1964

CANADA

LAW REPORTS

RAPPORTS JUDICIAIRES

DU CANADA

Supreme Court of Canada

Cour Suprême du Canada

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Ottawa, 1965

JUDGES

OF THE

SUPREME COURT OF CANADA

The Honourable ROBERT TASCHEREAU, P.C., *Chief Justice of Canada.*

The Honourable JOHN ROBERT CARTWRIGHT.

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT. P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

The Honourable EMMETT MATTHEW HALL.

The Honourable WISHART FLETT SPENCE.

ATTORNEYS GENERAL OF CANADA

The Honourable LIONEL CHEVRIER, Q.C.

The Honourable GUY FAVREAU, Q.C.

SOLICITOR GENERAL OF CANADA

The Honourable J. WATSON MACNAUGHT, Q.C.

JUGES
DE LA
COUR SUPRÊME DU CANADA

L'honorable ROBERT TASCHEREAU, C.P., *juge en chef du Canada.*
L'honorable JOHN ROBERT CARTWRIGHT.
L'honorable GÉRALD FAUTEUX.
L'honorable DOUGLAS CHARLES ABBOTT, C.P.
L'honorable RONALD MARTLAND.
L'honorable WILFRED JUDSON.
L'honorable ROLAND A. RITCHIE.
L'honorable EMMETT MATTHEW HALL.
L'honorable WISHART FLETT SPENCE.

PROCUREURS GÉNÉRAUX DU CANADA

L'honorable LIONEL CHEVRIER, C.R.
L'honorable GUY FAVREAU, C.R.

SOLLICITEUR GÉNÉRAL DU CANADA

L'honorable J. WATSON MACNAUGHT, C.R.

90139—1½

ERRATA

in volume 1964

Page 167, line 3 from bottom. Read "dispose" instead of "disposed".
Page 256, delete the last 13 lines starting at words "En vertu . . .".
Page 257, delete the first 5 lines.
Page 559, line 3 of French Caption. Read "1953–54" instead of "1963–64".
Page 559, line 4 of English Caption. Read "1953–54" instead of "1963–64".

in volume 1963

Page 584, line 5 of head-note. Insert "or" after "statutory".

UNREPORTED JUDGMENTS—JUGEMENTS NON RAPPORTÉS

The following judgments rendered during the year will not be reported

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Les jugements suivants rendus durant l'année ne seront pas rapportés

Apexx Control Ltd. v. Johnson et al. and Montreal Trust (Man.), appeal dismissed with costs, May 26, 1964.

Architectural Institute of B.C. v. Francour and Francour Const. Co., 43 W.W.R. 80, 39 D.L.R. (2d) 590, appeal dismissed with costs, February 7, 1964.

Bishop v. Ontario Securities Commission, [1964] 1 O.R. 17, 41 D.L.R. (2d) 24, appeal dismissed without costs, October 20, 1964.

Boland Foundation v. Moog and Moog (Ont.), appeal dismissed with costs, November 13, 1964.

Boston Insurance Co. v. Bank of Montreal, [1963] Que. Q.B. 487, appeal dismissed with costs, May 7, 1964.

British American Oil Co. Ltd. v. Roberge, [1964] Que. Q.B. 18, appeal dismissed with costs, June 9, 1964.

Bronfman v. Moore, [1964] Que. Q.B. 675, appeal dismissed with costs, November 24, 1964.

Clarkson Co. Ltd. v. Pickersgill (Ont.), appeal allowed with costs, March 16, 1964.

Clarke-Marlow v. Sharp et al. (Ont.), appeal dismissed with costs, June 23, 1964.

Colonial & Home Fuel Distributors v. Skinners' Ltd., 39 D.L.R. (2d) 579, appeal dismissed with costs, October 21, 1964.

Columbia Cellulose Co. et al. v. Continental Casualty Co., 43 W.W.R. 355, 40 D.L.R. (2d) 297, appeal dismissed with costs, February 12, 1964.

Commission des Ecoles Catholiques de Chicoutimi v. Union Professionnelle des Educateurs de Chicoutimi et al., [1964] Que. Q.B. 282, appeal dismissed with costs, November 26, 1964.

Côté v. Commission de Transport de Montréal et al., [1964] Que. Q.B. 606, appeal dismissed with costs, February 27, 1964.

Dominic Supports & Forms Ltd. v. Louis Donolo Inc. (Que.), appeal dismissed with costs, April 28, 1964.

Fay and Fay v. Verbickas (Ont.), appeal allowed with costs and cross-appeal dismissed with costs, May 8, 1964.

Gardiner v. Minister of National Revenue, 63 D.T.C. 1219, appeal dismissed with costs, November 4, 1964.

Haase v. The Queen (B.C.), appeal dismissed, November 20, 1964.

Lanctôt and Fafard v. Plante, [1963] Que. Q.B. 787, both appeals dismissed with costs, March 2, 1964.

Langstaff Land Development Ltd. v. Campbell et al. (Ont.), appeal dismissed with costs, May 12, 1964.

Legault v. Carignan, [1963] Que. Q.B. 222, appeal dismissed with costs, Cartwright J. dissenting, March 23, 1964.

MacLean v. The Queen, 39 C.R. 404, 3 C.C.C. 118, appeal dismissed, February 10, 1964.

Meeker v. The Queen (B.C.), appeal dismissed, October 8, 1964.

Packsack Diamond Drills Ltd. v. J. K. Smit & Sons International Ltd., 24 Fox Pat. C. 146, 30 D.L.R. (2d) 46, appeal dismissed with costs, October 15, 1964.

Potvin v. St-Cyr, [1964] Que. Q.B. 31, appeal dismissed with costs, December 1, 1964.

Queen, The v. Asmussen et al. (Exch.), appeal dismissed with costs and cross-appeal allowed with costs, June 17, 1964.

Queen, The v. Leclair, [1964] Que. Q.B. 72, appeal dismissed, April 30, 1964.

R. & R. Enterprises Ltd. v. Hamel, [1964] Que. Q.B. 361, appeal dismissed with costs, June 4, 1964.

Robertson v. Minister of National Revenue, [1963] C.T.C. 550, 63 D.T.C. 1367, appeal dismissed with costs, June 10, 1964.

Robwaral Ltd. v. Minister of National Revenue, [1960] Ex. C.R. 221, C.T.C. 16, 60 D.T.C. 1025, appeal dismissed with costs, October 21, 1964.

Rosemount Rental Developments v. City of Medicine Hat et al., 43 D.L.R. (2d) 433, appeal dismissed with costs, May 20, 1964.

Shepherd v. The Queen (Exch.), appeal dismissed with costs, December 1, 1964.

Swanson Construction Co. v. Government of Manitoba and Dominion Structural Steel Ltd., 43 W.W.R. 385, 399, 40 D.L.R. (2d) 162, 176. appeal dismissed with costs, May 27, 1964.

MOTIONS—REQUÊTES

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

Cette liste ne comprend pas les requêtes pour permission d'appeler qui ont été accordées.

Allstate Insurance Co. v. Groulx (Que.), leave to appeal refused with costs, November 19, 1964.

American Cyanamid v. Myers (Exch.), leave to appeal refused with costs, July 9, 1964.

Banks v. Upper Lakes Shipping Co. Ltd., [1964] Que. Q.B. 594, leave to appeal refused with costs, June 29, 1964.

Beaudry v. The Queen (Alta.), leave to appeal refused, May 4, 1964.

Blais v. Touchet, [1963] S.C.R. 358, motion for re-hearing refused with costs, February 3, 1964.

Bouchard v. Ravary et al. (Que.), leave to appeal refused with costs, October 6, 1964.

Cahan v. Jager (Alta.), leave to appeal refused with costs, March 23, 1964.

Carleton, County of v. City of Ottawa (Ont.), motion to adduce new evidence granted, October 26, 1964.

Clarke-Marlowe v. Sharp et al. (Ont.), leave to appeal refused with costs, November 16, 1964.

Coco-Cola Co., Ltd. v. Labour Relations Board of Quebec (Que.), leave to appeal refused with costs, December 2, 1964.

Continental Pharma. et al. v. American Cyanamid (Ont.), leave to appeal refused with costs, March 19, 1964.

Conwest Exploration Co. v. Letain, [1964] S.C.R. 20, motion for re-hearing refused with costs, January 28, 1964.

Craig v. The Queen (Ont.), leave to appeal refused, March 23, 1964.

Croteau et al. v. Auclair, [1963] Que. Q.B. 964, leave to appeal refused with costs, February 27, 1964.

Danis et al. v. Blais (Que.), leave to appeal refused with costs, February 14, 1964.

Darby v. The Queen (B.C.), leave to appeal refused, February 27, 1964.

Deschênes v. The Queen (Ont.), leave to appeal refused, June 22, 1964.

Dominion Textile Co. Ltd. v. Labour Relations Board of Province of Quebec, [1964] Que. Q.B. 256, leave to appeal refused with costs, March 23, 1964.

Doric Textile Mills Ltd. v. Commission des Relations Ouvrières et al. (Que.), leave to appeal refused with costs, October 9, 1964.

Druce v. The Queen (Ont.), leave to appeal refused, June 8, 1964.

Farmers & Merchants Trust Co. Ltd. v. Zimmerman (Sask.), (1963), 45 W.W.R. 310, leave to appeal refused, February 3, 1964.

Florent v. Siboldoro (Ont.), leave to appeal refused with costs, November 30, 1964.

Gaskin v. Retail Credit Co., (1964), 43 D.L.R. (2d) 120, leave to appeal refused without costs, February 4, 1964.

Heft v. Town of Ste. Rose et al., [1964] Que. Q.B. 697, leave to appeal refused with costs, May 11, 1964.

Hill v. Hill, (1963), 46 W.W.R. 158, leave to appeal refused with costs, May 4, 1964.

Hoffman-LaRoche Ltd. v. Bell Craig (Ont.), leave to appeal refused with costs, September 23, 1964.

Hôpital Voghel Inc. v. Montréal, [1964] Que. Q.B. 391, leave to appeal refused with costs, March 16, 1964.

Hôpital Voghel Inc. v. City of Montreal, [1964] Que. Q.B. 391, motion to quash granted with costs, March 16, 1964.

Howard v. California (Man.), leave to appeal refused without costs, March 17, 1964.

Imperial Inv. Corpn. v. Low-Beer (B.C.), leave to appeal refused with costs, October 14, 1964.

Laporte v. Touzin and Bouchard (Que.), leave to appeal refused with costs, November 23, 1964.

Madden v. The Queen (Ont.), leave to appeal refused, June 8, 1964.

Marine Pipeline & Dredging Ltd. v. Canadian Fina Oil Ltd. (Alta.), leave to appeal refused with costs, December 7, 1964.

McCaud v. The Queen (Ont.), application for issuance of writ of habeas corpus refused, June 8, 1964.

Nicolas v. The Queen, [1964] Que. Q.B. 241, leave to appeal refused, March 16, 1964.

Norcan Oils Ltd. v. Fogler (Alta.), motion to adduce new evidence granted, May 27, 1964.

Oil, Chemical and Atomic Workers, International Union v. Imperial Oil Ltd., [1963] S.C.R. 584, motion for re-hearing refused with costs, January 28, 1964.

Paquette v. The Queen (Ont.), leave to appeal refused, January 20, 1964.

Partridge et al. v. Mahler et al. (Ont.), leave to appeal refused with costs, February 17, 1964.

Petroff v. The Queen (Ont.), leave to appeal refused, February 11, 1964.

Pyper v. The Queen (Man.), leave to appeal refused, February 3, 1964.

Queen, The v. Dubé, (1964), 42 C.R. 168, leave to appeal refused, March 16, 1964.

Queen, The v. Patmore (B.C.), leave to appeal refused, November 9, 1964.

Queen, The v. Vye (Ont.), leave to appeal refused, October 19, 1964.

Read v. The Queen (Ont.), application for issuance of writ of habeas corpus refused, August 19, 1964.

Read v. The Queen (Ont.), leave to appeal refused, August 19, 1964.

Resnick v. The Queen, [1964] 2 O.R. 101, leave to appeal refused, March 16, 1964.

Scott v. The Queen (Ont.), leave to appeal refused, May 11, 1964.

Selkirk v. The Queen (Ont.), leave to appeal refused, November 2, 1964.

Trans-Canada Feeds v. Union Carbide (Exch.), leave to appeal refused with costs, July 9, 1964.

Tutty v. The Queen (Alta.), leave to appeal refused, February 27, 1964.

United Steelworkers v. International Nickel Co. of Canada (Ont.), leave to appeal refused with costs, February 4, 1964.

Viola v. The Queen (Ont.), leave to appeal refused, October 19, 1964.

Williamson et al. v. Summerfeldt (Ont.), leave to appeal refused with costs, April 28, 1964.

Wilson v. The Queen (B.C.), leave to appeal refused, October 26, 1964.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ARRÊTS

DE LA

COUR SUPRÊME DU CANADA SUR APPEL DE DÉCISIONS

DES

TRIBUNAUX FÉDÉRAUX ET PROVINCIAUX

90129-8—1

ARTURO RAFAEL ESPAILLAT-RODRIGUEZ ..... APPELLANT;

1963

*June 13, 14
Oct. 1

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Immigration—Person having ceased to be a non-immigrant applying to become a permanent resident of Canada—Failure to comply with regulations as to visa and medical certificate—Deportation order—Jurisdiction of Special Inquiry Officer—Immigration Act, R.S.C. 1952, c. 325.

The appellant, a citizen of the Dominican Republic, entered Canada in November 1961, at which time he held a diplomatic passport. In January 1962, he exchanged his diplomatic passport for an ordinary passport. In the following March he reported to an immigration officer, pursuant to s. 7(3) of the *Immigration Act* that he had ceased to be a non-immigrant and applied to become a permanent resident of Canada. After a hearing before a Special Inquiry Officer under ss. 27 and 28 of the Act, an order of deportation was made against the appellant on the ground that he was a person other than a person referred to in s. 28(2) in that, not being a Canadian citizen or a person having Canadian domicile, he was not a person who could come into Canada as of right, that he was a person seeking admission to Canada but was a member of the prohibited class described in s. 5(*t*) of the Act because (a) he was not in possession of a valid and subsisting immigrant visa issued by a visa officer as required by s. 28(1) of the *Immigration Regulations,* Part 1, and (b) his passport did not bear a medical certificate duly signed by a medical officer, nor was he in possession of a medical certificate in the form prescribed by the Minister as required by s. 29(1) of the said Regulations. An appeal to the Immigration Appeal Board, under s. 31 of the Act, was dismissed and this decision was subsequently confirmed by the Minister. The appellant then brought proceedings by way of *certiorari* to quash the deportation order. The application was refused by the High Court and an appeal to the Court of Appeal was dismissed. The appellant then appealed to this Court.

Held (Cartwright J. *dissenting*): The appeal should be dismissed.

Per Taschereau C.J. and Abbott, Judson and Hall JJ.: The administrative responsibility of granting or refusing the immigrant visa, required by the regulations as a condition precedent to landing in Canada, was entrusted, under the Act, to certain designated officers located outside Canada. Immigration officers at points of entry in Canada were given no authority to grant such a visa. The Minister was given wide discretionary powers and it might well be that he had power to waive the visa requirements, but in the present case he was not prepared to take such action. Regulation 28(1) was not beyond the power of the Governor in Council to enact.

The Special Inquiry Officer had jurisdiction to make the deportation order. The hearing was in accordance with the provisions of the Act and the

*PRESENT: Taschereau C.J. and Cartwright, Abbott, Judson and Hall JJ.

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order was based on findings of fact which had not been challenged. The order having been made under the authority of and in compliance with the Act, under s. 39, a court had no jurisdiction to interfere.

De Marigny v. Langlais, [1948] S.C.R. 155, referred to. *Ex parte Mannira* (1959), 17 D.L.R. (2d) 482, agreed with.

Per Cartwright J., dissenting: Regulation 28 was procedural rather than substantive; and the general words of ss. 5(*t*) and 7(3) of the Act must be construed as rendering this regulation inapplicable to an applicant who is in fact at the time of seeking admission lawfully present in Canada. Similarly, the purpose of regulation 29 was to prevent a would-be immigrant setting out for Canada if he falls within classes (*a*), (*b*), (*c*) or (*s*) of s. 5 of the Act and in so far as it contemplates a medical certificate obtained in the country whence the applicant came it also was inapplicable to the case of a person who has for some time prior to making application for admission been lawfully present in Canada. This was not to say that the appellant did not have to obtain a medical certificate to establish that he did not fall within any of the aforementioned classes. In the present case there was uncontradicted sworn testimony that the applicant was in perfect health and that he asked to be informed to whom he could submit himself for an examination. To deny him this information and a reasonable time in which to obtain a certificate would be to deny him the sort of hearing to which under the Act and the common law he was entitled.

Ex parte Mannira, supra; Attorney-General of Canada v. Brent, [1956] S.C.R. 318, referred to.

APPEAL from an order of the Court of Appeal for Ontario, dismissing an appeal from an order of McRuer C.J.H.C. Appeal dismissed, Cartwright J. dissenting.

F. A. Brewin, Q.C., and *C. Sirois*, for the appellant.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the respondent.

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

ABBOTT J.:—The appellant, who is a citizen of the Dominican Republic, entered Canada on or about November 4, 1961, and since that date has not been out of Canada. On entering Canada, he carried a diplomatic passport issued by the Dominican Republic which was based on his having been made Commercial Attaché for that Republic in Iran. He also held a Canadian diplomatic visa issued at the Canadian Embassy in the Dominican Republic. He therefore entered Canada as a non-immigrant pursuant to paragraph (*a*) of subs. (1) of s. 7 of the *Immigration Act*, R.S.C. 1952, c. 325.

His appointment as Commercial Attaché was cancelled at the beginning of January 1962 and he was then issued with an ordinary passport by the Embassy of the Dominican Republic in Ottawa. Apparently he then decided to retire "from political ways" and to apply to become a resident of Canada.

In March 1962, appellant reported to an immigration officer pursuant to s. 7(3) of the *Immigration Act* that he had ceased to be a non-immigrant and signed an application form to become a permanent resident in Canada. He was duly examined pursuant to s. 20 of the Act by an immigration officer and on July 10, 1962, a report was made by the said officer to a Special Inquiry Officer pursuant to s. 23 that the appellant was not a Canadian citizen nor a person who had acquired Canadian domicile and that it would or might be contrary to the Act or the *Immigration Regulations* to grant him admission to Canada as a permanent resident as he was a member of the prohibited class referred to in subs. (*t*) of s. 5 of the Act by reason of the fact:

1. that he was not in possession of a valid and subsisting immigrant visa, issued by a visa officer, as required by subs. (1) of s. 28 of the *Immigration Regulations,* Part I; and
2. his passport did not bear a medical certificate duly signed by a medical officer, nor was he in possession of a medical certificate in the form prescribed by the Minister, as required by subs. (1) of s. 29 of the *Immigration Regulations,* Part I.

On July 17, 1962, a hearing pursuant to ss. 27 and 28 of the Act was held before Mr. Collingwood Schreiber, a Special Inquiry Officer at Ottawa, at which the appellant was represented by counsel. No exception was or has been taken to the conduct of this hearing.

Immediately following the said inquiry, the Special Inquiry Officer made an order of deportation against appellant pursuant to s. 28(3) of the Act on the ground that he was a person other than a person referred to in subs. (2) of the same section in that, not being a Canadian citizen or a person having Canadian domicile, he was not a person who could come into Canada as of right, that he was a person seeking admission to Canada but was a member of the pro-

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hibited class described in s. 5(*t*) of the Act because (a) he was not in possession of a valid and subsisting immigrant visa issued by a visa officer as required by subs. (1) of s. 28 of the *Immigration Regulations*, Part I, and (b) his passport did not bear a medical certificate duly signed by a medical officer, nor was he in possession of a medical certificate in the form prescribed by the Minister as required by subs. (1) of s. 29 of the said Regulations, Part I. It is sufficient to support the deportation order that appellant had failed to comply with either of the said sections: *De Marigny v. Langlais*[1].

Appellant appealed to the Immigration Appeal Board under s. 31 of the Act and, after a hearing, the Immigration Appeal Board on August 9, 1962, dismissed this appeal.

On September 19, 1962, the Honourable R. A. Bell, the then Minister of Citizenship and Immigration, after reviewing the circumstances of the case, pursuant to s. 31 of the *Immigration Act* confirmed the decision of the Immigration Appeal Board and stated that he did not feel that there was any justification for his intervention as Minister. On October 25, 1962, after still further representations and after a further review, the Minister again stated that he could find no justification for interfering with the deportation order which had been made.

By originating notice of motion dated November 1, 1962, appellant brought proceedings for an order by way of *certiorari* to quash the deportation order "on the ground of the lack of jurisdiction". The said application came on for hearing before the Chief Justice of the High Court of Ontario on November 30, 1962, and was dismissed without written reasons, the learned Chief Justice considering himself bound by the decision of the Court of Appeal for Ontario in *Ex parte Mannira*[2].

An appeal from this order was dismissed by the Court of Appeal for Ontario on March 4, 1963, also without written reasons, that Court no doubt considering itself bound by its previous decision in the *Mannira* case. The present appeal by leave of the Court of Appeal for Ontario is from that decision. At the hearing before us Mr. Brewin

[1] [1948] S.C.R. 155 at 160, 2 D.L.R. 801, 91 C.C.C. 313, 5 C.R. 403.
[2] [1959] O.W.N. 109, 17 D.L.R. (2d) 482.

agreed that if the *Mannira* case was rightly decided this appeal fails. In my respectful view it was rightly decided.

In its essential features the present appeal does not differ in any material respect from that in *Ex parte Mannira*. In both cases the appellant had entered Canada as a non-immigrant. As such, under s. 7(3) of the Act, he had no higher rights than a would-be immigrant presenting himself at a port of entry for admission as a permanent resident of Canada. In both cases appellant was not in possession of the immigrant visa or the medical certificate required under the regulations. Such regulations were passed under s. 61 which in its terms authorizes the Governor in Council to make regulations respecting "the terms, conditions and requirements with respect to the possession of . . . passports, visas or other documents pertaining to admission; . . ." Regulation 28(1) is such a regulation and it reads:

> 28. (1) Every immigrant who seeks to land in Canada shall be in possession of a valid and subsisting immigrant visa issued to him by a visa officer and bearing a serial number which has been recorded by the officer in a register prescribed by the Minister for that purpose, and unless he is in possession of such visa, he shall not be granted landing in Canada.

"Visa officer" is defined in regulation 2(h) as follows:

> 2. (*h*) "visa officer" means—
>
> (i) an immigration officer stationed on duty outside of Canada and authorized by the Minister to issue visas or letters of pre-examination for the purpose of section 28, and
>
> (ii) in a country where no such immigration officer is stationed
>
> (A) a diplomatic or consular officer of Canada, or
>
> (B) a diplomatic or consular officer of the United Kingdom if there is no diplomatic or consular officer of Canada in the country; . . .

The only persons entitled to enter Canada as of right are Canadian citizens and persons having Canadian domicile. All others desiring to do so must comply with the requirements of the statute and regulations.

In the *Immigration Act*, Parliament has provided for the control of immigration to Canada and for the selection of prospective immigrants. The regulations passed under the authority of the Act clearly contemplate that the examination of persons seeking permanent admission to Canada in order to determine their suitability whether from a medical standpoint, an internal security point of

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view or otherwise, should be conducted abroad, in the homeland of the prospective immigrant. No doubt there are sound reasons for such a requirement.

The administrative responsibility of granting or refusing the immigrant visa, required by the regulations as a condition precedent to landing in Canada, has been entrusted to certain designated officers located outside Canada. Immigration officers at points of entry in Canada are given no authority to grant such a visa.

The Minister of Citizenship and Immigration is given wide discretionary powers under the Act and it may well be that he has power to waive the visa requirements. The record shows that in the present case he was not prepared to take such action.

The word "visa" is used in the Act itself and the term is familiar to anyone who travels outside the boundaries of his own country. It is merely a certificate or endorsement upon a passport or other similar document, made by a person authorized to do so, that the bearer of the document is entitled to proceed to the country to which he seeks entry: See Webster Third New International Dictionary under the word "visa".

Appellant submits however that regulation 28(1) is beyond the power of the Governor in Council to enact because it purports to delegate to specified immigration officials and diplomatic or consular officers, an absolute discretion to grant or refuse such immigrant visa. As I have said, the administrative responsibility of granting or refusing the immigrant visa required by regulation 28(1) has been entrusted to certain designated officers located outside of Canada. It must be entrusted to someone and the duty of such officers is to ascertain whether or not an applicant for permanent landing in Canada comes within one of the prohibited classes. That question is a question of fact.

The present regulation 28(1) is similar in its terms to the former regulation 18(4) considered in *Ex parte Mannira*, and on this point I adopt the following statement of Schroeder J.A.[1]:

> I cannot agree with the submission that Reg. 18(4) is invalid on the ground that it purports to delegate an authority committed to the Governor-General in Council to officers outside of Canada. There is cer-

[1] (1959), 17 D.L.R. (2d) 482 at 491.

tainly no factual basis which supports counsel's suggestion. Moreover it impresses me that if an officer empowered to issue an immigrant visa were to exercise his powers improperly, such abuse of authority could hardly be held to affect the validity of the Regulation.

The Special Inquiry Officer had jurisdiction to make the deportation order. The hearing before him was in accordance with the provisions of the *Immigration Act*. The order was based on findings of fact which have not been challenged.

There is nothing to indicate that appellant ever applied to the proper visa officer as defined in s. 2(h) of the regulations for an immigrant visa. The Examining Officer and Special Inquiry Officer merely applied, after a hearing and in accordance with the provisions of the *Immigration Act,* regulations validly made by the Governor in Council to prevent those who come into Canada as non-immigrants from achieving a preferred or special position in relation to permanent admission to Canada. The order of deportation against appellant having been made under the authority of and in compliance with the provisions of the *Immigration Act,* under s. 39, a court has no jurisdiction to interfere with the order.

The appeal should be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by the Court of Appeal for Ontario, from an order of that Court dismissing an appeal from an order of McRuer C.J.H.C. whereby the application of the appellant for an order in lieu of a writ of *certiorari* to quash a deportation order made against the appellant on July 17, 1962, by Collingwood Schreiber, a Special Inquiry Officer, was dismissed.

There is no dispute as to the relevant facts.

The appellant is a citizen of the Dominican Republic. He was born in that country on October 2, 1921. He entered Canada on November 4, 1961, to visit his children who were attending school in Ottawa. He has remained in this country ever since. At the time of his entry he held a diplomatic passport issued by the Dominican Republic which was based on his having been appointed Commercial Attaché for the Dominican Republic in Iran; endorsed on this passport was a Canadian diplomatic visa issued at the Canadian Embassy in the said Republic. The appellant's

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appointment as Commercial Attaché was cancelled at the beginning of January 1962, and he exchanged his diplomatic passport for an ordinary passport which was issued to him at the Embassy of the Dominican Republic in Ottawa on January 12, 1962. This ordinary passport was cancelled but was re-validated at the same Embassy on May 29, 1962; it will expire on May 29, 1964.

It is common ground that the appellant entered Canada lawfully as a non-immigrant. Following the exchange of his diplomatic passport for an ordinary passport he decided to seek to become a resident of Canada and early in March 1962, pursuant to s. 7(3) of the *Immigration Act,* R.S.C. 1952, c. 325, hereinafter referred to as "the Act", he reported to an immigration officer at Ottawa that he had ceased to be a non-immigrant; he was told to return on March 29, 1962, for a further interview.

On March 29, 1962, the appellant was interviewed by an immigration officer at whose request he signed an application to become a permanent resident of Canada. This officer examined the appellant under oath and told him that he would be informed of the decision made on his application. Thereafter the appellant attended at the same office every two weeks to inquire whether a decision had been reached. On June 13, 1962, the appellant received a letter dated June 11, 1962, signed by the Immigration Officer in charge at the Immigration Port of Ottawa, stating that his application was refused and that he was required to leave Canada within 30 days.

On July 11, 1962, the appellant received a letter dated July 10, 1962, from Collingwood Schreiber, Special Inquiry Officer of the Department of Immigration, stating that his application had been reviewed by an immigration officer who had made a report pursuant to s. 23 of the Act which said, "You are a member of the prohibited class referred to in Section 5, paragraph 't' of the Immigration Act by reason of the fact that (i) you are not in possession of a valid and subsisting immigrant visa issued by the visa officer as required by subsection (1) of section 28 of the Immigration Regulations Part I, (ii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations

Part I." This letter required the appellant to appear for a special inquiry on Tuesday, July 17, 1962, at the Immigration Office in Ottawa.

On the following day the appellant attended at the Immigration Office at Ottawa and asked for arrangements to be made to enable him to be medically examined by a medical officer appointed by the Minister so that he could obtain a medical certificate as required by the Regulations but the representative of the Immigration Office informed the appellant that there was nothing for him to do but wait and present himself at the special inquiry.

On July 17, 1962, the appellant attended at the Immigration Office and a special inquiry under the Act was held by the Special Inquiry Officer, Mr. Schreiber. At the end of the hearing the decision was announced and an order for the deportation of the appellant was made. The order recites that under s. 28 of the *Immigration Act* and on the basis of the evidence adduced at the inquiry held at the Immigration Office of Ottawa on July 17, 1962, the Special Inquiry Officer had reached the decision that the appellant might not come into Canada or remain in Canada as of right in that (i) he was not a Canadian citizen, (ii) he was not a person having a Canadian domicile and that he was a member of a prohibited class described under paragraph "t" of s. 5 of the *Immigration Act* as he could not or did not fulfil or comply with the conditions or requirements of the Act or the Regulations by reason of the fact that (i) he was not in possession of a valid and subsisting immigrant visa issued by a visa officer as required by subs. (1) of s. 28 of the Regulations of the *Immigration Act,* Part I, and (ii) his passport did not bear a medical certificate duly signed by a medical officer, nor was he in possession of a medical certificate in the form prescribed by the Minister as required by subs. (1) of s. 29 of the Regulations of the *Immigration Act,* Part I.

An appeal taken to the Immigration Appeal Board was dismissed on August 9, 1962. Representations were made to the Minister of Citizenship and Immigration, but the order for deportation was not altered.

The decision of the Minister not to interfere with the deportation order was communicated to the appellant's solicitor by a letter dated October 25, 1962, and on November 1, 1962, the application to the Supreme Court of On-

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tario to quash that order was launched. The notice of motion was directed to Mr. Schreiber and he returned to the Court the record of his inquiry including the transcript of the evidence taken before him on July 17, 1962. In support of the motion was filed an affidavit made by the appellant in which were set out the facts recited above amongst others.

The motion was heard by McRuer C.J.H.C. on November 30, 1962, and was dismissed at the conclusion of the argument without recorded reasons. An appeal heard by the Court of Appeal on March 4, 1963, was similarly dismissed without recorded reasons. It would appear that the learned Chief Justice of the High Court and the Court of Appeal regarded themselves as bound by the earlier judgment of the Court of Appeal in *Ex parte Mannira*[1], a decision which counsel for the appellant submits should be over-ruled.

In support of the appeal counsel for the appellant submits that the Special Inquiry Officer was without jurisdiction to make the deportation order for the following reasons:

(*a*) Regulation 28(1) is *ultra vires* the Governor in Council as the said regulation purports to vest in a visa officer absolute and uncontrolled discretion to grant or refuse a visa as a condition of admission to Canada without giving any reasons therefor, or granting any hearing to the would-be immigrant.

(*b*) Because Regulation 28(1) as applied in the present case is inconsistent with the provisions of s. 7, subs. (3) of the *Immigration Act*.

(*c*) Because Regulation 29, in requiring that no immigrant should be granted landing in Canada without a medical certificate, necessarily contemplates that the immigrant be given an opportunity to appear before a medical officer who might grant or refuse a medical certificate in accordance with the regulations and a deportation order made on the basis of the absence of a medical certificate when no opportunity is afforded to obtain one is invalid.

(*d*) In the alternative, Regulation 29 is *ultra vires* the Governor in Council.

(*e*) Because the proceedings in this case effectively denied to the appellant a hearing as to his admissibility provided for by the *Immigration Act*.

(*f*) The order of deportation is inconsistent with the Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(*e*).

