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Kellock J.

Assuming that during any part of the period of control the aim of the parties to the agreement could not have been successfully carried into execution, such a fact would not, in law, constitute any answer to the indictment.

In *Regina v. Aspinall et al.* (1), Brett J.A., as he then was, said, at pp. 58-9:

> Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed.

In his Digest of the Criminal Law, 9th ed. 1950, Stephen J. says at p. 24:

> When two or more persons agree to commit any crime, they are guilty of the misdemeanour called conspiracy whether the crime is committed or not, and though in the circumstances of the case it would be impossible to commit it.

The authority relied on is *Regina v. Whitchurch et al.* (2), and, in my opinion, it fully justifies the statement in the text.

The appellants referred to the decision of the Court of Criminal Appeal in England in *Rex v. West et al.* (3). In that case, however, the regulations in question had been amended so that in effect there were three separate offences charged. Nothing of that kind is in question here. Section 498(1)(*d*) remained in force throughout. The fact that the wartime controls were of a temporary nature no doubt influenced the parties to the conspiracy in continuing their agreement throughout. That the agreement did continue is sufficient in itself in point of law even had the Courts below been unable to find, as in fact they did find, that the agreement was not as ineffective during the period of the controls as the appellants contend.

In my opinion, therefore, question 5 must also be answered in the negative.

With regard to question 3, it is contended that the indictment states two separate offences in the alternative, namely, the offence of agreeing to unduly lessen competition and the offence of agreeing to unduly prevent competition.

(1) (1876), 2 Q.B.D. 48. (2) (1890), 24 Q.B.D. 420.
(3) [1948] 1 K.B. 709, [1948] 1 All E.R. 718, 32 Cr. App. R. 152.

Again, with regard to question 4, the error the Court below is alleged to have fallen into is in failing to hold that the indictment was void for duplicity in that it states in the alternative the several offences under s. 498(1)(*d*) of agreeing as to manufacture, purchase, barter, sale, transportation or supply.

To return to the statutory language that everyone is guilty of *an* indictable offence "who conspires, combines, agrees or arranges with any other person . . . (*d*) to unduly prevent or lessen competition in the production", etc., in my opinion, upon the proper construction of these words, there is but one offence created. To adopt in part language used by Meredith J., as he then was, in *Rex v. Elliott* (1):

> The crime is in the conspiracy, not in the unlawful acts comprehended in it.

A little later on the same page the learned judge pointed out that

> By looking at the acts agreed to be done, instead of only at the agreement to do them, the crime is apt to be wrongly multiplied.

As the question involved in the cross-appeal is allied to questions 3 and 4, I propose to consider it at this point also. That question is as to whether the Court of Appeal erred in law in striking from the conviction the words "manufacture" and "production". In the course of its judgment the Court of Appeal (2) affirmed the finding of the trial judge that

> the Mills as a group and the Merchants as a group did conspire with one another to lessen or prevent *competition* in the fine paper industry in Canada; the Mills at the production level, the Merchants at the wholesale level. Within that broad, over-all, all-embracing agreement each group had its part to play in accomplishing their common purpose.
>
> The Mills, pursuant to a common understanding between them and the Merchants, co-operated with the Merchants to prevent, if possible, any inroads by others into the wholesale field in which the Merchants operated; and the Merchants in turn, pursuant to a common understanding between them and the Mills, co-operated with the Mills to prevent, if possible, any mill *competition* from the only source where it really existed, namely, foreign manufacturers.

(The italics are mine.)

There was, of course, evidence upon which such a finding could be made.

(1) (1905), 9 O.L.R. 648 at 651, 9 C.C.C. 505.

(2) [1955] O.R. at p. 726.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Kellock J.

In my opinion, on the plain reading of s. 498(1)(*d*), the accused may be charged with conspiring "to unduly prevent" competition in any one or more of the modes mentioned in para. (*d*) depending upon the evidence to be adduced, or, similarly, "to unduly lessen" competition and he may also and no doubt will invariably be charged with conspiring "to unduly prevent or lessen" by any one or more of such means. The fact that, as in the case at bar, there was no evidence directed to the word "barter" has no effect upon the result nor would it have had if that word or any of the other intended modes of carrying the conspiracy into effect had been omitted, so long as one of the statutory means was specified. The Crown could, for example, if it did not intend to adduce evidence with regard to any of the other words contained in the section, confine itself to charging a conspiracy with regard to "manufacture" only.

Accordingly, the form of the present indictment is authorized by s. 498(1)(*d*) and that being so, it falls within ss. 852(3) and 854 of the *Criminal Code*. The decision of this Court in *Belyea v. The King; Weinraub v. The King* (1), is authority for the view I have expressed and is unaffected by the fact that s. 1010(2) of the *Criminal Code* as it then stood no longer exists.

With regard to the question raised by the cross-appeal, it will be observed that in the extract from the reasons of Roach J.A., quoted above, the learned judge was directing his mind to the essence of the charge under s. 498(1)(*d*), namely, the conspiracy to prevent or lessen "competition". Subsequently, however, when the learned judge came to deal with the question which is now the subject of the cross-appeal in this Court, he did so in the following two passages:

> I do not think that the evidence establishes that they conspired to prevent or lessen *production and manufacture* in Canada, but of that I shall have more to say later (2).

And subsequently:

> As earlier stated herein, I do not think that as between the two groups there was a conspiracy to lessen or prevent *production or manufacture* (3).

(1) [1932] S.C.R. 278, 57 C.C.C. 318, [1932] 2 D.L.R. 88.

(2) [1955] O.R. at p. 735.

(3) *Ibid.* at p. 737.

With respect, these passages appear to lose sight of the nature of the charge, namely, the conspiracy to unduly prevent or lessen "competition" in production, manufacture, etc. There is, therefore, here an error in a matter of law, namely, an erroneous construction of the statutory offence and the charge contained in the indictment, and not in the question of fact as to whether or not there existed or did not exist any evidence of conspiracy to lessen or prevent competition in production or manufacture, as to which the learned Justice of Appeal had made a contrary finding, namely, that

> the Mills as a group and the Merchants as a group did conspire with one another to lessen or prevent *competition* in the fine paper industry in Canada; the Mills at the production level, the Merchants at the wholesale level. Within that broad, over-all, all-embracing agreement each group had its part to play in accomplishing their common purpose (1).

In my opinion, this a finding that the mills and merchants together did conspire to unduly prevent or lessen competition in both production and manufacture as well as in purchase and sale. The object of the mills was to limit competition in production and manufacture to themselves as against outsiders and in this they were aided by the common agreement of the merchants. Even if the mill competition which was in view was from foreign manufacturers, the finding expressly includes this, namely, that there was a common understanding between mills and merchants "to prevent, if possible, any *mill* competition from the only source where it really existed, namely, foreign manufacturers". In my opinion, therefore, the Court of Appeal erred in striking out the words "production" and "manufacture" from the indictment.

It is contended on behalf of the appellants that there is no jurisdiction in this Court under the provisions of s. 1025 of the *Criminal Code* to entertain the cross-appeal as it is said that there was no "setting aside" of the conviction within the meaning of s. 1014. I cannot agree. A conviction upon a charge of conspiring to unduly prevent

(1) [1955] O.R. at p. 726.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Kellock J.

or lessen competition in the barter of any commodity is, to my mind, as I have already pointed out, not the same as a conviction of conspiring with respect to the preventing or lessening of competition in the purchase or sale of a commodity. Accordingly, in substituting a conviction of conspiring to unduly prevent or lessen competition in the purchase, barter, sale, transportation and supply of an article, the Court of Appeal necessarily set aside the conviction made by the trial judge, namely, that of conspiring to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of that commodity.

With regard to question 1, the contention of the appellants is essentially founded upon the language of subs. (2) of s. 41 of the *Combines Investigation Act*, R.S.C. 1927, c. 26, as enacted by 1949 (2nd sess.), c. 12, s. 3, and amended by 1952, c. 39, ss. 6 and 8. By virtue of s. 6 of the 1952 Act the former s. 39A was renumbered as s. 41.

It is contended for the appellants that s. 41 is not a procedural but a substantive enactment and can have no restrospective operation, and further, that the reference to s. 498 in subs. (2) is confined to s. 498 of the *Criminal Code* as enacted by s. 11 of the statute of 1952, which begins with the following words:

> 11. Sections four hundred and ninety-eight and four hundred and ninety-eight A of the *Criminal Code* chapter thirty-six of the Revised Statutes of Canada, 1927, are repealed and the following substituted therefor:

The contention is that the words "section four hundred and ninety-eight" in subs. (2) of s. 41 refer to the s. 498 enacted by the statute of 1952 and, accordingly, that even though s. 41 is to be considered a procedural enactment, it is expressly made applicable only to prosecutions under the new s. 498. It is therefore said also that, as the prosecution here in question is in respect of the period ending with October 31, 1952, to which s. 498 of the *Criminal Code* as it stood on that date is the applicable section, resort cannot be had to the antecedent of s. 41, namely, s. 39A, enacted in 1949 by 13 Geo. VI, c. 12, as that section, although continued by s. 6 of the 1952 legislation as s. 41, ceased,

by reason of its amendment by s. 8 of the same statute, to have any application to a prosecution under the old s. 498.

There is no question, in my opinion, that s. 41 is procedural in its nature and in so far as the appellants' argument is dependent upon a contrary view it cannot be supported.

In my opinion the *Interpretation Act,* now R.S.C. 1952, c. 158, affords an answer to the appellants' contention. By s. 19 (1), it is provided that where any Act or enactment is repealed, then, unless the contrary intention appears, such repeal does not, save as in the section is otherwise provided,

> (*d*) affect any offence committed against any Act, enactment or regulation so repealed or revoked, or any penalty or forfeiture or punishment incurred in respect thereof, or
>
> (*e*) affect any . . . legal proceeding or remedy in respect of any such . . . penalty, forfeiture or punishment as aforesaid,

and any such . . . penalty, forfeiture or punishment may be imposed, as if the Act . . . had not been repealed.

Accordingly, regardless of any repeal of s. 498 of the *Criminal Code,* the liability to prosecution thereunder continued. This, of course, the appellants concede.

It is further provided by subs. (2) of s. 19 that

> Where other provisions are substituted for those so repealed or revoked, then, unless the contrary intention appears, . . .
>
> (*c*) in the recovery or enforcement of penalties and forfeitures incurred . . . under the Act, enactment or regulation so repealed or revoked, . . . *the procedure established by the substituted provisions* shall be followed as far as it can be adapted.

This appears to be a clear enactment that s. 41, as enacted or amended by the statute of 1952, is to apply with any necessary adaptation to a prosecution under s. 498 as it stood prior to the legislation of 1952. The "necessary adaptation" is, of course, to read "section four hundred and ninety-eight of the *Criminal Code*" as referring to the "old section" 498.

In my opinion also, the objection raised by the appellants which is the subject-matter of the second question

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Kellock J.

is completely answered by the language of s. 41. Granted the applicability of the section to the prosecution here in question, para. (*c*) of subs. (2) provides that

> a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant

shall not only be "admitted in evidence" without further proof but

> shall be *prima facie* evidence . . .
>
> (ii) that anything recorded in or by the document as having been done, said, or agreed upon by *any* participant or by an agent of *a* participant was done, said or agreed upon *as recorded* and, where anything is recorded in or by the document as having been done, said or agreed upon by an agent of *a* participant, that it was done, said or agreed upon with the authority of the participant.

(The italics are mine.)

It is, in my opinion, the plain language of this legislation that where a document of the character mentioned states, for example, that two participants agreed upon a thing, that is *prima facie* evidence against both notwithstanding that the statement may appear in a document which is an "inter-office memorandum" which never left the premises of the participant in whose possession or on whose premises ("used or occupied") it was found. This subject does not lend itself to extended comment. There was, accordingly, no error on the part of either Court below in the respect raised by the second question.

In this view, the appellants fail, the cross-appeal succeeds and the conviction made by the learned trial judge should be restored.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J. [after quoting the indictment and setting out the questions on which leave to appeal and to cross-appeal was given]:—The facts are set out in the reasons for judgment of the learned trial judge (1) and in those of the Court of Appeal (2), and it is not necessary to repeat them.

(1) [1954] O.R. 543, 109 C.C.C. 65, 19 C.R. 1.
(2) [1955] O.R. 713, 112 C.C.C. 108, 22 C.R. 205, [1955] 4 D.L.R. 225.

I propose to deal with the questions in regard to which leave to appeal was granted in the order in which they are set out above.

As to the first question two submissions were made. It was argued, first, that s. 41 does not fall within the general rule that enactments dealing with procedure apply to bygone transactions, that the radical changes it makes in the law of evidence go beyond any mere matter of procedure, and that consequently it ought not to be given retrospective effect; and, secondly, that on the true construction of *An Act to Amend the Combines Investigation Act and the Criminal Code,* 1952, 1 Eliz. II, c. 39, s. 41 does not apply to breaches of s. 498 which occurred before the repeal of that section and its re-enactment, in a slightly different form, by s. 11 of the 1952 Act.

As to the first of these submissions, it may well be that the circumstance that a statute deals with a matter of evidence is not necessarily conclusive as to its having retrospective effect. I agree with the following observations of the learned author of Phipson on Evidence, 9th ed. 1952, p. 1:

> Law is commonly divided into Substantive Law, which defines rights, duties and liabilities; and Adjective Law, which defines the procedure, pleading and proof by which the substantive law is applied in practice.
>
> The rules of *Procedure* regulate the general conduct of litigation; the object of *Pleading* is to ascertain for the guidance of the parties and the Court the material facts in issue in each particular case; *Proof* is the establishment of such facts by proper legal means to the satisfaction of the Court, and in this sense includes disproof. The first-mentioned term is, however, often used to include the other two.

In *Gardner v. Lucas et al.* (1), Lord Blackburn says, at p. 603:

> Now the general rule, not merely of *England* and *Scotland,* but, I believe, of every civilized nation, is expressed in the maxim, *"Nova constitutio futuris formam imponere debet non praeteritis"—prima facie,* any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to shew it, it might be retrospective. For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they

(1) (1878), 3 App. Cas. 582.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* v. THE QUEEN

Cartwright J.

should not be. Then, again, I think that where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal.

It will be observed that Lord Blackburn differentiates between enactments making alterations in the form of procedure and those making alterations in matters of evidence but appears to regard both as *prima facie* retrospective; he continues:

> But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid—to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to shew that is not the case.

The very question raised in this first submission is dealt with by Casey J., giving the unanimous judgment of the Court of Queen's Bench, Appeal Side, in *Eddy Match Co. Ltd. et al. v. The Queen* (1), particularly at p. 13, which was followed by the learned trial judge. I am in substantial agreement with the reasons of Casey J. on this point. While s. 41 makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only and, in my opinion, the learned trial judge was right in holding that it applied to the trial of the charge before him.

As to the second submission of the appellants, in regard to the effect of s. 11 of the 1952 Act, set out above, for the reasons given by my brother Kellock I agree with his conclusion that this submission must be rejected.

It follows that I would answer question 1 in the negative.

As to question 2, I am in agreement with the reasons and conclusion of my brother Kellock.

Questions 3 and 4 may conveniently be dealt with together. In opening his argument on these questions Mr. Robinette called attention to the fact that the very point involved appears to have been decided, adversely to his

(1) (1953), 109 C.C.C. 1, 18 C.R. 357, 20 C.P.R. 107.

contention, by the judgment of this Court in *Belyea v. The King; Weinraub v. The King* (1), particularly at pp. 281-2; but he argued that the judgment of this Court in *Archer v. The Queen* (2) is inconsistent with that in *Belyea v. The King* and that we are free to examine the matter *de novo*. The question raised in the *Archer* case was as to the validity of a conviction in proceedings under *The Summary Convictions Act*, R.S.O. 1950, c. 379. This Court was unanimously of opinion that a conviction on an information charging two offences in the alternative was invalid and that the defect was not cured by s. 723 or s. 725 of the 1927 *Criminal Code*. The governing principle is stated by my brother Locke at p. 40, quoting from the judgment of Avory J. in *Rex v. Surrey Justices; Ex parte Witherick* (3):

> It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict*.

That this principle, except in so far as it may have been modified by statute, is equally applicable to a count in an indictment does not appear to me to admit of doubt. It is so decided in many cases and it is sufficient to refer to the statement of Humphreys J. giving the unanimous judgment of the Court of Criminal Appeal in *Rex v. West et al.* (4):

> . . . it is elementary law that no more than one offence may be charged in any one count of an indictment.

I can find nothing in the judgments of this Court or of the Court of Appeal in the *Belyea* case to indicate that those Courts decided whether the fifth count in the indictment, which is set out in the report of the trial judgment (5), and was in substance identical with that in the case at bar, charged only one offence or charged in the alternative more offences than one; although there is a sentence in the judgment of the trial judge, Wright J., which suggests that he assumed for the purposes of his decision that the count contained charges of separate offences.

(1) [1932] S.C.R. 279, 57 C.C.C. 318, [1932] 2 D.L.R. 88.
(2) [1955] S.C.R. 33, 110 C.C.C. 321, 20 C.R. 181, [1955] 2 D.L.R. 621.
(3) [1932] 1 K.B. 450 at 452.
(4) [1948] 1 K.B. 709 at 718, [1948] 1 All E.R. 718, 32 Cr. App. R. 152.
(5) [1931] O.R. 202 at 204 (*sub nom. Rex v. Singer et al.*).

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Cartwright J.

That learned judge said, at p. 205:

> I do not think the fact that the offences were stated in the alternative, under the particular circumstances of this case, leaves the indictment open to be quashed.

As at present advised, I do not think that the judgment of this Court in the *Belyea* case requires us to hold that more offences than one can validly be charged in a single count whether in the alternative or otherwise and I desire to reserve my opinion on that question until it becomes necessary to decide it. The reason that I do not find it necessary to pursue the matter further is that I agree with the conclusion reached by my brother Kellock and by Roach J.A., that the indictment in the case at bar charges only one offence, a single conspiracy. I would accordingly answer questions 3 and 4 in the negative.

As to question 5, I agree with the reasons and conclusion of my brother Kellock.

Questions 6 and 7 may conveniently be dealt with together as the answers to them depend upon the interpretation of s. 498(1)(*d*) of the *Criminal Code*.

In approaching these questions it is convenient to consider first how they were dealt with in the Courts below. We must proceed upon the facts as found in those Courts. These are summarized in the following passages in the reasons of Roach J.A. (1):

> On all the evidence, the trial judge made specific findings of fact as follows:
>
> 1. ". . . that well before the year 1933 these seven accused companies [the Mills] and the J. R. Booth company had entered into a firm agreement to control and fix prices and deal with many other elements . . . and that agreement has continued from then until the end of the period charged in the indictment, the 31st October 1952". (O.R., p. 579.) (I should perhaps here state that the E. B. Eddy Company leased the assets of J. R. Booth Company on 1st January 1945 and purchased those assets, except certain Crown leases and water-rights, in April 1946.)
>
> 2. ". . . with the exception of some very unimportant merchants . . . these accused merchants controlled all of the wholesale trade in fine paper in Ontario and Quebec. The co-conspirator merchants occupied a similar position in the remainder of Canada, and the accused merchants and co-conspirator merchants through their membership in the Canadian Paper Trade Association engaged actively in agreeing amongst themselves as to the complete and absolute control of the wholesale paper trade in the Dominion of Canada." (O.R., p. 580.)

(1) [1955] O.R. at pp. 718-9 and 726.

3. That the two groups came together through the agency of the Mills Relation Committee of the Merchants; "that the merchants and the mills on many occasions did make agreements and that those agreements were merely supplementary to and carrying out the main mill-merchant agreement to lessen competition in fine paper throughout the whole of Canada (O.R., p. 585); that the accused corporations [both Mills and Merchants] and Mr. Turgeon, were parties to the main agreement lessening competition, and that the accused Moffitt aided and abetted the original creation of that agreement and was, if anything, the most effective agent—so far as the merchants were concerned—in carrying out the agreement. . . ."

* * *

In my opinion the learned trial judge was right in holding that the Mills as a group and the Merchants as a group did conspire with one another to lessen or prevent competition in the fine paper industry in Canada; the Mills at the production level, the Merchants at the wholesale level. Within that broad, over-all, all-embracing agreement each group had its part to play in accomplishing their common purpose.

The Mills, pursuant to a common understanding between them and the Merchants, co-operated with the Merchants to prevent, if possible, any inroads by others into the wholesale field in which the Merchants operated; and the Merchants in turn, pursuant to a common understanding between them and the Mills, co-operated with the Mills to prevent, if possible, any mill competition from the only source where it really existed, namely, foreign manufacturers.

At p. 733, Roach J.A. concludes that, on the evidence as to what happened in the case at bar, "the consumer or whoever buys from the wholesaler does not get the benefit of any competition at either the manufacturing or the wholesale level".

The learned trial judge having rightly held that the interpretation of s. 498(1)(*d*) and particularly of the word "unduly" is a matter of law proceeds to a careful review of most of the decisions of the Courts of this country which deal with the meaning of the section and, while he does not, in any one passage, formulate a positive interpretation of the clause, he reaches the conclusion which he expresses as follows (1):

Therefore I have come to the conclusion that in determining whether an agreement had as its object to lessen competition unduly, I must be guided by the interpretation of that adverb assigned in the decisions of the Courts to which I have referred, and in considering the evidence adduced I am not free to find that the lessening intended was not undue on the basis of any necessity of the industry, reasonableness of prices resulting or reasonableness of profits obtained.

(1) [1954] O.R. at p. 572.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Cartwright J.

As to the meaning of the word "unduly", the views expressed by Roach J.A. do not appear to me to differ in any matter of substance from those expressed by the learned trial judge. The learned Justice of Appeal deals with the matter as follows (1):

> As to what is meant by "unduly", we can start with the decision of this Court in *Rex v. Elliott* (1905), 9 O.L.R. 648 at 657 . . . Osler J.A. delivering the judgment of this Court said that competition is lessened or prevented "unduly" if it is lessened or prevented "in an undue manner or degree, wrongly, improperly, excessively, inordinately".
>
> In *Weidman et al. v. Shragge* (1912), 46 S.C.R. 1 at 37 . . . Duff J., as he then was, said: ". . . I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment".
>
> In the same case at p. 42, Anglin J., as he then was, said: ". . . the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive, or oppressive restrictions upon that competition the benefit of which is the right of every one".
>
> What Duff J. and Anglin J. there said was quoted with approval later in *Stinson-Reeb Builders Supply Company et al. v. The King,* [1929] S.C.R. 276. . . .
>
> In *Rex v. Container Materials Ltd. et al.,* 76 C.C.C. 18 at 43 . . . Robertson C.J.O. said: "Competition from which everything that makes for success is eliminated except salesmanship is not the free competition that s. 498 is mainly designed to protect".
>
> In the same case in the Supreme Court of Canada, *sub nom. Container Materials, Limited et al. v. The King,* [1942] S.C.R. 147 . . . Kerwin J., as he then was, with whom Hudson and Taschereau JJ. concurred, having first referred to the *Stinson-Reeb* case and *Weidman et al. v. Shragge,* continued: "Under the decision of the *Stinson-Reeb* case, the public is entitled to the benefit of free competition except in so far as it may be interfered with by valid legislation, and any party to an arrangement, the direct object of which is to impose improper, inordinate, excessive or oppressive restrictions upon that competition, is guilty of an offence . . . the matter must be looked at in each case as a question of fact to be determined by the tribunal of fact upon a common sense view as to the direct object of the arrangement complained of".
>
> The defence introduced evidence which was intended to show that the prices charged by the Mills were reasonable having regard to the necessities of the Mills. Such evidence, in my opinion, is no answer to a charge laid under s. 498 for the reason stated by Anglin J. in *Weidman et al. v. Shragge, supra.*
>
> Applying the test laid down in the cases to which I have referred the agreement between the two groups was one to lessen or prevent competition unduly.

(1) [1955] O.R. at pp. 735-6.

In the last sentence in this passage Roach J.A. appears to regard the decisions from which he has quoted as laying down a single test for he speaks of "the test laid down". I must confess that I have found difficulty in discerning just what that test is. As was pointed out by Anglin J., in *Weidman et al. v. Shragge, supra,* at p. 41, the conclusion is inescapable that Parliament contemplated that there may be agreements to prevent or lessen competition which do not fall within the prohibition of s. 498(1)(*d*); the intended prevention or lessening must be "undue" to render the agreement criminal. "Undue" and "unduly" are not absolute terms whose meaning is self-evident. Their use presupposes the existence of a rule or standard defining what is "due". Their interpretation does not appear to me to be assisted by substituting the adjectives "improper", "inordinate", "excessive", "oppressive" or "wrong", or the corresponding adverbs, in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.

The conclusion of the learned trial judge in the case at bar, affirmed by the Court of Appeal, appears to me to be that because the purpose and effect of the agreement of the appellants was the virtual elimination or prevention of all competition which would otherwise have entered into wholesale dealings in the products in question in Canada, the object of the agreement is necessarily "undue", and the making of it is criminal, even although it be affirmatively proved (a) that the prevention of competition intended to be brought about, and in fact brought about, was no more than was necessary to permit the industry to develop and survive in Canada, (b) that the participants derived only reasonable profits, and (c) that the prices charged to the purchasers of the products were at all times reasonable. I do not intend to imply that I regard these three matters as having been proved; the question of law is whether the Courts below were right in holding that, if proved, they would afford no answer to the charge, and in treating the evidence tendered to prove them as irrelevant.

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* *v.* THE QUEEN

Cartwright J.

Had the matter been one with which we were called upon to deal unaided by earlier decisions which are binding upon us, I would have found this conclusion a surprising one. As was said by my brother Rand in *Re The Farm Products Marketing Act* (1):

> The provisions of the *Combines Investigation Act* and the *Criminal Code* envisage voluntary combinations or agreements by individuals against the public interest that violate their prohibitions.

A similar view was expressed by Lord Atkin in *Proprietary Articles Trade Association et al. v. Attorney-General for Canada et al.* (2).

Had the three matters mentioned above, which the learned trial judge regarded as irreleveant, been proved, I would have found it difficult to regard the agreement as being in either intention or operation "against the public interest". But the matter is not *res integra*; and, in my view, the learned judges in the Courts below are right in interpreting the decisions to which they refer as supporting the conviction of the appellants on the findings of fact which are summarized in the passages quoted above from the reasons of Roach J.A.

In essence the decisions referred to appear to me to hold that an agreement to prevent or lessen competition in commercial activites of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest; that it is the arrogation to the members of the combination of the power to carry on their activities without competition which is rendered unlawful; that the question whether the power so obtained is in fact misused is treated as irrelevant; and that the Court, except I suppose on the question of sentence, is neither required nor permitted to inquire whether in the particular case the intended and actual results of the agreement have in fact benefited or harmed the public.

(1) [1957] S.C.R. 198 at 219-20.

(2) [1931] A.C. 310 at 323-4, 55 C.C.C. 241, [1931] 2 D.L.R. 1, [1931] 1 W.W.R. 552.

In other words, once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public interest is conclusively presumed, and the parties to the agreement are liable to be convicted of the offence described in s. 498(1)(*d*). The relevant question thus becomes the extent to which the prevention and limitation of competition are agreed to be carried and not the economic effect of the carrying out of the agreement. In each case which arises under the section the question whether the point described has been reached becomes one of fact.

In the case at bar, accepting the interpretation of s. 498(1)(*d*) set out above, to which I think the authorities bind us, the agreement made by the appellants appears to me, on the facts as found, to fall within the terms of the section.

I conclude that questions 6 and 7 must be answered in the negative.

Nothing would be gained by my attempting to form an opinion as to whether the state of the law, brought about by the interpretation of the section to which I think we are bound, is a desirable one. If it should be that in construing the word "unduly" the Courts have failed to discern the true intention of Parliament it is, under the principle of *stare decisis,* too late for us to reopen the question, and the remedy, if one is required, lies in the hands of Parliament.

It follows from what I have said above that, in my opinion, the appeals should be dismissed.

In view of the dismissal of the appeals, the cross-appeal ceases to have any great importance. Having concluded for the reasons given above in dealing with questions 3 and 4 that the indictment, following as it does the words of s. 498(1)(*d*), charges only one offence, although it describes alternative modes of committing it, I am of opinion that

1957

HOWARD SMITH PAPER MILLS LTD. *et al.* v. THE QUEEN

Cartwright J.

the amendment of the conviction ordered by the Court of Appeal was not necessary and I concur in the disposition of the cross-appeal proposed by my brother Kellock.

Appeals dismissed; cross-appeal allowed.

Agents for the appellants' solicitors: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: F. P. Varcoe, Ottawa.

1957

*Feb. 12, 13
May 13

NORMAN F. FIRTH (*Plaintiff*) ..... APPELLANT;

AND

THE WESTERN LIFE ASSURANCE COMPANY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Life—Non-payment of renewal premium—Days of grace—Due date of premium falling on non-juridical day—The Insurance Act, R.S.O. 1950, c. 183, s. 146.

A term policy of life insurance provided for payment of renewal premiums on April 13 in each year. April 13, 1952, was Easter Sunday and the following day, April 14, was a holiday. The insured died on May 14, the renewal premium for that year being then unpaid. The insurer repudiated liability under the policy on the ground that it had lapsed because of non-payment of the renewal premium by May 13. The beneficiary contended that the death occurred within the days of grace allowed under the policy and under s. 146 of *The Insurance Act*.

Held (Rand and Cartwright JJ. dissenting): The action must fail. The "due date" of the premium was April 13, and this was not affected by the fact that it was a Sunday. The days of grace ran from "the day on which the premium is due" and therefore expired on May 13.

Per Rand and Cartwright JJ., *dissenting*: The insurer could not legally have accepted payment of the premium on April 13 by reason of the provisions of the *Lord's Day Act*, R.S.C. 1952, c. 171, particularly ss. 4 and 14. Had the policy contained no provision for a period of grace, the premium could have been paid as of right on April 14. It followed from this that the words "the day on which the premium is due" in s. 146(1) of *The Insurance Act* meant April 14 and not April 13. The days of grace had therefore not expired when the insured died.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing an appeal from a judgment of Spence J. (2). Appeal dismissed.

---

*PRESENT: Kerwin C.J. and Taschereau, Rand, Cartwright and Abbott JJ.

(1) [1956] O.R. 455, [1956] I.L.R. 1-222, 4 D.L.R. (2d) 284.

(2) [1955] O.R. 56, [1955] I.L.R. 1-170, [1955] 2 D.L.R. 457.

T. Sheard, Q.C., and *W. H. Powell, Q.C.*, for the appellant.

C. F. H. Carson, Q.C., and *J. B. S. Southey*, for the respondent.

The judgment of the Chief Justice and Taschereau and Abbott JJ. was delivered by

THE CHIEF JUSTICE:—This is an action on a term policy of insurance, dated April 13, 1951 (ex. 1), issued by the respondent on the application of Meridian Timber Co. Ltd. on the life of James G. White for a five-year period from its date. The appellant sues as assignee of the timber company. While a policy bearing the same date had been issued earlier it was found to be incorrect and there is, in my opinion, no doubt that the appellant must rest his case on the terms of ex. 1. The details in connection with both policies were explained to us and are set forth in the reasons for judgment of the trial judge (1) and of the Court of Appeal (2). We are relieved from considering the claim (first advanced in the Court of Appeal) for rectification of the policy by substituting April 30 as being the date for payment of renewal premiums instead of April 13, since on the argument Mr. Sheard stated that he abandoned any such contention. The problem may therefore be viewed without regard to any of the attendant circumstances except those now mentioned.

The policy is dated April 13, 1951, and was made in consideration of the annual premium of $1,092 to be paid in advance to the respondent on the delivery of the policy and of the payment thereafter of a like amount on each succeeding 13th day of April in every year during the continuance of the contract. The first premium was paid on or about April 30, 1951. The insured died May 14, 1952, and after the receipt of information of that occurrence the appellant, with his solicitor, attended at the offices of the respondent about 7 o'clock on the evening of that day with a certified cheque in favour of the respondent for $1,092. The offices were, of course, closed, but a letter, with the cheque, was put under the door, or in a letter-box, of the building in which the respondent's offices are

(1) [1955] O.R. 56, [1955] I.L.R. 1-170, [1955] 2 D.L.R. 457.
(2) [1956] O.R. 455, [1956] I.L.R. 1-222, 4 D.L.R. (2d) 284.

1957

FIRTH v. WESTERN LIFE ASSUR. CO.

Kerwin C.J.

located. This cheque was returned the following day with a letter, pointing out that the policy had lapsed prior to the receipt of payment.

April 13, 1952, was Easter Sunday and the appellant contends that, apart from any question of grace, he was entitled to pay the second premium on April 15, because of the 14th being Easter Monday.

Section 146 of *The Insurance Act*, R.S.O. 1950, c. 183, deals with days of grace and is as follows:

146. (1) Where any premium, not being the initial premium, under any contract is unpaid, the insured, his assign or agent, or any beneficiary, may, within a period of grace of thirty days or, in the case of an industrial contract, four weeks from and excluding the day on which the premium is due, pay, deliver or tender to the insurer at its head office, or at its chief agency in the Province, or to its collector or authorized agent, the sum in default.

(2) The payment may be made by sending a post office order or postal note, or a cheque payable at par and certified by a bank doing business in Canada under *The Bank Act* (Canada), or a draft of such bank, or a money order of an express company doing business in the Province, in a registered letter duly addressed to the insurer, and the payment, delivery or tender shall be deemed to have been made at the time of the delivery and registration of the letter at any post office.

(3) Payment, delivery or tender as aforesaid shall have the same effect as if made at the due date of the premium.

(4) The period of grace hereinbefore in this section mentioned shall run concurrently with the period of grace, if any, allowed by the contract for the payment of a premium or of an instalment of premium.

(5) Upon the maturity of the contract during the period of grace and before the overdue premium is paid, the contract shall be deemed to be in as full force and effect as if the premium had been paid at its due date, but the amount of such premium with interest, not in excess of six per cent per annum, and the balance, if any, of the current year's premium, may be deducted from the insurance money.

(6) Nothing in this section shall deprive the insured of the benefit of any period of grace allowed by the contract in excess of the period of grace allowed by this section.

The terms of the policy with reference to this question read:

GRACE.—In the payment of all renewal premiums hereunder, a grace of one month (of not less than 30 days) will be allowed from the actual due date of the premium herein stated. During the period of grace the Policy shall continue in force, but in the event of the Policy becoming a claim during the said period of grace, and before the overdue premium or deferred premiums, if any, of the current Policy year are paid, the amount of such premiums will in settlement of the claim be deducted from the sum insured.

The appellant argues that under subs. (1) of s. 146 of *The Insurance Act* it cannot be said that the premium was "due" on Sunday, April 13, 1952, because the respondent, being a company engaged in the insurance business, was prohibited from carrying on that business on the Lord's Day and that, in any event, the offices were closed. It is also contended that it could not be said that the premium was "the sum in default" if it was not paid before Sunday, April 13. In my view, the subsection is quite clear and is not capable of that construction. All it provides for is a period of grace of 30 days and in the circumstances the dates fixed by the Act and by the policy are the same. Therefore, on Sunday, April 13, 1952, the second premium was unpaid. With respect to other views, it is beside the point to consider a case where a statute or the contract did not provide for a period of grace and the last day for paying a premium happened to expire on a Sunday, because we are not concerned with that problem and I find no assistance in *Landrigan v. Missouri State Life Ins. Co.* (1) or in general statements that days of grace are days allowed for making a payment after the time limited has expired. I agree with the Court of Appeal that, in this connection, there is no difficulty in the construction of subs. (1) of s. 146 of *The Insurance Act*.

The appellant then contends that, even if the above be the result under the Act, the grace provisions in the policy enlarged the rights of the appellant and that some meaning must be given to the word "actual" in the phrase "a grace of one month (of not less than 30 days) will be allowed from the actual due date of the premium herein stated". Again, with respect, I have no difficulty in deciding that this word had not the effect of making April 14, 1952, the due date from which the period of grace is to be counted. It was so held by the Supreme Court of Texas in *Aetna Life Ins. Co. of Hartford v. Wimberly* (2) and, even if that case may be distinguished, as suggested by the appellant, I would have come to the same conclusion in the present appeal.

The second contention of the appellant is that even if the grace period began to run on April 14, 1952, the policy when properly interpreted gave 31 days of grace.

(1) (1922), 245 S.W. 382.

(2) (1908), 112 S.W. 1038.

1957

FIRTH v. WESTERN LIFE ASSUR. CO.

Kerwin C.J.

I can find no substance in this argument. I agree with the Chief Justice of Ontario that the appellant was not entitled to a period of grace in excess of either one month or 30 days, whichever was the greater.

Finally, I can find no ambiguity in the policy that would give rise to the application of the maxim *contra proferentem*. It is stated that this would be in direct conflict with the provisions of the policy stating that the premium is to be an annual one. Of course it is annual but the date for its payment was distinctly stated in the policy and the premium was not paid within the days of grace allowed. As to the so-called rule in *McMaster v. New York Life Insurance Company* (1), it is sufficient to say that the extent of its application has been canvassed in the Courts of the United States in later cases and has been considered in *The Provident Savings Life Assurance Society of New York v. Mowat et al.* (2). In my opinion, the policy is clear and under its terms the payment of the second annual premium, whether made on May 14 or May 15, 1952, was too late.

The appeal should be dismissed with costs.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario (3) affirming a judgment of Spence J. (4) by which the appellant's action was dismissed. The relevant facts are fully stated in the reasons for judgment of the learned trial judge, and a brief summary will be sufficient to make clear the reasons for the conclusion at which I have arrived.

The action was brought on a policy issued by the respondent on the life of one James G. White, which was filed as ex. 1 at the trial. In the view that I take of the matter, the fact that this policy was issued in substitution for one which had been prepared and delivered earlier becomes irrelevant. It is conceded that, if the policy was still in force at the time of the death of White, the

(1) (1901), 183 U.S. 25, 22 S. Ct. 10. (2) (1902), 32 S.C.R. 147.
(3) [1956] O.R. 56, [1956] I.L.R. 1-222, 4 D.L.R. (2d) 284.
(4) [1955] O.R. 455, [1955] I.L.R. 1-170, [1955] 2 D.L.R. 457.

appellant is the person to whom the insurance moneys are payable. The policy is dated April 13, 1951; by its terms the respondent agrees to pay $100,000 inmmediately upon receipt and approval of proofs of the death of White, during the continuance of the contract, provided that his death occurs before April 13, 1956. The policy reads in part as follows:

THIS CONTRACT is made in consideration of the Application for this Policy, a copy of which is hereto attached, and of the statements and agreements therein contained, hereby made a part of this contract, and of the annual premium of One Thousand and Ninety-Two Dollars to be paid in advance to the Company, on the delivery of this Policy, and of the payment thereafter of a like amount on each succeeding Thirteenth day of April in every year during the continuance of this contract.

* * * * *

GRACE.—In the payment of all renewal premiums hereunder, a grace of one month (of not less than 30 days) will be allowed from the actual due date of the premium herein stated. During the period of grace the Policy shall continue in force, but in the event of the Policy becoming a claim during the said period of grace, and before the overdue premium or deferred premiums, if any, of the current Policy year are paid, the amount of such premiums will in settlement of the claim be deducted from the sum insured.

It is common ground that the first premium of $1,092 was paid on or about April 30, 1951 and that no further premium was paid or tendered during the life of White. White died on May 14, 1952. The sole defence is that at the time of White's death the policy had lapsed for non-payment of the annual premium claimed by the respondent to have been due on April 13, 1952. The last-mentioned date was a Sunday.

I find it necessary to deal with only one of the grounds relied upon in support of the appeal. Counsel for the appellant contends that, under s. 146(1) of *The Insurance Act,* R.S.O. 1950, c. 183, May 14 was the last day of the period of grace and consequently, by virtue of subs. (5) of the same section, the policy was in full force and effect when White died on that day. Whether or not this contention is sound depends on the construction of the words of the section. Counsel were unable to refer us to any decisions in which the precise point has arisen and I have found none.

1957

FIRTH
v.
WESTERN
LIFE
ASSUR. CO.

Cartwright J.

Section 146 reads in part as follows:

146. (1) Where any premium, not being the initial premium, under any contract is unpaid, the insured, his assign or agent, or any beneficiary, may, within a period of grace of thirty days . . . from and excluding the day on which the premium is due, pay, deliver or tender to the insurer at its head office, or at its chief agency in the Province, or to its collector or authorized agent, the sum in default.

* * * * *

(3) Payment, delivery or tender as aforesaid shall have the same effect as if made at the due date of the premium.

(4) The period of grace hereinbefore in this section mentioned shall run concurrently with the period of grace, if any, allowed by the contract for the payment of a premium or of an instalment of premium.

(5) Upon the maturity of the contract during the period of grace and before the overdue premium is paid, the contract shall be deemed to be in as full force and effect as if the premium had been paid at its due date, but the amount of such premium with interest, not in excess of six per cent per annum, and the balance, if any, of the current year's premium, may be deducted from the insurance money.

(6) Nothing in this section shall deprive the insured of the benefit of any period of grace allowed by the contract in excess of the period of grace allowed by this section.

In 1952, April 13, the date stated in the policy for the payment of the second annual premium, fell on a Sunday. By reason of the provisions of the *Lord's Day Act*, R.S.C. 1952, c. 171, particularly ss. 4 and 14, it would have been unlawful for the respondent to receive payment of the premium on that day, and its office was in fact closed. In these circumstances the cases cited by Mr. Sheard make it clear that, had the policy contained no provision for a period of grace, the insured or beneficiary would have been entitled as a matter of right to pay the premium on April 14. In my opinion, it follows from this that when applied to the circumstances of this case the words in subs. (1) "the day on which the premium is due" mean April 14 and not April 13. The matter may be tested by supposing that the premium had in fact been paid on April 14. How, if this had happened, could it have been said to be "the sum in default", the words with which subs. (1) concludes? A party who pays a sum on the day on which he is by law entitled to pay it cannot be said to be in default. How could April 14 be properly described as a day of grace when if payment were made on that day it

would be made as a matter of right and not of indulgence? As is pointed out by Daues J. giving the judgment of the Court in *Landrigan v. Missouri State Life Ins. Co.* (1), the term "grace" is used in contradistinction to "right". I find convincing the reasoning in the following passage in the judgment in that case, at p. 387:

> The days of grace cannot begin at a time when the policy is alive and in force under the paid premium, but begins only when the policy has run its limit under the paid premium, and runs as days of grace above and beyond the time during which the policy was in force under the premium. The insured had insurance as a matter of right under the premium until September 17, 1918, and during the period that he had insurance as a matter of right he could not be given insurance as a matter of grace, for grace is used in contradistinction to right. Thirty-one days of grace was a time of indulgence granted, and it was not an indulgence until after the expiration of the insurance as a matter of right.

The following definition in Byrne's Law Dictionary (1923) p. 277 is, in my opinion, accurate:

> Days of grace are days allowed for making a payment or doing some other act after the time limited for that purpose has expired.

It would be anomalous to reckon as part of a period of grace allowed to a party a day upon which no grace was required.

I find some further support for the view I have expressed in the fact that in subs. (1) the Legislature has used the word "day" rather than the word "date" which is used in subs. (3) and in subs. (5).

Having concluded that April 14, 1952 was "the day on which the premium is due" it follows that the period of "thirty days from and excluding" that day would include May 14, 1952, the day on which the life insured died. Consequently, the contract matured during the period of grace, the rights of the parties are governed by subs. (5), and the appellant is entitled to judgment for the sum of $100,000 less $1,092, that is $98,908, with interest at 5 per cent. from the date of the receipt by the respondent of proofs of the death of the life insured. If the parties are unable to agree as to the date from which interest should be computed the matter may be spoken to.

I would allow the appeal, set aside the judgment in the Courts below and direct that judgment be entered for the appellant for $98,908 with interest as above set out. The appellant is entitled to his costs throughout.

(1) (1922), 245 S.W. 382.

1957

FIRTH v. WESTERN LIFE ASSUR. CO.

Cartwright J.

Appeal dismissed with costs, RAND *and* CARTWRIGHT JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Byrne & Dixon, Hamilton.

Solicitor for the defendant, respondent: David A. Robinson, Hamilton.

1957

*Jan. 30, 31
Feb. 1, 4
May 13

HAROLD MURRAY ORCHARD, PATRICK CALDWELL, EDMUND HOULE, ALBERT COWLEY, MALCOLM BAKER, ANTHONY HOLEWELL and AXEL LARSEN, Sued on their own behalf, and on behalf of all other members of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Milk Wagon Drivers and Dairy Employees, Local No. 119, except the plaintiff (*Defendants*) .....APPELLANTS;

AND

JOHN EVERS TUNNEY (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Labour law—Unincorporated trade union—Liability of officers for wrongful acts towards members—Whether members' rights based on status or on contract—Whether union or other members liable for wrongful acts of officers.

The plaintiff was a member of a trade union and employed in a "union shop". A complaint was made to the executive board of the local and he was notified that an inquiry would be held and that, in the meantime, he was suspended. A letter was immediately written informing the plaintiff's employer that he had been temporarily suspended, whereupon he was discharged from his employment. An inquiry was thereafter held by the executive board, following which the board found the plaintiff guilty and in effect expelled him. A meeting of the union was called to consider the finding of the executive committee but no vote was taken. The plaintiff sued for damages claiming against the defendants both personally and as representing all other members of the local.

Held: The plaintiff was entitled to a declaration that he was still a member of the local because, under the constitution of the local and international unions, the action of the executive board required confirmation by the local and remained conditional until it received that confirmation. There was no authority whatever for a "temporary suspension"

*PRESENT: Rand, Locke, Cartwright, Abbott and Nolan JJ.

before the inquiry by the executive board. The plaintiff was also entitled to damages against the defendants in their personal but not in their representative capacity.

Per Rand, Cartwright and Abbott JJ.: The rights of a member of a trade union are based upon contract and not upon status. The contract is with all other members of the union and not with the union as such. The union has no capacity to contract with a member and it follows *a fortiori* that a union as such cannot incur liability in tort. The acts of the defendants were clearly *ultra vires*, the original "temporary" suspension having been without a semblance of authority. The members of the executive board were individually responsible for those acts.

Per Locke and Nolan JJ.: The statements made to the respondent's employer that he had been suspended by the union and that he had ceased to be a member were both false and were found to have been made maliciously with intent to injure him. Damage having resulted the individual members of the board were personally liable to the respondent in tort.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) affirming the judgment of Williams C.J.Q.B. (2).

H. G. H. Smith, Q.C., and *C. L. Dubin, Q.C.*, for the appellants.

L. St. G. Stubbs, Q.C., and *Gerald Stubbs*, for the respondent.

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

RAND J.:—The appellants are a trade union and certain of its officers. The latter, as members of the executive board, and the union, as represented by them, are charged by the respondent, Tunney, with wrongfully purporting to suspend and expel him from membership and with wrongfully causing his employment to be terminated by an employer bound by a union shop agreement. A union shop is one in which an employee must as a condition of his employment be or become and continue to be a union member.

A defence *in limine* is that the respondent, by the constitution and by-laws of the union to which he subscribed, is bound to exhaust the procedure of appeal to the tribunals of the union including those of the international organization with which the local union is affiliated, an

(1) 15 W.W.R. 49, [1955] 3 D.L.R. 15. (2) 9 W.W.R. (N.S.) 625.

1957

ORCHARD *et al.* v. TUNNEY

Rand J.

appeal which admittedly he did not prosecute, and because of which, under the decision in *White et al. v. Kuzych* (1), it is said that the action is premature: and this must first be dealt with.

Several answers are given: that no charge in writing as required by the regulations of the union was made and none furnished the respondent; that the executive board was not legally constituted; that the hearing was unfairly conducted; that the right of appeal to the general executive of the international union at Miami, Florida, was illusory and a virtual denial of the respondent's rights; and that by the regulations of the local union the finding of the executive board was subject to confirmation by a general meeting of the union, which it did not receive.

I find it unnecessary to pass upon more than the last ground. Section 33 of the constitution and by-laws of the local union provides in part that

> The Executive Board shall try all members against whom charges have been preferred, and report the findings at the next regular meeting of the union.

and s. 45:

> All decisions of the Executive Board shall be concurred in at a regular meeting of the union before becoming effective. The accused shall have the right to appeal to the General Executive Board.

The respondent was alleged to have made false statements to other members reflecting upon the manner in which the affairs of the union involving, among other things, financial features, had been conducted by the secretary-treasurer, the appellant Houle. Apparently a complaint had been made orally either to the president or to the executive board by Houle the gist of which was conveyed to the respondent by a letter notifying him that an inquiry would be held, and that in the meantime he was suspended. With the approval of the executive board and a vice-president of the international body, notice was at once sent by Houle to the employer of the respondent to the effect that he had been temporarily suspended from the union and, under the labour agreement, could not, during the suspension, be continued in the service. The

(1) [1951] A.C. 585, [1951] 2 All E.R. 435, [1951] 3 D.L.R. 641, 2 W.W.R. (N.S.) 679 (*sub nom. Kuzych v. White et al.*).

employer thereupon notified him of that communication, paid him a week's wages in advance and ended his employment.

At the inquiry witnesses were called, three by Houle and two on behalf of the respondent; on the evidence given at the trial the statements made were, in substance, by one witness that the respondent had made remarks to him of the nature charged, and by the other four that no such remarks had been made to them. On this the board found Tunney guilty and, in the language of the minute, he was "suspended from all rights, benefits and privileges", language which it is accepted was intended to effect expulsion.

Shortly after this was announced and on the written request of a number of members a meeting of the union was convened for the purpose of considering the charges and "the findings thereon at the trial thereof". Tunney was excluded from the meeting and after a disorderly session during which it seems to have become apparent that an approval of the board's action was doubtful, the meeting ended without a vote being taken and the matter was given no further consideration. At this meeting, as well as on the inquiry and at another session of the executive board, the dominating as well as the domineering role of Houle was made plainly evident.

The effect of s. 45 is that the finding of the board remains conditional until by concurrence it becomes accomplished. Under art. XVIII, s. 20, of the international rules an appeal may be taken from the "decision of the local executive board" to the general executive board. In the absence of confirmation there was no decision and the condition of taking or enabling an appeal did not come into existence.

Mr. Smith urges that s. 45 conflicts with art. XVIII, s. 1(*a*) of the international constitution. By art. XXI, s. 1(*a*):

> Each Local Union shall have the right to make such by-laws as it may deem advisable, providing they do not conflict with the laws of the International Union.

And by art. XVIII, s. 1(*a*):

> A member or officer of a local union, charged with any offense constituting a violation of this Constitution, shall, unless otherwise provided in this Constitution, be tried by the Local Executive Board.

1957

ORCHARD *et al.* *v.* TUNNEY

Rand J.

The local constitution and by-laws were approved on January 6, 1924, by the president of the international union, under the authority of art. VI, s. 5, of the international constitution:

> The General President shall assist and advise local unions, draft agreements when called upon, and approve local by-laws.

Presidential approval is, I should say, sufficient to raise a presumption of the absence of such a conflict. The president is the highest executive officer of a vast organization, invested with the widest authority, and his approval of s. 45 can be taken to be a matter of ordinary administration. But on the true construction of art. XXI, s. 1(*a*), there is no conflict. The finding, when confirmed, remains the decision of the board, the trial tribunal. So far from conflicting with the spirit and the prescriptions of the international constitution, the by-law serves them in preventing local controversies from encumbering with petty matters the work of the general executive. That was in the mind of vice-president O'Laughlin when in the meeting of the local executive board called to consider a series of charges made against Houle arising indirectly out of this dispute, he rasped,

> . . . There are grounds for the General President not answering your communications before. He is now in Frisco and he is certainly not going to be bothered with the trials and tribulations of a little local union—(Loud protests) I will qualify that,—when he is at a convention involving one million members.

The approval is also a protection against arbitrary and dictatorial action of local officers, the need for which, in the interests of the local union, has been convincingly demonstrated here.

The initial suspension was conceded to have been wholly unauthorized. From its commencement until the trial, the respondent had suffered financially while seeking and engaging in other work and may in the future be seriously prejudiced in employment whether he remains a union member or not. His actual pecuniary loss does not seem to have been calculated but the evidence indicates it to have been not less than $700 and he was able ultimately to obtain employment only with a non-union employer. In that situation to what, if any, relief is he entitled and against whom?

In the absence of incorporation or other form of legal recognition of a group of persons as having legal capacity in varying degrees to act as a separate entity and in the corporate or other name to acquire rights, incur liabilities, to sue and be sued, the group is classified as a voluntary association. There are many varieties of this class ranging from business partnerships, labour unions, professional, fraternal and religious societies to social clubs, in the latter of which personal relations are the main objects, and in the descending or ascending scale the difference in the interests would seem to be proper to be reflected in the legal significance, if any, attributable to them.

Most of their purposes in some form or other touch property; and as their economic character grows that contact is correspondingly enlarged. In a degree depending upon the nature of their objects, they have been left largely to their own government on the ground, probably, that it is better to let family affairs settle themselves; but as they have evolved and membership has taken on greater economic importance resort to the Courts has become more frequent and the warrant for juridical interposition to prevent injustice has called for a more critical analysis of the jural elements involved.

Organizations of workmen to promote interests primarily economic have already become of impressive importance to the individual member in his relations with fellow-workmen and employer. In this country, apart from removing from them all taint of illegality as combinations, legislation, generally speaking, has been limited to arrangements with employers. In Manitoba *The Labour Relations Act,* R.S.M. 1954, c. 132, provides the usual machinery for the certification of unions as bargaining agents, for the conciliation of labour disputes looking to the elimination of strikes, for the negotiation of labour agreements, and for ancillary matters such as unfair labour practices.

In the protection of its interests, the ranks of labour are looked upon as marshalled against a compact order of private capital and there tends to be demanded of members an unquestioning loyalty. By its nature, certainly in its earlier stages, the organization lends itself to the domination of strong personalities and the corruptions of power.

1957

ORCHARD *et al.* v. TUNNEY

Rand J.

There has resulted an increasing use of the device of either union or closed shop. With only self-determined disciplinary procedure restraining action by officials, the ordinary member must at times either submit to dictatorial executive action or run the risk of being outlawed from the employable ranks of his trade or labour class.

Following the enactment in England of the *Trade Union Acts,* 1871 and 1876, one of the main objects of which was to abrogate the condemnation of unions, in most cases, as combinations in restraint of trade, the ground on which the jurisdiction in equity was grounded is generally taken to have been declared in *Rigby v. Connol* (1), to be the protection of interests in property. In *Taff Vale Railway Company v. The Amalgamated Society of Railway Servants* (2), the House of Lords, interpreting the legislation as recognizing a labour union to be capable of owning and exercising the power of property and of acting by agents, held an action in tort to lie against the union in its registered name for illegal acts committed by its authorized agents. This was followed five years later by an amendment to the statute which specifically denied such an action.

In the course of elaborating, in the light of this legislation, the legal relations between members of a union, the Courts of England in the earlier stages distinguished between the remedies that were open. In *Kelly v. National Society of Operative Printers* (3), the Court of Appeal upheld an injunction against a certified trade union from acting upon an illegal expulsion, but dismissed a claim for damages as for a breach of contract. Swinfen Eady L.J., at p. 1058, puts it thus:

> I am not aware of any authority for the proposition that a member of a voluntary unincorporated association can recover general damages against the association as such, for a breach of the rules, or of the contract contained in the rules. The committee of the society is the agent of all the members of the society, but one member cannot recover from the other members damages for the acts of the committee.

Phillimore L.J. at p. 1060 says:

> These damages can only be supported as damages for breach of contract. With whom did the plaintiff contract? Not, I think, with the trade

(1) (1880), 14 Ch. D. 482. (2) [1901] A.C. 426.
(3) (1915), 113 L.T. 1055.

union, which, as Lord Macnaghten says in *Russell's* case (1), is merely an unincorporated society of individuals. I think that the plaintiff contracted with each and every of the members, and if anybody has broken any contract with him it is each and every member. Further, the officers of the society are agents for him quite as much as for the other members. And if he sues the trade union for what it has done, he is suing himself among others.

and Bankes L.J. at p. 1062:

> Here the contract relied on is that contained in the rules. These rules do, in my opinion, constitute a contract as between the plaintiff and the other members of his trade union. . . . Further than this, the very ground on which the plaintiff succeeds in obtaining an injunction is fatal to his claim for damages. He succeeds in that claim because he has established that the London committee and the executive committee in expelling him from the society acted without authority and in defiance of the rules. Having established that fact, it is not possible to contend that they were at the same time the authorised agents of his fellow-members to do the acts which he complains of as constituting breaches of his contract.

In *Bonsor v. Musicians' Union* (2), before the House of Lords, in which a similar question of damages was raised, *Kelly, supra,* was expressly overruled, and a registered union held liable in contract for the wrongful expulsion of a member. The issue called for an examination of the reasons in *Taff Vale* going to the character of the contractual relations involved in the union. On that question there was a difference of opinion; Lord Morton of Henryton and Lord Porter viewed them clearly and Lord Keith of Avonholm somewhat elusively as existing between the union as such and the member; Lord MacDermott and Lord Somervell of Harrow, as between the members. The latter associated themselves with Lord Macnaghten and Lord Lindley to whom, in *Taff Vale,* the use of the union name in the action was a procedural feature only which did not change the internal legal structure of the association.

Before pursuing that question, a contention which in Canada, at least, seems to be raised here for the first time, should be examined. It was argued that union membership had by its characteristics attained the stage of status, and that rights arising from it in the respondent had been infringed. It was on this ground that the judgment of Tritschler J. in the Court of Appeal proceeded.

(1) *Russell v. Amalgamated Society of Carpenters and Joiners et al.,* [1912] A.C. 421.

(2) [1956] A.C. 104, [1955] 3 All E.R. 518.

1957

ORCHARD *et al.* v. TUNNEY

Rand J.

I am unable to assent to that contention. There are few, if any, more ill-defined ideas in law than that of status. We have examples which are clear in legal features, such as marriage, but the difficulty of bringing them under a general conception or principle is demonstrated in the comprehensive exposition given the subject by Dr. Carleton K. Allen in (1930), 46 L.Q.R. 277.

Reducing it to its more concrete forms, status in its strict sense appears a condition of one or more persons between or toward whom and another or others distinctive legal relations exist to which by the domestic law special rights, duties, capacities and incapacities are annexed. Generally, at least, status embodies personal elements and is recognized by foreign states, although, in them, its incidents may or may not be accorded enforcement. Its creation may involve a voluntary or contractual assumption of the condition, but the incidents are determined by law. Thus while the right of the master in England over the personal freedom of the slave was denied by Lord Mansfield in *Somerset v. Stewart* (1), property interests arising from the status might properly have been regarded differently. Probably the most significant of the characteristics is the effect upon the legal capacities or incapacities of the parties.

I cannot bring the relations of a member with his immediate union within such a condition. With or without international affiliation these groups, as yet, are local to their own political jurisdictions or other geographical areas and are intended to be so; what special rights or capacities can be predicated of membership which to foreign employment or law, or to our own present law, would be matter for any form of recognition? What is vital to a member is his right as such to protection in employment; that would be an incident of the status; and the conclusive answer seems to be that on the assumption that the group is bound by an underlying agreement the incidents are already furnished by the parties themselves. To declare a contractual provision to be an incident of a newly-recognized status would be an unnecessary act of

(1) (1772), Lofft. 1, 98 E.R. 499.

legislation; to extend it to an element beyond the contract would be to embark upon legislative policy in an unwarranted manner.

There is no legislation in Manitoba similar to that of the *Trade Union Acts*, 1871-1876; and it was not argued that *The Labour Relations Act, supra*, had any wider effect than as already stated. Apart, then, from statute, that a union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual and collective action, a commitment today almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each other. That means that each is bound to all the others jointly. The terms allow for the change of those within that relation by withdrawal from or new entrance into membership. Underlying this is the assumption that the members are creating a body of which they are members and that it is as members only that they have accepted obligations: that the body as such is that to which the responsibilities for action taken as of the group are to be related.

By the contract, therefore, liabilities incurred in group action are group liabilities and it is this unexpressed assumption that warrants the conclusion of several of the Lords in *Taff Vale* and in *Bonsor* in limiting execution of the judgments in those cases recovered to the property of the union. That such a limitation can be effected contractually as between the parties is undoubted and its attribution to the agreement is simply making explicit what is implicit in their act of organization. The contractual rights of a member are, then, with all members except himself, otherwise it would be the group as one that contracts; and what ordinarily is complained of as a breach toward a member must, in the light of the rules and the agreement to be bound by a majority, be such as at the same time is a violation in respect of all the other members and not of one or more only. Not having contractual capacity, it follows, *a fortiori*, that a union as such cannot incur liability in tort.

This contractual condition gives rise to a right to engage in all work for which the union mark is a requisite; and when a union or a closed shop agreement is entered into

1957

ORCHARD *et al.* *v.* TUNNEY

Rand J.

with an employer, union membership secures to each member the right to continue in that employment free from improper interference on the part of the union or its officers. Membership is the badge of admission and continuance and, *vis-à-vis* the employer, to remove the badge is directly and immediately to defeat the right.

The executive board here is vested with authority to require the employer to comply with the terms of the union contract, including the feature of the closed or union shop. The board, purporting to act within the scope of its authority, may, by way of analogy with a corporation, commit either an *ultra vires* act, that is, one that does not become an act of the membership body, or an act *intra vires* that brings about a breach of contract through an improper exercise of authority.

That distinction is pointed out by Farwell J. in *Taff Vale, supra,* where at p. 433 he uses the following language:

> I have already held that the society are liable for the acts of their agents to the same extent that they would be if they were a corporation, and it is abundantly clear that a corporation under the circumstances of this case would be liable. See, for example, *Ranger v. Great Western Ry. Co.* (1854), 5 H.L.C. 86, where Lord Cranworth points out that, although a corporation cannot in strictness be guilty of fraud, there can be no doubt that if its agents act fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. It is not a question of acting *ultra vires,* as in *Chapleo v. Brunswick Permanent Building Society* (1881), 6 Q.B.D. 696, but of improper acts in the carrying out of the lawful purposes of the society.

This is as applicable to the labour union here as it was to the partly recognized society with which he was dealing.

That the original suspension here was without a semblance of authority is not disputed; it was an *ultra vires* act for which the members of the executive were individually responsible. By that act, their notification under the cloak of apparent authority to the employer, and their action on the inquiry, they brought about, as they intended to do, a nullification of the respondent's legal right as a union member to continue in the employment specifically of the employer, a dairy company, and generally of a union shop. This was a direct infringement of or trespass upon that right which of itself gave rise to

a cause of action against those committing it: *Ashby v. White et al.* (1), an action brought by a person entitled to vote at an election for members of Parliament against the returning officer for refusing to admit his vote. In the Queen's Bench on a motion in arrest of judgment, it was held, Holt C.J. dissenting, that the action did not lie, but on appeal to the House of Lords the judgment was reversed. In his reasons, the Chief Justice used the following well-remembered language, at pp. 953-5:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. . . .
>
> And I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindred of his right.

No reasons appear to have been given by the Lords but those of the Chief Justice were undoubtedly upheld.

To the same effect was *Marzetti v. Williams et al.* (2).

The steps so taken by the board and the subsequent action were found by the Courts below to have been wilful and without justification or excuse. Acting in an *ultra vires* course they were not representing the union; their acts were those of third persons; and they cannot be heard to say, nor was it argued, that what they did was done as legitimate measures in advancing the interests of their organization.

The cause of action alleged against the individual appellants in tort is then well founded. The relief allowable against the union is limited to the declaration of the respondent's continued membership and the injunction against interfering with him as a member. And I am unable to say that the damages awarded, considering the possible consequences in the future, are excessive.

(1) (1703), 2 Ld. Raym. 938, 92 E.R. 126.

(2) 1 B. & Ad. 415, 109 E.R. 842.

1957

ORCHARD *et al.* v. TUNNEY

Rand J.

I would, therefore, allow the appeal and modify the judgment below to the extent of striking out the last sentence of para. 4 of the formal judgment so that the paragraph will read:

THIS COURT DID FURTHER ORDER AND ADJUDGE that the Order and Judgment of the learned trial Chief Justice, set out in paragraph 4 of the formal judgment under appeal, whereby it was Ordered and Adjudged that the plaintiff do have judgment for damages of $5,000 against the defendant members of the said executive board of the defendant Local Union No. 119 in their individual capacities, and also against the defendant Local Union No. 119 as represented by the members of the said executive board, be VARIED to read that the plaintiff do have judgment for damages of $5,000 against the individual defendants personally.*

In other respects the judgment is affirmed. The respondent will be entitled in this Court to his costs against the appellants in their individual capacities and to one-half of his costs against them in their representative capacity.

The judgment of Locke and Nolan JJ. was delivered by

LOCKE J.:—While there is a very extensive record in this case, much the greater part of it relates to matters which are no longer the subject of dispute. In addition to the damages awarded against the individual plaintiffs and against them in their representative capacity at the trial, further relief by way of a direction for an accounting was given against the appeallant Houle. This latter portion of the judgment was varied in the judgment of the Court of Appeal, certain of the claims for an accounting being set aside, and there is no cross-appeal as to these matters by the respondent.

The appeal taken to this Court is from that part of the judgment of the Court of Appeal which declared that the respondent was at all relevant times a member in good standing of Local Union No. 119 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America: that the action taken by the executive board of the union in suspending the respondent from his rights as a member was null and void: restraining the executive board and the union from enforcing the suspension of the respondent and interfering with the exercise of his rights as a member and awarding judgment for

* The judgment of the Court of Appeal contained the additional words "and against all other members of Local Union No. 119 (except the Plaintiff) to the extent of their interest in the funds of the local union".

damages in the sum of $5,000 against the individual appellants and against all other members of Local Union 119 to the extent of their interest in its funds, and granting to the respondent his costs on the terms of the judgment at the trial.

The facts to be considered in dealing with these issues are few and not in dispute.

The respondent had become a member of the local union at Winnipeg in the year 1935, at which time he was in the employ of the Crescent Creamery Co. Ltd. as a salesman. He continued in the employ of that company and as a member of the union until 1940, when he enlisted for service in the navy. On his discharge in 1945, after a short delay, he re-entered the service of the creamery company and again became a member of the union. This state of affairs continued until the occurrence of the events which gave rise to this litigation.

The union had for an undisclosed period of time prior to 1947 represented the salesmen employed by Crescent Creamery Co. Ltd. and, as their bargaining agent, had entered into a series of collective agreements with them and other dairy companies, dealing, *inter alia*, with wages, hours and other conditions of employment and providing for a union shop obligating the employer to engage members of the union as salesmen. Membership in the union was prescribed as a condition of continued employment. Such a collective agreement which, by its terms, was to continue in effect from April 1, 1947, until October 31, 1948, was in force on July 18, 1947, when a letter was addressed by the appellant Houle, in his capacity as secretary-treasurer and business agent of the union, to the general manager of Crescent Creamery Co. Ltd., notifying the company that the respondent

> has been temporarily suspended by the Executive Board of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 119, as of July 18th, 1947 and under the terms of Agreement between your Company and the Union, J. Tunney cannot remain in your employment till his suspension is cancelled

and requesting the company to comply with the agreement.

On receiving this, the company laid Tunney off work and his remuneration ceased.

1957

ORCHARD *et al.* v. TUNNEY

Locke J.

By letter dated July 21, 1947, the appellant Orchard wrote Tunney advising him that he had been charged under a clause in the constitution of the union with saying on several occasions that he had "the goods" on the secretary obtained by making investigations, and insinuating that discrepancies existed in the affairs of the union. The letter asserted that such statements were detrimental to the welfare of the union, stated that the trial of the charges would be held in the Labour Temple in Winnipeg on August 4 at 7 p.m., and informed Tunney that he was suspended "from all benefits of the local" until the trial was disposed of.

A hearing took place at the time stated and on August 7, 1947, Orchard again wrote Tunney advising him that he had been found guilty of the charge by the executive of the local and:

> In accordance with Section 5, Clause 10, you are hereby suspended from all rights, benefits and privileges as contained in the Constitution and Laws of our Brotherhood, as from August 4th, 1947.

The respondent endeavoured to get other employment with another dairy company which was a party to the collective agreement with the union but, by reason of his suspension, they would not employ him. Thereafter, he engaged for a while in a different type of employment, eventually obtaining employment as a salesman with a dairy company which did not employ union labour.

On September 30, 1947, the Crescent Creamery Co. Ltd. wrote the respondent informing him that, as they had been notified that he was no longer a member of Local 119, they could no longer employ him as a driver salesman. A cheque for $36, being a week's wages, in lieu of notice, was enclosed. The respondent had not been re-employed by the Crescent company up to the time of the trial which was held at Winnipeg in April 1950.

The constitution of the local union provided by s. 33 that the executive board should try all members against whom charges had been preferred and report the findings at the next regular meeting of the union. Section 45 required that all decisions of the executive board should be concurred in at a regular meeting of the union before becoming effective and that the accused should have the

right to appeal to the general executive board. The latter body is appointed under the provisions of the constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, with which Local 119 was affiliated.

It was admitted on the hearing before the Court of Appeal that the executive board of the local union had no power to suspend a member before the trial of charges preferred against him under the provisions of the constitution, and the contrary was not asserted in this Court. The statement in the notification sent to the Crescent Creamery Co. Ltd. on July 18, 1947, by the appellant Houle that Tunney had been temporarily suspended was untrue.

The learned trial judge and all of the learned judges of the Court of Appeal have expressed the opinion that the order of the executive board of which Orchard advised Tunney by the letter of August 7, 1947, was made without jurisdiction. With this conclusion I respectfully agree, and this whether the procedure to be followed was governed by the provisions of the constitution of the local union or that of the international brotherhood.

An order or decision such as this, made without jurisdiction, is a nullity: *Macfarlane et al. v. Leclaire et al.* (1); *McLeod v. Noble et al.* (2). As the learned trial judge has pointed out, there was no effective decision of the executive board from which to appeal or which might be concurred in at a regular meeting of the union before becoming effective under s. 45. The appeal provisions were, accordingly, inapplicable and the contention based upon the decision of the Judicial Committee in *White et al. v. Kuzych* (3), that the respondent did not exhaust his remedies under the constitution before commencing his action must be rejected.

The respondent not having been suspended in accordance with the requirements of the constitution, the appeal against that portion of the judgment declaring him to have been a member in good standing of Local Union 119 at all relevant times must fail.

(1) (1862), 15 Moo. P.C.C. 181, 15 E.R. 462.
(2) (1897), 28 O.R. 528.
(3) [1951] A.C. 585, [1951] 2 All E.R. 435, [1951] 3 D.L.R. 641, 2 W.W.R. (N.S.) 679 (*sub nom. Kuzych v. White et al.*).