If, but only if, the deportation order made by the Special Inquiry Officer was made under the authority and in accordance with the provisions of the Act the Court would be

[1] [1959] O.W.N. 109, 17 D.L.R. (2d) 482.

without jurisdiction to quash it, by reason of the provisions of s. 39. In dealing with the predecessor of that section in *Samejima v. The King*[1], Duff J., as he then was, said:

> The chief question I desire to discuss is the effect of section 23 of the *Immigration Act*. The words, "had made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile" are an essential part of this section; and its disqualifying provisions obviously can only take effect where the conditions expressed in these words are fulfilled. In particular, the phrase "in accordance with the provisions of this Act" cannot be neglected; their meaning is plain. The "order" returned as justifying the detention must be "in accordance with the provisions of this Act". It must not, that is to say, be essentially an order made in disregard of some substantive condition laid down by the Act.

It is necessary to consider the application of the relevant provisions of the Act to the facts of this particular case.

Section 7(3) of the Act is as follows:

> (3) Where any person who entered Canada as a non-immigrant ceases to be a non-immigrant or to be in the particular class in which he was admitted as a non-immigrant and, in either case, remains in Canada, he shall forthwith report such facts to the nearest immigration officer and present himself for examination at such place and time as he may be directed and shall, for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada.

The appellant complied with the terms of this subsection.

It is not questioned that the Special Inquiry Officer, Mr. Schreiber, had authority to enter upon and hold the hearing which took place before him on July 17, 1962. The procedure to be followed and the duties of the Special Inquiry Officer in respect of the hearing are laid down in s. 27 and subss. (1) and (2) and (3) of s. 28 of the Act which read as follows:

> 27 (1) An inquiry by a Special Inquiry Officer shall be separate and apart from the public but in the presence of the person concerned wherever practicable.
>
> (2) The person concerned, if he so desires and at his own expense, shall have the right to obtain and to be represented by counsel at his hearing.
>
> (3) The Special Inquiry Officer may at the hearing receive and base his decision upon evidence considered credible or trustworthy by him in the circumstances of each case.
>
> (4) Where an inquiry relates to a person seeking to come into Canada, the burden of proving that he is not prohibited from coming into Canada rests upon him.

[1] [1932] S.C.R. 640 at 641, 4 D.L.R. 246, 58 C.C.C. 300.

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28 (1) At the conclusion of the hearing of an inquiry, the Special Inquiry Officer shall render his decision as soon as possible and shall render it in the presence of the person concerned wherever practicable.

(2) Where the Special Inquiry Officer decides that the person concerned is a person who

(*a*) may come into or remain in Canada as of right;

(*b*) in the case of a person seeking admission to Canada, is not a member of a prohibited class; or

(*c*) in the case of a person who is in Canada, is not proven to be a person described in paragraph (*a*), (*b*), (*c*), (*d*) or (*e*) of subsection (1) of section 19,

he shall, upon rendering his decision, admit or let such person come into Canada or remain therein, as the case may be.

(3) In the case of a person other than a person referred to in subsection (2), the Special Inquiry Officer shall, upon rendering his decision, make an order for the deportation of such person.

The inquiry was held in the presence of the appellant and he was represented by counsel.

It has already been mentioned that the Special Inquiry Officer returned to the Court the transcript of the evidence taken before him. There is nothing in that evidence to suggest that the appellant is a member of any prohibited class other than the class described in clause (*t*) of s. 5, upon which the decision of the Special Inquiry Officer was based. In particular, the unchallenged evidence shewed that the appellant was possessed of ample means and that he and the other members of his family were in excellent health.

By reason of the concluding words of subs. (3) of s. 7, quoted above,—"and shall, for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada" the duty of the Special Inquiry Officer was that prescribed by clause (*b*) of subs. (2) of s. 28, quoted above, that is to say, he was required to decide whether the appellant was or was not a member of a prohibited class.

The Special Inquiry Officer having decided to make a deportation order was required by s. 13(*a*) of *Immigration Regulations*, Part II to forthwith inform the appellant "as to the provisions of the Act or the Regulations pursuant to which the order was made". This duty was duly performed.

The answer to the question whether or not the deportation order was made in accordance with the provisions of the Act depends upon the construction of the relevant

provisions of the Act and of the Regulations and upon whether the Regulations relied on by the respondent are *intra vires* of the Governor General in Council.

In entering upon the question of construction, the Act and the valid relevant Regulations must be read together and considered as a whole; and it is necessary to bear in mind the rule of construction expressed in the maxim *"Verba generalia restringuntur ad habilitatem rei vel aptitudinem personae"*. (Bac. Max. Reg. 10). The following passage in Maxwell on Interpretation of Statutes, 9th ed., 1946, at p. 63 has often been quoted with approval:

> It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the Legislature intended, they frequently express more, in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular; that is, they must be understood as used with reference to the subject-matter in the mind of the Legislature, and limited to it.

We are particularly concerned with s. 5(*t*) of the Act and with ss. 28(1) and 29(1) of the *Immigration Regulations*, Part I. These read as follows:

> 5. No person, other than a person referred to in subsection (2) of section 7, shall be admitted to Canada if he is a member of any of the following classes of persons:
>
> * * *
>
> (*t*) persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders lawfully made or given under this Act or the regulations. (Subs. (2) of s. 7 has no application to the facts of this case).
>
> 28 (1) Every immigrant who seeks to land in Canada shall be in possession of a valid and subsisting immigrant visa issued to him by a visa officer and bearing a serial number which has been recorded by the officer in a register prescribed by the Minister for that purpose, and unless he is in possession of such visa, he shall not be granted landing in Canada.
>
> 29 (1) No immigrant shall be granted landing in Canada (*a*) if his passport, certificate of identity or other travel document required by these Regulations does not bear a medical certificate duly signed by a medical officer, or
>
> (*b*) if he is not in possession of a medical certificate, in the form prescribed by the Minister, showing that he does not fall within one of the classes described in paragraph (*a*), (*b*), (*c*), or (*s*) of section 5 of the Act.

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The evidence of the appellant taken at the hearing on July 17, 1962, established that at that time he was not in possession of an immigrant visa, his passport did not bear a medical certificate and he was not in possession of a medical certificate in the form referred to in s. 29(1)(*b*). On proof or admission of these facts the Special Inquiry Officer decided that he was required by subs. (3) of s. 28 to make an order of deportation. This view was supported by the judgment of the Court of Appeal in *Ex parte Mannira, supra,* in which case a similar order made by the same Special Inquiry Officer was ordered to be quashed by a judgment of Ferguson J.[1], but was upheld by the Court of Appeal.

If the words of s. 5(*t*) and s. 7(3) of the Act and ss. 28 and 29 of the Regulations are interpreted literally they would seem to require the making of a deportation order in this case; but, in my opinion, the general words with which s. 7(3) concludes cannot be applied literally to a person who has for some time been lawfully in Canada and who entered Canada under such circumstances that he would not have and would not be required to have either an immigrant visa as described in s. 28(1) or a medical certificate as described in s. 29(1) of the Regulations. Such a literal application would in most, if not all, cases arising under s. 7(3) render the inquiry a mere formality bound to result in the making of a deportation order; the effect of the subsection would be to require the person concerned to return whence he came rather than to require the holding of an inquiry as to whether he was a member of any prohibited class.

When the Act is read as a whole its purpose is plain. It regulates the admission to Canada of persons who are neither Canadian citizens nor possessed of Canadian domicile as defined in the Act and the expulsion of such persons who may have been allowed to enter. A person who seeks to enter Canada as an immigrant is entitled to a hearing (s. 20(1) and s. 27 of the Act). The burden of proving that he is not prohibited from coming into Canada rests upon him, (s. 27(4)), but if he succeeds in proving this before the Special Inquiry Officer, it is the duty of that officer to admit him and the applicant has a corresponding right to be admitted (s. 28(2)(*b*)).

[1] (1958), 16 D.L.R. (2d) 450.

The prohibited classes are numerous. Section 5 contains twenty subdivisions, a number of which in turn contain the descriptions of several classes. In addition to these the Governor General in Council has authority under s. 61 of the Act to prescribe additional prohibited classes.

The vital question in the case of a would-be immigrant is whether in fact he comes within any prohibited class.

Assuming for the purposes of construction that s. 28 of the *Immigration Regulations*, Part I, is valid, it contemplates that a person in a foreign country who wishes to immigrate to Canada shall obtain an immigrant visa from a visa officer which by s. 2(*h*) of the Regulations is defined as meaning:

> (i) an immigration officer stationed on duty outside of Canada and authorized by the Minister to issue visas or letters of pre-examination for the purpose of section 28, and
>
> (ii) in a country where no such immigration officer is stationed
>
> (A) a diplomatic or consular officer of Canada, or
>
> (B) a diplomatic or consular officer of the United Kingdom if there is no diplomatic or consular officer of Canada in the country, . . .

The regulations are silent as to what are the duties of the visa officer but it may, I think, be assumed that he would make some sort of inquiry as to whether the applicant for the visa came within any of the prohibited classes so as to prevent a person setting out on the journey to Canada when it appeared probable that he could not be admitted. This section of the Regulations does not create a disability to admission to Canada in the nature of an additional prohibited class, rather it envisages a preliminary inquiry as to whether the applicant falls within any of the prohibited classes already created. It is procedural rather than substantive; and, in my opinion, the general words of ss. 5(*t*) and 7(3) of the Act must be construed as rendering s. 28 inapplicable to an applicant who is in fact at the time of seeking admission lawfully present in Canada. To hold that in the case of such a person a preliminary inquiry must be held in the foreign country whence he came would be contrary to the maxim, *lex neminem cogit ad vana seu inutilia*, which this Court has held may be of assistance in construing a statutory provision; vide *The Queen v. Crawford*[1].

[1] [1960] S.C.R. 527 at 539.

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If the Special Inquiry Officer finds it necessary to make inquiries or obtain evidence in the country whence the applicant came, the regulations give him ample powers to adjourn the hearing.

Turning to s. 29 of the Regulations its purpose is similarly to prevent a would-be immigrant setting out for Canada if he falls within classes (*a*), (*b*), (*c*) or (*s*) of s. 5 of the Act and in so far as it contemplates a medical certificate obtained in the country whence the applicant came it also is, in my opinion, inapplicable to the case of a person who has for some time prior to making application for admission been lawfully present in Canada. This is not to say that the appellant does not have to obtain a medical certificate to establish that he does not fall within any of the classes mentioned. In the case before us there is uncontradicted sworn testimony that the applicant is in perfect health and that he asked to be informed to whom he could submit himself for an examination. To deny him this information and a reasonable time in which to obtain a certificate would, in my opinion, be to deny him the sort of hearing to which under the Act and the common law he was entitled.

The view that the provisions of ss. 28 and 29 of the Regulations deal with preliminary matters is strengthened by the wording of s. 30:

> The passing of any test or medical examination outside of Canada or the issue of a visa, letter of pre-examination or medical certificate as provided for in these Regulations is not conclusive of any matter that is relevant in determining the admissibility of any person to Canada.

For the above reasons it is my opinion that the Special Inquiry Officer erred in his interpretation and application of the Act and of the Regulations and that he should have proceeded to inquire and decide whether the appellant was in fact a member of any prohibited class and should have given the appellant an opportunity to obtain a medical certificate shewing that he did not fall within any of the classes (*a*), (*b*), (*c*) and (*s*) of s. 5 of the Act. It follows from this that the deportation order which he made was not made in accordance with the provisions of the Act.

Since in reaching this conclusion I have assumed, without deciding, that ss. 28 and 29 of the Regulations Part I are *intra vires* of the Governor General in Council, I do

not find it necessary to decide the question of their validity and express no final opinion upon it.

However, since the judgments in the Courts below and the reasons of the majority in this Court are founded, in part at least, upon the view that s. 28(1) of the Regulations, Part I, is valid and is applicable to the appellant in the circumstances of this case, I venture to suggest that the reasons of the Court of Appeal in *Ex parte Mannira, supra,* do not provide an adequate answer to the argument of counsel for the appellant based on the decision of this Court in *Attorney General of Canada v. Brent*[1].

If, as a matter of construction, s. 28(1) of the Regulations, Part I, casts upon the visa officer the duty of issuing a non-immigrant visa whenever an applicant therefor establishes that he is not a member of any prohibited class then, for the reasons given above, it is not, in my opinion, applicable in the particular circumstances of the case at bar. If, on the other hand, this section of the Regulations casts no such duty on the visa officer it results that it is committed to his uncontrolled individual judgment to grant or withhold the visa as he sees fit and the delegation of authority to him is even wider than that which in the *Brent* case, this Court held to be *ultra vires* of the Governor in Council.

I would allow the appeal with costs throughout, set aside the orders of the Court of Appeal and of McRuer C.J.H.C. and direct that an order be made quashing the deportation order made by the Special Inquiry Officer on July 17, 1962.

Appeal dismissed with costs, Cartwright J. *dissenting.*

Solicitors for the appellant: Vincent, Addy, Charbonneau, Mercier & Sirois, Ottawa.

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

[1] [1956] S.C.R. 318, 2 D.L.R. (2d) 503.

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*Feb. 13, 14, 15
Nov. 6

CONWEST EXPLORATION COMPANY LIMITED, CASSIAR ASBESTOS CORPORATION LIMITED, KUTCHO CREEK ASBESTOS COMPANY LIMITED (*Defendants*) .... APPELLANTS;

AND

FELIX LETAIN (*Plaintiff*) ..... RESPONDENT.

AND

CASSIAR ASBESTOS CORPORATION LIMITED, AND KUTCHO CREEK ASBESTOS COMPANY LIMITED (*Defendants*) ..... APPELLANTS;

AND

FELIX LETAIN (*Plaintiff*) ..... RESPONDENT.

CONWEST EXPLORATION COMPANY LIMITED AND CASSIAR ASBESTOS CORPORATION LIMITED (*Plaintiffs*) ..... APPELLANTS;

AND

FELIX LETAIN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Option agreement—Obligation on part of optionee to cause company to be incorporated by fixed date to hold claims under option—Letters patent sealed and issued after fixed date but bearing earlier date—Whether terms of option complied with—Whether defence of equitable estoppel available to optionee.

Under an option agreement, dated July 26, 1955, the obligations of the optionee, the appellant company Conwest, were (a) to cause to be incorporated a company on or before October 1, 1958, to hold certain mining claims owned by the optionor, the respondent L, and (b) to allot and issue to L not less than 50,000 shares of this company. On September 14, 1955, L executed a transfer of the optioned claims to Conwest to be held subject to the terms of the agreement. L then

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

borrowed money from Conwest, and, in satisfaction, under a written loan agreement, Conwest agreed to take 13,000 of L's 50,000 shares in the proposed company. The remaining 37,000 shares were optioned to Conwest in four blocks to be taken up on February 15, in the years 1958, 1959, 1960 and 1961. The first block, consisting of 5,000 shares, was taken up on the specified date.

Conwest filed an application on September 18, 1958, for the incorporation of the company under the *Dominion Companies Act,* and was notified by the Director of Companies that letters patent were being prepared and would bear date September 25, 1958. Conwest then decided to invite L to have his name appear in the proposed company; on September 26, 1958, L agreed to this use of his name. The Director wrote to inquire about the nature of L's interest in the company, and in a declaration signed on October 7, L stated that he would have a substantial interest therein. Two days later L sent a telegram to the Director withdrawing his consent to the use of his name and stating that in his opinion his contract with Conwest was null and void.

The letters patent, bearing date September 25, 1958, were actually sealed and issued on October 20, 1958. The company subsequently issued 32,000 shares to L. Tenders were made for the several blocks of shares, as provided for by the loan agreement, but these tenders were refused.

L sought return of the claims held under option and the transfer of other contiguous claims staked by Conwest on the ground that the latter, not having performed the conditions precedent to the exercise of the option, had lost all its rights. According to the incorporating authority, the company came into being on September 25, 1958. Conwest claimed that this constituted performance of its contract. L maintained that he was entitled to have a company whose letters patent were actually sealed and issued on or before October 1, 1958. Three actions were tried together and the first two, brought by L, were dismissed. In the third action, Conwest was given specific performance of the share option agreement. An appeal from the judgment of the trial judge was allowed by the Court of Appeal, which held that Conwest had failed to comply with the terms of the option.

Held (Martland and Ritchie JJ. dissenting): The appeals should be allowed and the judgment at trial restored.

Per Taschereau C.J. and Cartwright and Judson JJ.: The share option agreement had effected an important modification of the claims option agreement of July 1955. On October 1, 1958, L was no longer in a position to demand a freely-transferable certificate for the shares to which he was entitled under the option. The result of the two agreements was that L had no interest in the incorporation of the company until Conwest failed on February 15, 1959, 1960 and 1961, to take up any of the instalments of shares under option.

Moreover, under the claims option agreement Conwest could choose to incorporate the company under the *Companies Act* of Canada, and rely on s. 133 to show to L that the incorporating authority had conferred a status upon this company from September 25, 1958. The application for incorporation had been completed by that date, the incorporating fees had been paid and the letter sent by the Director of Companies. Nothing more remained for Conwest to do. The rest was departmental routine, and on this basis alone Conwest had performed its contract precisely and exactly.

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Also, L, by his intervention in the incorporation of the company before October 1, 1958, and continuing after that date, provided Conwest with an equitable defence against a claim for the re-transfer of the claims under option and the transfer of the claims staked by Conwest. *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439; *Pierce v. Empey*, [1939] S.C.R. 247, referred to.

Per Cartwright J.: L was not simply resisting an attempt to enforce the option; he was seeking to compel the conveyance to himself not only of the claims which he caused to be transferred to Conwest but also of a number of other claims which were never his. While the appellant was entitled to succeed without the necessity of relying on the defence of equitable estoppel, that defence was available in the circumstances of this case.

Per Martland J., *dissenting:* Conwest was not seeking to raise equitable estoppel as a defence to the strict enforcement by L of his contractual rights. L did not need to take any steps to terminate the option agreement, for it terminated automatically upon expiration of the option period. Conwest was really seeking to use equitable estoppel as a means of establishing that there was an extension of the option period. But such an extension would involve the making of a new contract and for such a contract there was no consideration. Equitable estoppel had no application to this type of case. *Combe v. Combe,* [1951] 2 K.B. 215, referred to.

Per Martland and Ritchie JJ., *dissenting:* Even if it were to be accepted that the phrase "causing to be incorporated" as employed in the claims option was equivalent to "taking all reasonable steps to bring about incorporation", the actions of the appellants still fell short of compliance with that condition. No steps were taken to this end for a period of three years after the date of the agreement. When application for incorporation was made on September 18th, it proved to be too late for the charter to be granted "on or before October 1st, 1958", and the fact that it was made effective, when granted, as of an earlier date could not alter the position which existed on October 2nd, at which time no company had been incorporated and the claims option had lapsed.

If any delay in incorporation was caused by the suggestion that L's name be used, it was caused by the appellants. His consent given on September 26th, could not be regarded as a waiver of the terms of the option. Even if L's "declaration of substantial interest" which was not given until October 7th was to be treated as an acceptance by him of the fact that the company had not been incorporated and an acquiescence in delay, this could not serve to reinstate the lapsed option. The law is well settled that once it has expired an option cannot be revived without a new agreement for valuable consideration. *Dibbins v. Dibbins,* [1896] 2 Ch. 348, referred to.

The contention that the share option agreement was consistent only with L having waived strict compliance with the claims option was also rejected. The share option was concerned with shares in a company to be incorporated on or before October 1, 1958, and Conwest's failure to cause such a company to be incorporated within the stipulated time effectively prevented the shares from coming into existence.

APPEAL from a judgment of the Court of Appeal for British Columbia, allowing an appeal from a judgment of

Wootton J. Appeal allowed, Martland and Ritchie JJ. dissenting.

D. McK. Brown, Q.C., W. S. Walton, Q.C., and *F. U. Collier,* for the appellants.

Hon. J. W. de B. Farris, Q.C., C. F. Murphy, and *P. E. Hogan,* for the respondent.

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

JUDSON J.:—The result of the judgment of the Court of Appeal is that the appellant, Conwest Exploration Company Limited, must hand back to the respondent, Felix Letain, certain claims which it held under option, and also transfer other contiguous claims which it had staked itself. The Court of Appeal has held that Conwest failed to comply with the terms of the option.

The option agreement is dated July 26, 1955, and under it the obligations of Conwest were (*a*) to cause to be incorporated a company on or before October 1, 1958, to hold the claims under option, and, (*b*) to allot and issue to Letain not less than 50,000 shares of this company, the capitalization of which had been previously defined. On September 14, 1955, Letain executed a transfer of the optioned claims to Conwest to be held subject to the terms of the agreement.

Then Letain borrowed money from Conwest. Each borrowing was evidenced by an agreement in writing and the last loan agreement dated February 15, 1957, is really a consolidation of the two previous ones. Under this, Letain acknowledges that he has borrowed $13,000 from Conwest. In satisfaction of this loan Conwest agrees to take 13,000 of Letain's 50,000 shares in the company yet to be incorporated. This left Letain entitled to 37,000 shares in the proposed company, and these 37,000 shares were optioned to Conwest on the following terms:

February 15, 1958	5,000 shares
February 15, 1959	5,000 shares
February 15, 1960	7,000 shares
February 15, 1961	20,000 shares.

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The first block of February 15, 1958, was taken up by Conwest. Therefore, on October 1, 1958, the last date for the incorporation of the proposed company, Letain's interest had become limited to 32,000 shares, all of which were under option to Conwest.

I turn now to the steps taken to incorporate the company. On September 18, 1958, Conwest filed an application under the Dominion *Companies Act*. The suggested name was not satisfactory to the Department and a new name was substituted—Kutcho Creek Asbestos Company Limited. The Director of the Companies Division then notified Conwest that letters patent were being prepared and would bear date September 25, 1958. The Director testified that but for the matters to which I next refer, the letters patent would have been sealed and issued by October 1, 1958.

Conwest then decided to invite Letain to have his name appear in the proposed company. On September 26, 1958, Letain signed a consent to the incorporation of the company under the name of Letain Asbestos Company Limited. This was addressed to the Secretary of State and delivered. On September 29, 1958, the Bank of Montreal as assignee of the payments due under the share-option agreement, and therefore the assignee of Letain's total claim unless he was entitled to a reassignment of the claims, wrote to Conwest pointing out that its assignment was still subsisting and that the next payment was due on February 15, 1959. On September 29, 1958, the proposed company, relying on s. 133 of the *Companies Act*, held two organizational meetings. On October 1, 1958, the Director of the Companies Division following departmental practice, wrote to inquire about the nature of Letain's interest in the proposed new company. On October 7, 1958, Letain signed a declaration addressed to the Secretary of State stating that "on the incorporation and organization of the above company I will have a substantial interest therein". Two days later, on October 9, 1958, Letain sent a telegram to the Director withdrawing his consent to the use of his name and stating that in his opinion his contract with Conwest was null and void.

The letters patent of Kutcho Creek bear date September 25, 1958, in accordance with the advice officially given by the Director of the Companies Division on that date. The

letters patent were actually sealed and issued on October 20, 1958. Conwest proceeded with the organization of Kutcho Creek. This company, on November 7, 1958, issued 32,000 shares to Letain. On February 15, 1959, the Bank of Montreal refused the tender of $5,000 for the 5,000 shares due on that date. On March 2, 1959, 32,000 shares were tendered to Letain and refused. On February 16, 1960, the tender for the shares due on that date was refused, and on February 15, 1961, the tender of $40,000 for the remaining block of 20,000 shares was refused.

On these facts, in my respectful opinion, there is error in holding that Conwest, not having performed the conditions precedent to the exercise of the option, had lost all its rights. The share-option agreement of February 15, 1957, had effected an important modification of the claims-option agreement of July 1955. Under the claims-option agreement, if that alone is looked at, Letain on October 1, 1958, would have been entitled to demand 50,000 shares. Having received an incorporation date of September 25, 1958, and having held its organizational meetings on September 29, 1958, I think the company would have been in a position to deliver these shares, although Letain, I can well understand, might have had some difficulty in selling them merely on the strength of the departmental letter and s. 133 of the Act. But under the loan agreement of February 15, 1957, Letain was not entitled to the unconditional delivery of 50,000 shares or any shares. He had already sold 13,000 shares and the first option for another 5,000 shares had been taken up. He had therefore sold, in anticipation of incorporation, 18,000 shares, and the remaining 32,000 shares to which he was entitled were also under option. On October 1, 1958, therefore, he was in no position to demand a freely-transferrable certificate for these shares. The result of the two agreements is that Letain had no interest in the incorporation of the company until Conwest failed, on February 15, 1959, 1960 and 1961, to take up any of the instalments of shares under option.

This litigation has already been before this Court on a point of law arising under the pleadings. Conwest took the position that because of the provisions of s. 133 of the *Companies Act*, the date of incorporation was conclusively established against everybody by the date of the letters patent. This view was adopted by the Courts in British

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Columbia, but this Court held in *Letain v. Conwest Exploration Co. Ltd.*[1], that the application of the section was to matters which involved the status and powers of the company and that the section did not preclude a person from questioning the date of incorporation appearing in the letters patent in a civil action in which the status and powers of the company were not involved. The question of what constituted performance of this particular contract was therefore left untouched by this decision. The incorporating authority has said that this company came into being on September 25, 1958. Conwest now says that this is performance of its contract. On the other hand, Letain says that under the terms of his agreements with Conwest, he was entitled to have a company whose letters patent were actually sealed and issued on or before October 1, 1958.

Two conflicting views are therefore put forward on what constituted "causing a company to be incorporated" before a certain date. Of the two I think that Conwest's submission is to be preferred, and that Letain's interpretation of the contract is unduly narrow. From the point of view of performance of a contract, what constitutes "causing a company to be incorporated" lacks the definition of a single precise act, for example the payment of money on or before a certain date.

By the terms of clause 7 of the claims-option agreement, Conwest was given a complete choice of jurisdiction under which it might incorporate the company. There is no uniformity of practice throughout Canada in company incorporation. It was open to Conwest under this agreement to choose incorporation under the *Companies Act* of Canada, and to rely on s. 133 to show to Letain that the incorporating authority had conferred a status upon this company from September 25, 1958. The application had been completed by that date for a company under the name of Kutcho Creek, the incorporating fees had been paid and the letter sent by the Director of the Companies Branch. Nothing more remained for Conwest to do. The rest was departmental routine and in my opinion on this basis alone Conwest had, within the meaning of clause 7 of the claims-option agreement, performed its contract precisely and exactly. The contract left it open to Conwest to adopt

[1] [1961] S.C.R. 98, 33 W.W.R. 635, 26 D.L.R. (2d) 266.

this mode of performance and what the parties meant by performance of this contract is a question of construction for the Court.

I am strengthened in my opinion of what performance meant under these two agreements—the claims-option agreement and the share-option agreement, by the nature of the interest which was outstanding in Letain on October 1, 1958. I think the nature of the interest is strongly against Letain's interpretation of the performance to which he was entitled. Even if his interest had remained at 50,000 shares clear of encumbrance, Conwest could have delivered them on October 1, 1958, and they would have been validly issued on the strength of s. 133; but long before October 1, 1958, Letain's interest in 50,000 shares clear of encumbrance had disappeared. I have already defined the interest that remained in him and it is at least arguable that he could have no possible cause for complaint about anything until there was default in the exercise of the option on any instalment of the shares. The share-option agreement modified the need on the part of Conwest to show any incorporation of a company until it was in default in the exercise of the shares optioned to it.

I am also of the opinion that Letain, by his intervention in the incorporation of the company before October 1, 1958, and continuing after that date, provided Conwest with an equitable defence against a claim for the re-transfer of the claims under option and the transfer of the claims staked by Conwest. By acting as he did in signing the consent to the use of his name and the declaration of substantial interest on October 7th, together with his retention of the $18,000 paid for the shares in this proposed company, Letain represented to Conwest that he was satisfied with what was being done as performance of the contract and he knew that Conwest would act and was acting upon his representation. But for this representation, Conwest could have given him the kind of performance to which he now says he is entitled. I think that this brings the case within the principle which appears to have originated in the judgment of Lord Cairns in *Hughes v. Metropolitan Railway Co.*[1] There was an unambiguous representation of intention made by Letain which was intended to be acted upon and was acted upon by Conwest, with the result that Conwest's

[1] (1877), 2 App. Cas. 439.

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position in relation to Letain was prejudiced if Letain's interpretation of what constituted performance under this contract is correct. The principle is stated in the following terms:

> It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties.

There was a recognition of this type of equitable defence in the judgment of Duff C.J. in *Pierce v. Empey*[1], and without going into detail, it does not seem to me that the recent interest in England in this subject-matter, beginning with *Central London Property Trust Ltd. v. High Trees House Ltd.*[2], has done anything more than to restate the principle.

Letain says in answer to this that his intervention should go for nothing because Conwest represented to him when he signed the documents addressed to the Companies Department that the company was in fact incorporated. The documents themselves indicate to the contrary, particularly the declaration of interest of October 7, 1958, but in addition there is a finding of fact against Letain on this point made by the trial judge which could not be put in stronger terms. It reads as follows:

> The plaintiff knowing the situation between himself and the defendants but thinking that he should have made a better deal, as he says instead of taking "two-bit shares", he should have had more, testified that he said to himself before his telegram interfering with the use of his name was sent to the Department of State "By golly, it is not incorporated". No suggestion was made by anyone to him that the company had in fact been incorporated. In this respect I believe the witnesses for the defendants, and I disbelieve the plaintiff when he suggested in his evidence that one or more of the three gentlemen with whom he had dealings on behalf of Conwest represented to him that the company was in fact incorporated when he was communicated with before and after the 1st day of October, 1958. I saw the persons under oath and had good opportunity to estimate their credibility.

The inference to be drawn from Letain's conduct until October 9, 1958, when he revoked his consent to the use

[1] [1939] S.C.R. 247 at 252, 4 D.L.R. 672.

[2] [1947] K.B. 130.

of his name, was that he was participating in the incorporation of this company with full knowledge of what was being done, and was accepting Conwest's steps towards incorporation of this company as performance of Conwest's obligations under the two agreements. He knew what the position was. He chose to treat his contracts with Conwest as subsisting. He continued these contracts although he now says they were not fully performed at the due date. He cannot now assert his construction of the contract that the letters patent should have been sealed and issued on or before October 1.

I would therefore allow the appeals and restore the judgments at trial. The two actions brought by Letain in connection with the claims were dismissed with costs. I would also restore the judgment at trial which gave Conwest specific performance of the share-option agreement. The appellants are also entitled to their costs in the Court of Appeal and in this Court.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Judson and wish to add only a few words as to the availability of the defence of equitable estoppel in the circumstances of this case.

If I were able to share the view of my brother Martland that in substance the only question before us is whether Conwest can enforce an agreement made by Letain without consideration to extend the time within which Conwest was entitled to exercise the option previously granted to it I would not disagree with his statement of the applicable law.

In my view, however, Letain is the plaintiff in substance as well as in form. He is not simply resisting an attempt to enforce the option; he is seeking to compel the conveyance to himself not only of the eight claims which he caused to be transferred to Conwest but also of a number of other claims which were never his. The foundation of his asserted right to a conveyance of these claims is the failure by Conwest to perform strictly the term in the agreement of July 26, 1955, as to causing a company to be incorporated on or before October 1, 1958. Assuming that this condition had not been varied by the acts of the parties and that it was not complied with until October 20, 1958, it is my opinion that by the dealings between the parties recited in the reasons of my brother Judson Letain led

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Conwest to suppose that he would not exercise his right to insist on performance of the condition by the date mentioned; in my view it would be inequitable having regard to those dealings to allow Letain to take advantage of the delay which occurred. While, in my opinion, the other grounds upon which the judgment of my brother Judson is based are sufficient to entitle the appellant to succeed without the necessity of relying on the defence of equitable estoppel, that defence appears to me to be available in the circumstances of this case.

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

MARTLAND J. (*dissenting*):—I agree with the reasons of my brother Ritchie and wish to deal only with the matter of equitable estoppel. In my opinion it has no application to the circumstances of the present case.