1957

ORCHARD *et al.* v. TUNNEY

Locke J.

There remains the question as to the nature of the respondent's remedy for the damages he has unquestionably sustained.

There is no legislation in Manitoba similar to the *Trade Union Act* of 1871 or the Act of 1876, considered in *Taff Vale Railway Company v. The Amalgamated Society of Railway Servants* (1), nor to the *Trade Disputes Act* of 1906 (6 Edw. VII, c. 47) which was passed in England in consequence of the *Taff Vale* decision. Section 4 of the latter statute prohibits actions in tort against trade unions in respect of any tortious acts alleged to have been committed by them or on their behalf. A trade union in Manitoba not having the status, however, of such organizations in England to which the legislation of 1871 and 1876 applied and not being a corporate entity, a representation order was made in the present action by the Court of Appeal in advance of the trial. By that order, the persons who are the individual appellants in the present case were ordered to represent and defend the action on behalf of all other members of Local Union No. 119, except the present respondent, as well as on their own behalf.

The judgment at the trial, in addition, *inter alia,* to awarding damages of $5,000 against the members of the executive board in their individual capacities, gave judgment in that amount against Local Union No. 119 as represented by the members of the said Board. By the judgment of the Court of Appeal this portion of the judgment was varied by directing that the plaintiff have judgment in the said amount

against the individual defendants personally and against all other members of Local Union No. 119 (except the Plaintiff) to the extent of their interest in the funds of the local union.

It was alleged in the statement of claim that the actions of the executive board complained of were actuated by indirect and improper motives and that they had acted maliciously in order to injure the plaintiff. The learned trial judge held that the purported expulsion of the plaintiff was done in bad faith and all of the learned judges

(1) [1901] A.C. 426.

of the Court of Appeal were in agreement that the actions complained of were done maliciously with intent to injure him.

For the appellants it was alleged that the respondent's remedy, if any, was damages for breach of contract only, this on the footing that the relationship existing between the respondent and the other members of the local union was contractual, the terms of the contract being as defined in the rules applicable to the organization. This was recently held to be so in the case of the members of a registered trade union in England in *Bonsor v. Musicians' Union* (1). The point is that, if the cause of action was in contract rather than in tort, the damages would be assessable upon the principle defined in *Hadley et al. v. Baxendale et al.* (2). If this rule applied, it might well be that the damages proven were insufficient to justify the award of $5,000 made at the trial.

In my opinion, the cause of action for damages against the individual defendants was in tort. I further consider that as against the defendants, made so by the representation order, the only enforceable claim was for a declaration that the plaintiff was a member of the union in good standing.

Tunney's situation in July of 1947 was that he had steady employment with a large dairy company by which he had been employed for an aggregate of approximately 7 years, drawing a substantial weekly salary and apparently assured of indefinite employment so long as his services were satisfactory to his employer, and the union of which he was a member remained the bargaining agent for the salesmen and he remained a member in good standing. As a member of the union he was entitled to the benefits of the agreement that had been made by the union as bargaining agent for the salesmen.

The action of the individual appellants who have been found to have acted in concert in notifying his employer, first, that he had been suspended, and secondly, that he was no longer a member of the union, were wrongful acts. Both of these statements were false and caused immediate

(1) [1956] A.C. 104, [1955] 3 All E.R. 518.

(2) (1854), 9 Exch. 341, 156 E.R. 145.

1957

ORCHARD et al. v. TUNNEY

Locke J.

damage to the respondent in that he at once lost his employment and was unable to obtain work from any of the other dairy companies in Winnipeg who were parties to the collective agreement and all the other benefits and advantages to which membership in the union entitled him.

This is not such a case as *Lumley v. Gye* (1), where the cause of action was for inducing a breach of a contract of employment. The actions of the individual appellants did not result in the Crescent Creamery Co. Ltd. breaking its contract of employment with Tunney. Since the bargaining agent authorized to act on his behalf had agreed that membership in the union was to be a condition of his continued employment, the action of the employer in, first, suspending, and then dismissing him, with payment of a week's wages in lieu of notice, did not involve any breach of contract on its behalf. However, in my opinion, similar principles are applicable in determining the question of liability.

The members of the executive board were in a particularly advantageous position if they wished to injure Tunney in this manner. The employer was bound by its agreement to employ only members of the union and could not be expected to enquire into the regularity of the proceedings resulting in Tunney's alleged suspension or in his having thereafter ceased to be a member. The board were in a position to exert pressure upon the employer since a breach on its part of the covenant to employ only union men might well precipitate a strike.

In *Quinn v. Leathem* (2), Lord Macnaghten said, at p. 510:

> Speaking for myself, I have no hesitation in saying that I think the decision [*Lumley v. Gye, supra*] was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

(1) (1853), 2 E. & B. 216, 118 E.R. 749.

(2) [1901] A.C. 495.

Lord Lindley at pp. 534-5 said:

As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances.

In *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland* (1), Romer L.J. said in part:

In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, and the design was to carry out some spite against the man, . . . then that person is liable to the man for the damage consequently suffered. The conduct of that person would be, in my opinion, such an injustifiable molestation of the man, such an improper and inexcusable interference with the man's ordinary rights of citizenship, as to make that person liable in an action.

There is an exhaustive review of the authorities in *Pratt et al. v. British Medical Association et al.* (2), where McCardie J., at p. 260, expressed the opinion that it is an actionable wrong for a single person or a body of persons to inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business, even though the unlawful means may not comprise any act which is *per se* actionable, and that fraud fell within the expression "unlawful means".

(1) [1903] 2 K.B. 600 at 619-20. (2) [1919] 1 K.B. 244.

1957

ORCHARD *et al.* v. TUNNEY

Locke J.

It was the false statements made by Houle and Orchard which led to Tunney's dismissal and, whether or not malice is of the gist, malice has in the present case been expressly found.

Illustrations of the application of the principle above referred to are to be found in the judgment of this Court in *The Manitoba Free Press Company v. Nagy* (1), and in *National Phonograph Company, Limited v. Edison-Bell Consolidated Phonograph Company, Limited* (2).

I see no ground for any interference with the judgment for damages against the individual appellants.

Since, however, it has been found that the actions of the executive board were *ultra vires* and were done maliciously with intent to injure the respondent, in my opinion the judgment against them in their representative capacity as representing all the other members of the union cannot be sustained. The individual appellants had no authority from their fellow members to act in the manner complained of, either by the constitution of the union or by any course of conduct of the other members. As the evidence shows, very considerable numbers of the members protested vigorously against what had been done and disapproved of the actions of the executive board. The directors of a limited company cannot impose liability upon it by entering into transactions on its behalf which are beyond its corporate powers and I think, upon the same principle, the members of this union are not, even to the extent of their interest in the funds of the union, liable for acts done wholly beyond those powers entrusted to the individual appellants.

I agree that the judgment should be varied in the manner directed by my brother Rand and with his proposed order as to costs.

Judgment varied.

Solicitors for the defendants, appellants: Thompson, Shepard, Dilts & Jones, Winnipeg.

Solicitors for the plaintiff, respondent: Stubbs, Stubbs & Stubbs, Winnipeg.

---

(1) (1907), 39 S.C.R. 340.

(2) [1908] 1 Ch. 335.

TROYSCO MINES LIMITED (*Defendant*) APPELLANT; 1957

*Mar. 20
May 13

AND

HECTOR COMTOIS ET AL. (*Plaintiff*) ...RESPONDENT.

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

Mines and minerals—"Droit de mine"—Nature of right—Effect of reservation—Prescription—Civil Code, art. 1016.

A deed of land, made in 1889, reserved to the vendor a *droit de mine* in the land. *Held*: The effect of this reservation was to give the vendor and his *ayants cause* a right of property in the mines and minerals rather than a mere personal right. The parties to a contract were not to be presumed to have given to the words and expressions they used a meaning different from that given to them by the law on which, in the last analysis, the protection of validly made contracts depended, and under the legislation in force at the time and place of the deed this was the effect of the reservation. The right so reserved could not, therefore, be the object of extinctive prescription. *Stevenson v. Wallingford et al.; Wallingford v. Hotchkiss* (1894), 6 Que. S.C. 183, approved. Nor, in the circumstances of this case, could it be the object of acquisitive prescription.

Husband and wife—Covenants in marriage contract—Limits of application of Civil Code, art. 1265.

Article 1265 of the *Civil Code* does not apply so as to prevent the correction of a clerical error in a marriage contract, such as the giving of wrong numbers to lots conveyed by the contract. *Quaere*, whether the article applies to a provision in a marriage contract capable of taking effect independently of that contract, or only to the *convention matrimoniale* properly so called.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming a judgment of Mitchell J. Appeal dismissed.

Edouard Masson, Q.C., and *M. Lattoni, Q.C.*, for the defendant, appellant.

Lucien Tremblay, Q.C., and *Carrier Fortin*, for the plaintiff, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Alléguant être propriétaires d'au moins 50 pour cent des mines et minerais situés dans les lots 20-c et 21-c du rang 3 du canton Ham, dans la province de

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

(1) [1957] Que. Q.B. 149.

1957

TROYSCO MINES LTD. v. COMTOIS et al.

Fauteux J.

Québec, les intimés ont, par action pétitoire, requis l'affirmation judiciaire de ce droit de propriété contesté par l'appelante et joint à leur action une demande d'injonction assurant la suspension des travaux d'exploitation de ces mines et minerais, par l'appelante, jusqu'à établissement et partage de ces droits suivant la loi.

La Cour Supérieure a fait droit à ces demandes et son jugement a été confirmé par une décision unanime de la Cour d'Appel.

Nonobstant l'habile argument du procureur de l'appelante, le non-fondé des griefs soulevés à l'encontre de ce jugement est apparu à l'audition et a été confirmé par une considération ultérieure des questions dans la cause. En substance, ces griefs portent sur des questions de droit et sont relatifs (i) au droit de propriété des intimés à ces mines et minerais, et (ii) à la procédure.

Pour disposer des diverses prétentions au premier titre, il n'est plus nécessaire, à ce stage des procédures, de refaire ici la chronologie des actes et faits juridiques établissant le titre de propriété des intimés. Il suffira de ne référer qu'à ceux dont la considération est pertinente à l'appréciation des moyens qu'il y a lieu de considérer.

Le droit de propriété aux mines et minerais dont les intimés ont obtenu la reconnaissance en Cour Supérieure et Cour d'Appel, se fonde sur une réserve du "droit de mine" stipulée par Isaïe Comtois fils dans une convention sous seing privé, intervenue le 30 septembre 1889 et aux termes de laquelle il vendait à Clovis Richer partie des lots vingt(20) et vingt et un(21). C'est sur l'interprétation de l'expression "droit de mine" que les parties se sont divisées. Aux vues de l'appelante, le "droit de mine" n'est qu'un droit d'exploitation, un droit personnel, immobilier et incorporel; en somme, ce serait une simple créance qu'en l'espèce, le créancier aurait perdue par prescription extinctive et que l'appelante aurait acquise par prescription acquisitive. D'autre part, et suivant l'interprétation des intimés, ce "droit de mine", réservé lors de la disposition de la propriété de ces lots, est un droit de propriété aux mines et minerais; un tel droit ne peut être l'objet d'une prescription extinctive et la prescription acquisitive n'a été ni alléguée ni prouvée par l'appelante.

Pour décider du sens de l'expression "droit de mine", il convient, comme d'ailleurs l'art. 1016 du *Code Civil* l'autorise, de référer au sens que, suivant l'usage, on donnait à l'expression, aux temps et lieu de la convention précitée puisque celle-ci n'apporte aucune autre précision sur l'objet de la réserve.

Les parties à une convention ne sont pas présumées vouloir assigner aux mots et expressions y employés un sens autre que celui y attaché par la loi dont dépend, en dernière analyse, la protection des contrats validement consentis. Une référence à la législation en vigueur aux temps et lieu de la convention entre Comtois fils et Richer, indique clairement que le "droit de mine" n'est pas une pure créance personnelle mais un droit réel, un droit de propriété aux mines et minerais. Ainsi, par la loi 24 Vict., c. 31, adoptée en 1861 pour le Bas-Canada, afin de dissiper certains doutes élevés sur les titres des acquéreurs de privilèges et de droits touchant l'exploitation des mines, distincts du sol, la Législature du Canada a statué que:

> La vente . . . par le propriétaire ou concessionnaire de l'immeuble, *d'un droit de mine* ou d'un privilège d'exploration de toute mine, minerai . . ., avec ou sans la faculté d'exploiter la mine, si elle est dûment enregistrée au bureau d'enregistrement de la division d'enregistrement dans laquelle l'immeuble en question est situé, *en conférera la propriété* à l'acquéreur, suivant son rang et droit de priorité . . .

En 1880, la Législature de Québec adoptait la loi 43-44 Vict., c. 12, et décrétait ce qui suit, aux arts. 3 et 4:

> 3. Il n'est pas nécessaire, à l'avenir, de faire mention dans les lettres-patentes de terres octroyées pour fins agricoles, de la *réserve des droits de mines,* laquelle réserve est toujours censée exister, suivant les dispositions du présent acte.
>
> 4. Toute personne qui, jusqu'à ce moment, a obtenu par lettres-patentes, pour fins agricoles, mais avec *réserve du droit de mines* par le gouvernement, un lot de terre quelconque faisant partie des terres publiques de cette province, peut, si lui ou son représentant légal, *découvre et veut exploiter une mine,* acheter *le droit de mines* ainsi réservé par le gouvernement, en payant comptant, au commissaire des terres de la couronne, en sus du prix déjà payé pour le dit lot de terre, une somme additionnelle suffisante pour atteindre la somme de deux piastres l'acre, s'il s'agit de l'or ou de l'argent; et de une piastre l'acre, s'il s'agit du cuivre, du fer, du plomb ou autres métaux inférieurs.

Enfin, aux Statuts Refondus de Québec, 1888, vol. 1, le para. 2 de l'art. 1424, concernant la Loi des mines de 1888, édicte que:

> 2. Au cas où un particulier devenu propriétaire de la propriété superficiaire et souterraine à quelque titre que ce soit, avant le 10 juin 1884, vend, hypothèque, loue ou affecte le *droit de mine* sur telle propriété à un

1957

TROYSCO MINES LTD. v. COMTOIS et al.

Fauteux J.

autre particulier en conformité de l'article 2099 du code civil du Bas Canada, ces propriétés superficiaire et souterraine redeviennent deux propriétés parfaitement distinctes et indépendantes l'une de l'autre, à toutes fins que de droit, comme elles l'étaient lorsqu'elles étaient en la possession de la couronne; en sorte que la vente de l'une de ces propriétés, faite judiciairement ou autrement, n'affecte l'autre en aucune manière que ce soit.

Dans *Stevenson v. Wallingford et Canadian Pacific Ry. Co.; Wallingford v. Hotchkiss et al.* (1), la Cour de Revision confirme un jugement rendu par le Juge Gill où un sens identique est assigné à l'expression "droit de mine". Il convient d'en citer les extraits suivants:

> Attendu que le demandeur principal, alléguant qu'il est propriétaire des *droits de mines* dans le lot de terre . . . revendique par sa présente demande la dite quantité de phosphate comme étant sa propriété . . .
>
> Considérant que par la loi en force, lors de la dite vente pour taxe et vente du shérif, 47 Vict., c. 22, s. 1, les *droits de mines* et le droit à la propriété superficiaire d'un terrain sont distincts les uns des autres, que les droits miniers n'étaient pas taxés come tels, mais que le lot superficiaire seul était taxé, ladite compagnie minière alors investie du droit de propriété des mines qui pouvaient se trouver dans le lot de terre, n'était pas portée au rôle d'évaluation municipale, que par conséquent la vente municipale ne comprenait pas les droits de mines, et que c'est bien le demandeur principal en vertu de son titre du shérif qui est le seul et véritable propriétaire des droits de mines dans le dit lot de terre.
>
> Considérant que le dit demandeur principal est bien encore propriétaire du minerai que le défendeur principal a extrait du dit lot de terre . . .

Ces références suffisent, je crois, pour établir que le "droit de mine" était, aux temps et lieu de la convention précitée, compris comme un droit *in re* et non pas comme un droit *ad rem, i.e.,* comme un droit de propriété aux mines et minerais et non pas comme une simple créance sujette à extinction par prescription. Dans ces vues, il n'est pas nécessaire de considérer les prétentions de l'appelante qui invoque la prescription extinctive ou libératoire laquelle, étant une fin de non recevoir qu'un débiteur peut opposer à l'action de son créancier lorsque celui-ci a négligé de l'exercer pendant un temps déterminé, ne saurait ici trouver d'application. Quant à la prescription acquisitive, permettant l'acquisition d'un fonds par une possession prolongée pendant un certain temps, elle ne peut davantage être invoquée avec succès par l'appelante. La propriété du sol que posséderait l'appelante dans ces lots est, dans l'espèce, une propriété distincte de celle des mines et minerais; la possession de la première est donc indépendante de celle de

(1) (1894), 6 Que. S.C. 183.

la seconde et ne peut, par elle-même, pour cette raison, donner ouverture au jeu de la prescription acquisitive. D'ailleurs, la prescription acquisitive aussi bien que les faits qui en conditionnent l'opération n'ont pas été allégués par l'appelante. Cette dernière a, de plus, admis qu'antérieurement au mois de février 1953, l'année où la présente action fut instituée, il n'y avait jamais eu de mine ouverte ni de "droit de mine" exercé, soit sur les lots 20 et 21, ou 20-c et 21-c du rang 3 du canton mentionné. Cette première prétention de l'appelante doit donc être écartée.

Les faits suivants ont fourni à l'appelante une seconde objection au titre de propriété des intimés. Ce "droit de mine" réservé par Isaïe Comtois fils, ce dernier l'avait acquis à l'occasion de son mariage, alors que Isaïe Comtois père est intervenu au contrat de mariage passé le 13 avril 1885, pour donner exclusivement à son fils, ce acceptant, une terre faisant partie des lots en question, tout en se réservant la moitié des mines et minerais, abandonnant ainsi à son fils l'autre moitié. Quatre ans plus tard, toutes les parties à ce contrat de mariage ont, par acte authentique subséquemment enregistré, constaté, reconnu et corrigé une erreur cléricale qui s'était glissée à ce contrat alors que les lots 20 et 21 dont la terre donnée faisait partie, avaient erronément été désignés comme étant les lots 19 et 20. En raison de ces faits, on a fait la correction et Isaïe Comtois père a réaffirmé donner à Isaïe Comtois fils, acceptant, la même terre dont la désignation fut ainsi corrigée. Cette correction, dit l'appelante, constitue une violation des dispositions de l'art. 1265 du *Code Civil,* lequel se lit comme suit:

> 1265. Après le mariage, il ne peut être fait aux conventions matrimoniales contenues au contrat, aucun changement [pas même par don usuel d'usufruit, lequel est aboli.]
>
> Les époux ne peuvent non plus s'avantager entre vifs si ce n'est conformément aux dispositions de la loi qui permettent au mari, sous certaines restrictions et conditions, d'assurer sa vie pour le bénéfice de sa femme et de ses enfants.

Cet article consacre le principe de l'immutabilité des conventions matrimoniales. Mais vise-t-il simplement les conventions matrimoniales proprement dites ou également celles qui sont susceptibles d'existence indépendamment du contrat de mariage, comme c'est le cas de cette convention de libéralité intervenue exclusivement entre Comtois

1957

TROYSCO MINES LTD. v. COMTOIS et al.

Fauteux J.

père et son fils? Il ne paraît pas nécessaire de s'arrêter à la question. On notera cependant qu'une telle distinction a été faite dans *Dufresne v. dame Dufresne* (1), et qu'elle a donné lieu au maintien d'une convention de libéralité apparaissant dans un contrat de mariage dont la nullité fut reconnue. Ce qui est certain, c'est que si le principe d'immutabilité consacré par l'art. 1265 couvre cette donation de biens présents faite, par acte authentique, par Isaïe Comtois père exclusivement à son fils acceptant, la correction de l'erreur cléricale dénoncée par toutes les parties au contrat n'offense pas mais satisfait plutôt le principe de l'immutabilité. En faisant cette correction, l'intention et la volonté des parties à cette donation apparaissant au contrat de mariage, ont reçu la plénitude de leur exécution. En fait, l'objet réel de la donation n'a pas été changé, mais sa description en a été simplement corrigée. Cette autre objection ne peut valoir.

L'appelante, se référant à un avis donné au régistrateur par Isaïe Comtois fils, suivant les dispositions de l'art. 2172 C.C., veut y voir l'aveu que ce dernier n'était plus propriétaire du "droit de mine". Aux vues de l'appelante, cet aveu découlerait nécessairement du fait que Comtois fils ne fait en cet avis aucune référence au "droit de mine". Dans cet avis, ce dernier déclare que les lots 20-c et 21-c appartiennent à Clovis Richer en vertu de l'acte de vente du 24 septembre 1889, et qu'il donne cet avis pour renouveler l'enregistrement de tous les droits réels et de toutes les hypothèques lui résultant de cette vente. Comtois fils avait intérêt à donner cet avis; il restait une balance de prix de vente et l'hypothèque légale du vendeur non payé demeurait. Dans ces termes, la dernière partie de l'avis couvrant les droits réels n'exclut pas le droit aux mines et minerais. D'ailleurs, sur ces derniers, Comtois fils avait un droit de propriété et la conservation du droit de propriété n'était pas assujettie à la formalité du renouvellement de l'enregistrement du titre après la mise en vigueur du cadastre: *Duchaine v. The Matamajaw Salmon Club (Lted.)* (2); *Goldstein v. Allard et vir.* (3). Aussi bien, si l'on peut dire

(1) (1918), 28 Que. K.B. 318. (2) (1917), 27 Que. K.B. 196.
(3) (1912), 42 Que. S.C. 255.

que Comtois a fait plus que satisfaire aux exigences de l'art. 2172, il n'a pas, pour cette raison, perdu ses droits. Il n'y a pas, dans cette déclaration, l'aveu qu'on prétend y voir.

Au titre de la procédure, il n'y a, je crois, qu'un grief à retenir. Le procureur de l'appelante a soumis que l'intimé Flintkote Mines Limited ne saurait de toutes façons, à l'instar des intimés Comtois, être, avec eux, déclaré copropriétaire indivis d'au moins 50 pour cent des mines et minerais en question, les droits de cette compagnie se limitant à ceux lui résultant d'une option à elle consentie, en juin 1953, par les intimés Comtois. A mon avis, l'appelante ne peut utilement soulever ce moyen. Les relations juridiques existant entre les Comtois et Flintkote Mines Limited sont, en ce qui concerne l'appelante, *res inter alios acta.*

L'appelante n'a pas démontré que le jugement de la Cour d'Appel est mal fondé et, en conséquence, son appel à cette Cour doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Edouard Masson, Montreal.

Solicitors for the plaintiffs, respondents: Desruisseaux & Fortin, Sherbrooke.

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

AND

LE PROCUREUR GENERAL DE LA PROVINCE DE QUEBEC REPRESENTANT SA MAJESTE AU DROITS DE LA PROVINCE (*Defendant*) ..... RESPONDENT;

AND

JEAN DESLOGES AND LE SHERIF DU DISTRICT DE MONTREAL .. MIS-EN-CAUSE.

1957
*Mar. 14
May 13

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

Barristers and solicitors—Disavowal of attorney's act—When formal proceedings en désaveu required—Code of Civil Procedure, art. 251.

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

1957

BOILEAU
v.
A.G. OF QUEBEC
et al.

Judicial sales—Validity—Nullity of sale based on invalid judgment—How asserted—Opposition to judgment—Code of Civil Procedure, arts. 781, 784.

Deeds and Documents—Invalidity—When inscription en faux required—Forgery of bail bond.

One P, charged with theft, was admitted to bail on a bond signed by him and by an unknown person who signed the plaintiff's name and pledged property in Montreal belonging to the plaintiff. P did not appear; the bail was forfeited and judgment was pronounced against P and the plaintiff for $3,000. P instructed an attorney to present a *requête civile* and this was done in the names of P and the plaintiff, but the attorney was not instructed by the plaintiff. The *requête civile* was dismissed and, eventually, the plaintiff's lands were sold by the sheriff to D.

Some three months after the sale, the plaintiff learned, for the first time, of the proceedings and immediately filed an opposition to the judgment against him, asking that the judgment and sale be set aside.

Held: The plaintiff was entitled to succeed on his opposition, notwithstanding the fact that he had not taken proceedings *en désaveu* under art. 251 of the *Code of Civil Procedure.*

Per Taschereau, Cartwright, Fauteux and Abbott JJ.: Article 251 makes a *requête en désaveu* essential in the case of an attorney *ad litem* who has exceeded his powers, *i.e.*, an attorney who has been retained but has gone beyond the terms of his retainer. Where, however, the attorney has acted without instructions from the party, proceedings in disavowal are optional, since the article expressly provides that the rights of the party are not prejudiced if he does not take such proceedings. *Cooke v. Caron et al.* (1884), 10 Q.L.R. 152; 11 Q.L.R. 268, approved. Article 251, in this respect, differs from the corresponding article of the French *code of procedure* and the French decisions are therefore inapplicable.

The plaintiff was not required to proceed by *inscription en faux* to set aside the bail bond. Such an inscription was essential where the good faith of the public officer was attacked but where, as here, the prothonotary had recorded exactly what took place before him, and the cause of nullity was the fraud of the unknown person who had signed the plaintiff's name, such an inscription was not required.

Although D had, in good faith, obtained a title from the sheriff, the sale could nevertheless be invalidated where there had been illegality in obtaining it. A petition in nullity under art. 784 of the *Code of Civil Procedure* was not the only remedy available and a direct action or an opposition to judgment was equally available. Since the judgment was completely invalid because of the personation, the sale must also be set aside, reserving, however, D's right to recover the amount he had paid to the sheriff.

Per Rand and Cartwright JJ.: The absence of disavowal, under art. 251, in order to constitute a bar to an opposition to judgment, must be in relation to the very proceeding attacked by the opposition. These proceedings were brought for the annulment of the original judgment, which was pronounced *ex parte*, and the *requête civile* was a subordinate proceeding. If the judgment was set aside, everything depending on it automatically fell. Since it was only the original judgment with which the opposition was concerned, no question of disavowal could arise. Since the judgment must be declared to be a nullity, the judicial sale based on it was equally null.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing a judgment of Edge J. Appeal allowed.

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

R. Beaudet, Q.C., and *C. A. Séguin, Q.C.*, for the defendant, respondent.

Yvon Desloges for the *mis-en-cause* Desloges.

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

TASCHEREAU J.:—Les faits essentiels à la détermination de la présente cause peuvent être brièvement résumés.

Dans le cours du mois d'avril 1953, un nommé Frank Perreault a été accusé de vol dans le district d'Arthabaska, mais en attendant l'instruction de son procès il a été conditionnellement libéré, après qu'un cautionnement hypothécaire de $3,000 fut fourni. Ce cautionnement, signé par Perreault et par un nommé Roland Boileau, a été enregistré sur une propriété portant le numéro cadastral 299 du quartier St-Louis, et dont les numéros civiques sont 1215-1217 de la rue St-Dominique à Montréal. Il est certain que cet immeuble était la propriété de l'appelant, dont le nom apparaît comme ayant fourni le cautionnement, mais il est également certain que ce n'est pas l'appelant qui a apposé sa signature. Cette autre personne qui l'aurait apposée n'a pas été identifiée. Le protonotaire devant qui le cautionnement a été donné a juré que celui qui l'a signé n'est pas l'appelant, et tout le reste de la preuve est au même effet.

Le jour du procès de Perreault, soit le 21 octobre 1953, ce dernier a fait défaut de comparaître, et le 30 décembre 1953, par jugement de la Cour Supérieure, le cautionnement a été déclaré confisqué au profit de la Couronne, et Perreault et l'appelant ont été condamnés conjointement et solidairement à payer la somme de $3,000.

Le 7 janvier 1954, Frank Perreault qui se trouvait en prison a donné instructions à Me Paul Demers, avocat de Victoriaville, de présenter une requête civile pour faire surseoir à la vente des immeubles, et pour faire annuler le jugement rendu le 30 décembre 1953. A la requête, le nom de l'appelant Roland Boileau a été ajouté comme requérant.

(1) [1956] Que. Q.B. 593.

1957

BOILEAU v. A.G. OF QUEBEC et al.

Taschereau J.

avec celui de Frank Perreault. Le 15 mars 1954, l'honorable Juge Alfred Savard a rendu jugement, rejetant la requête civile avec dépens, et de ce jugement il n'y a pas eu d'appel.

Me Paul Demers, entendu comme témoin, a juré qu'il a reçu ses instructions de Perreault seul, et qu'il n'a jamais rencontré l'appelant Boileau malgré qu'il ait demandé à Perreault de communiquer avec lui. Ce n'est qu'à l'audition de l'opposition à jugement, qui fait l'objet du présent appel, que Me Demers a vu Boileau pour la première fois. Ce dernier n'a donc jamais donné aucune instruction à personne d'agir en son nom pour loger cette requête civile.

Dans le cours du mois de mai 1954, un huissier de la Cour Supérieure a exécuté un bref de *fieri facias* contre les biens mobiliers de l'appelant, situés à 1217 St-Dominique, mais comme il n'a pu trouver l'appelant, il a laissé une copie du bref au bureau du protonotaire de la Cour Supérieure à Montréal, et le même jour il a fait un rapport de *nulla bona*. Les propriétés ont en conséquence été saisies le même jour en exécution du jugement antérieurement rendu par le protonotaire. En juillet 1954, la propriété a été vendue par le shérif, et adjugée au mis-en-cause Jean Desloges, pour la somme de $1,700.

Le 16 août 1954, l'appelant Roland Boileau a fait opposition au jugement rendu par le protonotaire le 30 décembre 1953, qui le condamna à payer $3,000 à la Couronne, et demanda que ledit jugement et que la vente de sa propriété en exécution de ce même jugement par le shérif au mis-en-cause Desloges en date du 9 juillet 1954, soient annulés à toutes fins que de droit. La Couronne a contesté cette opposition en disant que l'appelant connaissait le jugement du 30 décembre 1953, dès le moment où il a été rendu, et soutient cette prétention par le fait que le 12 janvier 1954 il a présenté une requête civile. Or, l'on sait qu'une opposition à jugement, en vertu des termes du *Code de procédure civile*, doit être produite dans les quinze jours de la signification du jugement (C.P. arts. 1166 et 1167).

La Cour Supérieure a maintenu l'opposition de l'appelant, a annulé le jugement rendu par le protonotaire pour confiscation de cautionnement rendu par défaut contre lui, le 30 décembre 1953; a cassé et annulé toutes les procédures d'exécution émises contre l'appelant, et a déclaré nulle la vente par le shérif au mis-en-cause Desloges.

La Cour d'Appel a fait droit à l'appel et a rejeté l'opposition avec dépens, M. le juge S. McDougall dissident.

Il faut en premier lieu retenir de toute la preuve qui a été offerte, que l'appelant Boileau n'a jamais signé le cautionnement qui a été enregistré sur sa propriété, et qu'il n'a pas plus autorisé Me Demers à instituer en son nom des procédures en requête civile pour faire révoquer le jugement de confiscation de cautionnement en date du 30 décembre 1953. Il ignorait aussi totalement que sa propriété avait été vendue par le shérif, et ce n'est que lorsqu'il a voulu percevoir ses loyers, ce qu'il faisait d'une façon très irrégulière, qu'on lui a appris que les locataires avaient payé au nouveau propriétaire, le mis-en-cause. C'est alors qu'il se rendit, le 6 août 1954, au greffe de la Cour Supérieure du district d'Arthabaska, et qu'il a su définitivement que son immeuble avait été vendu en satisfaction du jugement rendu par le protonotaire. Le 16 août, par conséquent dans les délais prévus au *Code de procédure civile,* il produisit son opposition à jugement. La prétention de l'intimé à l'effet qu'il était au courant de ce jugement lorsqu'il a produit sa requête civile ne peut être accueillie. La preuve me semble concluante qu'il n'a jamais autorisé personne à instituer ces procédures, qu'il n'a jamais parlé de cette affaire à qui que ce soit, et son opposition n'est donc pas tardive.

L'intimé prétend aussi que si l'appelant n'a pas autorisé la production de la requête civile, son seul recours était une requête en désaveu (art. 251 C.P.), et qu'à défaut de se prévaloir de ce moyen, les effets de la requête civile subsistent. Avec déférence, je ne crois pas ce moyen fondé. L'article 251 C.P. se lit ainsi:

> 251. La partie peut désavouer le procureur *ad litem* qui excède ses pouvoirs. Elle peut également désavouer celui qu'elle n'a pas constitué, *sans préjudice de ses droits si elle ne le fait pas.*

On a cité une nombreuse jurisprudence et des autorités pour établir qu'en France le désaveu est d'une impérieuse nécessité, et qu'à défaut de s'en prévaloir, la procédure non désavouée demeure et ne peut être répudiée.

Mais en France, le *Code de procédure* ne fait pas la distinction que fait le nôtre d'une façon non équivoqe. Cheznous, le législateur a clairement divisé le cas du procureur qui a été constitué *ad litem* et qui, dans l'exercice de son

1957

BOILEAU v. A.G. OF QUEBEC et al.

Taschereau J.

mandat, excède ses pouvoirs, et celui de cet autre procureur qui n'a pas été constitué, n'ayant reçu aucun mandat. En vertu de l'art. 251 de notre Code, dans le premier cas, il faut avoir recours au désaveu pour répudier des actes non autorisés. Dans le second cas, cette procédure est également permise, mais n'est pas de rigueur, et si la partie juge à propos de ne pas s'en prévaloir, ce sera sans préjudice à ses droits. C'est-à-dire que d'autres recours lui sont donnés, comme ceux qui appartiennent à une personne qui veut répudier les actes de celui qui, sans autorisation, a assumé le rôle de mandataire.

La jurisprudence de Québec n'est pas riche sur ce point, et je crois que la cause qui se rapproche davantage de celle que nous avons à décider est celle de *Cooke v. Caron et al.*, jugée en premier lieu par la Cour de Revision (1) et en second lieu par la Cour du Banc de la Reine (2). Dans cette cause il a été décidé que le désaveu par requête n'était pas nécessaire parce que les procureurs *ad litem* désavoués avaient produit une admission écrite de leur part qu'ils n'étaient pas autorisés à produire une comparution. Dans le cas qui nous occupe, Me Demers a admis, comme dans la cause de *Cooke v. Caron et al.* que j'ai citée précédemment, qu'il n'avait reçu aucune instruction de l'appelant.

Il y a donc similitude entre les deux cas. De plus, M. le Juge Casault, l'un des juges qui a siégé en Cour de Revision, s'exprime de la façon suivante à la page 155:

> Dans ce cas, il y a mandat, et le mandant ne peut désavouer et répudier que ce qui n'était pas compris dans le pouvoir général que le mandat conférait au mandataire ou qui n'avait pas été spécialement autorisé; *mais, lorsqu'il n'y a aucun mandat quelconque et que celui qui a comparu n'avait pas été constitué par la partie, il n'y a pas eu de représentation valable de la partie; la nullité est, par là-même, radicale,* et tout ce que la présence d'un procureur la représentant a pu autoriser, permettre ou valider est un consentement non autorisé qui, après jugement, donne lieu à la requête civile.

Je crois donc que les auteurs français qui ont été cités ne peuvent jeter aucune lumière sur le cas qui nous occupe, pas plus que les jugements de la province de Québec dans *Courchaine v. Courchaine et al.* (3); *Dorion v. Dorion* (4), et *Fournier et vir v. Trépanier et Paradis* (5). Dans ces dernières causes, il s'agissait de cas où le procureur avait été

(1) (1884), 10 Q.L.R. 152.
(2) (1884), 11 Q.L.R. 268.
(3) (1907), 9 Que. P.R. 54.
(4) (1892), 2 Que. S.C. 264.
(5) (1894), 5 Que. S.C. 129.

effectivement constitué, mais avait dépassé les limites du mandat qui lui avait été confié. On a donc justement appliqué les principes contenus dans la première partie de l'art. 251 C.P.

L'intimé soutient aussi que l'authenticité du cautionnement fourni par l'appelant ne pouvait être attaquée qu'au moyen d'une inscription en faux. Sa prétention est que le cautionnement qu'il a donné est un acte authentique (C.C. 1207) qui, en vertu de l'art. 1211 du *Code Civil,* ne peut être mis de côté en tout ou en partie, qu'en suivant les prescriptions des arts. 225 et suivants du *Code de procédure civile.*

La jurisprudence sur la nécessité de se pourvoir par inscription en faux est bien établie, et on doit avoir recours à ce moyen lorsque la véracité de l'officier public est mise en question. Lorsque ce dernier a fidèlement relaté ce qu'il a vu et entendu, la procédure par inscription en faux n'est pas nécessaire. Comme le dit M. le Juge Archambault dans une cause de *Tétreault v. Desserres* (1):

> . . . l'acte authentique ne peut être contredit et mis à néant comme faux en tout ou en partie que sur inscription en faux, . . . en la manière prescrite au Code de procédure . . . Du moment que l'on n'attaque pas la validité ou la sincérité de l'officier public, du notaire devant qui l'acte a été passé, l'inscription en faux n'est pas nécessaire, mais lorsqu'il s'agit d'un fait que l'officier public a constaté lui-même, la preuve contraire sans une inscription en faux lorsqu'une objection formelle a été faite . . . doit être rejetée . . .

On pourra consulter également au même effet, Langelier, De la Preuve (1894), p. 168; *Anderson v. Prévost et al.* (2); *Cloutier v. Baron* (3); *Phoenix Assurance Company Limited, of London, England v. Lagueux* (4); *Doyon v. Doyon* (5).

Dans le cas qui nous occupe, la sincérité du protonotaire n'a pas été mise en doute et, en conséquence, il n'était nullement nécessaire de procéder par inscription en faux.

Le dernier moyen invoqué est que l'adjudicataire de l'immeuble et mis-en-cause Desloges a obtenu de bonne foi un titre du shérif et que, dans l'occurrence, la nullité du décret ne peut être prononcée au bénéfice de l'appelant.

(1) (1940), 47 R. de Jur. 156.
(2) (1903), 28 Que. S.C. 434.
(3) (1922), 34 Que. K.B. 291.
(4) (1922), 38 R.L.N.S. 474.
(5) (1871), 3 R.L.O.S. 445.

1957

BOILEAU
v.
A.G. OF QUEBEC
et al.

Taschereau J.

On sait qu'en vertu des dispositions de l'art. 781 du *Code de procédure civile,* le décret purge *tous les droits réels* non compris dans les conditions de la vente, sauf quelques exceptions qui y sont mentionnées. En vertu de l'art. 784, le décret peut être déclaré nul à la poursuite du saisi ou de tout créancier ou autre intéressé, s'il y a eu dol ou artifices à la connaissance de l'adjudicataire pour écarter les enchères; ou encore si les conditions et formalités essentielles prescrites pour la vente n'ont pas été observées.

Dans le cas qui nous occupe, le saisi, appelant dans la présente cause, n'a pas procédé par voie de requête en nullité de décret mais par voie d'opposition. La requête en nullité de décret mentionnée à cet art. 784 n'est pas le seul remède qui appartienne à une partie intéressée, et le décret peut également être mis de côté si le recours est exercé par action directe. Dans une cause de *La Corporation de la Partie Sud de la Paroisse du Sacré-Cœur-de-Marie v. Barquin et Fontaine et al.* (1), il a été décidé qu'une demande en nullité de décret peut être poursuivie par voie d'action directe, pourvu que cette action contienne tout ce qui est essentiel à la requête. *Vide* également *Paul v. Giroux et McNamara et al.* (2), et *Lizotte v. Gasse* (3). Dans *Trudeau et al. v. Devost* (4), cette Cour a aussi décidé qu'une action comprend nécessairement une requête, et que le fait d'annexer à une demande un bref de sommation ne peut avoir pour effet d'invalider la procédure. Je suis en outre d'opinion que si le recours en nullité de décret peut être exercé par action directe, il peut également l'être par opposition à jugement, comme dans le présent cas, où les procédures par opposition ont été instituées moins de six semaines après la date de la vente par le shérif au mis-en-cause Desloges.

Le titre consenti par le shérif est évidemment un titre auquel on ne doit toucher qu'avec une extrême prudence. Mais il y a des cas où le décret a été annulé même pour des raisons non mentionnées spécifiquement à l'art. 784 C.P. A part des cas fréquents, où le titre du shérif a été déclaré nul parce que la vente avait été faite *super non domino,* con-

(1) (1920), 30 Que. K.B. 121.
(2) (1938), 41 Que. P.R. 327.
(3) (1938), 41 Que. P.R. 404.
(4) [1942] S.C.R. 257, [1942] 4 D.L.R. 420.

trairement aux dispositions de l'art. 699 C.P.C. (*Patton v. Morin* (1); *Dufresne et al. v. Dixon* (2)), il y en a d'autres où, par exemple, la Cour a déclaré nuls le jugement sur action hypothécaire obtenu contre un défendeur, *et le décret* qui s'en est suivi, parce que le défendeur n'avait pas été légalement assigné devant le tribunal: *Legault v. Surprenant; Paquin v. Surprenant* (3). Dans ses raisons, l'honorable Juge Dorion cite la cause de *Turcotte v. Dansereau* (4), où il a été décidé qu'un jugement obtenu sur une signification fausse était invalide et de nul effet. Si un jugement obtenu après au faux rapport de signification d'un huissier doit être déclaré invalide, ainsi en est-il du cas où la prétendue créance contre le débiteur saisi est représentée par un jugement qui est nul, parce que basé sur un faux document. Le saisi ne devait rien, n'était débiteur de personne, et il ignorait cette saisie et cette vente. Il serait inconcevable qu'un remède ne puisse être apporté à une semblable injustice.

Le mis-en-cause était évidemment de bonne foi. Il s'est porté adjudicataire de cet immeuble, a payé la somme de $1,700 et a obtenu un titre du shérif. Aussi importe-t-il de ne lui imposer aucuns frais, et de lui réserver tous les recours qu'il peut avoir de répéter le montant qu'il a payé. La même réserve doit également être faite en faveur de l'appelant pour le recouvrement des loyers échus et perçus depuis l'adjudication.

L'appel doit donc être maintenu avec dépens de toutes les Cours contre l'intimé. Le jugement de la Cour Supérieure doit être modifié en y ajoutant que les droits que peut avoir le mis-en-cause Desloges, de recouvrer la somme de $1,700 qu'il a payée pour le prix d'adjudication lui sont réservés, de même que ceux de l'appelant en ce qui concerne les loyers qu'il n'a pas perçus. Il n'y aura pas d'ordonnance quant aux frais contre les mis-en-cause.

RAND J.:—The material facts in this appeal can best be appreciated by stating them chronologically. In April 1953 a man named Perreault was accused of theft and placed under arrest. In the same month he was released on bail in the sum of $3,000 under a bond signed by himself and as surety by one whose signature was in the name Roland

(1) (1865), 16 Low. Can. R. 267.
(2) (1889), 16 S.C.R. 596.
(3) (1925), 40 Que. K.B. 228.
(4) (1897), 27 S.C.R. 583.

1957

BOILEAU v. A.G. OF QUEBEC et al.

Rand J.

Boileau. As an additional security the latter purported to hypothecate a lot of land bearing nos. 1215-1217 St. Dominique Street, Montreal. Perreault failed to appear in court on October 21, 1953, the appropriate day, and the bond was declared forfeited. On December 30, 1953, in the Superior Court, judgment was entered by the prothonotary against both Perreault and Boileau for the sum of $3,000 with interest and costs. On January 7, 1954, an application was made by an attorney on behalf of Perreault and purportedly of Boileau by way of *requête civile* to recall the judgment on the ground, in substance, that there had been no default in the condition of the bond, and on March 16, 1954, this was rejected. On April 9, 1954, execution was issued and after a return of *nulla bona* the property at 1215-1217 St. Dominique Street was on May 6 levied on and on July 9, 1954, sold for $1,700.

In this I am assuming the facts to indicate that the name on the bond was intended to designate the appellant. The attorney, acting on the *requête civile,* clearly intended to act not for the appellant as owner of the property, but for the person, whoever he was, who signed the bond as surety. The same can be said of the intention of the officer entering judgment. I put all that aside, however, and treat the plaintiff, personally unknown to both the attorney and the representative of the Crown, to have been the person against and on behalf of whom the various steps were intended to be taken.

The property consisted of a lodging-house and on or about August 7, 1954, Boileau, in course of collecting the rents from a woman in charge, was told that they had been paid to another who had become owner. As a result of what he subsequently learned, on August 16, 1954, the present proceedings by way of opposition to judgment were commenced.

The ground on which they are based is that the appellant, the owner of the property described, was not the person who signed or authorized the signature to the bond, that so far as the name can be taken to designate him, the signature was a forgery.

At the trial the appellant and the attorney who had initiated the *requête civile* were witnesses. It was admitted by the latter that, realizing the application would have to

be made on behalf of both parties to the bond, he intended to represent not only Perreault who instructed him, but also the person who signed the bond, but that he did not know who that man was and had no communication with him, neither is it suggested by him or by anything brought before the Court that Perreault did more than, on his own behalf, request the attorney to try to have the judgment revoked.

Edge J. in the Superior Court found as a fact that the signature was not that of the appellant and that there was no authorization by him to anyone to sign the bond and that the case was a simple one of forgery by a person unknown who with Perreault had conspired to bring about a fraud on the Court. He thereupon allowed the action, set aside the judgment and declared all the proceedings taken on it to be void.

In the Court of Queen's Bench the question that assumed controlling importance was this: by art. 251 of the *Code of Civil Procedure* provision is made for the disavowal of an attorney *ad litem* who has exceeded his powers or has acted without any authority whatever. This disavowal under the settled rules must be asserted by an independent proceeding instituted against the attorney and the issue of authority or not must be decided before the action in which it is raised, such as the opposition to judgment here, can be carried to adjudication.

Applying this article to the *requête civile,* it was held, McDougall J. dissenting, that no step in disavowal having been taken against the attorney in respect of the judgment of rejection of March 16, 1954, there was a fatal omission of a condition precedent to the present proceeding and that the judgment of Edge J. must be set aside.

Martineau J. in a thorough examination of the question reviewed the law of France and Quebec and there is no doubt that the general principle enunciated in the authorities cited is well established. In the second paragraph of art. 251, which deals with the case of a total absence of authority, the failure of a disavowal is declared to be "without prejudice to [the] rights [of the party]". This proviso, I agree, is somewhat obscure, but in any consideration of

1957

BOILEAU v. A.G. OF QUEBEC et al.

Rand J.

it the fact should not be overlooked that there is no such reservation in the corresponding article of the *Code of Procedure* of France.

With the greatest respect, however, an examination of the articles which elaborate the rule of disavowal makes it, I think, abundantly clear that the failure of disavowal must be in relation to the judgment or other act which is the object of attack in the proceeding in opposition. For instance, art. 253 limits the disavowal to the party or his attorney under a special power and the party himself must declare "that he did not authorize *the proceeding which he repudiates*"; art. 254 follows this in using the language "a declaration that the party disavows *the act in question* as never having authorized the same"; art. 258 declares that "if the disavowal is maintained, *the acts disavowed are annulled*".

What, then, was the act for the annulment of which these proceedings were brought? It was obviously the original judgment which was entered under the authority of s. 1115 of the former *Criminal Code*. That was done *ex parte*, and in the absence of both of the parties to the bond and of any person representing either of them. The application made in January to set aside that judgment is a subordinate proceeding, the validity of which, by the challenge now made, rests entirely upon the validity of the former; if that is set aside, everything depending on it automatically falls.

This was the view taken by the parties in the pleadings. The opposition makes no mention of the *requête* but goes straight to the judgment as having been signed without jurisdiction over the appellant. The defence raised the matter of the application but not for the purpose of showing that disavowal proceedings had not been taken; it was raised expressly for the purpose of showing knowledge in the appellant of the bail bond and of the original proceedings at least as early as January 1954, and that he had by that step acknowledged himself to be the surety named.

Since, then, it is the original judgment alone with which the opposition is concerned, no question of disavowal arises. The *requête* proceeding, apart from its evidential value of notice or of admission, is not in issue; its validity is wrapped up in that of the original judgment; and the question on which the Court of Queen's Bench proceeded does not arise.

The findings of fact by Edge J. seem to me to follow necessarily from the evidence; and they show that Boileau, the appellant, had no connection with any of the steps taken in his name, that the Court never had jurisdiction over him, and that the entire proceedings are a nullity.

A question remains of the position of the *mis-en-cause*. I agree with my brother Taschereau that where what bears the form of a judgment is declared to be a nullity, a judicial sale based on it, as in this case, is equally null. The contrary was not seriously urged before us. I agree also with the reservations proposed by him to be embodied in the judgment as to both the *mis-en-cause* and the appellant. There will be no costs in any court against the *mis-en-cause* and the appellant will have his costs against the respondent throughout.

CARTWRIGHT J.:—I agree with the reasons of my brother Taschereau and those of my brother Rand, and would accordingly dispose of the appeal as proposed by my brother Taschereau.

Appeal allowed.

Solicitors for the appellant: Hyde & Ahern, Montreal.

Solicitor for the respondent: Raymond Beaudet, Victoriaville.

1957
*Feb. 7, 8, 11, 12
May 13

LA CITE DE SHERBROOKE (*Defendant*), DOMINION TEXTILE COMPANY LIMITED, DOMIL LIMITED, CANADIAN INGERSOLL - RAND COMPANY LIMITED, PATON MANUFACTURING COMPANY LIMITED (*Mis-en-cause*) ..... APPELLANTS;

AND

LE BUREAU DES COMMISSAIRES D'ECOLES CATHOLIQUES ROMAINS DE LA CITE DE SHERBROOKE (*Plaintiff*) ..... RESPONDENT;

AND

J. H. BRYANT LIMITED ET AL. .....MIS-EN-CAUSE.

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

Taxation—Municipal land taxes—"Immoveables"—Machinery placed in a building and used in the operation of an industry—Whether immoveable by destination—Meaning of "à perpétuelle demeure"—Cities and Towns Act, R.S.Q. 1941, c. 233, s. 488—Civil Code, arts. 379, 380.

The plaintiff sought to have included in the assessment roll of the defendant city as a taxable immoveable under s. 488 of the *Cities and Towns Act*, R.S.Q. 1941, c. 233, certain machinery owned and used by the defendant companies in the operation of their industries, on the ground that it had become immoveable by destination. The Courts below found as a fact that none of the machinery was actually incorporated into the buildings. The trial judge held the machinery to be moveable but this judgment was reversed by the Court of Appeal.

Held: The machinery had become immoveable by destination and was therefore taxable under s. 488 of the *Cities and Towns Act*.

Per Taschereau, Fauteux and Abbott JJ.: In France, there are two ways by which a moveable object can become immoveable by destination: (i) when the object is placed on an immoveable for its service even without any physical attachment and without any necessity of permanency; and (ii) when it is physically attached to the immoveable "à perpétuelle demeure". The same two means of immobilization exist in the Quebec law, but with the difference that here the moveable must be placed "à perpétuelle demeure" in both cases. The French doctrine of industrial and agricultural immobilization exists in the Quebec law if the object is placed permanently, that is to say, with the intention to keep it there so long as it remains useful, but not excluding the possibility of replacement or even removal in the future.

*PRESENT: Taschereau, Kellock, Fauteux, Abbott and Nolan JJ.

Article 379 of the *Civil Code,* which merely requires that the moveable be placed permanently and which is not limitative, is sufficient to immobilize by destination, without the necessity of referring to art. 380, which creates only a presumption *juris tantum* of immobilization when the moveables are physically attached to an immoveable. In the case at bar, the machinery was placed for a permanency within the meaning of art. 379 in the building for the purpose of industry, it was indispensable for the operation of the industry and was an essential accessory to the buildings in which it was placed "à perpétuelle demeure". This rendered the machinery immoveable under art. 379 and it was not necessary to resort to art. 380 to complete the immobilization.

Per Kellock and Nolan JJ.: If the proprietor of a building suitable for an industrial process places in it machinery for the purpose of carrying on that process permanently and not merely temporarily, such machinery becomes immobilized under art. 379 of the *Civil Code,* whether or not any part of it falls within the first paragraph of art. 380. It does not matter if the same building could be devoted equally well to some other industrial purpose; nor will its nature be changed merely by some happening that results in the abandonment of the intention to carry on permanently. The evidence of the proprietor as to his intention is, at the least, admissible evidence.

The word "attached" in art. 380 does not mean "physically attached", but rather "joined" or "united" or "annexed" or "appropriated (affecté)" to the realty.

The words "à perpétuelle demeure" must have the same meaning in both arts. 379 and 380 of the Code. If the moveable is fastened in a durable manner, or if it is not removable without breakage or without destruction or deterioration, or if it serves to complete or perfect the realty, then it is placed "à perpétuelle demeure". What is envisaged by para. 2 of art. 379 is a building designed for the carrying on of the enterprise therein mentioned. In the case at bar, the machinery was placed upon the premises to complete them.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment of Marchand J. Appeal dismissed.

A. Rivard, for the City of Sherbrooke, appellant.

R. C. Holden, Q.C., for Dominion Textile Company Limited and Domil Limited, appellants.

J. Sénécal, Q.C., and *J. Chassé,* for Canadian Ingersoll-Rand Company Limited, appellant.

G. Monette, Q.C., for Paton Manufacturing Company Limited, appellant.

Evender Veilleux, Q.C., for the plaintiff, respondent.

(1) [1956] Que. Q.B. 639.

1957

CITY OF SHERBROOKE *et al.* v. COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

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

TASCHEREAU J.:—Le litige qui nous est soumis présente de très sérieuses difficultés légales, et sa solution aura sans doute une influence considérable sur l'économie industrielle et sur le pouvoir de taxation des cités et villes.

A Sherbrooke, comme dans bien d'autres endroits de la province, la ville doit préparer le rôle d'évaluation, qui sert également de base à la taxe scolaire. Pour l'année 1954, des experts nommés par la ville, ont évalué les propriétés imposables, mais, avec l'assentiment du conseil, et malgré des représentations opposées, certaines machineries propriétés de 265 manufactures et industries, n'ont pas été portées au rôle. La prétention était, comme elle l'est encore, que ces machineries, n'étant pas immeubles, mais bien des effets mobiliers, n'étaient pas assujetties à la taxation foncière. Le rôle d'évaluation fut donc homologué, sans mention de ces machineries, dont la valeur était de $4,706,446.85.

La commission scolaire, intimée dans la présente cause, et dont le budget se trouvait sérieusement affecté par cette omission, s'autorisant d'un amendement apporté à la loi, par la Législature de Québec, institua alors des procédures légales qui ont abouti jusqu'à cette Cour.

Le bureau des commissaires porta plainte devant le bureau de revision, et ce dernier, alléguant absence de juridiction, refusa d'entendre la plainte. L'affaire fut alors référée au conseil municipal de la cité de Sherbrooke, qui en vint à la conclusion que les biens en question n'étaient pas des immeubles, et, en conséquence, maintint le rôle tel que préparé par les estimateurs, et rejeta le protêt de la commission scolaire catholique romaine de Sherbrooke.

Le bureau des commissaires en appela à la Cour de magistrat du district de Saint-François, et M. le juge Marchand, le 30 mai 1955, confirma la décision du conseil de la cité de Sherbrooke, maintint le rôle tel que préparé par les estimateurs, et rejeta également le protêt de la commission scolaire de Sherbrooke. La Cour du Banc de la Reine fut saisie à son tour de la question et le 28 mars 1956, maintint l'appel (1) de la commission scolaire, et

(1) [1956] Que. Q.B. 639.

ordonna à la cité de Sherbrooke d'ajouter à son rôle d'évaluation la valeur de la machinerie apparaissant à la liste appelée "machineries supplémentaires", et appartenant aux mis-en-cause.

Les parties ne contestent pas les faits tels qu'ils ont été établis par M. le juge Marchand. Le magistrat s'exprime dans les termes suivants:

> Comme résumé de la preuve, on peut dire que les mis-en-cause, à l'exception de deux sont propriétaires d'établissements ou bâtisses que l'on a qualifiés d'industriels ou commerciaux, et que ladite machinerie "Supplementary Machinery" se trouve dans les dits établissements et est utilisée pour les fins de l'industrie ou du commerce y exploités. Il a été établi en outre que cette machinerie se trouve dans les dits établissements pour un temps indéfini, en ce sens que ladite "machinerie, en autant que les mis-en-cause maintiendront leurs opérations actuelles, sera utilisée tant qu'elle sera en état de fonctionner ou tant qu'elle ne sera pas remplacée par une autre machinerie plus moderne ou plus apte à donner un meilleur rendement, mais sans qu'il puisse être déterminé actuellement à quelle époque la machinerie peut être ainsi remplacée. Il a été établi également que la presque totalité de ladite machinerie est retenue à des planchers de ciment ou de bois par vis ou 'lag-screws', soit pour empêcher ou diminuer la vibration, soit pour la maintenir en alignement".

Il s'agit donc de déterminer la nature de ces machineries. Si ce sont des immeubles, le jugement de la Cour du Banc de la Reine doit être confirmé; si ce sont des biens mobiliers, le jugement de M. le juge Marchand est bien fondé, et doit être rétabli.

Les articles de la *Loi des cités et villes*, S.R.Q. 1941, c. 233, qu'il est nécessaire de considérer pour arriver à la détermination de la présente cause, sont les suivants:

> 485. Il est du devoir des estimateurs de faire, chaque année, au temps et en la manière ordonnés par le conseil, *l'évaluation des biens imposables* de la municipalité, suivant leur *valeur réelle*.
>
> 488. Les *immeubles imposables* dans la municipalité *comprennent* les terrains, les constructions et les usines qui *y sont érigées* et toutes *améliorations qui y ont été faites*, de même que les machineries et *accessoires qui sont immeubles par destination* ou qui le seraient, s'ils appartenaient au propriétaire du fonds. La *valeur réelle* du tout *est portée au rôle d'évaluation* au nom du propriétaire du fonds; mais si ce dernier prouve aux estimateurs que des machineries ou accessoires ont été placés par un locataire ou autre occupant, la valeur de ces machineries et accessoires est portée au nom du locataire ou occupant qui les possède et qui, à cet égard, est traité comme un propriétaire d'immeubles imposables.
>
> 521. Le conseil *peut imposer* et prélever annuellement, *sur tout immeuble* dans la municipalité, une taxe n'excédant pas deux pour cent *de la valeur réelle, telle que portée au rôle d'évaluation.*

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ÉCOLES DE SHERBROOKE *et al.*

Taschereau J.

La seconde question est de savoir si les machineries qui n'ont pas été portées au rôle d'évaluation, si elles ne sont pas des biens mobiliers, sont ou ne sont pas *des immeubles par destination.* C'est en conséquence au *Code civil* qu'il faut avoir recours pour solutionner la question et particulièrement aux arts. 379 et 380 qui se lisent ainsi:

379. Les objets mobiliers que le propriétaire *a placés sur son fonds à perpétuelle demeure,* ou qu'il y a incorporés, *sont immeubles par destination tant qu'ils y restent.*

Ainsi sont immeubles, sous ces restrictions, les objets suivants et autres semblables:

1. Les pressoirs, chaudières, alambics, cuves et tonnes;
2. *Les ustensiles nécessaires à l'exploitation des forges, papeteries et autres usines.*

Sont aussi immeubles par destination les fumiers ainsi que les pailles et autres substances destinées à le devenir.

380. Sont censés avoir été attachés à perpétuelle demeure les objets placés par le propriétaire qui tiennent à fer et à clous, qui sont scellés en plâtre, à chaux ou à ciment, ou qui ne peuvent être enlevés sans être fracturés, ou sans briser ou détériorer la partie du fonds à laquelle ils sont attachés.

Les glaces, les tableaux et autres ornements sont censés mis à perpétuelle demeure, lorsque, sans eux, la partie de l'appartement qu'ils couvrent demeurerait incomplète ou imparfaite.

Il ne fait pas de doute que le *Code civil* de la province de Québec et le *Code Napoléon,* en ce qui concerne "les immeubles par destination", diffèrent sous certains aspects. Les articles suivants du code français, qui, sans être identiques aux nôtres, reconnaissent aussi *l'immobilisation par destination,* peuvent sans doute nous aider à solutionner le problème qui nous intéresse. Ce sont les arts. 524 et 525 C.N. qui se lisent ainsi:

524. Les objets que le propriétaire d'un fonds y a placés pour le service et l'exploitation de ce fonds, sont immeubles par destination.

Ainsi, sont immeubles par destination, quand ils ont été placés par le propriétaire pour le service et l'exploitation du fonds:

Les animaux attachés à la culture;
Les ustensiles aratoires;
Les semences données aux fermiers ou colons partiaires;
Les pigeons des colombiers;
Les lapins des garennes;
Les ruches à miel;
Les poissons des étangs;
Les pressoirs, chaudières, alambics, cuves et tonnes;
Les ustensiles nécessaires à l'exploitation des forges, papeteries et autres usines;
Les pailles et engrais.

Sont aussi immeubles par destination, tous effets mobiliers que le propriétaire a attachés au fonds à perpétuelle demeure.

525. Le propriétaire est censé avoir attaché à son fonds des effets mobiliers à perpétuelle demeure, quand ils y sont scellés en plâtre ou à chaux ou à ciment, ou lorsqu'ils ne peuvent être détachés sans être fracturés et détériorés, ou sans briser ou détériorer la partie du fonds à laquelle ils sont attachés.

Les glaces d'un appartement sont censées mises à perpétuelle demeure, lorsque le parquet sur lequel elles sont attachées fait corps avec la boiserie.

Il en est de même des tableaux et autres ornements.

Quant aux statues, elles sont immeubles lorsqu'elles sont placées dans une niche pratiquée exprès pour les recevoir, encore qu'elles puissent être enlevées sans fracture ou détérioration.

A la lecture des articles ci-dessus, il ressort qu'en France, l'immobilisation, sans la nécessité *"de placement à perpétuelle demeure"*, est complète, et rend immeubles, les objets qui sont meubles par nature, si les choses ainsi placées sur un *fonds*, même *sans attaches matérielles*, sont affectées au service de l'immeuble, ou d'une entreprise agricole, industrielle, commerciale ou artisanale. En conséquence, en vertu des dispositions de l'art. 524, peuvent devenir *immeubles par destination*, des biens de nature mobilière, que par une fiction de la loi celle-ci déclare immobiliers, simplement *par un lien intellectuel*, parce qu'ils se rattachent à l'immeuble à titre d'accessoire. Ainsi évite-t-on la dissociation de biens qui économiquement forment un tout, et deviennent soumis au même régime juridique, en cas de saisie, de constitution d'hypothèque, de partage, de legs, ou pour l'application des règles des régimes matrimoniaux. *Vide*: Dalloz, Nouveau Répertoire, vol. I, p. 371. Deux conditions seulement sont requises. Il faut, en premier lieu, que *le meuble et l'immeuble appartiennent à la même personne*, et, en second *lieu, il faut nécessairement qu'il existe un rapport de destination entre les deux objects*: Planiol et Ripert, 2e ed. 1952, vol. 3, p. 81; Pandectes françaises, vol. 13, p. 55, n° 151. Mais l'énumération que l'on trouve dans l'art. 524 n'a rien de limitatif, et elle ne contient que des exemples que donne le législateur. Même en dehors de cette énumération, tout ce qui est placé sur un fonds par le propriétaire *pour le service et l'exploitation de son fonds, est immeuble par destination:* Planiol et Ripert, vol. 3, 2e ed. 1952, p. 84; Dalloz-Encyclopédie vol. I, p. 452, n° 116; Pandectes françaises, vol. 13, p. 57, n^{os} 173, 174, 175; Fuzier-Herman, Code civil annoté 1935, vol. 1, p. 625, n^{os} 65, 66, 67.

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Taschereau J.

Mais le Code français reconnaît deux moyens d'immobilisation des effets mobiliers: le premier que je viens d'exposer, où un *lien intellectuel* sert à l'affectation du meuble au service de l'immeuble, ou d'une entreprise agricole, industrielle, commerciale ou artisanale qui y est exploitée; et le second qui consiste en *un lien matériel* lorsqu'on attache le meuble à l'immeuble, *à perpétuelle demeure*. En ce cas, pour que l'immobilisation devienne parfaite, il faut, suivant les dispositions de l'art. 525 C.N., que les effets immobiliers soient scellés en plâtre, à chaux ou à ciment, ou qu'ils ne puissent être détachés sans être fracturés et détériorés, ou sans pour les enlever, que l'on brise ou détériore la partie du fonds à laquelle ils sont attachés. Mais comme le signalent Planiol et Ripert, Droit civil, vol. 3, p. 92, les modes d'adhérence que mentionne l'art. 525 C.N., *sont énonciatifs seulement et non limitatifs*, et les arrêts admettent l'efficacité de toute autre marque d'adhérence indicative d'une destination *à perpétuelle demeure*. L'article 525 C.N. donne comme exemple les glaces d'un appartement: elles sont censées mises à perpétuelle demeure, lorsque le parquet sur lequel elles sont attachées fait corps avec la boiserie. Le Code y assimile des statues placées dans une niche pratiquée pour les recevoir, encore qu'elles puissent être enlevées sans détérioration. La raison évidente de cette dernière disposition est que l'appartement serait incomplet si on y enlevait la statue.

La fixation à perpétuelle demeure est ainsi un second moyen d'immobilisation par destination pour des objets mobiliers qui, *n'étant pas nécessaires à l'exploitation,* se trouvent cependant rattachés au fonds par un signe extérieur, une attache matérielle: Dalloz-Encyclopédie Droit civil, vol. I, p. 458, n° 283. De cet art. 525 C.N. il résulte que par cela seul que des choses mobilières attachées à un fonds par le propriétaire y sont scellées en plâtre, à chaux ou à ciment, elles participent de la nature de l'immeuble *sans qu'il y ait à considérer quel peut être leur degré d'utilité ou d'inutilité par rapport au service de cet immeuble.* On verra que, par les différentes applications que la loi fait par l'art. 525 C.N. du principe posé par le dernier alinéa de l'art. 524 C.N., il faut conclure que le fait matériel d'une adhérence *apparente et durable*

donne à un meuble le caractère d'un immeuble par destination; l'intention du propriétaire de l'immeuble garni par le meuble est à cet égard sans influence: Civ. 5 février 1878, D.P. 78.1.156. C'est cette distinction qui crée la différence fondamentale qui existe entre ces deux arts. 524 et 525 du *Code Napoléon.*

Ces dispositions du Code français concernant l'immobilisation par destination tirent leur origine de la *Coutume de Paris.* L'article 90 de la *Coutume de Paris* était conçue en ces termes:

> Ustensiles d'hôtel, qui se peuvent transporter sans fraction et détérioration, sont réputés meubles; mais s'ils tiennent à fer et à clous, et sont scellés en plâtre, et sont mis pour perpétuelle demeure, et ne peuvent être transportés sans fraction et détérioration, sont censés et réputés immeubles.

Cependant, comme le remarquent Planiol et Ripert, Droit civil, vol. 3, p. 92, Pothier avait montré que cette circonstance d'attaches matérielles et de la difficulté qu'on pouvait avoir à déplacer l'objet était en réalité indifférente: car, disait-il, il y a des choses qui, sans être attachées à fer et à clous, sont censées faire partie de la maison, et d'autres qui, quoique attachées à fer et à clous, ne sont pas censées en faire partie: Pothier, Traité de la Communauté, n^{os} 47 et suivants. Planiol et Ripert ajoutent que la critique de Pothier est aussi juste sous le droit nouveau que sous l'ancien; les auteurs du Code auraient peut-être mieux fait, continuent les savants auteurs, de ne pas s'arrêter à la considération de l'attache matérielle puisque l'immobilisation est possible sans elle, et qu'elle-même ne réussit pas toujours à immobiliser un objet. On avait nul besoin, dit-on, de ces dispositions, et la formule générale par laquelle débute l'art. 524 suffisait pour tous les cas possibles d'immobilisation par destination. Mais évidemment les codificateurs du *Code Napoléon* et les législateurs de 1804 en ont décidé autrement, et ont préféré y inclure les dispositions de l'art. 525 C.N. Ils ont voulu souligner qu'il existe en droit français deux moyens d'immobilisation: celui qui résulte du fait *de placer* des objets sur un fonds pour son exploitation, sans liens matériels; et celui qui consiste *à attacher d'une façon durable* un meuble à un immeuble, par nature, même sans utilité pour le fonds lui-même. La rédaction de l'art. 524 C.N. exclut, contrairement à l'art. 525 C.N.. toute idée de *liens matériels.*

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ÉCOLES DE SHERBROOKE *et al.*

Taschereau J.

Les articles 379 et 380 du Code de la province de Québec, ont beaucoup de similitude avec les arts. 524 et 525 C.N. Les deux codes ont en effet des origines communes, et ces règles d'immobilisation des biens mobiliers par destination, nous font voir les influences identiques qui ont déterminé les législateurs des deux pays, comme dans bien d'autres cas, à condenser dans des textes les doctrines fondamentales des anciens jurisconsultes.

Pour les fins de la présente cause, il est important de remarquer surtout, la différence qui existe entre l'art. 524 C.N. et l'art. 379 du *Code civil* de Québec. C'est qu'en France, en vertu de 524 C.N., tel que je l'ai signalé déjà, les effets mobiliers que le propriétaire d'un fonds *y a placés* pour le service et l'exploitation de ce fonds sont *immeubles par destination.* La *perpétuelle demeure* n'est pas un élément essentiel à cette immobilisation. Cependant, dans la province de Québec, en vertu de l'art. 379 C.C., trois conditions sont requises pour qu'il y ait *immobilisation par destination.* La première est que celui qui place un objet mobilier sur un immeuble *doit être le propriétaire des deux*; il faut, en outre, que cet objet soit placé à *perpétuelle demeure* ou *incorporé*, et alors l'objet tant qu'il *y reste* est immeuble par destination. Par la volonté du propriétaire il est alors destiné à l'immobilisation.

Toute la présente cause repose donc sur l'interprétation des mots *placés à perpétuelle demeure,* et il importe de se demander quelles sont les exigences de la loi de Québec, pour que cette condition soit remplie.

C'est la prétention des appelants que ces mots "perpétuelle demeure" sont qualifiés par les dispositions de l'art. 380 C.C. Ainsi, d'après eux, pour qu'un meuble devienne immeuble par destination sous l'empire de l'art. 379, il faudrait nécessairement qu'il fut *attaché au fonds,* tel que le stipule l'art. 380, à fer et à clous, qu'il soit scellé en plâtre, à chaux ou à ciment, ou qu'il ne puisse être enlevé sans être fracturé, ou sans briser ou détériorer la partie du fonds à laquelle il est attaché. C'est à cette seule condition qu'un objet mobilier pourrait être immobilisé par destination.

Avec respect pour ceux qui entretiennent cette opinion, je ne puis accepter cette interprétation restrictive de l'art. 379. Ce serait ne pas faire donner au législateur le

maximum de sa pensée, et ce serait tomber dans une interprétation beaucoup trop éclectique qui, je crois, n'est pas conforme aux textes, et est contraire à la jurisprudence et à l'enseignement des auteurs.

A mon sens, il y a dans la province de Québec, comme en France, *deux moyens* bien distincts d'immobilisation de *biens mobiliers par destination*, et, les arts. 379 et 380 du *Code civil*, se distinguent entre eux comme se distinguent, en France, les arts. 524 et 525.

C'est d'ailleurs ce que Mignault signalait, il y a au delà de 50 ans, quand il écrivait, Droit civil, vol. 3, p. 412: "La loi appelle immeuble par destination les objets mobiliers qui prennent la nature d'un fonds auquel ils sont unis, soit par une *attache purement morale*, soit par une *attache physique ou matérielle*".

Mignault souligne également que l'art. 524 C.N. est plus général que le nôtre, 379 C.C., et que son énumération d'exemples est plus complète. Ainsi, le Code français ne prévoit pas la cessation de l'immobilisation par l'enlèvement de l'objet immobilisé car, il est clair que ceci va de soi; il est aussi évident que l'énumération de l'art. 524 C.N., comme le nôtre, n'est qu'à titre d'exemples, et n'est pas limitatif mais seulement énonciatif.

Mignault conclut, en tenant compte de toutes les différences qu'il y a entre les textes québecois et français, qu'il y a chez nous, dans le cas de l'art. 379 C.C., deux classes d'immeubles par destination: premièrement, les meubles placés par le propriétaire sur son fonds *à perpétuelle demeure*, et, deuxièmement, les meubles qu'il a *incorporés*. Nous avons vu précédemment qu'en France, la destination agricole ou industrielle est suffisante pour l'immobilisation par destination. Je suis d'opinion que cette destination agricole, ainsi que la destination industrielle, lorsqu'elles sont à perpétuelle demeure, existent aussi dans notre droit. Comme le signale Mignault, vol. 2, p. 416, la destination industrielle est représentée par les deux premiers exemples de l'art. 379(*a*), et la destination agricole par le dernier paragraphe de cet article.

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Taschereau J.

Mignault insiste sur la différence qu'il faut signaler entre les mots "*immobilisation à perpétuelle demeure*" et "*incorporé*". Il s'exprime ainsi à la page 419, vol. 2:

> Bien que les mots "à perpétuelle demeure" ne s'appliquent, dans la rédaction de l'article 379, qu'aux meubles *placés* sur le fonds, il va sans dire que la destination doit être permanente pour immobiliser un meuble *incorporé* à un immeuble. L'idée même de l'incorporation suppose la permanence de la destination du propriétaire et ce serait presque un pléonasme que de dire "incorporé à perpétuelle demeure".

Les mots "ou incorporé" que l'on trouve à l'art. 379 C.C., suggèrent l'idée qu'il existe un moyen d'immobilisation sans *incorporation*, mais uniquement par un *lien intellectuel*, sans les attaches dont je parlais tout à l'heure. D'ailleurs, les mots employés par le législateur "*placés à perpétuelle demeure*", et l'énumération (non limitative) que l'on fait des pressoirs, des chaudières, des alambics, des cuves et des tonnes, comme des ustensiles nécessaires à l'exploitation des forges, doivent évidemment écarter toute idée de liens physiques.

Il faut de toute nécessité attribuer aux mots "perpétuelle demeure" le même sens qu'on lui attribue en France, et que l'on trouve au dernier paragraphe de l'art. 524 C.N. et au premier de 525 C.N. Il ne faudrait pas croire, cependant, que ces expressions comportent une idée qui exclurait l'immobilisation, si on pouvait prévoir un temps où une machine placée dans une usine, cessait d'avoir son utilité. L'usure de la machine, les changements industriels, les conditions économiques variables, et bien d'autres facteurs, sont autant d'éléments dont il faut tenir compte pour la durée du temps où une machine doit être employée. Ce qui est important, c'est que la machine soit placée dans l'usine *pour l'exploitation du fonds,* pour un temps que l'on ne connaît peut-être pas, *mais avec l'intention de la laisser tant qu'elle sera en état de fonctionner, ou tant qu'elle n'aura pas été remplacée par une autre machine plus moderne ou plus apte à donner un rendement plus efficace.*

De tous temps, dans notre province, cette doctrine d'immobilisation sans attaches matérielles a été reconnue par nos tribunaux. Ainsi, dans la cause de *The Grand Trunk Railway Company of Canada v. The Eastern Townships Bank* (1), cause entendue avant la codification,

(1) (1865), 10 L.C. Jur. 11.

il a été décidé que le "rolling stock" d'un chemin de fer est un immeuble par destination, et comme tel ne peut faire l'objet d'une saisie *de bonis*. Et, pourtant, il n'y a rien par nature de plus "meuble" que des locomotives ou des wagons de chemin de fer. Le jugement formel et unanime de la Cour du Banc de la Reine (Division d'Appel) est le suivant (p. 18):

Considering that the locomotive engine seized in this cause forms part of the rolling stock of the Grand Trunk Railway Company; considering that the said locomotive engine is an indispensable portion of the realty forming the said road and is in law an immoveable (*immeuble par destination*), the Court here doth reverse and set aside the judgment rendered in the Court below; and proceeding to pronounce the judgment the Court below ought to have rendered, doth maintain the opposition of the said Grand Trunk Railway Company, and doth order that *main levée* be granted to them of the said seizure, the whole with costs in both Courts.

Dans la cause de *Budden v. Knight* (1), M. le juge Stuart de la Cour Supérieure s'exprime de la façon suivante:

The puncheons, casks, etc., supplied by the owner and necessary to carry on a brewery, and the hammers, pinchers, etc., necessary to work a forge, *are immoveable though in no way incorporated with the immoveable*—and they by law are accessory and form part of the immoveable upon which they have been placed for a permanency.

Après la codification, en 1877, dans *Binks v. The Rector & Church Wardens of the Parish of Trinity and the Trust and Loan Company of Canada* (2), on a décidé qu'une orgue placée dans une église, sans être attachée à fer et à clous, est immeuble par destination et le juge Papineau s'exprime de la façon suivante à la p. 259:

Le placement à perpétuelle demeure ne *se reconnaît donc pas toujours par ces moyens d'attachement corporel des objets mobiliers au fonds;* c'est plutôt un effet de la volonté puisqu'ils deviennent immeubles par la seule destination.

Dans *Philion v. Bisson* (3), M. le juge Bourgeois donne ainsi son opinion:

La bâtisse où la saisie a été pratiquée a été érigée pour en faire un moulin, et il nous importe peu de savoir comment les machines y ont été placées, si on a employé des clous, du fer ou du plomb pour les attacher à l'entreprise, il suffit de savoir (et ce fait est incontestablement prouvé) que les choses saisies bien que meubles de leur nature ont été placées à perpétuelle demeure dans le moulin en question par le propriétaire, et qu'elles sont ustensiles nécessaires à l'exploitation de l'usine établie par le défendeur sur le fonds acheté par lui de l'opposant. Article 379 c.c.

(1) (1877), 3 Q.L.R. 273. (2) (1881), 25 L.C. Jur. 258.
(3) (1878), 23 L.C. Jur. 32 at 41.

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Taschereau J.

M. le juge Jetté, Revue du Droit, vol. V., p. 605, écrit ce qui suit:

> Mais lorsqu'il s'agit de machines, de chaudières, fourneaux, forges, etc., établis dans une usine, est-il juste, est-il bon que ces objets soient immobilisés? La loi fait une distinction, ont-ils été placés ou établis par le propriétaire du fonds, ces objets en prennent la nature, parce que lui servant d'auxilliaires, ils se confondent avec lui, dans les mains du propriétaire. Leur immobilisation est donc indiquée par la nature même des choses.

Dans *Barker v. The Central Vermont Railway Co. and Hays et al.* (1), M. le juge Loranger a décidé:

> Des locomotives et chars affectés à l'exploitation d'un chemin de fer sont immeubles par destination—alors même qu'ils se trouvent momentanément sur des voies ferrées qui, sans appartenir à la compagnie, font partie de son système—et sont régis par la loi du pays où ce chemin de fer est situé; partant ils ne sont pas susceptibles de saisie mobilière.

En 1890, dans une cause de *Wallbridge v. Farwell* (2), M. le juge Taschereau disait: "It is well established jurisprudence that the rolling stock of a railway is immoveable property and part of the freehold."

Dans une autre cause de *Péloquin v. Bilodeau* (3), M. le juge Lemieux, rendant le jugement majoritaire de la Cour de Revision, dit ceci:

> Dans la première catégorie des immeubles par destination de notre code, c'est-à-dire le cas où le propriétaire a placé sur son fonds, à perpétuelle demeure, un meuble de façon à le convertir en immeuble, la loi n'exige pas d'adhérence ou d'incorporation du meuble à l'immeuble, et elle a pris soin de la dire en se servant du verbe *placer,* c'est-à-dire mettre sur ou dans et suivant la version anglaise, *to place on.*
>
> Ces termes: "placer ou mettre sur un immeuble" n'ont rien d'ambigu ni d'équivoque, et ne comportent nullement l'idée de fixité ou d'incorporation. A notre avis, il faut un effort d'imagination pour arriver à une conclusion contraire.
>
> Les mots, termes et expressions d'une loi doivent avoir le sens, la signification et l'application qui leur sont propres.
>
> Là-dessus, le code donne des exemples d'immeubles, et dans chacun de ces cas, il parle d'objets mobiliers qui sont ou peuvent rester distincts de l'immeuble et non attachés, qui restent mobiliers de leur nature et ne deviennent immeubles que par la volonté du propriétaire, toujours à la condition qu'il y ait destination à perpétuité au fonds et pour l'avantage du fonds.

Si d'autres autorités sont nécessaires pour compléter cette énumération qui illustre l'unanimité de la jurisprudence, on peut référer à *Cloutier v. Cloutier* (4); *Ville de Longueuil v. Crevier* (5); *Donohue Brothers Registered*

(1) (1898), 14 Que. S.C. 467.
(2) (1890), 18 S.C.R. 1 at 20.
(3) (1910), 39 Que. S.C. 388 at 392.
(4) (1934), 40 R. de Jur. 494.
(5) (1886), 14 R.L.O.S. 110.

v. La Corporation de la Malbaie (1); *Anderson v. Poirier* (2); *Nadeau v. Rousseau* (3), notes de Rivard J.; *St-Pierre v. Shugar* (4); *Diamond Shoe v. Turcotte* (5).

Les appelants ont invoqué à l'appui de leurs prétentions, l'arrêt de M. le Juge en chef Tyndale rendu dans la cause de *Baum v. St-Casimir Lumber and Manufacturing Co. Ltd* (6), où le jugé est le suivant:

Machinery in a sawmill cannot be considered as immoveable by destination if it appears that the machines which were attached to the ground floor were so attached by bolts penetrating into the cement, that they could be removed without damage to the machines and without damage to the floor except that holes were left in the cement.

The same applies to machines attached to the upper floor by bolts which passed through the wooden floor and were fastened on the other side by nuts screwed on to the bolts. These machines could also be removed without damage to themselves and without damage to the floor except that the holes made by the bolts, remained.

A la page 393, M. le juge Tyndale dit:

It is, however, now well settled by our jurisprudence that the machines cannot, for that reason alone, be considered as immoveables by destination: *Roy v. Lamontagne* (1936, 60 K.B. 134). They must also be attached to the premises by the proprietor for a permanency, within the meaning of art. 380 C.C.

On voit donc que le savant juge base sa décision sur le jugement de la Cour du Banc du Roi dans *Roy v. Lamontagne* (7), où il a été décidé ce qui suit:

Utensils employed in the making of maple sugar (*grément de sucrerie*) are moveables and they cannot be treated as immoveables by destination, unless it is established that they were converted into immoveables, by attachment for a permanency according to the terms of article 380 C.C.

Le jugé de cette cause, tel que déterminé par l'arrêtiste, peut, en effet, induire en erreur, mais l'analyse des raisons données par les divers juges de la Cour d'Appel, doit, je crois, laisser des doutes sur la véritable portée de ce jugement. Le défendeur réclamait des ustensiles employés à la fabrication du sucre d'érable, et alléguait qu'ils étaient des immeubles par destination, et ne pouvaient être l'objet d'une saisie *de bonis*. Mais, dans cette cause, aucune preuve n'avait été offerte, et c'est sur une admission de faits, évidemment incomplète, que le jugement de la Cour

(1) [1924] S.C.R. 511.
(2) (1898), 13 Que. S.C. 283.
(3) (1928), 44 Que. K.B. 545.
(4) (1916), 22 R.L.N.S. 167.
(5) (1935), 74 Que. S.C. 264.
(6) [1950] Que. S.C. 391.
(7) (1936), 60 Que. K.B. 134.

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Taschereau J.

a été prononcé. Il manquait un élément, que les juges signalent et qui semble être la cause déterminante de leur décision, c'est l'intention de fixer ces ustensiles à *perpétuelle demeure.*

Le juge Walsh dit, en effet, à la page 136:

There is nothing in the submitted facts to indicate that the seized moveables were placed on this land for a permanency. These objects are, by their nature, moveables; the intention of the owner to convert them has to be deduced from circumstances. They did not adhere to lands or tenements. The seized effects do not fall into the category of objects submitted by the Code (379 C.C.) to illustrate the principle of permanency that the Code emphasises.

A la page 151, M. le juge Saint-Jacques dit ce qui suit:

Si le dossier contenait une description de placement dans la cabane à sucre des objets mobiliers qui sont utilisés pour la conversion de l'eau d'érable en sirop et sucre, peut-être pourrait-on en conclure que le propriétaire a entendu les immobiliser, parce qu'il les aurait placés à perpétuelle demeure, ou incorporés à cet édifice qui s'appelle "la cabane à sucre".

En l'absence d'une telle preuve, je dois mettre sur le même pied tous les objets revendiqués qui, de leur nature, sont essentiellement mobiliers. Ils ont gardé leur caractère tant et aussi longtemps qu'ils sont restés entre les mains du demandeur et ils ne l'avaient pas perdu lorsque l'immeuble a été saisi et vendu par le shérif, le 9 octobre 1934. Le défendeur ne les a point acquis en se portant enchérisseur et adjudicataire de cet immeuble. Ces objets sont restés la propriété du demandeur, et c'est à bon droit qu'il en fait la revendication.

Dans cette cause, M. le juge Galipeault a concouru dans les raisons données par M. le juge Saint-Jacques. Dans l'appréciation de ce jugement de *Roy v. Lamontagne* M. le juge Gagné, dans la présente cause, dit ce qui suit à la p. 650:

Il faut remarquer aussi, quant à *Roy v. Lamontagne,* que cette cause est décidée sur une admission de faits ainsi rédigée. Je ne trouve que le texte anglais dans les notes de M. le juge Walsh:

The seized effects were in the sugar-shanty at the time of the sheriff's sale; there they have remained; they are utensils used in the operation of collecting and reducing maple sap.

Comme on le voit, il n'est aucunement question de placement sur les lieux, à perpétuelle demeure, ni d'objets nécessaires à la préparation du sucre d'érable. Mm. les juges Dorion et St-Jacques le signalent. Lorsqu'ils ajoutent que ces objets mobiliers doivent être attachés au fonds pour devenir immeubles par destination, ils expriment une opinion qui n'est pas essentielle à la solution du litige.

On peut se demander, je crois, si la Cour n'eût pas prononcé autrement dans un cas d'immobilisation industrielle comme celui qui nous est soumis.

Quelques autres décistions de cette Cour et du Conseil Privé, et qui ont été citées lors de l'audience, méritent aussi quelques considérations. Cependant, je dois signaler

qu'à mon sens elles n'ont aucune application. Ainsi, dans la cause de *The Lower St. Lawrence Power Company v. L'immeuble Landry, Limitée* (1), il a été décidé que les tuyaux, les poteaux, les fils et les transformateurs compris dans un système d'éclairage électrique, érigé dans les rues d'une municipalité sont immeubles. Cette immobilisation ne l'est pas en vertu des arts. 379 et 380, mais elle l'est en vertu de l'art. 376, étant des immeubles par nature. La même réflexion doit s'appliquer au sujet de la cause de *Montreal Light, Heat and Power Consolidated and others v. The City of Outremont* (2). Cette cause fut aussi décidée en vertu de l'art. 376 C.C. et se rapportait aux tuyaux conduisant le gaz à éclairage dans les rues de la ville d'Outremont. Ces tuyaux furent aussi déclarés des immeubles par nature.

La cause du *Bell Telephone Company of Canada v. Ville St. Laurent* (3) fut aussi décidée sous l'empire de l'art. 376 C.C. Le Conseil Privé a décidé qu'un standard téléphonique appartenant au Bell Telephone dans un immeuble dont la compagnie n'était pas le propriétaire, n'était pas un immeuble par nature. Il n'a pas, par conséquent, été question de déterminer si ce standard téléphonique était immeuble par destination, vu que la condition essentielle de l'immobilisation par destination ne se présentait pas, vu que la compagnie n'était pas propriétaire à la fois du standard et de la bâtisse où il était situé. Voici ce que dit Lord Thankerton, à la page 79:

> As already stated, the appellant is only a tenant of the premises.
>
> Accordingly, the respondent's claim is rested solely on Article 376 of the Code and on the view that the switchboard is an integral part of that which is admittedly immoveable—namely, the poles, wires and cables of the appellant.

De l'ensemble de toute cette jurisprudence il me paraît ressortir que l'art. 379 C.C., qui n'exige que *le placement d'un objet à perpétuelle demeure* sur un fonds, et qui n'est pas limitatif, dans les exemples qu'il donne, est suffisant par lui-même pour immobiliser un meuble par destination, sans qu'il soit nécessaire d'avoir recours à l'art. 380 pour déterminer le mode d'immobilisation. Ce dernier article, comme d'ailleurs l'art. 525 C.N., crée une présomption

(1) [1926] S.C.R. 655.
(2) [1932] A.C. 423.
(3) [1936] A.C. 73.

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Taschereau J.

juris tantum d'immobilisation pour les objets que l'on attache à un fonds, *sans nécessité aucune pour l'exploitation de ce fonds.* Ces deux arts. 379 et 380 envisagent donc des situations différentes.

Je crois que la question est parfaitement résumée par deux auteurs modernes. M. Marler dans "Law of Real Property" (1932), p. 7, dit avec raison ce qui suit:

> How are we to know with what intention a movable was placed by the land-owner on his land? Can he say that a movable placed on his land is or is not immovable? If he can, can he not change his mind? We cannot conceive it to be in the power of any person to determine at his pleasure a movable so placed to be movable or immovable, to say that it is immovable if seized as a movable, or *vice-versa.* His intention is not to be gathered from what he may say, even in the most formal manner, but from the mode of its attachment to his land, or if it is not attached at all, but simply rests on it by its own weight, or if very lightly attached or capable of being removed without breakage, from the purpose for which it has been placed on his land. But more is necessary. For whatever purpose it was placed on his land, the intention to place it there for a permanency, must be manifest, and, as we have to exclude any verbal expression, we have to look to the thing itself for the evidence of such intention.
>
> It may be added that the attachment must be for the purpose for which the land is destined, or in the quaint French of the year-book, *pour le profit de l'inhéritance.*
>
> "The mode of annexation is of a comparatively small moment, the purpose of the annexation and the intent with which it was made being, in most cases, the important consideration. *Physical* annexation is not indispensable, provided the article is of an *accessory character and, in some way in actual or constructive union with the principal subject and not merely brought upon it.* It is true the mode of annexation, in the absence of other proof of intent, may become controlling, as where it is in itself so inseparable and permanent as to render the article necessarily a part of the realty, and even in the case of a less thorough method, the manner of attachment may still afford convincing evidence that the intention was to make the article a permanent accession. Still, there is no unvarying test; and neither the mode of annexation nor the manner of use can ever be said to be entirely conclusive." This is the American doctrine (Warvelle, Real Property), and it is similar in that respect to our own.

M. le professeur Beaudoin, à son tour, résume ainsi le problème dans son Droit Civil de la Province de Québec, et à la page 360, il exprime ainsi ses vues:

> La jurisprudence québecoise a semble-t-il débordé les cadres de l'article 379 C.C. Bien que n'adoptant pas une ligne de conduite aussi libérale qu'en France, le texte s'y opposant, elle a tout de même été très loin dans l'extension de l'art. 379 dont l'énumération n'est pas considérée comme limitative, ne pouvant étayer son interprétation sur la notion de service et d'exploitation du fonds, elle a donné un sens très large à l'expression "objets et autres choses semblables" visée au texte. Elle a d'autre part

conçu la notion de perpétuelle demeure comme une notion moins matérielle qu'intentionnelle rejoignant ainsi l'attitude de la jurisprudence française dont elle s'est visiblement inspirée. Dans les cas où elle ne pouvait faire appel à l'incorporation, elle a invoqué la notion de *perpétuelle demeure qui joue donc ici un rôle presque identique à celui du service ou de l'exploitation du fonds du droit français.*

(Ce sont mes italiques partout.)

Il est intéressant également de lire le jugement rendu par la Cour d'Appel dans la *Compagnie de Téléphone Saguenay-Québec v. La Ville de Port Alfred et les Commissaires d'écoles pour la municipalité de Port Alfred* (1). Dans cette cause, on a décidé qu'un standard téléphonique placé dans une maison appartenant à la compagnie de téléphone Saguenay-Québec, est un immeuble par destination, s'il est placé à perpétuelle demeure suivant les exigences de l'art. 379 C.C. Dans cette cause, M. le juge Pratte, avec qui s'accorde M. le juge Galipeault, dit à la page 860:

> A mon avis, la raison de la règle posée par l'art. 379 C.C. est que, dans l'esprit du propriétaire, certains objets mobiliers sont nécessaires pour compléter le fonds sur lequel ils sont placés, en le rendant tel que le propriétaire veut qu'il soit. Or, dans l'espèce, il ne fait pas doute que le standard téléphonique n'a pas été installé provisoirement, mais pour former avec le bâtiment qui l'abrite une centrale téléphonique. Sans ce standard, l'immeuble ne serait pas ce que la demanderesse a voulu qu'il fût.

Enfin, dans la présente cause, je m'accorde avec les remarques suivantes de M. le juge McDougall, de M. le juge Martineau et de M. le juge Gagné. M. le juge McDougall dit (2):

> In the light of the foregoing it cannot be said that the machinery in question was placed in the building for a temporary purpose. It is quite clear that it was intended that it should remain certainly indefinitely, and as long as each machine could serve the purpose of the industry. Without further labouring the case, I may say that, in my opinion, insofar as such things can be permanently used they were so placed in the present case. In consequence the answer to the final question is in the affirmative, namely that the machines became immobilized by destination.

M. le juge Martineau s'exprime ainsi (3):

> Je ne crois pas que tel soit l'effet de cet article 380 C.C. qui me semble tout simplement vouloir dire que, dans les cas qu'il mentionne, il devra être présumé que les objets ainsi attachés ont été placés par le propriétaire sur son fonds à perpétuelle demeure.

(1) [1955] Que. Q.B. 855, affirmed, post, p. 512.

(2) [1956] Que. Q.B. 639 at 647.

(3) *Ibid.* at p. 652.

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Taschereau J.

Il dit également (1):

> Ceci ne veut pas dire qu'il suffirait à un propriétaire de placer des objets sur son fonds, sans intention arrêtée de les enlever un jour, pour les rendre immeubles par destination, car alors la plupart des meubles meublant les maisons d'habitation occupées par leur propriétaire seraient ainsi immeubles. Il faut de plus qu'ils soient des accessoires indispensables de l'immeuble. Il faut qu'il y ait entre eux et le fonds un rapport de destination, c'est-à-dire qu'ils soient affectés au service de l'immeuble, pour me servir des expressions de Planiol et Ripert. J'ajouterai que ce rapport de destination peut être aussi entre ces objets et l'utilisation du fonds, ainsi qu'il apparaît clairement des deux catégories d'objets mentionnés au deuxième paragraphe de l'article 379 C.C.

Et, enfin, M. le juge Gagné est très catégorique dans son opinion (2):

> Exiger que tous ces objets soient attachés au fonds, c'est-à-dire leur appliquer l'article 380 pour qu'ils deviennent immeubles par destination, serait rendre inutile et inapplicable ce texte de la loi qui est pourtant très clair.
>
> On reconnaît que la perpétuelle demeure est une question d'intention du propriétaire mais que la preuve de cette intention doit résulter des faits matériels constatés et non pas de déclarations que peut faire le manufacturier. Ceci, je crois, est évident.
>
> Il me semble que lorsqu'un propriétaire d'usine installe dans cette usine les machines et l'outillage qui sont nécessaires à son exploitation, il en résulte une présomption très forte d'installation à perpétuelle demeure, surtout lorsqu'il s'agit de manufactures aussi importantes que celles possédées par les mis en cause. Il lui appartient de prouver que ces machines et cet outillage y étaient placés temporairement, mais il ne lui suffit pas de le dire.

Je dois ajouter que les machines, dans la présente cause, sont attachées au sol, pour empêcher, dit-on, la vibration. Même si ces attaches matérielles ne sont pas suffisantes pour satisfaire les exigences de l'art. 380, elles révèlent sûrement l'intention de la *perpétuelle demeure*, que requiert 379 C.C. C'est, d'ailleurs, l'idée exprimée par M. Marler, *supra*, quand il dit: "The manner of attachment may still afford convincing evidence that the intention was to make the article a permanent accession."

Pour conclure, je suis d'opinion que la liste des machines, dite "liste supplémentaire", énumère des immeubles par destination, qui doivent en conséquence être portés au rôle d'évaluation. Ces machines sont en effet *placées* sur le fonds pour l'exploitation des industries; elles y sont indispensables, nécessaires à leurs opérations, et sont des accessoires essentiels aux immeubles où elles sont placées

(1) At p. 674. (2) At p. 649.

à perpétuelle demeure. Ceci satisfait complétement les exigences de l'art. 379 C.C. sans qu'il soit nécessaire de recourir à l'art. 380 C.C. pour compléter l'immobilisation.

En résumé, je crois que le *Code civil* de la province de Québec et le Code français en ce qui concerne l'immobilisation par destination, diffèrent sous certains aspects. En France, cette immobilisation sans la nécessité de "placement à perpétuelle demeure" est complète, si les objets mobiliers sont affectés au service de l'immeuble. Mais à part ce lien intellectuel qui sert à l'affectation du meuble au service de l'immeuble, il existe aussi une immobilisation par un lien matériel, lorsque le meuble est attaché à l'immeuble à perpétuelle demeure, conformément aux dispositions du Code.

Les articles 379 et 380 C.C., de la province ont plusieurs points de similitude avec les articles du Code français. Ici cependant, la nécessité de la perpétuelle demeure est impérieuse pour destiner un meuble à l'immobilisation. On reconnaît également ici l'immobilisation par attaches physiques, comme en France d'ailleurs, mais ces attaches ne créent qu'une présomption *juris tantum.*

Les mots "à perpétuelle demeure" n'excluent pas nécessairement la possibilité du remplacement ou de l'enlèvement de la machine. Une machine, comme dans le présent cas, placée pour l'exploitation d'un fonds, avec l'idée de la laisser tant qu'elle sera en état de fonctionner de façon utile ou profitable, malgré que l'on puisse prévoir un temps où elle sera désuète, ne cesse pas pour cette raison d'être affectée à l'immeuble à perpétuelle demeure au sens légal de cette expression.

Je crois donc que les appels doivent être rejetés avec dépens contre les appelants devant toutes les Cours. Cependant, il n'y aura pas d'ordonnance quant aux frais contre la cité de Sherbrooke devant cette Cour.

The judgment of Kellock and Nolan JJ. was delivered by

KELLOCK J.:—This appeal involves the interpretation of arts. 379 and 380 of the *Civil Code,* the particular question for decision being whether machinery in use in premises of the various appellants is immoveable within the meaning of these articles, and thus taxable under the provisions of the *Cities and Towns Act,* R.S.Q. 1941, c.

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Kellock J.

233, as amended. It having been found as a fact by both Courts below that there was no actual incorporation of any of the machinery into the various buildings, the question resolves itself into one of the proper interpretation of the words "à perpétuelle demeure" in these articles. I therefore leave "incorporation" out of the discussion.

The Court of Appeal (1) has held that these words ought to be construed in the sense of "indefinitely" but that the intention to place *à perpétuelle demeure*

> . . . must appear from the circumstances of the placing. The owner—or in this case the operator of the industry—may not by his mere declaration immobilize a moveable,

to quote the language of McDougall J. at p. 645. Gagné J. expressed the same view as follows at p. 650:

> On reconnaît que la perpétuelle demeure est une question d'intention du propriétaire mais que la preuve de cette intention doit résulter des faits matériels constatés et non pas de déclarations que peut faire le manufacturier. Ceci, je crois, est évident.

In determining the question of intention, however, these two members of the Court had resort exclusively to the evidence as to what had in fact been in the minds of the officers of the various appellants when the machinery was installed, thus violating the principle they had just laid down. McDougall J. said at p. 646:

> Upon an examination of the testimony of the Superintendent (Mills) of Dominion Textile Company, it would appear that all the machines are placed in their plants to remain there indefinitely, to be removed only under certain conditions such as obsolescence, change of demand for products for which certain machines are used, improved machines to replace old machines and other analogous reasons.

Gagné J., who agreed with McDougall J., said at p. 650:

> Or, le résumé de la preuve que donne le juge de première instance et que reproduit M. le juge McDougall démontre parfaitement que toute la machinerie dont on demande la mention au rôle d'évaluation, comme immeuble, était bien placée dans cette usine non pas temporairement mais pour aussi longtemps qu'elle serait utile.

Articles 379 and 380 contain no express definition of the expression "à perpétuelle demeure", which is derived from the French law existing in Lower Canada when the Code was drafted in 1866. Its meaning at that time is, moreover, not doubtful.

(1) [1956] Que. Q.B. 639.

Pothier, in his Traité de la Communauté, nos. 47 and following, to which the codifiers refer, in discussing art. 90 of the *Custom of Paris*, points out that it imperfectly expressed the existing law in that there were things which, without being attached "à fer et à clous", were considered "faire partie" of a building, and others which although attached "à fer et à clous", were not to be so considered. The author states at no. 35 that vine props, although lightly attached to the land and taken out in the winter time, are considered as part of the land

parce qu'ils y sont placés pour perpétuelle demeure, et destinés à y servir à cet usage jusqu'à ce qu'ils soient entièrement usés, et qu'ils ne puissent plus servir.

In no. 36, he states that a windmill is considered to constitute part of the land upon which it is placed because it is placed "pour perpétuelle demeure" although it is not attached at all. The meaning of these words comes out very clearly in these references and also in no. 48, where Pothier contrasts the situation where things that are placed "n'y sont que *pour un temps.*"

No. 61 contains a further illustration, namely, artillery in a chateau or a fortress which, although not physically attached

est censée y être pour perpétuelle demeure, et en faire partie: car elle sert à compléter ce château ou cette forteresse, qui ne peut être château ou forteresse sans artillerie.

As a further illustration the author cites things which are necessary for the celebration of divine service in a chapel. They are considered to be immoveables because they serve to complete the chapel which would not be a chapel without them. He distinguishes the case where these things are not in a chapel but in the mansion house of the seigneur in Paris. In such case they are moveables as the house is not "établi chapelle pour toujours".

The corresponding English expression "for a permanency" must be interpreted on the same footing as the words "à perpétuelle demeure". Its meaning is well brought out in the Oxford Dictionary where "a permanent way" is defined as "the finished road-bed of a railway, as distinguished from a contractor's temporary way".

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Kellock J.

In the Court below both McDougall and Gagné JJ. would have construed the words "à perpétuelle demeure" in the sense I have referred to above had they not been misled as to the effect of the words "tant qu'ils y restent" in art. 379. They excluded this meaning by reason of the presence of the words "tant qu'ils y restent". These words are merely declaratory. They do not operate to affect the meaning of the words "à perpétuelle demeure". In Baudry-Lacantinerie, Droit Civil, 3rd ed. 1905, vol. 6, p. 84, no. 92, the authors state:

> L'immobilisation par destination, étant créée par la volonté du propriétaire, peut cesser par une volonté contraire, c'est-à-dire dès que cesse la cause qui avait produit l'immobilisation.

Similarly, Beudant, vol. 4, p. 125, no. 124:

> Pour mettre fin à l'immobilisation il suffit que le propriétaire supprime le rapport de destination qui reliait l'objet mobilier au fonds.

While, as already stated, arts. 379 and 380 contain no express definition of the expression "à perpétuelle demeure", they do contain illustrations of what is involved. Article 379 provides that "moveable things which a proprietor has placed on his real property for a permanency" (à perpétuelle demeure) or which he has "incorporated therewith" are immoveable by their destination, so long as they remain there. The article proceeds to provide: "Thus, within these restrictions" certain described classes of objects become immoveable, *i.e.*, by being placed on the land *à perpétuelle demeure* or by incorporation.

The last paragraph of the article reads:

Sont *aussi* immeubles par destination les fumiers ainsi que les pailles et autres substances destinées à le devenir.	Manure, and the straw and other substances intended for manure, are *likewise* immoveable by destination.

One of the sources in the old law to which the codifiers point in the case of this particular provision is Pothier, Commentaires, *supra*, no. 40, which reads in part as follows:

> Les pailles qui sont nées dans une terre, et les fumiers qui y sont faits par les animaux qui servent à son exploitation, étant dès leur naissance destinés à demeurer *toujours* dans cette terre, à y être enterrés pour la fumer, et à être par là en quelque façon identifiés avec cette terre, sont réputés en *faire partie* . . .
>
> Comme c'est cette destination qui fait regarder les pailles et fumiers comme faisant partie de la terre, il faudrait décider autrement si l'usage du père de famille était de les vendre plutôt que de les employer à fumer sa terre: ils seraient en ce cas réputés meubles, . . .

Manure and straw intended for manure became immoveable by destination under the old law if the intention of the proprietor was to use them to fertilize his lands rather than to sell them. The last paragraph of art. 379 reflects that law clearly.

It may be relevant to point out that the intention of the Provincial Legislature in 1866 was as stated in 20 Vict., c. 43, ss. 4 and 6, which read:

4. The said Commissioners shall reduce into one Code, to be called the *Civil Code of Lower Canada,* those provisions of the Laws of Lower Canada which relate to Civil Matters and are of a general and permanent character . . .

6. In framing the said Code(s), the said Commissioners shall embody therein such provisions only as they hold to be then actually in force, and they shall give the authorities on which they believe them to be so; they may suggest such amendments as they think desirable, but shall state such amendments separately and distinctly, with the reasons on which they are founded.

The codifiers did not anywhere state that arts. 379 and 380 included any amendment of the existing law.

Accordingly, the last paragraph of art. 379 provides an example of things which "likewise" become immoveable, *i.e.*, in the same manner as other moveables by being placed on land *à perpétuelle demeure* or by incorporation. In my opinion the word "likewise" brings out the meaning of "aussi" in the French version, which is "most consistent with the provisions of the existing laws on which the article is founded": art. 2615.

Before considering the terms of the first paragraph of art. 380, it is convenient to consider its last paragraph, which reads:

Les glaces, les tableaux et autres ornements sont censés mis à perpétuelle demeure, lorsque, sans eux, la partie de l'appartement qu'ils couvrent demeurerait incomplète ou imparfaite.	Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect.

What is meant by "incomplete" and "imperfect" in this context can be fully understood only by reference to

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Kellock J.

the former law. The codifiers refer, *inter alia,* in this connection to Pothier, Commentaires, *supra,* nos. 47 *et seq.*, where the author lays down certain rules as to the interpretation of art. 90 of the *Custom of Paris.* It will be sufficient to quote parts of nos. 53 and 55:

53. Troisième règle.—Les choses qui peuvent facilement être déplacées du lieu où elles sont, ne laissent pas d'être censées faire partie de la maison, lorsqu'elles y servent à compléter la partie de la maison où elles sont placées, *quum posita sunt ad integrandam domum*: mais, si elles n'y servent que d'ornement et d'ameublement, ou pour l'exercice du métier de la personne qui habite la maison, *si posita sunt ad instruendam domum,* elles ne sont pas censées faire partie de la maison, et sont de simples meubles.

55. A l'égard des glaces et des tableaux qui sont encadrés dans une cheminée; si ce qui est derrière la glace ou le tableau, sont les briques de la cheminée, ou quelque planche qui ne soit pas de même parure que le reste de la cheminée, en ce cas la glace ou le tableau paraît être mis pour compléter cette partie de la maison: car la cheminée serait imparfaite, et il manquerait quelque chose, si derrière le tableau ou la glace il n'y avait que les briques, ou quelque planche de parure différente du reste de la cheminée. Le tableau ou la glace étant donc en ce cas mis *ad integrandam domum,* il est censé en faire partie: *Quae tabulae pictae pro tectorio includuntur, aedium sunt;* L. 17, f. 3, ff. *de Act. empt.*

Au contraire, si ce qui est derrière la glace ou le tableau, est de même parure que le reste de la cheminée, en ce cas la cheminée ayant toute sa perfection indépendamment de la glace qu'on y a attachée, on ne peut pas dire, en ce cas, que la glace serve *ad integrandam domum;* elle ne sert que *ad instruendam domum,* et elle ne doit pas, suivant notre principe, être censée faire partie de la maison, mais elle doit être regardée comme un meuble.

Read against the background of the existing law, the intent of the last paragraph of art. 380 is quite plain. Removal of an object will, by reason of the condition of the wall behind it, demonstrate whether or not it was placed "à perpétuelle demeure".

That this paragraph is merely another example of the application of a principle which is not limited to ornaments is, I think, quite clear. It could not be contended merely because it is not an "ornament" that a travelling crane, such as is to be seen in any steel-fabricating plant, is not as much a part of the entire immoveable as are the steel uprights which are embedded in the earth and support

the tracks upon which the crane rests and travels back and forth in the course of its operation. The crane serves to complete the rest of the structure which would be not only imperfect but useless without it.

The first paragraph of art. 380 is as follows:

380. Sont censés avoir été attachés à perpétuelle demeure les objets placés par le propriétaire qui tiennent à fer et à clous, qui sont scellés en plâtre, à chaux ou à ciment, ou qui ne peuvent être enlevés sans être fracturés, ou sans briser ou détériorer la partie du fonds à laquelle ils sont attachés.

380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, imbedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached.

This paragraph provides another means of ascertaining whether the intention of the owner was to place *à perpétuelle demeure*. In this instance it is from the durable nature of the bond by which the moveable has been fastened to the realty that the intention is to be gathered.

It is clear from the above discussion that, contrary to the contention of the appellants, this paragraph does not provide the exclusive rule by which the intention to place *à perpétuelle demeure* is to be determined. The opening language of art. 379 is the governing language. It is the

Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith

which become immoveables. Both paragraphs of art. 380 merely furnish objective means by which the intention of the proprietor may be ascertained.

Moreover, I do not think the word "attached" in the early part of art. 380 means "physically" attached. One would hardly say of a thing that it will be "considered" as being "physically attached" to realty if it is "actually fastened" thereto by a visible bond. That would be pure tautology. Rather it would be said that a thing is to be considered as being "joined" or "united" or "annexed" or "appropriated" (affecté) to the realty when fastened to it by a material tie. It is in that sense, in my opinion, that the word "attached" is used in art. 380.

In commenting on the meaning of arts. 524 and 525 C.N., Dalloz, Répertoire, vol. 6, *vo.* Biens, no. 108, says:

Or, qu'est-ce qu'entend l'art. 524 par un effet mobilier *attaché* à un fonds? Exige-t-il une union physique, une incorporation matérielle? Non, la preuve s'en trouve dans l'article 524 lui-même, puisqu'il déclare

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Kellock J.

immeubles les animaux *attachés* à la culture; d'où il résulte assez manifestement sans doute que, dans les dispositions qui nous occupent, le mot *attaché* doit s'entendre même d'une union purement morale, et qu'en d'autres termes, un objet est attaché à un immeuble dès qu'il y a été placé pour son service ou son agrément, dès qu'il y a été *affecté*. Ainsi donc, pour que la première condition d'immobilisation soit remplie, il est nécessaire, il est indispensable que l'effet mobilier ait été *affecté* de fait et non pas seulement d'intention à un immeuble; mais il n'est point exigé qu'il y ait entre l'un et l'autre un lien matériel.

Whether or not the author's view is to be taken as correctly interpreting the provisions of arts. 524 and 525 C.N., it does, in my opinion, express by analogy the correct approach to the first paragraph of art. 380, namely, as illustrative of one type of evidence from which the intention of the proprietor is to be gathered.

Before considering the effect of paragraphs numbered "1" and "2" of art. 379 C.C., it should be observed that while these two provisions are expressed in the same language found in the first part of art. 524 C.N., the objects thereby described become immobilized under the French Code merely by being placed upon land "pour le service et l'exploitation de ce fonds" and not "à perpétuelle demeure". This should be clear merely by comparing the language of the two articles, but two commentators upon the French Code may be cited: Baudry-Lacantinerie, Droit Civil, 3rd ed. 1905, vol. 6, p. 78, no. 85; Colin-Capitant (1953), vol. 1, p. 833, no. 1447(*c*).

It follows that the view given effect to in a number of decisions in the provincial Courts that the doctrine of "industrial" or "agricultural" immobilization provided for by the first part of art. 524 C.N. also obtains under art. 379 C.C., is erroneous. That contention was negatived as long ago as 1877 in *Wyatt v. Levis & Kennebec R. R. Co.* (1), where Meredith C.J., in delivering the judgment of the majority, called attention to the difference in the two Codes and said, at p. 226:

> I therefore find it impossible to agree in the opinion that as to the matter under consideration in this case, the provision of the French code, and of our code are in principle the same. On the contrary I think that the realization [immobilization] of moveables by reason of their being placed upon a property of a particular kind for its *service et exploitation*, which is expressly allowed by the French code, is wholly unknown to our law, . . .

(1) (1880), 6 Q.L.R. 213.

There have been other judicial expressions to the same effect since that time.

While the codifiers were instructed by s. 7 of the provincial statute, 20 Vict., c. 43, that the Code should be framed upon the same general plan and should contain, as nearly as might be found convenient, the like amount of detail upon each subject as the French Code, and while they point out, at p. 141 of their second report, that the similarity between the law of Lower Canada and that of France at the time of the codification in France might have made it possible for the Provincial Legislature to have permitted the adoption of the *Code Napoléon,* yet:

> . . . *the legislature has willed otherwise.* It has in truth indicated the French code as a model with respect to the plan to be followed, as to the division of subjects and as to the details to be furnished on each; but all that is only accessory and regards the form; as to the substance, it is declared that the code to be made shall be composed exclusively of our own laws. What is law in force should be included, what is not must be excluded, and can, at most, only be proposed apart as an admissible alteration.

Provincial legislation in Quebec in recent years has emphasized that immobilization by "industrial exploitation" is not to be equated with immobilization by destination under the *Civil Code.* In 1941 the relevant section of the *Cities and Towns Act,* R.S.Q. 1941, c. 233, s. 488, was as follows:

> 488. Les immeubles imposables dans la municipalité comprennent les terrains, les constructions et les usines qui y sont érigées et toutes améliorations qui y ont été faites, de même que les machineries et accessoires *qui sont immeubles par destination* ou qui le seraient, s'ils appartenaient au propriétaire du fonds . . .

In 1943, by c. 37, s. 5, s. 488 was repealed and the following substituted:

> 488. Les immeubles imposables dans la municipalité comprennent les terrains, les constructions et les usines qui y sont érigées et toutes améliorations qui y ont été faites, de même que les machineries et leurs accessoires *placés dans les usines et servant à leur exploitation,* quel que soit le propriétaire de ces machineries et accessoires . . .

In 1945, by c. 53, s. 1, the section as enacted by the statute of 1943 was repealed and the section as it read in the revised statutes of 1941 was restored.

It is therefore plain that in the view of the Legislature, the doctrine of industrial exploitation does not exist under art. 379 C.C.

1957

CITY OF SHERBROOKE *et al.* *v.* COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Kellock J.

In this situation there is nothing, in my opinion, to be gained by saying that, by reason of the inclusion in art. 379 of paras. "1" and "2" and the last paragraph, which deals with fertilizers, the article recognizes a limited industrial and agricultural immobilization provided the objects in question have been placed on the land "à perpétuelle demeure". That a thing has been placed on his land by the proprietor *à perpétuelle demeure* is the sole requirement, in the absence of incorporation. In my opinion, therefore, only confusion can result from the employment of such terms, and some of the decided cases illustrate that such confusion has resulted.

Returning then to the general rule enunciated in the opening paragraph of art. 379, the words "à perpétuelle demeure" must receive the same meaning as applied to the classes of things described in the paragraphs numbered "1" and "2" as elsewhere in that article and in art. 380. Was the intention at the time of placing, as in the case of manure or straw intended for manure, that they should remain "toujours"? If fastened in a durable manner, as described in the first paragraph of art. 380 or if not removable without breakage or without destruction or deterioration, or if they serve to complete or perfect the realty, the question must be answered in the affirmative.

It will be convenient to set out the numbered paragraphs in their context, as follows:

379. Les objets mobiliers que le propriétaire a placés sur son fonds à perpétuelle demeure, ou qu'il y a incorporés, sont immeubles par destination tant qu'ils y restent.

Ainsi sont immeubles, *sous ces restrictions,* les objets suivants et autres semblables:

1. Les pressoirs, chaudières, alambics, cuves et tonnes;

2. Les ustensiles nécessaires à l'exploitation des forges, papeteries et autres usines.

Sont aussi immeubles par destination les fumiers ainsi que les pailles et autres substances destinées à le devenir.

379. Movable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immoveable by their destination so long as they remain there.

Thus, within these restrictions, the following and other like objects are immovable:

1. Presses, boilers, stills, vats and tuns;

2. All utensils necessary for working forges, papermills, and other manufactories.

Manure, and the straw and other substances intended for manure, are likewise immoveable by destination.

Paragraphs "1" and "2" are again, and expressly so, illustrations of the general rule. Presses, boilers, utensils, etc., are immoveable "sous ces restrictions", *i.e.*, if placed "à perpétuelle demeure".

In the case at bar it is paragraph numbered "2" which is the relevant paragraph.

According to the finding of the learned trial judge, confirmed by the Court of Appeal, the machinery here in question is not in any way fastened to the realty so as to come within the description contained in the first paragraph of art. 380. It was, however, placed in the respective manufacturing plants with the intention that it should not be removed until necessitated by "obsolescence, change of demand for products for which certain machines are used, improved machines to replace old machines and other analogous reasons", to quote from McDougall J. at p. 646. This is to say of the machinery what was said by Pothier in the passage already quoted, where, in speaking of vine props, he said they were "destinés à y servir à cet usage jusqu'à ce qu'ils soient entièrement usés, et qu'ils ne puissent plus servir". The buildings themselves where the machinery is placed, are of a character designed for the carrying on of the respective industrial processes for which the machines were acquired.

At the time when Pothier wrote, industrial development had not, of course, reached the stage of modern times, but Pothier touches upon the present question in his Traité de la Communauté, (*supra*), in para. no. 59, where, in speaking of moveables which serve to "complete" the building in which they are found, he says:

> . . . lorsqu'un bâtiment a été construit exprès pour être une raffinerie de sucre, les grandes chaudières qui y sont enfoncées en terre, et scellées en maçonnerie, sont censées faire partie de l'édifice, auquel il manquerait quelque chose, et qui ne serait pas une raffinerie sans ces chaudières.

Under para. "2" the codifiers also refer to *V Pandectes Francaises,* pp. 66 and 67. On the latter page the word "ustensiles" is used, not in the narrow dictionary sense of "vessels" or "tools" but with a much larger signification. The paragraph reads:

> Il peut y avoir, et il y a en effet, dans les villes, même à Paris, des établissements, des manufactures, qui demandent un bâtiment disposé exprès, et qui deviendrait inutile si sa destination était changée. Il n'est

1957

CITY OF SHERBROOKE *et al.* v. COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Kellock J.

pas douteux que non seulement les pressoirs, cuves, chaudières et alambics, mais encore les autres ustensiles, quoique mobiles, qui servent à l'exploitation de ces établissements ou manufactures, sont réputés immeubles. Dans une raffinerie, par exemple, non seulement les cuves, mais aussi tous les autres ustensiles, sont immeubles.

A judgment of the Parliament of Flanders on April 7, 1780, is referred to as the basis of the statement in the last sentence. I have not been able to locate the full text of that judgment but have seen only the reference to it in Merlin, vol. 20, p. 150.

It would therefore appear that even under the old law before the French Code not only the large objects physically attached to the refinery building, as described by Pothier, but "tous les autres ustensiles" of the refinery were also considered immoveables for the reason that they served to complete the building for the purpose for which it was designed or applied, namely, a refinery.

The governing principle is perhaps better understood by comparing the "ustensiles" mentioned above with such articles as household furniture. A chateau or a fortress is not complete as a chateau or a fortress without the artillery necessary for its defence, but both the chateau and the fortress would be complete, as such, without the furniture necessary for the comfort of the occupants. Similarly, the chapel attached to the chateau was not considered complete as a chapel without the things which served the object for which it was built, namely, divine service. On the other hand, the room in the mansion house in Paris used by the seigneur while living there for the purpose of divine worship, remained complete as a room when no longer used for that purpose, as it was not built or designed for use as a chapel.

It is this principle which is invoked, in my opinion, by art. 379 in the case of the classes of things described in para. "2". What is envisaged is a building designed for the carrying on of the enterprises therein mentioned. A paper-mill building without "all utensils necessary for working" the mill would not be a complete paper-mill. The words "other manufactories", in my opinion, make it clear that a factory used for a particular manufacturing purpose is none the less within the intendment of the paragraph although it is capable of being used for other kinds of manu-

facturing processes with other machinery. Without the necessary machinery a factory is not a factory. The building is merely a shell.

In my opinion, therefore, if the proprietor of a building suitable for an industrial process places in it machinery for the purpose of carrying on that process permanently and not merely temporarily, such machinery becomes immobilized under art. 379 whether any part of it does or does not fall within the first paragraph of art. 380. The principle is not displaced merely because the same building could be devoted equally well to some other industrial purpose.

If such be the intention of the proprietor at the time of placing the machinery, the possibility of the occurrence of some vicissitude bringing about a desistment from that intention is not sufficient to change its nature. A railway built to be operated permanently may cease to be operated at a future time for a number of reasons but this possibility is not sufficient to alter the nature of the builder's original intention. On the other hand, instances occurred during the late war when manufacturing plants were established to supply some product or products during the period of the war only. Such a plant could not be regarded as having been established with an intention *à perpétuelle demeure*.

In my opinion, this law was well understood in Lower Canada at the time of the enactment of the Code and subsequently, and forms the basis of the decision in *The Grand Trunk Railway Company of Canada v. The Eastern Townships Bank* (1), a judgment of the Court of Appeal, where it was held that

> . . . the locomotive engine seized as a moveable is in fact an *integral* part of the immoveable property constituting the Grand Trunk Railway. It is to all intents and purposes part of the realty, *un immeuble par destination*, and is no more liable to seizure, apart from the immoveable property to which it belongs, than the detached burrstones in a mill, the vats in a brewery, or the boilers in a sugar factory;

per Drummond J. The judgment of the Court was put upon the ground that the locomotive "is an indispensable portion of the realty forming the said road".

It is obvious that the railway, consisting of rails, ties, etc., erected upon the ground, would be incomplete and useless for any other purpose without the rolling stock

(1) (1865), 10 L.C. Jur. 11 at 15.

1957

CITY OF SHERBROOKE *et al.* v. COMMISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Kellock J.

for the movement of which it is built. The rolling stock serves to complete the railway in the same way as the electric crane to which I have already referred.

In *Binks v. The Rector & Church Wardens of the Parish of Trinity and The Trust and Loan Company of Canada* (1), the issue was as to whether a church organ was an immoveable. Papineau J. correctly put to himself the question at p. 259:

> Il est donc important de constater si c'est pour perpétuelle demeure que l'orgue en question a été placé dans l'Eglise de la Trinité, parce que de ce point-là, et de celui-là seulement, dépend le maintien ou le renvoi de l'opposition en cette instance.

After pointing out that a church is a building constructed for a special purpose, so much so that it cannot be diverted to any other use without substantial alterations and that an organ, as much as the church in which it is placed, is earmarked permanently for divine service, the learned judge held that the earmarking or appropriation of the organ to the church building should be regarded as permanent as the object both were designed to serve.

In *Péloquin v. Bilodeau* (2), the question for decision involved certain boilers, vats, tuns, etc., used for making maple sugar. Lemieux J., who delivered the judgment of the majority, was of opinion that arts. 379 and 380 did not demand in all cases a physical tie between the moveable and the immoveable. The last paragraph of art. 380 was sufficient proof of this to him. He again pointed out, at the foot of p. 396, that while the French law has points of similarity, it differs substantially from the *Civil Code*. At p. 397 he said:

> Ainsi, notre code édicte l'immobilisation d'un meuble à toutes fins que de droit, industrielles, agricoles ou autres, lorsqu'il est placé à perpétuité sur un fonds. L'art. 524 du code Napoléon n'exige pas, dans certains cas, la perpétuelle demeure, il suffit que le meuble soit placé pour l'utilité et exploitation du fonds pour en faire un immeuble.

The learned judge held that if the articles in question were removed (at. p. 399)

> . . . on se serait trouvé en présence d'un fonds dénudé et incapable de donner la seule production que le propriétaire pouvait en attendre et espérer.
>
> Ces ustensiles étaient l'âme de la fabrication. Les faire disparaître, la fabrication tombait et perdait sa nature. Les enlever, aurait détruit

(1) (1881), 25 L.C. Jur. 258. (2) (1910), 39 Que. S.C. 388.

l'immeuble, l'aurait amoindri, lui aurait ôté ses moyens productifs et, partant, ç'aurait été méconnaître le vœu du propriétaire qui avait placé ces objets sur le fonds pour en faire partie, et cela, à perpétuelle demeure.

* * *

Dans les circonstances relatées, est-il possible de conclure logiquement et légalement que le propriétaire n'avait pas placé *pour toujours* et à perpétuelle demeure sur son fonds, pour le service et l'exploitation de ce fonds, les agrès et ustensiles de sucrerie en question?

It is not necessary, for present purposes, to approve or disapprove of the actual decision. Cimon J. dissented, being evidently of opinion that the evidence was insufficient to satisfy the requirements of arts. 379 and 380, and it has been decided in other cases, upon other facts, that equipment for making maple sugar continued to be moveables. Lemieux J. had himself so held in *Anderson v. Poirier* (1). *Péloquin's Case* is not important for the particular application made of the principles laid down but for the discussion of these principles.

In 1936 the Court of Appeal had occasion to consider arts. 379 and 380 in *Roy v. Lamontagne* (2), a case involving again things used in making maple sugar.

Walsh J. at p. 136 said:

Our law is derived from the old French law of the time of Pothier. The Code Napoléon does not give effect to all the enactments of this old law, because of modern trends that gave importance to moveables. Our Civil Code, however, did not adopt all the principles of the Code Napoléon. The result is greater confusion in regard to a subject necessarily complicated because of the effort required to convert into an immoveable what is by nature a moveable (especially when the object is not attached to the principal thing by physical links).

Dorion J., at p. 141, after referring to the previously existing law and arts. 379 and 380, said:

La difficulté est de savoir si l'on doit considérer comme immeubles des machines et des ustensiles et autres objets mobiliers qui se trouvent sur un immeuble et qui sont nécessaires à l'exploitation de cet immeuble, et s'ils sont ainsi devenus immeubles par le seul fait qu'ils y sont placés par le propriétaire. Ceci peut conduire très loin, et, en effet, on est allé très loin.

L'ameublement d'une maison est nécessaire à l'usage ou à l'exploitation de cette maison; les instruments aratoires sont nécessaires à l'exploitation d'une ferme, ainsi que les animaux qui s'y trouvent, et le Code Napoléon, en effet, déclare les animaux de ferme immeubles. (C.N. 524). Notre Code ne va pas jusque-là.

(1) (1898), 13 Que. S.C. 283. (2) (1936), 60 Que. K.B. 134.

1957

CITY OF SHERBROOKE *et al.* v COM-MISSAIRES D'ECOLES DE SHERBROOKE *et al.*

Kellock J.

The learned judge, as well as St-Jacques J., considered that art. 380 laid down the limits within which immobilization under art. 379 was to be established—"Ce sont là des restrictions apportées à l'apparente généralité des termes de l'art. 379." This statement, if it overlooks the generality of the rule stated in art. 379, is too narrow.

St-Jacques J. pointed out that it is the last paragraph of art. 524 C.N., which is analogous to art. 379 C.C. French commentaries on the first part of art. 524 C.N. are thus of little use, in his opinion.

The learned judge was, however, of opinion that art. 379 provides for the immobilization of the classes of moveables described in paras. "1" and "2" only and no others. As already mentioned, I find myself unable to agree.

For the above reasons, *Royal Trust Co. v. Ein* (1) and *Baum v. St. Casimir Lumber and Manufacturing Co. Ltd.* (2) must be taken to have been wrongly decided.

I do not find it necessary to discuss any of the other cases, beyond referring to *Budden v. Knight* (3) and *Philion v. Bisson* (4), which follows it. These decisions are misleading inasmuch as they are in part founded upon the view that the doctrine of industrial immobilization introduced into the French law by the first paragraph of art. 524 C.N. is applicable under art. 379 C.C. In *Budden v. Knight,* for example, the learned trial judge, after stating that moveables are immobilized by being "placed by the proprietor on his real property for a permanency" or "by being incorporated in it", based his judgment, *inter alia,* upon the statement in Sirey et Villeneuve, art. 517-8-9 *et seq.* (see Sirey et Gilbert, 4th ed. 1901, vol. 1, p. 415) that

> Les meubles et ustensiles attachés à l'exploitation d'une manufacture, que la loi répute immeubles par destination, ne sont autres que ceux qui sont *nécessaires* à l'exploitation de cette manufacture.

and concluded at p. 277:

> The articles revendicated having been placed in the brewery to be used in its working, and being necessary to the same, were immoveables by destination, and became part of the brewery which could not be seized and sold by a *fieri facias de bonis,* and passed to the defendant under the adjudication to him of the brewery in which they still were, and of which they had never ceased to form part.

(1) [1942] Que. S.C. 63.
(2) [1950] Que. S.C. 391.
(3) (1877), 3 Q.L.R. 273.
(4) (1878), 23 L.C. Jur. 32.

The only question remaining for determination is as to whether art. 379 excludes from the determination of the question of intention all evidence other than external physical circumstances. In my opinion, that is not so. How is it to be ascertained that a farmer intends to sell his manure or straw rather than to place it on the land or whether the "straw" or "other substance" is *intended* for manure at all? No doubt his actual practice in former years may be looked to but that could not be an infallible guide in a subsequent year.

By the terms of the article itself, in my opinion, the evidence of the owner as to his intention is, at the least, admissible evidence. As already pointed out, McDougall and Gagné JJ. found it impossible in the case at bar to come to a conclusion without examining the evidence of the officers of the appellant company.

I therefore think that the Court of Appeal has reached the right result. The appeal should be dismissed with costs throughout as against the appellants save that there should be no costs against the appellant city in this Court.

Appeal dismissed with costs.

Solicitor for the City of Sherbrooke, appellant: A. Rivard, Sherbrooke.

Solicitors for Dominion Textile Company Limited and Domil Limited, appellants: Heward, Holden, Hutchison, Cliff, McMaster & Meighen, Montreal.

Solicitors for Canadian Ingersoll-Rand Company Limited, appellant: Lafleur, Brown & Picher, Montreal.

Solicitors for Paton Manufacturing Company Limited, appellant: Monette, Filion & Lachapelle, Montreal.

Solicitor for the plaintiff, respondent: E. Veilleux, Sherbrooke.

1957
*Feb. 4, 5, 6, 7
May 13

LA COMPAGNIE DU TELEPHONE SAGUENAY - QUEBEC AND LA COMPAGNIE DE TELEPHONE BELL DU CANADA (*Plaintiffs*) .. APPELLANTS;

AND

LA VILLE DE PORT - ALFRED (*Defendant*) ..... RESPONDENT;

AND

LES COMMISSAIRES D'ECOLES POUR LA MUNICIPALITE DE PORT-ALFRED (*Mis-en-cause*) .. RESPONDENT.

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

Taxation—Municipal land taxes—"Immoveables"—Telephone switchboard in telephone exchange building—Whether immoveable by destination—Cities and Towns Act, R.S.Q. 1941, c. 233, s. 488—Civil Code, arts. 379, 380.

A telephone switchboard owned by a telephone company and placed for a permanency in the company's exchange building, is an immoveable by destination, and, therefore, taxable under s. 488 of the *Cities and Towns Act*. *City of Sherbrooke et al. v. Le Bureau des Commissaires d'Ecoles Catholiques Romains de la Cité de Sherbrooke et al., ante*, p. 476, applied.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming the judgment of Lacroix J. Appeal dismissed.

Gustave Monette, Q.C., and *P. C. Venne, Q.C.*, for the plaintiffs, appellants.

Roland Fradette, Q.C., for the respondents.

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

TASCHEREAU J.:—La Compagnie de Téléphone Bell du Canada est maintenant aux droits de la Compagnie du Téléphone Saguenay-Québec. Cette dernière était propriétaire d'un immeuble dans la ville de Port-Alfred, et y avait installé son bureau central pour les opérations téléphoniques. Dans cet immeuble se trouvait un tableau

*PRESENT: Taschereau, Kellock, Fauteux, Abbott and Nolan JJ.

(1) [1955] Que. Q.B. 855.

téléphonique, propriété de l'appelante, que la ville pour fins de taxation municipale a évalué à la somme de $60,000 pour l'année 1950-51, se terminant le 30 juin 1951. Le rôle municipal sert aussi de base à l'impôt scolaire, et c'est la raison pour laquelle la commission scolaire a été mise-en-cause.

L'appelante, la Compagnie de Téléphone Bell du Canada, qui a acheté l'actif de la Compagnie du Téléphone Saguenay-Québec, et qui a pour elle continué l'instance, prétend que ce standard téléphonique est un bien mobilier, et, par conséquent, n'est pas sujet à la taxe foncière et ne doit pas apparaître au rôle d'évaluation.

Une action fut instituée en vertu de l'art. 50 du *Code de procédure civile,* et on a allégué que le rôle était *ultra vires* de la corporation intimée, et que celle-ci avait outre-passé les pouvoirs que la loi lui accorde en évaluant les effets qui font l'objet de ce litige. L'appelante demande, en conséquence, que le rôle d'évaluation, comme d'ailleurs le rôle de perception, soient annulés. L'honorable juge Lacroix a rejeté l'action avec dépens. Il en est arrivé à la conclusion que l'appelante était propriétaire de l'immeuble où elle a elle-même placé ce standard téléphonique à perpétuelle demeure, que les objets étaient attachés au sol de l'immeuble à fer et à clous, et retenus par un nombre considérable d'écrous et de boulons, qui les fixent au plancher, au plafond et aux murs, et qu'ils sont reliés à un grand nombre de fils, qui sont soudés aux différentes parties de la construction. Ces objets, dit-il, sont nécessaires aux fins de l'installation de la station téléphonique, sont incorporés à l'immeuble, et sont, en conséquence, immobilisés par destination.

La Cour du Banc de la Reine (1) a confirmé unanimement ce jugement. Elle a vu dans le texte de l'art. 488 de la *Loi des Cités et Villes* les conditions nécessaires pour déclarer immeuble, et, par conséquent, sujet à la taxe foncière, le standard téléphonique en question. Ce texte se lit ainsi:

> Les immeubles imposables dans la municipalité comprennent les terrains, les constructions et les usines qui y sont érigées et toutes améliorations qui y ont été faites, *de même que les machineries et accessoires qui sont immeubles par destination ou qui le seraient, s'ils appartenaient au propriétaire de fonds.*

(1) [1955] Que. Q.B. 855.

1957

BELL TELEPHONE CO. v. VILLE DE PORT-ALFRED et al.

Taschereau J.

M. le juge Pratte conclut que par l'opération de l'art. 379 C.C., ces objets sont nécessaires pour compléter le fonds sur lequel ils se trouvent, qu'ils ont été placés à perpétuelle demeure, et qu'ils sont, en conséquence, immeubles par destination. M. le juge Hyde est d'opinion que ces objets sont non seulement des immeubles par destination en vertu de l'art. 379 C.C., mais aussi qu'ils ont été fixés à fer et à clous, et ont été immobilisés par l'opération de l'art. 380 C.C. M. le juge en chef Galipeault a concouru dans les jugements de MM. les juges Pratte et Hyde.

Je m'accorde avec les conclusions des jugements de la Cour Supérieure et de la Cour du Banc de la Reine, et, pour les raisons que j'ai données dans la cause de *City of Sherbrooke et al. v. Le Bureau des Commissaires d'Ecoles Catholiques Romains de la Cité de Sherbrooke et al.*, (*ante*, p. 476), je crois que cet appel ne peut pas réussir. Ce standard téléphonique est clairement, à mon avis, un immeuble par destination, et je ne crois pas qu'il soit nécessaire de déterminer si oui ou non, il était au sens de 380 C.C., fixé à fer et à clous.

L'arrêt rendu par le Comité judiciaire du Conseil Privé dans *Bell Telephone Company of Canada v. Ville St. Laurent* (1) ne peut trouver ici aucune application. Dans cette dernière cause, la compagnie n'était pas propriétaire de l'immeuble où était situé le standard téléphonique, et, par conséquent, toute immobilisation par destination était impossible. Pour déclarer immeuble le standard en question, il eût fallu qu'il le soit par nature, suivant les dispositions de l'art. 376 C.C., et, à mon sens, le Conseil Privé a décidé avec raison que tel n'était pas le cas. Cette décision a été rendue en 1936, avant l'amendement apporté à l'art. 488 de la *Loi des Cités et Villes* (5 Geo. VI, c. 41), qui a ajouté à l'article tel qu'il existait la disposition suivante:

> La valeur réelle du tout est portée au rôle d'évaluation au nom du propriétaire du fonds; mais si ce dernier prouve aux estimateurs que des machineries ou accessoires ont été placés par un locataire ou autre occupant, la valeur de ces machineries et accessoires est portée au nom du locataire ou occupant qui les possède et qui, à cet égard, est traité comme un propriétaire d'immeubles imposables.

L'appel doit donc être rejeté avec dépens.

(1) [1936] A.C. 73.

The judgment of Kellock and Nolan JJ. was delivered by

KELLOCK J.:—For the reasons given by me in *City of Sherbrooke et al. v. Le Bureau des Commissaires d'Ecoles Catholiques Romaines de la Cité de Sherbrooke et al.* (*ante*, p. 476), I think all the items here in question, except the incoming cables, are to be regarded as immoveables, having been placed upon the premises by the owner for a permanency, completing, as they do, the telephone exchange, for the purposes to which the premises are devoted. This result is not affected by the fact that while some of the items are attached by "iron and nails", as the Courts below have found, the switchboard proper merely rests upon the floor by its own weight.

I cannot agree that the assessed items, taken as a whole, are not to be considered as machinery within the meaning of the statute here in question. They do, in my opinion, come within the definition given in the Oxford Dictionary to which I referred in *Northern Broadcasting Company Limited v. The Improvement District of Mountjoy* (1).

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Munnoch & Venne, Montreal.

Solicitor for the respondents: R. Fradette, Chicoutimi.

---

(1) [1950] S.C.R. 502 at 509, [1950] 3 D.L.R. 721.

1957

*Feb. 19
June 6

IN THE MATTER OF the Estate of Everett George Kerslake, late of the City of Toronto, in the County of York, Veterinary Surgeon, deceased.

MILDRED LOUISE KERSLAKE (*Applicant*) ..... APPELLANT;

AND

ALISON BRUCE GRAY (otherwise known as Alison Bruce Kerslake) (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Dependants' relief—What constitutes "estate" of testator—Insurance policies payable to ordinary beneficiary—The Dependants' Relief Act, R.S.O. 1950, c. 101, ss. 1(e), (f), 2(1).

Insurance—Life insurance—Ordinary beneficiary—Whether proceeds of policy part of "estate" of insured for purposes of The Dependants' Relief Act, s. 2(1)—The Insurance Act, R.S.O. 1950, c. 183, s. 161.

The proceeds of an insurance policy payable to an ordinary beneficiary do not form part of the "estate" of the insured within the meaning of *The Dependants' Relief Act.* A dependant under that Act is entitled to look only to the estate that the personal representatives of the deceased are entitled to administer, and those representatives have no claim upon such insurance moneys.

Per Cartwright J., *dissenting*: When the definitions of "estate", "testator" and "will" in the Act are properly construed, and read with the relevant provisions of *The Insurance Act,* the result is that insurance in such circumstances is to be deemed part of the estate for purposes of the Act, just as it is available to creditors of the estate. *Dictum* in *Deckert v. The Prudential Insurance Company of America,* [1943] O.R. 448 at 456-7, approved with a reservation; *In re Roddick* (1896), 27 O.R. 537, explained; *Re Benjamin* (1926), 59 O.L.R. 392; *Re Isaacs,* [1954] O.R. 942 at 956, disapproved. The position of an ordinary beneficiary designated in a policy of life insurance is analogous to that of a legatee or of a volunteer in whose favour a general power of appointment is exercised, and while on the death of the insured the beneficiary may enforce payment from the insurer he will hold the proceeds of the policy subject to the possible claims of creditors or dependants in the same way as if he had received them as a specific legacy.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming a judgment of McDonagh J. of the Surrogate Court of the County of York. Appeal dismissed, Cartwright J. dissenting.

*PRESENT: Kerwin C.J. and Rand, Kellock, Locke and Cartwright JJ.

(1) [1955] O.W.N. 606, [1955] 4 D.L.R. 326.

F. A. Brewin, Q.C., for the applicant, appellant.

Terence Sheard, Q.C., for the respondent.

The judgment of Kerwin C.J. and Rand, Kellock and Locke JJ. was delivered by

KELLOCK J.:—This appeal arises under the provisions of *The Dependants' Relief Act*, R.S.O. 1950, c. 101, the contention of the appellant being that the "estate" of the testator for the purposes of the statute must be taken to include the proceeds of certain policies of insurance upon the life of the deceased Everett George Kerslake, originally payable to the estate of the deceased but subsequently changed by him by declaration under the Ontario *Insurance Act* and made payable to the respondent, an ordinary beneficiary. The appellant is the lawful wife of the deceased.