The agreement which gives rise to the issues in this appeal is an option agreement. It is true that it contains, in addition to the option granted by the respondent to the appellant, Conwest Exploration Company Limited (hereinafter referred to as "Conwest"), to purchase the respondent's claims, provision for the transfer of those claims to Conwest during the option period; for the right of Conwest to work them during that time; and for the addition to those claims of any fractional mineral claims, lying within the exterior boundaries of the respondent's claims, or any mineral claims, or fractional mineral claims adjoining any of the said claims, staked and recorded by Conwest. Essentially, however, it is an option to purchase and the question in issue in these proccedings is whether Conwest did actually purchase the respondent's claims, for it had no right to retain them or any added claims unless it had done so. That question depends entirely upon whether or not Conwest accepted the option. Conwest asserts that it did and this the respondent denies.

In so far as its claim depends upon the application of the doctrine of equitable estoppel, Conwest contends that, while it did not accept the respondent's offer within the period limited by the option agreement, it was induced by his conduct to believe that he had agreed to extend the time for acceptance and that it acted upon that representation. In taking this point, however, Conwest is not seeking

to raise equitable estoppel as a defence to the strict enforcement by the respondent of his contractual rights. The respondent did not need to take any steps to terminate the option agreement, for it terminated automatically upon the expiration of the option period. What Conwest really seeks to do is to use equitable estoppel as a means of establishing that there was an extension of the option period. But such an extension would involve the making of a new contract and for such a contract there was no consideration.

The doctrine has never been extended this far and its application in similar circumstances was denied by the Court of Appeal in England in *Combe v. Combe*[1]. While it is true that in that case the party seeking to apply the principle was the plaintiff in the action, in my opinion its application is not dependent upon which party sues the other. The basic question is as to whether, in the circumstances of the particular case, it is being used as a defence to the strict enforcement of contractual rights, or as a means of proving the existence of a contract made without consideration. It has no application to the latter type of case and consequently, in my view, should not be applied here.

I would dispose of the appeal in the manner proposed by my brother Ritchie.

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for British Columbia allowing an appeal by the present respondent from a judgment of Wootton J. rendered with respect to three actions which were consolidated and tried together before him.

Two of these actions were brought by Letain for the retransfer to him of certain mining claims which he had transferred to Conwest Exploration Company Limited (hereinafter called Conwest) pursuant to the provisions of a claims option agreement dated July 26, 1955 (hereinafter referred to as the CLAIMS OPTION) which was to be exercised by Conwest causing a mining company to be incorporated on or before October 1, 1958, and which the respondent claims was not so exercised.

The third of these consolidated actions was brought by the appellants Conwest and Cassiar Asbestos Corporation

[1] [1951] 2 K.B. 215.

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Limited (hereinafter called Cassiar), for specific performance of a SHARE OPTION agreement dated February 15, 1957 (hereinafter referred to as the SHARE OPTION) for the purchase of the shares to which the respondent would have become entitled in the proposed mining company in the event of that company being incorporated in accordance with the terms of the CLAIMS OPTION.

The disposition of these actions must, in my opinion, depend upon whether or not Conwest exercised or was excused from exercising its option to purchase the said mining claims by causing a mining company to be incorporated on or before October 1, 1958, in accordance with the said CLAIMS OPTION, the relevant clauses of which read as follows:

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

8. The considerations to be paid or otherwise satisfied by the proposed company for the transfer to it of the said claims shall be such as shall be arranged between Conwest and the proposed company, *including* the allotment and issue by the proposed company, as fully paid and non-assessable, of such number of shares in its authorized capital, being not less than Fifty Thousand (50,000) shares in its authorized capital, as shall be agreed between Conwest and the proposed company, to which shares reference is hereinafter made as "THE VENDOR'S SHARES". Of the vendor's shares, fifty thousand (50,000) shall be allotted and issued to, and shall be the property of the Optionor.

* * *

11. The Optionor will deliver forthwith to Conwest a good and sufficient bill of sale, or good and sufficient bills of sale, each in triplicate, of the said claims, to Conwest duly executed and attested and capable of due registration, which bills of sale Conwest may register in due course. *In the event that Conwest shall not duly exercise the option hereby granted, Conwest will, at the request of the Optionor, retransfer the said claims, or such of them as shall be retained in good standing, to the Optionor.*

* * *

13. In the event that Conwest shall stake and record, or cause to be staked and recorded on its behalf, any fractional mineral claim or claims lying within the exterior boundaries of the said claims, or any mineral claim or claims, or fractional mineral claim or claims which adjoin any of the said claims, the same shall, for the purposes of this indenture, be treated as though they were comprised in the said claims.

It is established that Conwest caused Kutcho Creek Asbestos Company Limited (hereinafter referred to as Kutcho Creek), a mining company, "to be incorporated under the Companies Act of Canada" with letters patent bearing date September 25, 1958, and in the first of these actions Conwest pleaded, by way of defence,

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

The point of law so raised was the subject of an appeal to this Court at the instance of Letain (see *Letain v. Conwest Exploration Company Limited*[1]), and it was then determined that the mere production of the letters patent of Kutcho Creek bearing date September 25, 1958, in no way precluded the appellant (*i.e.* Letain) "from showing at the trial that Conwest did not exercise its option according to its terms".

Accordingly, when these actions came to trial, Mr. A. A. Cattanach, who was the Director of the Companies Division in the Department of the Secretary of State in September and October 1958, was called as a witness on behalf of Letain to prove that the letters patent of Kutcho Creek were not signed and the seal of the Secretary of State was not affixed until October 20, 1958.

The CLAIMS OPTION was required to be exercised by "causing" a mining company "to be incorporated . . . *under the Companies Act of Canada* or under the laws of such other jurisdiction in Canada as Conwest shall choose . . .", but Conwest did not choose "any other jurisdiction in Canada" and the method of incorporating a company under Part 1 of the *Companies Act* of Canada which is specified in s. 5(1) of that Act was the subject of comment in this Court in *Letain v. Conwest, supra,* at p. 107, where it is said:

> The only method of creating a body corporate under Part 1 of the Dominion Companies Act is for the Secretary of State to grant a charter by letters patent under his seal of office (see s. 5(1)). If the charter so granted bears a date earlier than that upon which the seal was affixed then by virtue of s. 133 the company acquires status with effect from the earlier date. The question here, however, is not whether or not Kutcho Creek Asbestos Company Limited is to be conclusively taken as having the status of a company incorporated on the 25th of September but rather

[1] [1961] S.C.R. 98, 33 W.W.R. 635, 26 D.L.R. (2d) 266.

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whether or not the respondent caused it to be "incorporated on or before the 1st day of October 1958", within the meaning of those words as they are used in para. 7 of the agreement pursuant to which this action was brought.

It is suggested that those representing Conwest actually complied with the terms of clause 7 by causing all reasonable steps to be taken towards the incorporation of a mining company on or before October 1, 1958. In support of this suggestion, it is pointed out that the application was first made on September 18th, that the draft letters patent were prepared on September 25th bearing that date, and that they were completed on or before October 1st, so that the seal of the Secretary of State *could* have been affixed by the close of business on that date.

It is evident also that the first organization meetings of the new company were held on September 29th and that those responsible, apparently relying on their interpretation of s. 133 of the *Companies Act,* treated the matter as if the company had in fact been incorporated on September 25th.

I agree with Bird J.A., who delivered the reasons for judgment on behalf of the Court of Appeal, that "the CLAIMS OPTION is an option simpliciter to purchase mineral claims . . ." and that the requirement for incorporation of a mining company contained in clause 7 is to be treated, to use the words of Kindersley V.C. in *Lord Ranelagh v. Melton*[1]:

> . . . as a condition on the performance of which the party who claims the benefit of the performance is entitled to certain privileges but in order to entitle him to them he must perform the condition strictly; and if the time fixed for the performance of the condition passes over by one single day that prevents his having the right.

The word "causing" may be capable of different shades of meaning dependent upon the context in which it is used, but in my opinion as it is employed in the phrase "causing to be incorporated" in clause 7 of the CLAIMS OPTION, it necessarily implies the achievement of an objective which in this case was the incorporation of a mining company on or before October 1, 1958.

Even if it were to be accepted that the phrase "causing to be incorporated" as so employed was equivalent to "taking all reasonable steps to bring about incorporation",

[1] (1864), 34 L.J. Ch. 227 at 229.

the actions of Conwest and Cassair would still, in my view, fall short of compliance with this condition of the option. It is to be remembered that the option was signed on July 26, 1955, and that there was therefore a period of three years and two months in which to cause the company to be incorporated. No steps whatever appear to have been taken to this end for three years after the agreement was made and in July, 1958, for some unexplained reason, representatives of Conwest and Cassair approached Letain with a view to having the date for compliance with the option by incorporating a company, extended for a further three years until October 1, 1961; it was only after it had become apparent that Letain would not agree to this that last-minute steps were taken to comply with the terms of the option by the making of an application for incorporation on September 18, 1958. Under the circumstances this proved to be too late for the charter to be granted "on or before October 1st 1958", and the fact that it was made effective, when granted, as of an earlier date cannot, in my opinion, alter the position which existed on October 2nd, at which time no company had been incorporated and the CLAIMS OPTION had lapsed. By the time that the Secretary of State signed and affixed his seal to the charter the time fixed for the performance of the condition had, to adopt the language of Kindersley V.C., "passed over" not only "by one single day" but by eighteen days and the right to exercise the option was gone.

It is no doubt true that the retroactive effect of the antedating of the charter as of September 25th might, after the company had been duly incorporated, have the effect of validating acts done by the embryo company, but in my view no such acts can have had any validity as corporate acts until after the incorporation of the company on October 20th.

This does not, however, dispose of the ground upon which the learned trial judge based his decision and which was urged upon us by counsel for the appellants, namely, that Letain waived strict compliance with the CLAIMS OPTION and so conducted himself

that the defendants were led into the position of believing . . . that everything was to be satisfactory regardless of the date of October 1st, 1958, and that they acted to their detriment in reliance on that belief and were, therefore, "estopped from claiming default against the defendant Conwest".

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It was contended on behalf of the appellants that the delay in incorporation of this company after September 26th was occasioned, or at least acquiesced in, by the respondent because on that date, when the name of Kutcho Creek had been accepted by the Companies Division, representatives of the appellants requested Letain to let his name be used as part of the company's title and as a result of his having consented to this request, Mr. Cattanach wrote to him on October 1st asking for a "declaration of substantial interest in the company" which Letain did not send forward until October 7th and in which he said

> that on incorporation or organization of the said company I will have a substantial interest therein.

If any delay in the incorporation was caused by the suggestion that Letain's name should be used, I am satisfied that it was caused by the representatives of the appellants rather than by the respondent. Whatever their motives may have been, it was the appellants who approached Letain in the last days of September 1958 to obtain his consent to the use of his name, and although this may have been a friendly gesture which Letain appreciated at the time, his consent given on September 26th cannot, in my opinion, be regarded as a waiver of the terms of the option.

It is suggested, however, that the respondent's "declaration of substantial interest" which was not given until October 7th is to be treated as an acceptance by Letain of the fact that the company had not then been incorporated and an acquiescence in the delay, but even if this were so it could not serve to reinstate the lapsed option as the law is well settled that once it has expired an option cannot be revived without a new agreement for valuable consideration (see *Dibbins v. Dibbins*[1]).

A substantial portion of the appellants' argument was devoted to the contention that the SHARE OPTION of February 15, 1957, read in the light of the relationship then existing between Letain and Conwest both before and after that date, is consistent only with Letain having waived strict compliance with the CLAIMS OPTION.

It is true that the respondent was employed by Conwest before the CLAIMS OPTION was granted and that for

[1] [1896] 2 Ch. 348, *per* Chitty J. at 351 and 352.

three years thereafter he worked for that company during the prospecting seasons and, indeed, was continuously in its employ from August 1, 1957, to October 1, 1958, but none of his contracts of employment has any bearing on the terms of the CLAIMS OPTION and I am unable to see that the relationship of employer and employee which existed between the parties during these years placed Letain under any obligation to notify Conwest that he intended to hold it to the letter of its bargain. Nor do I think that the provisions of the loan agreements and the SHARE OPTION executed by the respondent in the years 1956 and 1957 gave rise to any such obligation.

The loan agreements of December 7, 1955, and December 3, 1956, were given by Letain as collateral security for repayment of advances totalling $5,500 made to him by Conwest and had the effect of releasing Conwest from its obligation to issue shares to Letain in the company to be incorporated under the CLAIMS OPTION if the loans were not repaid before June 7, 1957. These loan agreements were abrogated by the SHARE OPTION agreement of February 15, 1957, under which Conwest agreed to cancel Letain's existing indebtedness and to advance a further sum of $7,500 in return for the transfer to it of all the respondent's right, title and interest in the first 13,000 of the 50,000 shares to which he might become entitled under the CLAIMS OPTION in the event of a mining company being incorporated in the manner thereby provided.

By para. 8 of this agreement it was provided:

> *In the event of the incorporation and organization of the said mining company,* Letain hereby gives and grants to Conwest the sole and exclusive options, which are herein referred to as "THE SHARE OPTIONS", to purchase the whole or any part or parts of the remaining Thirty-seven Thousand (37,000) shares of the said mining company to which Letain shall then be entitled, and which shall be issuable to Letain as fully paid and non-assessable, at the prices, on or before the dates and in the quantities hereunder mentioned, that is to say:
>
> FIRST. The whole or any part or parts of Five Thousand (5,000) shares, at the price of One Dollar ($1.00) per share, on or before the 15th day of February 1958.
>
> SECOND. The whole or any part or parts of Five Thousand (5,000) shares, at the price of One Dollar ($1.00) per share, on or before the 15th day of February 1959.
>
> THIRD. The whole or any part or parts of Seven Thousand (7,000) shares, at the price of One Dollar ($1.00) per share, on or before the 15th day of February 1960.

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FOURTH. The whole or any part or parts of Twenty Thousand (20,000) shares, at the price of Two Dollars ($2.00) per share, on or before the 15th day of February 1961.

Counsel for the appellants attached great importance to the fact that on November 17, 1957, the respondent assigned all moneys which might be paid to him under this agreement to the Bank of Montreal giving notice of this assignment to Conwest, and that prior to February 15, 1958, the Bank was paid and accepted $5,000 in respect of the first block of the 37,000 shares in the proposed company.

It is also pointed out on behalf of the appellants that as late as September 29, 1958, the Bank of Montreal in its capacity as Letain's assignee wrote to Conwest stating:

> The assignment is still in effect and we trust that the payment due in February 1959 will be forwarded direct to us for account of Mr. Letain.

It is to be remembered that the SHARE OPTION, like the loan agreements which preceded it, was concerned with shares which were to be issued in the "proposed company referred to in the said agreement of July 26th, 1955, to be incorporated within the time set forth in that agreement . . .". By its failure to cause such a company to be incorporated within the time set forth, Conwest effectively prevented the shares which were the subject-matter of this option from ever coming into existence and this appears to me to afford a complete answer to the action for specific performance of the SHARE OPTION which action was brought to enforce a right that Conwest itself had destroyed.

The fact that Conwest appears to have been ready to pay for the optioned shares both before the CLAIMS OPTION was due to be exercised and after it had lapsed cannot, in my opinion, be treated as a substitute for the incorporation of a mining company in accordance with the terms of that option any more than the acceptance of the first $5,000 payment under the SHARE OPTION in February 1958, or the anticipation of the February 1959 payment by the Bank of Montreal, can be treated as evidence of Letain's agreement to waive strict compliance with the specified date for the incorporation of the proposed mining company.

The suggestion that the respondent's conduct over the years was such as to justify the appellants in believing that

he had relieved Conwest from the obligation to exercise the CLAIMS OPTION on or before October 1st is, in my view, entirely inconsistent with the draft agreement sent to Letain by the representatives of the appellants Conwest and Cassiar in July 1958 which recited the fact that the CLAIMS OPTION provided for the incorporation of the proposed company on or before October 1st. By this draft agreement, as has been indicated, Letain was asked to extend the time for the incorporation "from on or before the 1st day of October 1958 to on or before the 1st day of October 1961", and it appears to me that his refusal to agree to this extension must have alerted the appellants to the importance of complying with the deadline of October 1st for the incorporation of the proposed company.

I am satisfied that, at least from the date of this refusal in July or August 1958, the appellants were fully aware of the importance of adhering to the October 1st limit for the incorporation of the proposed company, and I am satisfied also that far from believing that "everything was to be satisfactory regardless of the date of October 1st . . .", the appellants were seeking to have that date extended, and that having failed to do this they took all the steps which they thought to be necessary to comply with the letter of the CLAIMS OPTION by obtaining the assurance of the Companies Division that a mining company would be incorporated with letters patent bearing date of September 25, 1958. The fact of the matter was that between October 1 and October 20, 1958, no such company was in existence but this does not mean that the representatives of the appellants had been misled into thinking that they did not have to meet the October 1st deadline. On the contrary, those who were responsible wrongly thought that the deadline had been met, relying as they did on their own view of the effect of the said s. 133 of the *Companies Act*.

In view of the above, I am unable to conclude that Letain waived any of his rights under the CLAIMS OPTION and with all respect I can find no evidence to justify the learned trial judge's conclusion that he was estopped from claiming default against the appellant Conwest.

I agree with Bird J.A. that the effect of Conwest's failure to exercise the CLAIMS OPTION is that a resulting trust was created in favour of Letain with respect to the mining

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Ritchie J.

claims in question and that he is entitled to have them retransferred to him in accordance with the terms of that option.

I agree also with Mr. Justice Bird that the claims and fractional claims shown hatched in blue on exhibit 47, like those which are hatched in red, are all "fractional mineral . . . claims which adjoin" the claims transferred to Conwest pursuant to the CLAIMS OPTION and that they are therefore "to be treated" as though they were comprised in the said claims, and to be transferred to the respondent in accordance with the terms of that option.

For these reasons as well as for those contained in the decision rendered by Bird J.A. on behalf of the Court of Appeal, I would dismiss this appeal with costs.

Appeal allowed with costs, Martland *and* Ritchie JJ. *dissenting.*

Solicitors for the appellants: Guild, Yule, Schmidtt, Lane, Collier & Hinkson, Vancouver.

Solicitors for the respondent: Hogan, Webber & Woodliffe, Vancouver.

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*Mai 30
Oct. 1

MADELEINE DAGENAIS (*Demanderesse*) ..... APPELANTE;

ET

JOSEPHAT GERVAIS ET JOSEPHAT BEAUCHAMP (*Défendeurs*) ..... INTIMÉS.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Automobile—Passagère blessée—Accident dû à la faute d'un mineur au volant avec la permission d'un autre mineur à qui son père permettait de se servir du véhicule—Action intentée contre les deux pères—Responsabilité—Code Civil, arts. 1053, 1054.

Une automobile, dans laquelle la demanderesse était passagère, dérapa sur la route, avec le résultat qu'une des portes s'ouvrit et la demanderesse fut projetée sur des pierres qui lui causèrent de graves blessures. La voiture appartenait au défendeur G et elle était conduite par le fils mineur du défendeur B à qui le fils mineur de G avait permis de

*CORAM: Le Juge en chef Taschereau et les Juges Cartwright, Fauteux, Abbott et Hall.

prendre le volant. Dans l'action, basée sur les arts. 1053 et 1054 du *Code Civil,* intentée aux deux pères seuls, il fut allégué contre G que l'automobile était défectueuse, qu'il avait prêté sa voiture à son fils mineur qu'il savait être un conducteur téméraire, incompétent et imprudent, et qui à son tour avait permis au fils de B de prendre le volant. Contre B, il fut allégué qu'il avait autorisé l'émission d'un permis de conduire pour son fils mineur alors qu'il savait que ce dernier était un conducteur incompétent et imprudent. La Cour supérieure a rejeté l'action et ce jugement fut confirmé par une décision majoritaire de la Cour du banc de la reine.

Arrêt: L'appel doit être rejeté.

Les défendeurs ne peuvent être recherchés en dommages en vertu de l'art. 1053 du *Code Civil.* Les deux Cours inférieures ont eu raison de statuer que la voiture n'était pas défectueuse, que les deux garçons étaient des chauffeurs expérimentés et que ce n'était pas une négligence de la part des défendeurs de leur confier la conduite de cette voiture.

En vertu de l'art. 1054 du Code, la responsabilité du père disparaît si ce dernier a agi comme un homme prudent, s'il a donné à son fils une bonne éducation et s'il a exercé sur lui une surveillance adéquate. *Alain v. Hardy,* [1961] R.C.S. 540. Cette défense trouve son application dans le cas présent. De plus, il n'y a pas lieu pour cette Cour d'intervenir puisque la responsabilité sous l'un et l'autre de ces deux articles ne repose que sur des questions de faits.

APPEL d'un jugement de la Cour du banc de la reine, Province de Québec[1], confirmant un jugement du Juge Côté. Appel rejeté.

M. Bourassa, C.R., et A. Nadeau, C.R., pour la demanderesse, appelante.

A. Lemieux, C.R., pour les défendeurs, intimés.

Le jugement de la Cour fut rendu par

LE JUGE EN CHEF:—Le 6 septembre 1953, vers 11:30 p.m., Madeleine Dagenais, alors fille mineure, était passagère dans une automobile qui, au moment de l'accident, était la propriété du défendeur Josephat Gervais de St-Antoine-Abbé, district de Beauharnois, et qui circulait à ce moment sur la route n° 4 venant de Huntingdon en direction de Ormstown.

Dans sa déclaration le demandeur es-qualité, tuteur de Madeleine Dagenais, allègue qu'en arrivant à une courbe assez prononcée, l'automobile du défendeur Josephat Gervais, conduite par Carmel Beauchamp, fils mineur du défendeur Josephat Beauchamp, circulait à une vitesse excessive et dangereuse sur un pavé glissant alors qu'il pleuvait et que la visibilité était mauvaise. Il est allégué

[1] [1962] B.R. 866.

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Taschereau J.C.

en outre qu'en approchant la courbe, Carmel Beauchamp, conducteur, a perdu le contrôle de la voiture et la porte avant du côté droit s'ouvrit subitement et la demanderesse qui était assise sur le siège avant fut projetée hors de l'automobile, et elle tomba sur un amoncellement de roches et de pierres sur le côté droit de la route et la voiture alla s'arrêter plus loin sur le bord du fossé.

Il ne fait pas de doute que Madeleine Dagenais a été blessée très gravement et a dû être conduite immédiatement après l'accident à l'hôpital d'Ormstown, et la preuve médicale révèle qu'elle sera pratiquement invalide pour le reste de ses jours.

C'est la prétention de l'appelante, maintenant fille majeure, qui a repris l'instance, que le défendeur Josephat Gervais est responsable de cet accident parce qu'il était propriétaire de l'automobile dans laquelle la victime était passagère, que la porte avant droite était défectueuse et en mauvaise condition, que Josephat Gervais n'avait pas pris les précautions nécessaires pour assurer la sécurité des passagers qui voyageaient dans sa voiture, et qu'il avait prêté son automobile à Claude Gervais, son fils mineur, et que ce dernier a permis à Carmel Beauchamp, fils mineur de Josephat Beauchamp, de conduire cette voiture. On prétend également que Josephat Gervais savait que son fils Claude était un conducteur téméraire, incompétent et imprudent, qu'il conduisait son automobile d'une façon dangereuse, et que ce fait était de notoriété publique.

On a également soumis à la Cour que Claude Gervais conduisait sous l'influence de la boisson, qu'il transportait dans son automobile des boissons alcooliques qu'il consommait sur le bord de la route, qu'il avait l'habitude de laisser conduire la voiture par d'autres jeunes gens et jeunes filles qui étaient des conducteurs incompétents et imprudents et qui faisaient également un usage excessif et immodéré de bière et de boissons alcooliques. Josephat Gervais n'aurait pas exercé la surveillance voulue sur les allées et venues de son fils mineur Claude qui se servait à volonté de la voiture de son père sans que ce dernier s'assurât au préalable qu'il en ferait un bon usage et qu'il la conduirait avec compétence et en état de sobriété.

Quant à l'autre intimé Josephat Beauchamp, père de Carmel Beauchamp qui conduisait la voiture, on le tient responsable de cet accident parce qu'il est le père de

Carmel, fils mineur, et qu'il a autorisé l'émission d'un permis de conduire pour l'année 1953, date de l'accident, alors que son fils était un conducteur incompétent et imprudent.

La responsabilité reposerait sur les épaules de Carmel Beauchamp, comme auteur du quasi-délit, vu qu'il s'est engagé dans une courbe prononcée à une vitesse excessive et dangereuse, ce qui aurait été la cause que Madeleine Dagenais fut projetée hors de l'automobile.

La responsabilité de Josephat Beauchamp proviendrait du fait qu'il savait que son fils mineur avait l'habitude de conduire son automobile d'une façon imprudente, qu'il était souvent sous l'influence de la boisson, et que le défendeur Josephat Beauchamp n'exerçait aucune surveillance sur les allées et venues de son fils et qu'il lui prêtait même sa propre automobile. On reproche au défendeur Beauchamp d'avoir donné son consentement à l'émission d'un permis de conduire pour l'année 1953, et c'est la prétention de l'appelante qu'il n'a pas donné à son fils une éducation sérieuse et que ce dernier avait une conduite désordonnée.

La responsabilité des deux défendeurs-intimés reposerait donc sur les arts. 1053 et 1054 du *Code Civil,* en ce sens qu'il y a eu faute de leur part (*culpa in eligendo*), que la voiture n'était pas en bon état, que la porte était défectueuse, et aussi parce qu'ils n'auraient pas réussi à faire disparaître la responsabilité qui s'attache à leur qualité de père (1054 para. 6). Ils auraient failli de démontrer qu'ils n'auraient pu empêcher le fait qui a causé le dommage.

M. le Juge Côté, de la Cour supérieure, a rejeté l'action. Il a retenu la faute du jeune Carmel Beauchamp, conducteur de la voiture, soulignant qu'il n'aurait pas pris toutes les précautions requises pour empêcher la voiture de quitter la route comme elle l'a fait. Il retient aussi la faute de Jean-Claude Gervais qui, selon lui, était le préposé de Carmel Beauchamp. Mais ces deux derniers n'ont pas été poursuivis, et la seule question à déterminer est donc de savoir si les deux défendeurs sont responsables des actes de leurs fils.

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La Cour d'Appel[1] a confirmé ce jugement, M. le Juge Bissonnette ayant enregistré sa dissidence aurait maintenu l'action jusqu'à concurrence de $23,781.70.

Je m'accorde avec la Cour supérieure et la Cour d'Appel que les intimés ne peuvent être recherchés en dommages, en vertu de l'art. 1053 du *Code Civil*. Sous l'empire de cet article, il incombe à la victime du délit ou du quasi-délit de prouver la faute, soit qu'elle naisse d'une imprudence, d'une négligence ou d'une inhabileté. Il me paraît clair, en vertu des jugements de la Cour supérieure et de la Cour d'Appel, que la voiture prêtée par Josephat Gervais était une voiture en bon état, que la porte du côté droit fonctionnait bien et que son fils, de même que Carmel Beauchamp, étaient des chauffeurs expérimentés, et que ce n'était pas une négligence de la part des intimés de leur confier la conduite de cette voiture. La cour Supérieure et la cour d'Appel, à mon sens, ont eu raison de statuer ainsi.

En ce qui concerne la responsabilité découlant de l'art. 1054 du *Code Civil*, les principes qui déterminent la responsabilité des parents sont bien établis. Vide *Alain v. Hardy*[2]; *Foley v. Marcoux*[3].

Dans ces causes, où la jurisprudence a été définitivement établie, cette Cour a décidé que la responsabilité disparaît, si le père a agi comme un homme prudent, s'il a donné à son fils une bonne éducation et s'il a exercé sur lui une surveillance adéquate. Alors là, il n'a pu empêcher le fait qui a causé le dommage. Comme cette Cour le dit dans *Alain v. Hardy*:

> Le père n'est pas tenu de démontrer qu'il y avait *impossibilité complète* d'empêcher le fait qui a causé le dommage. En effet, si le texte devait être interprété de cette façon, et s'il fallait lui donner une telle rigidité, seule la preuve du cas fortuit, de la force majeure ou de l'acte d'un tiers, pourraient faire disparaître la responsabilité. Il doit y avoir plus de flexibilité, et ce qu'il faut rechercher, c'est toujours la faute, et s'il y a eu surveillance, bonne éducation, prêt d'une auto à un chauffeur compétent, on peut dire que le père a agi comme un *homme prudent*, et *il est alors exempt de responsabilité*.

Dans le cas qui nous occupe, cette clause d'exonération doit trouver la plénitude de son application, et libérer les deux défendeurs-intimés de toute responsabilité civile découlant de l'art. 1054 C.C. C'est ce qu'ont pensé le juge au

[1] [1962] B.R. 866.
[2] [1951] R.C.S. 540 à 552. [3] [1957] R.C.S. 650.

procès et la majorité des juges de la Cour d'Appel, et sur cette question de responsabilité, comme d'ailleurs celle dérivant de l'art. 1053, où il ne s'agit que de questions de faits, je crois qu'il n'y a pas lieu que cette Cour intervienne.

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L'appel doit être rejeté avec dépens si les intimés les demandent.

Appel rejeté avec dépens si demandés.

Procureur de la demanderesse, appelante: Maurice Bourrassa, Verdun.

Procureur des défendeurs, intimés: Albert Lemieux, Valleyfield.

LA CITE DE JONQUIERE (*Defendant*) ..... APPELLANT;

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*Mar. 6
Oct. 1

AND

FREDDY MUNGER *ET AL.* (*Plaintiff*) ..... RESPONDENT.

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

Labour—Collective agreement—Provisions imposed by arbitration award—Alleged error in retroactive clause—Power to amend—Labour Relations Act, R.S.Q. 1941, c. 162A, s. 17—An Act respecting Municipal and School Corporations and their Employees, 1949, 13 Geo. VI (Que.), c. 26, s. 12.

On February 1, 1954, an arbitration council, appointed under the *Act respecting Municipal and School Corporations and their Employees*, 1949, 13 Geo. VI (Que.), c. 26, made an award prescribing the hours of work and wage scales to be in force between the appellant City and its employees. Attached to and forming part of the award was the text of a collective agreement. The award was made retroactive to a specified date, 13 months back. Subsequently, at the instance of the employer, the arbitration council amended the award on the ground of alleged clerical error to provide that all the provisions as to hours of work should become effective only as of the date of the original award.

The plaintiff, an employee of the City, sued for a balance of wages of $829.24, being the amount he would have received had the wage increase been given effect retroactively. The City contended that the

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

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agreement had been validly amended and, alternatively, that the award was null since it was made retroactive for a period of 13 months while under s. 12 of the Act it could not be made retroactive for more than 12 months. The trial judge dismissed the action, but this judgment was reversed by the Court of Queen's Bench. The City was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The award was not null because it was made retroactive for a period exceeding that which was permitted by the Act. The effect of s. 12 in the circumstances of this case was to render the agreement retroactive for 12 months.

The terms of the agreement were clear and unambiguous and under them the plaintiff was entitled to the amount which has been awarded to him.

The council had no power to make the alterations. It had the right to interpret the award and to correct a simple clerical error, but not to amend it. The error, if there was an error, which the Council purported to correct, was not a clerical error. It was doubtful as to whether it could be said that the council was in error in making the award retroactive. However, if they erred in so doing it was in a matter of substance and not in expression.

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

Toussaint McNicoll, Q.C., for the defendant, appellant.

Yves Pratte, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Queen's Bench (Appeal Side) of the Province of Quebec[1], which reversed the judgment of the learned trial judge and gave judgment in favour of the respondent for $889.24 with interest and costs.

The facts are not in dispute. For a number of years the respondent has been employed by the appellant as a truck driver (snow-blower and watering truck, Class A) and the mis-en-cause, Le Syndicat National Catholique des Employés Municipaux de Jonquière Inc., has been duly certified by the Labour Relations Board of the Province of Quebec as the bargaining agent of all employees of the appellant.

Prior to December 31, 1952, the working conditions of the respondent were governed by the terms of a collective

[1] [1962] Que. Q.B. 381.

labour agreement made between the appellant and the mis-en-cause, which terminated on the last mentioned date. The appellant and the mis-en-cause were unable to agree upon the terms of a new collective labour agreement and the dispute was referred to a Council of Arbitration, hereinafter referred to as "The Council", set up in accordance with the provisions of *An Act respecting Municipal and School Corporations and their employees,* Statutes of Quebec, 13 Geo. VI, c. 26, hereinafter referred to as "The Act". The Council heard the parties and made its award on February 1, 1954.

By this award the Council prescribed the working conditions which were to be in force between the appellant and its employees for the two-year period from January 1, 1953 to December 31, 1954. Attached to and forming part of the award was the text of a collective labour agreement to which the award referred as follows:

> Pour conclure, le présent tribunal ordonne aux parties de signer la convention collective dont le texte est annexé.
>
> A défaut par les parties de signer ladite convention collective, le tribunal décrète que la présente sentence arbitrale aura le même effet que la signature par les parties de ladite convention collective.

The award was signed by all members of the Council although the member appointed by the union appended a report dissenting in part; it was delivered on February 1, 1954, to the clerk of the Council to be communicated to the parties and was immediately communicated to them.

The relevant terms of the collective agreement created by the award, particularly those relating to hours of work and wage scales, are set out in the reasons of Montgomery J. and need not be repeated.

The opening paragraph of art. 20 of the agreement reads as follows:

> La présente convention entrera en vigueur rétroactivement à compter du 1er janvier 1953 pour une période de deux années, devant se terminer le 31 décembre 1954.

It was argued by the appellant at the trial and in the Court of Queen's Bench that the whole agreement was null because it was made retroactive for thirteen months while under s. 12 of the Act it could not be made retroactive for more than twelve months. I did not understand this argument to be pressed before us but, in any case, I would reject it for the reasons given by the learned trial

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judge which were quoted and accepted by Montgomery J. The effect of s. 12 in the circumstances of this case is to render the agreement retroactive to February 1, 1953, instead of to January 1. This view was apparently taken by the legal advisers of the respondent as his claim was restricted to the period from February 1, 1953 to February 1, 1954.

I agree with Montgomery J. that the terms of the agreement are clear and unambiguous and that under them the respondent is entitled to the amount which has been awarded to him.

The question on which there has been a difference of opinion between the learned trial judge and the Court of Queen's Bench is whether the terms of the agreement forming part of the award of February 1, 1954, were validly varied by a document dated February 24, 1954, signed by two members of the Council, under the following circumstances. On or about February 6, 1954, the appellant gave notice to the members of the Council of a motion asking that the Council correct a manifest clerical error in the award concerning the retroactivity of the provisions as to hours of work. The member of the Council appointed by the union notified the Council that he refused to take part in the hearing of the motion on the ground that the award as delivered represented the decision arrived at by the Council and that it was without jurisdiction to alter it. The remaining members of the Council heard the motion and on February 24, 1954, purported to deliver a judgment amending the award and the agreement forming part thereof to provide that all the provisions as to hours of work should become effective only as of February 1, 1954.

I agree with the unanimous opinion of the Court of Queen's Bench that the Council had no power to make this alteration.

I wish to adopt the following passage in the reasons of Montgomery J.:

> I am satisfied that the council had the right to interpret the award but not to amend it. This does not mean, however, that it did not have the right to correct a simple clerical error. Anybody having quasi-judicial powers must have such a right, otherwise the consequences of a simple slip in drafting an award might be disastrous. The right of a court to correct a clerical error is expressly recognized by Article 546 of the Code of Civil Procedure. This article is not directly applicable in the present instance, but we may, in my opinion, apply the same principle.

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I find myself in complete agreement with the reasons of Montgomery J. for holding that the error, if error it was, which the majority of the Council purported to correct by the document of February 24, 1954, was not a clerical error. There is nothing that I wish to add to those reasons.

I share the doubts of Montgomery J. as to whether it can be said that the Council was in error in making the award retroactive; if, however, they erred in so doing it was in a matter of substance; there was no error in expressing in the words of the award and of the agreement which formed an integral part of it the decision at which the Council had arrived.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorney for the defendant, appellant: T. McNicoll, Jonquière.

Attorneys for the plaintiff, respondent: Pratte, Coté, Tremblay & Dechêne, Quebec.

THE COMMISSIONER OF PATENTS ....APPELLANT;

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*Oct. 17, 18
Nov. 15

AND

FARBWERKE HOECHST AKTIENGESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Patented chemical substance diluted by carrier—Composition claims rejected—Patent Act, R.S.C. 1952, c. 203, s. 41(1).

The respondent filed a parent and 9 divisional applications for the grant of Letters Patent all relating to different processes for producing an antidiabetic preparation, sulphonyl urea. These applications were made under s. 41(1) of the *Patent Act* and they claimed the substance as produced by the various processes. Letters Patent were subsequently granted pursuant to these applications. The respondent later filed an application for Letters Patent entitled "Anti-diabetic compositions containing sulphonyl ureas". This application contained 15 claims, all of which related to a medicine consisting of the sulphonyl urea diluted by a carrier. The Commissioner of Patents rejected these composition

*PRESENT: Fauteux, Abbott, Martland, Judson and Spence JJ.

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claims on two grounds: (1) that the applicant was entitled only to one patent for an invention and that the composition claims did not inventively distinguish from the product claims already granted, and (2) that the claims related to substances prepared by a chemical process and intended for medicine and were prohibited by s. 41(1) of the Act because they amounted to an attempt to protect the substance otherwise than by a patentable process by which it was produced. In allowing an appeal from the Commissioner's decision, the Exchequer Court held that although the mixture was intended for a medicine, it was a substance—a new substance not prepared or produced by a chemical process. It went on to hold that the antidiabetic composition was new and useful and therefore patentable. It also held that there was inventive ingenuity.

Held: The appeal should be allowed.

The respondent had a patent under s. 41 of the *Patent Act* for the invention of a medicine. It now wanted another patent for the medicine in a diluted form, that is, mixed with some inert substance, called "an orally ingestible pharmaceutically acceptable carrier", that would enable it to be put on the market for consumption. The addition of an inert carrier was nothing more than dilution and did not result in a further invention over and above that of the medicinal itself. If a patent subsisted for the new medicinal substance, a separate patent could not subsist for that substance merely diluted. If a legal impediment existed against a patent claim for the new medicinal substance, namely, s. 41(1) of the Act, that legal impediment was equally applicable to the diluted substance.

The mixing of a patented chemical with a carrier was not new and it was not the result of inventive ingenuity; it was still a substance identical in all respects except dilution with a substance produced by a chemical process and for which a patent had been granted under s. 41(1).

Commissioner of Patents v. Ciba Ltd., [1959] S.C.R. 378, discussed.

APPEAL from a judgment of the Exchequer Court of Canada[1], allowing an appeal from a decision of the Commissioner of Patents to reject an application for a patent. Appeal allowed.

Gordon F. Henderson, Q.C., and *D. Bowman*, for the appellant.

Christopher Robinson, Q.C., and *Russel S. Smart*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The Commissioner of Patent appeals from the judgment of the Exchequer Court[1], which allowed an appeal from his decision to reject an application for a patent.

[1] (1962), 22 Fox Pat. C. 141, 39 C.P.R. 105.

On June 5, 1956, the respondent filed a parent and 9 divisional applications all relating to different processes for producing an antidiabetic preparation, sulphonyl urea. These applications were made under s. 41(1) of the *Patent Act*, R.S.C. 1952, c. 203, and they claimed the substance as produced by the various processes. Letters Patent were subsequently granted pursuant to these applications.

On June 28, 1957, the respondent filed an application for Letters Patent entitled "Anti-diabetic compositions containing sulphonyl ureas". This application contains 15 claims, all of which are in issue in this appeal. These claims all relate to a medicine consisting of the sulphonyl urea diluted by a carrier.

On January 13, 1960, the Commissioner of Patents rejected these composition claims on two grounds. The first was that the applicant was entitled only to one patent for an invention and that the composition claims did not inventively distinguish from the product claims already granted. The inventive feature of the claimed composition was in the sulphonyl urea compound and not in the association of the compound with the carrier.

The second ground was that the claims related to substances prepared by a chemical process and intended for medicine and were prohibited by s. 41(1) of the Act because they amounted to an attempt to protect the substance otherwise than by a patentable process by which it was produced. By the time the Commissioner had rejected the application in question in this appeal, the respondent had already received, on September 1, 1959, the 10 Letters Patent for the substance and the processes pursuant to s. 41(1) of the *Patent Act*.

What the respondent is seeking can be put in very plain words. It has a patent under s. 41 for the invention of the medicine. It now wants another patent for the medicine in a diluted form, that is, mixed with some inert substance, called "an orally ingestible pharmaceutically acceptable carrier", that will enable it to be put on the market for consumption. Claim 1 in the application under consideration may be taken as an example. It reads as follows:

1. An antidiabetic preparation effective on oral administration to reduce the blood sugar level, said preparation comprising as the active blood sugar lowering ingredient a sulphonyl urea of the formula

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Judson J.

R—SO_2—NH—CO—NR—R_1 in which; R is a radical selected from the group consisting of phenyl, substituted phenyl having up to two substituents selected from the group consisting of alkyl; alkoxy and halogen, and aliphatic and cycloaliphatic hydrocarbon containing 3-8 carbon atoms; R_1 represents a radical selected from the group consisting of aliphatic and cycloaliphatic hydrocarbon containing 2-8 carbon atoms, or a salt thereof, and an orally ingestible pharmaceutically acceptable carrier therefor.

The only difference between this claim and the following claims is that each claims sulphonyl urea of a formula that is different in definition, together with the carrier.

The case was argued both in the Exchequer Court and here on an agreed statement of facts. I set out paragraphs 6, 13, 15 and 17:

> 6. In application No. 731,948, each of the claims is for an antidiabetic preparation comprising a sulphonyl urea or its salts and an orally ingestible pharmaceutically acceptable carrier therefor, and no process was claimed. Such preparation would consist of a sulphonyl urea mixed with a carrier, or diluted by a carrier, or enclosed or encapsulated by a carrier in the form of a capsule.
>
> 13. The mixing, the diluting, the enclosing or encapsulating of a sulphonyl urea with an orally ingestible pharmaceutically acceptable carrier is not a chemical process.
>
> 15. At the effective filing date of application No. 731,948, a person skilled in the art could, if so requested, have made a preparation of the sulphonyl ureas or their salts and an orally ingestible pharmaceutically acceptable carrier therefor without the exercise of any inventive ingenuity.
>
> 17. The only utility disclosed in application No. 731,948 for the antidiabetic preparations claimed does not differ from the utility which is disclosed in the issued patents for the sulphonyl ureas and their salts, and upon which the grant of the said patents was predicated.

The Exchequer Court held that although the mixture was intended for a medicine, it was a substance—a new substance not prepared or produced by a chemical process. The fact that one of the ingredients in the substance was so prepared or produced did not make the substance as a whole one that was so prepared. This last assumption as it is applied to the facts of this case, which is merely one of dilution, is, of course, challenged by counsel for the Commissioner.

The Exchequer Court went on to hold that the antidiabetic composition was new and useful and therefore patentable. It also held that there was inventive ingenuity. It found this because the inventors had conceived the idea of mixing with a carrier the sulphonyl ureas, of whose unobvious utility they had knowledge so as to bring into being a new substance. But for their discovery of the un-

obvious utility of the substances, there would have been no reason for combining them with a carrier, for the utility of such a combination was not obvious. Thus, inventive ingenuity, one of the attributes of patentability, was in fact present.

The fallacy in the reasoning is in the finding of novelty and inventive ingenuity in this procedure of dilution. It is an unwarrantable extension of the ratio in the *Commissioner of Patents v. Ciba Ltd.*[1], where inventive ingenuity was found in the discovery of the valuable properties of the drug itself.

A person is entitled to a patent for a new, useful and inventive medicinal substance but to dilute that new substance once its medical uses are established does not result in further invention. The diluted and undiluted substance are but two aspects of exactly the same invention. In this case, the addition of an inert carrier, which is a common expedient to increase bulk, and so facilitate measurement and administration, is nothing more than dilution and does not result in a further invention over and above that of the medicinal itself. If a patent subsists for the new medicinal substance, a separate patent cannot subsist for that substance merely diluted. If a legal impediment exists against a patent claim for the new medicinal substance, namely, s. 41(1) of the *Patent Act*, that legal impediment is equally applicable to the diluted substance. The diluted medicinal is still a medicine and the essential step of the process for preparing the diluted medicinal is a chemical step. Therefore, s. 41(1) of the *Patent Act* applies. Further, the respondent has already received patent protection to the full extent allowed by the law. Invention may lie in a new, useful, and inventive process for producing a new medicinal substance, and the respondent has already obtained patents for such inventive processes and for the new product as produced by such processes. The process claims and process dependent product claims in these patents represent the full extent of the protection to which the respondent is entitled.

Therefore, the primary error in the judgment of the Exchequer Court is twofold. The mixing of a patented chemical substance with a carrier is not new and it is not

[1] [1959] S.C.R. 378, 19 Fox Pat. C. 18, 30 C.P.R. 135, 18 D.L.R. (2d) 375.

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the result of inventive ingenuity. It is, of course, a substance, as the learned President has found, but it is still a substance identical in all respects except dilution with a substance produced by a chemical process and for which a patent has been granted under s. 41(1) of the *Patent Act*.

The decision under appeal is of extreme practical significance. It gives effect to form rather than substance. The claim to a pharmaceutical composition with which the present appeal is concerned is free from the limitations imposed by s. 41(1) and a person who obtained a patent in this way could assert such claims against anyone using the pharmaceutically active ingredient constituting the substance of the invention regardless of the process whereby it was produced. Further, it might affect compulsory licensing applications under s. 41(3).

I am therefore of the opinion that the rejection of the application by the Commissioner of Patents was well founded for the reasons stated by him in his letter of rejection, which I now set out in full:

> Applicant's letter of May 20, 1959, has been received and the application has been reviewed having regard to applicants' arguments.
>
> However after careful consideration it has been decided that these arguments do not overcome the objections set forth in the last Office Action. The arguments will remain on record.
>
> All of the applicants' claims (1 to 15 inclusive) are rejected, and this rejection is made final under the provisions of Rule 46.
>
> The applicants are entitled to only one patent for their invention. The compositions defined in the claims fail to inventively distinguish from the product claims appearing in parent application number 708,643 now Patent number 582,621. The composition claims are obviously directed to the same invention as the product claims of Patent 582,621. The essential inventive feature of the claimed compositions resides in the medicinally active chemical compound, and not in the fact that this compound is associated with a carrier. It is general practice in the medicinal art to associate an active compound with a suitable diluting or carrying agent because, usually, such a compound cannot be used in the pure form. Furthermore the fact that the active compounds of the compositions have been allowed in the parent application in claims draughted along the requirements stated in Section 41 of the Patent Act constitutes evidence that said compounds are intended for medicine, and makes unnecessary and superfluous any claim to the mere use thereof. It is therefore clear that the composition claims of this application fail to reveal anything which is not taught or clearly implied by the allowed product claims of Patent 582,621.
>
> In the Exchequer Court decision number 100035, Rohm and Haas Company vs The Commissioner of Patents, Cameron J. makes clear that claims such as the present composition claims are not patentable. He states: "I am of the opinion, however, that when a claim to a compound

has been allowed, a claim to a fungicidal composition merely having that compound as an active ingredient is not patentable". And further that: "The utility of the compounds as fungicides is fully set forth in the specification of the patent which has been allowed; to name the compound as a fungicidal composition is merely to recite one of its inherent qualities". When "medicinal" is substituted for "fungicidal" and, "medicines" for "fungicides", the above quotation applies squarely to applicants' claims.

The argument, made by the applicants, that by taking the already patented compounds of Patent 582,621 and merely mixing them with a carrier they have converted them into new products which are not governed by Section 41, cannot be accepted. The essential inventive feature of the composition claims is the new medically-active chemical compounds. The invention of these composition claims relates to substances prepared by chemical processes, and intended for medicine. Practically all new medicines must be diluted with some carrier or other ingredient, and cannot be used in the pure form. Such carriers obviously must be compatible with the active substance, and suitable for the way in which the medicine is to be administered. In this case there is no question of second invention involving the discovery of a new and particular carrier which imparts a special, new, and unexpected character to the compositions. To permit the claiming of a medicine mixed with a carrier in per se form, rather than in process-dependent form, would mean that all new medicines could be claimed free of the restrictions of Section 41 in the only practical form in which they may be used. This, of course, would defeat the whole purpose of the Section.

All the claims are rejected.

As the objections cannot be overcome by amendment, this action terminates the prosecution of the application before the examiner. Any request for review must be lodged within three months.

signed (G. Drouin)

Examiner—Group C-6

I have set out the reasons of the Commissioner in full because they show the kind of consideration he gave to this problem in his office and also because of a suggested limitation of his function in the reasons of the Exchequer Court. Following statements made in *R. v. Patents Appeal Tribunal, Ex p. Swift & Co.*[1], the Exchequer Court said that the Commissioner should not refuse to allow an application to proceed to the grant of a patent unless he is quite satisfied that the subject-matter of the application could not conceivably be patentable within the meaning of the *Patent Act*.

The Commissioner was well within even this definition of the scope of his duties but I think that the *obiter* of the Exchequer Court expresses the duty of the Commissioner too restrictively and fails to recognize the distinction between the United Kingdom and the Canadian Patent

[1] [1962] 1 All E.R. 610 at 616, 2 Q.B. 647.

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Acts. Under ss. 6, 7 and 8 of the United Kingdom *Patents Act, 1949,* the Examiner may examine only for anticipation. He may not and does not as a matter of practice examine as to inventiveness. This is left to the Court. Further, as pointed out in *Re Levy & West's Application*[1], no appeal lies from the Patent Appeal Tribunal, whereas in a subsequent action the validity of the patent may be impeached in the highest court in the land.

In contrast, in Canada the Patent Office, supervised by the Court, does examine as to inventiveness, and an applicant may appeal to the highest court. Moreover, in the particular class of case with which we are here concerned dealing with drugs and medicines, there is considerable public interest at stake, and the Commissioner should most carefully scrutinize the application to see if it merits the grant of monopoly privileges, and to determine the scope of the monopoly available.

I also wish to say something about the construction put upon the decision of this Court in *Commissioner of Patents v. Ciba Ltd., supra.* Although the learned President does find in this case that there was inventive ingenuity, erroneously in my respectful opinion, he also states categorically that the *Ciba* case held that novelty and utility are the only attributes of patentability that need to be present in order to constitute an invention. This, to me, is an erroneous interpretation of the effect of the *Ciba* case. With respect, the judgment of this Court did not proceed on the narrow ground that novelty and utility are the only two attributes of patentability. The judgment of this Court affirmed the judgment of the Exchequer Court for reasons common to both judgments, namely, an adoption of the principles stated by Jenkins J. in *Re May & Baker Ltd. and Ciba Ltd's. Letters Patent*[2], and as far as I can see, until the question was raised in the reasons delivered in the Exchequer Court no one ever doubted the principle that invention is an essential attribute of patentability. In any case, in this Court, as far as I know, wherever the question has been material the judgments have always so held.

The construction put upon s. 41(1) of the *Patent Act* in the reasons for judgment of the Exchequer Court

[1] (1945), 62 R.P.C. 97 at 104. [2] (1948), 65 R.P.C. 255.

requires comment. The section was held to be restrictive of the rights that an inventor would have except for the prohibitions of the section. Consequently, the Court should not find that a particular application came within its prohibitions unless the conditions for its application are clearly present. I can see no justification for this interpretation. There is no inherent common law right to a patent. An inventor gets his patent according to the terms of the *Patent Act*, no more and no less. If the patent for which he is applying comes within the provisions of s. 41(1) of the Act, then he must comply with that section.

I would allow the appeal with costs both here and in the Exchequer Court and declare that the fifteen claims of application, serial No. 731,948, be held to be unpatentable.

Appeal allowed with costs.

Solicitor for the appellant: G. W. Ainslie, Ottawa.

Solicitors for the respondent: Smart & Biggar, Ottawa.

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*Oct. 1, 2
Oct. 10

CANADIAN UTILITIES LIMITED AND WESTERN CHEMICALS LIMITED ..... APPELLANTS;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENT.

MOTION TO QUASH APPEAL FROM JUDGMENT OF THE EXCHEQUER COURT OF CANADA

Appeals—Practice and procedure—Customs and Excise—Sales tax—Exemption—Refusal by Exchequer Court of leave to appeal from Tariff Board decision—Whether appeal lies to Supreme Court from refusal—Exchequer Court Act, R.S.C. 1952, c. 98, s. 82—Supreme Court Act, R.S.C. 1952, c. 259, s 42—Excise Tax Act, R.S.C. 1952, c. 100, ss. 57, 58.

The appellants applied to the Exchequer Court for leave to appeal from a declaration of the Tariff Board that natural gas used in their gas turbines for producing electricity was subject to and not exempt from sales tax. The president of the Exchequer Court refused leave to

*PRESENT: Cartwright, Fauteux, Abbott, Ritchie and Hall JJ.

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appeal on the ground that no question of law was involved in the declaration of the Board and that, in any event, this was not the kind of case in which leave should be given. The appellants served a notice of appeal to this Court from this refusal, and the Crown moved to quash for lack of jurisdiction.

Held: The motion to quash should be granted.

There was no right of appeal to this Court from the decision of the Exchequer Court to refuse leave to appeal, either under s. 58(6) of the *Excise Tax Act*, R.S.C. 1952, c. 100, or under s. 82(1) of the *Exchequer Court Act*, R.S.C. 1952, c. 98. *Lane et al. v. Esdaile et al.*, [1891] A.C. 210, applied. It has been consistently held in our Courts and in the Courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, provided that the tribunal has not mistakenly declined jurisdiction but has reached a decision on the merits of the application. In the present case, the application was considered on its merits. In no sense was jurisdiction declined. Consequently, regardless of whether the decision of the Exchequer Court should be described as a final order or an interlocutory order, there was no appeal.

MOTION by respondent to quash appeal from a judgment of Thorson P. of the Exchequer Court of Canada. Motion granted.

C. R. O. Munro, Q.C., for the motion.

G. H. Steer, Q.C., and *B. V. Massie, Q.C.*, contra.

The judgment of the Court was delivered by

CARTWRIGHT J.:—Each of the appellants applied to the Tariff Board, pursuant to s. 57 of the *Excise Tax Act*, R.S.C. 1952, c. 100, for a declaration that natural gas used in its gas turbines for producing electricity is exempt from sales tax imposed by the Act. By agreement the two applications were joined for hearing. On January 31, 1963, the Tariff Board declared that the natural gas so used is subject to and not exempt from sales tax. This was a decision of the majority of the Board; Mr. Elliott, dissenting, would have declared the natural gas to be exempt from the tax. The amount of the tax involved exceeds $123,000.

The appellants served a notice returnable on February 28, 1963, before the presiding judge of the Exchequer Court in chambers applying for leave to appeal to the Exchequer Court from the declaration of the Tariff Board, "upon the following questions of law":

1. Did the Tariff Board err as a matter of law in deciding that Brown Boveri gas turbine equipment for producing electricity is an internal com-

bustion engine within the meaning of Schedule III of the Excise Tax Act?

2. Did the Tariff Board err as a matter of law in deciding that natural gas when used in Brown Boveri gas turbine equipment for producing electricity, is not natural gas for heating purposes within the meaning of Schedule III of the Excise Tax Act.

The application for leave to appeal was heard by the learned President of the Exchequer Court on March 28, 1963, and at the conclusion of the hearing leave was refused. Subsequently the learned President gave written reasons for his decision. At the commencement of these reasons after reciting the making of the application and the two questions set out above he said in part:

> After hearing counsel for the applicants as well as for the respondent I refused leave to appeal on the ground that, in my opinion, no question of law was involved in the declaration of the Tariff Board and that, in any event, this was not the kind of case in which leave should be given and I dismissed the application with costs.
>
> Since then I have been requested by counsel for the applicants to give written reasons for my decision and these are now given.

The learned President went on to examine the proceedings before the Tariff Board, the reasons of the majority and those of the dissenting member and formed the opinion that the questions on which leave to appeal was sought were questions of fact and not of law. He did not elaborate his reasons for holding "that, in any event, this was not the kind of case in which leave should be given".

The decision of the learned President was embodied in a formal order of the Exchequer Court the operative part of which reads as follows:

> IT IS ORDERED that leave to appeal be and the same is hereby refused and that the application for leave be and the same is hereby dismissed with costs.

On May 24, 1963, the appellants served a notice of appeal to this Court from the order of Thorson P. which reads in part as follows:

> This Notice of Appeal is given pursuant to the provisions of Section 58, Subsection 6 of the Excise Tax Act being Chapter 100 of the Revised Statutes of Canada 1952.

The grounds of the appeal are as follows:

> (1) The learned Judge erred in holding that the majority finding of the Tariff Board that the Brown Boveri gas turbine equipments of the appellants were internal combustion engines were findings of fact.
>
> (2) The learned Judge erred in failing to find that the question whether the natural gas used in the appellants' Brown Boveri gas turbine

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equipment was used for heating purposes within the meaning of the Excise Tax Act was a question of law.

(3) The learned Judge erred in holding that the Court had no jurisdiction to grant the leave to appeal for which the application was made, and in finding that the decision of the Judge of the Exchequer Court that a question of law was or was not involved in the application for leave to appeal was not subject to review.

(4) The learned Judge erred in refusing to grant the appellants leave to appeal.

The respondent moves to quash this appeal "on the ground that the Supreme Court of Canada has no jurisdiction to hear this appeal, and alternatively on the ground that this appeal must be dismissed".

For the appellants it is contended that this Court has jurisdiction to entertain the appeal under the combined effect of s. 42 of the *Supreme Court Act*, subss. (1) (4) and (6) of s. 58 of the *Excise Tax Act* and subss. (1) and (5) of s. 82 of the *Exchequer Court Act*. These read as follows:

42. Notwithstanding anything in this Act the Supreme Court has jurisdiction as provided in any other Act conferring jurisdiction.

58. (1) Any of the parties to proceedings under section 57, namely,

(*a*) the person who applied to the Tariff Board for a declaration,

(*b*) the Deputy Minister of National Revenue for Customs and Excise, or

(*c*) any person who entered an appearance with the Secretary of the Tariff Board in accordance with subsection (2) of section 57,

may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

* * *

(4) The Exchequer Court may dispose of an appeal under this section by dismissing it, by making such order as the Court may deem expedient or by referring the matter back to the Tariff Board for re-hearing.

(6) Any order or judgment of the Exchequer Court made under this section may be appealed to the Supreme Court of Canada in like manner as any other judgment of the Exchequer Court, and the provisions of the *Exchequer Court Act* as to appeals apply to any appeal taken under this subsection.

82. (1) An appeal to the Supreme Court of Canada lies

(*a*) from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings, and,

(*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment,

pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

(5) A judgment is final for the purpose of this section if it determines the rights of the parties, except as to the amount of the damages or the amount of liability.

As already mentioned, the declaration of the Tariff Board was made under s. 57 of the *Excise Tax Act*. Subsection (3) of that section reads:

(3) A declaration by the Tariff Board under this section is final and conclusive, subject to appeal as provided in section 58.

In my opinion the reasoning of the House of Lords in *Lane et al v. Esdaile et al*[1] is decisive against the existence of a right of appeal to this Court from the decision of Thorson P. to refuse leave to appeal. The relevant words of *The Appellate Jurisdiction Act*, 1876, 39 and 40 Vict., c. 59, which was the statute conferring jurisdiction on the House of Lords were those of s. 3, reading as follows:

3. Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following, that is to say,

(1) Her Majesty's Court of Appeal in England;

There was no provision in the Act restricting the generality of the words just quoted. By Order LVIII Rule 15, dealing with the jurisdiction of the Court of Appeal, it was provided:

No appeal to the Court of Appeal from any interlocutory order, . . . shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. . . .

In July 1885, Kay J. gave judgment for the plaintiffs in an action against several defendants two of whom were the appellants. Some of the defendants other than the appellants appealed to the Court of Appeal and being unsuccessful in that Court appealed again to the House of Lords where, on August 10, 1888, they succeeded in reversing the judgments below against them. The appellants thereafter applied to the Court of Appeal for special leave to appeal against the judgment of Kay J. Their application was refused by the Court of Appeal and against that refusal they appealed to the House of Lords. A preliminary objection that no appeal lay to the House of Lords was unanimously sustained and the appeal was dismissed as incompetent.

[1] [1891] A.C. 210.

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Lord Halsbury points out the absurdity which would result from holding that there is a right of appeal from the refusal, and presumably also from the granting, of leave to appeal by the particular body appointed by the statute to decide whether leave should be given. I refrain from quoting from his speech and that of the other Lords who took part in the judgment. All that they say appears to me to be applicable to and decisive of the question before us.

The point has already come before this Court. In *Canadian Horticultural Council et al v. J. Freedman & Sons Limited*[1], Thorson P. refused two applications for leave to appeal made under s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, the wording of which is indistinguishable from that of s. 58(1) of the *Excise Tax Act*. At page 551 of the report there is a note reading:

> An appeal from the above decision to the Supreme Court of Canada was quashed by order of the Court on October 18, 1954.

The decision of the Court quashing the appeal was pronounced at the conclusion of the hearing and there is no record of the reasons which were given. In view of this I do not base my judgment on that decision.

In the case of *In re Smith v. Hogan Ltd.*[2], this Court set aside an order of Cannon J. refusing an application for special leave to appeal from a judgment in bankruptcy proceedings pronounced by the Appeal Division of the Supreme Court of New Brunswick but the reasons of the Court expressly approve the decision in *Williams v. The Grand Trunk Railway Co.*[3] to the effect that no appeal lies to the Supreme Court of Canada from an order of a Judge of that Court granting or refusing leave to appeal from a decision of the Board of Railway Commissioners. The order of Cannon J. was set aside because, owing to a misunderstanding touching the effect of a statute, he had erroneously decided that he had no jurisdiction to entertain the application; the order of this Court provided that the applicants might proceed with their application for leave.

[1] [1954] Ex. C.R. 541.
[2] [1931] S.C.R. 652, 1 D.L.R. 287, 13 C.B.R. 144.
[3] (1905), 36 S.C.R. 321.

In re Smith v. Hogan Ltd. is explained by Duff C.J. giving the unanimous judgment of the Court in *Duval v. The King*[1], as follows:

> The decision proceeded upon the ground that the dismissal of the application constituted a refusal to entertain an application which the applicant was legally entitled to have heard and decided on the merits.
>
> There is nothing in that judgment, or in any of the previous judgments there referred to, which suggests that, consistently with the intendment of the provisions of the *Railway Act*, or the provisions of the *Bankruptcy Act*, for example, this Court could, after an application for leave to appeal has been fully heard on the merits and dismissed by the judge to whom the application was made, review the decision on the merits and allow the application; and we think that applies with equal force to applications under the provisions of article 1025 of the *Criminal Code*.
>
> Here the application was made to Mr. Justice Hudson, was fully heard by him and dismissed, and we think that must be final.

I have considered all the decisions referred to in the arguments of counsel and I am satisfied that as a matter of construction the opening words of subs. (6) of s. 58 of the *Excise Tax Act*, "Any order or judgment of the Exchequer Court made under this section", do not include the decision of a judge of that Court granting or refusing leave to appeal under subs. (1) of that section. I am equally satisfied that no appeal from such a decision lies under either cl. (*a*) or cl. (*b*) of subs. (1) of s. 82 of the *Exchequer Court Act*.

It appears to me to have been consistently held in our courts and in the courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, provided that the tribunal has not mistakenly declined jurisdiction but has reached a decision on the merits of the application.

In the case at bar it is clear that the learned President considered the applications for leave to appeal on their merits and reached the conclusion that the questions on which leave was sought were not questions of law and that, in any event, this was not the kind of case in which leave should be given. In no sense did he decline jurisdiction. In these circumstances it is my opinion that no appeal from his decision lies to this Court regardless of whether that decision should be correctly described as a final order or an interlocutory order, a question which was fully argued

[1] [1938] S.C.R. 390 at 391, 4 D.L.R. 737, 71 C.C.C. 75.

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before us but as to which I do not find it necessary to express an opinion.

I would grant the motion to quash. The respondent is entitled to the costs of the motion.

Motion to quash granted with costs.