The provisions of the statute upon which the appellant particularly relies are as follows:

> 1. (*e*) "testator" means a person who by deed or will or by any other instrument or act so disposes of real or personal property, or any interest therein, that the same will pass at his death to some other person;
>
> (*f*) "will" means any deed, will, codicil, instrument or other act by which a testator so disposes of real or personal property that the same will pass at his death to some other person.
>
> 2.—(1) Where it is made to appear to a judge of the surrogate court of the county or district in which a testator was domiciled at the time of death that such testator has by will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants or any of them, the judge may make an order charging the whole or any portion of the estate in such proportion and in such manner as to him may seem proper, with payment of an allowance sufficient to provide such maintenance.

The appellant contends that as the result in fact of the declarations is that the deceased has so disposed of his property that adequate provision has not been made for the future maintenance of the appellant as one of his dependants, the "estate", with respect to which the judge is empowered to make an order by virtue of the subsection, must, in the light of the definitions in s. 1, be taken to include the insurance moneys.

The contention for the respondent, on the other hand, is that there is no sufficient basis in the statute for such a view and that "estate" means such assets only as the personal representatives of the deceased are entitled to administer.

1957

KERSLAKE v. GRAY

Kellock J.

In support of her position, the appellant points out, in the first place, that while s. 164 of *The Insurance Act,* R.S.O. 1950, c. 183, contains an express declaration that insurance moneys payable to preferred beneficiaries do not form part of the estate of the insured, there is no similar expression in s. 161. While that is so, I am of opinion that s. 161 operates to the same effect as regards ordinary beneficiaries as s. 164 does in the case of preferred.

By subs. (1) of s. 161, it is provided that the insured may designate the beneficiary by the contract or by declaration and may subsequently change the beneficiary, and subs. (2) enables the beneficiary, at the maturity of the contract, to enforce for his own benefit payment of the insurance moneys. It is significant that it is specifically provided by the subsection that "the insurer shall be entitled to set up any defence which it could have set up against the insured or his personal representatives". This provision emphasizes the status of the beneficiary in relation to his claim for payment.

It has for a long time been uniformly held in Ontario that insurance moneys payable to an ordinary beneficiary do not form part of the estate of the insured. Whatever criticism might have been directed at the decisions in *In re Roddick* (1); *Re Benjamin* (2), and *Re Jones* (3) (and I am not suggesting that the appellant is well founded in his criticisms of them), there is no basis for criticism since the enactment of subs. (2) of s. 161 by 1946, c. 42, s. 6.

In considering the meaning of the word "estate" in *The Dependants' Relief Act,* it is of some relevance to refer to certain provisions of *The Surrogate Courts Act,* R.S.O. 1950, c. 380. By s. 55 the Court is concerned only with "the property which belonged to the deceased at the time of his death". Further, by s. 77(1), it is provided that the fees payable upon the value of "the estate" of the deceased shall be calculated upon the value of "the whole estate". It has been held in *Re Farnsworth* (4) that insurance moneys payable to an ordinary beneficiary do not enter into the valuation of the estate under this section.

(1) (1896), 27 O.R. 537.
(2) (1926), 59 O.L.R. 392.
(3) [1933] O.W.N. 243.
(4) [1936] O.W.N. 48.

Whatever bearing the above statute may or may not have upon the issue here in question, I am, in any event, of opinion that there is in *The Dependants' Relief Act* itself clear indication that the contention of the appellant is erroneous. Section 10 is as follows:

> Subject to section 8, the amount or value of any allowance ordered to be paid, together with the value of any benefits given under the will of the testator, *shall not exceed the amount to which the person in whose favour the order is made would have been entitled if the testator had died intestate.*

(The italics are mine.)

Counsel for the appellant contends that the word "intestate" must be interpreted in the light of the definitions of "testator" and "will" in s. 1, and that by so doing the result for which he contends is attained. I am unable to agree. In my opinion the word "intestate" is not to have read into it other than its ordinary meaning, and when so regarded it is perfectly clear that a dependant is entitled to look only to the estate which the personal representatives of the deceased are entitled to administer. They, of course, have no claim upon moneys payable to an ordinary beneficiary under a policy of insurance except where there may exist some ground upon which the designation of the beneficiary may be set aside. It is not suggested that any such ground exists in the present case.

Again, by s. 8, it is provided that where a dependant has given personal assistance or the gift or loan of money or real or personal property toward the advancement of the testator in any business or occupation, the judge may place a money value upon the same and may direct that

> the applicant shall rank as a creditor upon the estate therefor, in the same manner and to the *same extent* as a judgment creditor upon a simple contract debt . . .

The section goes on to provide that

> . . . except as to the amount so fixed as the value of such assistance or as the amount or value in money of such gift or loan *an allowance payable under this Act shall be postponed to the claims of creditors of the estate.*

(The italics are mine.)

This section would seem in the clearest terms to indicate that the sole source from which any allowance granted under the Act is to be satisfied is the assets to which creditors are entitled to look. The assets to which creditors

1957

KERSLAKE v. GRAY

Kellock J.

are entitled to look are the assets which the personal representative of a testator is entitled to administer. Instead of containing any provision that a dependant is entitled to a higher right than creditors, as is here contended by the appellant, the statute is express in placing the dependant in a less favourable position.

In my opinion the appeal fails and must be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The question raised on this appeal is as to whether the proceeds of two policies of insurance on the life of the late Everett George Kerslake, hereinafter referred to as "the deceased", form part of his estate within the meaning of s. 2(1) of *The Dependants' Relief Act*, R.S.O. 1950, c. 101.

The facts are not in controversy. The appellant is the widow of the deceased. In 1949 the deceased obtained, in the State of Idaho, what purported to be a decree of divorce and on July 25, 1950, went through a form of marriage with the respondent; but it is conceded, for the purposes of this appeal, that the domicile of the deceased was at all times in Ontario and that his marriage to the respondent was not valid by the laws of that Province.

The policies in question were issued under contracts of group life insurance. In each case the certificate issued to the deceased bore the date July 1, 1946, and stated that the moneys to become payable on his death were to be paid to his estate.

On November 16, 1950, the deceased executed declarations naming the respondent as beneficiary in each of the policies and reserving his right to change the beneficiary.

On November 10, 1950, the deceased made a will reading, so far as is relevant, as follows:

> I GIVE, DEVISE AND BEQUEATH the whole of my estate of whatsoever nature and kind and wheresoever situate and over which I have any power of appointment to my second wife Alison Bruce Kerslake (formerly Alison Bruce Gray) for her own use absolutely, and I appoint her the sole executrix of this my Will.

The deceased died on July 22, 1953, and probate of his will was granted to the respondent on February 5, 1954.

Apart from the policies in question, certain other policies payable to the appellant and another policy as to which other litigation is pending, the deceased died insolvent.

The appellant's application for an allowance under the provisions of *The Dependants' Relief Act* was heard by His Honour Judge McDonagh in the Surrogate Court of the County of York. That learned judge was of the opinion that in the circumstances outlined above the proceeds of the policies in question did not form any part of the estate of the deceased and dismissed the application. His judgment was affirmed by the Court of Appeal.

The appellant contends that the proceeds of the policies in question form part of the "estate" of the deceased within the meaning of that term as used in *The Dependants' Relief Act*. The argument proceeds in this way: Apart from the declarations executed by the deceased on November 16, 1950, the proceeds of the policies would have formed part of his estate. Each declaration was a "will" as defined by s. 1(*f*) of *The Dependants' Relief Act,* being an "instrument by which a testator so disposes of . . . personal property that the same will pass at his death to some other person". The deceased in executing the declaration was a "testator" as defined by s. 1(*e*) of *The Dependants' Relief Act,* being a "person who by . . . instrument . . . so disposes of . . . personal property, or any interest therein, that the same will pass at his death to some other person". Up to this point the appellant's argument appears to be sound; it continues, the purpose of the Act is to make available for the maintenance of dependants such part of the estate of the testator as he has disposed of by "will" as defined in the Act; this purpose appears from the wording of s. 2(1):

> 2.—(1) Where it is made to appear to a judge of the surrogate court of the county or district in which a testator was domiciled at the time of death that such testator has by will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants or any of them, the judge may make an order charging the whole or any portion of the estate in such proportion and in such manner as to him may seem proper, with payment of an allowance sufficient to provide such maintenance.

which must be considered with s. 10:

> 10. Subject to section 8, the amount or value of any allowance ordered to be paid, together with the value of any benefits given under the will of the testator, shall not exceed the amount to which the person in whose favour the order is made would have been entitled if the testator had died intestate.

1957

KERSLAKE v. GRAY

Cartwright J.

The Dependants' Relief Act is, in the appellant's submission, a remedial statute and under s. 10 of *The Interpretation Act,* R.S.O. 1950, c. 184, "shall . . . receive such fair, large and liberal construction and interpretation as will best attain the object of the Act according to the true intent, meaning and spirit thereof"; this requires that the word "estate" as used in s. 2(1) and elsewhere in the Act be interpreted as including the property disposed of by the testator by any instrument falling within the definition of "will" in s. 1(*f*) which but for such disposition would have formed part of his estate, and that the word "intestate" as used in s. 10 be interpreted as "without having disposed of any property by any instrument falling within the definition of 'will' in s. 1(*f*)".

To this it is objected that such an interpretation involves adding to clauses (*e*) and (*f*) of s. 1 some such words as "and the words 'estate' and 'intestate' shall have corresponding meanings". As long ago as 1865, in *The Local Board of Health for the District of Wakefield v. The West Riding and Grimsby Railway Company* (1), Cockburn C.J. said:

> I hope the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion.

The hope of the learned Chief Justice has not been realized, and we must do our best not to be led into confusion.

With some hesitation, I have reached the conclusion that up to this point the appellant's argument is sound and that when *The Dependants' Relief Act* is read as a whole it becomes necessary to give to the words "estate" and "intestate" the meanings for which Mr. Brewin contends. To do otherwise would, in the case at bar and in many cases, make the application of the Act depend upon the form used by a testator to dispose of his assets. If, for example, in the case at bar, the deceased instead of naming the respondent as beneficiary in the declarations he attached to his certificates had simply stated in his will that everything of which he could dispose by will was to be given to her it would, I think, be clear that the proceeds of the policies would have been subject to s. 2(1) of the Act. "Estate" is not a word of single and precise meaning and in the context of this Act, read as a whole, it appears to me to mean "that

(1) (1865), 6 B. & S. 794 at 801, 122 E.R. 1386.

which would have formed the property of the deceased at the time of his death if he had made no 'will' as defined in the Act". "Intestate" on the other hand is a word of plain and definite meaning, that is "not having made a will"; but it also must be interpreted in context and the whole Act proceeds on the basis that "will" includes all those methods of disposition set out in s. 1(*f*). To construe the word "intestate" in s. 10 in the narrow sense of "not having made a will executed in accordance with the provisions of *The Wills Act*" would be to nullify the purpose, which appears from the Act as a whole, to reach all property of the deceased so disposed of by him that it will pass on his death to some other person.

Up to this point I have been considering only the wording of *The Dependants' Relief Act,* read as a whole, and it is now necessary to turn to an argument of the respondent which may be summarized as follows: It is said that, in the law of Ontario, it is well settled that the proceeds of a policy of life insurance made payable, either in the policy as originally issued or by declaration, to a named ordinary beneficiary do not form part of the estate of the insured and are not subject to the claims of his creditors; that when enacting *The Dependants' Relief Act* the Legislature must be assumed to have known this to be the law; and that the intention to alter the law in this respect should not be imputed when express words are not used and indeed insurance is nowhere mentioned in the Act. To this the appellant replies that the law of Ontario is not as stated and that such cases as appear to have so held were wrongly decided.

In approaching the problem posed by these conflicting arguments it is necessary to bear in mind the particular facts with which we are concerned. Nothing seems to turn on the fact that the policies in question were contracts of group life insurance. Section 137(2) of *The Insurance Act,* R.S.O. 1950, c. 183, is as follows:

> (2) In the case of group life insurance the term "insured", in the provisions of this Part relating to the designation or appointment of beneficiaries and the rights and status of beneficiaries, means the person whose life is insured.

It is conceded that the respondent is an "ordinary beneficiary". Section 158(3) of *The Insurance Act* is as follows:

> (3) Ordinary beneficiaries are beneficiaries who are not preferred beneficiaries, beneficiaries for value or assignees for value.

1957

KERSLAKE v. GRAY

Cartwright J.

Section 161(1) of *The Insurance Act* reads:

161.—(1) Subject to the rights of beneficiaries for value and assignees for value and to the provisions of this Act relating to preferred beneficiaries, the insured may designate the beneficiary by the contract or by a declaration, and may from time to time by any declaration appoint, appropriate or apportion the insurance money, or alter or revoke any prior designation, appointment, appropriation or apportionment, or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, and may surrender the contract to the insurer, borrow from the insurer upon the security of the contract, receive the surplus or profits for his own benefit, and otherwise deal with the contract as may be agreed upon between him and the insurer.

It is clear that the deceased up to the moment of his death had power to change the beneficiary named in the declarations and to make the policies payable to anyone else he pleased or to his estate.

It will, I think, be helpful to first consider what, in these circumstances, the legal position would have been prior to the amendment of the Ontario *Insurance Act* by c. 42, s. 6, of the statutes of Ontario of 1946 whereby subs. (2) was added to s. 161. After considering all the cases referred to by counsel it is my opinion, subject to a reservation to be mentioned shortly, that that position was correctly stated by Plaxton J. in *Deckert v. The Prudential Insurance Company of America* (1). While it did not become necessary for the learned judge to express a final opinion on the question, he examined with care a number of English and Canadian authorities including most of those which were discussed on the argument before us and having done so continued as follows, at pp. 456-7:

> It follows, on the authority of these decisions, (1) that the mere fact that the policy moneys are expressed to be payable to somebody other than the assured does not make the assured a trustee of the policy for the person nominated, and (2) that apart from statute and in the absence of the creation of any trust in his favour in respect of the policy moneys, an ordinary beneficiary under a life insurance policy, being a stranger to the contract, does not acquire any interest at law or in equity in the policy or the policy moneys, merely by reason of the fact that the policy moneys are expressed to be payable to him. He cannot, therefore, maintain any action against the insurer for the recovery of the policy moneys. The cause of action passes to the personal representative of the deceased insured, and the policy moneys, if and when recovered, fall into his estate.
>
> This conclusion is, I realize, at variance with the decisions in *In re Roddick, supra* (2), and *Re Benjamin, supra* (3). I cannot, after a most attentive consideration of the matter, reconcile those decisions with the

(1) [1943] O.R. 448, 10 I.L.R. 158, 211, [1943] 3 D.L.R. 747.
(2) (1896), 27 O.R. 537.
(3) (1926), 59 O.L.R. 392.

decisions of the English Courts to which I have referred and which appear to me, in light of the scheme of the life insurance legislation, to control the determination of the question under discussion . . . For the reasons I have indicated, I am disposed to think that the plaintiff has no right of action on the policies in her personal capacity, and can maintain the present action only in her representative capacity, *i.e.*, as sole executrix under the last will of the deceased insured, and for the benefit of his estate.

The Court of Appeal while affirming the judgment of Plaxton J. did not find it necessary to express an opinion on this point.

The view expressed in this dictum of Plaxton J. is in accordance with the law of England on the point which is, in my opinion, accurately stated in the following passages in Preston and Colinvaux on Insurance (1950) at pp. 337-8:

> As we have already seen the legal property in a life policy normally belongs to the person taking it out, subject to any assignment by him. If it is his own life that he insures, unless he has made a specific disposition of the policy by will, it will, on his death, subject to any equitable interests and the claims of his creditors, fall into residue and pass to the residuary legatee, or, if there is no will, to those entitled on intestacy.
>
> * * *
>
> It is common in the case of insurances on the assured's own life, for the assured to nominate a beneficiary at the time of taking out a policy. Such a nomination does not, however, by itself, constitute the assured a trustee, nor, since the person nominated is a stranger to the contract, has he any remedy at law. The property in such a policy will therefore pass, notwithstanding the nomination, to the personal representative of the assured on his death and the nominee has no rights whatsoever, unless—
>
> (i) the nomination amounts to a declaration of trust, or the person taking out the policy is merely the agent of the nominee, or . . . [the remaining exceptions refer to special statutory provisions].

The reservation to which I made reference above is as to that part of the dictum of Plaxton J. which negatives any right in an ordinary beneficiary to the proceeds of the policy in which he is so named. If those proceeds belong to the estate of the insured and pass under his will if he dies testate and otherwise as on an intestacy, then the provisions in *The Insurance Act* dealing with the appointment and change of ordinary beneficiaries would have no practical effect. The provisions of s. 161(1) have formed part of the Ontario *Insurance Act* in substantially their present form since 60 Vic., c. 36, s. 151, and it is difficult to suppose that they were not intended to serve some useful purpose. It may be that even prior to the 1946 amendment, the intention of the Legislature was to give to the designation

1957

KERSLAKE v. GRAY

Cartwright J.

of an ordinary beneficiary in accordance with the terms of the Act the equivalent of testamentary effect. On the other hand the purpose of s. 161(1) may have been to make it clear that the proposition stated, in, I venture to think, much too wide terms, in Bliss on Life Insurance, 2nd ed. 1874, p. 554, had no application in Ontario. The passage to which I refer is as follows:

> Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the moneys.

However, I do not pursue this line of inquiry as the position has been to some extent clarified by the enactment by Statutes of Ontario, 1946, c. 42, s. 6, of subs. (2) of s. 161, which reads:

> (2) Subject to subsection 1, a beneficiary or a trustee appointed pursuant to section 186 may, at the maturity of the contract, enforce for his own benefit or as such trustee the payment of insurance money appointed, appropriated or apportioned to him by the contract or a declaration and in accordance with the terms thereof, but the insurer shall be entitled to set up any defence which it could have set up against the insured or his personal representatives; and payment made to the beneficiary or trustee shall discharge the insurer.

It is noteworthy that a similar amendment was made in each of the other common law Provinces in 1945.

Before proceeding to a consideration of the effect of the legislation in its present form it will be convenient to refer to one of the more recent cases which support the position of counsel for the respondent.

In *Re Isaacs* (1), Roach J.A. delivered the unanimous judgment of the Court of Appeal. Having decided that the beneficiary designated in a policy of life insurance was, in the unusual circumstances of that case, an ordinary beneficiary, he continued at p. 956:

> Mr. Brewin then argued that if the appellant should be held entitled to the insurance moneys they should be declared subject to the payment of the debts of the estate. They cannot be liable for those debts unless they form part of the estate and they are not part of it: see *In re Roddick* (1896), 27 O.R. 537, and *Re Benjamin* (1926), 59 O.L.R. 392.

It will be observed that in the report of the argument the following appears at p. 950:

> The insurance moneys never formed part of the estate, and are therefore not subject to the debts of the deceased. They are never part of the estate when the insurance is in favour of a named beneficiary. [ROACH J.A.: We need not hear you further on that point.]

(1) [1954] O.R. 942, [1954] I.L.R. 1-164, [1955] 1 D.L.R. 327.

There are statements to the same effect in a number of judgments of the Ontario Courts but I think I am right in saying that they are all founded on the authority of *In re Roddick, supra.* In my respectful view the judgment in *In re Roddick* did not purport to lay down any general rule having application to a case in which both by contract and statute the insured has power, up to the last moment of his life, to dispose of the proceeds of a policy as he sees fit. The contract between the insured William Roddick and the insurer "the Supreme Tent of the Knights of the Maccabees of the World" contained the following provisions, set out at pp. 538-9 of the report:

Section 10. "No beneficiary or endowment certificate shall be made payable to any person other than the wife, children, dependents, mother, father, sister or brother of the member, nor can any such certificate be transferred or assigned by a member to any other person than above**." Section 11. "In the event of the death of all the beneficiaries named by the member before the decease of such member, if no other disposition be made thereof, the benefit shall be paid to the beneficiaries of the deceased member first in the order named in the preceding section; and if no person or persons shall be found entitled to receive the same by the laws of the order, then it shall revert to the endowment fund of the association."

The certificate issued to William Roddick named his mother as beneficiary; she predeceased him and the only persons falling within the class set out in s. 10 who survived him were his two sisters. The sisters did not bring an action; a case was stated for the opinion of the Court as to whether they or the administrator of William Roddick were entitled to receive the proceeds of the policy. I find it difficult to infer a general rule from a decision on a policy which by its terms precluded the insurance moneys from falling into the estate of the insured.

At common law the policies in question would, in my opinion, have been treated as contracts made between the deceased and the insurers whereby the latter agreed to pay the proceeds of the policies on the death of the deceased to the respondent, who, being a stranger to the contracts, would have had no right to enforce them. While authority is scarcely needed for this elementary proposition it is succinctly stated in Anson on Contract, 20th ed. 1952, at pp. 254-5 as follows:

A man cannot acquire rights under a contract to which he is not a party.

1957

KERSLAKE v. GRAY

Cartwright J.

It is contrary to the common sense of mankind that *M* should be bound by a contract made between *X* and *A*. But if *A* and *X* make a contract in which *X* promises to do something for the benefit of *M*, all three may be willing that *M* should have all the rights of an actual contracting party; and there would be nothing startling if the law should give effect to this desire. In many systems of law, indeed, this is the rule. It is not, however, the rule of the English Common Law.

By statute (s. 161(2)) the respondent has now been given a right of action against the insurer, and it is necessary to consider the nature of the right so created. Section 161(2), quoted above, must be read in the light of the other provisions in the Act dealing with life insurance and particularly those already quoted and the following:

131. 8. "declaration" means an instrument in writing signed by the insured, attached to or endorsed on a policy, or an instrument in writing, signed by the insured in any way identifying the policy or describing the subject of the declaration as the insurance or insurance fund or a part thereof or as the policy or policies of the insured or using language of like import, by which the insured designates or appoints a beneficiary or beneficiaries, or alters or revokes the designation or appointment of a beneficiary or beneficiaries, or apportions or reapportions, or appropriates or reappropriates, insurance money between or among beneficiaries;

158.—(1) Beneficiaries for value are beneficiaries who have given valuable consideration other than marriage and who are expressly stated to be, or described as, beneficiaries for value in the policy or in an endorsement thereon or in a subsequent declaration signed by the insured.

(2) Subject to section 167, preferred beneficiaries are the husband, wife, children, adopted children, grandchildren, children of adopted children, father, mother and adopting parents of the person whose life is insured.

(3) Ordinary beneficiaries are beneficiaries who are not preferred beneficiaries, beneficiaries for value or assignees for value.

159. A beneficiary for value and an assignee for value of a policy shall have a vested interest in the policy; but except as regards beneficiaries for value who are expressely stated to be or described as beneficiaries for value in the policy, a beneficiary for value or assignee for value who gives notice in writing of his interest in the policy to the insured at the head or principal office of the insurer in Canada prior to any other beneficiary for value or assignee for value shall have priority of interest as against such last-mentioned beneficiary or assignee.

161.—(4) A declaration, whether contained in a will or other instrument in writing, shall, subject to subsection 1, have effect from the time of its execution, but a declaration shall not affect the interest or rights of a beneficiary for value or assignee for value unless the declaration has been filed with the insurer at its head or principal office in Canada prior to the time when the beneficiary for value or assignee for value acquired such interest or rights and if not so filed the interest or rights of the beneficiary for value or assignee for value shall be as if the declaration had not been made.

(5) In the case of a declaration contained in a will it shall be sufficient for the purposes of subsection 4 to file a copy thereof or of the material part thereof verified by statutory declaration.

(6) A declaration contained in an instrument purporting to be a will which has not been revoked otherwise than by operation of law shall be effective as a declaration, notwithstanding that the instrument is invalid as a testamentary instrument.

164.—(1) Where the insured, in pursuance of the provisions of section 161, designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured.

When these provisions are considered together, it appears to me that the intention of the Legislature, in enacting the 1946 amendment, was to alter the rule of the common law to the extent of giving testamentary effect or an effect analogous thereto to the designation of an ordinary beneficiary so that the position of such beneficiary is assimilated to that of a legatee of the proceeds of the policy, and to give to the beneficiary a right of action against the insurer in substitution for, or in addition to, the procedure ordinarily available to a legatee to obtain payment of a legacy.

In my opinion an ordinary beneficiary has no vested interest in the policy or the proceeds thereof until the maturity of the contract, which in the case at bar is at the death of the deceased; to hold otherwise would be to disregard the sharp difference between the wording of s. 161(2) on the one hand and that of ss. 159 and 164(1) on the other. Up to the moment of his death the policies and their proceeds were the sole property of the deceased who had full power to dispose of them by will as he saw fit. The legislation gives to the declarations although not in testamentary form the same effect as if they had been made in that form; but I cannot find words in the legislation or discern reasons in principle to justify imputing to the Legislature the intention of placing a designated ordinary beneficiary in a position so different from, and superior to, that of a legatee of the proceeds of the policies that those proceeds should be held free from the claims of creditors of the deceased or from the liability to be made subject to the provisions of s. 2(1) of *The Dependants' Relief Act*. Such an interpretation would in effect, on the death of the insured, place an ordinary beneficiary in the same position as a preferred beneficiary, a result which the Act read as a whole does not appear to me to contemplate.

1957

KERSLAKE v. GRAY

Cartwright J.

There appears to me to be a close analogy between the position of an insured who, as in the case at bar, having an unfettered power to dispose at his death of the proceeds of a policy to anyone he pleases including his personal representatives designates an ordinary beneficiary, and that of an appointor having a general power of appointment over a fund which he exercises in favour of a volunteer. In the latter case the applicable rule is stated as follows in Farwell on Powers, 3rd ed. 1916, at p. 286:

> Both real and personal estate, subject to general powers of appointment, become assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers; and it makes no difference whether the power is exerciseable by deed or by will, or by will only.

A simple example will serve to illustrate the anomalous result of holding that a policy of insurance payable to a designated ordinary beneficiary forms no part of the estate of the insured. Suppose A dies leaving as his only assets policies of life insurance totalling $500,000, all of which are stated to be payable to his personal representatives. He leaves a widow, B, with no means of support, and he owes debts totalling $10,000. If (i) he leaves a will made the day before his death leaving everything of which he can dispose by will to C, a stranger, his creditors will be paid, the Court will have power to make provision for B under *The Dependants' Relief Act* and the remainder of the $500,000 will go to C; but if (ii) he leaves a will made the day before his death in which he designates C as the beneficiary of all his insurance policies, C will take the $500,000 and neither the creditors nor B can get anything, since under the combined effect of ss. 131(8) and 161(4) the will is a declaration and C a designated ordinary beneficiary. I do not think the words of the statute require such a result and I would respectfully decline to follow a decision that so held unless it were binding upon me.

In my opinion, the proceeds of a policy payable to an ordinary beneficiary can be resorted to by creditors of the insured and, consequently, I do not need to consider the argument of the respondent based on s. 8 of *The Dependants' Relief Act* as that argument rests on the assumption that the proceeds would be free from the claims of creditors.

For the above reasons I have reached the conclusion that the position of an ordinary beneficiary designated in a life insurance policy is analogous to that of a legatee to whom a legacy of an amount equal to the proceeds of the policy is given; and that while on the death of the insured the beneficiary may enforce payment from the insurer he will hold the proceeds of the policy subject to the possible claims of creditors or of dependants under *The Dependants' Relief Act* in the same manner as if he had received them as a specific legacy.

In the result I would allow the appeal, set aside the judgments below and direct that the application be referred back to the learned Surrogate Court Judge to be dealt with on the basis that the proceeds of the policies in question should be treated for the purposes of s. 2(1) of *The Dependants' Relief Act* as forming part of the estate of the late Everett George Kerslake specifically bequeathed to the respondent. The costs of both parties in all courts should be paid out of the proceeds of the policies in question, the costs of the further proceedings hereby directed should be disposed of by the learned Surrogate Court Judge.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: Cameron, Weldon, Brewin & McCallum, Toronto.

Solicitor for the respondent: David J. Walker, Toronto.

LOUIS BEAVER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1957
*May 30
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Narcotic drugs—Possession—What constitutes—Physical possession of package without knowledge of true nature of contents—The Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, s. 4(1)(d).

One who has physical possession of a package which he believes to contain a harmless substance but which in fact contains a narcotic drug, cannot be convicted of being in possession of the drug under s. 4(1)(*d*) of the *Opium and Narcotic Drug Act*. The essence of that crime is the possession of the forbidden substance and in a criminal case there

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

1957

BEAVER v. THE QUEEN

is in law no possession without knowledge of the character of the forbidden substance. Section 4(1)(*d*) is not an enactment of the class that excludes *mens rea* as an essential ingredient of the offence, and there is nothing in the wording of s. 17 of the Act requiring such a construction of s. 4(1)(*d*). It is, therefore, misdirection for a trial judge to tell the jury that, if possession of a package is established, the only question for them to decide is whether or not the package in fact contained a narcotic drug, and that the accused's knowledge or lack of knowledge of that fact, or even his honest but mistaken belief that it was a harmless substance, are wholly irrelevant to the question of his guilt or innocence and must not be considered by them.

Rex v. Hess, [1949] 1 W.W.R. 577, approved; *Morelli v. The King* (1932), 58 C.C.C. 120; *Rex v. Lawrence,* [1952] O.R. 149, overruled.

Per Fauteux and Abbott JJ., *dissenting*: The statute creates an absolute prohibition and *mens rea* is therefore not an essential element of the offence of possession. The principle underlying the Act is that possession of drugs covered by it is unlawful and where any exception is made to this principle that exception is made subject to particular controlling provisions and conditions.

APPEAL by the accused from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from convictions. Appeal allowed in part.

C. L. Dubin, Q.C., for the appellant.

Walter M. Martin, Q.C., for the respondent.

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

CARTWRIGHT J.:—The appellant was tried jointly with one Max Beaver before His Honour Judge Forsyth and a jury in the Court of General Sessions of the Peace for the County of York on an indictment reading as follows:

The jurors for our Lady the Queen present that LOUIS BEAVER and MAX BEAVER, at the City of Toronto, in the County of York, on or about the 12th day of March, in the year 1954, unlawfully did sell a drug, to wit, diacetylmorphine, without the authority of a license from the Minister of National Health and Welfare or other lawful authority, contrary to Section 4(1)(*f*) of the Opium and Narcotic Drug Act, Revised Statutes of Canada, 1952, Chapter 201 and amendments thereto.

2. The said jurors further present that the said LOUIS BEAVER and MAX BEAVER, at the City of Toronto, in the County of York, on or about the 12th day of March, in the year 1954, unlawfully did have in their possession a drug, to wit, diacetylmorphine, without the authority of a license from the Minister of National Health and Welfare or other lawful authority, contrary to Section 4(1)(*d*) of the Opium and Narcotic Drug Act, Revised Statutes of Canada 1952, Chapter 201, and amendments thereto;

AND FURTHER that the said LOUIS BEAVER is an habitual criminal;

AND FURTHER that the said MAX BEAVER is an habitual criminal.

(1) [1956] O.W.N. 798, 116 C.C.C. 231, 25 C.R. 53.

On September 19, 1955, the accused were found guilty on both counts and on the same day the learned trial judge found them to be habitual criminals. On October 17, 1955, the learned judge sentenced them to 7 years' imprisonment on each count, the sentences to run concurrently, and also imposed sentences of preventive detention.

Max Beaver has since died and we are concerned only with the case of the appellant.

The appellant appealed to the Court of Appeal for Ontario against both convictions and against the finding that he was an habitual criminal. These appeals were dismissed.

On February 19, 1957, the appellant was given leave to appeal to this Court from the convictions on the two counts on the following grounds:

1: The learned trial Judge erred in failing to instruct the jury that if they accepted the evidence of Louis Beaver or were in doubt as a result of it, he was not guilty of the offence.

2: The learned trial Judge erred in holding that the accused Louis Beaver was guilty of the offence charged whether he knew the package handed by the accused Max Beaver to the Police were drugs or not.

3: The learned trial Judge erred in instructing the jury that the only point that they had to decide was whether in fact the package handed the police by the accused Max Beaver was diacetylmorphine.

4: The charge to the jury by the learned trial Judge and the Court of Appeal is in error in holding that the accused Louis Beaver could be convicted of the offence charged in the absence of knowledge on his part that the substance in question was a drug.

By the same order, leave to appeal from the finding that the appellant was an habitual criminal was granted, conditionally upon the appeals from the convictions being successful.

It is not necessary to set out the facts in detail. There was evidence on which it was open to the jury to find (i) that Max Beaver sold to a police officer, who was working under cover, a package which in fact contained diacetylmorphine, (ii) that the appellant was a party to the sale of the package, (iii) that while the appellant did not have the package on his person or in his physical possession he and Max Beaver were acting jointly in such circumstances that the possession which the latter had of the package was the possession of both of the accused,

1957

BEAVER v. THE QUEEN

Cartwright J.

and (iv) that the appellant had no knowledge that the substance contained in the package was diacetylmorphine and believed it to be sugar of milk.

I do not mean to suggest that the jury would necessarily have made the fourth finding but there was evidence on which they might have done so, or which might have left them in a state of doubt as to whether or not the appellant knew that the package contained anything other than sugar of milk.

The learned trial judge, against the protest of the appellant, charged the jury, in effect, that if they were satisfied that the appellant had in his possession a package and sold it, then, if in fact the substance contained in the package was diacetylmorphine, the appellant was guilty on both counts, and that the questions (i) whether he had any knowledge of what the substance was, or (ii) whether he entertained the honest but mistaken belief that it was a harmless substance were irrelevant and must not be considered. Laidlaw J.A., who delivered the unanimous judgment of the Court of Appeal, was of opinion that this charge was right in law and that the learned trial judge was bound by the decision in *Rex v. Lawrence* (1), to direct the jury as he did. The main question on this appeal is whether this view of the law is correct.

The problem is one of construction of the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, and particularly the following sections, which at the date of the offences charged read as follows:

> 4. (1) Every person who . . .
> (*d*) has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority; . . .
> (*f*) manufactures, sells, gives away, delivers or distributes or makes any offer in respect of any drug, or any substance represented or held out by such person to be a drug, to any person without first obtaining a licence from the Minister, or without other lawful authority; . . .
>
> is guilty of an offence, and is liable
> (i) upon indictment, to imprisonment for any term not exceeding seven years and not less than six months, and to a fine not exceeding one thousand dollars and not less than two hundred dollars, and, in addition, at the discretion of the judge, to be whipped; or

(1) [1952] O.R. 149, 102 C.C.C. 121, 13 C.R. 425.

(ii) upon summary conviction, to imprisonment with or without hard labour for any term not exceeding eighteen months and not less than six months, and to a fine not exceeding one thousand dollars and not less than two hundred dollars.

(2) Notwithstanding the provisions of the *Criminal Code*, or of any other statute or law, the court has no power to impose less than the minimum penalties herein prescribed, and shall, in all cases of conviction, impose both fine and imprisonment; . . .

11. (1) No person shall, without lawful authority or without a permit signed by the Minister or some person authorized by him in that behalf, import or have in his possession any opium pipe, opium lamp, or other device or apparatus designed or generally used for the purpose of preparing opium for smoking, or smoking or inhaling opium, or any article capable of being used as or as part of any such pipe, lamp or other device or apparatus.

(2) Any person violating the provisions of this section is liable, upon summary conviction, to a fine not exceeding one hundred dollars, and not less than fifty dollars, or to imprisonment for a term not exceeding three months, or to both fine and imprisonment.

15. Where any person is charged with an offence under paragraph (*a*), (*d*), (*e*), (*f*), or (*g*) of subsection (1) of section 4, it is not necessary for the prosecuting authority to establish that the accused had not a licence from the Minister or was not otherwise authorized to commit the act complained of, and if the accused pleads or alleges that he had such licence or other authority the burden of proof thereof shall be upon the person so charged.

17. Without limiting the generality of paragraph (*d*) of subsection (1) of section 4, any person who occupies, controls, or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug or any article mentioned in section 11 is found, shall, if charged with having such drug or article in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug or article was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof.

In the course of the argument counsel also referred to the following provisions of other statutes of Canada:

The Interpretation Act, R.S.C. 1952, c. 158, s. 28(1):

28(1) Every Act shall be read and construed as if any offence for which the offender may be

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

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

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

The Criminal Code, R.S.C. 1927, c. 36, s. 5:

5. In this Act, unless the context otherwise requires, . . .

(*b*) having in one's possession includes not only having in one's own personal possession, but also knowingly,

1957

BEAVER
v.
THE QUEEN

Cartwright J.

(i) having in the actual possession or custody of any other person, and

(ii) having in any place, whether belonging to or occupied by one's self or not, for the use or benefit of one's self or of any other person.

2. If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

The judgment in appeal is supported by earlier decisions of appellate Courts in Ontario, Quebec and Nova Scotia, but a directly contrary view has been expressed by the Court of Appeal for British Columbia. While this conflict has existed since 1948, this is the first occasion on which the question has been brought before this Court.

It may be of assistance in examining the problem to use a simple illustration. Suppose X goes to the shop of Y, a druggist, and asks Y to sell him some baking-soda. Y hands him a sealed packet which he tells him contains baking-soda and charges him a few cents. X honestly believes that the packet contains baking-soda but in fact it contains heroin. X puts the package in his pocket, takes it home and later puts it in a cupboard in his bathroom. There would seem to be no doubt that X has had actual manual and physical possession of the package and that he continues to have possession of the package while it is in his cupboard. The main question raised on this appeal is whether, in the supposed circumstances, X would be guilty of the crime of having heroin in his possession?

It will be observed at once that we are not concerned with the incidence of the burden of proof or of the obligation of adducing evidence. The judgment of the Court of Appeal states the law to be that X must be convicted although he proves to the point of demonstration that he honestly believed the package to contain baking-soda.

I have examined all the cases referred to by counsel in the course of their full and helpful arguments but do not propose to refer to them in detail as the differences of opinion which they disclose are not so much as to the principles by which the Court should be guided in con-

struing a statute which creates a crime as to the result of applying those principles to the Act with which we are concerned.

The rule of construction has often been stated.

In *The Company of Proprietors of the Margate Pier v. Hannam et al.* (1), Lord Coke is quoted as having said:

> Acts of Parliament are to be so construed as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged.

In *The Attorney General v. Bradlaugh* (2), Brett M.R. said:

> Now, to my mind, it is contrary to the whole established law of England (unless the legislation on the subject has clearly enacted it), to say that a person can be guilty of a crime in England without a wrongful intent—without an attempt to do that which the law has forbidden. I am aware that in a particular case, and under a particular criminal statute, fifteen judges to one held that a person whom the jury found to have no intent to do what was forbidden, and whom the jury found to have been deceived, and to have understood the facts to be such that he might with impunity have done a certain thing, was by the terms of that Act of Parliament guilty of a crime, and could be imprisoned. I say still, as I said then, that I cannot subscribe to the propriety of that decision. I bow to it, but I cannot subscribe to it: but the majority of the judges forming the Court so held because they said that the enactment was absolutely clear.

In *Reynolds v. G. H. Austin & Sons Ld.* (3), Devlin J. says at pp. 147-8:

> It has always been a principle of the common law that mens rea is an essential element in the commission of any criminal offence against the common law. In the case of statutory offences it depends on the effect of the statute. In *Sherras v. De Rutzen,* [1895] 1 Q.B. 918, 921, Wright, J., in his well-known judgment, laid it down that there was a presumption that mens rea was an essential ingredient in a statutory offence, but that that presumption was liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it dealt. . . . Kennedy, L.J., in *Hobbs v. Winchester Corporation,* [1910] 2 K.B. 471, 483, thought that in construing a modern statute this presumption as to mens rea did not exist. In this respect, as he said, he differed from Channell, J., in the court below. But the view of Wright, J., in *Sherras v. De Rutzen* has consistently been followed. I need refer only to the dictum of Lord Goddard, C.J., in *Harding v. Price,* [1948] 1 K.B. 695, 700: "The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in *Brend v. Wood* (1946), 62 T.L.R. 462, 463: 'It is of the utmost importance for the protection of

(1) (1819), 3 B. & Ald. 266 at 270, 106 E.R. 661.
(2) (1885), 14 Q.B.D. 667 at 689-90.
(3) [1951] 2 K.B. 135, [1951] 1 All E.R. 606.

1957

BEAVER v. THE QUEEN

Cartwright J.

the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind'."

In *Regina v. Tolson* (1), Stephen J. says at p. 188:

> . . . I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.
>
> I am unable to suggest any real exception to this rule, nor has one ever been suggested to me.

and adds at p. 189:

> Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

I adhere to the opinion which, with the concurrence of my brother Nolan, I expressed in *The Queen v. Rees* (2), that the first of the statements of Stephen J. quoted above should now be read in the light of the judgment of Lord Goddard C.J., concurred in by Lynskey and Devlin JJ., in *Wilson v. Inyang* (3), which, in my opinion, rightly decides that the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining that essential question.

In *Watts and Gaunt v. The Queen* (4), Estey J. says:

> While an offence of which *mens rea* is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention.

I do not suggest that the principle stated in the above excerpts was absent from the minds of the learned judges in the Courts of Appeal in Ontario, Quebec and Nova Scotia who decided the cases on which the respondent relies. Those decisions are founded on the judgment of

(1) (1889), 23 Q.B.D. 168.
(2) [1956] S.C.R. 640 at 651, 115 C.C.C. 1, 24 C.R. 1, 4 D.L.R. (2d) 406.
(3) [1951] 2 K.B. 799, [1951] 2 All E.R. 237.
(4) [1953] 1 S.C.R. 505 at 511, 105 C.C.C. 193, 16 C.R. 290, [1953] 3 D.L.R. 152.

the Court of King's Bench, Appeal Side, in *Morelli v. The King* (1), in which Bond J., at p. 128, concluded his reasons as follows:

> I therefore reach the conclusion that while it is a principle of our law that to constitute an offence there must be a guilty mind, and that principle must be imported into the statute (*per* Cockburn, C.J., 8 Cox C.C., at p. 478), yet by apt words Parliament may exclude such a requirement, and in the case now under consideration has effectively done so.

When the decisions as to the construction of the *Opium and Narcotic Drug Act* on which the respondent relies are examined it appears that two main reasons are assigned for holding that *mens rea* is not an essential ingredient of the offence created by s. 4(1)(*d*), these being (i) the assumption that the subject-matter with which the Act deals is of the kind dealt with in the cases of which *Hobbs v. Winchester Corporation* (2) is typical and which are sometimes referred to as "public welfare offence cases", and (ii) by implication from the wording of s. 17 of the Act.

As to the first of these reasons, I can discern little similarity between a statute designed, by forbidding the sale of unsound meat, to ensure that the supply available to the public shall be wholesome, and a statute making it a serious crime to possess or deal in narcotics; the one is to ensure that a lawful and necessary trade shall be carried on in a manner not to endanger the public health, the other to forbid altogether conduct regarded as harmful in itself. As a necessary feature of his trade, the butcher holds himself out as selling meat fit for consumption; he warrants that quality; and it is part of his duty as trader to see that the merchandise is wholesome. The statute simply converts that civil personal duty into a public duty.

A few passages from the judgment in *Hobbs v. Winchester Corporation* will show the view taken of the purpose of the legislation there under consideration:

Cozens-Hardy M.R., at p. 476:

> Before reading the material words of these sections it is perhaps convenient to indicate what is the plain and apparent object of the Act with regard to the sale of unsound meat. The object is to prevent danger to the public health by the sale of meat for human consumption in a state or condition in which it is dangerous to human health.

(1) 58 C.C.C. 128, [1932] 3 D.L.R. 620.

(2) [1910] 2 K.B. 471.

1957

BEAVER v. THE QUEEN

Cartwright J.

Farwell L. J., at p. 481:

> Who is to take the risk of the meat being unsound, the butcher or the public? In my opinion the Legislature intended that the butcher should take the risk and that the public should be protected, irrespective of the guilt or innocence of the butcher. The knowledge or possible means of knowledge of the butcher is not a matter which affects the public; it is the unsound meat which poisons them; and I think that the Legislature intended that the butcher should sell unsound meat at his peril.

Kennedy L. J., at pp. 484-5:

> A man takes upon himself to offer goods to the public for their consumption with a view to making a profit by the sale of them. Those goods may be so impregnated with disease as to carry death or at any rate serious injury to health to any one consuming them. To say that the difficulty of discovering the disease is a sufficient ground for enabling the seller to excuse himself on the plea that he cannot be reasonably expected to have the requisite technical knowledge or to keep an analyst on his premises, is simply to say that the public are to be left unprotected and must submit to take the risk of purchasing an article of food which may turn out to be dangerous to life or health. I think that the policy of the Act is this: that if a man chooses for profit to engage in a business which involves the offering for sale of that which may be deadly or injurious to health he must take that risk, and that it is not a sufficient defence for any one who chooses to embark on such a business to say "I could not have discovered the disease unless I had an analyst on the premises."

Assuming that *Hobbs v. Winchester Corporation* was rightly decided I do not think that its reasoning supports the decision of the Court of Appeal in the case at bar. The difference between the subject-matter of the legislation there considered and that of the Act with which we are concerned is too wide.

As to the second reason, the argument is put as follows: Using again the illustration I have taken above, it is said (i) that the words of s. 17 would require the conviction of X if the package was found in his bathroom cupboard "unless he prove that [it] was there without his authority, knowledge or consent", that is, he is *prima facie* presumed to be guilty but can exculpate himself by proving lack of knowledge, and (ii) that since no such words as "unless he prove that the drug was in his possession without his knowledge" are found in s. 4(1)(*d*) it must be held that Parliament intended that lack of knowledge should be no defence.

In my view all that s. 17 accomplishes, still using the same illustration, is, on proof that the package was in his cupboard, to shift to X the onus of proving that he did not have possession of the package. To this X would

answer: "Of course I had possession of the package, I bought it, paid for it, carried it home and put it in my cupboard. My defence is that I thought it contained baking-soda. I had no idea it contained heroin." If it be suggested that X could not usefully make this reply if what was found in his house was not a sealed package but an article of the sort described in s. 11 the answer would appear to be that many persons might not recognize an opium lamp or an article capable of being used as part of such a lamp. The wording of s. 17 does not appear to me to compel the Court to construe s. 4 as the Court of Appeal has done. It still leaves unanswered the question: Has X possession of heroin when he has in his hand or in his pocket or in his cupboard a package which in fact contains heroin but which he honestly believes contains only baking-soda? In my opinion that question must be answered in the negative. The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance. Just as in *Regina v. Ashwell* (1) the accused did not in law have possession of the complainant's sovereign so long as he honestly believed it to be a shilling so in my illustration X did not have possession of heroin so long as he honestly believed the package to contain baking-soda. The words of Lord Coleridge C.J. in *Regina v. Ashwell* at p. 225, quoted by Charles J. delivering the unanimous judgment of the Court of Criminal Appeal in *Rex v. Hudson* (2):

> In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it.

might well be adapted to my illustration to read: "In good sense it seems to me he did not have possession of heroin till he knew what he had got."

In my view the law is correctly stated in the following passage in the judgment of O'Halloran J.A., with whom Robertson J.A. concurred, in *Rex v. Hess* (3):

> To constitute "possession" within the meaning of the criminal law it is my judgment that where, as here, there is manual handling of a thing, it must be co-existent with knowledge of what the thing is, and both these

(1) (1885), 16 Q.B.D. 190.
(2) [1943] 1 K.B. 458 at 462, [1943] 1 All E.R. 642, 29 Cr. App. R. 65.
(3) [1949] 1 W.W.R. 577 at 579, 94 C.C.C. 48 at 50-1, 8 C.R. 42.

1957

BEAVER v. THE QUEEN

Cartwright J.

elements must be co-existent with some act of control (outside public duty). When those three elements exist together, I think it must be conceded that under sec. 4(1)(*d*) it does not then matter if the thing is retained for an innocent purpose.

If the matter were otherwise doubtful I would be drawn to the conclusion that Parliament did not intend to enact that *mens rea* should not be an essential ingredient of the offence created by s. 4(1)(*d*) by the circumstance that on conviction a minimum sentence of 6 months' imprisonment plus a fine of $200 must be imposed. Counsel informed us that they have found no other statutory provision which has been held to create a crime of strict responsibility, that is to say, one in which the necessity for *mens rea* is excluded, on conviction for which a sentence of imprisonment is mandatory. The legislation dealt with in *Hobbs v. Winchester Corporation, supra,* provided that a sentence of imprisonment might, not must, be imposed on a convicted person. As to this Kennedy L.J. said at p. 485:

> Great stress is laid on the character of the punishment that may be inflicted under s. 117. I protest for myself that we are not to assume that where a judicial discretion is granted by the Legislature the tribunal, whatever its rank may be, exercising that discretion will exercise it otherwise than in a judicial manner. Because there may be a case, as there obviously may be, in which a man unknowingly exposes for sale food which is dangerous to health, and because the offence created by the statute is punishable by imprisonment in the first instance, that to my mind is not a ground for holding that a mens rea must be shewn in every case. If it is shewn that the man had no guilty knowledge the magistrate would probably inflict a merely nominal fine . . .

At p. 481 Cozens-Hardy M.R. expressed himself in similar terms.

It would, of course, be within the power of Parliament to enact that a person who, without any guilty knowledge, had in his physical possession a package which he honestly believed to contain a harmless substance such as baking-soda but which in fact contained heroin, must on proof of such facts be convicted of a crime and sentenced to at least 6 months' imprisonment; but I would refuse to impute such an intention to Parliament unless the words of the statute were clear and admitted of no other interpretation. To borrow the words of Lord Kenyon in *Fowler v. Padget* (1):

(1) (1798), 7 Term Rep. 509 at 514, 101 E.R. 1103.

I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for . . .

The conclusion which I have reached on the main question as to the proper construction of the word "possession" makes it unnecessary for me to consider the other points raised by Mr. Dubin in his argument as to the construction of s. 4(1)(*d*). For the above reasons I would quash the conviction on the charge of having possession of a drug.

As to the charge of selling, as is pointed out by my brother Fauteux, the appellant's version of the facts brings his actions within the provisions of s. 4(1)(*f*) since he and his brother jointly sold a substance represented or held out by them to be heroin; and I agree with the conclusion of my brother Fauteux that the conviction on the charge of selling must be affirmed.

For the above reasons, I would dismiss the appeal as to the first count (that is, of selling) but would direct that the time during which the appellant has been confined pending the determination of the appeal shall count as part of the term of imprisonment imposed pursuant to that conviction. As to the second count (that is, of having possession) I would allow the appeal, quash the conviction and direct a new trial. As leave to appeal from the finding that the appellant is an habitual criminal was granted conditionally upon the appeal from the convictions being successful, and as the appeal as to one conviction has failed, we are without jurisdiction to review the finding that the appellant is an habitual criminal and in the result that finding stands.

The judgment of Fauteux and Abbott JJ. was delivered by

FAUTEUX J. (*dissenting*):—The appellant Louis Beaver appeals, with leave of this Court, from a unanimous judgment of the Court of Appeal for Ontario (1) affirming his conviction by a jury on an indictment charging him, jointly with his brother Max Beaver, on two counts: (i) possession

(1) [1956] O.W.N. 798, 116 C.C.C. 231, 25 C.R. 53.

1957

BEAVER v. THE QUEEN

Fauteux J.

and (ii) sale, on March 12, 1954, of a drug, to wit, diacetylmorphine, contrary to s. 4(1)(*d*) and s. 4(1)(*f*), respectively, of the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201.

Subsequent to this conviction, the appellant was found to be an habitual criminal and this conviction, being appealed, was also unanimously confirmed by the Court of Appeal. Leave to appeal as to this conviction has been granted, conditionally upon the appeal against the conviction on the primary charge being successful.

To appreciate and determine the points of law raised on behalf of the appellant on the appeal related to the primary charge, it is expedient but sufficient to relate the following facts.

The evidence for the prosecution shows that in the forenoon of March 12, 1954, Constable Tassie of the R.C.M.P., known and operating under the name of Al Demeter, was introduced to the appellant by one Montroy, a drug addict, as one who was interested to obtain, jointly with him, one ounce of heroin. The price asked by the appellant for such a quantity being $800, it was agreed that only half an ounce would be bought and, further, that delivery and payment would be made at four o'clock in the afternoon, at the same place; the appellant insisting, however, that only one of either Tassie or Montroy was then to appear. At the appointed time and place, Tassie arrived and boarded the car driven by the appellant, then in company of his brother Max Beaver. Having travelled a certain distance, the car stopped; Max Beaver walked out towards a lamp-post, picked up a parcel, came back and boarded the car, and while proceeding to another destination, gave the parcel to Tassie who paid him the agreed price. Admittedly, this package contained half an ounce of diacetylmorphine.

The appellant did not challenge these incriminating facts but, testifying in his own defence, gave the following evidence: The day before the above-related occurrences, appellant and Montroy met together. The latter explained to the former that one Al Demeter had "double crossed" him, that he wanted to "get even" with him and, to achieve this purpose, made the following proposal, to which appellant acceded. It was agreed that Montroy

would introduce Demeter, who wanted to have drugs, to appellant as one from whom they could be obtained; a sale would be made; but sugar of milk instead of drugs would be delivered and the price received by the appellant would be remitted to Montroy. Feeling indebted to Montroy, from whom he and his brother, Max Beaver, had received certain favours while in a penitentiary, appellant executed this fraudulent plan.

Hence, on his story, appellant's defence was that he never intended to deal in drugs and never knew that the parcel delivered contained any. This was not accepted by the trial judge or by the Court of Appeal as being a valid defence in law under the *Opium and Narcotic Drug Act.* The jury, therefore, did not consider that defence which was withdrawn from them.

The grounds of law upon which leave to appeal was granted are the following:

1: The learned trial Judge erred in failing to instruct the jury that if they accepted the evidence of Louis Beaver or were in doubt as a result of it, he was not guilty of the offence.

2: The learned trial Judge erred in holding that the accused Louis Beaver was guilty of the offence charged whether he knew the package handed by the accused Max Beaver to the Police were drugs or not.

3: The learned trial Judge erred in instructing the jury that the only point that they had to decide was whether in fact the package handed the police by the accused Max Beaver was diacetylmorphine.

4: The charge to the jury by the learned trial Judge and the Court of Appeal is in error in holding that the accused Louis Beaver could be convicted of the offence charged in the absence of knowledge on his part that the substance in question was a drug.

The first proposition of law, submitted by counsel for the appellant, is that want of knowledge as to the nature of a substance found in the possession of an accused is a good defence to a charge that he had in his possession a drug, contrary to s. 4(1)(*d*) of the *Opium and Narcotic Drug Act.*

This submission rests on the presumption that *mens rea* is a necessary ingredient in every offence. But, as stated by Wright J. in *Sherras v. De Rutzen* (1), this presumption is liable to be displaced and this may be done either by the words of the statute creating the offence or by the subject-matter with which it deals, both of which must be considered. This view of the law and of the method

(1) [1895] 1 Q.B. 918 at 921.

1957

BEAVER v. THE QUEEN

Fauteux J.

of interpreting a statute when the question arises, is expressed in many other cases, such as *Hobbs v. Winchester Corporation* (1), and *Reynolds v. G. H. Austin & Sons Ld.* (2).

It appears convenient to deal first with the subject-matter of the Act and consider afterwards the provisions directly relevant to the offence of possession.

The plain and apparent object of the Act is to prevent, by a rigid control of the possession of drugs, the danger to public health, and to guard society against the social evils which an uncontrolled traffic in drugs is bound to generate. The scheme of the Act is this: The importation, exportation, sale, manufacture, production and distribution of drugs are subject to the obtention of a licence which the Minister of National Health and Welfare may issue, with the approval of the Governor General in council, and in which the place where such operations may be carried on is stated. Under the same authority are indicated ports and places in Canada where drugs may be exported or imported, the manner in which they are to be packed and marked for export, the records to be kept for such export, import, receipt, sale, disposal and distribution. The Act also provides for the establishment of all other convenient and necessary regulations with respect to duration, terms and forms of the several licences therein provided. Without a licence, it is an offence to import or export from Canada and an offence for any one who, not being a common carrier, takes or carries, or causes to be taken or carried from any place in Canada to any other place in Canada, any drug. Druggists, physicians, dentists and veterinary surgeons stand, of course, in a privileged class; but even their dealings in drugs for medicinal purposes are the object of a particular control. Under penalties of the law, some of them have to keep records of their operations, while others have the obligation to answer inquiries in respect thereto. Having in one's possession drugs without a licence or other lawful authority, is an offence. In brief, the principle underlying the Act is that possession of drugs covered by it is unlawful; and where any exception is

(1) [1910] 2 K.B. 471.
(2) [1951] 2 K.B. 135, [1951] 1 All E.R. 606.

made to the principle, the exceptions themselves are attended with particular controlling provisions and conditions.

The enforcement sections of the Act manifest the exceptional vigilance and firmness which Parliament thought of the essence to forestall the unlawful traffic in narcotic drugs and cope effectively with the unusual difficulties standing in the way of the realization of the object of the statute. Substantive and procedural principles generally prevailing under the *Criminal Code* in favour of the subject are being restricted or excepted. The power to search by day or by night, either premises or the person, is largely extended under s. 19. Special writs of assistance are provided for under s. 22. The consideration of the provisions of ss. 4 and 17 being deferred for the moment, the burden of proof is either alleviated or shifted to persons charged with violations under ss. 6, 11, 13, 16 and 18. Minimum sentences are provided or are made mandatory, under ss. 4 and 6. Deportation of aliens found guilty is also mandatory and this notwithstanding the provisions of the *Immigration Act* or any other Act, under s. 26. And the application of the *Identification of Criminals Act*, ordinarily limited to the case of indictable offences, is, by s. 27, extended to any offence under the Act.

All of these provisions are indicative of the will of Parliament to give the most efficient protection to public health against the danger attending the uncontrolled use of drugs as well as against the social evils incidental thereto, by measures generally centred and directed to possession itself of the drugs covered by the Act. The subject-matter, the purpose and the scope of the Act are such that to subject its provisions to the narrow construction suggested on behalf of appellant would defeat the very object of the Act. Such narrow construction is repugnant to the clear terms of s. 15 of the *Interpretation Act*, R.S.C. 1952, c. 158. In *Chajutin v. Whitehead* (1), Lord Hewart C.J., referring to the provisions of art. 18 of

(1) [1938] 1 K.B. 506, [1938] 1 All E.R. 159.

1957

BEAVER v. THE QUEEN

Fauteux J.

para. 4(*d*) of the Aliens' Order, 1920, which made an offence of the possession, without lawful authority, of a forged passport, said, at p. 509:

> In my opinion the Order—the circumstances giving rise to which are sufficiently familiar—would be reduced almost to waste paper if the offence could not be established unless the prosecution proved that the person having in his possession the forged passport had guilty knowledge of the fact that it had been forged. It is not easy to see how that knowledge, except in rare circumstances, could be directly proved; but not only, in my opinion, is there nothing in this part of the article to put any such burden upon the prosecution, but the words of the article negative the view that the prosecution is required to carry such a burden.

In that case, the appeal committee found, as a fact, that the appellant did not know that the passport had been altered, and honestly believed, on reasonable grounds, that it had been issued to him in the ordinary course, by the proper authority. The language of art. 18, para. 4(*d*), of the Order was as follows:

> Any person shall be guilty of an . . . offence if . . . he . . .
> (*d*) without lawful authority uses or has in his possession any forged, altered or irregular certificate, passport, or other document, or any passport or document on which any visa or endorsement has been altered or forged.

It was none the less decided that it was neither necessary for the prosecution to prove guilty knowledge of the alteration, nor open to the defendant to secure acquittal by proof that he did not know and had no reason to suspect that the passport was altered. This case, amongst others, such as *Rex v. Wheat*; *Rex v. Stocks* (1), is a clear authority supporting the proposition that the presumption that *mens rea* is an ingredient of an offence, as well as the defence flowing from an honest belief as to the existence of a state of facts may, by reason of the subject-matter of the Act or of the language of its provisions, or of both, cease to obtain. The *Opium and Narcotic Drug Act* comes, in my view, within these classes of Acts referred to by Wright J. in *Sherras v. De Rutzen, supra.*

With these considerations related to the subject-matter of the Act, it is appropriate now to turn to the language of the provisions of the statute directly related to the offence of possession.

(1) [1921] 2 K.B. 119.

The main provisions to consider are those of s. 4(1)(*d*), reading as follows:

> 4. (1) Every person who . . .
> (*d*) has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority; . . .
> is guilty of an offence, and is liable . . .

On the plain, literal and grammatical meaning of the words of this section, there is an absolute prohibition to be in possession of drugs, whatever be the various meanings of which the word possession may be susceptible, unless the possession is under the authority of a licence from the Minister first had and obtained, or under other lawful authority. As to the meaning of these provisions, I am in respectful agreement with and content to refer to the reasoning of Laidlaw J.A., speaking for the Court of Appeal for Ontario, in *Rex v. Lawrence* (1).

The language of the section and the subject-matter of the Act in which it is found, both considered in the light of the provisions of s. 15 of the *Interpretation Act*, cannot justify the narrow meaning of the word possession which is contended for by counsel for the appellant. I find no reason which would render inapplicable to this case what was said by Lord Hewart C.J. in the case of *Chajutin v. Whitehead, supra.* The question is not what is the meaning ascribed to the word possession in civil or in criminal cases, at common law or under statutory laws, but what is the meaning of the word under the Act and the provisions here considered. The case of *Regina v. Ashwell* (2) is, I think, of no application in the matter. The question there considered was possession in relation to the offence of larceny. Larceny is an offence involving the violation of possession; it is an offence against a possessor. This is not the type of possession with which this Act is concerned.

In *The Attorney-General v. Lockwood* (3), Alderson B. said at p. 398:

> The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal and gramma-

(1) [1952] O.R. 149, 102 C.C.C. 121 at 123 *et seq.*, 13 C.R. 425.
(2) (1885), 16 Q.B.D. 190.
(3) (1842), 9 M. & W. 378, 152 E.R. 160.

1957

BEAVER v. THE QUEEN

Fauteux J.

tical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act, or to some palpable and evident absurdity.

The interpretation of s. 4(1)(*d*), as made particularly in *Rex v. Lawrence, supra,* cannot, I think, be said to lead "to a plain and clear contradiction of the apparent purpose of the Act". On the contrary, of the construction suggested by the appellant and the one submitted by the respondent, the latter appears to be the only one really consistent with the apparent purpose of the Act. Nor, in my respectful view, can this latter construction be said to lead "to some palpable and evident absurdity". Such a view was not the one reached by Lord Hewart C.J. in *Chajutin v. Whitehead, supra,* where the provision of the law creating the offence was couched in language substantially similar to the one here examined. Indeed, and when the provisions of s. 4(1)(*d*) are further considered in the light of those of s. 17, it would seem to me that the construction suggested on behalf of the appellant would, as it will appear, bring an astonishing result.

Section 17 reads:

17. Without limiting the generality of paragraph (*d*) of subsection (1) of section 4, any person who occupies, controls, or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug or any article mentioned in section 11 is found, shall, if charged with having such drug or article in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug or article was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof.

The language of the section is clear. Parliament has provided: (i) that either one of these three facts, *i.e.*, occupation, or control, or possession, of any place in or upon which a drug covered by the Act is found, makes without more one who occupies, controls or has in his possession such a place, a possessor of drug without lawful authority, and (ii) that the occupier of such a place "*shall,* if charged with having such drug or article in possession without lawful authority, *be deemed to have been so in possession unless* he prove that the drug or article was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof". In the circumstances described in this section, knowledge in any sense is not an essential ingredient of the offence; but

lack of knowledge, if proved, is a defence. Yet, on the submission of appellant, if a drug is found on the very person of the accused, knowledge as to the nature of the substance would be an essential ingredient of the offence and would, therefore, have to be proved as part of the case for the prosecution of a charge laid under s. 4(1)(*d*). The essential ingredients of unlawful possession, under the Act, are the same under s. 4(1)(*d*) and under s. 17; the opening words of the latter section forbid us to construe the offence in a manner varying from one section to the other. This, however, is the result flowing from the appellant's submission. Furthermore, and if it is argued that knowledge is of the essence of unlawful possession under both s. 4(1)(*d*) and s. 17, then one is at a loss to understand why Parliament should have, in the latter section, provided for a defence resting on the proof of lack of knowledge. A like interpretation of s. 17 strips this exculpatory provision of any meaning and effect. The language of the two sections can only be rationalized, I think, by interpreting s. 4(1)(*d*) as meaning what it says, *i.e.*, as creating an absolute prohibition, and by interpreting s. 17 as extending the meaning of s. 4(1)(*d*), *i.e.*, this absolute prohibition, to the circumstances described in s. 17, with, however, and only in such circumstances, a defence resting on the proof of lack of knowledge.

This is the first occasion which this Court has to consider this submission of appellant which, ever since the decision rendered in 1932 in *Morelli v. The King* (1), the judges of the provincial Courts of Appeal have, with a few exceptions, refused to accept. The majority judgment rendered in 1948 in *Rex v. Hess* (2) stands as the first expression of judicial opinion contrary to these views. In the majority of judgments rendered subsequently to the *Hess* case, the views therein expressed were not followed. This decision has no reference to the *Morelli* case and it rests principally on a concept of possession which, in my respectful view, the subject-matter, purpose and scope of the Act and the language of s. 4(1)(*d*) and s. 17 do not warrant.

(1) 58 C.C.C. 128, [1932] 3 D.L.R. 620.

(2) [1949] 1 W.W.R. 577, 94 C.C.C. 48, 8 C.R. 42.

1957

BEAVER v. THE QUEEN

Fauteux J.

The more recent reported case, where a similar question was considered by the English Court of Criminal Appeal, is that of *Regina v. Hallam* (1). The provision considered was s. 4(1) of the *Explosive Substances Act,* 1883, the relevant part of which reads:

> Any person who . . . knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession or under his control for a lawful object, shall, unless he can show that he . . . had it in his possession or under his control for a lawful object, be guilty of felony . . . .

On this language, it was decided that knowledge that the substance was an explosive was an essential ingredient of the offence. Arguments such as the one related to the concept of possession, which feature the reasoning in the *Hess* case, *supra,* are foreign to this decision, which indeed was reached because the word possession was there qualified by the word "knowingly". Such a word, as noted by Laidlaw J.A. in the *Lawrence* case, *supra,* is absent from s. 4(1)(*d*). Furthermore, while possession of explosive substances is not, under the English Act of 1883, subject to a licence first had and obtained or other lawful authority, the contrary is the case with respect to the possession of drugs under the *Opium and Narcotic Drug Act.* Finally, the existence of "such circumstances as to give rise to a reasonable suspicion" that possession is for an unlawful object is an essential ingredient of the offence under the *Explosive Substances Act*; this ingredient does not appear under s. 4(1)(*d*). Reading the reasons for judgment in the *Hallam* case, one reaches the view that had the provisions therein considered been worded as are those of s. 4(1)(*d*) and as were also those of the section considered in *Chajutin v. Whitehead, supra,* a decision similar to the one rendered in the latter case would have been made.

As interpreted by most of the members of the Canadian Courts of Appeal since 1932, the provisions of s. 4(1)(*d*) are, like many other provisions of the Act, undoubtedly severe. The duty of the Courts is to give effect to the language of Parliament. And notwithstanding that the views expressed in *Morelli* and *Lawrence,* in particular, had been prevailing ever since 1932 and are still prevailing, Parliament has not seen fit to intervene. For all these

(1) (1957), 41 Cr. App. R. 111.

reasons, I find it impossible to accede to the proposition that knowledge of the nature of the substance is of the essence of the offence of unlawful possession under the Act.

Even assuming the correctness of this view of the law, argues counsel for the appellant, the latter could not be found guilty of either possession under s. 4(1)(*d*) or sale under s. 4(1)(*f*).

As to possession: Contrary to what is admittedly the fact in the case of Max Beaver, it is said, Louis Beaver the appellant did not have physical possession. The application of the relevant provisions of s. 5 of the 1927 *Criminal Code* in like matters has never been doubted. As stated by the Court of Appeal for British Columbia in *Rex v. Colvin and Gladue* (1), there is joint possession where one has a right to exercise some measure of control over the thing in the possession of another. On the admitted facts of this case, there is no doubt that the appellant was, to say the least, in full command and control of all the operations.

As to sale: Though the substance delivered to and paid for by Tassie was a drug, as admittedly it was represented and held out to be by appellant, it is said that the latter could not be guilty of the offence of sale under s. 4(1)(*f*) because, on his story, he intended and thought the substance sold to be sugar of milk. To this submission, the provisions of s. 4(1)(*f*) afford, I think, a complete answer:

> 4. (1) Every one who . . .
>
> (*f*) . . . sells, . . . any drug, *or any substance represented* or *held out by such person to be a drug,* to any person without first obtaining a licence from the Minister, or without other lawful authority; . . .

In the case of any sale made without first obtaining a licence from the Minister or without other lawful authority, the accuracy or inaccuracy of the representation made by the seller to the purchaser as to the nature of the substance sold and the honesty or dishonesty attending the representation, if inaccurate, are quite immaterial if the substance sold is represented or held out to be a drug by the seller to the purchaser. The relevant count of the indictment does not in terms say that appellant did sell a substance represented or held out by him to Tassie to be a drug, but that "he did sell a drug, to wit, diacetyl-

(1) 58 B.C.R. 204, [1942] 3 W.W.R. 465, 78 C.C.C. 282, [1943] 1 D.L.R. 20.

1957

BEAVER v. THE QUEEN

Fauteux J.

morphine"; in this language, however, is necessarily implied the allegation of the fact that appellant represented or held out the substance sold, delivered and paid for, to be a drug. Hence appellant's version of the facts brings this case within the provisions of s. 4(1)(*f*) and, if believed, would leave no alternative to a reasonable jury acting according to law but to return a verdict of guilty. Section 4(1)(*f*), as well as those previously referred to in the analysis of the Act, is indicative of the intent of Parliament to deal adequately with the methods, which are used in the unlawful traffic of drugs to defeat the purpose of the Act, ingenious as they may be. That the enforcement of the provisions of the Act may, in exceptional cases, lead to some injustice, is not an impossibility. But, to forestall this result as to such possible cases, there are remedies under the law, such as a stay of proceedings by the Attorney General or a free pardon under the royal prerogative.

I would dismiss the appeal against the unanimous judgment of the Court of Appeal for Ontario affirming the conviction on the primary charges and, in view of this result, the unanimous judgment of the Court of Appeal, affirming the decision that appellant is an habitual criminal, remains undisturbed.

Appeal allowed in part, FAUTEUX *and* ABBOTT JJ. *dissenting.*

Solicitors for the appellant: Kimber & Dubin, Toronto.