Solicitors for the appellants: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

Solicitor for the respondent: C. R. O. Munro, Ottawa.

EDITOR'S NOTE: Immediately after the conclusion of the hearing of the above motion to quash, the appellants applied for leave to appeal. This application was heard by Mr. Justice Cartwright and was dismissed with costs on October 10, 1963. His Lordship came to the conclusion that for the reasons given on the motion to quash there was no appeal from the decision of the Exchequer Court and, consequently, there was no jurisdiction to grant leave to appeal therefrom.

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*Oct. 28
Nov. 20

IN re RICHARD GEORGE DARBY

APPLICATION FOR WRIT OF HABEAS CORPUS

Criminal law—Habeas corpus—Theft from mail and possession—Conviction and sentence—Whether writ available.

The applicant was tried in the Supreme Court of British Columbia before a judge and a jury on two counts of theft from the mail and two counts of possession. He was convicted on the four counts and was sentenced to the penitentiary. He applied to this Court for a writ of *habeas corpus*.

Held: The application should be dismissed.

The applicant was confined pursuant to convictions made and sentences imposed by a Court of competent criminal jurisdiction. The certificate of conviction was valid on its face. In these circumstances no relief could be afforded by way of *habeas corpus*. *Goldhar v. The Queen*, [1960] S.C.R. 431, applied.

Application for a writ of *habeas corpus* referred to the Court by Spence J. Application refused.

No one appearing for the applicant.

W. G. Burke-Robertson, Q.C., contra.

*PRESENT: Cartwright, Fauteux, Abbott, Ritchie and Hall JJ.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an application for a writ of *habeas corpus ad subjiciendum,* originally made before Spence J. and referred by him to the Court pursuant to Rule 72. The application is made in writing and the applicant did not appear and was not represented by counsel.

It appears from the certificate of sentence that the applicant was tried in the Supreme Court of British Columbia before Hutcheson J. and a jury on the following counts:

(1) Theft of money from mail.
(2) Theft of watch from mail.
(3) Possession of money stolen from mail.
(4) Possession of watch stolen from mail.

that he was convicted on all four counts and, on February 1, 1963, was sentenced on each of counts (1) and (2) to four years imprisonment in the penitentiary and on each of counts (3) and (4) to two years imprisonment in the penitentiary, the four sentences to run concurrently.

It appears therefore that the applicant is confined pursuant to convictions made and sentences imposed by a Court of competent criminal jurisdiction. The certificate of conviction is valid on its face. The reasons for judgment delivered in this Court in *Goldhar v. The Queen*[1] and the authorities therein discussed, make it clear that in these circumstances no relief can be afforded to the applicant by way of *habeas corpus.*

It follows that the application for a writ of *habeas corpus* should be dismissed and I would so order.

Application dismissed.

[1] [1960] S.C.R. 431, 33 C.R. 71, 126 C.C.C. 337, 25 D.L.R. (2d) 401.

1963

*May 28
June 13

LLOYD W. GARDINER in his capacity as Public Trustee for the Province of Alberta and as such the duly appointed Administrator of the Estate of Gordon Papp, Deceased ..... APPLICANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Leave to appeal—Pleadings—Amendment to reply, withdrawing admissions—Estate Tax Act, 1958 (Can.), c. 29, s. 24(3)—Income Tax Act, R.S.C. 1952, c. 148, s. 99(3).

A corporation, the shares of which were owned as to 90 per cent by a husband and as to the other 10 per cent by his wife, took out an insurance policy on the life of the husband, with the wife named as beneficiary. On the death of the insured in April 1960, the Minister took the position that the proceeds of the policy should be included in the estate for estate tax purposes. On appeal to the Exchequer Court, the notice of appeal alleged that the deceased, or alternatively, the corporation, had paid the premiums unitl October 1959, at which date the corporation had assigned the policy to the wife; that the assignment had been an absolute one, and that neither the deceased nor the corporation had any interest in the policy after the assignment. In his reply to the notice of appeal, the Minister admitted these allegations. Subsequently, the Minister was allowed by the Exchequer Court to amend his reply so as to admit only that the deceased, or alternatively, the corporation had paid the premiums until October 1959. The appellant applied to this Court for leave to appeal from that ruling, contending that the admission could not be withdrawn because the Minister had failed to prove that the facts which had been admitted were not true.

Held: The application should be dismissed.

The facts to which the admission related were entirely within the knowledge of the appellant and first came to the knowledge of the Minister at the time of examination for discovery. The admission was as to matters of mixed fact and law. It was open to the trial judge to take the view that the evidence showed that there was a triable issue as to the validity and absolute nature of the assignment which should be decided at a trial rather than on an interlocutory motion. There was no good reason to think that on appeal the ruling which the trial judge had made in the exercise of his discretion would be reversed.

Application before Cartwright J. in chambers for leave to appeal from an interlocutory judgment of Cameron J. Application dismissed.

D. Spitz, for the applicant.

*PRESENT: Cartwright J. in Chambers.

G. W. Ainslie, contra.

The following judgment was delivered by

CARTWRIGHT J.:—This is an application for leave to appeal from an interlocutory judgment of Cameron J. allowing the respondent to amend his reply, and awarding the costs of the motion to the appellant in any event.

The question which is in dispute between the parties is whether the sum of $50,000 the proceeds of a life insurance policy taken out by a company, Papp's Truck Service Limited, on the life of Gordon Papp, in which his wife Mae Papp was named as beneficiary, should be included in the estate of the said Gordon Papp in calculating the amount of estate tax payable in respect of his estate. Gordon Papp died on April 22, 1960; he was the owner of 90 per cent and Mae Papp was the owner of 10 per cent of the shares of Papp's Truck Service Limited.

Paragraph 5 of the appellant's notice of appeal to the Exchequer Court reads as follows:

> 5. The deceased, alternatively, the Company, paid the monthly premiums on the policy until October, A.D. 1959. In October, A.D. 1959 the policy was assigned by the said Company to Mae Papp. The policy was absolutely assigned and neither the deceased nor the company had any interest whatsoever in the policy after the assignment thereof. Further Mae Papp assumed the burden of paying all the further instalments on the policy.

Paragraph 3 of the respondent's reply as originally delivered read as follows:

> 3. He admits that the deceased, alternatively, the company, paid the monthly premiums on the policy of assurance until October, A.D. 1959; that in October, A.D. 1959 the said policy of assurance was assigned by the said company to Mae Ritter Papp; that the said policy of assurance was absolutely assigned and neither the deceased nor the company had any interest whatsoever in the said policy of assurance after the assignment thereof; but does not admit any further allegations of fact, if any, contained in paragraph 5.

By the order of Cameron J. the respondent was allowed to delete this paragraph and to substitute the following:

> 3. He admits that the deceased, alternatively, the company, paid the monthly premiums on the policy of assurance until October, A.D. 1959 but does not admit any other allegations of fact, if any, contained in paragraph 5.

Other amendments were also permitted but they are comparatively unimportant.

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Both counsel state that the answer to the question whether the policy was absolutely assigned to Mae Papp in October 1959, so that neither the deceased nor the company had any interest whatsoever in the policy thereafter, is relevant to the decision of the dispute between the parties.

On the hearing of the motion before Cameron J. oral testimony was given. The solicitor who had prepared the reply on behalf of the respondent was examined and cross-examined at some length.

On the evidence given it was open to Cameron J. to find that the admission was made through inadvertance but it is urged on behalf of the appellant that it was not proved that the facts admitted were not true. Reliance was placed on a number of authorities most of which are discussed in the judgment of the Court of Appeal for Ontario in *Canada Permanent Mortgage Corporation v. The City of Toronto*[1]. Hope J. A. who delivered the unanimous judgment of the Court said at p. 733:

> An admission may in certain circumstances and upon proper terms be withdrawn on leave of the Court. Nevertheless it is well established that facts admitted cannot be withdrawn unless it is proved by satisfactory evidence that the fact so admitted was not true.

It was not necessary for the decision of that case to state the rule of practice in such wide terms. It is clear, as appears from the reasons at p. 735, that neither by evidence nor argument had counsel for the City attempted to show that the admission was not in fact correct; and the fact admitted was one within the knowledge of the City.

In the case at bar the facts to which the admission related were entirely within the knowledge of the appellant and first came to the knowledge of the respondent at the time of the examination for discovery; the admissions are as to matters of mixed fact and law. In my opinion, it was open to Cameron J. to take the view that the evidence showed that there was a triable issue as to the validity and absolute nature of the assignment of the policy which should be decided at a trial rather than on an interlocutory motion. There does not appear to me to be good reason to think that the Court on appeal would reverse the

[1] [1951] O.R. 726, 4 D.L.R. 587.

ruling which the learned judge made in the exercise of his discretion.

The application for leave to appeal is dismissed. The costs of the motion will be costs to the respondent in the cause.

Application dismissed.

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Cartwright J.

ALFRED K. HERRINGTON (*Plaintiff*) ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF HAMILTON (*Defendant*) ..... RESPONDENT.

1963

*May 21

May 27

MOTION TO QUASH

Practice and procedure—Pleadings—Partnership—Jurisdiction—Notice of appeal by one of two partners..

The City of Hamilton expropriated certain lands of which the appellant and his wife were owners as joint tenants and which formed part of the property of a partnership in which they were the only partners. One T was appointed receiver of all the assets of the partnership with power to manage the business of the partnership until the conclusion of the expropriation proceedings. The Ontario Municipal Board, which was appointed the sole arbitrator, fixed the compensation at $50,525. The husband, the wife and T appealed to ask that the compensation be increased. The appeal was dismissed. The husband alone decided to appeal to this Court, and served notice of appeal upon the solicitors for the City and the solicitor for his wife and T. The City moved to quash the appeal on the ground that the appellant had no status to maintain the appeal because a partner cannot sue alone to recover a debt due to the partnership.

Held: The motion to quash should be dismissed.

It may well be that the better practice would have been for the appellant to serve a notice of appeal on behalf of the partnership, in spite of the refusal of the other partner to take part in it. However, he has served notice of the appeal on all persons who were interested. What is of real importance is that all necessary parties should be made parties to the appeal. In this case it was of little significance whether the wife and T were described as appellants or respondents. The notice of appeal should therefore be amended to describe the wife and T as respondents and a copy of the order so directing should be served upon them.

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

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MOTION by the respondent to quash the appeal from a judgment of the Court of Appeal for Ontario for want of jurisdiction. Motion dismissed.

B. H. Kellock, for the motion.

R. F. Wilson, contra.

The judgment of the Court was delivered by

CARTWRIGHT J.:—On April 8, 1958, the City of Hamilton expropriated certain lands of which Alfred Herrington and Gisele Herrington, who are husband and wife, were the owners as joint tenants and which formed part of the property of a partnership in which they were the only partners.

Under the relevant statutory provisions the Ontario Municipal Board was appointed sole arbitrator to determine the compensation to be paid by the City. By order dated March 23, 1962, the Board fixed the compensation at $50,525.

Pursuant to a report of His Honour Judge Schwenger dated September 30, 1960, Samuel Taylor had been appointed Receiver of all the assets of the partnership with power to manage the business of the partnership until the final conclusion of the expropriation proceedings.

Alfred Herrington, Gisele Herrington and Taylor appealed to the Court of Appeal for Ontario from the award made by the Board asking that the compensation be increased. On January 9, 1963, this appeal was dismissed with costs.

Apparently Alfred Herrington decided to appeal to this Court while Gisele Herrington and Taylor decided not to appeal. By notice dated March 6, 1963, Gisele Herrington and Samuel Taylor changed their solicitors. On the same day the solicitors for Alfred Herrington served a notice of appeal to this Court, using the style of cause set out above and reading as follows:

> TAKE NOTICE that the Claimant, Alfred K. Herrington, appeals to the Supreme Court of Canada from the Order of the Court of Appeal of Ontario pronounced on the 9th day of January, 1963, and asks that the said Order be set aside or varied and that the amount of compensation awarded be increased, or in the alternative, that the matter be referred back to the Ontario Municipal Board for a new hearing.

This notice was directed to and served upon the solicitors for the City and the solicitor for Gisele Herrington and Samuel Taylor.

On March 8, 1963, an order was made by the Registrar of this Court approving the security given by the appellant.

Counsel for the City now moves to quash the appeal "on the ground that the appellant Alfred Herrington has no status to maintain this appeal". Counsel for Alfred Herrington opposes this motion and also moves:

> for an order extending the time for making application for leave to appeal and for leave to appeal to this Court from the Order of the Court of Appeal for Ontario dated the 9th day of January, 1963, dismissing the appeal of the Claimants from the Order of The Ontario Municipal Board dated the 23rd day of March, 1962, or for such further or other order as to this Honourable Court may seem just.

In support of the motion to quash, Mr. Kellock cited a number of cases holding that one partner cannot sue alone to recover a debt due to the partnership. In the earliest of these *Scott v. Godwin*[1], Eyre C.J. said at p. 73:

> I take it to have been solemnly adjudged in several cases, and to be the known received law, that one co-covenantee, one co-obligee, or one joint contractor by parol, cannot sue alone.

In *Kennedy, Ross and Velanoff v. Canadian General Insurance Co.*[2], all the members of a partnership had joined in an action on a policy issued to the partnership. The action was dismissed. One of the partners appealed to the Court of Appeal for Ontario in his own name. The appeal was quashed. Aylesworth J.A., who delivered the unanimous judgment of the Court, after pointing out that the policy was issued to and insured the partnership said, at pp. 688 and 689:

> There is no right of an individual partner either to sue upon such a claim or if judgment be given against the partnership in an action on such claim, individually and in his personal capacity to appeal from that judgment.

It is made clear, however, in the last paragraph of the reasons of the learned Justice of Appeal that the Court had offered to entertain an application by the appellant to regularize the proceedings; the offer was apparently disregarded. In the case at bar Mr. Wilson

[1] (1797), 1 Bos. & P. 67, 126 E.R. 782.
[2] (1960), 22 D.L.R. (2d) 687.

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makes such an application in case it should be found necessary.

It may well be that the better practice would have been for the appellant Alfred Herrington to serve a notice of appeal on behalf of the partnership, in spite of the refusal of the other partner to take part in an appeal; he has, however, served notice of the appeal on all persons who are interested. Had he not done so it would have been open to the Court, under Rule 50 (2), to direct that such parties respondent be added as might be necessary "to enable the Court effectually and completely to adjudicate upon and settle the question involved in the appeal". What is of real importance is that all necessary parties should be made parties to the appeal. In this case it is of little significance whether Gisele Herrington and Samuel Taylor are described as appellants or respondents, it is sufficient that they will be before the Court.

The notice of appeal should be amended to describe Gisele Herrington and Samuel Taylor as respondents and a copy of the order so directing should be served upon them; when this has been done the appeal will, in my opinion, be properly constituted, and the motion to quash should therefore be dismissed. The motion made on behalf of Alfred Herrington becomes unnecessary and should also be dismissed. I would reserve the costs of both motions to be disposed of by the Court hearing the appeal.

Motion to quash dismissed.

1963

*June 4
Dec. 16

MICHAEL MAGDA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Master and servant—Petition of right—Alleged brutal treatment by prison authorities—Liability for negligence of servants—Negligence must be shown—The Exchequer Court Act, R.S.C. 1927, c. 34—The Canadian Bill of Rights, 1960 (Can.), c. 44—The Crown Liability Act, 1952-53 (Can.), c. 30.

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Ritchie JJ.

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The appellant, a native of Roumania but who is now a Canadian citizen, was interned in Canada during the last war. By petition of right he claimed damages for "cruel and unusual treatment and punishment" accorded to him in the course of his internment during and for some time after the war. His broad petition was that all officers or servants of the Crown who were employed in jails and internment camps owed a duty to prisoners not to expose them to the kind of treatment and punishment to which he alleged he was subjected, and that the mere recitation of the manner in which he was treated constituted an allegation of breach of this duty and, therefore, negligence such as to create a liability against the Crown under s. 19(*c*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34. The Exchequer Court answered in the negative the question of law as to whether a petition of right lie against the Crown on the assumption that the allegations of fact contained in the petition were true. The appellant appealed to this Court.

Held: The appeal should be dismissed.

There was a wide difference between general allegations of mistreatment such as those made here and an allegation that some servant or agent of the Crown had, while acting within the scope of his duties or employment, committed a tortious act of negligence under such circumstance as to draw upon himself a personal liability to the petitioner. Under s. 19(*c*) of the *Exchequer Court Act*, the liability of the Crown was limited to proof of allegations of the latter character. Negligence involves the causing of damage by a breach of that duty of care for others which the circumstances of the particular case demand. The allegations of fact contained in the petition of right could not be considered as disclosing tortious acts of negligence by officers or servants of the Crown. They were descriptive of disciplinary and regulatory measures deliberately taken by authorities responsible for the custody of the appellant while he was legally interned and were, therefore, not such as to create liability against the Crown under s. 19(*c*).

The *Canadian Bill of Rights*, 1960 (Can.), c. 44, like the *Crown Liability Act*, 1952-53 (Can.), c. 30, was not in force during that period and the pre-existing rights which are there recognized did not include the right to bring an action in tort against the Crown except as specifically provided by statute.

APPEAL from a judgment of the President of the Exchequer Court of Canada[1] dismissing a petition of right. Appeal dismissed.

G. A. Roy, Q.C., for the appellant.

Paul Ollivier, Q.C., for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the President of the Exchequer Court of Canada[1] rendered on February 20, 1953, whereby he determined in the

[1] [1953] Ex. C.R. 22, 2 D.L.R. 49.

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negative the following question of law set down for hearing before him pursuant to rule 149 of the General Rules and Orders of the Exchequer Court:

> Assuming the allegations of fact contained in the Petition of Right to be true, does a petition of right lie against the Respondent for any of the relief sought by the Suppliant in the said Petition?

The petitioner, who is now a Canadian citizen, was, at the time of the happening of the events complained of in his petition of right, a citizen of Roumania and his present very substantial claim for damages is founded upon what his counsel describes as the "cruel and unusual treatment and punishment" accorded to him in the course of his imprisonment and internment in Canada during and for some time after the last war.

The circumstances of the appellant's arrest, internment and imprisonment and the details of his alleged mistreatment are fully reviewed in the reasons for judgment of the learned President, but it is now admitted to have been wrongly alleged in the petition of right that the appellant's imprisonment and internment were illegal and the claim asserted in this appeal is limited to a series of complaints as to the treatment accorded to the appellant while he was legally confined by order of the Canadian Government. In the factum filed on behalf of the appellant these complaints are attributed to the negligence of "officers of the Crown". The relevant paragraph of the factum, which appears on pp. 6 and 7, reads as follows:

> The officers of the Crown . . . were negligent during the incarceration of the Appellant in Halifax and during his internment, because they acted as follows:
>
> (*a*) They did not inform the Appellant of the motives for his arrest and of his detention. This is alleged in paragraph 41 of the Amended Declaration;
>
> (*b*) They did not allow the Appellant, for a period of three months, to write letters, and more particularly did not allow him to write to the Rumanian Consul in Montreal, and once they did allow him to write, they did not transmit his letter with due haste. This is alleged in paragraph 39 of the Amended Declaration;
>
> (*c*) They did not advise the Appellant that he could have his case referred to and dealt with by a Board under the terms of Article 25 of Order in Council P.C. 2385 of April 4, 1941. This is alleged in paragraph 41 of the Amended Declaration;
>
> (*d*) The Appellant was made to do forced labour, was put in solitary confinement, and put on bread and water, without mattress, for a period of six months. This is alleged in paragraph 35 of the Appellant's Amended Petition;

(e) The Appellant's rations were reduced to a cup of tea and a piece of bread at breakfast, a soup and piece of bread for lunch, and a cup of tea and a piece of bread in the evening. This is alleged in paragraph 36 of the Appellant's Amended Petition;

(f) The Appellant, while interned, was not granted the privileges of the Red Cross, while other enemy prisoners were. This is alleged in paragraph 53 of the Appellant's Amended Petition;

(g) The Appellant was not granted the privileges granted to other enemy prisoners. He could not write to his family, was not given similar medical care and was locked in a cell. This is alleged in paragraph 55 of the Appellant's Amended Petition.

It is to be observed with respect to sub-paras. (a) and (c) above that the complaints therein alleged are related to the arrest and continued incarceration of the appellant and in this regard it is to be observed that the complaints in question are preceded in the factum filed on behalf of the appellant by the following:

The incarceration of the Appellant in Halifax on December 14, 1940, was legal under the terms of Order in Council P.C. 4751. The continued incarceration of the Appellant in Halifax, after the rendering of Order in Council P.C. 2385 on April 4, 1941, was also legal, because the right of the Appellant under the said Order in Council to have his case reviewed was only permissive and not imperative. The internment of the Appellant under Regulation 21 of the Defence of Canada Regulations was legal as the Appellant was a Rumanian citizen.

The remaining matters complained of in sub-paras. (b), (d), (e), (f) and (g) are set out in the petition of right as part of the narrative of the appellant's experiences while in legal custody in Canada and although in his arguments before this Court appellant's counsel attributed all these complaints to the negligence of officers of the Crown, it is noteworthy that the only plea contained in the petition upon which reliance is placed as an allegation of such negligence is that contained in para. 74 which reads as follows:

L'incarcération et l'internement du requérant, tel que décrit ci-dessus, sont dus à la faute et/ou la négligence d'employés, de fonctionnaires, d'officiers et/ou de serviteurs de la Couronne, pendant qu'ils étaient dans l'exercice de leurs fonctions ou de leur emploi.

It is argued that because the words "tel que décrit ci-dessus" have been inserted in this paragraph it is to be construed as an allegation that all the matters complained of in the earlier paragraphs of the petition were occasioned by the fault and/or negligence of employees, officials, officers and/or servants of the Crown while acting within

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the scope of their employment, and that this constitutes an allegation sufficient to give rise to liability against the Crown.

It is settled law "that there cannot be an action in tort against the Crown unless it is founded upon a statute". See *The King v. Paradis & Farley Inc.*[1], *per* Taschereau J. as he then was; and the only such statutory provision existing at the time when the events complained of are alleged to have occurred was that contained in para. 19 (c) of the *Exchequer Court Act*, R.S.C. 1927, c. 34, as amended by 1938 (Can.), c. 28 which reads as follows:

> The Exchequer Court shall have exclusive original jurisdiction to hear and determine the following matters:
>
> (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The nature of the liability thus created against the Crown is explained in the reasons for judgment of Rand J. speaking for the majority of this Court in *The King v. Anthony*[2], where he said:

> I think it must be taken that what paragraph (c) does is to create a liability against the Crown through negligence under the rule of *respondeat superior*, and not to impose duties on the Crown in favour of subjects: *The King v. Dubois* (2); *Salmo Investments Ltd. v. The King* (3). It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.
>
> If the liability is placed merely on the negligent failure to carry out a duty to the Crown and not on a violation of a duty to the injured person, then there will be imposed on the Crown a greater responsibility in relation to a servant than rests on a private citizen. But the words "while acting" which envisage positive conduct of the servant taken in conjunction with the consideration just mentioned clearly exclude, in my opinion, such an interpretation.

The broad contention made on behalf of the appellant is that all officers or servants of the Crown who were employed in jails and internment camps such as those in which he was interned and incarcerated, owed a duty to the prisoners in their charge not to expose them to the kind of treatment and punishment to which the appellant alleges that he was subjected, and that the mere recitation of the manner in which he was treated, coupled with

[1] [1942] S.C.R. 10 at 13, 1 D.L.R. 161.
[2] [1946] S.C.R. 569 at 571, 3 D.L.R. 577.

the wording of para. 74 of the petition, constitutes an allegation of a breach of this duty and therefore of negligence such as to create a liability against the Crown under the *Exchequer Court Act.*

There appears to me, however, to be a wide difference between general allegations of mistreatment and unfairness suffered by a prisoner while confined by order of the Canadian Government and an allegation that some servant or agent of the Crown has, while acting within the scope of his duties or employment, committed a tortious act of negligence under such circumstances as to draw upon himself a personal liability to the petitioner. Under the provisions of s. 19 (c) of the *Exchequer Court Act,* the liability of the Crown is, in my opinion, limited to proof of allegations of the latter character.

It is to be observed also that the claim which is alleged to be put forward by para. 74 of the petition is not confined to "negligence" but is based upon an allegation of *"faute et/ou la négligence"* of officers and servants of the Crown. As the learned President of the Exchequer Court has pointed out, "negligence" is only one segment of the broad field of "faute" which is envisaged by the provisions of art. 1053 of the Quebec *Civil Code,* the English version of which reads as follows:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

In this regard, in *Canadian National Railways Co. v. Lepage*[1], *Rinfret J.* (as he then was) had occasion to say:

> The respondent's case is rested on fault consisting not in any positive act or imprudence, but in the neglect of the company and its employees (art. 1053 C.C.).
>
> * * *
>
> It is a familiar principle that neglect may, in law, be considered a fault only if it corresponds with a duty to act.

In the course of his reasons for judgment, the learned President has traced the history and development of the specific and independent tort of negligence and I have nothing to add to his analysis of the subject.

In essence, negligence involves the causing of damage by a breach of that duty of care for others which the

[1] [1927] S.C.R. 575 at 578, 3 D.L.R. 1030, 34 C.R.C. 300.

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circumstances of the particular case demand. It is lack of due care which gives rise to liability for negligence and a very real distinction exists between inadvertently causing injury through an unreasonable failure to guard against foreseeable danger to others and deliberately carrying out a course of conduct designed to control persons in legal custody by subjecting them to disciplinary action.

I agree with the learned President of the Exchequer Court that the allegation of fact contained in the petition of right cannot be considered as disclosing tortious acts of negligence by officers or servants of the Crown. They are descriptive of disciplinary and regulatory measures deliberately taken by authorities responsible for the custody of the appellant while he was legally imprisoned and incarcerated and are therefore not such as to create liability against the Crown under s. 19 (c) of the *Exchequer Court Act*.

As to the argument of appellant's counsel based on *The Canadian Bill of Rights*, 1960 (Can.), c. 44, it is only necessary to say that that statute, like *The Crown Liability Act*, 1952-53 (Can.), c. 30, was not in force during the period referred to in the petition of right and that the pre-existing rights which it recognizes do not include the right to bring an action in tort against the Crown except as specifically provided by statute.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Georges A. Roy and Jean-Paul Deschatelets, Montreal.

Solicitor for the respondent: Paul Ollivier, Ottawa.

GEORGE P. DEMENOFF .....APPELLANT;

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*Dec. 2
Dec. 16

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Appeals—Jurisdiction of Supreme Court of Canada—Right to appeal limited to questions of law on which there was a dissent in the Court of Appeal—Confession—Whether voluntary—Dissent as to admissibility—Whether dissent on a question of law—Criminal Code, 1953-54 (Can.), c. 51, ss. 79(1)(a), 597(1)(a).

The appellant, a Sons of Freedom Doukhobor, was convicted on a charge of having placed an explosive substance with intent to cause an explosion that was likely to cause serious damage to property, contrary to s. 79(1)(*a*) of the *Criminal Code*. A confession was put in evidence at the trial. His appeal was dismissed by a majority judgment of the Court of Appeal, the dissent being as to the admissibility of the confession. The appellant appealed to this Court.

Held: The appeal should be dismissed.

Under s. 597(1)(*a*) of the *Criminal Code*, this Court is incompetent to entertain an appeal if the ground of appeal raises only a question of mixed law and fact. The ground of appeal must raise a question of law in the strict sense and in respect to which there is a disagreement, expressed or implied, between the minority and the majority in the Court of Appeal. In the case at bar, the difference of opinion was attributable to different inferences drawn by the dissenting judge and by those of the majority from the accepted evidence relevant to the voluntariness of the confession. Consequently, the ground of appeal did not raise a question of law in the strict sense and this Court had no jurisdiction.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming the appellant's conviction for an offence under s. 79(1)(*a*) of the *Criminal Code*. Appeal dismissed.

Sydney B. Simons, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—This is an appeal from a majority judgment of the Court of Appeal for the Province of British Columbia[1] dismissing the appeal of the appellant from his

*PRESENT: Fauteux, Abbott, Martland, Ritchie and Spence JJ.

[1] (1963), 43 W.W.R. 610.

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conviction for the offence described under s. 79(1)(*a*) of the *Criminal Code*.

The appeal is taken under s. 597(1)(*a*) of the *Criminal Code* which provides that:

> 597. (1) A person who is convicted of an indictable offence other than an offence punishable by death and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada
>
> (*a*) on any question of law on which a judge of the court of appeal dissents, or
>
> .....
>
> .....

Under these provisions, this Court is incompetent to entertain an appeal if the ground alleged in support thereof raises only a question of mixed law and fact. It is indeed well settled by the decisions of this Court that the ground of appeal must raise "a question of law in the strict sense", *The King v. Décary*[1], and that this question of law, involved in the *ratio decidendi,* must be one in respect to which there is a disagreement expressed or implied between the minority and the majority in the Court of Appeal. *Rozon v. The King*[2].

In the case at bar, the majority and the minority disagreed with respect to the admissibility, as a voluntary statement, of a confession of guilt made by the appellant. It does not appear from the reasons of Davey J.A., dissenting, and from those of his colleagues Bird and Wilson JJ.A., of the majority, that this disagreement is based on a conflicting view of the law governing the admissibility of confessions; a careful consideration of the reasons for judgment reasonably indicates that the difference of opinion is attributable to different inferences being drawn by the dissenting Judge and by those of the majority from the accepted evidence relevant to the voluntariness of the confession. On this view of the matter, the ground of appeal alleged by the appellant does not raise a question of law in the strict sense. *The Queen v. Fitton*[3].

[1] [1942] S.C.R. 80, 77 C.C.C. 191, 2 D.L.R. 401.

[2] [1951] S.C.R. 248 at 256, 11 C.R. 255, 99 C.C.C. 167, 2 D.L.R. 594.

[3] [1956] S.C.R. 958, 24 C.R. 371, 116 C.C.C. 1, 6 D.L.R. (2d) 529.

Hence, this Court has no jurisdiction and the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: Rankin, Dean & Munro, Vancouver.

Solicitors for the respondent: Ewart, Kelley, Burke-Robertson, Urie & Butler, Ottawa.

RUFUS PRINCE AND ROBERT MYRON ..... APPELLANTS;

1963
*Nov. 18
Dec. 16

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Indians—Game laws—Hunting with night light contrary to s. 31(1) of The Game and Fisheries Act, R.S.M. 1954, c. 94—Whether prohibition applies to Treaty Indians—Whether word "hunt" in s. 72(1) of the Act subject to limitations in s. 31(1)—The Manitoba Natural Resources Act, R.S.M. 1954, c. 180, s. 13.

The appellants were charged with unlawfully hunting big game by means of night lights, contrary to s. 31(1) of *The Game and Fisheries Act*, R.S.M. 1954, c. 94. The appellants were Treaty Indians and were hunting deer for food for their own use and on lands to which they had the right of access. They were acquitted by the magistrate, but their acquittal was set aside by the Court of Appeal. They were granted leave to appeal to this Court.

Held: The appeal should be allowed and an acquittal directed.

In regard to Indians, the word "hunt" as used in s. 72(1) of *The Game and Fisheries Act* was not ambiguous nor subject to any of the limitations which are imposed by s. 31(1) upon non-Indians.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], setting aside the appellants' acquittal by a magistrate on a charge under s. 31(1) of *The Game and Fisheries Act* of Manitoba. Appeal allowed.

Duncan J. Jessiman, Q.C., for the appellants.

Benjamin Hewak, for the respondent.

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

[1] (1962), 40 W.W.R. 234.

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PRINCE AND MYRON v. THE QUEEN

Gerald LeDain, Q.C., for the Attorney-General of Quebec, intervenant.

S. Freedman, for the Attorney General of Alberta, intervenant.

The judgment of the Court was delivered by

HALL J.:—The appellants, both of them Treaty Indians, were charged before Magistrate Bruce McDonald of Portage la Prairie, Manitoba:

> That they did on or about the 27th day of October, A.D. 1961, at or near the Rural Municipality of South Cypress, in the Province of Manitoba, unlawfully hunt big game by means of night lights, contrary to the Provisions of the Game and Fisheries Act and Regulations, Section 31(1).

Section 31(1) of *The Game and Fisheries Act*, R.S.M. 1954, c. 94, provides as follows:

> 31(1) No person shall hunt, trap or take any big game protected by this Part and the regulations by means of night lights of any description, traps, nets, snares, baited line, or other similar contrivances, or set such traps, nets, snares, baited line, or contrivance for such big game at any time, and, if so set, they may be destroyed by any person without incurring any liability for so doing.

The learned Magistrate acquitted the appellants because the term "night lights"

> . . . as used in the above subsection was not capable of definition, that the land upon which the hunting was being done was land to which the Indians had access in that there were no prohibition signs posted, and that the Indians were entitled, in any event, to hunt in any manner they saw fit on land to which they had access.

The Crown took an appeal by way of stated case to the Court of Appeal for Manitoba[1]. The questions propounded were as follows:

(*a*) having found that Rufus Prince, George Prince, and Robert Myron were hunting big game by means of a spotlight was I right in holding that such spotlight was not a night light within the meaning of Section 31(1) of The Game and Fisheries Act, R.S.M. 1954, Cap. 94;

(*b*) was I right in interpreting the term "night lights" as contained in Section 31(1) of The Game and Fisheries Act, R.S.M. 1954, Cap. 94, as a classification or description of an object rather than a method or means of hunting;

(*c*) having found that the land upon which Rufus Prince, George Prince and Robert Myron were hunting was land that was occupied

[1] (1962), 40 W.W.R. 234.

and under cultivation and privately owned land, was I right in holding that such land was land to which the said Rufus Prince, George Prince, and Robert Myron had a "right of access";

(*d*) having found that the land upon which Rufus Prince, George Prince and Robert Myron were hunting was land to which the said Rufus Prince, George Prince and Robert Myron had "a right of access", was I right in dismissing the charge under Section 31(1) of The Game and Fisheries Act on this ground.

The Court of Appeal answered questions (*a*) and (*b*) in the negative; question (*c*) in the affirmative and question (*d*) in the negative, Schultz and Freedman JJ.A. dissenting as to (*d*). The Court accordingly directed that the case be referred back to the learned Magistrate with a direction that conviction should be entered against the three accused and that appropriate penalties should be imposed.

Leave to appeal to this Court was granted on January 22, 1963.

It was admitted in this Court that at the time in question in the charge the appellants were Indians; that they were hunting deer for food for their own use and that they were hunting on lands to which they had the right of access. These admissions are fundamental to the determination of this appeal.

Section 72(1) of *The Game and Fisheries Act,* R.S.M. 1954, c. 94, reads as follows:

72(1) Notwithstanding this Act, and in so far only as is necessary to implement The Manitoba Natural Resources Act, any Indian may hunt and take game for food for his own use at all seasons of the year on all unoccupied Crown lands and on any other lands to which the Indian may have the right of access.

The above section refers to *The Manitoba Natural Resources Act,* R.S.M. 1954, c. 180, of which s. 13 thereof reads as follows:

13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the law respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, with which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

There was a suggestion that the appeal involved a constitutional issue as to the validity of *The Game and Fisheries Act,* R.S.M. 1954, c. 94, in respect to Indians. The

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Hall J.

Attorney-General for Ontario gave Notice of Intervention and the Provinces of Quebec and Alberta did likewise. Prior to the appeal being heard, the Province of Ontario filed a Notice of Withdrawal. The Provinces of Quebec and Alberta filed factums and were represented by counsel at the hearing. They were not heard as the Court held that no constitutional issue arose in the appeal. The agreement dated December 14, 1929, between the Government of Canada and the Government of the Province of Manitoba containing, *inter alia,* said s. 13, pursuant to which *The Manitoba Natural Resources Act* was passed acquired the force of law by virtue of *The British North America Act,* (1930), 21 George V, c. 26.

The sole question for determination is whether the word "hunt" as used in s. 72(1) of *The Game and Fisheries Act,* R.S.M. 1954, c. 94, in regard to Indians is ambiguous in any way or subject to the limitations contained in s. 31(1) of the said Act.

With respect, I agree with the reasons of Freedman J.A. in his dissenting judgment and also with the statement by McGillivray J.A. in *Rex v. Wesley*[1], when he said:

> If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

The word "hunt" as used in the section under review must be given its plain meaning. "Hunt" is defined in the Oxford English Dictionary as:

> The act of chasing wild animals for the purpose of catching or killing them; to chase for food or sport; to scour a district in pursuit of game.

Webster's Third New International Dictionary defines "hunt" as: "To follow or search for game for the purpose

[1] (1932), 2 W.W.R. 337 at 344, 26 Alta. L.R. 433, 58 C.C.C. 269.

and with the means of capturing or killing." It is not ambiguous nor subject to any of the limitations which s. 31(1) imposes upon the non-Indian.

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Hall J.

I would allow the appeal with costs throughout and direct that the acquittal of the appellants be confirmed. There should be no order as to costs for or against the Attorneys-General of Quebec and Alberta.

Appeal allowed and acquittal directed, with costs.

Solicitors for the appellants: Johnston, Jessiman, Gardner & Johnston, Winnipeg.

Solicitor for the respondent: The Attorney General for Manitoba.

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ENGA CHRISTINE CAMPBELL (*Plaintiff*) ..... APPELLANT; *Oct. 9, 10 Dec. 16

AND

THE ROYAL BANK OF CANADA (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Invitor and invitee—Water accumulation on bank floor result of people entering with snow on footwear—Customer slipping and falling—Unusual danger—Failure to use reasonable care—Defence of volenti non fit injuria.

The plaintiff sustained injuries in a fall occasioned by slipping in some water which had gathered on the floor of the defendant's bank. It was a snowy day and the water had accumulated as the result of people entering the bank with snow on their footwear. The plaintiff, who was not a regular customer of the bank in question, entered the premises for the purpose of cashing a cheque, and after having endorsed the cheque she walked to one of the tellers' cages where she was told that she would have to get the cheque initialled by the accountant or the manager. As she left to attend to this, her feet slipped from under her and she fell heavily to the watery floor and was injured. The plaintiff recovered substantial damages at trial, but, on appeal, the Court of Appeal reversed the judgment of the trial judge by a majority decision.

Held (Martland and Judson JJ. dissenting): The appeal should be allowed.

Per Judson, Hall and Spence JJ.: The state of the floor on the afternoon of the accident constituted an "unusual danger". Not even the

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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exigencies of Western Canadian winter conditions would make usual the presence on the floor of a large bank, in mid-afternoon, of a dangerous glaze of water underfoot near the tellers' wickets. The danger could have been prevented by economical and easy precautions; a member of the public frequenting this bank was entitled to expect such precautions and their absence tended to make the danger an "unusual" one. The bank failed to use reasonable care to prevent damage to its customers.

The defendant failed to establish the defence of *volenti non fit injuria.* As found by the trial judge, the plaintiff was not *sciens* of the danger to be met in the area of the tellers' wickets. Certainly, the defendant had failed to show such knowledge as to leave the inference that the risk had been voluntarily encountered. There was nothing to indicate that the plaintiff consented to absolve the defendant from its duty to take care.

Also, as held by the Courts below, the defence of contributory negligence was not established.

Indermaur v. Dames (1866), L.R. 1 C.P. 274; *London Graving Dock Co. Ltd. v. Horton,* [1951] 2 All E.R. 1; *Lehnert v. Stein,* [1963] S.C.R. 38, applied; *Letang v. Ottawa Electric Railway Co.,* [1926] A.C. 725; *Osborne v. London and North Western Railway Co.* (1888), 2 Q.B.D. 220, referred to.

Per Martland and Ritchie JJ., *dissenting:* Proof of the existence of an unusual danger which caused the damage complained of was an essential ingredient of the plaintiff's case, and in the absence of such proof, it was superfluous to consider any defence based on the plaintiff's having known and appreciated the condition of the floor or having accepted the risk, if any, inherent in encountering it.

Hillman v. MacIntosh, [1959] S.C.R. 384; *Hanes v. Kennedy,* [1941] S.C.R. 384; *Rafuse v. T. Eaton Co. (Maritimes) Ltd.* (1958), 11 D.L.R. (2d) 773, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from a judgment of Maybank J. Appeal allowed, Martland and Ritchie JJ. dissenting.

A. C. Hamilton, for the plaintiff, appellant.

J. N. McLachlan, for the defendant, respondent.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Manitoba[1] (Freedman and Monnin JJ.A. dissenting) allowing an appeal by the respondent from the judgment rendered at trial by Mr. Justice Maybank whereby he awarded substantial damages to the appellant for injuries which she sustained in a fall occa-

[1] (1963), 41 W.W.R. 91, 37 D.L.R. (2d) 725.

sioned by slipping in some water which had gathered on the floor of the premises of the Royal Bank of Canada at Brandon, Manitoba, on a snowy day in November, 1959. The appellant, who was not a regular customer of the bank in question, entered the premises for the purpose of cashing a cheque, and after having endorsed the cheque she walked to one of the tellers' cages where she was told that she would have to get the cheque initialled by the accountant or the manager. As she left the wicket to attend to this, her feet slipped from under her and she fell heavily to the watery floor, with the result that she sustained the injuries in respect of which this action is brought.

The source of the water on the floor is explained by the learned trial judge when he says:

> There is no doubt that the numerous persons who entered the bank's lobby that day carried in a certain amount of snow on their boots

and he describes the nature and the condition of the floor itself as follows:

> The floor itself was of *smooth tile of a kind seen in many public places like banks*. It had been oiled on the week-end before the accident. There is no evidence to indicate improper oiling or an accumulation of oil in any particular place. Directly and by itself the oil on the floor did not cause the accident which is the subject of this action. It is possible that the oiled tile and water on top of it made the floor slippery, but I think the point does not necessarily have to be determined.

(The italics are mine).

The learned trial judge proceeds to make the following finding as to the cause of the accident:

> I think there can be no doubt that water on the floor of the bank lobby caused this woman to fall and I find this as a fact. It was, in my opinion, more than mere moisture or dampness; it may have been less than actual puddles; but certainly there was at least a dangerous glaze or film of water underfoot near the tellers' wickets. It may be that the recent oiling contributed to the slipperiness caused by the water, but whether that is so does not, as I have previously said, need to be determined. The place was too slippery for safety.

As will hereafter appear, Mr. Justice Maybank adopted the view that the bank, while not actually an insurer of the appellant's safety on its premises, was, nevertheless, under a duty to her to use reasonable care to keep those

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Ritchie J.

premises safe, and it appears to me to be clear that it was upon this basis that he fixed the bank with liability saying:

> In the instant case the bank did not take care to have its premises safe for its customers. In the vestibule was a rubber corrugated mat on which people could clean their footwear. It was not adequate as a help towards keeping a fairly dry lobby floor. A cocoa mat someplace about would have been useful. Also, when the weather was such that people carried in wet snow, a few strips of matting to the busy parts of the lobby or even at those busy places would have kept the floor nearly dry. The bank had no system or method for ensuring safe premises.

It is not disputed that the relationship between the bank and the appellant was that of invitor and invitee and the sole question raised by this appeal is whether the bank discharged the duty to which that relationship gives rise.

In defining this duty, the learned trial judge, after referring to a number of cases which had been cited before him, including *Indermaur v. Dames*[1], went on to say:

> Now it is quite clear that while the invitor does not actually insure the safety of his invitee, he must use reasonable care to keep safe the premises into which he has invited that person. If there is a danger for his invitee of which the invitor ought to have known, his responsibility is the same as if he had known of it. All the authorities listed above and many others either express these propositions or are consonant with them.

When this passage is considered in conjunction with the finding that it was a breach of the bank's duty for it to fail to have any "system or method of ensuring safety", it seems to me with the greatest respect to be apparent that the learned trial judge has misconceived the nature of the duty owing by an invitor to an invitee under the law applicable in Manitoba.

The nature of that duty has recently been restated in the case of *Hillman v. MacIntosh*[2], where Mr. Justice Martland, speaking on behalf of the majority of this Court said:

> . . . the relationship between the appellant and the respondent was that of invitor and invitee.
>
> The appellant, therefore, owed to the respondent, in relation to his use of the freight elevators, a duty the classic definition of which is that of Willes J. in *Indermaur v. Dames:*
>
> > And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question

[1] (1866), L.R. 1 C.P. 274 at 288.

[2] [1959] S.C.R. 384 at 391, 17 D.L.R. (2d) 705.

> whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.

See also *Hanes v. Kennedy*[1], *per* Kerwin J. (as he then was) at p. 387.

I would also adopt the following comment by Professor Fleming in his work on "The Law of Torts" 2nd ed., at p. 412:

> The duty is not to prevent unusual danger but to prevent damage from unusual danger. An invitee cannot claim that the occupier make alterations to his premises to render them safe. He must take them as they are subject to the occupier's duty to use reasonable care to protect him from unusual dangers.

It has been said that the term "unusual danger" as used in this context defies comprehensive definition, but as has been pointed out by MacDonald J. in *Rafuse v. T. Eaton Co. (Maritimes) Ltd.*[2]:

> . . . it clearly has one primary meaning: it means "such danger as is not usually found in carrying out the function which the invitee has in hand"; and "was intended to exclude the common recognizable dangers of every day experience in premises of an ordinary type". See *London Graving Dock Co. Ltd. v. Horton*[3], per Lord Porter at p. 745 and Lord MacDermott at p. 762.

In light of the above authorities, it appears to me to be established that proof of the existence of an unusual danger which caused the damage complained of is an essential ingredient of the plaintiff's case, and in the absence of such proof, it is superfluous to consider any defence based on the appellant's having known and appreciated the condition of the floor or having accepted the risk, if any, inherent in encountering it.

Accordingly, in my view, the first question to be answered in this case is:

> Has it been shown that an accumulation of moisture which had collected on the tile floor in front of the tellers' wickets in a busy bank in Brandon, Manitoba, on a snowy day constituted an unusual danger.

I think it may at least be accepted that it is natural for moisture to accumulate on the tile floor of a building at a point where people have been standing with damp snow on

[1] [1941] S.C.R. 384.
[2] (1958), 11 D.L.R. (2d) 733 at 777.
[3] [1951] A.C. 737.

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their boots, and that in snowy climates, unless some preventative measures are taken, this must happen to some extent in wintertime on the tile floors of all buildings frequented by the public. Mr. Armstrong, the bank manager, refers to the moisture which accumulated in the bank in question as "dampness" rather than "water", and Mr. Edworthy, who was a regular customer of the bank, says that he had never actually noticed water on the floor and did not notice it on the day in question until his foot slipped as he turned to help the appellant up from her fall. The views thus expressed do not satisfy me that it was unusual to find melted snow in varying quantities on the floor of this particular bank "when the weather was such that people carried in wet snow" (to use the trial judge's expression) and particularly that it was unusual for there to be a concentration of such melted snow in front of the tellers' wickets.

It remains to be considered whether it is usual for the occupiers of such a building to take preventative measures against allowing water to accumulate on tile floors, such as having cocoa matting or some other substance on the floor in wintertime, or having somebody circulating amongst the customers with a mop to keep the floor fairly dry.

It is apparent, as the learned trial judge has found, that the respondent did not employ any effective system to control or prevent such conditions as existed in the lobby when the appellant fell, and as there is nothing to indicate that there was anything about the weather or the condition of the floor itself to distinguish the day in question from any other day in winter, it becomes relevant to note that throughout the eight winters during which Mr. Armstrong had been manager there had never been any complaint about anybody falling or slipping in the lobby. This appears to me to support the suggestion that while the fall was unusual, the floor was not dangerous.

The learned trial judge has found that the floor "was of smooth tile of a kind seen in many public places such as banks", but I can find no evidence whatever in the record as to what if any measures it is usual for the occupiers of such public buildings to take in wintertime to prevent water collecting from the snowy boots of their customers.

The danger of attempting to decide this matter by taking judicial notice of floor conditions usually found in such buildings in snowy weather appears to me, with all respect, to be demonstrated by the sharp difference of opinion which existed between the distinguished judges of the Court of Appeal of Manitoba as to whether it was usual or unusual to find water in such quantities on the floor of a bank in Manitoba in wintertime. Three judges of that Court were of opinion that there was nothing "unusual" about the condition of the bank's floor on the day in question, saying that it would be "wholly unrealistic and unreasonable" ". . . to expect anything other than a wet floor on a snowy day in Manitoba in any public place such as a bank . . .", while two judges of the same Court had not the slightest doubt that the presence of water on the floor constituted an unusual danger and expressed the view that: "One does not normally expect that bank premises, to which members of the public customarily resort in large numbers, will be wet and therefore hazardous. Not even under Western Canadian winter conditions would it be usual to expect to encounter such a floor".

Owing no doubt to the view which he took of the law, the learned trial judge made no finding as to whether or not the appellant's injuries were caused by an unusual danger, unless it can be said that the finding that "The place was too slippery for safety" is itself to be considered a finding of unusual danger.

I do not consider the evidence that the appellant slipped and fell in the amount of water which had accumulated on the floor at the tellers' wickets of the respondent's bank and that Mr. Edworthy slipped but did not fall on the same spot as he turned to pick her up, is of itself proof of the presence of an unusual danger or indeed that it proves that on the day in question the floor was too slippery for the safety of persons other than the appellant.

As I am unable to find any evidence in the record before us that it was unusual for such floor conditions to be present in such a building on such a day, I must conclude that the appellant has failed to discharge the burden of proving that her unfortunate fall occurred under circumstances giving rise to liability on the part of the respondent bank.

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Ritchie J.

I would accordingly dismiss this appeal with costs.

The judgment of Judson, Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal of Manitoba[1] dated January 3, 1963, which allowed an appeal from the judgment of Maybank J. dated July 4, 1962, in which he awarded the plaintiff judgment against the defendant for $35,889 and costs. The plaintiff's claim against the defendant was for damages sustained in a fall on the premises of the defendant in Brandon, Manitoba, at 2:30 p.m. on Monday, November 23, 1959.

It is not my purpose at the present time to review the facts in detail as I presume they are to be mentioned in another judgment in this Court.

The appeal, however, was argued upon the basis that the plaintiff was an invitee upon the premises. The occupier's liability to an invitee was stated by Willes J. in *Indermaur v. Dames*[2] as follows:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know.

That outline of liability has been accepted universally since the day it was pronounced. Therefore, the first and the most important inquiry before a court considering such a claim is whether, under the circumstances existing at the time and place of the accident, there was present an "unusual danger". "Unusual danger" has been defined in the judgment given in the House of Lords in *London Graving Dock Co. Ltd. v. Horton*[3], by Lord Porter at p. 745, as follows:

> I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think Phillimore, L.J., in *Norman v. Great Western Railway Co.*, [1915] 1 K.B. 584 at 596, is speaking of individuals as individuals but of individuals as members of a type, e.g. that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack though it would be for a motor mechanic. But I do not think a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness.

[1] (1963), 41 W.W.R. 91, 37 D.L.R. (2d) 725.
[2] (1866), L.R. 1 C.P. 274.
[3] [1951] A.C. 737.

The plaintiff was a widow of 55 years of age who was attending the bank premises in order to obtain payment of a cheque made in her favour. The bank was not the one with which she regularly dealt and she had been in the premises but a few times before. In other words, she was an ordinary member of the public with no special prior knowledge of the conditions in the particular premises.

Lord Normand said at p. 752 of the same case:

> I am of opinion that if the persons invited to the premises are a particular class of tradesman then the test is whether it is unusual danger for that class.

Here, as I have stated, the invitee was an ordinary customer of the bank but of no particular class. We must, therefore, consider the facts in a particular case in the light of these statements of the law which I adopt.

The bank premises were in the City of Brandon, a city with a population not given in evidence but we may take judicial notice that it is a considerable city, second in Manitoba outside the Greater Winnipeg area, with a population of nearly 30,000. The bank premises contained the sole branch of the bank in that city and was no small building as it provided space for 7 tellers' wickets, and the area for the use of the public inside the main vestibule measured 21½ feet by 32 feet. To these bank premises the public resorted in large numbers.

The day of the accident was a Monday but was described by Mrs. Martens, a teller, as "a busy day" and it would seem that on a busy day each one of the 4 savings tellers dealt with between 30 and 35 customers during the day. The bank was at the corner of 8th Avenue and Prosser Street in the City of Brandon. The accident occurred at about 2.30 p.m. on November 23, 1959, and during the previous day 1¼ inches of snow had fallen in Brandon and another 2.8 inches fell throughout the course of the 23rd of November. The temperature on the latter day varied from 23 to 27 degrees so that the condition under foot could be referred to as mildly slushy. Whether or not there had been snow cleaning in the immediate vicinity of the bank, the learned trial judge found that many persons who entered the bank on that day carried in a certain amount of snow on their boots. Entering the bank, a customer passed through a vestibule 10 feet square, the floor of which was

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Spence J.

completely covered with a corrugated rubber mat. No witness at the trial had ever seen anyone stamping snow off their feet on that mat. The customer passing through that vestibule entered the public premises of the bank through a double door. Much of the evidence at trial and consideration in both the Court of Appeal and in this Court was devoted to an examination of the state of the floor in the public premises. That floor was of a rubber composition tile and had been treated with what was described in evidence as "self-polishing non-skid liquid wax" on either the Sunday or the Saturday preceding the accident, both of which, of course, were non-business days. The learned trial judge stated:

> It is possible that the oiled tile and water on top of it made the floor slippery, but I think the point does not necessarily have to be determined.

After that statement, the consideration of the issue of the defendant's liability has proceeded without regard to any possibility that the presence of wax referred to in error by the learned trial judge as "oiled" contributed in any way to the accident. In this case, we are not concerned with the effect of wax on the floor but with the effect of water from melted snow upon the floor. In the Court of Appeal, Guy J.A., entered into a detailed and careful examination of the evidence upon that topic and particularly the plaintiff's knowledge of the condition of the floor.

As to the presence of an "unusual danger" apart from any question of the plaintiff's knowledge and appreciation of it, one might well commence with the finding of fact by the learned trial judge, where he said:

> I think there can be no doubt that water on the floor of the bank lobby caused this woman to fall and I find this as a fact. It was, in my opinion, more than mere moisture or dampness; it may have been less than actual puddles; but certainly there was at least a dangerous glaze or film of water underfoot near the teller's wickets.

And:

> In the first place it should be said I think that the plaintiff's knowledge was not knowledge of the dangerous condition around the tellers' wickets. The condition was worse there. (The underlining is my own.)

These were findings of fact by an experienced trial court judge made after hearing the evidence, often contradictory, in court and coming to the conclusion as to the evidence

which he would accept and the probative value he would attach to that evidence,

> Yet her statement is one I accept unreservedly.

And:

> I have no doubt about the plaintiff's veracity. I would say that any unequivocal statement made by her should be accepted as wholly true.

Freedman J.A., said, in the minority judgment of the Court of Appeal, in reference to this finding, "And I would say that the evidence clearly supports such a finding". And at p. 207, "Once again, I would say that the learned trial Judge's conclusions are supported by the evidence." (The underlining is my own.)

With that statement and with that course in reference to the trial judge's findings of fact upon contradictory evidence, I am in complete agreement.

Watt or Thomas v. Thomas[1], *per* Lord Macmillan at p. 490; *S.S. Hontestroom v. S.S. Sagaporack*[2], *per* Lord Sumner at p. 47; *Powell v. Streatham Manor Nursing Home*[3], *per* Viscount Sankey at pp. 249-50; *Roche v. Marston*[4], *per* Kerwin J. at pp. 495-6; *Prudential Trust Co. Ltd. et al. v. Forseth & Forseth*[5], per Martland J. at pp. 594-5.

Therefore, in the light of these facts as so found, was the condition of the floor at the place where the plaintiff fell on November 23, 1959, a "condition of unusual danger"? Guy J.A., giving the judgment of the majority of the Court of Appeal, said:

> The plaintiff apparently lived in Western Canada all her life and spent the ten years prior to the accident, in the city of Brandon. She knew what the snow conditions were outside, and I think we may take judicial notice of the fact that she must have encountered the same situation in every shop, either city or rural office, department store, school and public building she visited during her lifetime. On at least nine occasions during the giving of her evidence in Court at the trial, she stated that she noticed the floor was wet; that she saw patches of water; that she thought it was wet ("not all over, but in spots"). In addition to this, of course, at least two witnesses testified that the bank floor was wet in spots.
>
> There had been a number of people in the bank during banking hours that day, and, according to the witness Martens, it was a busy day. According to the witness Golding, one of the plaintiff's witnesses, the condi-

[1] [1947] A.C. 484.
[2] [1927] A.C. 37.
[3] [1935] A.C. 243.
[4] [1951] S.C.R. 494.
[5] (1960), 21 D.L.R. (2d) 587.

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tion of the floor was no more than one would expect in a public place on a snowy day. I shall quote her evidence further on in this judgment.

Another witness called by the plaintiff was a Mr. Edworthy, who testified to the same effect; a portion of his evidence appears later in this judgment.

Having regard to the picture presented by all the evidence, I must say that the situation, which confronted the plaintiff in the bank on the day in question, was a situation so commonplace as to take it out of the category of the "unusual". The significance of the word "unusual" as it appears in the basic principle of *Indermaur v. Dames, supra,* seems to me to be this: if the danger is an usual danger, it must be assumed that ordinary reasonable people know and appreciate it fully. Conversely if they know and appreciate it, it ceases to be unusual. In my view, to expect anything other than a wet floor on a snowy day in Manitoba in any public place such as a bank, store, post office, school, office, theatre, restaurant, or any of the hundreds of shops that abound in the Province, is to deny the everyday realities of life, and is wholly unrealistic and unreasonable.

On the other hand, Freedman J.A., in giving the minority judgment of that Court, said:

One does not normally expect that bank premises, to which members of the public customarily resort in large numbers, will be wet and therefore hazardous. Not even under western Canadian winter conditions would it be usual to expect to encounter such a floor. Admittedly snowstorms outside carry with them the prospect of snow being brought within premises, but that very likelihood imposes upon the occupier the obligation to take some effective measures against hazards thereby created. He cannot stand idly by, do nothing to protect invitees from damage arising from a wet floor, and then simply look to the snowstorm to exonerate him. (The underlining is my own.)

The question of "reasonable care" under the rule of *Indermaur v. Dames,* will be described hereinafter.

Again, I find myself in agreement with Freedman J.A. that not even the exigencies of Western Canadian winter conditions would make usual the presence on the floor of a large bank in a city of 30,000, in mid-afternoon, of "a dangerous glaze of water underfoot near the tellers' wickets". I am of opinion that the state of the floor in that bank on that afternoon constituted an "unusual danger".

It is perhaps a test of some value to determine whether a condition is one of unusual danger to investigate the ease by which the occupier might avoid it. In the present case, the learned trial judge said:

A cocoa mat some place about would have been useful. Also when the weather was such that people carried in wet snow a few strips of matting to the busy parts of the lobby or even at those busy places would have kept the floor nearly dry.

If the danger could have been prevented by these economical and easy precautions then surely a member of the public frequenting such a busy place as this bank would have been entitled to expect such precautions or others equally effective, and their absence would tend to make the danger an "unusual" one. For these reasons, I am of the opinion that the condition which confronted the plaintiff as she walked "very gingerly" from the savings wicket towards the ledger wicket was a condition of "unusual danger".

Before considering the defences of *volenti non fit injuria* and of contributory negligence, I turn to the question of whether the defendant on its part did use "reasonable care to prevent damage" to the plaintiff. Throughout the case, in the evidence, and in the judgments of both Courts, reference is made to the defendant's "system" of cleaning the floor. So far as that system affected the accumulation of snow or water from melted snow upon the floor in the public area of the bank's premises, it may be characterized as haphazard at the best. Some of the employees of the bank described as "juniors" seem to have cast upon them the vague duty of both cleaning the snow from the sidewalks outside the bank and mopping up the water which might collect on the floor in the bank premises. The trial judge, upon consideration of the evidence, only could find that the sidewalks "had probably been cleared of snow during the day" but no junior or anyone else had mopped the floor inside the bank at all during the course of the day of November 23rd, despite the fact that nearly 3 inches of snow fell in the city of Brandon during that day. The janitor, Gill, who one might presume might be the employee whose duties had most immediate connection with the cleaning of floors, was not even required to be about the premises during business hours. This course of conduct on the part of the defendant bank I would characterize as failure to use reasonable care to prevent damage to its customers, including the plaintiff whom the bank could expect to frequent its premises. I have come to this conclusion realizing the ease with which the danger could have been prevented by any of the steps referred to by the learned trial judge. Moreover, in my view, such a finding does not cast upon small businesses and shops throughout

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Manitoba any onerous burden. I would adopt the words of Freedman J.A. in the Court of Appeal:

> Counsel for the defendant advanced the argument that to hold the defendant liable in circumstances such as the present would be to impose an unfair and intolerable burden upon occupiers of premises. With respect, I do not share that view. Naturally one does not expect perfection of conduct from an occupier of premises. Moreover, one must make allowances for climatic conditions and the hazards they bring. But if weather conditions bring with them risks, they are no less accompanied by a corresponding duty to take reasonable precautions against damage that might be caused therefrom. "The risk reasonably to be perceived defines the duty to be obeyed" said Cardozo J. (*Palsgraf v. Long Island Railroad Company*, (1928) 248 N.Y. 339), and it is appropriate to recall those words here.

Guy J.A., giving the majority judgment of the Court of Appeal, quoted the learned trial judge as follows: "That she was sciens to a degree is not open to opposing argument". And also:

> In the first place it should be said I think that the plaintiff's knowledge was not knowledge of the dangerous condition around the tellers' wickets. The condition was worse there. So that even if the maxim on which defendants often rely was "scienti non fit injuria" rather than "volenti non fit injuria" it could not be said that the plaintiff was *sciens* of the danger to be met in the area of the tellers' wickets. Even if she were aware of the floor around the tellers' wickets being more slippery than the floor around the endorsement counter, (and I do not see how she could be aware of this in all the circumstances), it seems to me one would still not be able to say that she was *volens*.

and expressed his view that the evidence did not support such statement. The learned justice in appeal then proceeded to quote extensively from the evidence of the plaintiff and concluded:

> With respect, the foregoing evidence of the plaintiff herself does not justify the statement of the learned trial judge that she was not *sciens* of the danger to be met in the area of the tellers' wickets.

And:

> I say this is significant because, if there was an unusual danger and if, as the law states, she must fully appreciate the nature and extent of the risk, the plaintiff alone fully appreciated the nature and extent of the risk, and the other witnesses regarded the condition as common or usual on days such as November 23, 1959.

Again, it is my view, that the learned trial judge heard the evidence and observed not only the plaintiff but all the other witnesses and expressed his finding of fact in the words which I have quoted above.

Freedman J.A. in the Court of Appeal accepted that finding of fact when he said:

> Here, however, the plaintiff had far from a full knowledge of the danger. Beyond sensing or perceiving a condition of moisture in the location of the endorsement counter, she had no actual knowledge of the far more serious condition of wetness around the area of the tellers' cage. On the evidence it cannot be said that the plaintiff was *sciens*.

I am of the opinion that under the circumstances, the finding of the learned trial judge should be accepted. Certainly, the defendant has failed to show such knowledge as to leave the inference that the risk had been voluntarily encountered. See *Letang v. Ottawa Electric Railway Co.*[1], *per* Lord Shaw at p. 730, and *Osborne v. London and North Western Railway Co.*[2], *per* Willes J. at p. 223:

> . . . 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".

In *Lehnert v. Stein*[3], Cartwright J., giving judgment for the majority of the Court, said at p. 43:

> The decision of this Court in *Car and General Insurance Corporation Ltd. v. Seymour and Maloney,* [1956] S.C.R. 322, 2 D.L.R. (2d) 369, renders it unnecessary to make any lengthy examination of the authorities, which were fully considered in the judgments delivered in that case, particularly in that of Doull J., in the Supreme Court of Nova Scotia (*in Banco*), (1955) 36 M.P.R. 337. That decision establishes that where a driver of a motor vehicle invokes the maxim *volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence, and that, as stated in *Salmond on Torts,* 13th ed., p. 44:
>
> "The true question in every case is: 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?"

There is nothing to indicate that the plaintiff consented to absolve the defendant from this duty to take care. Therefore, the defendant has not established the defence of *volens*.