KEYSTONE SHINGLES AND LUMBER LIMITED (*Plaintiff*) APPELLANT: *Feb. 20, 21, 22, 25, 26, 27 June 26

1957

AND

ROYAL PLATE GLASS AND GENERAL INSURANCE COMPANY OF CANADA AND STANLEY FYFE MIDDLETON MOODIE AND ALFRED JOHN TUTTLE AND EDWARD T. BERNIER AND ARNOLD BERNIER CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF BERNIER BROS. AND BERNIER BROS. LOGGING CO. AND EDWARD T. BERNIER (*Defendants*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Judicial sales—Duty of officer conducting sale—Allegation of conspiracy between buyer and sheriff's officer—Whether sheriff's officer obtained reasonable price for goods sold—Evidence of value.

The plaintiff company appealed from the dismissal of an action for damages arising out of the sale of its goods under writs of extent issued in respect of unpaid income tax and excess profits tax. The action was based principally upon allegations that (i) the defendant T (the sheriff's officer in charge of the sale) had conspired with other defendants who bought the goods to arrange a fraudulent "wash sale" and thus to deprive the plaintiff of the opportunity of buying the goods, and (ii) the sheriff and T had negligently carried out their duties and had failed to obtain a reasonable price for the goods.

Held (Rand and Cartwright JJ. dissenting in part): The appeal should be dismissed.

Per Kerwin C.J. and Locke and Abbott JJ.: As to the allegation of conspiracy, there were concurrent findings in the Courts below that the evidence did not support these allegations and the Court should not interfere with these findings. As to the claim based on negligence, the onus was on the plaintiff to establish a sale at an undervalue and the evidence as to value was unsatisfactory. T had been negligent in making no proper inventory or appraisal, but damage was the gist of the action and there were concurrent findings that damage had not been proved.

Per Rand and Cartwright JJ., *dissenting in part*: While the evidence raised suspicion as to some of the dealings, the Court would not be justified in setting aside the concurrent findings in the Courts below negativing the existence of the alleged conspiracy. As to the claim based on negligence, however, the evidence did support a finding that T had not exercised due care to obtain the best price possible for the goods sold and that he could have obtained at least $700 more. The appellant was therefore entitled to judgment for $700 against T.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Abbott JJ.

1957

KEYSTONE SHINGLES AND LUMBER LTD. v. ROYAL PLATE GLASS & GEN. INS. Co. et al.

APPEAL from a judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Wood J. (2) dismissing the action. Appeal dismissed, Rand and Cartwright JJ. dissenting in part.

A. Bull, Q.C., and *S. M. Toy,* for the plaintiff, appellant.

Douglas McK. Brown and *R. E. Ostlund,* for the defendant insurance company, respondent.

G. F. H. Long, for the defendants Moodie, Tuttle and Bernier, respondents.

L. S. Eckardt, for the defendants Bernier Bros., Bernier Bros. Logging Co. and Arnold Bernier, respondents.

The judgment of Kerwin C. J. and Locke and Abbott JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1), which dismissed an appeal of the present appellant from the judgment of Wood J. (2), dismissing the action.

The appellant is a lumber company which formerly carried on its operations in New Westminster and engaged in logging operations at Acteon Sound in the county of Vancouver.

On February 6, 1950, a writ of extent issued out of the Exchequer Court of Canada directed to the sheriff of the county of Westminster, in respect of an indebtedness of $10,984.40 for income and excess profits taxes due to the Crown. A second writ of extent was issued in like manner on July 8, 1950, directed to the said sheiff for the sum of $2,653.95.

On July 7 and July 8, 1950, two concurrent writs of extent were issued by the Exchequer Court directed to the respondent Moodie, the sheriff of the county of Vancouver, directing him to seize the goods and chattels of the appellant for the recovery of the said debts, to diligently appraise and extend the same and not to sell the same "until We shall otherwise command you".

(1) 7 D.L.R. (2d) 245.

(2) 16 W.W.R. 273, [1955] 4 D.L.R. 53.

Acteon Sound is on the mainland approximately 200 miles north of Vancouver and, at this place, the appellant had carried on logging operations for some time prior to the month of December 1948, when they were discontinued. At that time the buildings and logging equipment were leased by the appellant to a third party. Operations were apparently terminated about April 1, 1950. Thereafter, the appellant maintained a watchman at the camp.

On June 16, 1951, the assets of the appellant at Acteon Sound were seized by the respondent Tuttle on the direction of the sheriff under the concurrent writs of extent. These consisted of various donkey engines, trucks, trailers, pumps, blocks and lines, tools and other equipment of the nature commonly used in small logging operations on the Pacific coast. In addition, there were certain booming equipment, floats, furniture, a quantity of steel rails, a launch and two smaller boats. While this equipment was described in great detail in the voluminous evidence directed to the question of its value, I consider it unnecessary, in view of my conclusion, to describe it in further detail.

On June 27, 1951, upon the application of the Crown, an order was made by the Registrar of the Exchequer Court at Ottawa directing the sheriff of the County of Vancouver to

> sell by private sale or public auction the goods or chattels now under seizure by virtue of a Concurrent Writ of Extent issued out of this Honourable Court on the 7th day of July, A.D. 1950.

No question is raised in these proceedings at to the propriety of the making of this order.

On June 15, 1951, Raymond Bernier, since deceased, who was apparently a member of the firm of Bernier Bros., saw the sheriff, saying that they were interested in purchasing the seized chattels. Tuttle was sent by the sheriff to Acteon Sound in company with Bernier and made a very rough inventory of the goods under seizure. Thereafter, Bernier opened negotiations with H. W. Kellond, an official in the Vancouver office of the Department of National Revenue, and made an offer of $4,500. This offer was subsequently increased in negotiations with Tuttle, the last offer made by Bernier, according to him, being in the amount of $5,300. On July 7, 1951, according to the latter, Bernier came to the sheriff's office and signed a letter written for him by

1957

KEYSTONE SHINGLES AND LUMBER LTD. v. ROYAL PLATE GLASS & GEN. INS. CO. et al.

Locke J.

Tuttle, offering that amount for the "machinery & equipment presently under seizure by your office, owned by Keystone Shingles & Lumber Ltd.".

According to Kellond, while negotiations were going on with Bernier, Gail W. Beach, the president of the appellant company, had been negotiating with him for a settlement of the Department's claim. Kellond says that on July 6 he told Beach that, if the Keystone company would pay $5,000 then and $3,000 at some later time to be arranged, he would recommend its acceptance. At Beach's request, he wrote out a memorandum which read:

> If you will offer settlement of $8,000 for FULL SETTLEMENT, we will give the offer favourable consideration.

Kellond says that he told Beach to pay the sheriff the $5,000 on account of the claim for taxes and that, if this was paid, a sale of the assets would be "withheld" and that Beach left his office agreeing to do this. Kellond then telephoned to Tuttle telling him that he did not want the sale to proceed if the $5,000 was paid.

There is a direct conflict between Beach and Tuttle as to what followed thereafter.

According to Beach, it was on July 5 that Kellond agreed to recommend the settlement and gave him the memorandum and he says that, on the same afternoon, he went to see Tuttle telling him of the arrangement made with Kellond and that he wanted to make a payment of $5,000 on the taxes and stop the sale. According to him, Tuttle said that he would not accept the payment on account and that he would have to bid for the purchase of the assets seized. Beach does not say that he showed the memorandum he had received from Kellond to Tuttle, nor did he ask him to telephone to Kellond and verify his statement that the $5,000 was to be paid on account of the taxes, nor did he himself telephone to Kellond to ask him to instruct the sheriff. He says that Tuttle told him he had a private bid for the goods but that it was not for a very large sum and that if he (Beach) brought in a cheque for $5,000 to purchase them it would be all right. Beach says that, as Tuttle refused to accept the payment on that footing, he left the office returning on the morning of July 7 at about 10.30

with a letter addressed to the sheriff signed by Beach on behalf of Westminster Mills Ltd., a company of which he was also an officer. This letter read:

> We attach hereto cheque for $5,000 which we are offering for sale to us of goods and equipment which you seized belonging to Keystone Shingles & Lumber Ltd. at Acteon Sound B.C.
>
> This tender is made for immediate acceptance, otherwise please return the cheque to us without delay.

According to Beach, it was because Tuttle insisted that the matter could only be handled in this way that the offer of purchase was made. He says that he was aware of the fact that it was Bernier who had been negotiating to purchase the assets but had understood from Tuttle that $5,000 was more than any offer Bernier had made. Kellond was unavailable on July 7, which was a Saturday. Beach, after leaving the sheriff's office, went to the law office of Mr. C. S. Arnold, a solicitor, but found the office closed and left a memo with certain instructions. He then was called out of town to Harrison Lake in connection with some other business and did not again reach Vancouver until early afternoon of July 9, in the interim having no communication of any kind with Tuttle or Kellond.

Mr. Arnold, in giving evidence, said that he had received a written message from Beach on the morning of July 9 and telephoned the sheriff's office saying that he understood that he was making some kind of a sale under an execution against one of Beach's companies, that he did not wish to act for Beach and had telephoned to the latter's office but found that he had not returned to New Westminster, having been held up by the floods in the Fraser valley. According to him, Tuttle said that Beach had called on him the previous week and made an offer of $5,000 but that he (Tuttle) had a higher offer and that he had told Beach that he would give him until noon that day. Arnold said that he then asked him if he could not extend the time since Beach was caught up at Harrison but that Tuttle declined, saying that 12 noon was the deadline and if Arnold was to get hold of Beach he should tell him to go to the Income Tax Department and try to make a deal with them himself. Tuttle asked Arnold if he wanted to make a bid but was told that his instructions were so vague that he was not in a position to do so.

1957

KEYSTONE SHINGLES AND LUMBER LTD. v. ROYAL PLATE GLASS & GEN. INS. Co. et al.

Locke J.

Tuttle's evidence directly conflicts with that of Beach on most of the material matters. He says that he had been told by Kellond on the afternoon of July 6 of the proposed settlement and that Beach was to pay to the sheriff $5,000 on account of the claim for taxes and a further $3,000 later. Beach did not, according to Tuttle, see him either on July 5 or 6 but appeared at the sheriff's office on the morning of July 7 at about 10.30 with two letters bearing that date: one, the letter from Westminster Mills Ltd. above referred to; the other, also dated that day, signed by Beach on behalf of the appellant company, which stated that the writer had called at the sheriff's office the previous day to obtain details of the seizure and had been informed that the sheriff had received a private bid for the equipment and intended to accept it, unless he received a higher offer immediately. Tuttle said that he asked Beach if he would not alter the letter so that the $5,000 offered would be a payment on account of the settlement of $8,000 arranged tentatively with Kellond. At the same time, he says that he told Beach that he had received a bid of $5,300 and, accordingly, could not accept a bid for the property for a lesser amount. Tuttle says that Beach refused to change the letter and that he then told him that he would hold his cheque in the meantime and give him until 12 noon on the following Monday to make the payment of $5,000 on account. On cross-examination, he said that Beach might alternatively have made a higher bid than the $5,300 offered by Bernier, though he does not say that he told him so. Beach then left and Tuttle reported the matter to Kellond on Monday morning, July 9. At this time he heard from Mr. Arnold who, he says, informed him that he had been trying to get in touch with Beach but did not ask him to defer the sale, saying that if Arnold had done so he would have agreed. According to him, Mr. Arnold had said that he did not want to act in the matter and, apparently, the discussion only amounted to a request to know what was being done.

Not having heard from Beach by noon on July 9, Tuttle says that he notified Bernier that his offer of July 7 was accepted. On July 23 Westminster Mills Ltd. wrote to the

sheriff enclosing two cheques totalling $6,000 to increase the amount of its previous offer. The sheriff returned these with a letter dated July 24.

The learned trial judge, in a considered judgment, dealt with this aspect of the matter in the following terms (1):

> Various negotiations went on between Mr. Beach and the department which resulted in something concrete on July 6 when the department agreed to accept $8,000 in full settlement of all taxes owing by the Company of which $5,000 was to be paid in cash and the balance later, the sale being in the meantime postponed indefinitely.
>
> Beach then repaired to the sheriff's office armed with a memorandum reading: "If you will offer settlement of $8,000 in full settlement we will give the offer favourable consideration." But instead of paying the $5,000 on account of taxes he made no mention of this memorandum or of his arrangement. By letter dated (Friday) July 7, he made an offer on behalf of Westminster Mills, another of his companies, to buy the goods for $5,000. This letter was accompanied by an unmarked cheque payable to the sheriff. However, Bernier Bros. made a new offer of a larger amount, namely $5,300 of which Beach was advised. He, therefore, had an opportunity of making a larger offer and had he done so no doubt that larger offer would have been accepted.
>
> Instead of that he left town leaving some indefinite instructions with Mr. C. S. Arnold, a solicitor in Vancouver, but no money. Beach had been advised that the sale would take place on the following Monday and nothing further being heard in the meantime from him, except a telephone call from Mr. Arnold, the Bernier Bros. offer was accepted.

In a later passage the learned judge, after saying that he was asked to find on the evidence that Tuttle and the deceased Raymond Bernier had fraudulently arranged a "wash sale", held that this was not established and that the evidence "forms no sufficient basis for a finding of conspiracy and fraud against the defendants".

The offer of $5,300 had not, according to Tuttle, been made after Beach made the offer on July 7, but before. Beach had denied that he was advised of this, but the learned trial judge accepted Tuttle's evidence in preference and, while he did not deal in further detail with the conflict in the evidence of the two witnesses, made what I construe to be a finding that Beach did not offer to pay the $5,000 in accordance with his arrangement with Kellond.

The reasons for the unanimous judgment of the Court of Appeal were delivered by Mr. Justice Sheppard (2). After finding that it had been agreed between Kellond and Beach on July 6 that $5,000 should be paid in cash and $3,000 at some later date to be arranged, and that what Beach had

(1) 16 W.W.R. at pp. 281-2. (2) 7 D.L.R. (2d) 245.

1957

KEYSTONE SHINGLES AND LUMBER LTD. v. ROYAL PLATE GLASS & GEN. INS. CO. et al.

Locke J.

done was to make the offer of Westminster Mills Ltd. to buy the assets for $5,000, it was said that Tuttle had told Beach that day that the sheriff had a higher offer and that they would allow Beach until noon on Monday July 9 to increase his offer and that, as he did not do so, the assets had been sold. The Court concurred in the finding of fact made at the trial that the evidence did not support the charge of fraudulent conduct against Tuttle and Raymond Bernier and formed no sufficient basis for a finding of conspiracy and fraud against the defendants.

If, as Beach asserted, Tuttle, having been informed, as he admits, by Kellond of the arrangement made with Beach the day previous, had told Beach that he could not accept the payment on account and postpone the sale, but insisted that the matter could be dealt with only by a sale under the writs of extent and refrained from telling Beach of Bernier's offer of $5,300, his conduct would have been clearly fraudulent. That he did so has been negatived by the concurrent findings of the learned trial judge and of the Court of Appeal. Both Courts have accepted Tuttle's version as to what took place at the discussion on the morning of July 7. No finding is made as between Mr. Arnold's statement that he had asked that the sale be delayed until he could get in touch with Beach and Tuttle's evidence that no such request was made. If, however, Tuttle was mistaken in this, his refusal to extend the time in the circumstances narrated by him would not, in my opinion, afford any basis for a charge of fraudulent conduct on his part.

The statement of claim alleged negligence on the part of the sheriff and of Tuttle in carrying out their duties under the writs of extent in a number of particulars, which included failing to make an inventory and appraisal of the goods seized and in failing to obtain a greater price at the sale. It further alleged that there was a conspiracy between the sheriff, Tuttle and the Berniers to sell the property seized to the latter for a grossly inadequate amount, it being claimed that the property sold was of the value of at least $97,000.

Under the authority of the writs of extent, Beach had been examined on oath on June 20, 1950, in his capacity of president of the appellant company as to its assets. A

transcript of this examination was put in evidence at the trial and contained statements by Beach which, while not being particularly explicit, were clearly capable of meaning that the property of the company at Acteon Sound was worth only approximately $5,000. In dealing with the question of the value of this property, the learned trial judge referred to these statements and to the further fact that, in his dealings with Tuttle on July 7, Beach had only offered $5,000 for the property under seizure which, he considered, confirmed the opinion expressed previously as to the value.

The judgment of the Court of Appeal, after reviewing generally the evidence of value adduced on the part of the appellant and pointing out that the onus was on the plaintiff in the action to establish a sale at an undervalue, agreed with the learned trial judge that this had not been done.

The evidence as to the value of the property in question was, in my opinion, unsatisfactory. The sheriff's officer, Tuttle, who seized the property in June 1951, expressed the opinion that it was only of value as scrap and not worth more in the aggregate than $3,000 or $4,000. However, no proper inventory was taken by him or appraisal made and he had no qualifications as a valuator and it is rather upon the failure of the appellant to prove by acceptable evidence that the sale was not made for a reasonable price that both Courts have proceeded. There was, in my opinion, a failure on the part of the sheriff and his officer to discharge their duty of making a proper inventory and appraisal of the goods but, as pointed out by Sheppard J. A., damage is the gist of the action and there are concurrent findings that damage has not been shown.

The argument addressed to us by learned counsel for the appellant, in which everything that could be fairly urged on its behalf has been said, has failed to satisfy me that these findings are clearly wrong. I would accordingly dismiss this appeal with costs.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting in part*):—The salient facts out of which this litigation arises are set out in the reasons of my brother Locke.

1957

KEYSTONE SHINGLES AND LUMBER LTD. v. ROYAL PLATE GLASS & GEN. INS. Co. et al.

Cartwright J.

The two main grounds of appeal urged before us were (i) that the Courts below erred in rejecting the appellant's claim based on conspiracy, and (ii) that the appellant suffered damages as a result of the breach of the duty to use reasonable care to obtain as high a price as possible for the goods of the appellant sold pursuant to the writs of extent.

As to the first of these grounds, while the evidence appears to me to raise suspicion as to the nature of some of the dealings between the respondent Tuttle and the Berniers, I agree with my brother Locke that we would not be justified in setting aside the concurrent findings in the Courts below negativing the existence of the alleged conspiracy.

As to the second ground, counsel for the respondents concede that there rested upon the respondent or respondents responsible for the conduct of the sale of the appellant's goods a duty to use reasonable care to obtain as high a price as possible; their contention is that there was no breach of that duty.

In support of this ground counsel for the appellant stress the following points, (i) that no detailed inventory of the goods to be sold was made, (ii) that even if the lowest figures given by any of the witnesses called by the respondents be taken in valuing the goods sold, their total value was greatly in excess of the amount realized, (iii) that it was unreasonable of Tuttle to accept the Berniers' offer of $5,300 at noon on Monday July 9, 1951, when he had been advised by the late Mr. Arnold that Beach was out of town and delayed by the floods, as he ought to have anticipated that Beach, on his return, would make a better offer, and (iv) that as the Berniers' offer had been accepted conditionally on their cheque being honoured on presentation Tuttle ought to have cancelled the sale to them when the cheque was dishonoured and given Beach an opportunity to make a higher bid.

The failure to make a more detailed inventory does not appear to have caused any damage. The only prospective purchasers of the equipment were the Berniers and Beach, or his nominees, and both had knowledge of what was being offered for sale. The evidence shows that it was reasonable to make a sale *en bloc*.

The value placed upon the equipment, after the event, by the various witnesses does not, in all the circumstances of the case, establish that the price of $5,300 obtained at the forced sale was such that a reasonable business man in the position of Tuttle would not have accepted it. It must be remembered that Beach, who was at all relevant times in full control of the appellant company, had consistently belittled the value of the equipment in his dealings with the Income Tax officials, particularly when he was examined on oath as to the appellant's assets, and that the bid which he had made in the name of Westminster Mills Ltd. a few days before the sale to the Berniers was for only $5,000. At the trial counsel for the appellant repudiated the suggestion that this bid was in reality made on behalf of the appellant.

As to the third point mentioned above, there is first the difficulty of the conflict between the evidence of Tuttle and that of the late Mr. Arnold. The latter says that on Monday morning July 9, he spoke to Tuttle on the telephone and proceeds as follows:

> I said to Mr. Tuttle, "Tuttle, I have a letter from Mr. Beach in which he tells me that you have some execution process against one of his companies"—now which one it was, I am not sure—I said, "I have just telephoned Mr. Beach's office to speak to him", because I said, "I do not wish to act for Mr. Beach." I said, "The office tells me that Mr. Beach went to Harrison on Saturday. They expected him back Sunday but he isn't back, the floods are raging and they can't get through by telephone and they can't tell me when he will be in." Mr. Tuttle said, "I have a Writ of Extent from the Income Tax Department," and he said, "Mr. Beach was in last week and made an offer of $5,000." He said, "I have a higher offer than that," and he said, "I told Mr. Beach that I would give him until to-day at noon." And I said to Mr. Tuttle, "Well, in view of the fact that he is caught up at Harrison Lake, can't you extend that along further?" And he said, "No, 12.00 o'clock noon is the deadline. If you are able to get hold of Mr. Beach tell him to go to the Income Tax Department and try and make a deal with them himself." So that was about all that took place.
>
> MR. MURPHY: Q. Mr. Arnold, when you asked him to extend the time, do you remember—or will you please try and remember so far as you can the words that he used?
>
> A. I can't say whether he said "I will not" or "I cannot extend the time past 12.00 o'clock noon."
>
> THE COURT: Q. That was noon of that very day?
>
> A. That was noon of that day.

Tuttle's account of this telephone conversation is that Mr. Arnold told him that he could not get in touch with Beach but did not ask him to postpone the sale. Tuttle

1957

KEYSTONE SHINGLES AND LUMBER LTD. v. ROYAL PLATE GLASS & GEN. INS. Co. et al.

Cartwright J.

says that if Mr. Arnold had asked him to postpone the sale he would have done so. The learned trial judge makes no finding as between these two versions of the conversation. On the probabilities of the case it appears to me unlikely that Mr. Arnold would have failed to request a postponement under the circumstances and it is significant that he was not cross-examined, but for reasons which will appear I do not find it necessary to endeavour to decide this question of fact.

The fourth point mentioned above is not specifically dealt with in the reasons in the Courts below. It seems clear that at noon on July 9, the offer of Bernier Bros. was accepted and a receipt, ex. 82, was handed to Arnold Bernier on which the words "subject to acceptance of cheque" were written in two places. The meaning attached to these words by Tuttle as stated on his examination for discovery and accepted by him at the trial was as follows:

> Q. Were you asked these questions and did you make these answers:
> "941. Q. And you gave him a receipt for that cheque?
> A. I imagine it was subject to acceptance of the cheque.
> 942. Q. It was an unconditional acceptance of his offer?
> A. Subject to acceptance of his cheque.
> 943. Q. What do you mean by that?
> A. Well, if the cheque is no good, the sale would have been null and void."
> A. That is right.

Tuttle goes on to say that he said nothing to Arnold Bernier as to the significance of this notation on the receipt. The cheque of Bernier Bros. was drawn on the Powell River branch of the Canadian Bank of Commerce. It appears to have been deposited to the credit of the sheriff's account in the Robson District branch of the same bank in Vancouver. On July 11 payment of the cheque was refused at the Powell River branch, the rejection slip is marked "Not sufficient funds" and "Refer to drawer" and has written on it the words "Refer to Mr. Tuttle—Sheriff's office". The cheque was apparently redeposited in the sheriff's account in the Robson District branch on July 13 and was paid in due course.

In the meantime under date of July 10, 1951, a letter addressed to the sheriff of the County of Vancouver and signed "Keystone Shingles & Lumber Ltd. By G. Beach" was sent to the sheriff. At the trial this letter was produced

by counsel for the respondents Moodie and Tuttle at the request of counsel for the appellant and it does not appear to have been suggested that it had not been received by the addressee in due course. In this letter the appellant took the position that the sale to Bernier Bros. was void and said in part:

> (18) Bids are definitely available by us or others, exceeding the sum purported to have been received at the so-called sale.
>
> (19) Numerous requests have been received by us for sale of various items of equipment, and we have just received another this morning from a logger at Simoon Sound.
>
> Responsibility for irregularity rests on you and associates and all parties concerned.
>
> It is requested that the money received be returned to the parties who made tender, and the sale nullified and cancelled. A larger offer will then be made by ourselves and others.

No attention seems to have been paid to this letter. Under date of July 13 the sheriff wrote to Westminster Mills Ltd. returning that company's cheque for $5,000 and stating that a greater sum had been tendered and accepted for the equipment in question. On July 23 Westminster Mills Ltd. forwarded to the sheriff cheques totalling $6,000. These were returned by the sheriff with a letter of July 24 stating that the equipment had been sold on July 9.

The learned trial judge did not deal expressly with the claim of the appellant based on Tuttle's alleged breach of duty and the Court of Appeal disposes of the point by holding that there was no proof that the sale was not made for a reasonable price. Consequently we are not confronted, as in the case of the allegation of conspiracy, with concurrent findings of fact.

After considering the evidence bearing on this branch of the matter I have reached the conclusion that Tuttle did not exercise due care to obtain the best price for the equipment. Granted that the conduct of Beach was most unsatisfactory, it must have been apparent to Tuttle that he or one of the companies he controlled was a prospective purchaser of the equipment. I can find no adequate explanation of Tuttle's conduct in insisting on carrying out the sale at noon on Monday, July 9 after his conversation with Mr. Arnold, even on the assumption that the latter did not expressly request a postponement, nor for his failure to make any inquiry as to what Beach or Westminster Mills

1957

KEYSTONE SHINGLES AND LUMBER LTD. v. ROYAL PLATE GLASS & GEN. INS. CO. et al.

Cartwright J.

Ltd. was prepared to offer after the cheque of Bernier Bros. had been dishonoured. On the preponderance of evidence I think it is established that, had he exercised reasonable care and judgment, Tuttle could have obtained at least $6,000 for the equipment. On the other hand I do not think it was proved that he could have obtained more than this.

In the result I would allow the appeal to the extent of awarding the appellant judgment for $700 damages against the respondent Tuttle. Having reached this conclusion it would next become necessary to consider (i) whether the respondent Moodie is also liable for this amount, (ii) whether the respondent Royal Plate Glass and General Insurance Company of Canada is liable under its bond, and (iii) what order should be made as to costs; but as the majority of the Court are of opinion that the appeal fails *in toto*, no useful purpose would be served by my exploring these difficult questions.

Appeal dismissed with costs, RAND *and* CARTWRIGHT JJ. *dissenting in part.*

Solicitor for the plaintiff, appellant: Robert D. Ross, Vancouver.

Solicitor for the defendant insurance company, respondent: L. St. M. DuMoulin, Vancouver.

Solicitors for the defendants Moodie and Tuttle, respondents: Long & Long, Vancouver.

Solicitors for the defendant Edward T. Bernier, respondent: Howard and Anderegg, Vancouver.

Solicitors for the defendants Bernier Bros., Bernier Bros. Logging Co. and Arnold Bernier, respondents: Jestley, Morrison, Eckardt & Goldie, Vancouver.

THE MUNICIPALITY OF METROPOLITAN TORONTO (*Respondent*) ..... APPELLANT;

AND

THE CORPORATION OF THE VILLAGE OF FOREST HILL (*Applicant*) ..... RESPONDENT.

1957
Mar. 21, 22
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Powers—Special statutory provisions—Provision of "pure and wholesome" water supply—The Municipality of Metropolitan Toronto Act, 1953 (Ont.), c. 73, s. 41.

By s. 41 of *The Municipality of Metropolitan Toronto Act*, the council is empowered to pass by-laws, *inter alia*, "to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water".

Held (Kerwin C.J. and Locke J. dissenting): Neither this provision nor any applicable provision of any other statute empowers the appellant municipality to provide for the fluoridation of the metropolitan water supply with the object of preventing or lessening the incidence of tooth decay.

APPEAL from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from a judgment of F. G. MacKay J.A. (2). Appeal dismissed.

H. E. Manning, Q.C., and *A. P. G. Joy*, for the appellant.

J. J. Robinette, Q.C., and *J. Ragnar Johnson, Q.C.*, for the respondent.

THE CHIEF JUSTICE (*dissenting*):—By leave of this Court the appellant, the Municipality of Metropolitan Toronto, appeals from a judgment of the Court of Appeal for Ontario (1) reversing that of F. G. MacKay J.A. (2), and quashing the appellant's By-law 278, passed June 14, 1955. By *The Municipality of Metropolitan Toronto Act, 1953* (c. 73 of the Ontario statutes of 1953), hereinafter called "the Act", the inhabitants of the metropolitan area were constituted a body corporate; the respondent, the Corporation of the Village of Forest Hill, is an "area munic-

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

(1) [1956] O.R. 367, 2 D.L.R. (2d) 570.

(2) [1955] O.R. 889, [1955] 5 D.L.R. 621.

1957

METRO-POLITAN TORONTO v. VILLAGE OF FOREST HILL

Kerwin C.J.

ipality" within the limits of the metropolitan district. The council had previously adopted report no. 8 of its Works Committee recommending that the Commissioner of Works be authorized to take the necessary steps to undertake the fluoridation of the metropolitan water supply and by By-law 278 that action was ratified and confirmed. Clause 2 of the by-law provides:

> 2. That the said Commissioner of Works and all other appropriate officials of the Municipality be and they are hereby authorized and directed to take the necessary steps, forthwith, to undertake the treatment of the Metropolitan water supply by fluoridation and to obtain all approvals required by statute for the installation of the equipment necessary for such treatment.

Part III of the Act is headed "Metropolitan Waterworks System". By virtue of the earlier provisions of this Part the appellant became a provider of water at the wholesale level to the area municipalities. Then comes the important section, s. 41:

> 41. The Metropolitan Council may pass by-laws for regulating the time, manner, extent and nature of the supply of water from its waterworks system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water, and to prevent the practising of frauds on the Metropolitan Corporation with regard to the water so supplied.

In these proceedings the Court is, of course, confined to the material filed so far as it may be relevant. On behalf of the appellant an affidavit was filed, sworn to by Professor Joslyn Rogers. Professor Rogers was a member of the Association of Professional Engineers and a graduate of the University of Toronto in chemistry; he had been the Professor of Analytical Chemistry at the University from 1918 to 1954 and was a toxicologist of over forty years' experience and was currently practising as a consulting chemist. From his knowledge and experience he was able to state that chemically pure water does not occur in nature and cannot be produced artificially except in small quantities and with considerable difficulty and that, accordingly, water is classified as pure if it is suitable for human consumption and agreeable in taste, smell and appearance. Paragraphs 4, 5 and 6 of his affidavit read:

> 4. All natural waters contain minerals and such waters would not for that reason alone be classified as impure if the quantity of minerals present does not render the water unpleasant to the senses or prejudicial to health.

5. Water containing fluorides in concentrations of up to two or three parts per million, which occurs naturally in many parts of North America, is not considered impure because of the presence of the fluoride. If the fluoride was introduced mechanically the water would still be considered pure as the ion added is the same in both cases and is offered to the human body in the same state.

6. To confirm my opinion respecting the classification of water I would refer to the 5th Edition of "The Examination of Waters and Water Supplies" by Thresh, Beale and Suckling at pages 84, 85, 86 and 87 in the Chapter entitled "What Constitutes a 'Pure and Wholesome Water'" which accurately represent my views.

As he indicates, an examination of the pages of the book referred to confirms his opinion.

While it is notorious that chlorine is added to many water supplies, it is argued that the addition of fluoride to a supply otherwise pure and wholesome is really treating it for a medicinal effect. In view of the above evidence I cannot treat any statement of counsel as an admission that the supply here in question before the addition of the fluoride was pure and wholesome. However, even assuming that this supply when treated with chlorine would be pure and wholesome, the only other evidence in the record bearing upon the point is the affidavit of Dr. Andrew L. Chute, Pediatrician-in-Chief of the Hospital for Sick Children, Toronto, and Professor of Pediatrics at the University of Toronto. Paragraphs 3, 4, 5 and 6 of his affidavit read:

3. Tooth decay, by affecting the majority of people in a community, has come to be recognized by the Medical and Dental Professions as one of the major health problems of our time.

4. I have been associated with others in the consideration of the effect of fluoridation of public or communal water supplies.

5. Studies covering a period of over thirty years under a wide variety of controlled conditions have established the effects of the consumption by human beings of fluoridated water.

6. I am convinced from a thorough perusal of these studies that the addition of fluoride in the proportion of one part per million to a public water supply which is deficient in that constituent is a safe measure and is free from any systemic ill-effects. Such treatment renders the water more wholesome as it is effective in reducing tooth decay to the extent of approximately 60% where consumption of such water begins at an early age and continues during childhood and adolescence. The benefits extend into adult life.

These paragraphs indicate that certainly water is rendered more wholesome through the addition of fluoride in the proportion named and, always presuming that the council acts in good faith, I cannot read s. 41 of the Act

1957

METRO-POLITAN TORONTO v. VILLAGE OF FOREST HILL

Kerwin C.J.

in such a way as to declare that in enacting By-law 278 the council of the appellant exceeded its authority. The good faith of the appellant's council was not impugned. I have not overlooked that Dr. Chute states in para. 7 of his affidavit:

> 7. In my opinion fluoridation is a most valuable measure in preserving the teeth and as a result a valuable measure in maintaining health.

This does not alter my opinion that in proceeding as it did the council of the appellant was not invading the realm of public health and, therefore, it is unnecessary to consider the provisions of *The Municipal Act,* R.S.O. 1950, c. 243, *The Public Health Act,* R.S.O. 1950, c. 306, or any other statute referred to. A decision in the contrary sense would raise the question as to the powers so to do, under the relevant statutes, of other municipalities who have added fluoride to their water supplies, but I refrain from discussing their position and restrict myself to a consideration of the power of the appellant's council under the provisions of s. 41 of the Act.

The appeal should be allowed, the order of the Court of Appeal set aside and the judgment of the judge of first instance restored, with costs throughout.

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

RAND J.:—The question in issue is whether the Municipality of Metropolitan Toronto, under its power, given by s. 41 of its charter (1) to pass by-laws

> for regulating the time, manner, extent and nature of the supply of water from its waterworks system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water, and to prevent the practising of frauds on the Metropolitan Corporation with regard to the water so supplied

can bring about what is called the "fluoridation" of its metropolitan water supply. The process, so-called, is simply the introduction into the water of a minute portion of fluorine, say, one part in one million, for the purpose of promoting the health of the teeth and in particular the elimination of caries, by building up in the bone substance

(1) *The Municipality of Metropolitan Toronto Act, 1953* (Ont.), c. 73.

a greater resistance to the inroads of decay by foreign matter within the mouth. In the water the fluorine effects no chemical change but becomes merely diffused in solution.

Mr. Manning's contention is short and precise: the duty and the authority of the municipality is to furnish "pure and wholesome water"; admittedly the addition of fluorine does not affect its quality, otherwise wholesome; by its authority to regulate the "nature" of the supply it may introduce into the particular supply such substances as are generally found in water and in its judgment are beneficial to the health of the users; and in regarding such an object we must distinguish between ends and means, that is, the end being wholesome water, the means, an agency of promoting health, rather than the end being to serve a health purpose superimposed on a functional or water means.

Notwithstanding the attractiveness of this argument, I am unable to agree with it. The word "nature" can be satisfied by other and more accustomed meanings than that of a medicinal addition for another than a water purpose. The nature of the supply is too well known for question: it may be taken from a lake, a river or a stream, accumulated in a reservoir, obtained from artesian wells or collected directly from rainfall. Although the exact role of water in the physiological economy was not gone into, the matter of furnishing that indispensable aliment to life has too long been the subject of discussion to leave much doubt of what it means to furnish it in a wholesome quality. That a municipality may purify it, that is, reduce objectionable foreign matter in it by means harmless to its consumers, is universally understood. In the settled understanding, also, a "water supply" comes from natural sources which show differences in their degree of purity. "Purity" itself is well understood although partaking of the impreciseness of any general term. Solutions of different substances are invariably present, but the human body has evolved in an adaptation to them in their normal or subnormal quantities.

Does it lie, in such terms of authority, with a local government to furnish a supply of synthetic water by approximating the ordinary or normal components? If its object was

1957

METRO-POLITAN TORONTO v. VILLAGE OF FOREST HILL

Rand J.

to obtain the ordinary or natural composition of substances in solution so as to furnish what the body has become adapted to receive as water there would be grounds for justifying such a measure; and if it were a matter of choice between a natural supply containing normal quantities of fluorine and one lacking that element, I have no doubt the choice could not be challenged. These involve the matter of furnishing water for its accepted purposes only.

But it is not to promote the ordinary use of water as a physical requisite for the body that fluoridation is proposed. That process has a distinct and different purpose; it is not a means to an end of wholesome water for water's function but to an end of a special health purpose for which a water supply is made use of as a means.

The method proposed does not appear to be the only feasible mode of making available to the public what is considered by the municipality to be a desired health ministration. Fluoridation apparently can be provided otherwise than by making it general in the water supply. If that is so, there is here neither that accepted desirability for its use nor an unobjectionable manner of supplying it which in other situations might be influential considerations in the determination of the question raised.

I would, therefore, dismiss the appeal with costs.

LOCKE J. (*dissenting*):—The appellant is a body corporate constituted by c. 73 of the statutes of Ontario, 1953. The expression "Metropolitan Corporation" is defined by the Act to mean the Municipality of Metropolitan Toronto and, by s. 3, it is provided that the powers of the corporation shall be exercised by its council and, except where otherwise provided, its jurisdiction confined to the metropolitan area. The area so defined includes the municipality of the Village of Forest Hill, which is one of the area municipalities referred to throughout the Act.

Of the various powers and duties vested in and imposed upon the appellant, this matter concerns only those dealt with in Part III of the statute under the subheading "Metropolitan Waterworks System".

Section 36 declares that, for the purpose of supplying to the area municipalities water for their use, the metropolitan corporation shall have all the powers conferred by

any general Act upon a municipal corporation and by any special Act upon an area municipality or local board thereof respecting, *inter alia*, the establishment, maintenance and operation of a waterworks system.

Section 37(1) reads:

> The Metropolitan Council shall before the 1st day of December, 1953, pass by-laws which shall be effective on the 1st day of January, 1954, assuming as part of the metropolitan waterworks system all works for the production, treatment and storage of water vested in each area municipality or any local board thereof and all trunk distribution mains connected therewith, and on the day any such by-law becomes effective the works and mains designated therein shall vest in the Metropolitan Corporation.

By s. 39 it is declared that where all the works of an area municipality for the production, treatment and storage of water are assumed by the metropolitan corporation, the area municipality shall not thereafter establish or operate any such works.

Section 41, so far as it is relevant to the present matter, reads:

> The Metropolitan Council may pass by-laws for regulating the time, manner, extent and nature of the supply of water from its waterworks system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water . . .

By a written report dated May 2, 1955, the Works Committee of the appellant municipality, after an investigation, details of which were disclosed in it, recommended to the council that the Commissioner of Works be authorized to take the necessary steps to undertake the fluoridation of the metropolitan water supply. By a by-law enacted on July 14, 1955, the municipality directed the Commissioner of Works to take the necessary steps forthwith to undertake the treatment of the Metropolitan water supply by fluoridation and to obtain all approvals required by statute for the installation of the equipment necessary for such treatment.

Section 101 of *The Public Health Act*, R.S.O. 1950, c. 306, requires the council of any municipality contemplating, *inter alia*, any change in an existing waterworks system to submit the plans, specifications and an engineer's report of the water supply and the works to be undertaken, together with such other information as may be deemed necessary by the Department of Health, to that Depart-

1957

METRO-POLITAN TORONTO v. VILLAGE OF FOREST HILL

Locke J.

ment, and declares that no such works shall be proceeded with until the source of supply and the proposed works have been approved by the Department.

The Commissioner of Works applied under the provisions of this section for approval of a change in the existing waterworks system of the metropolitan corporation to provide for the addition of one part per million of fluoride to the water supply. By a certificate dated July 11, 1955, signed by the Minister of Health, the Provincial Sanitary Engineer and the Deputy Minister of Health, it was certified that "the installation of equipment for fluoridation of the water supply" at the waterworks plants of the appellant and the source of water supply and the proposed works had been approved by the Department as required.

The respondent, by notice of motion given as permitted by s. 293 of *The Municipal Act*, R.S.O. 1950, c. 243, applied for an order to quash for illegality the by-law referred to "on the grounds, inter alia, that such by-law is ultra vires and beyond the competence of the said Council". While other grounds of attack were suggested, the only one argued has been that in passing the by-law the council exceeded its powers.

The application was dismissed by Mr. Justice F. G. MacKay (1). That learned judge was of the opinion that it was for the council acting in good faith to determine what treatment, if any, should be given to the water to most effectively carry out its statutory obligation. He was of the opinion that the arguments advanced as to the advisability of adding fluoride were irrelevant and should not be considered, except for the purpose of determining whether it had been shown that the council was not so acting. In his opinion, the evidence supported his view that good faith had been shown.

The unanimous judgment of the Court of Appeal, delivered by the Chief Justice of Ontario (2), reversed this order and directed that the by-law be quashed. In the reasons it is stated that it had been admitted in the Court of Appeal that the water, without the addition of fluoride, was pure and wholesome. Accepting the admission as establishing that fact, it was said that nothing in

(1) [1955] O.R. 889, [1955] 5 D.L.R. 621.

(2) [1956] O.R. 367, 2 D.L.R. (2d) 570.

The Municipality of Metropolitan Toronto Act, The Public Health Act, The Public Utilities Act, R.S.O. 1950, c. 320, or *The Municipal Act* conferred upon any of the area municipalities power to add some chemical to a pure and wholesome water supply and that the question to be decided was as to whether the respondent had power to do so "for a medicinal purpose". With great respect, I disagree and think the judgment appealed from is based upon a false premise.

In deciding the question whether the by-law was *intra vires* of the council, it was, of course, necessary to determine the exact nature of the action which the by-law assumed to authorize. The uncontradicted evidence is that "a physically or chemically pure water does not occur in nature and has defied all efforts to obtain it". This is the opinion of Joslyn Rogers, a chemical engineer of long experience whose affidavit was filed on the application. Mr. Rogers further said that it cannot be produced artificially, except in small quantities and with considerable difficulty. The admission that the water was pure—if intended as an admission of fact—was, therefore, inaccurate. If intended as meaning that it was "pure" within the meaning of the appellant's Act of incorporation, that was a question of law for the decision of the Court and not to be decided upon the admission of counsel. It should be said that no such admission was made in this Court.

In the extracts from the work of E. V. Suckling, M.B., to whose opinions in this respect Joslyn Rogers subscribes, it is said that wholesomeness is purely a medical question while purity must be physical and chemical. Apart from such evidence, the accuracy of the statement seems obvious. In view of the evidence to the contrary, I would decline in a matter of such moment to act on an admission of counsel in the Court of Appeal that the water supply was, without any addition, either pure or wholesome. That question, which, in my view, is only relevant to the issue as to whether the members of the council have acted in good faith in the exercise of their statutory duties, is to be decided on the evidence adduced upon the application.

1957

METRO-POLITAN TORONTO v. VILLAGE OF FOREST HILL

Locke J.

The only evidence on the question is that of Dr. A. L. Chute, the Pediatrician-in-chief of the Hospital for Sick Children in Toronto and Professor of Pediatrics at the University of Toronto. His affidavit states that tooth decay, by affecting the majority of people in a community, has come to be recognized by the medical and dental professions as one of the major health problems of our time. After saying that studies covering a period of over 30 years under a wide variety of controlled conditions had established the effects of the consumption by human beings of fluoridated water, the affidavit reads:

> 6. I am convinced from a thorough perusal of these studies that the addition of fluoride in the proportion of one part per million to a public water supply which is deficient in that constituent is a safe measure and is free from any systemic ill-effects. Such treatment renders the water more wholesome as it is effective in reducing tooth decay to the extent of approximately 60% where consumption of such water begins at an early age and continues during childhood and adolescence. The benefits extend into adult life.
>
> 7. In my opinion fluoridation is a most valuable measure in preserving the teeth and as a result a valuable measure in maintaining health.

As an exhibit to this affidavit, there is a list of some 65 municipalities in Ontario where natural fluorides are contained in the water supply in concentrations varying from .01 to 2.5 parts per million.

The requirement that the water supply shall be "pure and wholesome" would appear to have originated in the early English statutes. Thus, by s. 35 of the *Waterworks Clauses Act*, 1847, 10 Vict., c. 17, the undertakers operating waterworks are required to provide "a Supply of pure and wholesome Water, sufficient for the domestic Use of all the Inhabitants of the Town or District within the Limits of the special Act". Apparently in recognition of the fact that, as stated in the evidence in this matter, chemically pure water does not occur in nature and cannot be produced artificially except in small quantities and with difficulty, the *Public Health Act, 1936,* 26 Geo.V and I Edw. VIII, c. 49, by s. 111, imposes on the local authority the duty to provide "a sufficient supply of wholesome water for domestic purposes".

The word "wholesome" is used in more than one sense. One of the definitions in the Oxford Dictionary reads:

> Promoting or conducive to health; favourable to or good for health; health-preserving . . .

The definitions in Webster's New International Dictionary include the following:

> Promoting physical well-being; beneficial to the health or the preservation of health; . . . healthful . . .

The material does not assume to say what are the causes of tooth decay. The evidence, however, shows that the use of fluoridated water does materially reduce tooth decay where consumption begins at an early age, that these benefits extend into adult life and that it is a valuable measure for maintaining health. As the article from Suckling's work shows, water is treated with chlorine, lime and other chemicals or substances for the purpose of rendering it sterile and I would draw the inference from the statements made that doing so renders it less likely to cause typhoid fever or other water-borne diseases.

With respect for differing opinions, I consider that the appellant in discharging its duty to supply water that is wholesome may treat the water with chlorine, lime or other substances to render it sterile and less likely to cause typhoid, or with fluoride to render it less likely to be injurious to the health by contributing to tooth decay.

It is, in my opinion, a necessary inference from the evidence that the water supply in the metropolitan district of Toronto, whatever it may be, is in its natural state lacking in the element fluoride and thus less wholesome than it would be if that were added, to the extent mentioned. If the supply in its natural state contained fluoride to the extent of 2.5 parts to a million, as does the water obtained from the Boone River by the municipality of Essex, and if, in the opinion of the council acting in good faith, it was considered advisable to reduce the fluoride content to one part in a million, I think it would be within the power of the municipality to do so. Indeed, I find it hard to understand why it can be fairly contended that this would be beyond the municipal powers any more than to add chlorine to render the water more wholesome by rendering sterile and harmless some existing constituent in it. If the argument which succeeded in the Court of Appeal is carried to its logical conclusion, it would be *ultra vires* of the appellant to use water of the character used by the municipality of Essex

1957

METRO-POLITAN TORONTO v. VILLAGE OF FOREST HILL

Locke J.

or the 64 other municipalities referred to by Dr. Chute since such waters, in their natural state, contain fluoride in varying proportions.

In my opinion, nothing more is required to sustain the present by-law than the clear provisions of s. 41 of the appellant's Act of incorporation. It is, of course, not suggested that the council has not acted in good faith in attempting to discharge the duties imposed upon it by that section and it is not disputed that the introduction of fluoride, to the extent proposed, will render the water supply more wholesome, assigning to that word the meaning above quoted. The Legislature has deputed the responsibility of determining what steps should be taken to obtain a pure and wholesome water supply to the metropolitan council and not to the Courts.

I would allow this appeal with costs and restore the order of Mr. Justice MacKay.

CARTWRIGHT J.:—I am in general agreement with the reasons of my brother Rand and those of the learned Chief Justice of Ontario, and will add only a few words.

The question is as to the power of the council to enact the impugned by-law, and the answer depends upon the nature of the subject-matter to which it relates. If, on the evidence in the record, it could properly be regarded as action by the council to provide a supply of pure and wholesome water or to render more pure and wholesome a supply of water already possessing those characteristics I would hold it to be valid. But, in my opinion, it cannot be so regarded. Its purpose and effect are to cause the inhabitants of the metropolitan area, whether or not they wish to do so, to ingest daily small quantities of fluoride, in the expectation which appears to be supported by the evidence that this will render great numbers of them less susceptible to tooth decay. The water supply is made use of as a convenient means of effecting this purpose. In pith and substance the by-law relates not to the provision of a water supply but to the compulsory preventive medication of the inhabitants of the area. In my opinion the words of the statutory provisions on which the appellant relies do not confer upon the council the power to make by-laws in relation to matters of this sort.

In view of the difference of opinion in the Courts below and in this Court, it is fortunate that this is a case in which if we have failed to discern the true intention of the Legislature the matter can be dealt with by an amendment of the statute.

I would dismiss the appeal with costs.

ABBOTT J.:—For the reasons given by brothers Rand and Cartwright, with which I am in agreement, the appeal should be dismissed with costs.

Appeal dismissed with costs, KERWIN C.J. *and* LOCKE J. *dissenting.*

Solicitor for the appellant: C. Frank Moore, Toronto.

Solicitor for the respondent: J. Ragnar Johnson, Toronto.

THE WAWANESA MUTUAL INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

FLORENCE BELL AND ALLEN BELL (*Plaintiffs*) ..... RESPONDENTS.

1957
*Mar. 25
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile liability insurance—Special extension of meaning of "automobile"—Whether automobile owned by "person of the household" of insured—The Insurance Act, R.S.O. 1950, c. 183, ss. 207, 212(b), 214.

One M was the holder of an owner's policy within the meaning of s. 207 of *The Insurance Act,* covering his liability in respect of his own automobile or "an automobile not owned by the Insured nor by any person or persons of the household of which the Insured is a member, while temporarily used as a substitute for an automobile described in this policy". M's automobile being disabled, he took and drove a car belonging to his brother J, with whom he lived, on terms set out in the reasons for judgment. While driving this car, M was involved in an accident as a result of which he was killed and the respondents sustained serious injuries. The respondents obtained judgment against M's estate and then sued M's insurer under s. 214 of *The Insurance Act.*

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Held: The insurer was liable. In the circumstances, it could not be said that M was "a member of" J's household and the policy accordingly extended to the risk.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming a judgment of Aylen J. (2). Appeal dismissed.

D. A. Keith, Q.C., and *D. R. K. Rose*, for the defendant, appellant.

G. L. Mitchell, Q.C., and *A. L. McKenzie*, for the plaintiffs, respondents.

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

THE CHIEF JUSTICE:—It is impossible to define the phrase "any person or persons of the household of which the insured is a member" so as to cover all possible cases. In the present appeal the evidence discloses:

(1) Murley Milley paid board.
(2) His stay with his brother was of a temporary character.
(3) He was not a member of the family in the sense that children of the brother would be.
(4) Murley was not under the control of his brother.
(5) While Murley helped to some extent, it cannot be said that he shared any responsibility of a householder.

In view of these circumstances, I am unable to say that both Courts were wrong in the conclusion at which they arrived.

The appeal should be dismissed with costs.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J.:—The issue here is on the interpretation of the phrase of an exception "not owned by . . . any person or persons of the household of which the Insured is a member" as it applies to a substitute automobile in a liability insurance policy. The driver of a car involved in a collision in which the respondents were injured was the insured and the car belonged to a brother and had been

(1) [1956] O.W.N. 809, [1956] I.L.R. 1-241, 5 D.L.R. (2d) 759.
(2) [1956] O.W.N. 733, [1956] I.L.R. 1-241.

taken by the insured without permission; and the appellant's contention is that by reason of the exception it was excluded from the coverage of the policy.

Both the Oxford and the Century dictionaries make it clear that the term "household" is of flexible meaning. In the general understanding it is associated and at times identical with what is connoted by "family" or "domestic establishment". The characteristics of the relations between members of a household are so varied and of such different degree or significance that it is quite impossible to define the word in detailed terms applicable to all cases; and to come to a conclusion as to its scope as it is used in the policy requires that we resort to the ordinary aids to interpretation. The exception is in the language of the company, and if it is ambiguous the ambiguity must be resolved in favour of the insured; and a material consideration to be taken into account is the purpose intended to be served by it.

That purpose must be sought. The insurance here is of an owner in relation to a described automobile, but this is only one of a number of forms which automobile insurance may take. The automobile as described may extend, as here, but with exceptions, to a substituted machine; the policy may insure persons other than the owner, also with exceptions; and the insurance against theft, for example, may as here except members of a specified group. This does not exhaust the special forms or provisions, but the examples point one direction which experience has led insurance companies to take. These particular exceptions seem clearly to be aimed at persons living in close relations with the owner and against automobiles conveniently available for interchangeable use; slight differences in the language used seem to reflect similar differences in the nature or scope of the membership and to be referable significantly to special features of the particular risk being dealt with. The precise language used, then, may be of controlling importance.

In the case before us the reason for the exception of the substituted car where it is owned by a person "of the household" of which the insured is a member seems to be the tendency of and the opportunity afforded to the members of such a group to make common use of their

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Rand J.

cars and thus to limit the insurance taken out. In other ways more or less freedom in the common use of cars tends to be prejudicial to the insurance business, such as by creating favourable conditions for collusion on claims; and the exception against theft clearly regards the special opportunities furnished for that offence.

The "household", in the broad sense of a family, is a collective group living in a home, acknowledging the authority of a head, the members of which, with few exceptions, are bound by marriage, blood, affinity or other bond, between whom there is an intimacy and by whom there is felt a concern with and an interest in the life of all that gives it a unity. It may, for example, include such persons as domestic servants, and distant relatives permanently residing within it. To some degree they are all admitted and submit to the collective body, its unity and its conditions, particularly that of the general discipline of the family head. They do not share fully in the more restricted family intimacy or interest or concern, but they participate to a substantial degree in the general life of the household and form part of it.

These are persons "of" the household. A distinction between being "of" and "in" a household is made in the policy itself. In the case of theft the insured is not protected when it is committed by a person "in" the household. On the argument my first impression was that one "in" the household is necessarily "of" it, but further consideration has led me to a different view. The circle of those "in" is larger than those "of", a good example of which is furnished by the case of *Home Ins. Co. v. Pettit* (1). There the exception was of theft by a person "in" the household of the insured and an uncle, temporarily a guest of the insured's father, was held to be of that description.

With this distinction in mind, the purpose of the exemption here, to guard against the use by the insured of another automobile either his own or that of one "of" the household of which he is a member, is against one who bears such a relation to the owner as to make easy and readily at hand the use by him of the other's car, which otherwise the latter might be interested in seeing

(1) (1932), 143 S. 839.

insured. By the exception the business objectionableness of the extension of one insurance to cover more than one car—obvious in the case of the owner himself—is so far avoided.

The insured was a younger brother of the owner, in whose home he was a boarder. The details of his position in the household have been given in other reasons and I will not repeat them. From them I do not draw the inference that makes him "of" the household. He was paying his board and working; his stay, though indefinite, was not intended to be longer than to enable him to become started in a home of his own. He had no permission whatever to use the brother's car. His interests and concerns were primarily his own and not more related to the family life of his brother than if he had been living apart. The mere occasional extension to him of minor household accommodations or participation on special occasions in more intimate family activities does not overbear the dominant and distinct individual interests of his own. That separate identity of life he maintained and in no substantial way was it merged in that of the family. It may be said that he was a person "in" the household of his brother but not "of" it.

That was the view taken by Laidlaw J. A., speaking for the Court of Appeal (1), and I am quite unable to say that it was not the right view.

The appeal must, then, be dismissed with costs.

LOCKE J.:—The policy which, it was found, had been issued by the appellant company to the late Murley Milley was an owner's policy, within the meaning of that expression in s. 207 of *The Insurance Act,* R.S.O. 1950, c. 183.

The insured vehicle described in it was a Studebaker sedan. While the third party liability insured against by the policy was, on the face of it, in respect of the operation of the Studebaker car, by a clause appearing under

(1) [1956] O.W.N. 809, [1956] I.L.R. 1-241, 5 D.L.R. (2d) 759.

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Locke J.

a heading "Additional Agreements" following the main insuring clauses, the word "automobile", where used in the policy, was defined to include

> an automobile not owned by the Insured nor by any person or persons of the household of which the Insured is a member, while temporarily used as the substitute for an automobile described in this Policy which is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

At the time of the accident giving rise to these claims, the Studebaker sedan owned by Murley Milley was apparently out of commission and he was driving a Vauxhall car, the property of his brother, John Milley, at whose home he resided. He appears to have taken his brother's car without the latter's permission, but this circumstance does not affect the question to be determined. The respondents were severely injured in the accident and Murley Milley was killed.

In an action brought against John Milley and George Stewart Nash, administrator *ad litem* of the estate of Murley Milley, deceased, damages were awarded to the respondent Florence Bell in the sum of $6,000 and to the respondent Allen Bell in the sum of $48,228.05. The action against the present appellant under the provisions of s. 214 of *The Insurance Act* followed.

The deceased was a younger brother of John Milley who lived with his wife and family in Sarnia. The Milleys were natives of Newfoundland and some 3 years prior to the accident, at the invitation of John Milley, Murley Milley had come from there to Sarnia to obtain work. He was unmarried and, except during a comparatively short period of time when he was employed on a steamer on the Great Lakes, he lived with his brother, being provided with both room and board and, as would appear from the evidence, was treated as one of the family. When working he paid board but when, as at times happened, he was unemployed he paid nothing, though apparently he was expected to pay for any such period when he became able to do so. During the last year of his life he had become engaged to be married and at times his fiancee had stayed at his brother's house, being treated as a guest and no payment being made for either her food or lodging. On the day of his death he had been going to

Goderich to see her and I gather from the evidence that he contemplated marriage and leaving his brother's home as soon as he was able to do so.

During the latter part of Murley Milley's life, a cousin of the brothers was also living in John Milley's house and, during part of the time, a younger brother had lived there, the cousin and younger brother each paying for their board and lodging.

Murley Milley was 27 years old at the time of his death on February 12, 1955. While being treated as if he were a member of his brother's family, it is not suggested that he regarded himself in any sense as being subject to the latter's orders or directions and while he at times helped around the premises by doing odd jobs, such as cutting the lawn, they formed no part of the arrangement between the brothers.

Section 212(*b*) of *The Insurance Act* permits an insurer, by an endorsement on the policy, to extend the coverage in the case of an owner's policy to include "the operation or use of automobiles not owned by nor registered in the name of the insured". While this would permit an extension of the coverage to any automobile other than that described in the policy in certain circumstances, the present insurer limited the risk by excluding, *inter alia,* other automobiles owned by a person of the household of which the insured was a member.

There is much to be said, in my opinion, for the view advanced by the appellant that, in the circumstances described, Murley Milley was a member of the household of his brother. The interpretation which has commended itself to the learned trial judge is, however, that the word "household" should be construed as synonymous with the word "family" and that the relation existing between the parties must be permanent and not temporary. While undoubtedly a resident in the household, the learned judge considered that he was not a member of it in the sense the expression was used in the policy.

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Locke J.

The judgment of the Court of Appeal delivered by Mr. Justice Laidlaw and concurred in by Aylesworth and Schroeder J.J.A. agreed with the reasons for judgment delivered at the trial, adding that (1):

there was not that intimate relationship, that domestic *nexus*, between the late Everett Murley Milley and John Milley, as head of a household and other members of it, that would make him . . . a member of it.

After pointing out that he was simply a temporary inmate, the learned judge added:

he did not have those duties and responsibilities and those privileges of the kind and nature reciprocal to the head and other members that would make him a member of the household of John Milley.

To entitle the insurer in the present case to the benefit of what may be called either language restricting the risk or an exemption of certain vehicles from the protection granted by the clause, it was necessary for it to satisfy the Court that Murley Milley was a member of the household of which his brother John was the head.

While the provision now appearing as para. (*b*) of s. 212 of *The Insurance Act* was introduced into the statute as s. 183f(*b*) by 1932, c. 25, the point to be determined here has not been dealt with in any Canadian case to which we have been referred.

The language of this portion of the clause is, in my opinion, ambiguous, due to the uncertainty of the meaning to be ascribed to the word "household". The word has been interpreted in several American cases construing policies of insurance as bearing the same meaning as "family". But, again, that word is one which has various meanings dependent upon the context in which it is found. In *The King v. The Inhabitants of Darlington* (2), construing a provision in one of the poor laws, Lord Kenyon C.J. said that in common parlance

the family consists of those who live under the same roof with the paterfamilias: those who form (if I may use the expression) his fireside.

In the New Oxford Dictionary, one of the definitions of the word "household" reads:

The inmates of a house collectively; an organized family, including servants or attendants, dwelling in a house; a domestic establishment.

(1) [1956] O.W.N. at p. 809.

(2) (1792), 4 T.R. 797 at 800, 100 E.R. 1308.

In the same work, the definitions of "family" include one which reads:

> The body of persons who live in one house or under one head, including parents, children, servants, etc.

In *English v. Western* (1), a policy of insurance taken out by a boy of 17, living with and dependent on his father, provided that the underwriter should indemnify the insured against liability for bodily injury to any person arising out of the use of the car but excluding injury to any member of the insured's household. While the boy was driving in the car with his sister, who also lived with his father, an accident occurred in which she was injured. The claim was resisted on the ground that she was a member of the insured's household, which was given effect to by Branson J. at the trial. On appeal, the judgment was reversed by a majority of the Court, Slesser and Clauson L.JJ. holding that the expression "any member of the assured's household" was just as capable of being construed as meaning any member of a household of which the assured was the head as it was of meaning any member of the same household of which the assured was a member and, being ambiguous, it must be construed *contra proferentes* and that, since the assured was not the head of the household, the exception did not apply.

I think it may be said with equal force that the household referred to in the clause in question in this action may consist of only the head of the house, his wife and children, or may include, in addition, relatives rooming in the house, even though they pay for their lodging. Some slight indication that the word should be construed in the former sense is afforded by the fact that, in the insuring clause against theft, liability is excluded for theft by any person *in* the household while the clause we are considering refers to a member *of* the household.

The language of the insuring clause, unlike the statutory conditions, is the language of the insurer. In *Anderson v. Fitzgerald* (2), Lord St. Leonards, referring to a policy of life insurance, said that, as it was prepared by the company, if there should be any ambiguity in it it must be

(1) [1940] 2 K.B. 156, [1940] 2 All E.R. 515.
(2) [1853], 4 H.L. Cas. 484 at 507, 10 E.R. 551.

1957

WAWANESA MUTUAL INS. CO. v. F. BELL et al.

Locke J.

taken more strongly against the person who prepared it. In a more recent case, the law was stated to the same effect in the House of Lords by Viscount Sumner in *Lake v. Simmons* (1). The result of the authorities appears to me to be accurately summarized in MacGillivray on Insurance Law, 4th ed. 1953, s. 708.

In the circumstances of the present case, I think the language in question is to be construed in the manner most favourable to the insured person and that the respondents as judgment creditors are entitled to the same rights against the company as the insured might have asserted. For these reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Bell, Keith, Ganong & Griffiths, Toronto.

Solicitors for the plaintiffs, respondents: Mitchell & Hockin, London.

1957

*Mar. 7

June 26

THE LOUNSBURY COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

GEORGE DUTHIE (*Plaintiff*) .....RESPONDENT;

AND

EARL SINCLAIR (*Defendant*) .....RESPONDENT.

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

Conditional sales—Remedies of unpaid seller—Repossession and resale of goods—Special contractual obligation to obtain best price possible on resale—The Conditional Sales Act, R.S.N.B. 1952, c. 34, s. 10.

Contracts—Novation—Assignment of liabilities—When permitted—Absence of consent of other party.

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

(1) [1927] A.C. 487 at 508-9.

The appellant sold to the respondent D a tractor under a conditional sale agreement in which it was provided, *inter alia,* that on default by D the appellant should be entitled to retake possession of the property "and sell the same at public auction or by private sale and apply the proceeds . . . on account of the purchase price . . . and interest then unpaid", and that: "Any surplus after such sale shall belong to the purchaser." At a time when the balance unpaid including interest was less than $1,500 (out of a total purchase-price of $7,780), the appellant took possession of the tractor and, after some unsuccessful negotiations with D, it delivered the tractor to P on payment by him of the exact balance owed by D and, on P's instructions, assigned its interest under the contract to the defendant S, an employee of P.

Held: The appellant was liable in damages for breach of its obligation under the contract to effect a provident sale of the tractor. The evidence established that the market value of the tractor at the time of repossession was much in excess of the price obtained by the appellant from P and the measure of damages was this excess value. D had never consented to the substitution of S or P as a party to the original contract and the circumstances did not in any way amount to a novation. The appellant's obligation under the contract was one that it could not assign without D's consent so as to be discharged of its own liability.

Courts—Jurisdiction—Appellate jurisdiction of Supreme Court of Canada—Issue as to costs only—The Supreme Court Act, R.S.C. 1952, c. 259, ss. 36(a), 43.

An action was brought against L Co. and S. The trial judge dismissed the action as against both defendants, with costs. On appeal, this judgment was reversed as against L Co. and the Court ordered that S's costs should be paid by L Co. L Co. appealed.

Held: In the circumstances, the Supreme Court had no jurisdiction in respect of the judgment in favour of S, which was for costs only. Neither the plaintiff nor S had appealed and the only issue before the Supreme Court in which S was concerned was the order as to costs, in respect of which leave to appeal had not been obtained.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), allowing in part an appeal from a judgment of Anglin J., who dismissed the action as against both defendants. Appeal dismissed.

R. Dwight Mitton, Q.C., for the defendant, appellant.

J. T. Gray, for the plaintiff Duthie, respondent.

J. E. Murphy, Q.C., for the defendant Sinclair, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of The Supreme Court of New Brunswick, Appeal Division (1), allowing an appeal from a judgment of Anglin

(1) 4 D.L.R. (2d) 631 (*sub nom. Duthie v. Lounsbury Co. Ltd. and Sinclair*).

1957

LOUNSBURY CO. LTD. v. DUTHIE AND SINCLAIR

Cartwright J.

J. and directing judgment to be entered in favour of the respondent Duthie against the appellant for $4,555.85; the judgment at the trial dismissing the action against the respondent Sinclair was affirmed but the order as to costs was varied to provide that Sinclair's costs of the action and appeal should be paid by the appellant.

Pursuant to the terms of a conditional sale agreement dated August 12, 1948, the respondent Duthie, hereinafter referred to as "Duthie", purchased from the appellant a crawler tractor and a Smith angledozer, which are used together as a composite unit and will be referred to hereinafter as "the tractor". The price was $7,780 of which $3,700 was paid in cash, the balance of $4,080 plus a financing charge of $160 to be paid in instalments the last of which fell due on August 19, 1949. Interest was payable on any instalments not paid when due.

The conditional sale agreement provided in part as follows:.

> . . . if the Purchaser makes any default in payment the Vendor shall be entitled to possession and may retake possession of the property, so agreed to be sold to the Purchaser, without process of law, and in accordance with the provisions of Section 10 of Conditional Sales Act, and sell the same at public auction or by private sale, and apply the proceeds after deducting all expenses connected with such retaking possession and sale, including the payment of any lien or distress for rent of a third party on the said property, on account of the purchase price of said property and interest then unpaid; and the Purchaser further agrees to pay for any deficiency after such repossession and sale of above property if provisions of Section 10 of Conditional Sales Act have been complied with. Any surplus after such sale shall belong to the Purchaser.

On January 24, 1950, the balance of the purchase-price remaining unpaid including interest was $1,444.15 and on that day the appellant took possession of the tractor and sent to Duthie a notice of seizure pursuant to the provisions of *The Conditional Sales Act*, R.S.N.B. 1927, c. 152, now R.S.N.B. 1952, c. 34. The notice, which was addressed to Duthie and signed by the appellant, read in part:

> AND FURTHER TAKE NOTICE that demand is hereby made upon you for payment of the sum of Fourteen Hundred and Forty-four Dollars and fifteen cents being the balance due under the said Conditional Sales Agreement, and that unless the said sum of Fourteen Hundred and Forty-four dollars and fifteen cents is paid to the undersigned on or before the 14 day of February 1950 the undersigned will thereafter sell the said Tractor and angledozer by private sale on the premises of the undersigned at

Pleasant St. in the town of Newcastle, in the County of Northumberland and that if the proceeds of such sale are less than the said sum of Fourteen Hundred and Forty-four dollars and fifteen cents you will be held liable of any deficiency, but should there be a surplus on such sale, you will be entitled to same.

Between the date of the seizure and February 14, 1950, Duthie had some discussions of the matter with Mr. Roy, manager of the appellant, who urged him to get the money to pay off the balance due; Duthie tried unsuccessfully to do this and then told Roy he had not been able to get the money and would have to let the tractor go. Duthie assumed at this point that the appellant would sell the tractor and that in due course he would receive the surplus of the selling price as it is not disputed that the market value of the tractor in its then condition was substantially greater than the balance owing under the conditional sale agreement, and his evidence on discovery, put in at the trial by the appellant, was that he was quite willing that the appellant should sell it.

Duthie heard nothing further from the appellant, or from anyone else. At a later date, not fixed exactly in the evidence, he found out that the tractor had been delivered to one Price who was using it in his business as if it were his own.

On March 18, 1952, Duthie commenced this action against the appellant and the respondent Sinclair. The statement of claim, as originally delivered, recited the conditional sale agreement, the seizure, the terms of the notice quoted above and continued:

7. The Plaintiff says that, instead of selling the said Tractor and Angle Dozer and accounting to the Plaintiff, as required so to do, under the said Notice in writing hereinbefore referred to and under and by virtue of the Provisions of Section 10, of the Conditional Sales Act, being Chapter 152 of the Revised Statutes of New Brunswick, 1927, the said Defendant, Lounsbury Company Limited, on or about the 20th day of February, A.D., 1950, unlawfully and wrongfully assigned and transferred the said Conditional Sale Agreement hereinbefore referred to and wrongfully and unlawfully converted the said Tractor and Angle Dozer to it's [*sic*] own use thereby depriving the Plaintiff thereof.

8. The Plaintiff further says that on or about the 20th day of February, A.D., 1950, the Defendant, Lounsbury Company Limited, wrongfully and unlawfully delivered possession of the said Tractor and Angle Dozer, which it had wrongfully and unlawfully converted from the said Plaintiff, to the Defendant, Earl Sinclair.

9. The Plaintiff says that the Defendant, Earl Sinclair, wrongfully and unlawfully converted the said Tractor and Angle Dozer to his own use and continues so to do.

1957

LOUNSBURY CO. LTD. v. DUTHIE AND SINCLAIR

Cartwright J.

10. The Plaintiff claims against the Defendants, for the wrongful conversion of the said Tractor and Angle Dozer and for an accounting.

The statement of claim concluded with a claim for damages in the sum of $6,335.85 being the difference between the purchase price of the tractor and the unpaid balance of $1,444.15.