The learned trial judge found that the defence of contributory negligence has not been established. Guy J.A., giving the majority judgment of the Court of Appeal, said

[1] [1926] A.C. 725.
[2] (1888), 21 Q.B.D. 220.
[3] [1963] S.C.R. 38, 36 D.L.R. (2d) 159.

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"It is clear from the evidence, with respect, that the learned trial judge was right". I also concur in this view.

Therefore, in the result, I am of the opinion that the appeal should be allowed with costs and the judgment of the learned trial judge should be restored. The plaintiff is also entitled to the costs of the appeal in the Court of Appeal.

Appeal allowed with costs, MARTLAND *and* RITCHIE JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Honeywell, Baker, Gibson, Wetherspoon, Lawrence & Diplock, Ottawa.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

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*Oct. 25
Dec. 16

IRVIN HEPTING AND GERTRUDE HEPTING (*Plaintiffs*) ..... APPELLANTS;

AND

ANTHONY SCHAAF, KATHERINE SCHAAF AND ANDREW EXNER (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real property—Sale of house—Fraudulent misrepresentation—Claim for damages—Presumption as to worth not rebutted—Evidence of reduced value due to the misrepresentation.

The defendants AS and KS, who were husband and wife, sold their house to the plaintiffs, through the agency of the defendant E, a realtor. The defendants fraudulently concealed the fact that no permit existed to build a basement suite in the house. The plaintiffs brought an action claiming damages and were awarded judgment for $2,500. The defendants' appeal to the Court of Appeal having been allowed, the plaintiffs, with leave, appealed to this Court.

Held: The appeal should be allowed.

The evidence adduced by the plaintiffs plus the presumption authorized by the authorities that, *prima facie,* the property was worth the sum paid for it, justified the trial judge in fixing the damages at $2,500, unless evidence adduced on behalf of the defendants rebutted this presumption.

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*PRESENT: Taschereau C.J. and Martland, Judson, Hall and Spence JJ.

There was sound basis for the trial judge's conclusion that the defendants had not succeeded in rebutting the presumption. The plaintiffs then were justified in depending upon the admissions made by the defendant E in his examination for discovery, *i.e.*, that the value of the house with a rentable suite therein, presumed to be $17,700 because of its purchase at that amount, would be reduced by $2,500 if it did not contain such a rentable basement suite.

McConnel v. Wright, [1903] 1 Ch. D. 546; *Steele v. Pritchard* (1907), 7 W.L.R. 108; *Rosen v. Lindsay* (1907), 7 W.L.R. 115; *London County Freehold & Leasehold Properties Ltd. v. Berkeley Property and Investment Co., Ltd.*, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, allowing an appeal from a judgment of MacPherson J. Appeal allowed.

The Hon. C. H. Locke, Q.C., for the plaintiffs, appellants.

D. G. McLeod, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan dated December 11, 1962. By that judgment the said Court of Appeal allowed an appeal from the judgment at trial of MacPherson J. dated September 26, 1961, granting to the plaintiffs judgment against all defendants for $2,500 and costs. The statement of claim in the action (case p. 1) sets out the purchase by the plaintiffs from the defendants Schaaf through the agency of the defendant Exner of premises known as 1306 Horace Street, Regina, and the alleged fraudulent misrepresentation in reference thereto made by the defendant Exner as agent for the defendants Schaaf. Although the prayer for relief in para. 10, subpara. (*a*) thereof is for a declaration that the agreement be rescinded, the statement of claim recites that the transaction was closed and that the plaintiffs went into occupation of the premises. It is probably for this reason that MacPherson J., in his reasons for judgment, considered the remedy of damages only. The defendants, in their notice of appeal to the Court of Appeal of Saskatchewan, set out their grounds of appeal as follows:

1. That the said judgment is against law, evidence and the weight of evidence.
2. That the learned trial judge erred in holding that the defendants, or any of them, are guilty of deceit.

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3. In the alternative, there was no evidence that the defendant, Exner, acted fraudulently or had any knowledge of the matters complained of.
4. That the learned trial judge misdirected himself with respect to the measure of damages and should have held that there was no evidence on which to base an assessment of damages for deceit against the defendants, or any of them.
5. That the learned trial judge erred in holding, if he did so hold, that the fraud and deceit, alleged in the plaintiff's statement of claim, had been proven and should have held that the plaintiffs had not established the fraud alleged against the defendants.

Giving judgment for the Court of Appeal of Saskatchewan, Maguire J.A. said:

> The claim of the plaintiff at trial was limited to one of damages, it not being possible to obtain nor grant rescission in that title to the purchaser's former dwelling had been transferred to the vendors in part satisfaction of the purchase price, and subsequently sold, thus preventing the parties being placed back in status quo.
>
> It is not necessary, for the purposes of this appeal, to consider the several findings of the trial judge, other than the award of damages set at the sum of $2,500.00.

The plaintiffs obtained leave to appeal the judgment from the Court of Appeal of Saskatchewan to this Court and the respondents, in their factum, at p. 4, set out the following "Points in Issue" (p. 4):

(1) The Respondents submit that the Learned Trial Judge erred in holding that the Defendants, Exner and Schaaf, perpetrated a fraud by concealment.

(2) The fraud alleged was not proven.

(3) The agent, if anything, gave only an innocent misrepresentation and the principal did not deliberately employ an agent in order that an untrue representation would be made.

(4) The Plaintiffs proved no loss resulting from the alleged fraud.

Counsel for the respondents submitted argument upon the first three of these propositions but there appears no reason to disturb the finding of MacPherson J. at trial, who said:

> I find that the defendants Exner and Schaaf did perpetrate a fraud on the plaintiffs Hepting by concealing the fact that no permit to build the suite existed.

Therefore, these reasons are concerned only with whether the plaintiffs have proved damages for the fraudulent misrepresentation found by the learned trial judge.

The only evidence upon damages adduced by counsel for the plaintiff at the trial was, firstly, one question and answer put to the plaintiff Gertrude Hepting:

Q. Have you had any experience in prices and values of houses of this type?

A. Oh, yes, I've seen enough houses that I know that house isn't worth 17,6, what we paid for it, not without a basement suite. It's not built that good.

THE COURT: No. She has seen houses, Mr. Gerrand.

MR. GERRAND: Well, I won't press that because I have lots of evidence on that point.

That evidence which, of course, was of no weight whatsoever, was not referred to again at the trial or on appeal. Secondly, counsel for the plaintiffs read in as part of the plaintiffs' case, *inter alia,* the answers of the defendant Exner upon the examination for discovery as follows:

83. Q. As a real estate agent you would know, I take it, that there would be a substantial difference in value between that house with a properly rentable suite and one where the suite could not be occupied by law?

A. That is right.

84. Q. You would agree to that?

A. Yes.

85. Q. Would you like to venture an estimate of what the difference might be in value with or without?

A. Twenty-five hundred dollars.

and the answer of the defendant Schaaf upon examination for discovery:

73. Q. Mr. Exner has made an estimate of the value of that property without the right of the rentable suite would be $2500.00 less than with it. Do you agree with those figures?

A. Yes, I imagine it would be very close.

Giving judgment for the Court of Appeal of Saskatchewan, Maguire J.A. quoted those questions and answers and said:

The first extract of evidence referred to deals with the varying value of the dwelling depending upon whether it contained a legal, and thus rentable, basement suite or not. It is thus of no help in determining damages within the rule or basis quoted. It does not in any sense go to establish that the purchasers obtained a property of less value than the price paid therefor.

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The learned justice in appeal was there applying the judgment of Lamont J. in *Hasper v. Shauer*[1] at p. 215:

> The measure of the plaintiff's damage in an action of deceit is, as stated by the trial judge, the difference between the contract price and the real value of the land (if that value be less) at the time the contract was entered into.

and also quoted Kerr on Fraud and Mistake, 7th ed., p. 498.

In *McConnel v. Wright*[2], the Court of Appeal considered an action for damages for deceit. Collins M.R. said (p. 554):

> That obliges me to say something as to the principle upon which damages are assessed in these cases. There is no doubt about it now. It has been laid down by several judges, and particularly by Cotton L.J. in *Peek v. Derry*, 37 Ch. D. 541; but the common sense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect come in, but it is an action of tort—it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. But, in so far as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages, prima facie the assets as represented are taken to be an equivalent and no more for the money which was paid.

Cozens-Hardy L.J., said at p. 559:

> As a rule of convenience, and indeed almost of necessity, the property which would have been acquired by the company, if all the statements in the prospectus had been correct, must prima facie be taken to be worth the precise sum paid for the property, neither more nor less. This is the prima facie presumption, and it is sufficient for the decision of the present case, for no evidence has been adduced by the defendant to rebut the presumption.

That statement has been accepted in the Court of Appeal of Manitoba in *Steele v. Pritchard*[3], and *Rosen v. Lindsay*[4], where, at p. 117, Phippen J.A. said:

> The law on this point appears to be clearly laid down by the Court of Appeal in England in *McConnell v. Wright,* [1903] 1 Ch. 554. It is probably most tersely stated by Cozens-Hardy L.J., at p. 559, (and the above quotation is repeated).

[1] [1922] 2 W.W.R. 212.
[2] [1903] 1 Ch. D. 546.
[3] (1907), 7 W.L.R. 108.
[4] (1907), 7 W.L.R. 115.

In *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property and Investment Co., Ltd.*[1], Slesser L.J., said at p. 1047:

> The damage will be the difference between £611,000 paid for the property and the amount which the plaintiffs would have paid had they known the actual circumstances as to these eleven flats.

In my view, therefore, the evidence adduced by the plaintiffs plus the presumption authorized by the authorities which I have cited would have justified the learned trial judge in fixing the damages at $2,500, as he did, unless evidence adduced on behalf of the defendants had rebutted the said presumption. The only evidence adduced on behalf of the defendants was the following:

Firstly, in examination in chief of the defendant Exner:

> Q. Now, the selling price of 1306 Horace Street was $17,700.00. Can you give us your opinion of the value of 1306 Horace?
>
> A. My opinion as to the value of 1306, was that your question?
>
> Q. Yes.
>
> A. It was in line with other three bedroom homes in Rosemont district, as far as selling price, without suites, as just a straight three bedroom bungalow.
>
> Q. Is 1306 Horace Street a three bedroom bungalow?
>
> A. Yes.

and the said counsel requesting and obtaining the recalling of the defendant Exner, asked him for an explanation of his answers upon examination for discovery to questions 83 to 85, quoted aforesaid. In reference thereto, the learned trial judge said:

> Exner was asked in his examination for discovery (83 to 85) if there would be a substantial difference in value between that house (i.e. the one sold to the plaintiffs) with a properly rentable suite and one in which the suite could not in law be occupied. He agreed there would be a difference in value and he estimated the difference at $2,500.00. Schaaf in his examination agreed with Exner. The defendants tried to modify these answers at trial but, in my opinion, without success.

Counsel for the respondents argued that the learned trial judge, in the last sentence just quoted, was referring only to the attempt by counsel for the defence to obtain from the defendant Exner an explanation of his answers to questions 83 to 85 on the examination for discovery. I am of opinion that the learned trial judge's remarks should not be so

[1] [1936] 2 All E.R. 1039.

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limited but that rather he expressed therein his view as to all of the evidence in reference to damages given by the defendant Exner and which I have quoted above, whether it be on his examination in chief or when recalled, and that in the result the learned trial judge found that the defendants had not rebutted the presumption arising from the proof that the plaintiffs had purchased these premises for $17,700 and that, therefore, *prima facie,* the premises, if they had possessed the accommodation represented to the plaintiffs, would have had a value of $17,700.

I am further of the view that upon the evidence, the learned trial judge was justified in coming to the conclusion that the presumption had not been rebutted. It must be remembered that he had found as a fact that the defendants Schaaf and Exner had "perpetrated a fraud on the plaintiffs Hepting by concealing the fact that no permit to build the suite existed" and it would be strange if they sold to the plaintiffs the premises at the price of a house without a rentable suite when they were so anxious to represent the house as one which possessed such a rentable suite. It is true that the defendant Anthony Schaaf had accepted the premises at a valuation of $20,000 very shortly before but in that transaction he was merely taking the premises in trade and in part payment for a hotel building which he was anxious to sell. Evidence of William Johner who acted upon the purchase by the defendant Anthony Schaaf on the premises at 1306 Horace Street, Regina, and who agreed with counsel for the defence in cross-examination:

> Q. Is it fair to say that Mr. Schaaf was selling the hotel rather than buying the house? The principal deal was the sale of the hotel?
> A. Oh, I would say it was.

And the defendant Anthony Schaaf in order to put through the sale of the hotel very quickly waived a term of his offer which required proof that the suite in the basement at 1306 Horace Street was properly rentable. The answer given by the defendant Exner was itself rather equivocal:

> It was in line with other three bedroom homes in Rosemont district as far as selling price without suites, as just a straight three bedroom bungalow.

Q. Is 1306 Horace Street a three bedroom bungalow?

A. Yes.

This might well have meant that the third bedroom in 1306 Horace Street was this basement bedroom which, under the by-laws, could not legally be used as a bedroom. I have read the evidence throughout and have found no positive statement that there were in 1306 Horace Street three bedrooms above the ground level. The learned trial judge listened to the evidence in court, observed the witnesses and assessed the probative value of their evidence. In my view, there was sound basis for his conclusion that the defendants had not succeeded in rebutting the presumption arising from the sale of the house for $17,700. When that presumption is not rebutted then the plaintiffs are justified in depending upon the admissions made by the defendant Exner in his examination for discovery, *i.e.*, that the value of the house with a rentable suite therein, presumed to be $17,700 because of its purchase at that amount, would be reduced by $2,500 if it did not contain such a rentable basement suite.

I am, therefore, of the opinion that the appeal should be allowed with costs, the judgment of the learned trial judge restored; the plaintiffs are entitled to the costs of the appeal to the Court of Appeal of Saskatchewan.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Gerrand & Gerrand, Regina.

Solicitors for the defendants, respondents: Pedersen, Norman, McLeod & Pearce, Regina.

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*Oct. 2, 3
Dec. 16

HERBERT BROOKS .....APPELLANT;

AND

KAREL PAVLICK AND GLORIA PAVLICK ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Land titles—Application for first registration—Jurisdiction of Local Master of Titles—The Land Titles Act, R.S.O. 1960, c. 204—British North America Act, s. 96.

On an application for first registration under *The Land Titles Act*, the Local Master of Titles decided that the appellant should be registered as owner of the lands, as described in the application, and overruled the objection of the respondents to the said description which objection was based on a metes and bounds description in the conveyance to the appellant's predecessor in title. The respondents' appeal from the Local Master to the Supreme Court of Ontario was dismissed; a further appeal was allowed by the Court of Appeal. An appeal, by leave of this Court, was then brought by the appellant.

Held: The appeal should be allowed.

The Master of Title's jurisdiction was limited to the consideration and determination of what documents should be registered upon the title and therefore who should have the protection of the guaranteed title and the right to claim on the assurance fund. When he determined an application for first registration in favour of the applicant the effect of s. 52 of *The Land Titles Act* was to give to the first registered owner a fee simple, subject to rectification of the register by proceedings in the ordinary courts under s. 169. In discharging such duty the Master had to act judicially, but such judicial action was necessary to enable him to perform his primary administrative duty and in so acting judicially he did not deprive himself of jurisdiction.

The jurisdiction conferred upon the Master of Titles by *The Land Titles Act* to determine whether an application for first registration under the Act should be granted was not exercised by any officer whatsoever prior to Confederation as the scheme of registration of titles did not exist in Ontario before 1885 and any judicial determinations he made were merely necessarily incidental to the discharge of those duties which, therefore, were not analogous to those of a Superior, District, or County Court.

Accordingly, the order of the Local Master of Titles was one which he had jurisdiction to make and such jurisdiction was not granted by the provincial legislation in violation of s. 96 of the *British North America Act*.

The Court of Appeal not having considered the grounds for appeal other than that of jurisdiction of the Local Master of Titles, the case was returned for disposal upon the other grounds of appeal.

Re Mutual Investments Ltd. (1924), 56 O.L.R. 29; *Dupont v. Inglis*, [1958] S.C.R. 535, applied; *Attorney-General for Ontario v. Victoria Building Ltd.*, [1960] S.C.R. 32; *Heller v. Registrar, Vancouver Land Registra-*

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

tion District, [1963] S.C.R. 229, distinguished; *Re Winter,* [1962] O.R. 402, disapproved; *Re Lord and Ellis* (1914), 30 O.L.R. 582; *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.,* [1949] A.C. 134; *Re Ontario Teachers Federation & Duncan,* [1958] O.R. 691; *Farrell v. Workmen's Compensation Board,* [1962] S.C.R. 48, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from Morand J. who had dismissed an appeal from the Local Master of Titles. Appeal allowed.

C. L. Dubin, Q.C., for the appellant.

D. J. Wright, for the respondents.

E. R. Pepper, Q.C., for the Attorney-General of Ontario.

D. S. Maxwell, Q.C., and *N. A. Chalmers,* for the Attorney General of Canada.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal of Ontario[1] allowing an appeal from Morand J. who had dismissed an appeal from the Local Master of Titles. The Local Master had held that the appellant should be registered as owner of certain lands in the Township of Reach, County and Province of Ontario, as described in the application for first registration. The Local Master of Titles had overruled the objection of the respondent to the description of the lands in the application for first registration which objection was based on a metes and bounds description in the conveyance to the appellant's predecessor in title. Such metes and bounds description would have limited the area of the lands subject to the application for first registration with the result that part of these lands would have come to the respondent from his predecessor in title. The Local Master of Titles acting, at any rate in part, on what he believed was the admission of the respondent that the boundary between the two parcels of land was the centre line of Beaver Meadow Creek, proceeded to inquire and found as a fact that such centre line of Beaver Meadow Creek was in the position described in the applicant's application for first registration.

[1] [1962] O.R. 449, 32 D.L.R. (2d) 567.

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The respondent appealed to the Supreme Court of Ontario and Morand J. by order of October 17, 1961, dismissed the appeal. The respondent appealed from that order to the Court of Appeal and that Court by its judgment of January 23, 1962, allowed the appeal. The appellant now appeals to this Court.

A perusal of the reasons for judgment of Schroeder J.A., who gave judgment for the Court of Appeal, shows that after reciting the facts the learned Justice of Appeal dealt only with the issue of the jurisdiction of the Local Master of Titles to consider whether the boundary between the lands of the appellant and the respondent should be settled by the line of Beaver Meadow Creek as in the agreement for sale between their predecessors in title in 1861 or at the different line set out in the metes and bounds description in the conveyance, which was expressed to be pursuant to the agreement of 1861. In his reasons, Schroeder J.A. said:

> It is contended by counsel for the respondent that the Local Master of Titles did not assume the right to adjudicate upon the legal issues raised by the appellant. He maintains that his findings were based upon the appellant's alleged admission before him that the true boundary line between the properties in question was the centre of Beaver Meadow Creek. It is not easy to understand how such an admission could have been made on behalf of the appellant. It is wholly and utterly inconsistent with the objection based on the serious questions of law to which I have referred, and if the Master purported to deal with this application on a purely factual basis, completely ignoring the serious claims as to title advanced by the appellant, then on that ground alone his Order must be set aside.

In this Court, all counsel confined themselves to argument as to the Local Master's jurisdiction to make his order under these circumstances. Therefore, in these reasons I shall deal only with that topic.

Schroeder J.A. said:

> Counsel for the appellant contended that the Master did in fact purport to exercise the right and power of determining judicially the question of title between the parties and that in so doing he was acting without jurisdiction; that this was a judicial power which could only be exercised by a Court in the nature of a Superior, County or District Court, and that a provincially appointed officer who purported to exercise such powers was acting in contravention of section 96 of The British North America Act, 1867. That precise point was considered by the Court in re the application of *Etta K. E. Winter* in an unreported judgment delivered on 8th March, 1961 and was decided favourably to the appellant's contention. In my opinion the Master did purport to exercise such powers, and in doing so he rejected the argument advanced by counsel for the appellant.

If it were otherwise he would not have commented upon some of the appellant's submissions made upon the hearing of the application. It was settled in *Display Service Limited v. Victoria Medical Building Limited*, [1958] O.R. 759, affirmed *sub nomine Attorney General for Ontario v. Victoria Medical Building Limited*, [1960] S.C.R. 32, that a provincially appointed officer was not empowered to exercise powers of this nature. It is also beyond question that lack of jurisdiction to pronounce a judgment or order deprives it of any effect whatsoever, even as against the party who invoked the determination. *Archbishop of Dublin v. Trimlistone*, (1948) 12 I.R. Eq. R. 251 at page 268; *Toronto Railway Company v. Toronto*, [1904] A.C. 809 at page 815.

In the *Display Services* case, this Court was concerned with the constitutional validity of s. 31(1) of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, which provided:

> The action shall be tried in the county or district in which the land or part thereof is situate before a judge of the county or district court, provided that where the land is situate wholly in the County of York the action shall be tried before a Master of the Supreme Court or an Assistant Master.

The validity of the section was attacked on the ground that the grant of such jurisdiction to the Master was a violation of s. 96 of the *British North America Act*, which reads:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

The Court adopted the test of the validity of s. 31(1) of *The Mechanics' Lien Act* put by the Judicial Committee in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*[1], *per* Lord Simonds:

> Does the jurisdiction conferred by the Act on the appellant board broadly conform to the type of jurisdiction exercised by the superior, district, or county courts?

Using this test and examining the various provisions of *The Mechanics' Lien Act*, the Court concluded, to quote Judson J. at pp. 42-43:

> All these functions are exercised in an original way and constitute a new type of jurisdiction for the Master which in many aspects is not merely analogous to that exercised by a s. 96 judge but is, in fact, that very jurisdiction, limited only to one particular field of litigation.

It would seem that in determining the question of whether the jurisdiction given to "the proper master of titles" by s. 21 of *The Land Titles Act*, R.S.O. 1950, c. 197, is in violation of s. 96 of the *British North America Act* this Court

[1] [1949] A.C. 134 at 154, [1949] L.J.R. 66.

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must follow a similar investigation to determine whether the jurisdiction broadly conforms to the type exercised by Supreme, District, or County Courts.

It should be noted that the Notice of Constitutional Issue served pursuant to the direction of the late Chief Justice of this Court in the third paragraph gives notice that "the question will be raised by the respondent as to whether the powers given to the Master of Titles by the *Land Titles Act* of the Province of Ontario, being R.S.O. 1960, c. 204, are within the constitutional jurisdiction of the Legislature of the Province of Ontario" but the original application for first registration was dated the 8th day of November 1960 and the Revised Statutes of Ontario 1960 only came into force on January 1, 1961 (Proclamation of Governor in Council R.S.O. 1960, vol. 5, p. 311). However, for the purpose of this examination the sections, although differently numbered, are in substantially similar terms.

Section 21 of *The Land Titles Act* (now s. 44) provides:

> 44. The examination of a title shall be conducted in the prescribed manner, subject to the following:
>
> 1. Where notice has been given, sufficient opportunity shall be afforded to any person desirous of objecting to come in and state his objections to the proper master of titles.
> 2. The proper master of titles has jurisdiction to hear and determine any such objections, subject to an appeal to the court in the prescribed manner and on the prescribed conditions.
> 3. If the proper master of titles, upon the examination of any title, is of opinion that it is open to objection but is nevertheless a title the holding under which will not be disturbed, he may approve of it or may require the applicant to apply to the court, upon a statement signed by the proper master of titles, for its sanction to the registration.
> 4. It is not necessary to produce any evidence that by *The Vendors and Purchasers Act* is dispensed with as between vendor and purchaser or to produce or account for the originals of registered instruments unless the proper master of titles otherwise directs.
> 5. The proper master of titles may receive and act upon any evidence that is received in court on a question of title, or any evidence that the practice of conveyancers authorizes to be received on an investigation of a title out of court, or any other evidence, whether it is or is not receivable or sufficient in point of strict law, or according to the practice of conveyancers, if it satisfies him of the truth of the facts intended to be made out thereby.
> 6. The proper master of titles may refer to and act upon not only the evidence adduced before him in the proceeding in which it is adduced but also any evidence adduced before him in any other proceeding wherein the facts to which it relates were or are in question.

7. The proper master of titles may also act upon his own personal knowledge of material facts affecting the title upon making and filing a report, stating his knowledge of the particular facts and the means he had of obtaining such knowlege.

It is, of course, necessary to consider not s. 21 in isolation but to have regard for the act as a whole and to consider its various sections, *Dupont v. Inglis*[1], *per* Rand J. at p. 539. *The Land Titles Act* of the Province of Ontario was first enacted in 1885 designed to facilitate and make more economical the registration of ownership and interest in lands within the province. The statute provides for the appointment of officers variously designated as Director of Titles, Master of Titles, Deputy Master of Titles, and Local Master of Titles, and puts upon such officers the duties of examining and approving for registration documents submitted by applicants. Perhaps the most essential feature of the legislation is the grant to the registered owner, whether it be upon first application to be registered as such under *The Land Titles Act* or by transfer, a title in fee simple free from all estates and interests whatsoever except those listed in the relevant sections (s. 9 in R.S.O. 1950, c. 197, now s. 52, and s. 41 in R.S.O. 1950, c. 197, now s. 86). The rights of those who may be damaged by the acceptance of the document for registration are protected by the following provisions, *inter alia*:

s. 21 (now s. 44) provides for opportunity to any person desirous of objecting to the first registration to come in and state his objection to the proper master of titles;

s. 144 (now. s. 29) provides any person affected by an order or decision of the director, master or local master, may appeal to a judge of the High Court and from them to the Court of Appeal;

s. 127 (now s. 60) provides for the establishment of an assurance fund;

s. 128 (now s. 63) provides for a right in damages against the applicant who has obtained the damaging registration and payment of such damages from the fund if he is unable to recover damages from the applicant.

It is true s. 131 (now s. 65) excludes from recovery from the fund those who have failed to pursue their rights under ss. 21 and 144 (now ss. 44 and 29) but the right of persons

[1] [1958] S.C.R. 535.

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who believe themselves damnified to proceed in the ordinary courts of the province and obtain rectification of the register is preserved fully by s. 119 (now s. 169) which reads:

> 169. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register may be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

The initial words of this section were interpreted in *Re Lord and Ellis*[1], where at p. 585, Meredith C.J.O. said:

> These sections are expressly made subject to rights acquired by registration under the Act; that I hold to mean such rights as a purchaser for valuable consideration from the registered owner would acquire. No reason has been suggested, nor can I find any, why justice may not be done between the original parties to the injustice.

A party damnified by a registration may protect himself against innocent purchasers for consideration by filing a caution under the provisions of s. 74 (now s. 135). It would appear from the consideration of those sections recited aforesaid and from a perusal of *The Land Titles Act* as a whole that a person claiming an interest in lands can proceed in the ordinary courts without regard for the decisions of the "proper master of titles" and may even protect himself from the intervention of innocent purchasers for value from the registered owner by filing a caution, although to preserve his rights to claim under the Assurance Fund he must proceed in accordance with the provisions of the Act.

The Master of Title's jurisdiction is limited to the consideration and determination of what documents should be registered upon the title and therefore who should have the protection of the guaranted title and the right to claim on the Assurance Fund. When the master of titles determines an application for first registration in favour of the applicant the effects of s. 9 (now s. 52) is to give to the first registered owner a fee simple but, despite the very positive words of that section, the register may be rectified by a procedure in the ordinary courts under s. 119 (now s. 169). The objections

[1] (1914), 30 O.L.R. 582.

which the Master "has jurisdiction to hear and determine" (s. 21, para. (2) now s. 44) are objections to the Master's acceptance of a document for registration. It is, of course, true that in discharging such duty the Master of Titles must act judicially, but such judicial action is necessary to enable him to perform his primary administrative duty and in so acting judicially the Master of Titles does not deprive himself of jurisdiction. *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., supra, per* Lord Simonds, at p. 145; *Re Ontario Teachers Federation & Duncan*[1], *per* Aylesworth J.A. at p. 696. I adopt the words of Riddell J. (as he then was) in *Re Mutual Investments Ltd.*[2]:

> But it is said that the Master of Titles is a mere administrative officer, that he must register even a document which is a plain violation of the law and leave the person or company registering to take the consequences. I decline to accede to that argument; in view of the very great effect of registering such documents, I think that he may and, where necessary, should pass upon the legality of any document submitted to him.

(The underlining is mine.)

I am of the view that the jurisdiction conferred upon the Master of Titles by the provisions of *The Land Titles Act* of Ontario is, therefore, quite unlike the jurisdiction conferred on the Master of the Supreme Court by *The Mechanics' Lien Act* of Ontario considered in the *Display Service* case, *supra.* There, as I have pointed out, the Court found that jurisdiction was not merely analogous to the jurisdiction of that exercised by s. 96 but in fact that very jurisdiction. Under *The Land Titles Act,* the Master of Titles has a jurisdiction to determine whether an application for first registration under the Act should be granted and that jurisdiction was not exercised by any officer whatsoever prior to Confederation as the scheme of registration of titles did not exist in Ontario before 1885 and any judicial determinations he makes are merely necessarily incidental to the discharge of those duties which, therefore, are not analogous to those of a Superior, District, or County Court.

It would appear this situation bears more resemblance to that considered by this Court in *Dupont v. Inglis*[3], where the Court was concerned with whether the provisions of

[1] [1958] O.R. 691.

[2] (1924), 56 O.L.R. 29 at 31.

[3] [1958] S.C.R. 535.

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The Mining Act in Ontario gave to the Commissioner a jurisdiction which was in violation of s. 96. Rand J., in delivering the judgment of this Court, upheld the validity of the statute in question upon three grounds: firstly, that the jurisdiction was granted to a Crown officer to determine which of two or more competing parties should acquire rights over Crown owned lands; secondly, that a like jurisdiction existed prior to Confederation under *The Gold Mining Act* and was exercised by a provincially appointed officer so that the continuation of such jurisdiction was protected by s. 129 of the *British North America Act*; but thirdly, at pp. 544-5, Rand J. states:

> It was urged that the issue was in reality between the respondents and the individual appellants, but that confuses the matter. The question is the validity of the alleged first staking, and that is a matter between the licensee and the Crown. Its adjudication may affect a subsequent staking by another licensee; but there is no *vinculum juris* and no *lis* between the two licensees, and the disputant is before the tribunal only as he is permitted by the statue to have the claim of another put in question before the recorder.

Similarly, under *The Land Titles Act,* the objection is before the Master of Titles only as he is permitted by that statute to have the claim of the applicant for first registration put in question before the said Master.

Counsel for the respondent cited *Heller v. Registrar, Vancouver Land Registration District et al.*[1] That case concerned an attempt by a former registered owner of land in the Vancouver Land Registration District to require the Registrar of that district, pursuant to the powers conferred upon him by s. 256 of the *Land Registry Act* of British Columbia, to cancel a certificate of title for that land which had been issued to the wife of the former owner. Among other things, it was alleged that the wife had wrongfully obtained possession of the transfer, the registration of which had given rise to her title. At p. 235, Martland J. said:

> In my opinion, it is no part of the function of a Registrar, under this section, to adjudicate upon contested rights of parties, for the determination of which it would be necessary for him to hear, receive and weigh evidence. He can only act upon the material which is before him in his own records.
>
> I realize that the provisions of para. (c) of s. 256 may appear to be inconsistent with this conclusion. That paragraph relates to a situation where "any registration, instrument, entry, memorandum, or endorsement

[1] [1963] S.C.R. 229.

was fraudulently or wrongfully obtained". If, however, these words were to be construed in their widest sense, so as to enable a Registrar to act, under the section, upon evidence submitted to him upon which he could make a finding of fraud, I would have grave doubts as to whether this provision could be held to be *intra vires* of the Legislature of British Columbia. So construed, the Registrar would be clothed with an original jurisdiction to determine questions of title to land in relation to which fraud had been alleged (*Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd. et al.*, [1960] S.C.R. 32, 21 D.L.R. (2d) 97).