At the opening of the trial para. 7 of the statement of claim was amended to read:

7. The Plaintiff says that the Defendant The Lounsbury Company Limited did not sell the said Tractor and Angle Dozer in accordance with the Notice of Sale above referred to, and further says that the said Defendant The Lounsbury Company Limited wrongfully and illegally, and contrary to the provisions of Section 10 of the Conditional Sales Act, Chapter 152, R.S.N.B. (1927), on or about the 20th day of February, 1950, delivered possession of the said Tractor and Angle Dozer to one Harold N. Price, and otherwise converted the same to its own use.

Paragraph 8 was struck out and there was added an alternative claim for damages amounting to the difference between the value of the tractor at the time of repossession and the unpaid $1,444.15. I agree with the view of the learned Chief Justice of New Brunswick that the pleadings sufficiently asserted a claim for damages for breach by the appellant of its contractual obligation to act in realizing on the seized property as a reasonable man would in the realization of his own property.

The defence pleaded by the appellant was that after having seized the tractor and given the notice quoted above to Duthie, it received a request from one Price to assign the conditional sale agreement to him, that it agreed to do so on payment to it of the $1,444.15, that Price paid this amount to it, that Price directed the assignment to be made to the respondent Sinclair who was then an employee of Price, that this was done and that it then delivered the tractor to Price.

An assignment under seal from the appellant to Sinclair dated February 14, 1950, was filed as an exhibit at the trial; the affidavit of execution attached to it was sworn on February 14, 1950. No notice of the assignment, in writing or otherwise, was given to Duthie, nor was he advised that the appellant was not going to proceed with the sale of the tractor in pursuance of the notice of seizure.

The learned trial judge found the facts to be as pleaded by the appellant, and was of opinion that, Sinclair being merely the nominee of Price, the latter "by virtue of the assignment and taking over possession of the repossessed tractor stepped into the shoes of the defendant Lounsbury Company as the conditional vendor". While he does not say so expressly it is implicit in the reasons of the learned trial judge that as a result of the assignment the appellant was relieved of its obligations to Duthie which were *ipso facto* fastened upon Price, so that Duthie's right of action, if any, was thereafter against Price only.

In allowing the appeal the Appeal Division proceeded on two alternative grounds. The first is stated in the following terms (1):

> In his judgment the learned trial Judge discussed briefly the transactions between Duthie and Price involved in the lumbering operations or resulting therefrom. He expressed the view that they constituted a collateral matter in no way material to the issues raised in the action, in which opinion I concur. He proceeded to find that the company had duly repossessed the machine as it was entitled to do under the conditional sale agreement by reason of Duthie's default in completing payment and that due notice had been given by the company to Duthie, in accordance with the *Conditional Sales Act*, that unless payment was made on or before February 14, 1950, the machine would be sold by the company at private sale. There can be no question as to the correctness of such findings.
>
> He concluded however that there had been no sale of the machine by the company and therefore no conversion for which it could be held responsible. With this view I find myself unable to agree. It seems to me that the acts of the company in assigning the conditional sale agreement, at the instigation of Price, to Sinclair, without the knowledge or consent of the latter, and in delivering the machine, without any authorization from Sinclair, to Price on being paid by the latter $1,444.15 were mere subterfuges to cloak the nature of the real transaction which was a sale and nothing else.
>
> On this view of the case the company is liable for its failure to effect a provident sale on principles enunciated in *McHugh v. Union Bank*, 10 D.L.R. 562, [1913] A.C. 299, and *Vanstone & Rogers v. Scott* (1908), 1 Alta. L.R. 492.

I do not find it necessary to discuss this first ground as, in my respectful opinion, the alternative ground on which the judgment of the Appeal Division is based is clearly right.

(1) 4 D.L.R. (2d) at p. 636.

1957

LOUNSBURY CO. LTD. v. DUTHIE AND SINCLAIR

Cartwright J.

Proceeding on the assumption that the findings of fact made by the learned trial judge were correct the learned Chief Justice of New Brunswick was of opinion that the appellant was liable in damages to Duthie for failing to effect a provident sale of the tractor. He says in part (1):

By its contract with Duthie the company undertook that, in the event of repossession, it would proceed to sell the machine and pay to Duthie any surplus remaining after expenses and the balance of the purchase-price had been paid. The conditional obligation so undertaken became an absolute obligation when the company resumed possession under the contract. The liability under that obligation could not be assigned by the company so as to deprive Duthie of his right to have the company proceed to a sale of the machine and pay to him any surplus resulting therefrom.

In Anson's Law of Contract, 20th ed., p. 262, the relevant principles of law are stated thus:

"A promisor cannot assign his liabilities under a contract.

"Or conversely, a promisee cannot be compelled, by a promisor or by a third party, to accept any but the promisor as the person liable to him on the promise.

"The rule is based on sense and convenience, for a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract.

In 8 Halsbury, 3rd ed., p. 258, the principles are enunciated as follows:

"451. Assignment of Liabilities. As a rule a party to a contract cannot transfer his liability thereunder without the consent of the other party. This rule applies both at common law and in equity and is generally unaffected by statute.

"There is, however, no objection to the substituted performance by a third person of the duties of a party to the contract where the duties are disconnected from the skill, character, or other personal qualifications of the party to the contract. In such a circumstance, however, the liability of the original contracting party is not discharged, and the only effect is that the other party may be able to look to the third party for the performance of the contractual obligation in addition to the original contracting party.

"By the consent of all parties liability under a contract may be transferred so as to discharge the original contract. Such a transfer is not an assignment of a liability but a novation of the contract."

* * *

There is nothing in the circumstances that can be construed as a novation. As already stated the agreement contained no provisions respecting an assignment of it or of any right or obligation created thereby. There was nothing said or done by Duthie that can be taken as authorizing or consenting to a transfer by the company of its obligations under the agreement. Consequently the company had no right to seek to divest itself of its undertaking contained in the agreement that, in the event of seizure, it would proceed to a sale of the repossessed machine and account to Duthie for any surplus. Having resumed possession of the machine the company was bound to proceed in a proper manner to sell the machine

(1) 4 D.L.R. (2d) at pp. 638-40.

and pay to Duthie any surplus resulting, being powerless to rid itself of its obligation in this regard. For its breach of contract the company should be held liable.

In my opinion, the passage from Halsbury quoted by the learned Chief Justice of New Brunswick correctly states the law; and, assuming that it could validly assign the contract without Duthie's consent, the appellants' liability to perform its contractual obligation to effect a provident sale would not be discharged by the making of the assignment.

I wish to make two additional references. The first is to the judgment of Collins M.R. in *Tolhurst v. The Associated Portland Cement Manufacturers (1900), Limited; The Associated Portland Cement Manufacturers (1900), Limited and The Imperial Portland Cement Company, Limited v. Tolhurst* (1):

> It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor.

The second is to the judgment of the Lord President in *Thomas Stevenson & Sons v. Robert Maule & Son* (2). That was a case in which the obligation undertaken by the defenders did not require any special skill or experience and consequently was one which might be performed vicariously. After differentiating the contract from one to which the principle *delectus personae* applies and which is therefore not assignable, the Lord President treats it as a matter of course that the assignment of the contract would not relieve the assignors from liability if their obligation was not performed. He says at p. 343:

> It is work, therefore, the performance of which might quite well be delegated to another, the defenders' liability, of course, remaining the same as if the work was being done on their own premises by their own servants. The law applicable to this case is nowhere more succinctly and accurately stated than in Anson on Contracts (15th ed., p. 286). "If A undertakes to do work for X which needs no special skill, and it does not appear that A has been selected with reference to any personal qualification, X cannot complain if A gets the work done by an equally competent person. But A does not cease to be liable if the work is ill done." That appears to me to be good law and good sense, and is directly applicable to the present case.

(1) [1902] 2 K.B. 660 at 668. (2) [1920] S.C. 335.

1957

LOUNSBURY CO. LTD. v. DUTHIE AND SINCLAIR

Cartwright J.

No attempt was made to challenge the assessment of Duthie's damages made by the Appeal Division.

I share the view of both Courts below that the state of accounts between Price and Duthie was irrelevant to the latter's claim against the appellant.

For the above reasons I would dismiss the appeal against the judgment in Duthie's favour.

The appellant also appeals from that part of the judgment of the Appeal Division which requires it to pay the costs of Sinclair. The judgment at the trial dismissed the action as against Sinclair with costs payable by Duthie. The Appeal Division affirmed that dismissal but varied the order as to costs. Neither Duthie nor Sinclair appealed from that part of the judgment dealing with Sinclair and the only issue before us in which he is concerned is the order as to costs. No leave to appeal having been granted, it appears to me that, under ss. 36(*a*) and 43 of the *Supreme Court Act*, R.S.C. 1952, c. 259, we are without jurisdiction in regard to the judgment in favour of Sinclair which is for costs only.

In the result I would dismiss the appeal against Duthie with costs and would dismiss the appeal against Sinclair with costs as of a motion to quash.

Appeals dismissed with costs.

Solicitor for the defendant company, appellant: R. Dwight Mitton, Moncton.

Solicitors for the plaintiff, respondent: Dougherty, West & Gunter, Fredericton.

Solicitors for the defendant Sinclair, respondent: Murphy & Murphy, Moncton.

ANTHONY CLIFFORD EDWARDS, Executor of the Estate of Alice Maud Mary Edwards, deceased (*Plaintiff*) APPELLANT;

1957
*April 2
June 26

AND

EDNA PEARL BRADLEY (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts and trustees—Resulting trusts—Creation of joint bank account—Presumptions from relationship.

Where a joint bank account is created with moneys that are the sole property of one depositor, the other holder of the account, if he acquires the legal title to the moneys through the death of the original depositor, *prima facie* holds those moneys on a resulting trust for the estate of the deceased depositor. There is no presumption of advancement where such an account is opened by a mother in the joint names of herself and her child, although in the case of a widowed mother very little evidence will be required in such circumstances to establish the intention of a gift. If the evidence is insufficient to show such an intention, effect must be given to the trust.

APPEAL from a judgment of the Court of Appeal for Ontario (1) reversing a judgment of Barlow J. (2). Appeal allowed.

R. M. Willes Chitty, Q.C., and *R. E. Shibley,* for the plaintiff, appellant.

W. B. Beardall, Q.C., for the defendant, respondent.

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

THE CHIEF JUSTICE:—It is unnecessary to decide in this appeal whether what was done was invalid as a testamentary disposition. There are cases where it has been held that, there being a present gift of the amount on deposit, *The Wills Act* did not apply: *Young et al. v. Sealey* (3), where Romer J. discussed several decisions in the Irish Free State, in New Brunswick and in Ontario, including *Re Reid* (4). Reference might also be made to *Russell v. Scott* (5), a decision of the High Court of Australia.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

(1) [1956] O.R. 359, 2 D.L.R. (2d) 382.
(2) [1955] O.W.N. 895.
(3) [1949] Ch. 278, [1949] 1 All E.R. 92.
(4) (1921), 50 O.L.R. 595, 64 D.L.R. 598.
(5) (1936), 55 C.L.R. 440.

1957

EDWARDS v. BRADLEY

Kerwin C.J.

The circumstances of this case and particularly the fact that the respondent, a daughter of Mrs. Edwards, lived with her husband in Michigan, many miles from her mother's residence, do not permit any presumption of advancement to arise and, therefore, the ordinary rule applies that there was a resulting trust in favour of the mother, unless the evidence is sufficient to overcome that presumption. There is nothing in the document signed for the bank by the mother and daughter to cut down the former's equitable interest. It has been pointed out in *Re Mailman Estate* (1) and *Niles et al. v. Lake* (2) that documents of this nature are drawn by the bank and cannot affect the resulting trust. That does not mean that where the facts warrant it a finding may not be made that there was a present gift and that the presumption as to a resulting trust was overcome, but here the evidence falls short of what is required.

The appeal should be allowed and the judgment of the Court of Appeal set aside. The judgment of the trial judge should be restored, except that the appellant's costs of the action and trial should be paid out of the money in the bank as between solicitor and client. The appellant is also entitled out of the money in the bank to his costs as between solicitor and client of the appeal to this Court, but there should be no other order as to costs in this Court. The respondent should pay the appellant's costs as between party and party in the Court of Appeal, leaving the appellant, as executor, to recover the difference between such party-and-party costs and his solicitor-and-client costs of that appeal out of the money in the bank.

The judgment of Rand and Locke JJ. was delivered by

RAND J.:—The question in issue is whether the deceased mother of the parties, Alice Maud Edwards, on the occasion of having a bank account then in her name transferred to the names of herself and her daughter, Edna Bradley, the respondent, intended that the daughter should thereby obtain a beneficial interest either of a present joint tenancy or in the nature of a remainder. This depends upon the circumstances surrounding the transfer and these must then be examined.

(1) [1941] S.C.R. 368, [1941] 3 D.L.R. 449.

(2) [1947] S.C.R. 291, [1947] 2 D.L.R. 248.

The mother, 80 years of age and in reasonably good health, was a widow with three children, two sons and the respondent. The husband had died in 1950, leaving her the sole beneficiary of his estate. Included in that estate was the home farm on which the widow continued to live. The son Anthony, the appellant, lived on his own farm $1\frac{1}{2}$ miles distant and the daughter, married, at Pontiac, Michigan. The homestead was rented and farmed by Anthony, for which he paid his mother $500 a year.

At the time of transferring the account the daughter's husband was building a home in Pontiac and the common expectation seems to have been that in the course of time the mother would be living with them in it. In anticipation of that, the mother apparently thought she should make a contribution towards the cost and during this period, the precise date of which does not appear, had offered assistance which at the time the daughter declined.

On January 30, 1952, the mother and daughter went to the bank and, as mentioned, had the account changed to their joint names. On April 8 following, the daughter approached the mother, saying "The money you offered me, I could use it now." A cheque on the account was thereupon given to her signed by the mother for $500. Later, on July 28, 1952, they went together to the bank and the same amount was drawn out by the mother and given the daughter. On this occasion a document, intended to confirm the fact of a gift to the daughter of both sums, was signed by the mother to this effect:

I gave Edna Bradley my daughter on April 8th $500 also on July 29 $500 to help building a home on Dixie Hi-Way. At any time if I am not able to live alone or sick I can go to live with them.

Mrs. Alice M. M. Edwards

This was endorsed on the back by the former wife of the son Garnet as follows:

July 29th, 1952.

At the time this money was given to Edna, Mrs. Edwards knew what she was doing and it was her wish that Edna have it free of any ties.

Hazel Edwards

The memorandum was given at the request of the daughter in these words: "I don't want there to be any fuss about this at all, would you mind signing a statement to the effect that this is a gift and not a loan."

1957

EDWARDS v. BRADLEY

Rand J.

No cheque was drawn on the account by the daughter while the mother lived. The mother died on January 9, 1953. On August 3, 1951, six months before the joint account was opened, she had made a will, afterwards probated, by which the farm was devised to the son Anthony subject to the payment of (a) $1,500 to her stepson, Ray Edwards, (b) $1,500 to the respondent and (c) $1,500 to her son Garnet. After providing $100 each for four granddaughters, to be paid out of the personal estate, the residue was divided equally between her stepson, Ray, and the three children, the respondent, the appellant and Garnet. There is no evidence of personal property of any value apart from the bank account. On January 30, 1952, the amount to the credit of the account was $6,195.63 and at her death it was $4,612.79. Her only income was the rent from the farm and the bank interest.

The judgment of the Court of Appeal (1), reversing that of the trial judge (2), and finding that the joint account was intended to vest beneficially in the daughter, nullifies the residuary bequest as well as those to the grandchildren. It will be seen from the charge of $4,500 against the farm and the division of the residue that, even with an additional benefit accruing to the son Anthony from the farm, the amount of which, if any, is not shown, the intention of the testatrix was to distribute her estate in rough equality between the three children and the stepson. Is the conclusion that within six months after that testamentary act, she deliberately divested herself of any residual property and completely distorted the distribution provided by the will, a reasonable inference from the circumstances shown?

That she was a woman of character, strength and independence is quite evident. Enjoying good health, she undoubtedly looked to a not far distant day when she would accept the welcome home of her daughter, the acknowledgment of which was made clear by her contribution to its cost; but there was also the possibility that at any time she might be stricken with incapacity. Obviously she desired to be a burden to no one and her resources were sufficient to that purpose. It was what one might easily expect that she

(1) [1956] O.R. 359, 2 D.L.R. (2d) 382.

(2) [1955] O.W.N. 895.

should provide against the day when she would be unable to attend to her banking affairs as she had done; and that, I am satisfied, was the purpose of the joint account.

It is just as clear that the daughter had no notion of having received any gift by the fact of the account or of having the right to touch it for her own purposes while her mother lived. The requests for the advances and the exclusive checking on the account by the mother themselves put this beyond any doubt, and the memorandum of July 9 concludes it.

No present benefit for the daughter was, then, intended by formal change in the account. Is there any justification for inferring that the mother intended the money to be exclusively hers while she lived but at her death to belong to the daughter? I can discover not an iota of matter on which can be based the conclusion that the mother, giving so many evidences of parental regard to the claims of all her children as well as of the stepson, had in mind to strip the residuary clause of all content and meaning: that would be contrary to every probability. The care taken to protect the daughter against an adverse inference from the two cheques, evidenced by the memorandum, shows how sensitive she was to the effect on the children of the distribution of what she owned; the legacy of $1,500 in addition to one-third of the residue to the daughter had been overbalanced to the extent of $1,000, but this had a special justification; to add to that the remaining funds in the bank and to wipe out the residue, including, as the evidence goes, the $400 to the grandchildren, would, as I read her mind, have been something utterly repugnant to her.

I would, therefore, allow the appeal and restore the judgment of Barlow J., including the costs of both parties to be paid out of the money in the bank, those of the appellant as between solicitor and client. In this Court the appellant only will be entitled to costs, and as between solicitor and client to be paid out of the same fund. The respondent will pay the appellant's costs as between party and party in the Court of Appeal, the appellant recovering the difference between those and solicitor-and-client costs out of the same fund.

1957

EDWARDS v. BRADLEY

CARTWRIGHT J.:—I have had the advantage of reading the reasons of the Chief Justice and those of my brother Rand and agree with their conclusion that this appeal must be allowed. I also agree that it is unnecessary in this case to decide the question dealt with by Romer J. in *Young et al. v. Sealey* (1) as to whether the view of the law taken in *Owens v. Greene; Freeley v. Greene* (2) or that taken in *Re Reid* (3) should be preferred.

Assuming that on the death of the late Alice Maud Edwards the respondent had the legal right to withdraw the money on deposit in the joint bank account and on making the withdrawal would have the legal title to the money withdrawn, the question is whether she is beneficially entitled to that money or holds it in trust for her mother's personal representative.

As all the moneys deposited in the account were the sole property of the mother the daughter would *prima facie* hold the fund to which she has the legal title on a resulting trust for the mother's estate. In *Dyer v. Dyer* (4), Eyre C.B. says:

> It is the established doctrine of a Court of equity, that this resulting trust *may be rebutted* by circumstances in evidence.
>
> The cases go one step further, and prove that *the circumstance of one or more of the nominees being a child or children of the purchaser, is to operate by rebutting the resulting trust*; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence . . . Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side.

Dyer v. Dyer was a case of father and son. In my opinion the result of the decisions in cases of mother and child is correctly summarized in the following passage in 18 Halsbury's Laws of England, 3rd ed. 1957, s. 736, p. 387:

> There is no presumption of a gift where the purchase or investment is made by a mother, even though living apart from her husband, or a widow, in the name of her child or in the joint names of herself and her child, though in the case of a widowed mother very little evidence to prove the intention of a gift is required . . .

(1) [1949] Ch. 278, [1949] 1 All E.R. 92.
(2) [1932] I.R. 225.
(3) (1921), 50 O.L.R. 595, 64 D.L.R. 598.
(4) (1788), 2 White & Tud. L.C., 9th ed., 749 at 750-1.

Giving full effect to the existence of the relationship of mother and daughter, as a circumstance of evidence, I agree with the Chief Justice and my brother Rand that the proper inference to be drawn from all the evidence in the case at bar is that it has not been shown that the mother intended to pass the beneficial interest to the respondent either in her lifetime or on her death. It necessarily results from this finding of fact that the appeal succeeds.

I have found the question as to what disposition should be made of the costs of the proceedings a difficult one. If I alone were called upon to decide it I would have thought that the costs of both parties throughout should be paid out of the fund in question by reason of the following circumstances: The deceased mother, through no fault of the respondent, made arrangements whereby on her death the legal title to the fund appeared to be vested in the respondent, leaving it to be determined by an examination of all the surrounding circumstances whether the respondent was intended to have the beneficial interest also. The learned trial judge (1) was of opinion that the mother did in fact intend that on her death the respondent should take the fund beneficially, but for reasons of law decided he could not give effect to this intention. The Court of Appeal (2), while taking a similar view of the evidence, reached a different conclusion as to the law and allowed the appeal. In this Court for the first time in the proceedings a different view has been taken as to the result of the evidence and we are restoring the judgment of the learned trial judge but for reasons differing from those on which he proceeded. It appears to me that the grounds for ordering all costs to come out of the fund are at least as strong as those which were found sufficient by the majority of this Court in *Niles et al. v. Lake* (3).

However, as my view on this branch of the matter is not shared by the other members of the Court, I concur in the disposition of the appeal proposed by the Chief Justice.

Appeal allowed.

(1) [1955] O.W.N. 895.
(2) [1956] O.R. 359, 2 D.L.R. (2d) 382.
(3) [1947] S.C.R. 291, [1947] 2 D.L.R. 248.

1957

EDWARDS v. BRADLEY

Cartwright J.

Solicitors for the plaintiff, appellant: Myers, McDonnell & Mitchell, Chatham.

Solicitors for the defendant, respondent: Bedford, Beardall & Pickett, Chatham.

1957

*May 30, 31
June 3
June 26

IN THE MATTER OF RICHARD JOHN MAAT AND ROLAND CHARLES MAAT.

AUSTIN HEPTON AND ETHEL HEPTON (*Defendants*) ..... } APPELLANTS;

AND

HERMAN MAAT AND TRUDY MAAT (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infants—Custody—Governing considerations—Prima facie right of natural parents to custody.

The natural parents of an infant are entitled to its custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that custody be given to some other person. The natural parents can lose their right only by abandoning the child or so misconducting themselves that in the opinion of the Court it would be improper to leave the child with them. Their wishes in respect of custody must not be disregarded unless very serious and important reasons connected with the child's welfare require it. *Re Baby Duffell*, [1950] S.C.R. 737; *In re Agar-Ellis* (1883), 24 Ch. D. 317, applied. The fact that the natural parents of a child have consented to its adoption does not affect this principle. It cannot be said that a consent to adoption, once voluntarily given, is in effect irrevocable, or that the withdrawal of this consent before the adoption has been completed should be disregarded by the Court unless it appears to be in the best interests of the child that withdrawal be allowed. *Re Baby Duffell, supra*, applied.

The mother of newborn twins, who before their birth had told the doctor and others that she wished to have them adopted, signed a consent to their being taken from the hospital by the doctor, to be given to adopting parents. After her discharge from the hospital she and her husband both signed formal consents to the adoption of the children, but within three months they changed their minds. They were at first unable to find out where the children were, but eventually, having done so, they took proceedings to obtain custody. The trial judge awarded custody to the foster parents with whom the children had been placed, but this judgment was reversed by the Court of Appeal. The foster parents appealed.

---

*PRESENT: Rand, Locke, Cartwright, Abbott and Nolan JJ.

1957

HEPTON *et al.* *v.* MAAT *et al.*

Held (Locke J. dissenting): The appeal should be dismissed. The conduct of the respondents, though reprehensible in many ways, did not constitute "very serious and important reasons" sufficient to justify the Court in depriving them of custody of their children.

Per Locke J., *dissenting*: Under the law of Ontario the paramount consideration in matters of custody, to which all others must yield, is the welfare and happiness of the infant. *McKee v. McKee,* [1951] A.C. 352 at 365, quoted and applied. Here the trial judge, having heard the parties and considered the matter most carefully, awarded custody to the appellants. It was not shown that in so doing he had acted on any wrong principle or disregarded any material evidence; on the contrary, he had clearly followed the principle declared in the *McKee* case. Accordingly, under the rule laid down in that case at p. 360, his decision should not be disturbed.

APPEAL from a judgment of the Court of Appeal for Ontario reversing a judgment of Treleaven J. on an issue as to the custody of two infants. Appeal dismissed.

C. L. Dubin, Q.C., for the defendants, appellants.

J. J. Robinette, Q.C., for the plaintiffs, respondents.

RAND J.:—It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed. As *parens patriae* the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. No one would, for a moment, suggest that the power ever extended to the disruption of that unity by seizing any of its children at the whim or for any public or private purpose of the Sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself. The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility—as if, for example, he were a homeless orphan wandering at large.

The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is

1957

HEPTON *et al.* *v.* MAAT *et al.*

Rand J.

threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.

This, in substance, is the rule of law established for centuries and in the light of which the common law Courts and the Court of Chancery, following their differing rules, dealt with custody. As applied in equity, where the absolute right of the father, recognized in the common law Courts, was not acknowledged, it is now by s. 3 of *The Infants Act,* R.S.O. 1950, c. 180, the governing law of Ontario.

As was said by my brother Cartwright in *Re Baby Duffell; Martin and Martin v. Duffell* (1):

> The wishes of the mother [here the parents] must, I think, be given effect unless "very serious and important" reasons require that, having regard to the child's welfare, they must be disregarded.

and by Bowen L.J. in *In re Agar-Ellis; Agar-Ellis v. Lascelles* (2), quoted in the *Duffell* case at p. 747:

> . . . it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.

It might be that the foster parents would furnish to the children here a home of easier circumstances and better fortune than that of the respondents; but who can say that that difference is for the ultimate welfare of the child? It might, in fact, prove to be the reverse. Carried to its logical result, the presumption that it would be would involve the conclusion that a modest home can, with better grace, be torn apart than one of opulent means. This needs only to be mentioned to be rejected. In the home of the respondents a third child, a daughter, was born in the year following the birth of her brothers, and that what forms the home for this child is not fit for nurturing these young boys cannot, in the circumstances shown, be seriously urged.

Various acts of the mother in special relation to these boys are argued to show her unfitness to resume the care of them. At the time of their birth this young woman was 21 and the father 23 years of age, they had within 5 or 6 years of that time come to this country from Holland, the husband had been out of work for almost 6 months, they

(1) [1950] S.C.R. 737 at 746, [1950] 4 D.L.R. 1.
(2) (1883), 24 Ch. D. 317 at 337-8.

were undoubtedly passing through very dark days and hope was at its faintest. That at such a time thoughts from which they would afterwards shrink could enter their minds needs only a bit of imagination to be understood. The mother's evidence does exhibit almost a primitive idea of her duty to a Court in this country; but she was young, in a strange land, fighting for her children, and however much she is to be condemned as an individual, it would be psychologically unsound to take that conduct to evidence her unfitness as a mother. Within less than 2 months of handing the children over these parents were seeking them and that desire had been made known to the foster parents. Whether it was instigated by the admonition of the maternal grandmother to remember their duty as Dutch parents or by the awakening of the parental sense or both is unimportant; that it was not for the purpose of exacting a price was the conclusion of the Court of Appeal in which I entirely concur; and it is not disputed that from September 1954 they sought first to discover the whereabouts of and then to recover their children. It may not unfairly be suggested that if the foster parents had extended to the respondents the sensitive and sympathetic imagination that enabled them to long to bestow parental love on children of strangers, they would have better understood the thoughts and feelings of the young couple seeking their own, and not have sought to strengthen their claim by keeping the whereabouts of the children secret. I should have thought that, to avoid any unnecessary distress to the latter, however temporary it might be, they would at least have allowed the dispute to be determined without delay. Nor can I view the pain of a permanent separation on the part of these foster parents to be comparable with that of the natural parents.

I find it, therefore, quite impossible to say that the conclusion arrived at by the Court of Appeal was wrong. The appeal must be dismissed, but there will be no costs.

LOCKE J. (*dissenting*):—In my opinion this appeal should be allowed.

There can be no doubt as to the principles to be applied in matters of this nature in the Province of Ontario since the judgment delivered by the Judicial Committee in

1957

HEPTON et al. v. MAAT et al.

Locke J.

McKee v. McKee (1), which reversed the judgment of this Court (2) which had, in turn, set aside the judgment of the Court of Appeal (3) and that of Wells J. who had heard the application for custody (4). In that case Lord Simonds said in part (p. 360):

> Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

He said further (p. 365):

> It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody . . . To this paramount consideration all others yield.

In this matter Treleaven J., after having heard the parties and given the most careful consideration to the matter, awarded the custody to the appellants. It was not shown, in my opinion, that in doing so that learned judge either acted on any wrong principle or disregarded any material evidence. On the contrary, it is clear that he followed the principle declared by the Judicial Committee in the *McKee* case, which I have quoted.

As the other members of the Court are of the opinion that this appeal should be dismissed, I refrain from making any comment on the evidence other than to say that my consideration of it would lead me to the same conclusion as that reached by Mr. Justice Treleaven and by Mr. Justice F. G. MacKay in the Court of Appeal.

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

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, reversing a judgment of Treleaven J. and ordering that the respondents do have the custody of the infants Richard John Maat and Roland Charles Maat.

(1) [1951] A.C. 352, [1951] 1 All E.R. 942, [1951] 2 D.L.R. 657.
(2) [1950] S.C.R. 700, [1950] 3 D.L.R. 577.
(3) [1948] O.R. 658, [1948] 4 D.L.R. 339.
(4) [1947] O.R. 819, [1947] 4 D.L.R. 579.

The infants whose custody is in question are twins. They were born on June 23, 1954, in lawful wedlock. The respondents are their natural parents, but since leaving the hospital, on or about July 23, 1954, the children have been in the custody of the appellants.

At the time of the trial of the issue before Treleaven J. in November 1955 the respondent Herman Maat was 24 years of age and the respondent Trudy Maat 22. Both of them were born in Holland. The former came to Canada in July 1949 and the latter in September 1952. They met each other in September 1952 and were married on October 10, 1953.

Shortly after their marriage Herman Maat experienced difficulty in securing steady employment. He was unable to keep up the payments on a home which he had purchased and lost it. For some time the respondents' only home was a trailer. In this they moved to Windsor where Herman Maat sought employment without success. In May 1954 he returned to Toronto where he got work with a former employer. He left his wife living in the trailer at Windsor and returned there at week-ends. He did not get a room in Toronto but slept in his truck. In June 1954 he brought his wife and the trailer from Windsor and they lived in the trailer at the trailer camp in Cooksville, some 10 miles west of Toronto. On the drive from Windsor to Cooksville they suffered some minor mishaps.

Speaking of their state of mind at this period the learned trial judge says:

> There can be no doubt they were both greatly worried about the expected child, and there is much convincing evidence that both parents regretted it was going to be born.

On or about June 16, 1954, Trudy Maat consulted Dr. J. D. Smith of Cooksville. There are direct contradictions between the evidence of this witness and his wife, who is also a doctor, on the one hand and that of the respondent Trudy Maat on the other. Where it conflicts with that of the respondents the learned trial judge has expressly accepted the evidence of the Smiths and I proceed on the basis that the facts are as testified to by them. Trudy Maat was very upset emotionally and was crying. She told the doctor that she was pregnant, that she and her husband did not want to have the baby, and that she had, at the sugges-

1957

HEPTON *et al.* *v.* MAAT *et al.*

Cartwright J.

tion of her husband, taken an overdose of pills without result. She asked the doctor to bring on an abortion. He, of course, told her he would not do this, and went on to say that she must let the child be born and could make one of three choices, to keep it, to have it adopted through the Children's Aid Society, or to have it adopted privately.

The next day Trudy Maat returned to the doctor's office and told him that she and her husband wanted the baby to be adopted. He examined her, found her condition normal and formed the opinion that the child would be born in about a month. About a week later Herman Maat telephoned the doctor that his wife's pains had commenced. Dr. Smith arranged for hospital accommodation, went to the trailer and told Herman Maat to take his wife to the hospital. The doctor asked if they still wanted to give the baby up and they both said that they did. Later in the day the twins were born. Being premature they were placed in an incubator. That evening Herman Maat went to the hospital to see his wife. He had asked the doctor if he could see her and the doctor, thinking that he might not be able to see her if he went alone, offered to drive him to the hospital. Mrs. Smith was also in the car. On the way Mrs. Smith asked Herman Maat if he was sure he wanted to give the babies up and he replied that he wanted to get it over with. Neither of the parents saw the children. On the fourth day after their birth Dr. Smith again asked Trudy Maat the same question and she replied in the affirmative. It is customary for a newborn baby to leave the hospital with the mother unless written instructions are given to the contrary. Trudy Maat signed the necessary form to permit the babies to be taken out by Dr. Smith and knew they were to be taken to adopting parents. When she was able to leave the hospital, apparently on June 30, Dr. and Mrs. Smith drove her home and on the way went to the office of Mr. Leslie Pallett, a solicitor whom the respondents had visited at Dr. Smith's suggestion before the babies were born. At that time Herman Maat had told Mr. Pallett that they wished to have the baby adopted and when Mr. Pallett learned that the Maats were married he tried to discourage them from taking this course. The Smiths also tried to persuade them to keep the children.

In Mr. Pallett's office Trudy Maat signed a consent to the adoption of each twin and later in the day Herman Maat came in and signed these also. Mr. Pallett explained to them that the making of an adoption order would permanently deprive them of their parental rights. On July 31 Trudy Maat went to Mr. Pallett's office to ask about a notice she had received regarding the registration of the children's birth. At Mr. Pallett's request she signed fresh consents as he understood that her consent should be on a document other than that signed by her husband. Mr. Pallett asked her if she had changed her mind about the adoption and she replied in the negative. In reciting the above facts I have proceeded on the evidence of Mr. Pallett which the learned trial judge accepted in preference to that of the respondents.

At no time did the Smiths or Mr. Pallett disclose to the respondents either the identity or the whereabouts of the appellants, to whom the twins had been given when they left the hospital.

By the middle of September 1954 the respondents had regretted their decision and were actively seeking to recover their children. They interviewed Dr. J. D. Smith and Mr. Pallett, both of whom refused to tell them where the children were but communicated to the appellants the respondents' request for their children. The request was rejected. The respondents consulted a solicitor who wrote to Dr. Smith on October 6, 1954, but received no answer. After months of persistent effort the respondents finally discovered the whereabouts of the children and the respondent Herman Maat forcibly repossessed them. On being visited by the police, however, the respondents were persuaded for the time being to relinquish such possession and the present proceedings resulted. It is not suggested that there was any undue delay in commencing these proceedings.

Mr. Pallett testified that on the occasion of the last-mentioned visit, after he had told the respondents that the appellants would not give up the babies and that he did not think he could do anything for them they went out. His evidence continues:

> Very shortly after the husband came back in and said to me, "Will they give me some money for the babies?" I said, "Get out." He said, "Will I get my money back?" I presumed he was referring to the money paid for the hospital bill, and we had a few nasty words, and he left.

1957

HEPTON *et al.* *v.* MAAT *et al.*

Cartwright J.

This was put forward as indicating a willingness upon the part of Herman Maat to sell his children but I am quite unable to so interpret it. Assuming that he used the words quoted, it must be remembered that Maat had just been told by Mr. Pallett, the only lawyer with whom he had had any discussion about adoption, that he could not get the babies back, and that he was at this time without independent advice, Mr. Pallett being solicitor for the appellants. Under these circumstances what he said was consistent with his seeking repayment of the expenses to which he had been put in connection with the birth of the babies if, as he had just been told was the case, he could not have the babies themselves. I share the view as to the incident expressed by Aylesworth J.A. as follows:

> . . . I must say at once that if the learned trial judge attributed any particular significance to what was then said as bearing upon the question of custody I must respectfully disagree.

I agree with the following statement of Aylesworth J.A. as to the appellants:

> It is quite clear that Mr. and Mrs. Hepton are of reputable character and no one suggests that they are not both well qualified and anxious to become foster parents or that the twins presently in their custody have not been well and lovingly cared for. Respondents at the present time are considerably better off financially than the Maats and are both in their middle thirties and childless.

I also agree with the view of the respondents which he expressed as follows:

> The evidence shows that the young parents, although of extremely modest means, are hard-working, religious people of respectable parentage. They are regular attendants at their church and have many friends in their community of the same racial strain as themselves.
>
> * * *
>
> . . . If in any of the quotations which I have made from the learned trial judge's reasons he is to be taken as concluding that the parents are unfit persons to have the custody and upbringing of their children then again I must respectfully disagree. I am quite unable to find anything in the evidence so far as the welfare of their children is concerned in impeachment of the appellants from a moral, spiritual or social viewpoint; reference has already been made to the economic situation, or even to the contrast in the economic situation, as between appellants and respondents, but the appellants are much younger than the respondents and have yet to make their way in their new country. As I have already said, the evidence indicates that they are industrious and of good character . . .

The material position of the respondents at the time of the trial was accurately described by the learned trial judge as follows:

> Since the babies were born the Maats' material position has improved somewhat. They no longer live in the trailer but are now in a modest apartment. The locality, however, is not a very desirable one in which

to bring up children. They have had another child born to them, a daughter. As at present situated if the twins are returned to them all three children would be occupying the same room. Herman Maat is earning between $80 and $90 a week as a truck driver for a fuel oil company.

With the greatest respect it appears to me that the learned trial judge has attached too much importance to the consents to the adoption of the infants which were signed by both of the respondents. The argument that a consent to adoption once voluntarily given by the natural parents is in effect irrevocable or that the withdrawal thereof should be disregarded by the Court unless it appears to be in the best interests of the child that withdrawal should be allowed was unanimously rejected by this Court in *Re Baby Duffell; Martin and Martin v. Duffell* (1). That case concerned the claim of the unmarried mother of an illegitimate child but as Aylesworth J.A. points out: "The position of a man and his wife jointly seeking custody of their children is of course at least on a par with that of the mother of an illegitimate child." In the course of his able argument, Mr. Dubin submitted that much that was said in the judgments delivered in *Re Duffell* as to the principles by which the Court should be guided in dealing with a question of custody in which one of the parties is a natural parent and the other a stranger in blood, was *obiter*. I incline to disagree with this submission and in any case I regard it as settled law that the natural parents of an infant have a right to its custody which, apart from statute, they can lose only by abandoning the child or so misconducting themselves that in the opinion of the Court it would be improper that the child should be allowed to remain with them, and that effect must be given to their wishes unless "very serious and important reasons" require that, having regard to the child's welfare, they must be disregarded.

While not accepting this view of the law, Mr. Dubin put forward a number of matters which in his submission should be regarded as "very serious and important reasons" that the respondents should not have their children; these may be summarized as follows: (i) the desire of the parents to procure an abortion, (ii) the fact that they consented to give up the children for adoption when their circumstances were such that it was not impossible for them to have kept them, (iii) the conversation as to money with which I have

(1) [1950] S.C.R. 737 at 745-6, [1950] 4 D.L.R. 1.

1957

HEPTON *et al.* v. MAAT *et al.*

Cartwright J.

dealt above, (iv) their apparent willingness to give untrue testimony, (v) the taking of the children from their carriage without the permission and against the will of the appellants, (vi) the sense of irresponsibility which, it was argued, the above matters indicate, (vii) the suggestion that their desire to get the children back was not spontaneous but was inspired by their spiritual adviser and by the wife's parents and that there is no evidence that they have real love for the children.

As to the last of these items, I can find nothing in the evidence to warrant the inference that the respondents are actuated by any motive other than the normal desire of parents for their children, and I cannot see in what way it would have been possible for them to demonstrate their love for the children, whose whereabouts were concealed from them for months and who were thereafter kept from them, except by doing their best to regain possession of them. I do not find it necessary to deal with the other items in detail as I share the view of my brother Rand and that of Aylesworth J.A. that they do not warrant the conclusion that the parents are unfit persons to have the custody and upbringing of their children.

In argument we were pressed with the authorities that emphasize the peculiar advantage possessed by the trial judge in cases as to the custody of infants and the reluctance of appellate Courts to interfere with the exercise of his discretion; but, in the case at bar, with respect, I am of opinion that the learned trial judge erred in principle in failing to give due weight to the fact that the respondents are the natural parents of the children and in attaching undue importance to the consent to adoption which the respondents withdrew when the children had been for less than two months in the possession of the appellants.

Having reached the conclusion that the respondents are fit and proper persons to have the custody and upbringing of their children and that there is no very serious and important reason requiring that, having regard to the children's welfare, the wishes of their parents must be dis-

1957

HEPTON *et al.* *v.* MAAT *et al.*

Cartwright J.

regarded, it follows that I would dismiss the appeal, but before parting with the matter I wish to adopt the view expressed by Aylesworth J.A. as follows:

> Indeed, so far as the welfare of the children is concerned, I do not think it should be overlooked that now that the whereabouts of the children is known to the appellants their desire to keep in contact with their children if the children are left with respondents may well work against the children's welfare; nor do I think it unimportant that the children are almost bound to become aware of their ancestry and of their racial heritage. Knowledge of these things and that they are being brought up in alienation from their own flesh and blood is something which to my mind must play an important part on a consideration of what is best for the welfare of the children. Nor is it without significance that in their parents' home they will in all probability experience the affection and companionship of their sister and perhaps of future brothers and sisters. I also regard these as additional considerations demonstrating in an affirmative way the absence in this case of anything of a serious or important nature militating to deprive the parents of custody.

While in view of the difference of opinion in the Courts below and in deference to the full and able arguments addressed to us I have set out my reasons in my own words, and perhaps at undue length, I wish to express my agreement with the reasons of Aylesworth J.A. with whom Roach J.A. concurred.

I would dismiss the appeal. Both counsel made it plain that, whatever the result, costs were not asked and there will be no order as to costs.

Appeal dismissed without costs.

Solicitors for the defendants, appellants: Pallett & Pallett, Port Credit.

Solicitor for the plaintiffs, respondents: W. E. G. Young, Woodstock.

KOOL VENT AWNINGS LIMITED (*Defendant*) ..... APPELLANT;

1957

*Apr. 3
June 26

AND

HER MAJESTY THE QUEEN (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales Tax—Whether awnings, canopies, marquees and umbrellas are "prepared roofings"—The Excise Tax Act, R.S.C. 1927, c. 179, ss. 86(1), 89(1), sched. III.

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

1957

KOOL VENT AWNINGS LTD. v. THE QUEEN

The aluminum awnings, canopies, marquees and umbrellas manufactured and sold by the defendant for installation over windows, doorways, patios and house balconies are not "prepared roofings" within the meaning of sched. III of the *Excise Tax Act* and consequently are not exempt from sales tax under s. 89(1) of the Act.

The words "prepared roofings" mean materials such as paper and felt, specially prepared for roofing, processed or treated so as to make them capable of resisting the weather. They are generally manufactured and sold in rolls or sheets and may be installed on roofs. A roof constructed with the defendant's products would not possess the essential characteristics of being an integral part of the building and of being weatherproof.

APPEAL from the judgment of Fournier J. of the Exchequer Court of Canada (1). Appeal dismissed.

H. Neuman and *J. Rudner,* for the defendant, appellant.

D. H. W. Henry, Q.C., and *P. M. Ollivier,* for the plaintiff, respondent.

The judgment of the Court was delivered by

NOLAN J.:—This is an appeal from the judgment of the Exchequer Court of Canada (1) awarding the respondent the sum of $37,064.66, representing sales tax payable by the appellant in respect of the sale of aluminum awnings, canopies, marquees and umbrellas during the period May 1, 1950, to May 31, 1953, together with penalties to November 30, 1953, amounting to $2,383.81 and further penalties in the amount of $2,470.90 from December 1, 1953, to the date of judgment.

For the purposes of the action the appellant made the following admissions:

1. That it produced or manufactured in Canada the goods referred to in Plaintiff's information;
2. That the said goods were sold and delivered to purchasers by Defendant in all the provinces of Canada except Ontario, from the 1st of May 1950 to the 31st of May 1953;
3. That total payment, either on a cash or deferred payment basis, has been received by Defendant covering the said total sales prices;
4. That if the sales of the said goods were taxable under the provisions of the Excise Tax Act and amendments thereto, which is specifically denied for the reasons mentioned in Defendant's statement of defence, Defendant is liable for the amount of taxes claimed in the present action.

The appellant is an incorporated company having its head office in Montreal. It manufactures, sells and installs metal coverings known as "Kool Vent" and is a licensee of

(1) [1954] Ex. C.R. 633, 54 D.T.C. 1158, [1954] C.T.C. 311.

a company in the United States of America known as Kool Vent of America. Its two manufacturing plants in Canada are situate in the Province of Quebec and in the Province of British Columbia.

The material manufactured and sold by the appellant consists of strips of aluminum of varying widths, but generally about 7 inches wide. After being painted, the strips are cut into the required lengths and are assembled by being hooked or fastened together. They are then given the shape and slope specified in the order form and the sides are processed in the same way. They are installed over windows, doorways, patios and balconies.

The only point in issue on this appeal is whether the learned trial judge was right in holding that such aluminum awnings, canopies, marquees and umbrellas, manufactured and sold by the appellant during the period in question, were subject to the sales tax imposed by s. 86(1) of the *Excise Tax Act*, R.S.C. 1927, c. 179, as amended, or whether such products were exempt as being "Prepared roofings" within the meaning of sched. III of that Act.

Sections 86(1) and 89(1) of the *Excise Tax Act* read, in part, as follows:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent. on the sale price of all goods

(*a*) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii) hereof, by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, and

(ii) payable, in a case where the contract for the sale of the goods (including a hire-purchase contract and any other contract under which property in the goods passes upon satisfaction of a condition) provides that the sale price or other consideration shall be paid to the manufacturer or producer by instalments (whether the contract provides that the goods are to be delivered or property in the goods is to pass before or after payment of any or all instalments), by the producer or manufacturer *pro tanto* at the time each of the instalments becomes payable in accordance with the terms of the contract;

* * *

89. (1) The tax imposed by section eighty-six of this Act shall not apply to the sale or importation of the articles mentioned in Schedule III of this Act.

1957

KOOL VENT AWNINGS LTD. v. THE QUEEN

Nolan J.

Under the heading of "CERTAIN BUILDING MATERIALS" in sched. III are included "Prepared roofings" and "Articles and materials to be used exclusively in the manufacture or production of the aforementioned building materials".

The appellant contended that the products in question were "Prepared roofings" within the meaning of sched. III of the *Excise Tax Act* and consequently exempt from taxation by reason of s. 89(1) of that Act.

The evidence adduced on behalf of the appellant was that these coverings installed over windows, doorways, patios and balconies were roofs and that such Kool Vent products were "Prepared roofings". On the other hand the evidence adduced by the respondent was that prepared roofing consisted of felt, rags or asbestos saturated with bitumen and was sold in a roll and that it was called prepared roofing because it could be laid without the assistance of an expert by simply spreading it over a wooden roof and fastening it down with nails.

The learned trial judge, in accepting the contention of the respondent, set out his views on the expression "Prepared roofings" in the following language (1):

> In my mind, the words "prepared roofings" were well explained by the witnesses and I believe they mean materials such as paper and felt, specially prepared for roofing. They are processed or treated in a way that makes them capable of resisting the weather. These materials are generally manufactured and sold in rolls or sheets and may be installed on roofs by an uncomplicated procedure requiring very little skill. The felt or paper is ordinarily saturated in a bituminous preparation and when affixed is covered with asphalt or tar and sprinkled with sand or very fine crushed stone. There may be other prepared roofings with which I am not familiar, but the above will suffice to illustrate what I think is the meaning of "prepared roofings" and the defendant's goods do not fall within that meaning.

In my opinion the learned trial judge, on the evidence, correctly defined the expression as it is understood by persons familiar with the building trade and the appellant has failed to discharge the onus of showing that its products come within the exempting provision contained in sched. III of the *Excise Tax Act*.

Moreover, I agree with the contention of the respondent that the roof of a building is commonly understood to be an integral part of the building and to be weatherproof. I

(1) [1954] Ex. C.R. at p. 642.

1957

KOOL VENT AWNINGS LTD. v. THE QUEEN

Nolan J.

accept the evidence adduced by the respondent that a roof constructed with the products of the appellant would not possess these essential characteristics.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Jack Rudner, Montreal.

Solicitor for the plaintiff, respondent: F. P. Varcoe, Ottawa.

1957

*May 22
June 26

HENRI-GEORGES LAMBERT (*Plaintiff*) APPELLANT;

AND

LEVIS AUTOMOBILES INC. AND RENE HALLE (*Defendants*) ..... } RESPONDENTS;

AND

GENERAL MOTORS ACCEPTANCE CORPORATION ..... } MIS-EN-CAUSE.

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

Sale—Nullity—Error and false representation—Whether unreasonable delay in taking action to annul.

An action to annul the sale of an automobile on the ground of misrepresentation must be taken with reasonable diligence. If the buyer of an automobile allows 14 months to elapse without making any complaint, and then, after the automobile has been repossessed, seeks to annul the sale on the ground that the car, although sold to him as new, was not so in fact, his action must fail. In such circumstances he will be deemed, because of his unreasonable delay, to have accepted the situation.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming the dismissal of the action by Gibsone J. Appeal dismissed.

Paul Miquelon, Q.C., for the plaintiff, appellant.

Geo. René Fournier, Q.C., for the defendants, respondents.

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Nolan JJ.

(1) [1956] Que. Q.B. 257.

1957

LAMBERT v. LEVIS AUTOMOBILES INC. et al.

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

TASCHEREAU J.:—Dans le cours du mois de juillet 1952, l'appelant a acheté de l'intimée la Lévis Automobiles Inc. une voiture de marque Dodge, modèle 1952, pour le prix de $2,600. En paiement, l'appelant a remis au vendeur une voiture Pontiac, pour laquelle on lui a donné un crédit de $500, et la balance due sur le prix d'achat, plus les taxes de vente, s'élevait à $2,142. L'appelant a donné un chèque au montant de $342, laissant une balance de $1,800.

Le compagnie intimée qui a fait cette vente par l'intermédiaire de son agent René Hallé, a obtenu de l'appelant un document permettant au vendeur de vendre et céder à General Motors Acceptance Corporation of Canada, la mise-en-cause, tous ses droits sur ladite automobile.

Le chèque au montant de $342 donné en acompte n'a jamais été payé par l'appelant, mais ce dernier a fait quelques versements à la mise-en-cause la General Motors Acceptance Corporation. Il a ainsi payé les versements échus respectivement les 23 septembre, octobre et novembre 1952, mais subséquemment a discontinué de les effectuer. Jusqu'à cette date, il ne s'était pas plaint de l'état de la voiture qu'on lui avait vendue, et ce n'est que le 18 février 1953, après au delà de six mois de possession et d'usage, alors qu'il était pressé de payer par la mise-en-cause, qu'il a commencé à reprocher à ses vendeurs que l'automobile n'était pas une voiture neuve, telle que vendue, et demanda une réduction du prix de vente. Le 23 mars 1953, la mise-en-cause, à qui la voiture avait été transportée, en reprit possession faute de paiement, et ce n'est que le 18 septembre 1953, soit après treize mois et vingt et un jours de la vente, que l'appelant a institué une action en résiliation.

L'honorable Juge Gibsone en Cour Supérieure a rejeté l'action avec dépens, et ce jugement a été unanimement confirmé par la Cour d'Appel (1).

Je suis clairement d'opinion que, si la voiture automobile achetée par l'appelant n'était pas de la qualité supérieure qui lui avait été représentée, l'action est sûrement tardive, et sur ce point je m'accorde entièrement avec les raisons données par M. le Juge St-Jacques et qui ont été approuvées

(1) [1956] Que. Q.B. 257.

par MM. les Juges Pratte et Rinfret. Les actions de ce genre doivent être instituées dans un délai raisonnable, et dans le cas actuel elle ne l'a été qu'au delà d'un an après que le contrat de vente fut intervenu.

Il est bien vrai que l'appelant prétend avoir appris seulement au mois de décembre 1952 que la voiture en question n'était pas une voiture neuve, mais même ceci ne serait pas suffisant pour justifier la présente action, qui n'a été instituée que dans le mois de septembre 1953. Ce délai est tardif, et je partage entièrement les vues de la Cour d'Appel que le demandeur a implicitement renoncé au droit qu'il aurait pu avoir de se plaindre de l'erreur et des fausses représentations dont il prétend avoir été la victime.

La cause de *Lortie v. Bouchard* (1) n'a pas d'application et ne peut servir à déterminer le présent litige. Dans cette cause, il a été décidé que l'action en annulation pouvait être maintenue, même si elle avait été instituée quatre mois après l'exécution du contrat, parce que dans les circonstances spéciales qui se présentaient, il n'y avait pas eu de retard indu. Les défauts attribués à l'automobile n'étaient apparus que graduellement, et il n'y avait eu aucune acceptation de la part de l'appelant acheteur qui n'avait cessé de se plaindre.

Il est bien vrai que dans cette cause de *Lortie v. Bouchard, supra,* il a été mentionné, comme il l'avait été dit déjà par la Cour d'Appel dans la cause de *Bernier v. Grenier Motor Co. Ltd.* (2), que l'art. 1530 C.C. qui est applicable au cas de demande en nullité pour vices rédhibitoires, ne l'est pas dans le cas où il s'agit de garantie conventionnelle et formelle, mais il a également été dit qu'il faut quand même que l'action, comme celle qui nous est soumise, soit intentée dans un délai raisonnable, même si on n'applique pas toute la rigueur qu'il faut appliquer dans le cas de l'art. 1530.

Je suis d'opinion que le vieux brocard de droit romain *Vigilantibus et non Dormientibus jura subveniunt,* s'applique dans le présent cas. Par son silence, l'appelant a accepté les conditions existantes; il a institué son action tardivement, et celle-ci a été justement rejetée par la Cour Supérieure et la Cour du Banc de la Reine.

L'appel doit en conséquence être rejeté avec dépens.

(1) [1952] 1 S.C.R. 508.

(2) (1926), 41 Que. K.B. 488.

1957

LAMBERT v. LEVIS AUTOMOBILES INC. et al.

RAND J.:—I agree that there was an unreasonable delay in taking proceedings for annulling the contract. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: Pierre de Varennes, Quebec.

Solicitors for the defendants, respondents: Fournier & Monast, Quebec.

1957

*Feb. 27, 28
June 26

JOHN LAVERNE MILLER (*Plaintiff*) ....APPELLANT;

AND

JOHN DECKER, DICK DECKER AND TRIEN DECKER (*Defendants*) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Defences—Volenti non fit injuria—What must be established—Implied assumption of risk with full knowledge of its nature and extent—Driver known to passenger to be intoxicated.

The plaintiff and the defendant J set out, according to the findings of the trial judge, to go "beering" and after that to go to a dance in J's car. After drinking beer for some two hours they embarked in the car, both of them being then intoxicated. An accident occurred as the result of J's gross negligence and the plaintiff sustained serious injury.

Held (Taschereau and Abbott JJ. dissenting in part): The plaintiff could not recover. The circumstances were such as to lead necessarily to the inference that he had impliedly, and with full knowledge of the nature and extent of the risk resulting from J's driving, agreed to assume that risk. *Car and General Insurance Corporation Limited v. Seymour and Maloney,* [1956] S.C.R. 322, distinguished and applied.

Per Taschereau and Abbott JJ., *dissenting in part*: The circumstances were not such as to establish a voluntary assumption of the risk by the plaintiff but he had been guilty of contributory negligence to the extent of 50 per cent. He was therefore entitled to judgment against J for one-half of the damages sustained by him.

Actions—Bars to relief—Ex turpi causa non oritur actio—Whether rule applicable.

Per Taschereau and Abbott JJ.: The circumstances above set out were not such as to make applicable the rule *ex turpi causa non oritur actio. Foster v. Morton* (1956), 38 M.P.R. 316 at 333, quoted with approval.

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

APPEAL from a judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Wood J. (2) dismissing the action. Appeal dismissed. The defendants Dick Decker and Trien Decker were the parents of the defendant John Decker, an infant.

Alfred Bull, Q.C., for the plaintiff, appellant.

Douglas McK. Brown and *Raymond E. Ostlund*, for the defendants, respondents.

The judgment of Taschereau and Abbott JJ. was delivered by

ABBOTT J. (*dissenting in part*):—Appellant's claim is one in damages for personal injuries sustained while a gratuitous passenger in a car owned by the respondent John Decker and driven by him while he was under the influence of liquor. The facts, which are really not in dispute, are fully set out in the judgments in the Courts below and I need not recite them here. The accident in which the appellant was injured was caused by the gross negligence of the respondent.

The learned trial judge held that the defence of voluntary assumption of the risk had been established and dismissed appellant's action. That judgment was affirmed by the Court of Appeal for British Columbia, by Bird J.A. on the ground of voluntary assumption of risk, by O'Halloran J.A. on the ground that the parties were engaged in a common enterprise, and by Smith J.A. on the ground that appellant's action was barred by the rule *ex turpi causa non oritur actio.*

The principal defence argued before this Court was that of *volenti non fit injuria.* The general principles applicable to that defence were stated by the Judicial Committee in *Letang v. Ottawa Electric Railway Company* (3), in the following terms, quoted from the judgment of Wills J. in *Osborne v. The London and North Western Railway Company* (4):

> If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.

(1) 16 W.W.R. 97, [1955] 4 D.L.R. 92.
(2) (1954), 13 W.W.R. 642.
(3) [1926] A.C. 725, [1926] 3 D.L.R. 457, 32 C.R.C. 150, [1926] 3 W.W.R. 88, 41 Que. K.B. 312.
(4) (1888), 21 Q.B.D. 220 at 224.

1957

MILLER v. DECKER

Abbott J.

It might be noted in passing that the facts in that case are of little help since it was held that there was no evidence of either *volentia* or *scientia*.

The defence as applied to a drunken driver, known to his passenger to be under the influence of liquor, was recently considered by this Court in *Car and General Insurance Corporation Limited v. Seymour and Maloney* (1). In that case the learned trial judge (2) had applied the principle of voluntary assumption of the risk to relieve a drunken driver from responsibility for damages caused to a gratuitous passenger as a result of the driver's gross negligence. This finding was reversed by the Supreme Court of Nova Scotia sitting *in banco, sub nom. Seymour v. Maloney et al.* (3), and the driver was held to have been guilty of contributory negligence. That judgment was confirmed by this Court.

It is clear from the judgments in this Court in the *Seymour* case that for a negligent driver to be completely relieved from liability, the plaintiff must have agreed expressly or by implication to exempt the defendant from liability for damages suffered by the plaintiff and occasioned by the negligence of the defendant during the carrying out of the latter's undertaking. In other words, to constitute a defence there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence. As was pointed out by Kellock J. at p. 331, the question in each particular case is, in the language of Lindley L.J. in *Yarmouth v. France* (4), "not simply whether the plaintiff knew of the risk, but whether the circumstances are such as *necessarily* to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff".

No doubt there may be cases in which the defence of voluntary assumption of risk is available to a drunken driver to relieve him completely from responsibility to his passenger for the consequences of his own gross negligence. I am in agreement, however, with the view expressed by

(1) [1956] S.C.R. 322, 2 D.L.R. (2d) 369.
(2) 36 M.P.R. 337, [1955] 1 D.L.R. 824.
(3) 36 M.P.R. at 360, [1955] 4 D.L.R. 104.
(4) (1887), 19 Q.B.D. 647 at 660.

Doull J. in *Seymour v. Maloney, supra,* when, speaking for himself, Ilsley C.J. and Hall and MacQuarrie JJ., and referring to the *volenti* doctrine, he said (1):

> . . . in my opinion it is not in most cases an appropriate approach to the determination of the liability of the drunken driver. The person who accepts the drive may be negligent in doing so, but he seldom considers the risk or knows how drunk the driver is.

It is not without significance, I think, that we were referred to no case decided in England since the passing of the *Law Reform (Contributory Negligence) Act,* 1945, c. 28, in which the doctrine of voluntary assumption of risk has been applied to relieve a defendant completely from civil liability for the consequences of his own negligence, and Mr. Brown told us that he had not been able to find any such decision.

In the instant case I am of opinion that the proper point of time at which appellant might be said to have voluntarily assumed the risk was when the three young men set out in respondent's car to visit the beer parlour. At that time no drinks had been consumed and the respondent John Decker stated that, as he was the driver, he had only intended to take one or two drinks. These good intentions, as so often happens, were not lived up to, but to paraphrase the words of Kellock J. in the *Seymour* case, *supra,* at p. 332, I do not think that the situation was then such as *necessarily* to lead to the conclusion either that the appellant agreed to take upon himself the whole risk or that the respondent accepted him into his automobile on such a footing. Moreover, in my opinion the evidence established that after some two hours spent in the beer parlour appellant was in no condition to give such an undertaking.

With respect I cannot agree with the view expressed by Smith J.A. that the action is barred by the rule *ex turpi causa non oritur actio.* This ground does not appear to have been directly pleaded or argued in the Courts below but in any event in my opinion more must be proved than is evident in this case before this defence can be given effect to. The application of the rule in a case of this kind was recently considered by the Supreme Court of Nova Scotia sitting *in banco* in *Foster v. Morton* (2). The relevant

(1) 36 M.P.R. at p. 372, [1955] 4 D.L.R. at p. 115.

(2) (1956), 38 M.P.R. 316, 4 D.L.R. (2d) 269.

1957

MILLER v. DECKER

Abbott J.

authorities are reviewed at length in the judgment of MacDonald J. and I am in agreement with his statement at p. 333 where he says:

> There are, I think, weighty reasons why in principle this doctrine of illegality should not afford a general defence to civil actions of negligence arising out of automobile accidents, particularly in Canada where many kinds of conduct are prohibited by the Criminal Code and by many Provincial Acts of a penal nature. Accordingly, authority of the clearest kind should be required before concluding that the mere fact that the conduct of a party to a civil action was wrongful as being in violation of the Criminal Code or a penal act constitutes a defence. There is no such binding authority and such as exists is to the contrary effect. (Williams, Joint Torts and Contributory Negligence, pp. 333-5; Winfield on Tort, 6th ed., pp. 47, 520-1; Pollock on Torts, 15th ed., pp. 125-7; *National Coal Board v. England*, [1954] 1 All E.R. 546 at pp. 552, 554-7, noted in (1954), 17 Mod. L. Rev. 365; 70 L.Q. R. 298-9; cf. *City of Vancouver v. Burchill*, [1932] S.C.R. 620—breach of highway legislation.) There is even less reason to hold that a passenger injured in a motor vehicle should be debarred from compensation merely because he was in law implicated in the criminal conduct of the driver as a constructive party thereto.

Upon the principle enunciated by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited* (1), however, I am of opinion, upon the evidence, that appellant was guilty of contributory negligence. Under the *Contributory Negligence Act*, R.S.B.C. 1948, c. 68, and having regard to all the circumstances of the case, I would apportion the liability equally between the appellant and the respondent John Decker.

Nothing was established which could justify holding the respondents Dick Decker and Trien Decker responsible for the negligence of their son John Decker.

In the result, therefore, I would allow the appeal against the respondent John Decker, declare him liable for 50 per cent. of the damages suffered by appellant and refer the matter back to the Supreme Court of British Columbia for the assessment of damages. The appellant should have his costs here and in the Court of Appeal and one-half of his costs in the trial Court. The appeal should be dismissed as against the respondents Dick Decker and Trien Decker with costs throughout.

RAND J.:—In this case there is the extreme example of complementary relations considered in *Car and General Insurance Corporation Limited v. Seymour and Maloney* (2), in the circumstances that both driver and passenger at

(1) [1951] A.C. 601, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665.
(2) [1956] S.C.R. 322, 2 D.L.R. (2d) 369.

the time of the accident were so far under the influence of liquor as to be incapable of appreciating the dangers of their situation. The facts leading up to that condition can be shortly stated.

The driver, the respondent John Decker, and the passenger, the appellant Miller, with a friend Thistleton, young men of 19 years of age, had in the early evening of October 12, 1952, in Vancouver set out together to enjoy themselves. This was to be done first by indulging in the amenities of a beer parlour and following that those of a dance hall. The car was owned by Decker. Shortly before setting out, at a restaurant, a gathering place for the young men of the neighbourhood, they had met with others and in the course of talk the evening's entertainment was mentioned. Miller was undecided whether to go to a "show" with Decker and Thistleton or to "go beering with the rest of the fellows". Telling the others to wait for his return, he left the restaurant to go home for his clothes. After waiting 15 or 20 minutes Decker and Thistleton took the car and called at Miller's home to see what it was to be, and they were told that he would go along with them to the show. They drove past the restaurant just as the others were leaving it. The car was stopped and the discussion of plans was renewed. Miller indicated his preference for a "beer" party and finally Decker and Thistleton agreed to have a couple of drinks at a hotel in New Westminster and then "come straight back" to a dance hall. Miller described his purpose in going to the beer parlour as being "to drink a bunch of beers to get feeling good and then go to the dance hall". It was suggested by one of them, 7 or 8 in number, that all go in one car, but to this Decker demurred. At the hotel they gathered around a table and drank double rounds or more of beer from each one. Miller equally with Decker fully appreciated the condition to which they would be brought by the beer and the effect of that condition on the driving of the car as well as the risks entailed. Before leaving they decided to go not to a Legion dance they had in mind but to another, the place of which is not material.

About 11 o'clock they left the hotel and proceeded to the hall. Miller recalls getting into the car but is very vague about the journey or being at the dance; and the memory of Decker is not much clearer. About midnight the three set

1957

MILLER v. DECKER

Rand J.

out for home, but neither could recall the circumstances of getting into the car or of the ride. Later they passed another automobile at an estimated speed of 75 miles an hour and when their car struck railway tracks running across the street on which they were travelling it seemed, in the language of the witness who was watching it, "to take off in the air", and crashed on its side. Both suffered injuries.

From these facts the inference is clear that the three were acting together in a common purpose and that the drinking of each was an encouragement to the same act in the others. Being fully aware of the most likely consequences of this indulgence, each voluntarily committed himself to the special dangers which they then entered upon.

In that situation I cannot think that any difficulty arises in the application of the principles of liability for negligence. As between themselves there is no doubt of what would have been required by Decker in the interchange that is to be constructed between these young men as they sat down at the beer table to begin "to make an evening of it". That he would have required the other two to assume the risks all were able to foresee and would have participated in creating, to take the same risks that he was taking, is unquestionable. The conditions then existing, their inevitable development, and the obvious hazards were theirs equally and jointly; and one can imagine the reasonable response of Decker, had his mind still been clear enough, if either of them had let fall a suggestion that he would be responsible for their safety: they would have been told to get into another car.

It is equally clear that Miller is to be taken to have accepted that requirement. This would have been obvious if he had remained sober and in command of his faculties; and having, by his voluntary acts, co-operated in creating and placing himself in the midst of the mounting dangers, his intoxication does not qualify his acceptance.

In this case, to treat either the question whether the assumption of the risk was a requirement of Decker or whether it was accepted by Miller as to be decided at the moment of setting out from the dance hall, would, in view of their condition, be futile: one could not then rationally propose terms nor the other accept them: and only from

the circumstances in which they moved to the fulfilment of their purpose around the beer table is the answer in either case to be drawn. The terms are to be inferred, then, on the understandings which the ordinary persons of their age, aware of their situation and as it would develop, as reasonable and prudent young men, would have proposed and accepted. That standard is imposed on those whose minds are clear and those who deliberately commit themselves to the vortex of such risks can claim no greater indulgence.

I would, therefore, dismiss the appeal with costs.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK J.:—In *Car and General Insurance Corporation Limited v. Seymour and Maloney* (1), this Court held the defence of *volenti* to be available in actions of the type here in question, provided, of course, that defence was made out as a matter of evidence. The question for the Court in such cases was variously formulated by the members of the Court but with no difference in essence.

At p. 324, Rand J. said:

> In such commitments the question ought, I think, rather to be, can the defendant reasonably be heard to say, as an inference from the facts, that the risk of injury from his own misconduct was required by him to be and was accepted by the complainant as such a term?

At p. 326:

> . . . the basic understanding must be reduced to an actual or constructive exchange of terms under which the commitment of the interests of both is brought.

Kellock J., at p. 332:

> . . . the true question is that stated in Salmond, 10th ed., at p. 34, "Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?" Having regard to the statute law in force in Nova Scotia, that question becomes in the case at bar, "Did the plaintiff agree, expressly or by implication, to exempt the defendant from liability for any damage suffered by the plaintiff during the carrying out of the undertaking of the latter, occasioned by the gross negligence of the defendant?"

The word "latter" above should obviously have been "former". And lower down on the same page, with reference to the facts then before the Court:

> . . . I do not think it arguable that the situation was then such as *necessarily* to lead to the conclusion either that the plaintiff agreed to take upon herself the whole risk or that the defendant accepted her into his automobile on such a footing.

(1) [1956] S.C.R. 322, 2 D.L.R. (2d) 369.

1957

MILLER v. DECKER

Kellock J.

At p. 334, Locke J.:

In the present matter, the question as to whether or not the respondent "freely and voluntarily, with full knowledge of the nature and extent of the risk" she ran "impliedly agreed to incur it", the test approved by the Judicial Committee in *Letang v. Ottawa Electric Railway Company*, [1926] A.C. 725, 731, was one of fact.

And lower on the same page:

In my opinion, the question as to whether the evidence showed that the plaintiff had given a real consent to the assumption of the risk, absolving the defendant from the duty to take the limited degree of care imposed upon him by s. 183 of the *Motor Vehicles Act* (c. 6, 1932), did not in this case depend upon the views of the trial judge as to the respondent's veracity, but rather upon the inferences to be drawn from facts which were not in dispute.

Cartwright J. at p. 335:

I agree with my brother Rand that the question to be answered in deciding whether the defence of *volenti non fit injuria* was established in this case is whether the defendant can reasonably be heard to say, as an inference from the facts, that the risk of injury from his own misconduct was required by him to be and was accepted by the complainant as a term of his undertaking to carry her gratuitously . . .

Under the relevant statute law of British Columbia the respondent driver is rendered liable to a passenger for gross negligence only. It is common ground between the parties that the finding of gross negligence at the trial must stand and that the further finding that the accident, as a result of which the plaintiff sustained injuries, occurred as a result of the defendant's intoxication.

The learned trial judge (1) upheld the defence of *volenti*, as did Bird and O'Halloran JJ.A. in the Court of Appeal (2). The judgment of Sidney Smith J.A. dismissing the appeal was put on another ground.

The learned trial judge (3) found that

The two young men involved, aged about 19, were members of a group of similar age and proclivities living in Vancouver who on the evening in question had nothing to do so they all decided to go "beering" and for such purpose drove in three cars to the Russell Hotel in New Westminster where they sat drinking beer for two hours or more. Some time during the evening they decided to go to a dance and it seemed appropriate that they should qualify themselves to enjoy that dance for the plaintiff says on his examination for discovery:

"Q. What you were to do actually was to drink a bunch of beers to get feeling good and then go out to this dance hall, isn't that right? A. That's right."

(1) (1954), 13 W.W.R. 642.
(2) 16 W.W.R. 97, [1955] 4 D.L.R. 92.
(3) 13 W.W.R. at p. 642.

This plan was ultimately carried out. In my opinion, the relevant time when the question of consent or no consent is to be determined is the time, as above, to which the learned trial judge directed his mind.

The relevant evidence of the appellant is as follows:

Q. You knew as you were drinking these beers that you were gradually becoming under the influence of liquor, didn't you? A. That is right.

And further:

Q. I suppose you knew when you were in the beer parlour that if Decker would be drinking beer his ability to drive might not be as good as otherwise? A. Yes.

Q. You knew that, didn't you—did you tell him to quit drinking at all? A. No.

Q. I suppose you knew, too, that the more beer he drank the greater would be the risk if he would drive the car? A. No, I wasn't bothering with any—

Q. You know that is so? A. Yes.

Q. In other words, if you are sitting by with me and we are both drinking and you see me drinking a lot and know I am going to drive a lot, you know there is additional risk to be incurred if you drive with me? A. Yes.

Q. You know that, don't you—and you knew when you were in the beer parlour drinking he was drinking with you, that the plans were to go to the dance hall? A. Yes.

Q. And as far as you were concerned you were going with Decker? A. That is right.

Q. And in his car? A. Yes.

.....

Q. And these other boys were all your age approximately? A. Yes.

Q. I don't suppose you thought drinking beer like that would make any of them sober or more sober, did you? A. No.

Q. You know enough about drinking to know that it might affect them the same as it affected you, isn't that right? A. Yes.

Q. "Yes", did you say? A. Yes.

The appellant says that all he can recall as to leaving the beer parlour was getting into the front seat of the respondent's car. He also has some vague recollection of his conduct at the dance. The accident took place after the respondent driver and the appellant had left the dance. Its occurrence is thus described by the learned trial judge (1):

At any rate, both the plaintiff and the defendant became very intoxicated and in that condition they, together with another young man, drove to a dance. They seem to have very little recollection as to what happened there but on returning Decker drove along Scott Road at 75 to 80 miles per hour passing other traffic until a railway crossing was reached. At that point, according to the evidence of the driver of one of the cars which was passed, the defendant's car seemed to take to the air. It landed off the road on its side as a result of which the infant plaintiff suffered his injuries.

(1) 13 W.W.R. at p. 643.

1957

MILLER v. DECKER

Kellock J.

There is no doubt that Decker's driving was not only dangerous but reckless and amounted to gross negligence. Had there been a fatality he might well have been successfully prosecuted for manslaughter. As it was he pleaded guilty to dangerous driving before a magistrate and was fined $50.

In my opinion, the question whether the evidence establishes that the appellant consented to assume the risk without compensation in the event of injury must be answered in the affirmative. I adopt what was said by Bird J.A. in the Court below (1), that

> It is I think inconceivable that anyone, even of the most limited intelligence, would not realize the danger of being driven by another thus fortified. Miller was party to the plan, realized that he himself was becoming intoxicated and that the others, drinking as he was, were likely to be similarly affected; nevertheless he elected to ride with Decker in the latter's car. In those circumstances I do not think that Miller's conduct in so doing reasonably can be interpreted otherwise than as a free and voluntary acceptance of the risk involved in being driven by one who he knew was intoxicated.

It is further contended for the appellant that as the respondent driver committed a breach of s. 285(6) of the 1927 *Criminal Code* as well as that he was driving in excess of the statutory speed limit at the time of the accident, the defence of *volenti* is rendered inapplicable.

In my opinion, this objection is not well taken. There is a substantial difference between the breach of such statutory provisions as those laying down safety requirements in factories for the protection of persons employed therein, and a breach of such statutory provisions as the above.

Such statutes as the *Factory Acts* were enacted to create an absolute duty on the employer to protect his employees by the installation of the safeguards called for by the enactments, breach of which duty would give to an injured employee a cause of action against which even the express consent of the employee to dispense with the statutory requirements would afford no defence. On the other hand, statutes of the character of those here in question were not enacted from any such standpoint or with any such object. Accordingly, there is no public policy attaching to their breach which would provide any basis for giving effect to such a contention as that put forward by the appellant in the case at bar.

(1) 16 W.W.R. at p. 106.

1957

MILLER v. DECKER

Kellock J.

As to the contention put forward on behalf of the respondents other than the driver, based on s. 48 of the *Motor-Vehicle Act*, R.S. B.C. 1948, c. 227*, our view as to its untenable nature was sufficiently indicated on the argument.

I would dismiss the appeal with costs.

Appeal dismissed with costs, TASCHEREAU and ABBOTT JJ. *dissenting in part.*

Solicitors for the plaintiff, appellant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitor for the defendants, respondents: Angelo E. Branca, Vancouver.

*48. In case a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating on any highway a motor-vehicle entrusted to the minor by the parent or guardian; but nothing in this section shall relieve the minor from liability therefor. In every action brought against the parent or guardian of a minor in respect of any cause of action otherwise within the scope of this section, the burden of proving that the motor-vehicle so driven or operated by the minor was not entrusted to the minor by the parent or guardian shall be on the defendant.

PAUL PELLETIER (*Defendant*) .....APPELLANT;

1957

*Mar. 18, 19
June 26

AND

BENNY SHYKOFSKY (*Plaintiff*) .....RESPONDENT.

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

Courts—Appeals—Inferences to be drawn from facts—Second appellate Court.

Where the validity of an appellant's claim depends upon an inference of fact to be drawn from all the facts proved and the application to that inference of a legal principle, and where a Court of Appeal has drawn an inference different from that of the trial judge, this Court will interfere with the judgment appealed from only if clearly satisfied that it is erroneous. *Demers v. Montreal Steam Laundry Company* (1897), 27 S.C.R. 537, applied.

Master and servant—Injuries to passengers in taxicab—Whether driver in the performance of the work for which he was employed—Civil Code, art. 1054.

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

1957

PELLETIER v. SHYKOFSKY

As the result of the negligence of D, the plaintiff was injured while a passenger in a taxicab owned by the defendant and driven by D. The plaintiff and D, an old friend of army days, embarked upon an extensive tour of the city of Montreal, visited at least two taverns and were both intoxicated at the time of the accident. The meter of the taxicab was not in operation during the tour but there was evidence that payment was to be made for the time spent on the trip. While there were inconsistencies in the evidence, there was little direct conflict. The trial judge found that D was in the performance of his work but this finding was reversed by the Court of Appeal.

Held: The Court of Appeal was justified in its view that the judgment at trial could not be supported and in drawing the inference that this was not a case of an engagement of carriage on behalf of D's employer. The judgment should therefore be affirmed.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment at trial. Appeal dismissed.

G. Laurendeau and *L. Racicot,* for the defendant, appellant.

Hazen Hansard, Q.C., and *William Grant,* for the plaintiff, respondent.

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

ABBOTT J.:—Appellant's claim is one in damages for personal injuries sustained while a passenger in a taxicab owned by respondent and driven by an employee, one Fernand Daigle.

The Superior Court maintained appellant's action to the extent of $13,296.91, being 75 per cent. of $17,729.21, established as being the amount of the damages sustained by appellant, held that the accident in which appellant was injured was caused by the fault of Daigle and that the latter was in the performance of the work for which he was employed by respondent within the meaning of art. 1054 C.C. so as to engage the vicarious responsibility of respondent.

There is no doubt that the accident was due to the negligence of Daigle, the facts are fully recited in the judgments of the Courts below and I need refer to them only briefly.

Appellant and Daigle both testified, the latter on discovery and the former at the trial. From their evidence it appears that the appellant, on the invitation of Daigle, an

(1) [1956] Que. Q.B. 83.

old friend of Army days, entered the latter's taxicab and the two then repaired immediately to the nearest tavern where they proceeded to refresh themselves with at least one bottle of beer apiece, paid for by appellant. They then embarked upon an extensive tour of the city of Montreal, a tour which the learned trial judge characterized by such terms as "fameuse course", "fantastique et extraordinaire". During the course of this tour they visited at least one more tavern where they partook of further alcoholic refreshment, again at appellant's expense, and were found by both Courts below to have been in a state of intoxication at the time of the accident.

There is some evidence that a part of the trip was to enable appellant to visit the office of his employer and to look for a customer whom appellant admitted he had never met or spoken to and whom they were unable to find. The meter on the taxicab was not operating during the tour but appellant testified that at some time during the evening he made an arrangement with Daigle to pay him at the rate of $4 an hour for the time spent on the trip while Daigle's version is that appellant was to pay him $3 to $4 for the evening.

On this evidence, the learned trial judge held that Daigle was in the performance of the work for which he was employed but this finding has been unanimously reversed by the Court of Queen's Bench (1), which held that the trip in question was in the nature of a joy ride and that at the time of the accident

le conducteur du taxi ne conduisait pas dans l'intérêt de son patron mais pour se réjouir durant quelques heures en compagnie de l'intimé, en absorbant de la boisson qui devait augmenter l'agrément.

It is a truism, of course, to state that when a case is tried under the system known in Quebec as "enquête and merits", the trial judge, who acts as both judge and jury, speaks with preponderating authority when he determines the weight to be given to contradictory testimony: see *Montreal Tramways Company v. Sofio* (2). While there are some inconsistencies as between the evidence of appellant and that of Daigle there is little direct conflict. There is some conflict as to the degree of intoxication and as to the arrangements for payment, but the trial judge accepted the

(1) [1956] Que. Q.B. 83. (2) (1921), 27 R.L.N.S. 284 at 288.

1957

PELLETIER v. SHYKOFSKY

Abbott J.

evidence of Daigle as to intoxication in preference to that of appellant. Presumably, therefore, he was not ready to accept the evidence of the latter without some reservations.

The validity of appellant's claim depends upon an inference of fact to be drawn from all the facts proved and the application to it of a legal principle. On this inference of fact the learned judges of the Court of Appeal have differed from the learned trial judge, as they were entitled to do. The position of this Court in such circumstances was clearly stated by Taschereau J., as he then was, when in rendering the unanimous judgment of the Court in *Demers v. The Montreal Steam Laundry Company* (1), he said at p. 538:

> . . . it is settled law upon which we have often acted here, that where a judgment upon facts has been rendered by a court of first instance, and a first court of appeal has reversed that judgment, a second court of appeal should interfere with the judgment on the first appeal, only if clearly satisfied that it is erroneous; *Symington v. Symington* L.R. 2 H.L. Sc. 415.

The appellant has failed to satisfy me that the judgment of the Court below is erroneous. On the contrary, I am in agreement with the view expressed by the learned judges of the Court of Queen's Bench that the judgment of the Superior Court cannot be supported.

The appeal should be dismissed with costs.

RAND J.:—I agree that this appeal should be dismissed. Several of the significant items of the story which, as presented, were suspect, could and should, if true, have been supported by more or less independent corroboration. In its absence the Court of Appeal (2) was justified in drawing the conclusion it did, that the case was one of the reunion of two comrades-in-arms and not an engagement of carriage by one of them on behalf of his employer.

LOCKE J.:—In my opinion, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Lomer Racicot, Montreal.

Solicitors for the plaintiff, respondent: McMichael, Common, Howard, Case, Ogilvy & Bishop, Montreal.

---

(1) (1897), 27 S.C.R. 537.

(2) [1956] Que. Q.B. 83.

IRENEE SICARD (*Defendant*) .....APPELLANT;

AND

LEON-DAVID GERMAIN (*Plaintiff*) ....RESPONDENT.

1957

*May 28, 29
June 26

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

Contract—Sale—Intrepretation.

The defendant agreed to buy from the plaintiff 75 shares in a company for the sum of $200 per share plus an additional amount to be determined as soon as certain outstanding government claims against the company had been settled. The additional amount was to be equal to "la différence entre la somme de $200 . . . et la valeur nette des dites actions, basée sur le rapport des auditeurs de la Cie annexé aux présentes . . . après avoir donné effet au règlement des dites réclamations".

Held: The agreement was clear and unambiguous in its terms. The parties accepted as final the valuation of the company's assets and the amount of its liabilities as set forth in the auditors' statements and as shown on its books, with the exception that the items showing the estimated liability for contract refunds and the estimated liability for taxes were to be replaced by the actual amounts when the claims were settled. The settlement of the two liabilities was bound to affect the company's surplus of assets over liabilities but it could not affect the value of the assets of the company nor the amount of the other liabilities as accepted by the parties in their agreement.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec, reversing the judgment at trial. Appeal dismissed.

H. Gérin-Lajoie, Q.C., and *Charles J. Gélinas, Q.C.*, for the defendant, appellant.

Louis-Joseph de la Durantaye, Q.C., and *Jean Filion, Q.C.*, for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—For some years prior to June 18, 1945, both appellant and respondent had been actively engaged in the management and operation of a company known as Sicard Limitée. This appeal turns upon the interpretation to be given to an agreement dated June 18, 1945, between appellant and respondent, under the terms of which appellant

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

1957

SICARD v. GERMAIN

Abbott J.

purchased from respondent 75 shares of the capital stock of the said Sicard Limitée owned by respondent. The agreement of sale reads as follows:

M. L. D. Germain.

Je, soussigné, par les présentes, vous offre d'acheter soixante-quinze (75) actions ordinaires du capital-actions de Sicard Limitée, pour et en considération du paiement des sommes suivantes:

A.—Une somme de $200 par action, représentant le prix payé par vous pour l'acquisition desdites actions, ladite somme devant être payée comptant sur la livraison des certificats d'actions dûment endossés et transférés en mon nom;

B.—Une somme additionnelle qui sera déterminée dès que les réclamations des Départements des Munitions et de l'Impôt sur le revenu auront été réglées définitivement et qui sera égale à la différence entre la somme de $200 ci-dessus payée comptant et *la valeur nette desdites actions, basée sur le rapport des auditeurs de la Cie annexé aux présentes et sujet à la vérification de L. D. Germain après avoir donné effet au règlement desdites réclamations.* Cette somme sera payable dès que l'évaluation desdites actions aura été complétée.

L'achat desdites actions sera censé prendre effet comme en date du 31 août 1944.

La présente offre doit être acceptée immédiatement et à défaut de telle acceptation elle deviendra caduque et sans effet.

Montréal, 18 juin, 1945.

ACCEPTÉE: (Signé) I. SICARD

(Signé) L. D. GERMAIN.

(The italics are mine.)

As originally drafted by appellant, this agreement contained the following words in clause B following the words "la valeur nette desdites actions":

tel que fixée par les Auditeurs de la Compagnie, et approuvée par M. M. Lajoie, Gélinas & Macnaughten, avocats,

but at the suggestion of respondent these words were struck out and replaced by the words:

basée sur le rapport des auditeurs de la Cie annexé aux présentes et sujet à la vérification de L. D. Germain.

The amount of $200 per share called for by clause A of the agreement was paid and respondent's claim is for the balance alleged to be owing under the provisions of clause B.

Appellant contends that the terms of clause B require that "la valeur nette" of the company's shares be established (i) by using as a basis the financial statements annexed to the agreement, but also (ii) by giving what Mr. Gérin-Lajoie described as "full effect" to certain settlements made with the Department of Munitions and Supply

with respect to war contracts and with the Department of National Revenue with respect to liability for income tax and excess profits tax.

Before the Superior Court and the Court of Queen's Bench, respondent took the position that the agreement entitled him, by reason of his right of "vérification", to revalue all the assets of the company and to revise the amount of all its liabilities following the final determination of the two claims referred to, in order to ascertain the net value of the shares. This interpretation was rejected by the trial Court and by the Court of Queen's Bench, and was not urged before this Court.

Alternatively respondent submitted that the financial statements prepared by the company's auditors and annexed to the agreement were to be accepted as final in determining the value of the assets and the amount of the liabilities of the company as shown therein, leaving only the undetermined claims for contract refunds and taxes to be replaced when these items had been finally settled. This interpretation was accepted by the Court of Queen's Bench and is the one urged by respondent before this Court.

It is conceded that the financial statements annexed to the agreement accurately reflected the financial position of the company as shown by its books at August 31, 1944, including the value placed upon its assets and the amount of its liabilities, both actual and estimated.

I am in respectful agreement with the view expressed by Bissonnette and Hyde JJ. in the Court below, that the agreement of sale is clear and unambiguous in its terms. The parties accepted as final for the purposes of the agreement the value of the company's assets and the amount of its liabilities as set forth in the auditors' statements and as shown on its books with two exceptions, namely, the estimated liability for contract refunds and the estimated liability for income and excess profits tax. In these two instances the actual amounts when these were determined were to replace the estimated amounts shown in the statements. In addition, respondent reserved the right to verify (1) that the auditors' statements annexed to the agreement were in accordance with the company's books and (2) the amounts finally settled as being the company's actual liability for contract refunds and taxes.

1957

SICARD v. GERMAIN

Abbott J.

Respondent, having ceased to be a shareholder of Sicard Limitée, took no part in the settlement of the two Government claims although it was obviously in his interest as well as in that of the company that these claims should be settled for the lowest possible amount. The final determination of the exact amount of these two liabilities may have rendered it desirable that some changes be made in the company's books in order to make them conform to approved accounting practice. This, however, was something in which the respondent had ceased to have any interest, and he was, of course, in no position to have any say as to what changes it might be deemed desirable to make in the company's books. The settlement of the two liabilities in question was bound to affect the company's surplus of assets over liabilities but the final determination of the amounts owing for contract refunds and taxes could not affect the value of the assets of the company, nor could it affect the amount of the company's other liabilities as accepted by the parties in their agreement of June 18, 1945.

For these reasons as well as for those given by Bissonnette and Hyde JJ. in the Court below, with which I am in respectful agreement, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Lajoie, Gélinas & Lajoie, Montreal.

Solicitor for the plaintiff, respondent: L. J. De La Durantaye, Montreal.

BENJAMIN AUBERTIN ET AL. (*Plaintiffs*) APPELLANTS; 1957

*May 14, 15
Oct. 1

AND

LA CITE DE MONTREAL (*Defendant*) RESPONDENT.

AND

CAISSE ET HURTEAU .....MIS-EN-CAUSE.

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

Gifts—Interpretation—Whether gift in usufruct or in substitution—Effect of sheriff's sale—Civil Code, arts. 443, 925, 928, 959—Code of Civil Procedure, art. 781.

The essence of the creation of a usufruct is that there are double gifts, one of the *jouissance* and the other of the *nue propriété*, taking effect simultaneously and without any lapse of time. In a *substitution fidéicommissaire*, on the other hand, the donee is charged to deliver the thing given, or another thing, to a third person, benefited in second place; in other words, two benefits are conferred, but in succession rather than simultaneously, and there is an interval between the enjoyment of the *grevé* and the opening of the substitution. Under art. 928 of the *Civil Code* a disposition may create a substitution notwithstanding the use of the word "usufruct"; the terms of the deed, and the intention there disclosed, rather than the ordinary interpretation of particular terms, must determine whether or not a substitution has been created.

A testator, by cl. 5 of his will, devised "la jouissance et usufruit" of his estate to his four sons and made them universal legatees "en jouissance et usufruit comme susdit". By cl. 6, he devised "la nue propriété" of his estate "aux enfants de ces derniers [his four sons] nés et à naître . . ." One of the assets of the estate, an immoveable, was seized by the sheriff to satisfy a judgment against the estate and was subsequently sold to the defendant. An opposition to secure charges was made by the grandchildren but rejected by a judgment which was not appealed. The grandchildren instituted this action to have the sale declared null on the ground that it had not discharged the right of substitution not then open. The trial judge held that the will had created a substitution, and gave judgment for the plaintiffs, but this judgment was reversed by the Court of Appeal.

Held: The appeal should be dismissed. The rights of the plaintiffs in the immoveable were discharged by the sheriff's sale since the terms of the will indicated that a usufruct rather than a substitution was created.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment at trial. Appeal dismissed.

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

(1) [1956] Que. Q.B. 817.

1957

AUBERTIN *et al.* v. LA CITÉ DE MONTRÉAL

C. A. Geoffrion, for the plaintiffs, appellants.

Philippe Beauregard, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Il s'agit dans la présente cause d'un appel d'un jugement de la Cour du Banc de la Reine (1), qui a maintenu l'appel de la Cité de Montréal et infirmé le jugement rendu par la Cour Supérieure du District de Montréal.

Les appelants sont tous les petits-enfants de feu Alexandre Aubertin, décédé à Montréal le 28 octobre 1924. Dans son testament, exécuté devant les notaires J. A. Brunet et J. H. Lippé le 2 novembre 1916, Alexandre Aubertin qui avait quatre fils, Joseph, Paul, Albert et Raoul, a disposé de ses biens de la façon suivante:

5°. Je donne et lègue la jouissance et usufruit de tous mes biens meubles et immeubles de nature quelconque que je délaisserai aux jour et heure de mon décès, sans exception ni réserve, à Joseph Aubertin, Albert Aubertin, Paul Aubertin, et Raoul Aubertin, mes quatre fils que j'institue mes légataires universels en jouissance et usufruit comme susdit.

Pour par eux avoir la dite jouissance et usufruit, leur vie durant, à leur caution juratoire et sans être tenus de faire inventaire et être partagée par parts et portions égales entre eux, savoir un quart à chacun d'eux.

6°. Je donne et lègue la nue propriété des biens ci-dessus légués à mes dits fils Joseph Aubertin, Albert Aubertin, Paul Aubertin et Raoul Aubertin, en jouissance, aux enfants de ces derniers, nés et à naître en légitimes mariages.

Pour être, mes dits biens partagés entre les enfants des dits Joseph Aubertin, Albert Aubertin, Paul Aubertin et Raoul Aubertin, par souche suivant l'ordre ordinaire des Successions, à l'exclusion de tous autres, lequel partage ne sera fait qu'après le décès du dernier des mes dits enfants ci-dessus nommés.

Dans le cas de décès d'aucun des dits Joseph Aubertin, Albert Aubertin, Paul Aubertin et Raoul Aubertin avant moi, en laissant des enfants, sa part dans ma Succession accroîtra à ses dits enfants.

Dans le cas où aucun des dits Joseph Aubertin, Albert Aubertin, Paul Aubertin et Raoul Aubertin mes fils viendrait à décéder sans laisser d'enfants ou qu'en ayant il vient ou vinssent à décéder en minorité et sans laisser d'enfants, sa part dans ma succession accroîtra à ses frères ci-dessus nommés lui survivant et dans le cas de prédécès d'aucun d'eux ci-dessus nommés aux enfants de ce dernier, à l'exclusion de tous autres, pour être partagée entre ses frères survivants et les enfants d'aucun de ses frères susnommés, décédé, par souche et suivant l'ordre des Successions.

(1) [1956] Que. Q.B. 817.

Je donne cependant à aucun de mes enfants qui décéderait sans laisser d'enfants, le droit de léguer par testament, à son épouse la vie durant de cette dernière en gardant viduité, la jouissance des biens à lui présentement légués.

Je veux et entends et c'est une clause expresse de mon présent Testament que les biens meubles et immeubles, ainsi que les fruits, revenus et intérêts de ces dits biens présentement légués à mes enfants ci-dessus nommés ou petits enfants, leur soient propres, qu'ils ne fassent partie d'aucune communauté de biens; de plus que ces dits biens et les fruits, revenus et intérêts de ces dits biens soient insaisissables par aucun des créanciers de mes enfants ci-dessus nommés et petits-enfants, leur étant donnés à chacun d'eux à titre d'aliments et de pension alimentaire, cependant la présente clause n'aura en aucune manière effet d'empêcher mes petits-enfants de vendre, hypothéquer ou autrement aliéner leur part dans les biens de ma Succession.

Par la clause 8 de son testament, le testateur a nommé son fils Joseph Aubertin exécuteur testamentaire, et a étendu ses pouvoirs au delà de l'an et jour, et lui a donné l'autorisation de vendre et de disposer de l'actif de sa succession.

Parmi cet actif dont le testateur était propriétaire à son décès, se trouvaient les 7/10 d'un lot de terre, situé dans la cité de Montréal et portant le numéro 3607 du plan officiel et du livre de renvoi de la paroisse de Montréal. Les autres 3/10 du lot en question appartenaient à trois des fils du testateur, Joseph, Paul et Albert Aubertin.

Par acte authentique en date du 27 août 1937, l'exécuteur testamentaire et les héritiers ont vendu à la compagnie Canada Packers Limited une partie du lot 3607 ci-dessus mentionné, pour le prix de $12,000 comptant. Le 1er février 1939, la Canada Packers Limited a institué des procédures judiciaires contre les vendeurs et contre tous les appelants dans la présente cause, et a réclamé le paiement de la somme de $1,157.80 pour taxes d'église affectant le lot 3607, que la Canada Packers Limited avait payées avec subrogation, et avec les conclusions hypothécaires sur la balance du lot 3607 non vendue et appartenant encore à la succession du testateur Alexandre Aubertin. Cette action a été contestée par la succession, mais a été maintenue par jugement de la Cour Supérieure rendu par l'honorable Juge Louis Cousineau le 21 décembre 1939. Un bref d'exécution a en conséquence été émis le 12 avril 1940, à la réquisition de Canada Packers Limited, et le résidu de ce lot 3607 appartenant à la succession, a été saisi pour satisfaire le jugement rendu.

1957

AUBERTIN *et al.* v. LA CITÉ DE MONTRÉAL

Taschereau J.

Les appelants actuels ont, le 31 mars 1940, produit une opposition à fin de charges dans laquelle ils ont conclu que la propriété soit vendue par le shérif, sujette aux droits des opposants comme "nus propriétaires". Cette opposition a été rejetée par jugement rendu par l'honorable Juge Surveyer le 9 octobre 1940, pour le motif que les opposants étaient parties à l'action, et l'appel à la Cour du Banc du Roi qui a suivi ce jugement a été subséquemment abandonné. Le 12 septembre 1940, la partie du lot saisie a été vendue par le shérif et adjugée à la cité de Montréal, l'intimée dans la présente cause, pour la somme de $3,300.

On voit donc par les termes du testament dont j'ai reproduit les parties essentielles et nécessaires à la détermination de cette cause, que le testateur a laissé à ses quatre fils Joseph, Albert, Paul et Raoul la *jouissance* et *usufruit* de tous ses biens meubles et immeubles pour leur vie durant, sans être tenus de faire inventaire. Quant à la *nue propriété* des biens affectés à l'usufruit, il l'a donnée et léguée aux enfants de ses quatre fils nés et à naître en légitimes mariages. Il a été stipulé que les biens ainsi légués devaient être partagés entre les enfants des quatre usufruitiers par souche suivant l'ordre ordinaire des successions, après le décès du dernier des enfants du testateur.

Il s'agit de savoir, dans la présente cause, si ce testament a créé un usufruit ou s'il a créé une substitution fidéicommissaire. Evidemment, s'il s'agit d'un usufruit, les droits des parties ont été purgés par la vente du shérif le 12 septembre 1940, mais s'il s'agit au contraire d'une substitution, alors, en vertu des termes de l'art. 781 du *Code de procédure civile,* le décret aurait purgé tous les droits réels, sauf la substitution non ouverte à cette date.

La Cour Supérieure a décidé qu'il s'agissait d'une substitution non ouverte, et que l'action instituée par les présents appelants était bien fondée, qu'en conséquence la cité de Montréal n'avait pas un titre de propriété absolu et parfait sur l'immeuble vendu par le shérif, que le droit de propriété de la cité de Montréal était sujet à caducité en faveur des demandeurs appelés à la substitution créée par le testament de feu Alexandre Aubertin, enregistré contre ledit immeuble.

La Cour du Banc de la Reine (1) a adopté une opinion contraire. Elle a renversé ce jugement, a déclaré qu'il s'agissait d'un legs d'usufruit en faveur des quatre fils Aubertin, qu'il ne s'agissait nullement d'une substitution, et que les demandeurs-appelants n'avaient pas le droit de demander que l'immeuble possédé par la cité de Montréal soit déclaré affecté d'une substitution en leur faveur et qu'à tout événement, si telle substitution existait, elle aurait été purgée par la vente du shérif à cause des dispositions de l'art. 959 du *Code Civil*, qui dit que: "Les jugements intervenus en faveur des tiers contre le grevé ne peuvent être attaqués par les appelés sur le motif de la substitution, si on les a mis en cause . . ."

Je partage les vues de la Cour du Banc de la Reine, car je vois clairement dans les termes mêmes du testament tous les éléments essentiels à la constitution d'un usufruit. On sait que l'usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance: C.C. 443. Le legs en usufruit constitue un démembrement de la propriété, car le droit de l'usufruitier qui en est un de jouissance, comporte seulement le droit d'utiliser la chose et d'en recueillir les fruits, mais non celui de disposer de cette chose. L'usufruitier a, en conséquence, le *jus utendi* et le *jus fruendi*, mais est privé du *jus abutendi*. Il n'a pas la plénitude du droit de propriété, qui ne se complétera que par la fin de l'usufruit en faveur du nu propriétaire.

L'usufruit comporte simultanément une double libéralité, prenant effet au même moment, soit la jouissance pour l'usufruitier, et la nue propriété pour l'autre bénéficiaire. Les libéralités ne comportent pas d'ordre successif. Dans la substitution fidéicommissaire, au contraire, celui qui reçoit une chose est chargé de rendre cette chose, soit à son décès, soit à un autre terme. La substitution fidéicommissaire est en effet une disposition par laquelle, en gratifiant quelqu'un expressément ou tacitement, on le charge de rendre la chose qui lui a été donnée, ou une autre chose à un tiers que l'on gratifie en second ordre: Thevenot D'Essaule no. 7. Il n'y a donc pas de libéralité simultanée, soit la jouissance d'un bien à une personne et la nue propriété à une autre en même temps. Il y a bien, comme

(1) [1956] Que. Q.B. 817.

1957

AUBERTIN *et al.* *v.* LA CITÉ DE MONTRÉAL

Taschereau J.

le dit Mignault, vol. 5, p. 8, deux libéralités, *mais d'ordre successif,* et il existe aussi *un trait de temps* entre la jouissance des grevés et l'ouverture de la substitution, quand l'appelé aura la propriété des biens.

En vertu de l'art. 928 du Code civil, il est bien vrai qu'une substitution peut exister quoique le terme d'"usufruit" ait été employé pour exprimer le droit du grevé. C'est d'après l'ensemble de l'acte et l'intention qui s'y trouve suffisamment manifestée, plutôt que d'après l'acceptation ordinaire de certaines expressions, qu'il est décidé s'il y a ou non substitution.

Dans le cas qui est soumis à la considération de cette Cour, il me semble clair d'après les termes du testament, qu'il y a eu en premier lieu une *double libéralité simultanée,* soit la jouissance des biens aux quatre fils Joseph, Albert, Paul et Raoul Aubertin, et en même temps, en vertu du paragraphe 6 de son testament, le testateur a donné et légué *la nue propriété* des biens ci-dessus légués à ses petits-enfants, soit les enfants des quatre fils ci-dessus mentionnés, nés et à naître en légitimes mariages. Tous ces biens doivent être partagés entre les enfants de Joseph, Albert, Paul et Raoul Aubertin par souche suivant l'ordre ordinaire des successions, et le partage ne doit être fait qu'après le décès du dernier des quatre fils ci-dessus mentionnés. Il n'y a pas *d'ordre successif* qui est créé, comme il n'y a pas davantage de *trait de temps entre le droit de chacun des légataires.* S'il y avait une substitution, il faudrait voir dans les termes du testament, et a défaut de précisions satisfaisantes, par l'ensemble de l'acte et l'intention qui s'y trouve manifestée par le testateur, un ordre successif, c'est-à-dire des libéralités successives, et un trait de temps qui est essentiel à la substitution.

En d'autres termes, l'usufruit est un droit réel limité à la vie de son titulaire auquel il permet de se servir d'une chose *appartenant à autrui* et d'en prendre les fruits, sans en altérer la substance ni en modifier la destination: Capitant, "Vocabulaire Juridique" p. 488.

C'est pourquoi dans l'usufruit il y a deux libéralités simultanées, la jouissance à un, la nue propriété à un autre, tandis que la substitution, pour employer l'expression de

Pothier (Œuvre de Pothier vol. 8, p. 455), est une disposition que l'on fait de ses biens au profit d'un autre *par le canal d'une personne interposée* que l'on charge de remettre à cet autre. Comme le dit M. le Juge L. P. Demers dans la cause de *Gauthier v. L'Hon. M. Wilson et al. et Antigna* (1):

> Ce qui caractérise la substitution, c'est que le testateur fait pour ainsi dire le testament de chacun des grevés quant aux biens donnés.

Dans le cas de substitution, les biens passent d'une personne à une autre mais non pas dans le cas d'usufruit. L'appelé n'a nullement la propriété, mais la reçoit par l'intermédiaire d'un grevé qui est chargé de la lui remettre. Ce n'est qu'à cette époque, à l'ouverture de la substitution, que l'appelé recevra la propriété de la chose. Les mots "nue propriété" comportent à mon sens l'idée d'un usufruit, à moins que le contraire n'apparaisse, car dans le cas de substitution le droit de propriété de l'appelé ne naîtra qu'à la mort du grevé. Dans le cas qui nous occupe, il n'y a rien de semblable. Seul le partage se fait à la mort du dernier des fils, de tous les biens dont les petits-fils avaient déjà la propriété.

Pour ces raisons, et celles données par la Cour du Banc de la Reine, je suis d'avis de rejeter le présent appel avec dépens.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Pager & Pager, Montreal.

Solicitors for the defendant, respondent: Choquette & Berthiaume, Montreal.

---

(1) (1925), 31 R.L.N.S. 50 at 58.

1957

*May 24, 27
**Oct. 1

RICHARD FOLEY (*Defendant*) .....APPELLANT;

AND

OVILA MARCOUX (*Plaintiff*) .....RESPONDENT.

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

Infants—Automobile taken by minor son of owner—Whether father liable for injury resulting from minor's negligence—No allegation of minority in action taken against father—Minor not préposé of his father—Civil Code, arts. 1053, 1054—The Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53.

When, in an action against a father for damages caused by his minor son while driving his father's car with permission, there is no allegation of the minority of the son and it is admitted that the son was not the *préposé* of his father, the latter cannot be held responsible under art. 1054 C.C. But his responsibility will be engaged under art. 1053 C.C. if it is proved that he was negligent in permitting his son to take his car.

The defendant's son, aged 18 years, took his father's automobile and negligently struck and injured the plaintiff's minor daughter. The son did not have specific permission to use the car on this occasion but had a continuing and standing permission to use it for his own purposes whenever he wished to do so. He used a piece of wire to start the car, as the keys were in his father's possession, but to the knowledge of his father he had used a similar device previously. The liability of the father was maintained by the trial judge and by a majority in the Court of Appeal.

Held (Rand J. dissenting): The appeal should be dismissed. The father was guilty of a fault of omission in not exercising a proper supervision and control over the driver. It is not sufficient to give instructions, one must see that they are followed.

If the defendant is responsible under art. 1053 C.C. because of his negligence, he is *a fortiori* responsible under the *Motor Vehicles Act* which creates a presumption against him.

Rand J., *dissenting,* agreed with Martineau J. that the defendant had proved that the damages suffered by the plaintiff's daughter were not the result of his fault.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming the judgment at trial. Appeal dismissed.

S. D. Rudenko, Q.C., for the defendant, appellant.

C. A. Séguin, Q.C., for the plaintiff, respondent.

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Nolan JJ.
**Nolan J. died before the delivery of judgment.

(1) [1957] Que. Q.B. 512.

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

TASCHEREAU J.:—Les circonstances suivantes ont donné naissance à cet appel. Le 2 juillet 1950, la voiture automobile de l'appelant Richard Foley était conduite par son fils Richard Foley jr. et, dans la paroisse de St-Grégoire le Grand, district d'Iberville, a frappé la fille mineure de l'intimé es-qualité, qui circulait à bicyclette sur la route régionale Iberville-Farnham. La victime a subi des blessures graves, et l'intimé a en conséquence réclamé, tant personnellement qu'en sa qualité de tuteur à son enfant mineure, la somme de $75,000 contre Richard Foley père et Richard Foley fils, conjointement et solidairement.

La Cour Supérieure, présidée par M. le Juge C. E. Ferland, a accueilli l'action contre Richard Foley père, pour la somme de $26,843.81, mais elle l'a rejetée contre le fils, parce qu'au moment de l'assignation ce dernier était mineur. La Cour du Banc de la Reine (1) a rejeté l'appel logé seulement par Richard Foley père. M. le Juge Martineau dissident, aurait maintenu l'appel et rejeté l'action. Ici, comme en Cour d'Appel, il n'est pas question de l'action qui a été instituée contre le fils.

La veille de l'accident en question, c'est-à-dire le samedi 1er juillet, Richard Foley fils, avec l'un de ses frères ainsi que Jules Poliquin et Réal Cousineau, avaient passé la soirée avec d'autres amis, dans le garage de Richard Foley père, et il est en preuve qu'ils avaient bu ensemble plusieurs bouteilles de bière. Vers onze heures ce soir-là, le fils prit la voiture de son père et, en compagnie de Cousineau et Poliquin, ils se rendirent tous trois dans le district d'Iberville, où ils passèrent la nuit. Le lendemain matin, soit le dimanche suivant, les trois jeunes voyageurs se rendirent dans un hôtel local, où ils absorbèrent encore des liqueurs alcooliques. Ils quittèrent l'hôtel vers 11.30 heures de l'avant-midi, et l'accident s'est produit vers midi. Après l'accident, Richard Foley fils et ses compagnons ont quitté les lieux sans porter secours à la victime; ils cachèrent l'automobile dans une cour dans la ville d'Iberville, et ils ont continué leur route vers Montréal, sauf Richard qui est demeuré à St-Jean, et qui après, est retourné à Montréal et

(1) [1957] Que. Q.B. 512.

1957

FOLEY
v.
MARCOUX

Taschereau J.

s'est caché sous une tente, où la police l'a retrouvé. Au jour fixé pour l'enquête, ce dernier était détenu dans la prison commune de Bordeaux, où il a purgé une sentence d'emprisonnement.

Il ne fait aucun doute que cet accident est dû à la faute de Richard Foley fils, qui conduisait la voiture. Le juge au procès en vient à la conclusion qu'il conduisait d'une manière imprudente, dangereuse et quasi criminelle, dans une courbe, et à une vitesse illégale. D'ailleurs, devant la Cour du Banc de la Reine, la question de négligence dans la conduite de l'automobile n'a pas été soulevée, et elle ne l'a pas été davantage devant cette Cour.

Dans son plaidoyer, Richard Foley père allègue que c'est sans permission que le fils a pris son automobile la veille de l'accident, qu'il n'était pas son préposé, qu'il a bien élevé son fils, lui a donné les soins d'éducation que doit donner un bon père de famille à ses enfants, et a veillé sur lui avec soin et diligence.

Dans l'action, la minorité du fils n'est pas alléguée, et elle ne l'est pas davantage dans le plaidoyer de Foley père. Cette absence d'allégation exclurait par conséquent l'application de l'art. 1054 C.C., qui est à l'effet que le père est responsable du dommage causé par son fils mineur, mais cette responsabilité que la loi présume a lieu seulement lorsque le père ne peut prouver qu'il n'a pu empêcher le fait qui a causé le dommage.

Dans la cause de *Alain v. Hardy* (1), il a été décidé que si le père démontre la compétence de son fils mineur pour conduire une automobile, qu'il était porteur d'une licence après avoir passé les examens requis, qu'il était un chauffeur compétent, ayant une assez longue expérience, qu'il n'est pas adonné aux liqueurs alcooliques, qu'il était assidu à son travail et prudent dans la conduite des véhicules automobiles, il repousse la présomption créée par l'art. 1054.

Mais ce n'est pas ainsi dans la présente cause que le débat s'est engagé, vu les allégations de la contestation écrite. Comme il est établi que le fils *n'était pas le préposé de son père,* ce dernier ne peut de ce chef être tenu civilement responsable, sous l'empire de l'art. 1054 C.C.

(1) [1951] S.C.R. 540.

Si dans l'occurrence il y a responsabilité du père, c'est donc en vertu de l'art. 1053 C.C., mais alors, le fardeau de la preuve repose normalement sur le demandeur, et c'est à lui qu'incombe de prouver une faute imputable au défendeur. Ainsi, ce sera pour lui une faute qui engagera sa responsabilité, de prêter sa voiture automobile à un chauffeur incompétent, d'être négligent dans le choix de la personne qui doit la conduire (*culpa in eligendo*).

Il n'y a pas dans la déclaration d'allégation de faute de cette nature, mais le défendeur a voulu démontrer qu'il n'avait pas été coupable de cette négligence qui pouvait lui être reprochée, et c'est ainsi que le débat s'est engagé. Comme le dit M. le Juge Bissonnette, avec qui je m'accorde:

> Ainsi donc, telle que liée, la contestation ne permettait pas à la défense de recourir à la preuve de l'exonération découlant du deuxième alinéa de l'art. 1054 C.C. Mais parce qu'elle a tenté cette preuve, la demande pouvait la combattre et, comme ceci se faisait sans objections de part et d'autre, l'intimé peut tirer avantage de tous faits répréhensibles prouvés contre l'appelant en raison de sa conduite fautive à l'endroit de son fils, non pas cependant sous la force de l'article 1054, mais sur celle de l'article 1053 C.C.

Dans sa défense, Richard Foley père plaide entre autres qu'il n'est pas en faute, que son fils a été bien élevé, qu'il lui a donné tous les soins d'entretien et d'éducation qu'un bon père de famille doit donner à ses enfants, qu'il lui a toujours prodigué de bons conseils. Dans sa réponse, le demandeur allègue que le défendeur savait d'ailleurs que son fils était imprudent, mais il lui confiait régulièrement l'usage de son automobile, sans égard aux risques qu'il encourait ainsi. L'appelant aurait donc prêté sa voiture à son fils, malgré que ce dernier fût imprudent, et ne se préoccupait nullement des conséquences prévisibles.

Comme le signale M. le Juge Bissonnette, il est très possible que cette allégation de la réponse soit illégale, mais l'objection, je crois, est tardive et irrecevable, parce que non seulement l'appelant n'en a pas demandé le rejet, mais il a, dans sa réplique, lié contestation sur icelle. La preuve a été versée au dossier sans objection, et ce n'est pas la fonction de cette Cour de se soucier maintenant de cet incident de procédure.

Il résulte donc que si Foley père a commis une faute en prêtant sa voiture à un conducteur dont la compétence n'offrait pas la garantie nécessaire de sécurité, sa responsabilité sera engagée en vertu de l'art. 1053 C.C.

1957

FOLEY
v.
MARCOUX

Taschereau J.

La preuve révèle, et c'est la conclusion à laquelle en est arrivé le juge au procès, que le fils détenait un permis pour conduire une automobile avec le consentement écrit de son père, et que ce dernier avait donné à son fils la permission de se servir de la voiture à volonté, pour ses fins personnelles, sans demander aucune autorisation préalable. Il n'est pas contesté que le soir en question, Foley père avec madame Foley étaient dans la maison, et que dans le garage en arrière de la cour, où se tenait une réunion pour célébrer le retour d'un jeune Foley arrivé d'Afrique, plusieurs personnes étaient réunies. Après que la réunion eut pris fin, Foley fils prit la voiture de son père, et comme je l'ai signalé déjà, en compagnie de Cousineau et Poliquin, ils se rendirent dans le district d'Iberville, pour y voir un autre ami du nom de Perron. Comme Foley père était allé se coucher assez à bonne heure, il avait laissé sa voiture dans la cour de la maison, vu que le garage était occupé, et avait gardé les clés avec lui, de sorte que personne normalement ne pouvait se servir de la voiture sans lui demander les clés. Au lieu d'aller éveiller son père pour les lui demander, afin de se rendre à Iberville, Foley fils établit le contact dans la voiture, dont les portes n'étaient pas fermées à clé, au moyen d'un fil de plomb, et c'est ainsi qu'il réussit à démarrer.

Je crois que la négligence de Foley père a été établie, et que sa faute en est une d'omission, vu qu'il n'a pas exercé la surveillance voulue dans le choix du conducteur. Il n'est pas suffisant pour se disculper de la responsabilité civile, de donner des instructions, mais encore faut-il voir à ce que ces instructions soient observées. Dans le cas actuel, il y a à mon sens certainement eu une déficience de ce côté. Le fils qui n'avait que 18 ans et qui, en conséquence, devait être surveillé davantage, avait la permission de se servir de la voiture quand il le voulait. Malgré que ce fût le père qui gardait les clés, il savait que son fils faisait usage de la voiture pour entreprendre des randonnées nocturnes, sans demander les clés. Il est clair que ce dernier devait donc nécessairement, au cours de ces occasions, faire démarrer la voiture au moyen d'un fil de plomb, comme il l'a fait le

soir de l'accident. L'appelant était satisfait que l'automobile fût de retour le matin afin qu'il puisse s'en servir lui-même. Voici ce qu'il dit à ce sujet dans son témoignage:

Q. Did he ever before take your car at night without permission, nor asking you for the keys?

A. Yes a few times, but as long as the car was there in the morning I did not mind him taking the car.

Le soir en question, l'appelant savait ou devait savoir que de la bière se consommait dans la cour et dans le garage, pour célébrer le retour de l'autre fils, et que les jeunes gens dont son fils mineur, absorbaient en assez grande quantité des liqueurs alcooliques. Au lieu d'exercer la vigilance requise qui s'imposait dans une semblable occasion, l'appelant est allé se coucher, et a laissé à la jeunesse la liberté dont elle a profité, avec le résultat malheureux que l'on connaît.

L'appelant nous dit qu'il avait les clés avec lui, dans sa chambre. Mais il ne pouvait pas ignorer, à cause des expériences passées et de la tolérance bienveillante qu'il manifestait, qu'il était facile pour Richard fils de se servir quand même de la voiture. C'est donc une grave faute d'omission que l'appelant a commise, et il doit en subir toutes les conséquences qui découlent de la loi.

L'article 53 de la *Loi des Véhicules-Moteurs*, S.R.Q. 1941, c. 142, ne peut pas être invoqué davantage comme fin de non recevoir. Si, comme je le crois, l'appelant est responsable en vertu de l'art. 1053 C.C., parce que sa faute a été établie, *a fortiori* l'est-il en vertu de la *Loi des Véhicules-Moteurs* qui crée une présomption contre lui.

Pour les raisons ci-dessus je suis donc d'opinion que l'appel doit être rejeté avec dépens.

RAND J.:—For the reasons given by Martineau J. in the Court of Queen's Bench (1), I would allow the appeal and dismiss the action with costs throughout.

Appeal dismissed with costs, RAND J. *dissenting.*

Solicitor for the plaintiff, respondent: Stanislas Poulin, St. Jean, Quebec.

Solicitors for the defendant, appellant: Rudenko & Gross, Montreal.

(1) [1957] Que. Q.B. 512.

1957
*June 12
Sept. 30

MAYNARD BOYCE MARSHALL AND HARRY ALVIN VAN ALLEN (*Plaintiffs*) ..... APPELLANTS;

AND

CROWN ASSETS DISPOSAL CORPORATION (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of goods—Special terms and conditions—Withdrawal of goods not yet "delivered"—What constitutes delivery.

The plaintiffs agreed to buy from the defendant certain machines, the contract containing a clause entitling the defendant "to withdraw from the sale any property which has not been delivered to the purchaser". After execution of the contract, payment in full of the purchase-price and delivery to the plaintiffs of an authority to the custodian to release or ship the machines, the plaintiffs sent a carrier to collect them but before the carrier was able to obtain possession the defendant withdrew the goods from sale and returned the cheque given by the plaintiffs. The plaintiffs sued for damages for breach of contract.

Held: The plaintiffs could not succeed. The word "delivered" in the contract imported an actual physical delivery out of the possession of the custodian, and since this had not taken place the defendant was entitled to withdraw the machines; there was no room for construing the contract *contra proferentem*. Nor, in view of the positive terms of the condition, could it be said that the defendant was estopped by the conduct of its employee from asserting that there had not been delivery; there was nothing in the record to show that the employee was authorized by the defendant to waive its right to enforce the condition.

APPEAL by the plaintiffs from a judgment of the Court of Appeal for Ontario (1), affirming a judgment of Barlow J. (2). The facts are fully stated in the reasons for judgment of the Courts below and for purposes of this report may be briefly summarized as follows:

The plaintiffs entered into a contract with the defendant corporation for the purchase of five tractor crawlers which were at that time at the United States Naval Station at Argentia, Newfoundland. These machines were surplus goods which the defendant was authorized to sell on behalf of the Government of the United States.

(1) [1956] O.R. 930, 5 D.L.R. (2d) 572.

(2) [1956] O.W.N. 489, 3 D.L.R. (2d) 156.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Nolan JJ.

The contract of sale, which was executed by both parties on May 17, 1955, was expressly made subject to "general conditions of sale", under no. 1 of which the defendant corporation was entitled "to withdraw from the sale any property which has not been delivered to the Purchaser".

On execution of the contract the plaintiffs obtained from the defendant written authority to the custodian to release or ship the tractors, and they then instructed a carrier in Newfoundland to collect them for the plaintiffs. Before the carrier was able to obtain possession of the machines, they were withdrawn from sale by the defendant pursuant to instructions received from the United States.

The plaintiffs were advised on May 24, 1955, by G. L. Wood, who had negotiated with them on behalf of the defendant, that the sale was "cancelled under clause no. 1, general conditions of sale" and the cheque given by them to the defendant was returned.

The plaintiffs sued for damages for breach of contract but the action was dismissed at trial and on appeal.

G. E. Beament, Q.C., and *R. B. Hutton*, for the plaintiffs, appellants.

D. S. Maxwell, for the defendant, respondent.

At the conclusion of the argument, judgment was delivered orally dismissing the appeal with costs. The reasons of Kerwin C.J. and Locke, Cartwright and Abbott JJ.* were delivered by

THE CHIEF JUSTICE:—At the conclusion of the argument on behalf of the appellants we dismissed this appeal with costs, without calling upon counsel for the respondent. We are of opinion that there is no ambiguity in clause 1 of the "general conditions of sale", reading as follows:

> 1. Crown Assets Disposal Corporation (hereinafter referred to as "The Corporation") reserves the right to withdraw from the sale any property which has not been delivered to the Purchaser without incurring any liability except to refund to the Purchaser any amount paid on account of such property.

We agree with the Court of Appeal that "delivered" means actual delivery out of the possession of the custodian, *i.e.*, the U.S. Naval Station Supply Department, Argentia,

* Nolan J. died before the delivery of the reasons.

1957

MARSHALL AND VAN ALLEN v. CROWN ASSETS DISPOSAL CORPN.

Kerwin C.J.

Newfoundland. There is, therefore, no room for the application of the doctrine *contra proferentem* and none of the decisions relied upon by the appellants in that connection applies.

In view of the positive terms of the condition, the argument that the respondent was estopped by the conduct of its employee Wood from asserting that there had not been delivery cannot be supported. There is nothing in the record to sustain a contention that Wood was authorized in any manner to waive on behalf of the respondent the right to enforce the condition.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Beament, Fyfe & Ault, Ottawa.

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

1956

*Dec. 14, 15

1957

June 26

THE PRUDENTIAL TRUST COMPANY LIMITED (*Applicant*) .... APPELLANT;

AND

THE REGISTRAR, THE LAND TITLES OFFICE, HUMBOLDT LAND REGISTRATION DISTRICT (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real property—Land titles system—Effect of certificate—Notation "Minerals Included" erroneously made by registrar—Rights of purchaser relying on certificate—The Land Titles Act, R.S.S. 1953, c. 108, ss. 66, 67, 200(1).

Crown lands were granted in 1909 by a patent which reserved to the Crown all mines and minerals. After various mesne conveyances, a certificate of title was issued on July 11, 1929, bearing a rubber stamp endorsement "Minerals Included". On October 4, 1949, the then owner of the lands conveyed them to transferees to whom a certificate of title was issued with the same endorsement. On January 29, 1951, these owners executed a transfer of a one-half interest in the mines and minerals to the appellant company and a certificate of title was issued to the appellant on February 12, 1954. The respondent had filed a caveat on October 9, 1953, on behalf of Her Majesty in the right of

*PRESENT: Rand, Kellock, Locke, Cartwright and Nolan JJ.

the Province against the registration of any instrument affecting title to the minerals. The appellant then proceeded by way of originating notice to determine the title to the minerals.

Held: The caveat must be withdrawn. The appellant had a title good as against all persons, including the Crown, to the mines and minerals conveyed to it by the transfer of 1951. Whatever might be said as to the position before the Province of Saskatchewan acquired its natural resources in 1930, the effect of the certificates issued after that date and bearing the endorsement "Minerals Included" was conclusive on a proper reading of ss. 66, 67 and 200(1) of *The Land Titles Act*.

Per Rand, Locke, Cartwright and Nolan JJ.: The mistake made in endorsing the certificate did not result in a "wrong description of boundaries or parcels" within the meaning of s. 200(1). *Canadian Pacific Railway Co. Ltd. et al. v. Turta et al.*, [1954] S.C.R. 427, applied.

APPEAL from a judgment of the Court of Appeal for Saskatchewan (1) affirming a judgment of Doiron J. (2). Appeal allowed.

E. C. Leslie, Q.C., for the applicant, appellant.

Roy S. Meldrum, Q.C., and *Jule G. Gebhart*, for the respondent.

RAND J.:—The administration of lands by the Dominion in what is now the Province of Saskatchewan up to September 1, 1905, the date of the erection of the Province, was, for the purposes here, under *The Dominion Lands Act*, R.S.C. 1886, c. 54, and *The Land Titles Act*, 1894 (Can.), c. 28. By 4-5 Ed. VII, c. 42, the constituting Act, the ungranted public lands and reserved interests in granted lands were retained by the Dominion to be administered in the interest generally of Canada. By s. 16 all laws and regulations then in force were continued as if the Act had not been passed, but subject to be repealed or amended by Parliament or Legislature according to the authority of each.

The Province, by c. 24 of its statutes of 1906, enacted *The Land Titles Act* which, by s. 204, was to come into force upon the repeal, so far as it was applicable to lands within the Province, of *The Land Titles Act*, 1894. This repeal was effected by order in council dated July 23, 1906, under the authority of 4-5 Ed. VII (Can.), c. 18, and became final on September 8, 1906, the date of its last publication in the Canada Gazette. From that date, therefore, the provincial *Land Titles Act* applied to lands granted thereafter by the

(1) (1956), 18 W.W.R. 1, 2 D.L.R. (2d) 29. (2) (1955), 16 W.W.R. 287.

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Rand J.

Dominion, the letters patent for which were forwarded direct to the provincial registrars of land titles. The distinction so indicated between the proprietary interests of the Dominion and their administration and the regulatory jurisdiction of the Province over its own as well as the proprietary interests of private persons becomes significant to the resolution of the controversy here presented.

The interests retained by the Dominion, whether in the form of reservations or exceptions in the grant or in escheat or forfeiture (and apart from cases of grants of less than fee simple), were beyond the operation of provincial law; they were property of Canada and under s. 91 of the *British North America Act* within the exclusive legislative jurisdiction of Parliament. It is not suggested that any statutory provision of Parliament subjected them, by way of adoption, to the operation of the provincial *Land Titles Act*; and they were thus, after September 8, 1906, unaffected by any registration enactment.

This remained the situation until October 1, 1930, when *The Saskatchewan Natural Resources Act,* 1930 (Can.), c. 41, came into force. By its provisions and those of the agreement which it ratified, all interests of the Dominion in and connected with lands within the Province other than those which were to continue to be administered by the Dominion under the various heads of s. 91 of the federation Act, were transferred to the Province.

As of April 1, 1930, the provincial Legislature passed *The Administration of Natural Resources (Temporary) Act, 1930,* c. 12 of the statutes of that year. By s. 2 the provisions of certain Dominion statutes, including *The Dominion Lands Act,* enumerated in a schedule, so far as they dealt with matters within provincial authority, were continued in force. Broad powers of repeal and substitution and for making regulations were conferred on the Lieutenant Governor in council; and the setting up of a Department to administer the transferred resources was authorized.

The effect of these enactments was that the transferred interests passed under the control of the Province as of October 1, 1930, and that the only legislation then applicable was that of the continued provisions of the *Dominion Lands Act* enabling their administration and the provincial *Land Titles Act* of 1906 as amended.

The Provincial Lands Act, 1931 (Sask.), c. 14, and *The Mineral Resources Act, 1931* (Sask.), c. 16, became effective on August 15 of that year. Between October 1, 1930, and that date, what was the standing of the title to mineral rights so transferred in relation to *The Land Titles Act*? The Province had become in effect the owner of minerals reserved in original Dominion grants, the remaining interests in which, speaking generally, were held under certificates of title authorized by the provincial statute which contained provisions subjecting the interests of the Crown to certain effects of the declarations of title contained in the certificates. Did the transferred interest in reservations thereupon become subject to what are now ss. 67 and 200 of *The Land Titles Act*, R.S.S. 1953, c. 108, in the same manner and to the same extent as if the grants had been made originally by the Province, for example, between October 1, 1930, and March 11, 1931?

Section 67 deals with a certificate as an instrument of title in its descriptive aspect, as in an abstract; and in addition to express registrations for which provision is made by the statute, the certificate impliedly tabulates certain interests to which the title certified is declared to be subject. That, as a provincial instrument, it can and should exempt from its descriptive inclusion an interest reserved to the Crown in the original grant whenever and by whomever made, seems to me to be obvious. Its purpose is to furnish a true and correct specification of the estate or interest in land of which the statute affirms a definitive legal ownership in the holder, to distribute by enumeration the total interests of the fee simple with all burdens and subtractions however they arise. This function is to be distinguished from that of those sections which declare the legal effect of that description in relation to conflicting sources of interests or titles.

The clause in the first paragraph of s. 67, "unless the contrary is expressly declared", likewise goes to a descriptive purpose and is unobjectionable. When the operative efficacy of s. 200, on which the trust company rests its claim, is extended to clause (*a*) of s. 67, however, a further consideration must be taken into account. As already mentioned, a reservation in a grant by and subsisting in the Dominion cannot be affected by such a provision as s. 200. But when

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Rand J.

that reserved interest comes within the administration of the Province, a different situation is presented, in the examination of which a distinction must be made between a grant, say, of minerals to an individual and an administrative transfer, as in 1930, to the Province. If, for example, between June 11, 1929, when the certificate in this case was issued to the tax purchaser, and October 1, 1930, the Dominion Government had granted the minerals to A, would the prior certificate with its endorsement "Minerals Included" have prevailed over that issued upon the later grant? I should say not, because as the Dominion Crown was not bound by the provincial Act, its grant could not be nullified as from the moment of its issue. If a similar situation had arisen before September 5, 1905, while the Act of 1894 was in force, a different question would have been presented, calling, in my opinion, for a different answer.

But after October 1, 1930, there is the coincidence in the Province of both the administrative control of the minerals and the subjection of the Crown to the statute, as would have been the case of the Dominion between 1894 and September 1, 1905; and although a grant of the minerals by the Dominion to an individual could not be defeated by provincial law, a transfer of administrative powers over Crown interests to the Province can be nullified by an instrument given appropriate efficacy by provincial legislation. If the certificate issued in 1949 containing the same endorsement as in those of 1911 and 1929, "Minerals Included", would supersede the prior vested interests of the Province, uncertified, as I think it would, I can see no escape from attributing the same effect after October 1, 1930, to the certificate of 1929 or its predecessor of 1911. Once ownership, as it may be called, of the Province arises, the statute applies automatically, "every certificate" shall be "conclusive evidence . . . as against Her Majesty", and no subsequent date can be fixed as marking the point of producing that result. It is as if on November 1, 1930, the Province for the first time enacted s. 200; the same coincidence would arise with the same effect, just as in the case of a subsisting reservation made before 1894 at the moment of the enactment of s. 57, the forerunner of s. 200. If the certificate of 1949 had been issued on October 2, 1930,

would the result have been different? I do not think so. What, then, do ss. 67 and 200 provide as binding the provincial Crown?

Section 67 had its prototype in s. 56 of the Act of 1894 and to the end of clause (*a*) is identical in its language; the subsequent clauses have been somewhat modified in their terms and some particulars have been added to the class of interests which generally they cover; but essentially the two sections deal with the same matters and serve the same purpose, a purpose already elaborated. The phrase "unless the contrary is expressly declared", the vital phrase, does not mean the logical converse of the affirmative "shall be subject to"; it is not that the express declaration should, for example, be "This certificate is not subject to subsisting reservations in the original grant from the Crown"; that would involve a self-contradiction. The reservations may still remain in the Crown or may have been granted, and in the latter case they would be embodied in a certificate. What the section provides for as a contrary declaration is express language to the effect that the content of the land described and certified as owned by the holder includes a specific interest that, in the grant, may have been reserved. The interest is to be "subsisting"; if the reservation no longer subsists as such in the Crown, its subject-matter must have become merged in or released from the estate declared by the certificate, or have been disposed of by grant. There might, of course, have been nothing reserved. The important consideration is that the implication of the declaration or specific inclusion, that the reservation is no longer "subsisting", may be erroneous.

Then s. 200 enters: the certificate is to be conclusive against Her Majesty as well as all other persons. "Subject to the exceptions and reservations implied under the provisions of this Act" must mean, when related to s. 67, as they are to be interpreted along with the clause providing the "declaration to the contrary". And here arises the question of what is meant by being "under the Act" where "land" is defined to include "any interest". It means either that the interest has been embodied in a certificate or that, by the language of the statute, it has been drawn within the operation of provisions declaring the conclusiveness of a certificate. If the reservation of an interest in the original

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Rand J.

grant by a Province remains for all purposes outside of and unaffected by the statute, the "declaration to the contrary" is read out of s. 67, and clause (*a*) serves the purpose only of a notice that it is excluded absolutely from the certificate. But the other clauses have not that purpose: they are concerned with interests which are created outside of the Act, which, but for the enumeration, would be overridden by the certificate, but which by an "express declaration to the contrary" can be defeated. I cannot see how, in the light of s. 200, a distinction is to be made between them; and if one can be overridden by a declaration, so can all. The necessary implication of the clause, then, is that the interest of the Province arising from a reservation in an original provincial grant can be bound by such a declaration in a certificate.

It follows that s. 67(*a*) provides for a descriptive title in a certificate in priority to subsisting Crown reservations made in original grants by either Government, and by force of s. 200 this is as operative against the Province when the reserved interest has been transferred to it by the Dominion as when the reservation has been made by itself.

Is there, then, under s. 200, a case of "wrong description of boundaries or parcels"? The judgment of this Court in *Canadian Pacific Railway Co. Ltd. et al. v. Turta et al.* (1), held that similar language in the Alberta Act did not embrace the omission of a reservation of mines and minerals in a certificate and the same result must follow from the improper inclusion of such an interest.

Nor can it be claimed for the Crown that it holds a prior "certificate of title granted under this Act". The language of s. 35 of the Act of 1894 in which the folio in the land titles office is spoken of as "constituted by the existing grant or certificate of title of such land" was retained in s. 45 of the statute of 1906, but in s. 37 of R.S.S. 1909, c. 41, the words "grant or" were omitted. This puts it beyond doubt that these instruments are not equivalents and that the registered grant does not by itself constitute a statutory title under the Act to the interests reserved to the Crown. Apart from an express legislative declaration of an indestructible paramount title, the provincial Crown is in the position of

(1) [1954] S.C.R. 427, [1954] 3 D.L.R. 1, 12 W.W.R. 97.

not being able, except by means of a prior certificate or caveat, to protect its reservations from the operation of s. 200.

This interpretation is supported by the general intendment of the statute which treats a grant in fee simple as the controlling interest and the reservations as incidental. By subjecting the Crown to the operation of ss. 67 and 200, the disposal of the fee draws those interests within the effects of error which the statute contemplates and which it subordinates to the legal declaration of ownership contained in the certificate.

The purpose of the new system of land titles was declared in its first enactment as *The Territories Real Properties Act,* 1886 (Can.), c. 26, as being

> to give certainty to the title to estates in land in the Territories and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive.

In the light of that language the Crown has bound itself with the subject to the conclusiveness of the certificate. This cannot be restricted to land which, in the sum total of interests, has been granted out of the Crown, because the reservations within s. 67(*a*) must have been made in the original grant and still subsist in the Crown. And where the language of that clause and of the qualifying declaration is in such general terms, the basic purpose of the statute becomes pertinent to the interpretation. The same pertinency exists in relation to s. 200.

There remains the question of the effect upon ss. 67 and 200 of *The Provincial Lands Act,* now R.S.S. 1953, c. 45, and *The Mineral Resources Act,* now R.S.S. 1953, c. 47, including their amendments. The former, by s. 10, provides that in every disposition of provincial lands the reservations provided for by that Act, *The Mineral Resources Act,* and others shall be implied. "Disposition" is defined in s. 2(4) as

> the act of disposal or an instrument by which that act is effected or evidenced, and includes a Crown grant, order in council, transfer, assurance, lease, licence, permit, contract or agreement and every other instrument whereby lands or any right, interest or estate in land may be transferred, disposed of or affected, or by which the Crown divests itself of or creates any right, interest or estate in land.

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Rand J.

Section 3 of *The Mineral Resources Act* declares that mines and minerals "shall be leased or otherwise disposed of only in accordance with the provisions" of that Act and regulations made under it. The word "disposition" is given the same meaning as in *The Provincial Lands Act*.

These provisions co-exist with those of *The Land Titles Act* and a reconciliation must be made if their language permits it. The former deal with the act or instrument of the Crown disposing of its interests; but it is not by such an act or instrument that the effects of ss. 67 and 200 are brought about; it is by the force of an act of the Legislature; and once an interest of the Crown becomes bound by the conclusiveness of a certificate, that legal result is untouched by those two statutes. If that were not so, the submission by the Crown to ss. 67 and 200 would be limited to interests embodied in certificates of title, which would render s. 67(*a*) meaningless and reduce s. 200 to cases in which the Crown, by dealing in land already brought under certificate, would be bound by that fact alone.

I would, therefore, allow the appeal, set aside the judgments below, and direct the removal from the certificate of the caveat registered on October 9, 1953, as B.G. 5418. There will be no costs.

KELLOCK J.:—The question at issue in this appeal concerns the title to certain mines and minerals reserved to the Crown in the right of Canada by a patent of July 29, 1909, by which the lands, apart from the minerals, were granted to one Burrows. The latter registered his grant on September 2, 1909, and on the same day received a certificate of title under the provincial *Land Titles Act,* 1906, c. 24. By various mesne conveyances the title of Burrows became vested in one Schindler, to whom a certificate of title was issued on June 11, 1929, which certificate had endorsed upon it, by means of a rubber stamp, the words "Minerals Included". On October 4, 1949, Schindler executed a transfer in favour of Joseph and Carl Guber, the predecessors in title of the appellant, to whom a certificate of title was issued on October 29, 1949, bearing the same endorsement.

Ultimately, on January 29, 1951, the Gubers executed a transfer of an undivided one-half interest in the mines and minerals to the appellant, to whom a certificate of title

was issued on February 12, 1954. In the meantime, on March 13, 1951, a caveat had been registered by the appellant, followed on October 9, 1953, by a caveat filed by the respondent on behalf of Her Majesty in the right of the Province against the registration of any instrument affecting title to the said minerals. The present proceedings were brought by the appellant by way of originating notice to determine the mineral title.

Doiron J., the judge of first instance, gave effect to the caveat filed on behalf of the respondent, and ordered cancellation of the certificate of title issued to the appellant, as well as deletion of the endorsement on the certificate of title issued to the Gubers. An appeal by the present appellant was dismissed by the Court of Appeal, Culliton J.A. dissenting.

It is common ground that *The Land Titles Act,* R.S.S. 1953, c. 108, recognizes the registrability of an estate in fee simple in minerals as a subject-matter of distinct ownership, and while the appellant admits that the minerals were never granted by the Crown, it is contended that in dealing with the Gubers with respect to the minerals, the appellant relied and was entitled to rely upon the certificate of title issued to them and that such certificate was "conclusive evidence as against Her Majesty" that they had title by virtue of ss. 67 and 200(1) of *The Land Titles Act.*

The appellant further submits that by reason of the express terms of s. 200(1), the Crown is bound by the statute and that the endorsement is an express declaration within the meaning of s. 67, which provides that:

> 67. The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to:
>
> (*a*) any subsisting reservations or exceptions contained in the *original* grant of the land from the Crown; . . .

It is therefore argued that it is not competent to the respondent to assert that there is any "subsisting" reservation of minerals in the Crown. The argument involves the contention that, although the original grant was from the Dominion, title to the reserved minerals passed to the Province under the *Natural Resources Agreement* of 1930, before the issue of the Guber certificate, and that therefore, although the endorsement could not operate as a declaration

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Kellock J.

to the contrary with respect to the reservation so long as it was in favour of the Dominion, the Province became precluded by the certificate of title and the operation of s. 200 from asserting any interest in the minerals immediately upon the *Natural Resources Agreement* becoming effective.

In the reference *Re Transfer of Natural Resources to the Province of Saskatchewan* (1), the effect of the 1930 legislation was considered. At pp. 275-6 Newcombe J., who delivered the judgment of the Court, said:

> It is not by grant *inter partes* that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by Order in Council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service. I will quote the words of Lord Davey in *Ontario Mining Company v. Seybold,* [1903] A.C. 73, at 79, where his Lordship, referring to Lord Watson's judgment in the *St. Catherines Milling Case* (1888), 14 App. Cas. 46, said
>
> "In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North America Act, 1867, 'it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, 'as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.' Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province."

Accordingly, the minerals here in question remained throughout vested in the Crown, having been and having remained reserved by the *original* patent. It was "the administration of them and the exercise of their beneficial use" only which was affected. The reservation in the original patent, therefore, remained a subsisting reservation as well after as before the *Natural Resources Agreement.*

For reasons which will appear, I do not find it necessary to decide as to the contention of the appellant that the endorsement became effective as against the Province immediately upon the coming into force of the agreement.

(1) [1931] S.C.R. 263, [1931] 1 D.L.R. 865, affirmed [1932] A.C. 28, [1931] 4 D.L.R. 712, [1931] 3 W.W.R. 488.

Unquestionably, immediately prior to that date the endorsement could have no such effect. I do not think it can be doubted either, that a conveyance by the Dominion would have entitled the grantee to obtain registration of his title notwithstanding the outstanding certificate held by Schindler. To hold the contrary would render virtually nugatory the interest of the Dominion in the minerals by making that interest incapable of realization. It may be that the passing to the Province of the interest of the Dominion in 1930 did not disentitle the Province to registration, but, as I have said, I do not find it necessary, in the present circumstances, to decide the point.

The situation existing on the date when the agreement became effective did not continue. In 1949 there occurred the transfer from Schindler to the Gubers, to whom a certificate of title was issued with the endorsement "Minerals Included". That certificate was issued after the mineral title had been vested in the Province, and the appellant acquired its interest in the lands in reliance upon it. It is to these circumstances that *The Land Titles Act* is to be applied.

The respondent contends in the first place that the declaration contemplated by s. 67 is a statutory one. In my opinion, however, the section is not so limited. A declaration in the certificate itself is sufficient.

The respondent further contends that the words "Minerals Included" are employed in the Land Titles Office in practice only in cases where, in fact, no reservation of minerals at all is contained in the original Crown grant, and that they are inapt as a declaration that a reservation of minerals made in the original grant no longer subsists. I am unable to accept this contention. If the words are capable of the meaning that the original patent did not include a grant of the minerals, s. 200(1) would entitle the appellant to rest on that statement even although the original patent had contained such a reservation. The Province would not be entitled to assert the contrary. The words are, however, in my opinion, equally capable of the construction that the mineral title, although originally reserved, had been subsequently granted by the

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Kellock J.

Dominion or by the Province after the latter had acquired it. In either circumstance the appellant would again be protected.

As applied to the certificate of title granted to the Gubers, under which the appellant claims, s. 200(1) plainly provides that it is a complete estoppel against the Province with respect to the express statement which it contains, namely, that the person named in the certificate is entitled to the minerals as against the Province. A person dealing with the lands on the footing of such a certificate would be entitled to assume as against the Province that both the surface rights and the minerals had been granted by the Crown at some earlier stage. This being so, it is not open to the respondent to contend that the minerals had never been brought under the Act.

It is, however, further contended for the respondent that by virtue of *The Provincial Lands Act,* now R.S.S. 1953, c. 45, and *The Mineral Resources Act,* now R.S.S. 1953, c. 47, enacted by the Legislature subsequent to the *Natural Resources Agreement* of 1930, the provincial title was protected. In my opinion this point can be put most forcibly from the standpoint of the respondent by reference to s. 3 of *The Mineral Resources Act, 1931,* c. 16, in the form in which it was enacted in 1939 by c. 14, s. 1, which was prior to the acquisition of any interest by the Gubers. The section reads:

> 3. Mines and minerals which are the property of the Crown, and the right of access thereto, shall be leased or otherwise disposed of *only* in accordance with the provisions of this Act and the regulations made thereunder.

While the verb "dispose" in s. 3 is not defined, the noun "disposition" is defined by s. 2(4) of *The Provincial Lands Act,* 1931, c. 14, (which *The Mineral Resources Act* by s. 2(3) adopts) as meaning, unless the context otherwise requires, the "act" of disposal or "an instrument by which that act is effected or evidenced" and includes "every other instrument whereby lands or any right, interest or estate in land may be transferred, disposed of or *affected*".

While I was at first inclined to the view that the contention of the respondent upon the footing of this legislation was well founded, I now do not think that is so. In view of the clear terms of s. 200(1) of *The Land Titles Act* and

the purpose of that statute, the appellant and other persons dealing with the Gubers were entitled to rely on the certificate, including the endorsement, and to assume that there had been a grant of the minerals.

I do not think the decision of this Court in *The District Registrar of the Land Titles District of Portage La Prairie v. Canadian Superior Oil of California Ltd. and Hiebert* (1), is relevant. In that case the certificate of title contained a reference to the reservation in the original grant, and it was held by the majority of this Court that the relevant legislation required that grant to be read as reserving the minerals.

Nor do I think there is anything in the decision of this Court in *Balzer and Balzer v. The Registrar of Moosomin Land Registration District et al.* (2), which is relevant to the case at bar. That was the case, merely, of an application by a transferee of land to strike out an endorsement on his certificate of title where there was no opposing interest, and where there was no suggestion that any other person had acquired any rights on the faith of the endorsement or any prior endorsement to the same effect.

I would allow the appeal. By agreement there will be no costs.

The judgment of Locke and Nolan JJ. was delivered by

LOCKE J.:—The patent granted to T. A. Burrows for the north-west quarter and the west half of the north-east quarter of section 6 in township 36, range 17, west of the second meridian in Saskatchewan, dated July 29, 1909, reserved to the Crown, *inter alia,* all mines and minerals which might be found to exist therein.

Section 21 of *The Saskatchewan Act,* 1905 (Can.), c. 42, reserved all Crown lands, mines and minerals and royalties incident thereto in the Province to the Crown in the right of the Dominion.

Upon the filing of these letters patent in the appropriate registration district, Burrows became entitled to a certificate of title by reason of the provisions of s. 49 of *The Land Titles Act,* 1906 (Sask.), c. 24. That section, with an

(1) [1954] S.C.R. 321, [1954] 3 D.L.R. 705.

(2) [1955] S.C.R. 82, [1955] 1 D.L.R. 657.

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Locke J.

alteration which is immaterial to the present matter, appeared as s. 41 of c. 41 in the revision of the statutes in 1909.

The certificate issued to Burrows was not made part of the material upon the application but, according to the abstract filed, it was issued on September 2, 1909, and it is common ground that it was in the form prescribed by the statute which appears as Form E in the statute of 1906. That form certifies that the named person is the owner of the estate described in the property in question "subject to the incumbrances, liens and interests notified by memorandum underwritten or indorsed hereon, or which may hereafter be made in the register". No reference as to the reservation of minerals was contained in or endorsed upon the certificate, this being unnecessary by virtue of s. 76 of the Act which, so far as it is relevant, read:

> The land mentioned in any certificate of title granted under this Act shall, by implication and without any special mention therein unless the contrary is expressly declared therein be subject to:
>
> (*a*) Any subsisting reservations or exceptions contained in the original grant of the land from the crown . . .

Burrows transferred the north-west quarter of section 6 to the Luse Land Company Limited by a transfer registered on September 7, 1909, a certificate of title issuing to the company which contained no reference to minerals. That company transferred the lands to one Alexander by a transfer registered on June 5, 1911, and on that date a certificate of title issued to the transferee. At some unspecified time that certificate was endorsed "Minerals Included", these words being placed upon the certificate by a rubber stamp, immediately following the description of the land, and it appears to have been assumed throughout that this endorsement was made by or on the direction of the Registrar for the Humboldt Land Registration District. That the endorsement was made on that certificate prior to June 11, 1929, appears certain from the fact that in 1926 the land was sold for arrears of taxes and title was thereafter obtained by the tax sale purchaser, Thomas F. Schindler, by whom an application for title which resulted in the issue of the new certificate was filed on November 24, 1928. The new certificate was dated June 11, 1929, and endorsed in the same manner, "Minerals Included", presumably at the time it was issued.

The title was in this state when an agreement between the Dominion of Canada and the Province of Saskatchewan was made dated March 20, 1930, whereby the natural resources were surrendered to the Province. That agreement was confirmed by *The Saskatchewan Natural Resources Act*, 1930 (Can.), c. 41. In view of an argument which has been addressed to us as to the effect of this statute, it should be noted that para. 1 of the agreement, which was confirmed read in part:

> . . . the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province . . .

Thus, the mines and minerals reserved to the Crown in the letters patent thereafter, in the words of the agreement "belonged" to the Province of Saskatchewan.

When *The Land Titles Act* was first enacted as 1906 (Sask.), c. 24, s. 180 which appeared with a group of sections under the sub-heading "Evidence and Procedure" read:

> 180. Every certificate of title granted under this Act shall except:
>
> (*a*) In case of fraud wherein the owner has participated or colluded; and
>
> (*b*) As against any person claiming under a prior certificate of title granted under this Act in respect of the same land; and
>
> (*c*) So far as regards any portion of the land by wrong description of boundaries or parcels included in such certificate of title so long as the same remains in force and uncancelled under this Act;
>
> be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same for the estate or interest therein specified subject to the exceptions and reservations implied under the provisions of this Act.

In 1917 the Act was repealed and re-enacted as c. 18 of the second session of that year, subs. 1 of s. 174 being in the same terms.

The question whether the Crown in the right of the Dominion might have asserted its right to the minerals on the property in question as against Schindler does not arise. The section, it will be noted, does not purport to do anything more than to enact as a rule of evidence that no one, including the Crown, may be heard to dispute the title of the owner named in the certificate, except in certain specified cases. It is in effect an estoppel by statute. If it were

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Locke J.

necessary to determine the matter, it would be my opinion that no such estoppel would have operated as against the Crown in the right of the Dominion.

Following the transfer of the natural resources pursuant to the agreement of 1930, the Province passed *The Provincial Lands Act,* 1931 (Sask.), c. 14, and *The Mineral Resources Act,* 1931 (Sask.), c. 16. These Acts now appear as cc. 45 and 47, respectively, of R.S.S. 1953. As it is contended that the provisions of these statutes affect the question to be determined, their terms must be considered.

By *The Provincial Lands Act* provision was made as to the manner in which lands forming part of the natural resources of the Province might be disposed of. The word "disposition" appearing in the statute is defined as meaning the act of disposal or an instrument by which that act is effected or evidenced and to include, *inter alia,* a Crown grant and every other instrument whereby lands or any right, interest or estate in lands may be transferred or disposed of, or by which the Crown divests itself of or creates any estate or interest in lands. By s. 8 it is provided that provincial lands shall be sold in accordance with the provisions of the Act and the orders and regulations made thereunder. Section 10 provides that there shall be implied in every disposition of provincial lands under the Act or any other Act of the Legislature all reservations provided for in the Act and, *inter alia, The Mineral Resources Act.* Section 14 declares that there is reserved to the Crown out of every disposition of provincial lands under the Act all mines and minerals, whether solid or liquid or gaseous, and that all mines and minerals existing on or under provincial lands shall be disposed of in the manner provided by *The Mineral Resources Act* and regulations made thereunder.

The Mineral Resources Act defines the word "mineral" in a manner including petroleum and natural gas and, by s. 3, provides that mines and minerals the property of the Crown shall be disposed of only in accordance with the provisions of the Act. The word "disposition" is defined as meaning a disposition as defined in *The Provincial Lands Act.*

Nothing was done by the Province from the time of the transfer of the natural resources in 1930 up to the time of the commencement of these proceedings to dispose of or alienate the minerals on the lands in question, the status

of these remaining as it was at the time of the issue of the Crown grant to Burrows, save that the beneficial interest of the Dominion had, as stated, been transferred to the Province.

On October 29, 1949, a transfer from Schindler to Joseph and Carl Guber was registered in the Humboldt Land Titles Office and, on that date, a certificate of title issued endorsed in like manner with the words "Minerals Included".

On January 29, 1951, the Gubers executed a transfer in favour of the appellant of an undivided one-half interest in all mines and minerals, except coal, upon or under the quarter-section for valuable consideration, and on March 13, 1951, the trust company filed a caveat giving notice of its interest. By caveat filed on October 9, 1953, the Registrar gave notice on behalf of Her Majesty in right of the Province of a claim to ownership of the minerals. On February 12, 1954, a certificate of title issued to the trust company pursuant to the transfer from the Gubers, this being made subject to the Registrar's caveat.

That the Gubers and the trust company were purchasers for value without notice of any adverse claim to the minerals is admitted.

The provisions of *The Land Titles Act* which affected the rights of the parties did not differ at any relevant time from the terms of the statute as it appears in the Revised Statutes of 1953 and it will be convenient to refer to the sections as they there appear. Section 66 provides that:

> The owner of land for which a certificate of title has been granted shall hold the same subject, in addition to the incidents implied by virtue of the Act, to such encumbrances, liens, estates or interests as are endorsed on the folio of the register which constitutes the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatever, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title as mentioned in section 200.

The implied reservations, including those contained in the original grant from the Crown, which appeared as s. 76 of the statute of 1906 now appear as s. 67 in the Revised Statutes.

Section 180 of the Act of 1906 is now, with an addition which does not affect the present matter, s. 200.

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Locke J.

In view of the provisions of ss. 66, 67 and 200, which must be read together, a person purchasing lands or an interest in land from one who has a clear certificate of title issued under the provisions of *The Land Titles Act* may not safely rely upon a search of the certificate alone, since he is charged with the knowledge that it is issued subject, *inter alia,* to any subsisting reservations or exceptions contained in the original grant from the Crown, unless the contrary is expressly declared. In the present matter, where the Prudential Trust company was interested only in the purchase of an interest in the mineral rights, it was, in my opinion, entitled to rely upon the statement on the face of the certificate that the title included minerals. The terms used were explicit and their meaning free from doubt. In my opinion, the fact that a search of the patent granted to Burrows would have disclosed the reservation does not assist the respondent.

Section 200 declares that the certificate of title and the duplicate certificate shall be conclusive evidence of the title of the person named therein, except, *inter alia,* as to "any portion of the land by wrong description of boundaries or parcels included in such certificate". I mention this since, as the transfer from the Luse Land Company Limited to Alexander conveyed the land alone without any reference to minerals, to describe the interest of Alexander and subsequent transferees as including the minerals might appear to be a wrong description of the parcel of land to which they were entitled as owners. In my opinion, however, this point is concluded as against the Crown by the decision of this Court in *Canadian Pacific Railway Co. Ltd. et al. v. Turta et al.* (1). I see no distinction in this respect between cl. (*c*) of s. 200(1) and s. 44 of the Alberta statute considered in that case.

I am further of the opinion that the provisions of *The Provincial Lands Act* and *The Mineral Resources Act* do not assist the position of the Crown. It is true that the joint effect of these statutes is to provide that lands and mineral rights which are included in the statutory definition of land in the former statute may be disposed of only in the manner provided. The "disposition" defined in *The Provincial Lands Act,* as an examination of that statute and

(1) [1954] S.C.R. 427, [1954] 3 D.L.R. 1, 12 W.W.R. 97.

The Mineral Resources Act discloses, is a disposition by the Crown in right of the Province, and there is no suggestion that any such disposition is involved in the present matter. The appellant's case is simply that by virtue of the provisions of s. 200 the Province is estopped from asserting its claim to the minerals.

The word "land" is defined in s. 2(10) of *The Land Titles Act* as meaning land and every estate or interest therein and mines, minerals and quarries thereon or thereunder. The interest of the Crown in the minerals in question was, therefore, land in respect of which presumably a certificate of title might have issued under the provisions of the Act at the instance of the Crown. Section 85 of *The Land Titles Act,* which first appeared as s. 78A of *The Land Titles Act* of 1938 (c. 20) which repealed the former statute, provides that where a certificate of title is, on the coming into force of the Act, registered in the name of the Crown or is thereafter registered in the name of Her Majesty in the right of the Province of Saskatchewan and includes the mines and minerals which may be found to exist therein, no transfer by the Crown of such land shall include such mines or minerals which remain vested in the Crown. So long as the title to the minerals in question remained in the Crown in the right of the Dominion, no patent was issued in respect of them and nothing done to make such interest subject to *The Land Titles Act.* As indicated, at least since 1938, a certificate of title might have issued to the Crown in the right of the Province upon its application but that has not been done.

For the respondent, it is contended that ss. 66 and 200 relate only to certificates of title issued in respect of land which has been brought under the Act, either on application by the owner named in the letters patent pursuant to ss. 33 *et seq.* in the case of lands for which patents issued from the Crown prior to January 1, 1887, or by the filing of the original letters patent with the Registrar which entitled the owner under s. 48 to the grant of a certificate of title under the provisions of the Act. If this argument could be sustained, neither of these sections could affect the rights of the Province in the circumstances described.

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Locke J.

The contention amounts to this, that s. 200 should be construed as if it read:

> Every certificate of title and duplicate certificate granted under this Act for land which is then or has theretofore been brought under the Act shall, except:—

or to that effect. Section 66 and the concluding sentence of s. 183 would, of necessity, be construed in the same manner.

With respect for differing opinions, I think this construction cannot be supported.

Considering s. 200 by itself, it is stated that the certificate and duplicate certificate referred to are conclusive evidence that the person named is entitled to the land included in the same for the estate or interest specified, subject to the exceptions named. Land is defined in subs. 10 of s. 2 as meaning, *inter alia,* lands of every nature and description and every estate or interest therein. The section is not restricted by its own terms to land which has been brought under the Act but includes an estate or interest granted by letters patent.

That this is the proper interpretation is further supported by the language in which the exceptions are expressed. Thus, where a Registrar has been induced by fraud to issue a certificate of title for land theretofore not subject to the Act, the construction contended for would make exception (*a*) inapplicable. In the same manner, where, by wrong description of boundaries or parcels, land which had not been brought under the Act and for which the existing root of title was a grant from the Crown, or land the title to which remains in the Crown, is included in the certificate, cl. (*c*) would not apply. Nothing in the language of the section itself excludes the application of (*a*) and (*c*) to such cases.

If the history of s. 200 and of the other sections whose construction would be affected if this contention of the Crown were upheld is considered, it appears to me to be fatal to the argument.

Section 200, which appeared as s. 180 when *The Land Titles Act* of Saskatchewan was first enacted in 1906, was not original drafting but was apparently taken, though not *verbatim,* either from s. 62 of *The Territories Real Property Act,* 1886 (Can.), c. 26, which came into force on January 1,

1887, or from s. 62 of *The Real Property Act* of Manitoba, enacted as c. 28 of the statutes of 1885, which came into force on July 1 of that year.

The Manitoba section read in part:

> Every certificate of title granted under this Act, when duly registered, shall (except in case of fraud wherein the registered owner shall have participated or colluded) so long as the same remains in force and uncancelled under this Act, be conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever, that the person named in such certificate is entitled to the land included in such certificate, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in section 61, except as far as regards any portion of land that may by wrong description of boundaries or parcels be included in such certificate when the holder of such certificate is neither a purchaser or mortgagee for value, nor the transferee of a purchaser or mortgagee for value, and except as against any person claiming under any prior certificate of title granted under this Act in respect of the same land . . .

Section 61, so far as it was relevant, was in the same terms as the present Saskatchewan s. 67.

At the time *The Real Property Act* was enacted in Manitoba, the root of the title of all lands in the hands of private owners, with some exceptions such as in the case of the Hudson's Bay Company, was a grant from the Crown by letters patent under the provisions of *The Dominion Lands Act*. The reference, therefore, to "land that may by wrong description of boundaries or parcels be included in such certificate" could not have been intended to be only such land as had been brought under the provisions of *The Real Property Act*. There was no such land on July 1, 1885. The fraud referred to in the case of the first certificate of title issued in respect of the lands could only, of necessity, have referred to fraud in obtaining a certificate for lands held under what was and continues to be known in Manitoba as the old system.

The same situation existed in the territory which now constitutes the Provinces of Saskatchewan and Alberta and the North-West Territories when *The Territories Real Property Act* was passed by Parliament. As has been pointed out, the same language, with variations which do not affect the question, was contained in s. 62 and, at the time that statute was passed, there were no lands in this territory which were subject to any *Land Titles Act*. The Act did not, of course, apply to the Province of Manitoba.

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Locke J.

Since it is, therefore, apparent that the certificate of title referred to in the section in the Manitoba Act and that of the Dominion Act referred to certificates granted in respect of lands which were held by letters patent from the Crown as well as to those which became subject to the Act, I can see no logical reason for giving a different meaning to the same language in s. 200 of the present Saskatchewan Act.

It may be noted that the present s. 66 of the Saskatchewan statute, which appeared as s. 75 in the Act of 1906, was apparently taken from s. 60 of *The Territories Real Property Act*, though an important term of the section in that statute was omitted. As s. 66 of the Saskatchewan Act now reads, the owner of land for which a certificate of title has been granted shall hold the same, subject to the named exceptions, free of all other encumbrances, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming under a prior certificate of title as mentioned in s. 200. The section in the Dominion statute contained the further exception of "land that is, by wrong description of parcels or of boundaries, erroneously included in the certificate of title". The reason for the omission is not apparent but, as s. 66 must be read in conjunction with ss. 183 and 200, the matter is not of importance. Nothing in s. 66 or s. 75 of the statute of 1906 nor s. 60 of *The Territories Real Property Act* lends any support to the view that the land for which the certificate of title mentioned has been issued includes only land which has been brought under the operation of the Act.

In my opinion, further light is thrown upon the matter by an examination of s. 183. By that section, it is provided that no action of ejectment or other action for the recovery of land for which a certificate of title has been granted shall lie against the owner under this Act, except in the case of, *inter alia*, a person deprived of land by fraud as against the person who through such fraud has been registered as owner, or as against a person deriving title otherwise than as a transferee *bona fide* for value from or through such owner through fraud, a person deprived of or claiming any land included in any grant or certificate of title of other lands by misdescription of such other land or of its boundaries as

against the owner of such other land, and an owner claiming under an instrument of title prior in date of registration where two or more grants or certificates of title have been registered or issued in respect of the same land. The section concludes:

(2) In any case other than the above, the production of the duplicate certificate of title or a certified copy of such certificate shall be an absolute bar and estoppel to any such action against the person named in such certificate as owner of the land therein described.

There is nothing in the section which qualifies or restricts the meaning to be assigned to the word "land", so that the definition in the statute applies.

This s. 183 appeared as s. 147 of the Act of 1906. That section appears to have been taken from s. 103 of *The Territories Real Property Act*. That section, in turn, appears to have been taken from s. 116 of the Manitoba Act, after deleting words which limited the right by providing that it was not available as against a *bona fide* purchaser for value.

The Manitoba Act was based largely upon the *Real Property Act* of the Province of South Australia, which appeared as c. 11 of the statutes of that Province in the year 1860. The section of that Act from which, obviously, the Manitoba section was taken is s. 118. The reference to misdescription, however, read:

in the case of a person deprived of any land by reason of a wrong description of any land or of its boundaries.

Section 116(5) of the Manitoba Act and s. 103(*e*) of the *Territories Real Property Act* referred to "the case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries". The reason for the changed wording would appear to be that both in Manitoba and in the North-West Territories the title to some of the lands would continue to be letters patent, and, as to others, certificates of title which, for the first time, were authorized. It was apparently thought necessary to refer both to grants and to certificates of title to make it clear that, if land held in either manner was included by misdescription in a certificate of title issued under the Act, the right reserved to the real owner might be enforced by ejectment. The rights reserved by s. 200(*c*) are not, of course, limited to lands the title to which is either letters

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Locke J.

patent or certificates of title but include lands as to which no Crown grant has been made and title to which accordingly remains in the Crown.

In my opinion, the judgment of this Court in *Balzer and Balzer v. The Registrar of Moosomin Land Registration District et al.* (1), does not assist the position of the respondent. That case did not involve the rights of third parties purchasing the lands in good faith or the application of ss. 66 and 200 of *The Land Titles Act*, as was pointed out in the judgment of Kellock J. In the circumstances of that case, the lack of authority of the Registrar to endorse a certificate with the words "minerals in the Crown" was decisive. In the present case, where title has been acquired by a purchaser in good faith and without notice, effect cannot be given to that objection in view of the decision in *Turta's Case, supra.*

I would allow this appeal and direct that the registration of the caveat filed by the Registrar be vacated. By agreement between the parties, no costs should be awarded.

CARTWRIGHT J.:—The relevant facts are set out in the reasons of other members of the Court and in those of the learned justices in the Courts below. Those reasons make it clear that the Crown in the right of Saskatchewan never parted with the title to the minerals within, upon or under the quarter-section in question, which became vested in it as of October 1, 1930, pursuant to statutes of Saskatchewan, 1930, 20 Geo. V, c. 87, and 1931, 21 Geo. V, c. 85, statutes of Canada, 1930, 20-21 Geo. V, c. 41, and 1931, 21-22 Geo. V, c. 51, and the statute of the United Kingdom 1930, 20-21 Geo. V, c. 26, having been previously vested in the Crown in the right of Canada.

There remains for consideration the submission that, notwithstanding the fact that the Crown never parted with these minerals, the appellant has acquired an indefeasible title to an undivided one-half interest therein by reason of the fact that it purchased the same from Joseph Guber and Carl Guber relying upon the certificate of title issued to them on October 29, 1949.

(1) [1955] S.C.R. 82, [1955] 1 D.L.R. 657.

Section 200(1) of *The Land Titles Act*, R.S.S. 1953, c. 108, is as follows:

200.—(1) Every certificate of title and duplicate certificate granted under this Act shall, except:

(*a*) in case of fraud wherein the owner has participated or colluded; and

(*b*) as against any person claiming under a prior certificate of title granted under this Act in respect to the same land; and

(*c*) so far as regards any portion of the land by wrong description of boundaries or parcels included in such certificate of title;

be conclusive evidence, so long as the same remains in force and uncancelled, in all courts, as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under the provisions of this Act.

I did not understand counsel to suggest that any of the exceptions (*a*), (*b*), or (*c*) have application in the circumstances of this case.

As a matter of construction I think it clear that the Gubers' certificate of title in terms certifies that they are the owners not only of "the surface" of the quarter-section but also of the minerals in and under it. To hold otherwise would be to give no effect to the words "Minerals Included". It is argued for the respondent that, even if this is the proper construction of the words of the certificate, the appellant's case is not advanced because its title is "subject to the exceptions and reservations implied under the provisions of this Act", which, under s. 67(*a*) include, unless the contrary is expressly declared, "any subsisting reservations or exceptions contained in the original grant of the land from the Crown".

No doubt when the appellant purchased from the Gubers, whether or not it examined the original grant from the Crown, it took subject to the reservation therein contained reading as follows:

. . . reserving all mines and minerals which may be found to exist within, upon or under such lands, together with full power to work the same, and for this purpose to enter upon, and use and occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals, or the mines, pits, seams and veins containing the same . . .

unless it can be said that "the contrary" was "expressly declared". In my opinion the contrary was expressly declared in the certificate which, construed as I have concluded it should be, stated in terms that the minerals were

1957

PRUDENTIAL TRUST CO. LTD. v. REGISTRAR, HUMBOLDT

Cartwright J.

included in the Gubers' title. The certificate is "conclusive evidence . . . in all courts as against Her Majesty and all persons whomsoever"; and, in my opinion, the Crown cannot successfully assert its title to the minerals as against the appellant, not because it has ever parted with that title but because the certificate on which the appellant relied is, by the statute, made conclusive evidence of the rights of the parties. Since the decision of this Court in *Canadian Pacific Railway Co. Ltd. et al. v. Turta et al.* (1), it cannot be doubted that an owner may be deprived of title to his land by the error of a Registrar in issuing a certificate although the error would have been discoverable by a search of the title.

The circumstance that prior to October 1, 1930, the legislation of Saskatchewan may well have been ineffective as regards the rights of the Crown in the right of Canada appears to me to be irrelevant as the certificate upon which the appellant relied was issued in 1949.

Since writing the above I have had the opportunity of reading the reasons of my brothers Rand and Locke and I agree with them.

I would allow the appeal and direct the Registrar to withdraw caveat no. B.G. 5418. Pursuant to the agreement of the parties there should be no order as to costs.

Appeal allowed without costs.

Solicitors for the appellant: MacPherson, Leslie & Tyerman, Regina.

Solicitor for the respondent: The Attorney General for Saskatchewan, Regina.

---

(1) [1954] S.C.R. 427, [1954] 3 D.L.R. 1, 12 W.W.R. 97.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

SIDNEY KEITH NEIL .....RESPONDENT.

1957

*June 10, 11
**Oct. 1

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Criminal sexual psychopaths—Sufficiency of evidence—Whether accused "likely" to act as set out in the Criminal Code, 1953-54 (Can.), c. 51, s. 659(b)—Meaning of "inflict"—Validity of legislation.

The Crown appealed from the reversal of a finding by a trial judge that the respondent was a criminal sexual psychopath.

Held (Taschereau and Locke JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Abbott J.: It was proved that the respondent had shown "a lack of power to control his sexual impulses", and proof that he was likely to repeat his conduct would have brought him within the definition in s. 659(*b*) of the *Criminal Code*. It was possible to "inflict" evil, in the sense of causing another person to suffer or incur it, by mere persuasion and without any use of force or coercion. But it was not shown that he was likely to repeat his conduct; the proper conclusion on the evidence was that such a repetition was improbable, and one essential element of the definition was therefore not satisfied.

Per Rand J.: Parliament intended by the definition in s. 659(*b*) to describe a condition of impulse that in certain circumstances of normal control would become uncontrollable. The medical evidence in this case was only to the effect that the respondent's impulses were "uncontrolled or uncontrollable" and the medical witnesses further said that normally a man in possession of his faculties (which the respondent was) could control his criminal sexual impulses. It had not been shown, as was essential, that the respondent's impulses were uncontrollable, rather than merely uncontrolled.

Per Cartwright J.: The primary meanings of the word "inflict" involved an element of force, violence or coercion and the word was not apt to describe conduct consisting solely of temptation and persuasion. It was therefore not shown on the evidence that the respondent, even assuming that he was likely to repeat his offences, was "likely to . . . inflict . . . evil" on other persons. Further, the evidence did not indicate that the respondent was likely to repeat acts of the kind in respect of which he had been convicted.

Per Taschereau and Locke JJ., *dissenting*: The long course of criminal conduct of the respondent inflicted "injury . . . or other evil" upon his victims within the meaning of s. 659(*b*) and there was ample evidence on which the trial judge might properly find that it was likely that he would in the future act in the same manner with other children. The finding of the trial judge should therefore be restored.

---

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Abbott and Nolan JJ.

**Nolan J. died before the delivery of judgment.

1957

THE QUEEN
v.
NEIL

Per Kerwin C.J. and Rand, Locke, Cartwright and Abbott JJ.: A psychiatrist called as a witness on a hearing under s. 661(1) should not be asked to give his opinion upon the very question that is to be determined by the Court, *viz.*, whether or not the accused is a criminal sexual psychopath.

Per Kerwin C.J. and Cartwright and Abbott JJ.: The trial judge, on the hearing of an application under s. 661(1) of the *Criminal Code*, has not only the right but the duty to consider the evidence given on the substantive charges against the accused, and that evidence should form part of the record on an appeal from his decision.

Constitutional law—Criminal law and procedure—Validity of the Criminal Code, 1953-54 (Can.), c. 51, ss. 659-667.

Sections 659 to 667 of the *Criminal Code* are *intra vires* of the Parliament of Canada, being legislation in relation to "the Criminal Law, . . . including the procedure in Criminal Matters" within s. 91(27) of the *British North America Act*.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, reversing a judgment of Boyd McBride J. finding the respondent to be a criminal sexual psychopath.

H. J. Wilson, Q.C., and *J. J. Frawley, Q.C.*, for the appellant.

M. E. Shannon, for the respondent.

D. H. W. Henry, Q.C., and *M. M. de Weerdt*, for the Attorney General of Canada, intervenant.

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

THE CHIEF JUSTICE:—By leave of this Court the Attorney General of Alberta appeals from a decision of the Appellate Division of the Supreme Court of Alberta setting aside a finding of Mr. Justice McBride under s. 661 of the *Criminal Code*, 1953-54 (Can.), c. 51, that the respondent was a criminal sexual psychopath. The appeal to the Appellate Division was under s. 667 of the Code and the leave to appeal to this Court was granted under s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259, as amended by 1956, c. 48, s. 3, so that we are not restricted to questions of law. Section 659(*b*) of the Code defines criminal sexual psychopath as

> a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

Mr. Justice McBride had presided over the trial with a jury of the respondent on two counts of an indictment charging:

1. That he, at Calgary, in the Judicial District of Calgary, on or about the 1st day of September, A.D. 1955, being a male person, did commit an act of gross indecency with Hugh Ernest Helmer, another male person, contrary to the Criminal Code.

2. That he, at Calgary, in the Judicial District of Calgary, on or about the 31st day of March, A.D. 1956, being a male person, did commit an act of gross indecency with George Melville Gibson, another male person, contrary to the Criminal Code.

The respondent was convicted on both counts and, pursuant to s. 661(1) of the Code, the Court heard evidence as to whether the respondent was a criminal sexual psychopath and made the finding in question. No appeal was taken from the conviction on the two counts and on the appeal by the respondent to the Appellate Division from the finding and sentence of preventive detention no application was made by the Crown to have the record of the trial proceedings before that Court, which thereupon proceeded to hear the appeal on the record of the application made under s. 661(1). Oral reasons were delivered as follows:

The Court feels, with our brother Mr. Justice Johnson in doubt, that the appeal should be allowed and the conviction quashed, on the grounds that the Crown has failed to bring the evidence of the psychiatrists within the definition of criminal sexual psychopath.

The trial judge was, of course, not only entitled but obliged to consider the evidence adduced at the trial on the two counts and that should have been produced before the Appellate Division. It is in the record before this Court and we have had the advantage of argument of counsel with reference as well to it as to the proceedings under s. 661(1).

The details appear elsewhere and need not be repeated. Upon a consideration of them and of all the evidence I am satisfied that it was proved that the respondent "has shown a lack of power to control his sexual impulses". In my opinion the evidence of his actions with young boys and his own testimony on the application under s. 661(1) makes that clear. As to the last part of the definition, "and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person",—if, because of his lack of power to control his sexual impulses, he is likely to repeat the actions referred to, then the mere fact that he would not use force upon the other party is not sufficient to take

1957

THE QUEEN v. NEIL

Kerwin C.J.

it out of the phrase. Parliament has distinguished "attack", which indicates force, from inflicting injury, pain or other evil. One may inflict, that is, cause another to suffer or incur, something that is inherently evil by persuading him without the use of force to commit the act, the effect of which may remain with him for many years. I am unable to restrict the meaning of the words Parliament has chosen to carry out its intention to those cases where coercion is used.

There remains the question whether the respondent is *likely* to inflict that evil upon another in the future. The disease is a terrible one and requires treatment, but the penalty imposed is severe. The sentence of preventive detention is to be served in a penitentiary. By s. 664 it does not commence until the two years shall have been served, although the Governor in Council may commute the latter to a sentence of preventive detention. By s. 666 where a person is in custody under a sentence of preventive detention, the Minister of Justice shall, at least once in every three years, review the condition, history and circumstances of that person for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions.

I have the greatest sympathy with the object desired to be attained by Parliament, but each case must be decided on its own circumstances. After careful consideration of these, I have come to the conclusion, by virtue of the powers conferred as a result of leave having been given to appeal to this Court under s. 41 of the *Supreme Court Act,* that the respondent is not *likely* to repeat the acts with young boys of which he has been found guilty, or similar acts, and, therefore, he is not *likely* to inflict evil on any person in the future. Undoubtedly the trial judge had an advantage in seeing and hearing the respondent who gave evidence upon the application to declare him a criminal sexual psychopath, but on that application the two doctors were asked by counsel for the Crown questions that should not have been put and gave evidence that should not have been received. The nature of these questions and answers appears elsewhere. Even though the application under s. 661(1) was made to a judge alone, the fact that the doctors gave their opinion upon the very question to be determined by the

1957

THE QUEEN v. NEIL

Kerwin C.J.

Court makes it impossible for me to read the learned judge's reasons as showing that he came to his conclusion without being swayed by these opinions.

For this reason I am, with respect, unable to agree with him. Even if s. 592(1)(*b*)(iii) applies to appeals under s. 667 and if "procedure on appeals" in subs. (3) of s. 667 is applicable, not only am I not satisfied that no substantial wrong or miscarriage has occurred, but I have reached the conclusion that the Appellate Division was right in setting aside his finding.

At the argument, and without calling upon counsel for the Attorney General of Canada, we disposed of the respondent's contention that the sections were *ultra vires* of Parliament on the short ground that they were legislation in relation to criminal law, including procedure in criminal matters, within head 27 of s. 91 of the *British North America Act*.

The appeal should be dismissed.

TASCHEREAU J. (*dissenting*):—I agree with my brother Locke that this appeal should be allowed, and the order of the Court of Appeal set aside.

I do not find it necessary, however, for the determination of this case, to give any opinion as to the legality of the evidence of Drs. Michie and Carnat, who testified that the respondent was a criminal sexual psychopath who had a lack of power to control his sexual impulses, and was likely to inflict injury, pain, *or other evil* on any person.

The other evidence adduced, and particularly the continued misconduct of the respondent, was, I think, sufficient to justify the trial judge in reaching the conclusion at which he arrived.

The appeal should be allowed.

RAND J.:—This appeal calls for the interpretation of the definition, in s. 659(*b*) of the *Criminal Code*, of a criminal sexual psychopath. The definition is in these words:

> "Criminal sexual psychopath" means a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

1957

THE QUEEN v. NEIL

Rand J.

The accused respondent was found by the trial judge to come within that definition but that finding was reversed in the Appellate Division. The facts have been set forth by my brother Cartwright and it will not be necessary for me to deal with them. The provision is new, and involving, as it may, the deprivation for years of a person's liberty, it calls for a careful examination of its terms and the considerations which lie behind it.

The essence of the defence is that what the definition describes is one who, in circumstances within the range of normal control over sexual impulses or tendencies, has no control; that within that range his desires are such as may seek satisfaction to the point of physical attack or its equivalent on another person. Sexual desires and impulses express themselves in a gamut of modes, and that fundamental characteristic of human beings must be kept in mind as the background to gross manifestations. By a loose sense of the word "lack", the definition is broad enough to include all the degrees of demand for gratification within or beyond the point of government; but the word may also signify the absence of control within that range as the essential factor; and applying the long-established rule for interpreting statutes creating criminal offences, the stricter and more limited scope must be attributed to the definition. In each case the distinctive features pertinent to that issue must be given the fullest enquiry and the conclusion reached beyond a reasonable doubt.

The question of the elements of control and their presence or absence becomes, then, of fundamental importance. In this, the will in action which dominates such emotional pressures, the act of volitional rejection, is associated with ideas and feelings; they may be moral, ethical, religious or of any other character, and the resulting action executes or fulfils one or more of them. The criminal psychopath is afflicted with a constitutional endowment which in the particular respect does not provide that strength of restraint that keeps within the band of normal behaviour; and the critical degree lies at the point when the forces acting present a danger sufficiently great to be brought under social control. Here that point is argued to be where uncontrollability is present as abnormality.

Parliament has dealt with the dereliction of indecency in the extreme manner in s. 149 of the *Criminal Code,* by which the offence as of April 1, 1953, was extended to embrace any two persons. Under that provision the accused was found guilty and sentenced to a term of two years in prison.

In the light of all this, I cannot but think that Parliament, by the definition, intended to describe a condition of impulse that in certain circumstances of normal control would become uncontrollable. The language applies to persons of both sexes and all ages. In matters involving boys in their 'teens, as here, there is in fact a consent on their part and that becomes relevant to the determination of controllability. As was put to counsel, if at any stage of the approach, upon a boy's turning away or resenting suggestions made, the accused had at once desisted, how could it be said that he was a victim of uncontrollable impulses? I do not think it can be. Dr. Michie spoke of the homosexual "drive" of the accused as either "uncontrolled or uncontrollable" (and these would, in the particular circumstances of the case, seem to distribute the alternatives) and that he (the doctor) had always "had the feeling that the person who is not mentally disturbed can control his impulses. All do not agree with that." Dr. Carnat agreed that to a "great extent" a man who has possession of his faculties can control his "criminal sexual impulses". He was of the opinion that the accused was sane and had possession of his mental faculties; and that the trial and exposure to which he had been subjected could quite possibly act as a permanent deterrent of the practices indulged in.

The opinion of both psychiatrists that the accused was a criminal sexual psychopath was on their own interpretation of the definition, an interpretation which was not elaborated or even attempted to be stated to them but which, on a reading aloud of the definition, was assumed by both, and evidently by the trial judge and counsel prosecuting, to be of such plain and understandable simplicity as not to require any examination or analysis. Dr. Carnat agreed with every "material part" of the evidence of Dr. Michie "relevant to this case", and I take this to include the statement that the "drive" was either "uncontrolled or

1957

THE QUEEN v. NEIL

Rand J.

uncontrollable". The impulse was patently "uncontrolled" in the sense that it was given expression; but the vital question was whether, at the critical time, it was uncontrollable. On this we have no confirmatory medical opinion which s. 661 requires.

I should repeat, by way of emphasis, that the section applies to sexual manifestation in relation to both sexes and all ages. It is not merely a protection to young persons. It may be that it would be socially desirable to subject victims of this weakness to indefinite detention merely for a tendency that involved young boys. That can easily be understood. But the statute, in my opinion, does not go so far: such an extension of criminality and magnitude of punishment have not been deliberated upon by Parliament; and the Courts are not the constitutional organs to enter upon questions of legislative policy.

The constitutionality of the statute was raised but I cannot think that its validity can be seriously challenged.

I would, therefore, dismiss the appeal.

LOCKE J. (*dissenting*):—We were informed upon the argument of this matter that the evidence taken at the trial of the respondent upon the two offences of which he was found guilty by the jury was not made part of the record considered by the Appellate Division.

The oral reasons delivered in the Appellate Division for setting aside the finding that Neil was a criminal sexual psychopath simply say that:

> The Crown has failed to bring the evidence of the psychiatrists within the definition of criminal sexual psychopath.

With respect, the meaning of this appears to me to be obscure .

Subsection (2) of s. 661 of the *Criminal Code* requires that on the hearing of an application under subs. (1) the Court "may hear any evidence that it considers necessary, but shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General".

Dr. T. C. Michie and Dr. Morris Carnat, whose qualifications are unquestioned, gave evidence on the application, the former having been nominated by the Attorney General. Dr. Michie had heard all of the evidence given at the trial before the jury and on the application. Dr. Carnat had

heard all of that evidence and, in addition, had examined Neil for some one and one-half hours while he was in custody to assist him in forming an opinion as to his mental state.

Paragraph (*b*) of s. 659 defines "criminal sexual psychopath" as meaning

> a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

Offences of the nature described in s. 661(1)(*a*)(iv),(v) and (vi) suggest mental infirmity and it was presumably for this reason that subs. (2) requires that in deciding such applications the Court should hear the opinions of at least two psychiatrists as to the sanity of the convicted person and as to whether he is likely to attack or otherwise inflict injury, pain or other evil on any person.

The decision as to whether Neil had shown by the long-continued course of misconduct in sexual matters, proven at the trial and on the application, a lack of power to control his sexual impulses was, of course, for the judge alone. Counsel appearing for the Crown, however (who did not appear on the argument in this Court), asked both Drs. Michie and Carnat if they considered Neil to be a criminal sexual psychopath and both answered in the affirmative. No objection was made by counsel for the convicted man but the question was clearly improper and should not have been permitted.

The oral reasons given by McBride J. for his finding show clearly, in my opinion, that that learned judge determined the question on his own view of the effect of the evidence and that the evidence of the doctors was treated by him as opinion evidence only as to the man's sanity, his power to control his sexual impulses and the likelihood of his attacking or otherwise inflicting pain or other evil on any person.

Had the matter been one for determination by a jury it would be my opinion that the improper admission of this evidence would have necessitated a rehearing for the reasons stated by Sir Charles Fitzpatrick C.J. in *Allen v. The King* (1), and by Lord Herschell L.C. in *Makin et ux. v. The Attorney-General for New South Wales* (2). In the

(1) (1911), 44 S.C.R. 331 at 339, 18 C.C.C. 1.

(2) [1894] A.C. 57 at 69.

1957

THE QUEEN v. NEIL

Locke J.

present case, where the matter was one for the decision of a single judge, and in the circumstances above stated, I would apply s. 592(1)(*b*)(iii), since, in my opinion, no wrong or miscarriage of justice has occurred.

I consider that the long course of criminal conduct of this respondent inflicted "injury . . . or other evil" upon the children who were his victims within the meaning of that language in s. 659(*b*). There was ample evidence upon which the learned trial judge might properly find that it was likely that he would in the future act in like manner with other children.

For the reasons so clearly stated by McBride J., I would allow this appeal and set aside the order of the Appellate Division.

CARTWRIGHT J.:—On May 24, 1956, the respondent was convicted after trial before Boyd McBride J. and a jury on the two following counts:

1. That he, at Calgary, in the Judicial District of Calgary, on or about the 1st day of September, A.D. 1955, being a male person, did commit an act of gross indecency with Hugh Ernest Helmer, another male person, contrary to the Criminal Code.

2. That he, at Calgary, in the Judicial District of Calgary, on or about the 31st day of March, A.D. 1956, being a male person, did commit an act of gross indecency with George Melville Gibson, another male person, contrary to the Criminal Code.

Following these convictions, and before sentence was passed, counsel for the Crown made application to the learned trial judge, pursuant to s. 661(1) of the *Criminal Code,* to hear evidence as to whether the respondent was a criminal sexual psychopath. Evidence was heard accordingly and at the conclusion of the hearing the learned trial judge found the respondent to be a criminal sexual psychopath, sentenced him to two years' imprisonment on each of the counts set out above, the sentences to run concurrently, and also imposed a sentence of preventive detention.

The respondent did not appeal from the convictions of the two substantive offences but did appeal against the sentence of preventive detention, pursuant to s. 667(1) of the Code.

On October 10, 1956, the Appellate Division, Johnson J. *dubitante,* set aside the finding that the respondent was a criminal sexual psychopath and the sentence of preventive detention.

On November 26, 1956, the appellant was granted leave to appeal to this Court from the judgment of the Appellate Division. Leave having been granted pursuant to s. 41(1) of the *Supreme Court Act*, R.S.C. 1952, c. 259, as amended by 1956, c. 48, s. 3, our jurisdiction is not restricted to questions of law.

Prior to the appeal coming on for hearing, the respondent gave notice to the Attorney General of Canada that he questioned the validity of ss. 659 to 667 of the *Criminal Code* and leave to intervene was granted to the Attorney General. At the hearing the Court was unanimously of opinion that these sections were *intra vires* of Parliament as being legislation in relation to the criminal law, including the procedure in criminal matters, within s. 91, head 27, of the *British North America Act*, and did not find it necessary to call upon counsel for the Attorney General of Canada.

We were informed by counsel that the Appellate Division was not furnished with the transcript of the evidence given at the trial of the two substantive offences but this was included in the appeal case in this Court. In my opinion the learned trial judge was entitled, and indeed required, to consider that evidence in addition to the evidence given before him on the application under s. 661(1).

As the definition of "criminal sexual psychopath" in s. 659(*b*) of the Code necessitates a consideration of the respondent's "course of misconduct in sexual matters", it is desirable to set out in chronological order the facts regarding that misconduct which are disclosed by the evidence.

There is no direct evidence as to the age of the respondent but he was teaching in a high school in 1937. The respondent did not give evidence on the trial of the substantive offences but did on the hearing under s. 661(1). He stated that he first remembered "homosexual activities" taking place in his own life when he was about 13 or 14. He was not asked to say what these activities were. Two witnesses were called who had associated with the respondent in the years 1938 and 1939. The first, Nares, gave evidence of no importance. The second, Stapley, stated (i) that the respondent had shared a bed with him and had handled his penis and that he had done the same to the respondent; (ii) that the respondent had committed sodomy upon him

1957

THE QUEEN v. NEIL

Cartwright J.

on several occasions; and (iii) that he and the respondent had engaged in acts of *fellatio* with each other on several occasions. The respondent explicitly denied statements (ii) and (iii) and stated that the thought of such actions was repugnant to him. He was not cross-examined and no finding of fact was made by the learned trial judge in regard to these two statements. In these circumstances counsel for the appellant stated in answer to a question from the bench that he did not ask the Court to proceed on the basis that either of these statements (ii) and (iii) was true, and in my opinion he was right in taking this position.

Apart from the respondent's own testimony, to be mentioned later, there is no evidence of other sexual misconduct until the years 1954, 1955 and 1956. During these years the respondent engaged in indecent acts with Gibson and Helmer and with two other youths in regard to whom no charges were laid. The course of conduct described was substantially the same in all cases and culminated in what counsel for the appellant described as "mutual manual masturbation". At the time of these occurrences the ages of the youths concerned varied from 14 to 17 years.

The testimony of the respondent, mentioned above, from which it might be inferred that there were other similar acts, is as follows:

> Q. Now when do you first remember homosexual activities taking place in your own life? I mean, how far back does it go? A. I would think when I was about 14 or 13.
>
> Q. Now, can you tell the Court how frequent those episodes have occurred in your life? Has it been a continuous thing, or have they broken off? A. They have broken off from time to time. The only times that there has been any pattern, if you could call it such, has been when the pressure of school work or some other such thing has forced me into the company of students whose problems actually became part of my own pattern of life, you might say. That is, in all cases I have tried to help whenever I could. In the case of the two boys that are mentioned in the indictment here, it seemed to me that they both had real problems, problems that were real to them, and I was trying to help build those people up mentally, to give them more confidence in themselves, and give them a better physique in order that they could appear to better advantage among other fellows. In the case of months of close association with them, then this very pattern grew out of it.
>
> Q. You mean, those homosexual practices? A. Yes, but there has never been any, as it were, impulse that has grown up suddenly or anything like that.

Questioned as to the future the respondent gave the following evidence:

Q. What do you have to say as to the likelihood of ever indulging in these homosexual practices in the future? A. I began to say, Mr. Shannon, that I can state unequivocally that it could never possibly happen again. For the first time in my life I have seen how this looks to other people. It is the first time in my life I have ever been confronted with public opinion and I can only say this, that under no circumstances would it ever happen again. In the first place, I voluntarily sent my school certificate to Edmonton to have it cancelled by my request so that at no time in the future could I be associated with schools or with young people. Furthermore, I have no intention of at any time associating with them, and the only reason it has happened in the past is where that association has been possible. As I see these actions now through other people's eyes I can merely say it will never happen again, it simply could not, my whole attitude, I think, has been entirely changed.

Q. What do you feel has been effect of the trial and your conviction on your attitude in this regard? A. It has been a tremendous shock, it was from the very first time, as a matter of fact, that Detectives Gilkes and Evans spoke to me in the morning of April 3rd, but the shock has been accumulative ever since and culminated as it has today. It has been a tremendous upheaval, but I will also say this, in those two months that have elapsed in between I have given very serious thought to my mental condition and all circumstances pertaining to this trial and to my past actions. And I say that not merely under oath, but with the deepest sincerity with which I am capable.

Q. Have you ever been in trouble with the law before? A. I have not.

Q. You have no previous convictions of any kind? A. No.

Q. How important do you feel the steps are that you have taken so that you will not be associated with young boys again, how important do you feel that will be? A. It means a complete reorientation of my life. I have always been associated with schools. From this time on I will not have any association with schools, Scout Troops or anything else. I intend, as a matter of policy, regardless of where I am, to keep entirely disassociated with anything to do with young people in any form.

Q. You said previously, as I understood your evidence, it was only through a period of time of associating with young people that those practices had developed, is that right? A. That is correct, yes.

Up to this point I have been dealing with the factual evidence. Its effect may be summarized as follows. From the age of 13 or 14 the respondent has had a recurring abnormal desire to indulge in homosexual practices. Those practices have been uniform; the other party concerned has been a youth between 14 and 17 with whom the respondent had for some time previously to their commencement been in close association as a teacher. In each case a considerable period of time has been taken in inducing the youth to participate in the practices. There is no suggestion of the

1957

THE QUEEN v. NEIL

Cartwright J.

respondent ever having employed anything in the nature of force. The word "seduction", used by Dr. Michie, aptly describes his method.

In allowing the appeal the Appellate Division gave brief oral reasons as follows:

> The Court feels, with our brother Mr. Justice Johnson in doubt, that the appeal should be allowed and the conviction quashed, on the grounds that the Crown has failed to bring the evidence of the psychiatrists within the definition of criminal sexual psychopath.

The two main grounds on which it was sought to support this judgment are (i) that even if the evidence supports the view that on regaining his liberty the respondent is likely to continue the same course of criminal conduct this does not bring him within the words of the definition in s. 659(*b*) "a person who . . . is likely to attack or otherwise inflict injury, pain or other evil on any person", and (ii) that the evidence does not warrant a finding that the respondent has shown such a lack of power to control his sexual impulses as makes it likely that he will in the future be unable to control them and be guilty of the same sort of conduct as that of which he has been convicted.

The validity of the first ground depends upon the proper construction of the definition in s. 659(*b*), and that of the second upon the effect of the evidence.

After anxious consideration I have reached the conclusion that Mr. Shannon is right in the first of the two submissions mentioned. S. 659(*b*) reads as follows:

> "criminal sexual psychopath" means a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

Assuming for the purposes of this branch of the matter that the course of misconduct in sexual matters pursued by the respondent has shown a lack of power on his part to control his impulses to engage in homosexual practices of the sort of which he has been convicted and that, therefore, when set at liberty he is likely to engage in similar practices, the question is whether this shows him to be "likely to attack or otherwise inflict injury, pain or other evil on any person". On the evidence there is no room for the suggestion that the respondent has ever attacked or is ever likely to attack anyone, and in the course of his full and helpful argument Mr. Frawley disclaimed any suggestion

that the respondent had used, or was likely to use, anything in the nature of force or compulsion to bring about the gratification of his abnormal desires. The submission of counsel for the appellant was that, on the assumption made at the opening of this paragraph, the respondent "is likely to . . . inflict . . . evil" on other youths. To persuade a youth to participate in acts of gross indecency is in itself a crime and there is no need to expatiate on the heinousness of such conduct; but the person who so persuades a youth is causing him to do evil rather than inflicting evil upon him. The primary meanings of the word "inflict", given in the Shorter Oxford Dictionary, are "to lay on as a stroke, blow or wound; to impose; to cause to be borne". In my opinion, neither of the verbs "to attack" or "to inflict" is apt to describe conduct, however evil in its ultimate purpose, which contains no element of force, violence or coercion but consists solely of temptation and persuasion.

I have reached this conclusion on the construction of the words of the definition, but it appears to me to be strengthened by a consideration of the evil which the enactment of the sections dealing with criminal sexual psychopaths was intended to remedy. The purpose of the enactment appears, from the related sections read as a whole, to be to protect persons from becoming the victims of those whose lack of power to control their sexual impulses renders them a source of danger; and the danger envisaged is, I think, that of coercive conduct resulting in the active infliction of pain, injury or other evil on the victim, not merely the persuading or seducing of another to participate in sexual misconduct. This view is also, in my opinion, supported by a consideration of the drastic nature of the preventive measure provided, that is, incarceration which may continue for life.

Having reached the above conclusion as to the meaning of the definition, it follows that I would dismiss the appeal, but I propose to deal also with the second main ground mentioned above on which it was sought to support the judgment of the Appellate Division.

The reasons of the Appellate Division are susceptible of the interpretation that, in their view, the evidence does not support a finding that the respondent has shown such a lack of power to control his sexual impulses as to render it

1957

THE QUEEN v. NEIL

Cartwright J.

likely that he will in the future commit further criminal acts of the sort of which he has been convicted. I do not find it necessary to decide whether the words in the definition "a lack of power to control" mean, as was submitted for the respondent, a total absence of power to control or, as was argued for the appellant, such a deficiency in power to control as renders it likely that control will not in fact be exercised, because, in my opinion, even if the latter meaning be adopted it cannot be said that the Appellate Division erred in their view that it was not established that the appellant was likely to repeat acts of the sort mentioned.

I have already quoted the evidence of the respondent to the effect that he is confident that there will be no repetition of his misconduct. Against this is to be set the evidence of the two psychiatrists. I have no criticism of these witnesses. They possess high professional qualifications and their answers were responsive to the questions put to them; but, in my respectful opinion, their examination was conducted in an improper manner. Under s. 661(3) it is the duty of the Court to find whether an accused is a criminal sexual psychopath. Section 661(2) provides that the Court may hear any evidence that it considers necessary but shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General. This provision does not effect any alteration in the rules as to the nature of the evidence which may be given by an expert witness, or as to the manner in which his examination should be conducted.

It will be sufficient to state briefly the course of the examination of Dr. Michie by counsel for the Crown. Having proved his professional qualifications, counsel asked him if he had listened to all the evidence both on the trial of the substantive offences and on the hearing under s. 661(1). The witness having answered in the affirmative, he was next asked whether he had listened for the purpose of determining to himself whether the accused was a criminal sexual psychopath. His answer was "Yes". He was then asked if he had "arrived at a decision". His answer was "Yes"; and he was then asked to make his decision known to the Court. His examination-in-chief concluded as follows:

Q. Just one step further in clarification of your final finding that he is a criminal sexual psychopath. The definition in the Code of criminal

sexual psychopath includes all of the following, and with leave of the court I would read it to you, Doctor. I am reading 659, subsection (*b*) of the Code in the following words:

> "'Criminal sexual psychopath' means a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who, as a result, is likely to attack or otherwise inflict injury, pain or other evil on any person."

Do you find, Doctor, that each one of the isolated requirements set forth in section 659, subsection (*b*) are found affirmatively against the accused? A. It is my opinion that that is so.

The objections to such a method of examination are obvious. The witness is being asked to weigh conflicting evidence; the Court does not know, for example, whether he accepted as true the evidence of Stapley, as to acts of *fellatio* and sodomy, which was denied by the respondent and which counsel for the appellant did not ask this Court to accept. The witness may have disbelieved the testimony of the respondent *in toto*. The witness could not be expected to know the rules as to weighing the evidence of an accomplice or to appreciate the significance of the respondent not having been cross-examined. The Court is unaware of the foundation of assumed facts on which the opinion of the witness was based. The witness is also, in effect, being called upon to interpret the definition contained in s. 659(*b*), a task the difficulty of which is emphasized by the different submissions as to its meaning made by counsel in the course of the argument before us.

In the cross-examination of Dr. Michie the following appears:

Q. I notice in your evidence, Dr. Michie, that you said, I think you used the term "sex impulses", I think that was the term you used, "are either uncontrollable or uncontrolled"? A. That is what I said, uncontrollable or uncontrolled.

Q. Uncontrollable or uncontrolled. May I draw the inference from that that Neil could control his sexual impulses? A. I have always had the feeling that the prisoner, that the person who is not mentally disturbed can control his impulses. All do not agree with that.

Q. That is your opinion? A. Yes.

And in the cross-examination of Dr. Carnat:

Q. Do you agree with Dr. Michie that a man, and here I do not misrepresent what Dr. Michie said, that a man who has possession of his mental faculties can control criminal sexual impulses. A. A man in possession of his mental faculties can control them?

Q. Yes? A. To a great extent, he probably can.

1957

THE QUEEN v. NEIL

Cartwright J.

Q. Do you have any reason to believe that the accused, Sidney Keith Neil, does not have possession of his mental faculties? A. He is mentally sane.

Q. Does he have possession of his mental faculties? A. Yes.

Q. In your opinion, could a public trial and conviction and all of the publicity and humiliation that goes with it, bearing in mind the circumstances of this case, could that have a therapeutic effect on this accused? A. It is quite possible it could. It could definitely act as a deterrent.

Q. It could make sufficient impression on him that he would no longer indulge in those practices? A. It is possible.

The question as to whether an accused who has shown a lack of power to control his sexual impulses is as a result likely to continue to fail to control them is one of fact in deciding which the trial judge undoubtedly has certain advantages over an appellate tribunal, but these advantages are not decisive in the case at bar where the finding depends on inferences to be drawn from past facts as to future probabilities. After a careful reading of all the record I have, as indicated above, reached the conclusion that it cannot be said that the Appellate Division was wrong in deciding that the evidence does not warrant a finding that the respondent is likely in the future to repeat the criminal conduct of which he has been found guilty.

I rest my decision, therefore, on both of the two main grounds set out above urged on behalf of the respondent.

I would dismiss the appeal.

Appeal dismissed, TASCHEREAU *and* LOCKE JJ. *dissenting.*

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

Solicitor for the respondent: M. E. Shannon, Calgary.

Solicitor for the Attorney General of Canada: W. R. Jackett, Ottawa.

TIP TOP TAILORS LIMITED .....APPELLANT;

AND

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

1957

*Mar. 26, 27
Oct. 1

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—What is "profit from business"—Dealings in foreign exchange—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4, 127(1)(e).

The appellant company bought large quantities of cloth in Great Britain. Before 1948, its practice was to pay for each lot by an individual purchase of sterling at the rate of exchange then prevailing. In January 1948 the officers of the company, foreseeing a possible devaluation of sterling, arranged with a bank in London for a line of credit to a stated maximum which could be called in by the bank at the end of each year. Thereafter, as each shipment of cloth was received the London bank was instructed to pay the seller and the price was entered in the company's books in Canadian dollars at the current rate of exchange. When the bank overdraft was paid in September 1949, the rate of exchange had dropped and the company thus made a net profit of $169,000.

Held (Cartwright J. dissenting): This profit was taxable as income of the company under the *Income Tax Act*, 1948.

Per Kerwin C.J. and Locke J.: In essence, there appeared to be no difference in the resulting profit whether it was expressed as one realized by the reduction in the number of Canadian dollars needed to discharge the debt to the bank or as a reduction in the cost to the taxpayer of the merchandise purchased and used during the period, and the profit that would have resulted had the taxpayer sold sterling short to the requisite amount. In either case, it was a profit made in one necessary part of the appellant's trading operations and was not a capital gain as a result of speculation in sterling. *Atlantic Sugar Refineries Limited v. The Minister of National Revenue*, [1949] S.C.R. 706; *Imperial Tobacco Co. (of Great Britain and Ireland) Ltd. v. Kelly* (1943), 25 Tax Cas. 292, applied; *McKinlay v. H. T. Jenkins and Son, Ltd.* (1926), 10 Tax Cas. 372, distinguished.

Per Rand and Fauteux JJ.: The profit was not to be regarded as one on a collateral borrowing of capital but rather as one derived from the "business" in which the company was engaged. The loan produced working capital used in the course of the company's business and in substance the creation of debt in the bank was merely a substitution of creditor for the actual transactions. There was no temporary investment in foreign capital.

Per Cartwright J., *dissenting*: There was nothing in the evidence sufficient to displace the *prima facie* presumption that a saving made in discharging an obligation to a lender was properly treated as an item of capital and not of revenue. Applying that presumption to this case, the profit was not taxable.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Fauteux JJ.

1957

TIP TOP TAILORS LTD. v. MINISTER OF NATIONAL REVENUE

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada (1), reversing a judgment of the Income Tax Appeal Board (2). Appeal dismissed.

Lazarus Phillips, Q.C., and *Philip F. Vineberg*, for the appellant.

D. W. Mundell, Q.C., and *R. A. P. Montgomery*, for the respondent.

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

LOCKE J.:—The *Income Tax Act*, 1948 (Can.), c. 52, does not contain any further definition of "income" which requires consideration in this case than that to be found in ss. 3 and 4. In this respect it differs from its predecessor, the *Income War Tax Act*, R.S.C. 1927, c. 97, where the meaning to be assigned to the term in the Act was elaborately defined.

Section 3 of the 1948 Act says that the income of a taxpayer for a taxation year for the purposes of Part I of the Act is his income from all sources inside or outside Canada and without restricting the generality of the foregoing includes income from, *inter alia*, all businesses. Section 4 so far as it is relevant merely says that income for a taxation year from a business is the profit therefrom for the year. Accordingly the only question to be considered is whether the profit which was undoubtedly realized in the present matter is a profit from the business carried on by the appellant.

The relevant facts are detailed in the judgment of Cameron J. delivered in the Exchequer Court (1). The purpose of the borrowing from the Canadian Bank of Commerce branch in London was stated during cross-examination of the witness Clayton, the secretary and controller of the appellant company, in these terms:

> . . . it was felt that the pound sterling would be devalued, and after discussing the matter fully with the president and other top officials in the company we decided to deliberately pursue this policy of running a large overdraft in England in the hope of gaining the capital profit on devaluation.

(1) [1955] Ex. C.R. 144, [1955] C.T.C. 113, 55 D.T.C. 1083.

(2) *Sub nom. No. 137 v. Minister of National Revenue* (1954), 9 Tax A.B.C. 377, 54 D.T.C. 23.

And again:

> I contend that that profit is the result of a premeditated act on my part and other officials of the company to build up a liability in England when, in fact, we could have specifically paid out of funds that we had in Canada, and it had no relationship whatsoever with the merchandise, as you are saying it does, in that once we paid a supplier the transaction was completed with the supplier and we had no more recourse to him. In normal circumstances, for as long back as I can trace the records, the procedure was different, and it was only during this 18 months when we tried to go short of sterling and the procedure was different and resulted in a capital profit, and has no relationship, in my opinion, to the merchandise.

While the foregoing is rather more argument than a statement of facts it makes clear the purpose of the course that was followed. The question as to whether the gain made by the company is a capital profit is, of course, the point in the case.

It is, in my view, of importance to note that while, as Clayton's evidence indicated, the appellant intended to advance the claim that any profit realized as a result of devaluation of the pound was a capital gain resulting from what was to be a speculation in foreign exchange, the interest charges on the bank loan were charged in the years 1948 and 1949 as expenses of the operation of the business. In my opinion the present matter is concluded against the appellant by the decision of this Court in *Atlantic Sugar Refineries Limited v. The Minister of National Revenue* (1). I am unable to differentiate the position of the taxpayer in that case in respect of the profit made on the short sales of sugar from the position of the appellant in regard to the profit that was made due to the fall in value of the pound.

At the commencement of the year 1948 the appellant had a very small overdraft with the bank in London and from then until September 1949 it used sterling borrowed from that bank to pay for the goods used in its manufacturing operations in Canada. The purpose of incurring the overdraft was made clear by Clayton. It was the hope that when it became necessary to pay the overdraft the value of the pound in relation to the Canadian dollar would have dropped, the practical result of which would be that the cost of the goods which had been used in the operations or purchased during that period would be reduced. In essence

(1) [1949] S.C.R. 706, [1949] C.T.C. 196, [1949] 3 D.L.R. 641.

1957

TIP TOP TAILORS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

there appears to be no difference between the resulting profit, whether it be expressed as one realized by the reduction in the number of Canadian dollars needed to discharge a debt or as a reduction in the cost to the taxpayer of the merchandise which had been used and purchased during the period, and that which would have resulted had the taxpayer sold sterling short to the requisite amount.

I agree with the learned trial judge that it was a scheme for profit-making in one necessary part of the appellant's trading operations, namely, the purchase of sterling funds and part of an integrated commercial operation being the purchase of the supplies and the payment for them in that currency. It was apparently treated as such in the preparation of the appellant's accounts for the years in question since if it was simply a speculation in sterling exchange divorced from the company's trading operations the interest payable on the bank loan would not have been deductible as an operating expense.

In my opinion the decision of Rowlatt J. in *McKinlay v. H. T. Jenkins and Son, Limited* (1) does not assist the appellant. As the report of that case indicates, Rowlatt J. treated the purchase of Italian currency which was made as an investment into which the taxpayer had put its money temporarily. The learned judge explained the ground of his decision in *McKinlay's Case* in the case of *George Thompson & Co., Ltd. v. The Commissioners of Inland Revenue* (2) where he said that he had considered that it was a case where they had some capital lying idle and they embarked upon an exchange speculation.

This fact is commented upon by Lord Greene M.R. in delivering the judgment of the Court of Appeal in *Imperial Tobacco Co. (of Great Britain and Ireland), Ltd. v. Kelly* (3), where, however, it is pointed out that the case stated in *McKinlay's Case* does not appear to contain any basis for a finding that the original purchase of the lire was a speculation. There had been, however, no appeal from the decision of Rowlatt J. and Lord Greene did not further express his opinion as to its accuracy.

(1) (1926), 10 Tax Cas. 372.
(2) (1927), 12 Tax Cas. 1091 at 1102.
(3) 25 Tax Cas. 292 at 301, [1943] 2 All E.R. 119 at 122.

Decisions as to what constitutes "income" under sched. D of the *Income Tax Act,* 1918 (U.K.), c. 40, appear to me to be of value in considering cases such as the present arising under the statute of 1948. To what extent they touch such cases arising under the *Income War Tax Act* need not here be considered. Under sched. D, s. 1, the tax is applied to the annual profit or gains arising, *inter alia,* from any trade whether the same be carried on in the United Kingdom or elsewhere. This does not appear to differ from ss. 3 and 4 of the Canadian statute.

In the *Imperial Tobacco* case the company carrying on business in England had acquired a large amount of American exchange for the purchase of tobacco in the United States and when the American dollars were requisitioned by the treasury in England they had appreciated greatly in value in terms of sterling. The question was as to whether the resulting profit to the company was income. Lord Greene said in part (1), after referring to *Thompson's* case:

> In the present case it is truly said that it was no part of the company's business to buy and sell dollars. But in each case the commodity (in the one case the coal and in the other case the dollars) was required for the purpose of transactions on revenue account and nothing else.

and held the profit to be taxable income. In the present matter the borrowings of sterling from the bank were made for the purpose of transactions on revenue account to the same extent.

The decision in *Tax Case No. 308* (2) does not, in my opinion, assist the appellant. That matter was decided in a special Court for hearing income tax appeals, the judgment being delivered by the learned President. The report contains a very meagre statement of the facts but it appears that the taxpayer, which carried on business in South Africa, had for many years financed its obligations by an overdraft in London. When the United Kingdom left the gold standard, the company took advantage of the favourable rate of exchange which resulted to discharge its liability on the overdraft for an amount in South African pounds substantially less than the nominal amount of its debts expressed in sterling. The profit thus resulting was held to

(1) 25 Tax Cas. at p. 301. (2) (1934), 8 S.A. Tax Cas. 99.

1957

TIP TOP TAILORS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

be a capital gain on the ground that the debt due to the bank on overdraft was of the nature of a loan and, therefore, a capital liability.

The report does not contain the statutory definition of income in the statute which affected the matter and the evidence did not disclose the purpose for which the moneys borrowed had been disbursed. It was, apparently, on the ground that the borrowing of money is *prima facie* a liability on capital account that, in the absence of other evidence, the learned President considered that the profit was a capital gain.

I see no relation between this set of facts and the present, where the exact purpose for which the moneys were borrowed from the bank was as above stated, being for the purpose of transactions on revenue account and nothing else, to adopt the language of the Master of the Rolls in the *Imperial Tobacco* case.

Everything that could be fairly urged on behalf of the appellant in the present matter has been said by the learned counsel who appeared on its behalf but, in my opinion, this appeal should fail for the above reasons.

The judgment of Rand and Fauteux JJ. was delivered by

RAND J.:—The appellant company deals in large-scale manufacture of wearing apparel in the course of which quantities of cloth are purchased in lots from Great Britain. Its ordinary practice, prior to January 1948, was to pay for each lot according to the terms of the invoice by an individual purchase of sterling at the rate of exchange then prevailing. In that month the officers of the company, foreseeing the likelihood of a devaluation of sterling, made preparations to avail themselves of the benefit of that happening should it eventuate.

The company thereupon arranged with a Canadian bank having a branch office in London for a line of credit at that office to a maximum of £250,000 which could be called in by the bank at the end of each year. Although this credit may have been available for any purposes of the company, that it would be resorted to for some or all of its purchases of material for its business is quite evident, and no other purpose is suggested. The debit account accumulated until September 1949; interim payments during that period were