In the circumstances of that case the Registrar was being asked to exercise the powers for correction of the registry which it was alleged had been conferred upon him by the statute, in order to hear and determine legal issues which had arisen between two parties concerning the title to registered land, which involved allegations of fraud. The decision in that case was that s. 256 of the Act gave him no such powers. It should be observed that no attempt is made in *The Land Titles Act* of Ontario to clothe the Master of Titles with similar jurisdiction. Part IX thereof deals with fraud and s. 125 (now s. 164) provides that, subject to the provisions of the Act with respect to registered dispositions for valuable considerations, any fraudulent disposition of land is void notwithstanding registration.

In the reasons in the Court of Appeal, Schroeder J.A. refers to the then unreported decision of that Court in *Re Winter*. That judgment now appears at [1962] O.R. 402. That was an appeal from the judgment of Thompson J. who had affirmed the order of the Master of Titles under s. 123 of *The Land Titles Act* (now s. 167), purporting to rectify the register. Schroeder J.A. held that the Master had no jurisdiction to make the order as by the provisions of the Act itself s. 119 (now s. 169) such power was expressly conferred upon the Court. At p. 405, Schroeder J.A. continues:

> Of even graver import is the fact that the Master of Titles, a provincially appointed officer, purported to exercise a judicial power which could only be exercised by a Court in the nature of a Superior, County or District Court in contravention of s. 96 of the *British North America Act*, 1867: *Display Service Co. v. Victoria Medical Bldg. Ltd.*, 16 D.L.R. (2d) 1, [1958] O.R. 759, affirmed *sub nom. A.-G. Ont. & Display Service Co. v. Victoria Medical Bldg., Ltd.*, 21 D.L.R. (2d) 97, [1960] S.C.R. 32.

For the reasons which I have set out above, I am not willing to accept this view.

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There is, however, a judgment of this Court in 1962 which is relevant. In *Farrell v. Workmen's Compensation Board*[1], Judson J., delivering the judgment of the Court, considered the opinion of the judge who heard the application in the British Columbia Court, *inter alia*, that the provisions of s. 76(1) of the British Columbia *Workmen's Compensation Act* were *ultra vires* as in violation of s. 96 of the B.N.A. Act, and said:

> The Court of Appeal ruled against both these grounds and on appeal to this Court, counsel for the applicant abandoned any attack on the Board on the ground of infringement of s. 96 of the *British North America Act*. It is very questionable whether there could be any profitable argument on this point after the judgments in *Workmen's Compensation Board v. C.P.R.*, [1920] A.C. 184, 88 L.J.P.C. 169, *Kowanko v. J. H. Tremblay Co.*, [1920] 1 W.W.R. 787, 51 D.L.R. 174, 30 Man. R. 198, *Attorney-General of Quebec v. Slanec and Grimstead*, (1933) 54 Que. K.B. 230, 2 D.L.R. 289, *Reference re The Adoption Act*, [1938] S.C.R. 398, 71 C.C.C. 110, 3 D.L.R. 497, and *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134, [1949] L.J.R. 66.

In the result, therefore, I have concluded that the order of the Local Master of Titles confirmed by the Director was one which he had jurisdiction to make and such jurisdiction was not granted in violation of s. 96 of the *British North America Act*.

The Court of Appeal for Ontario not having considered the grounds for appeal other than that dealing with the jurisdiction of the Local Master of Titles, the case should be returned to the Court of Appeal for disposal upon the other grounds of appeal as set out in the notice of appeal to that Court, and also for the disposition of costs other than costs of appeal to this Court. I am of the opinion that in view of all the circumstances of this case, there should be no costs in this Court.

Appeal allowed; no costs in this Court.

Solicitors for the appellant: Greer & Kelly, Oshawa.

Solicitors for the respondents: Blake, Cassells & Graydon, Toronto.

[1] [1962] S.C.R. 48, 37 W.W.R. 39, 31 D.L.R. (2d) 177.

SOCRATES ATHANASIOU AND OTHER ..... APPELLANTS;

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*May 29
Dec. 16

AND

PALMINA PULIAFITO COMPANY LIMITED AND OTHER ..... RESPONDENTS.

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

Real property—Lease—Rescission and damages—Moving picture theatre—Lessor's obligation to provide facilities required by by-laws—Failure to do so—Code Civil, arts. 1612, 1641.

In October 1956, the respondent company leased from the appellants, for a period of ten years, a moving picture theatre in Montreal. In February 1957, the lessee was advised by the City that its application for a permit, required to operate a theatre, was refused on the ground that the premises did not have the washroom and toilet facilities required under the City's by-laws. The lessee took action for cancellation of the lease and damages, and the landlord sued for arrears of rent. The lessee's action was dismissed at trial, and the landlord's maintained. Both judgments were reversed on appeal. The landlord appealed to this Court.

Held: The appeals should be dismissed.

The premises were suitable for use only as a theatre and were leased as such. It was established that they were not equipped with the facilities required under the by-laws. The obligation to provide these facilities, without which no permit could be issued, was one imposed upon the landlord and not upon the lessee. The landlord had failed to perform that obligation, and the lessee was therefore entitled to rescission under art. 1641(2) of the *Civil Code.*

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing judgments of Deslauriers J. Appeals dismissed.

R. Turgeon, Q.C., and *Harry H. Kliger, Q.C.,* for the appellants.

F. Aquin, for the respondents.

The judgment of the Court was delivered by

ABBOTT J.:—These two appeals are from judgments of the Court of Queen's Bench[1] unanimously reversing two

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Hall JJ.

[1] [1961] Que. Q.B. 806.

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ATHANASIOU et al. v. PALMINA PULIAFITO Co. et al.

Abbott J.

judgments of the Superior Court, the one dismissing an action taken by respondents asking for cancellation of a lease and damages, the other maintaining an action by appellants claiming arrears of rent and reimbursement of certain expenses. The two actions were tried together, the same facts being involved. At the hearing before us, leave to appeal to this Court was granted in the action in which appellants were the plaintiffs, the amount in issue in that action being less than $10,000.

The facts are fully recited in the reasons of Hyde J. who delivered the unanimous opinion in the Court below. For the purpose of this appeal they can be shortly stated.

In October 1956, the corporate respondent leased from appellants, for a period of ten years, a moving picture theatre in the City of Montreal which had previously been operated for some forty years by one of the appellants. Among other conditions the lease provided that the tenant was to take the premises in their actual state and condition and was to make all tenant's repairs during the term of the lease. The individual respondents intervened in the lease to guarantee payment of the rent and the fulfilment of the other obligations of the tenant thereunder.

After operating the theatre for some two months the corporate respondent closed it in January 1957, after having complained that the heating system was defective and that the building was infested with rats.

A permit from the City of Montreal is required for the operation of a moving picture theatre in that city, and appellants had held such a permit for a number of years. Any transfer of such permit requires the approval of the city authorities. On February 18, 1957, the corporate respondent was advised in writing by the city that its application for a permit was refused. The ground for such refusal appears to have been that the theatre did not have the washroom and toilet facilities required under the city by-laws for such an establishment.

On March 27, 1957, the respondents took action against appellants asking for cancellation of lease, reimbursement of expenses incurred and damages. In the meantime, on February 26, 1957, appellants had sued the respondents claiming unpaid rent and other items. Subsequently on

September 6, 1957, they filed an incidental demand claiming additional rent and other payments, their total claims amounting to $3,116.77. As I have said, the learned trial judge dismissed respondents' action to cancel the lease and maintained appellants' action and incidental demand to the extent of $3,106.77, both judgments being reversed on appeal.

The judgments in the Court below were based upon the sole ground that since the theatre did not have the sanitary facilities required by law, the appellants had failed to perform one of their principal obligations as lessors, namely, to deliver the thing leased in a fit condition for which it had been leased (art. 1612 of the *Civil Code*), and that respondents were therefore entitled to rescission under para. 2 of art. 1641 of the *Civil Code*.

The premises were suitable for use only as a theatre and were leased as such to the corporate respondent. Although appellants denied this in their plea, it was established that the premises were not equipped with the washroom and toilet facilities required under the city by-laws. Without a permit the premises could not be used legally as a theatre and the obligation to provide the required washroom and toilet facilities was one imposed upon the owners and not upon the tenant. In my opinion the respondents were entitled to ask for cancellation of the lease by reason of the failure of appellants to perform that obligation.

For the foregoing reasons as well as for those expressed by Hyde J. in the Court below with which I am in agreement, I would dismiss both appeals with costs.

Appeals dismissed with costs.

Attorney for the appellants: Harry H. Kliger, Montreal.

Attorneys for the respondents: Long & Aquin, Montreal.

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*May 22, 23, 24
Dec. 16

HENRY DORMUTH AND ADAM URSEL (*Defendants*) ..... APPELLANTS;

AND

RUTH V. UNTEREINER (*Plaintiff*) ....RESPONDENT;

AND

MARTIN MUSKOVITCH (*Defendant*) ..RESPONDENT.

HENRY DORMUTH AND ADAM URSEL (*Defendants*) ..... APPELLANTS;

AND

GRANT W. CHAMBERLAIN (*Plaintiff*) ..... RESPONDENT;

AND

MARTIN MUSKOVITCH (*Defendant*) ..RESPONDENT.

HENRY DORMUTH AND ADAM URSEL (*Defendants*) ..... APPELLANTS;

AND

LARRY MEIKLE (*Plaintiff*) .....RESPONDENT;

AND

MARTIN MUSKOVITCH (*Defendant*) RESPONDENT.

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*PRESENT: Taschereau C.J. and Martland, Judson, Ritchie and Hall JJ.

HENRY DORMUTH AND ADAM URSEL (*Defendants by counterclaim*) ..... APPELLANTS;

AND

MARTIN MUSKOVITCH (*Plaintiff by counterclaim*) ..... RESPONDENT;

AND

LARRY MEIKLE (*Defendant by counterclaim*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Motor vehicles—Collision—Identification of vehicle—Apportionment of fault—Damages.

Appeals—Application to adduce new evidence—Supreme Court Act, R.S.C. 1952, c. 259, s. 67.

The plaintiff Mrs. Untereiner and her husband were passengers in a car owned and operated by the plaintiff Meikle. It was following and trying to overtake a truck which was owned by A. Ursel and was being driven by H. Dormuth in a very erratic manner. The occupants of the Meikle car knew Dormuth and had good reason to suspect that he was not in fit condition to drive. Their purpose in trying to overtake him was to persuade him to discontinue driving. They did not succeed.

The Dormuth truck interfered in some way with an oncoming car owned and driven by M. Muskovitch. The latter was forced on to the shoulder of the road and then came across the road to the wrong side and struck the Meikle car head on. Mr. Untereiner was killed and Mrs. Untereiner, Meikle and another passenger, Chamberlain, were injured. Muskovitch was also injured.

Meikle, Chamberlain and Mrs. Untereiner sued to recover damages for their injuries. Mrs. Untereiner also sued under *The Fatal Accidents Act* for herself and five young children. The defendants in each action were Dormuth, Ursel and Muskovitch. Muskovitch also sued Dormuth and Ursel and in this action Meikle was brought in as defendant by counterclaim. The actions were all tried together and the result was that the trial judge found that both Dormuth and Muskovitch were at fault. He apportioned the fault two-thirds to Muskovitch and one-third to Dormuth. He found that Meikle was free of blame.

The Court of Appeal reversed this apportionment and made Dormuth two-thirds responsible and Muskovitch one-third responsible. They also exonerated Meikle. In this Court Dormuth and Ursel appealed against liability on the ground that their truck was not the one involved in the accident. Muskovitch cross-appealed to ask that he be freed from blame on the ground that he acted reasonably in an emergency created by the bad driving of Dormuth.

In the action under *The Fatal Accidents Act* the trial judge made an award of $37,500. The Court of Appeal, as a result of a cross-appeal by

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Mrs. Untereiner, increased this award to $60,000. On the question of damages, the appellants applied to this Court to adduce new evidence on the hearing of the appeal pursuant to s. 67 of the *Supreme Court Act*. The evidence sought to be introduced was a marriage certificate disclosing that subsequent to the trial but prior to the hearing before the Court of Appeal Mrs. Untereiner had remarried.

Held (Judson J. dissenting in part): The appeal and cross-appeal should be dismissed.

Per Taschereau C.J. and Martland, Ritchie and Hall JJ.: The appellants failed in their contention that the Courts below were wrong in finding that the truck driven by Dormuth was the vehicle seen by Meikle and his passengers just before the accident, and the degree of fault, as apportioned by the Court of Appeal, was correct.

The special grounds required in an application made under the proviso to s. 67 of the *Supreme Court Act* include being able to show that the evidence could not have been discovered by reasonable diligence before the conclusion of the hearing in the Court of Appeal and being able also to satisfy this Court that the evidence, if accepted, would be practically conclusive. Here there was nothing to suggest that the evidence of remarriage could not have been discovered before the appeal by the exercise of reasonable diligence. Nor was the evidence of Mrs. Untereiner's remarriage standing alone "practically conclusive" of any issue in the case. The application should therefore be dismissed, and, as there were no circumstances shown that would justify an interference with the award of damages made by the Court of Appeal, that award would not be disturbed.

Varette v. Sainsbury, [1928] S.C.R. 72; *Gootson v. R.,* [1948] 4 D.L.R. 33; *K.V.P. Co. Ltd. v. McKie,* [1949] S.C.R. 698; *Brown v. Dean,* [1910] A.C. 373; *Hanes v. Kennedy,* [1941] S.C.R. 384; *Lehnert v. Stein,* [1963] S.C.R. 38, referred to; *Curwen v. James,* [1963] 2 All E.R. 619, distinguished; *Lang v. Pollard and Murphy,* [1957] S.C.R. 858, applied.

Per Judson J., *dissenting in part:* There was no ground for interfering with the concurrent findings of the Courts below that the Dormuth truck was the one involved, and that both Dormuth and Muskovitch were at fault. Also, the Court of Appeal was correct in attributing the greater part of the blame to Dormuth.

The Court of Appeal was in error in increasing the award in the action under *The Fatal Accidents Act*. There was no error in principle on the part of the trial judge nor was the award so inordinately low as to call for interference, as being a wholly erroneous estimate of the damages, and on this ground alone the assessment of the trial judge should be restored. Accordingly, it was unnecessary to consider the application to introduce evidence to show that Mrs. Untereiner had remarried subsequent to the trial but prior to the hearing before the Court of Appeal.

APPEAL and cross-appeal from a judgment of the Court of Appeal for Saskatchewan, allowing the appeals of the respondents Muskovitch and Untereiner and dismissing the appeal of the appellants Dormuth and Ursel from a judgment of Thomson J. Appeal and cross-appeal dismissed, Judson J. dissenting in part.

A. W. Embury, Q.C., and *B. J. Thomson, Q.C.*, for the defendants, appellants.

E. C. Leslie, Q.C., and *J. Stein*, for the plaintiff, respondent, Ruth V. Untereiner.

R. M. Barr, Q.C., and *M. Neuman*, for the defendant, respondent, Martin Muskovitch.

F. A. Alexander, Q.C., for the plaintiff, respondent, Grant W. Chamberlain.

E. D. Bayda, for the plaintiff, respondent, Larry Meikle.

The judgment of Taschereau C.J. and Martland, Ritchie and Hall JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan which allowed the appeals of the respondents Martin Muskovitch and Ruth Untereiner and dismissed the appeal of the appellants Dormuth and Ursel from a judgment of Thomson J. sitting without a jury on the joint trial of four actions arising out of the same automobile accident.

The accident in question occurred on Sunday afternoon (on July 15, 1958) when Larry Meikle was driving his 1947 Chevrolet in a southerly direction on Highway No. 11 in the Province of Saskatchewan, on his way back to Regina from an abortive fishing expedition at Long Lake, in company with Mr. and Mrs. Untereiner who were in the back seat of the car, and Grant Chamberlain who shared the front seat with Meikle. Both Courts below are agreed that there was no negligence on the part of Meikle which caused or contributed to the accident, which happened when a 1956 Ford sedan, owned and operated by Muskovitch and travelling in a northerly direction on the same highway, to use the language of the learned trial judge:

> . . . plunged across the roadway directly into the path of the oncoming car driven by Meikle, with which it collided practically head on. Meikle was well on his own side of the road and the suddenness and speed with which the Muskovitch car came across the road gave him no chance to take evasive action of any kind. All of the occupants of the cars involved in the collision were injured and Ignace Untereiner died shortly after reaching the hospital from injuries which he sustained in said accident.

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Muskovitch's explanation of the erratic behaviour of his vehicle is that immediately before the accident he had been travelling on his own side of the road when a truck, which is alleged to have been owned by the appellant Ursel and driven by the appellant Dormuth and which he had observed for some 200 yards approaching him in a "snake way", suddenly pulled at least partially onto its left-hand side of the highway whereupon he (Muskovitch) pulled hard over to the right and applied his brakes with the result that his right wheels dropped onto the soft shoulder of the highway, and that, when he pulled to the left to get back on to the hard top, his car plunged across into Meikle's path. The truck did not stop.

Under these circumstances, Mrs. Untereiner brought two actions against Muskovitch, Dormuth and Ursel. In one she claimed damages for her own personal injuries and in the other she claimed under *The Fatal Accidents Act*, R.S.S. 1953, c. 102, on behalf of herself and her five children in her capacity as executrix of the estate of her late husband. Grant Chamberlain and Larry Meikle also brought separate actions against Muskovitch, Dormuth and Ursel, and in the Meikle action Muskovitch counter-claimed against Meikle, Dormuth and Ursel.

After a most extensive review of the evidence, the learned trial judge gave judgment for Mrs. Untereiner in both her actions and for Chamberlain and Meikle against the defendants, Muskovitch, Dormuth and Ursel, but he divided the fault between the last named defendants, finding Muskovitch liable to the extent of 70 per cent and Dormuth and Ursel to the extent of the remaining 30 per cent. The counter-claim of Muskovitch against Dormuth and Ursel was allowed to the extent of 30 per cent thereof. The general damages in Mrs. Untereiner's action under *The Fatal Accidents Act* were fixed at $37,500.

From this finding the defendant Muskovitch appealed on the ground that the evidence did not justify a finding of any negligence against him, or in the alternative, that if he was negligent he was negligent in a lesser degree than Dormuth. He also claimed that the respondent Meikle was negligent.

Before the Court of Appeal, Mrs. Untereiner in her representative action sought to vary the quantum of damages

alleging that it should be raised to at least $60,000 and Dormuth and Ursel sought to have the action against them dismissed on the ground that Dormuth driving Ursel's truck was some miles away from the scene of the accident when it happened.

The effect of the judgment of the Court of Appeal is that it reduces the degree of fault attributable to Muskovitch to 30 per cent and correspondingly increases that attributable to Dormuth and Ursel to 70 per cent, and allows the appeal of Mrs. Untereiner in her representative capacity by increasing damages awarded in respect of her husband's death to $60,000. From this judgment Dormuth and Ursel appealed to this Court contending that both the Courts below erred in not finding that the Ursel vehicle driven by Dormuth was some miles away from the scene of the accident when it happened, or in the alternative, that the trial judge's apportionment of percentages of fault and his award to Mrs. Untereiner in her representative action should be restored.

The respondent Muskovitch moved to vary the judgment of the Court of Appeal on the ground that he was entirely blameless and should not have been found 30 per cent at fault and that the action against him should therefore have been dismissed and his counterclaim against Dormuth and Ursel should have been allowed in full. If he should be found partially at fault, Muskovitch further takes the position that the award of damages fixed by the learned trial judge should not have been disturbed.

The occupants of the Meikle vehicle were familiar with Ursel's red Ford half ton pick-up truck which the male members of the party had been trying to push out of the sand at the fishing grounds at Long Lake earlier on the afternoon of the accident, and they were all well satisfied that this was the truck which they had watched ahead of them on Route 11 for some miles as it weaved from right to left and finally as it caused Muskovitch to take the avoiding action which resulted in the accident.

Dormuth did not give evidence at the trial, but on examination for discovery, he had admitted that he had driven the Ursel truck over Highway No. 11 on his way back from Long Lake to Regina on the afternoon of the accident and that he had had difficulty in steering because

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the truck pulled to the right and had to be pulled sharply back to the left.

The Dormuth-Ursel defence is based in large measure on evidence to the effect that Dormuth and his companion Matity had left the fishing area at Long Lake 30 or 40 minutes ahead of the Meikle party and it is argued that having regard to the distance involved and the respective speeds at which Dormuth and Meikle were said to be travelling, it could not possibly have been the Ursel truck which was seen by Meikle and his passengers immediately before the accident.

Although no member of the Meikle party actually saw Dormuth driving the truck ahead of them, there is no reason to disbelieve their description of the colour, make and size of the vehicle which they did see and it follows that the defence based on the time element, which was so fully argued on behalf of Dormuth and Ursel, involves also an acceptance of the extraordinary coincidence that there were two red half ton Ford pick-up trucks, each with two occupants, each with a low box and each weaving from right to left, travelling in the same direction over the same highway on the same afternoon within 30 or 40 minutes of each other.

It is true that there are discrepancies as to times and speeds which remain unexplained, but it appears to me that the probabilities weigh heavily against the happening of such a coincidence, and I am far from convinced that the two Courts below were wrong in finding that the Ursel truck driven by Dormuth was the vehicle seen by Meikle and his passengers just before the accident.

The learned trial judge was of opinion that Muskovitch, who had noticed the erratic behaviour of the approaching truck at a distance of 200 yards, should have taken greater precautions to prepare for the potential danger. Although Brownridge J.A., in the decision which he rendered on behalf of the Court of Appeal, found that Muskovitch reduced his speed to between 30 and 35 miles per hour when he first sighted the truck, he nevertheless held that, under the circumstances, it was negligent not to have reduced it further at that time, and I am not prepared to interfere with the concurrent findings in this regard.

The learned trial judge however took the view, that to take the action which Muskovitch did in trying to get back on the asphalt before slowing his speed materially—

> . . . was to court trouble and highly negligent, especially as he did not look to see whether there was any other vehicle in the way. It was his duty to look and make sure that what he was about to do could be done in safety before *taking the dangerous course he adopted.* There was no need whatever to get back to the black top in a hurry. He was confronted with no new danger or obstruction requiring him to leave the shoulder and if he had continued as he was until he had his car under control he would have had no trouble and there would have been no accident. (The italics are mine.)

In my view a critical analysis of the second to second reactions of a driver in the course of avoiding an immediate peril created by the negligence of another user of the highway is at best a very doubtful yardstick by which to measure degrees of fault.

I agree with Brownridge J.A. that "the immediate peril" in the present case was occasioned not when the truck was first sighted but when it suddenly turned across the centre line of the highway. It was then only 30 yards away from the Muskovitch car and the combined speed of the vehicles must have been at least 70 miles per hour. Under these circumstances, it appears to me, with the greatest respect for the views expressed by the learned trial judge, that it is unrealistic to assess the actions of Muskovitch in terms of his having deliberately "adopted" a dangerous course. In my view his method of driving before and after he succeeded in avoiding the truck was conditioned by the imminent danger in which he had been placed through Dormuth's negligence and I agree that the fault should be apportioned in the manner directed by the Court of Appeal.

On the question of damages, the appellants applied to this Court to adduce new evidence on the hearing of the appeal pursuant to s. 67 of the Supreme Court Act, R.S.C. 1952, c. 259.

The evidence sought to be introduced is a marriage certificate issued by the Division of Vital Statistics of the Department of Health of Saskatchewan on March 8, 1962, which discloses that Ruth Violet Untereiner was married to one James Edward Cherry on October 15, 1960. This certificate is produced as an exhibit to an affidavit of one Brown who describes himself as a "Branch Superintendent"

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and deposes that he is "acquainted with" the respondent Ruth Violet Untereiner and that she has informed him that she is remarried to "Mr. Cherry" and that he verily believes her to be the person named in the certificate.

Section 67 of the *Supreme Court Act* reads as follows:

> The appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the court appealed from, or a judge thereof, and the case shall set forth the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court; *but the Court may, in its discretion, on special grounds, and by special leave, receive further evidence upon any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination in Court, by affidavit, or by deposition, as the Court may direct.*

The words in italics were first introduced in 1928, (S.C. 1928, c. 9, s. 3) prior to which time the rule of this Court was firmly established that once the case had been settled it could not be amended "by adding what would be equivalent to new evidence". See *Confederation Life Association of Canada v. O'Donnell*[1]; *The Exchange Bank of Canada v. Gilman*[2]; *Red Mountain Railway Co. v. Blue*[3], and other cases cited in the note prepared by Mr. E. R. Cameron to be found in 10 Cameron's Supreme Court Cases at p. 18.

The case of *Varette v. Sainsbury*[4], although decided shortly before the proviso was added to s. 67, indicates the general view of this Court respecting the effect to be given to the discovery of new evidence. That was an appeal from an order of the Court of Appeal of Ontario granting a new trial on account of new evidence and Rinfret J. who delivered the reasons for judgment allowing the appeal on behalf of the Court, had occasion to say at p. 76:

> On an application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive.

The same test was adopted in *Gootson v. The King*[5], which was an appeal to this Court from a judgment of O'Connor J. in the Exchequer Court.

[1] (1882), 10 S.C.R. 92 at 93.
[2] (1889), 17 S.C.R. 108.
[3] (1907), 39 S.C.R. 390.
[4] [1928] S.C.R. 72.
[5] [1948] 4 D.L.R. 33.

That was a case in which a servant of the Crown acting within the scope of his employment had fainted while in control of his automobile with the result that it ran on to the sidewalk hitting and injuring the suppliant. There was some evidence as to the driver having previously suffered from an epileptiform seizure but the trial judge found that there was no proof of negligence and dismissed the claim. On appeal to this Court it was contended that the burden lay upon the respondent to show affirmatively that its servant had not been subject to epileptic fits and it was also contended that he had in fact been so subject and that the accident ocurred as the result of such a fit.

On a motion being made for leave to adduce further evidence under the provisions of s. 68 (now s. 67), Kerwin J. (as he then was) said at pp. 34-35:

> It was never intended by this enactment that the Court should admit further evidence under circumstances such as are here present and counsel for the suppliant, apparently realizing this, sought to expand his motion to include an order for a new trial under Section 47 of the Supreme Court Act . . . Presuming that the latter part of that section permits the Court to order a new trial on the ground of discovery of new evidence, it must be shown that it could not have been discovered by the appellant by the exercise of reasonable diligence before the trial and that the new evidence is such that, if adduced, it would be practically conclusive.

See also: *K.V.P. Co. Ltd. v. McKie et al.*[1], *per* Kerwin J. at pp. 700-701.

The above statements were made with respect to the role of a court of first appeal in relation to evidence discovered after the trial but, in my view the same considerations apply when evidence is tendered for the first time before this Court on appeal from a provincial Court of Appeal. The special grounds required in an application made under the proviso to s. 67 include, in my opinion, being able to show that the evidence could not have been discovered by reasonable diligence before the conclusion of the hearing in the Court of Appeal and being able also to satisfy this Court that the evidence, if accepted, would be practically conclusive.

The special grounds upon which the present application is made are stated to be that (1) subsequent to the trial but prior to the hearing before the Court of Appeal, the respondent Ruth V. Untereiner was remarried; (2) evi-

[1] [1949] S.C.R. 698.

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dence of this remarriage was not before the Court of Appeal, and (3) the Court of Appeal increased the general damages, and the evidence of the second marriage is material for the purpose of considering the quantum of damages.

It is to be noted that the affidavit filed in support of this application makes no reference to reasonable diligence having been exercised to discover the new evidence before the hearing was concluded in the Court of Appeal on March 7, 1962. In this regard as was pointed out by my brother Hall in the course of the hearing of this appeal, it is significant that the marriage certificate now sought to be introduced was issued on March 8, 1962, and that the relationship between Dormuth and Mrs. Untereiner is described by the learned trial judge in the following terms:

> The Untereiners were well acquainted with Dormuth and were on close and intimate terms with his son Tony Dormuth who was married to one of Mrs. Untereiner's sisters.

There is nothing before us to suggest that the evidence of remarriage could not have been discovered before the appeal by the exercise of reasonable diligence and indeed the circumstances which have been disclosed make it seem probable that Dormuth, who is one of the applicants, knew of the remarriage of his son's sister-in-law with whom he was well acquainted, some time between the date when it took place (October 15, 1960) and March 7, 1962, when the hearing was concluded in the Court of Appeal.

Nor do I think that the evidence of Mrs. Untereiner's remarriage standing alone is "practically conclusive" of any issue in the present case. It is relevant only to the question of damages and there are many other factors, such as the earning power, stability and health of the husband and his attitude towards the five step-children which would have a distinct bearing on the question of damages and which are in no way disclosed by proof of the marriage alone.

In this regard it is to be noted that in the leading case of *Brown v. Dean*[1], Lord Loreburn L.C. observed, at p. 374 that "When a litigant has obtained a judgment in a court of justice . . . he is by law entitled not to be deprived of that judgment without very solid grounds; and where . . . the ground is the alleged discovery of new evidence, it must

[1] [1910] A.C. 373.

at least be such as is presumably to be believed, and *if believed would be conclusive*".

It is true that in that case Lord Shaw did not agree with the last words of that sentence and that modern English cases, many of which are reviewed in *Braddock v. Tollotson's Newspapers Ltd.*[1], have proceeded on the view that "conclusive" is too strong a word to use in this context. (See also *Ladd v. Marshall*[2], *per* Lord Denning at p. 1491.) But the phrase "practically conclusive" has been employed more than once in this Court and I see no reason for departing from it.

Our attention has been directed also to the case of *Curwen v. James and others*[3], where a widow who had been awarded damages in respect of the death of her husband, remarried on the same day as the notice of appeal was filed and the Court of Appeal, acting on the evidence of the remarriage which was introduced before it, proceeded to cut the damage award made by the trial judge in half. The evidence in that case was admitted under the provisions of Order 58, Rule 9 (2) of the Rules of the Supreme Court in England which differ materially from s. 67 of our own *Supreme Court Act*. No question arose as to whether or not reasonable diligence had been exercised to discover the evidence before the conclusion of proceedings in the lower Court and the decision is based in large degree on the assumption that, to use the language of Sellers L.J. "the fact of the marriage would lead to the conclusion that there is some benefit to be gained financially by the plaintiff and that she would have some of the hardship of the loss of her husband's earnings ameliorated by the benefit she gets from the marriage". I do not think that any such assumption necessarily arises in the present case.

I am accordingly of opinion that the application of Dormuth and Ursel based on the discovery of new evidence should be dismissed and as I am not satisfied that any circumstances have been shown that would justify an interference with the award of damages made by the Court of Appeal, I would not disturb that award.

The case of *Lang et al. v. Pollard and Murphy*[4], was one in which the award of damages had been increased by the

[1] [1950] 1 K.B. 47.
[2] [1954] 1 W.L.R. 1489.
[3] [1963] 2 All E.R. 619.
[4] [1957] S.C.R. 858.

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Court of Appeal for New Brunswick, and Cartwright J., speaking for himself and Taschereau J., as he then was, had occasion to say, at p. 862:

> Under these circumstances where no error of principle and no misapprehension of any feature of the evidence is indicated I think that the rule which we should follow is that stated by Anglin J., as he then was, giving the unanimous judgment of the Court, in *Pratt v. Beaman,* [1930] S.C.R. 284 at 287:
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> > The second ground of appeal is that the damages allowed for pain and suffering by the trial judge, $1,500, should not have been reduced, as they were on appeal, to $500. While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.
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> This decision was followed in the unanimous judgment of this Court, delivered by Kerwin J., as he then was, in *Hanes et al. v. Kennedy et al.,* [1941] S.C.R. 384.
>
> The principle appears to me to be equally applicable whether the first appellate Court has increased or decreased the general damages awarded at the trial.

In the same case, Kerwin C.J., speaking for himself and Fauteux J., after referring to *Pratt v. Beaman* and two other cases in which the provincial Court of Appeal had reduced damages, went on to say:

> While in these last three cases a provincial Court of Appeal had reduced the damages awarded by the trial judge, the same principle is applicable and that is, particularly in Canada where estimates of damages may differ in the various Provinces, that this Court will not, except in very exceptional circumstances, interfere with the amounts fixed by the Court of Appeal where they differ from the damages assessed by the trial judge.

(See also *Hanes et al. v. Kennedy et al.*[1], and *Lehnert v. Stein*[2].)

In view of all the above I would dismiss the appeal of Dormuth and Ursel as against all the respondents with costs and I would dismiss the cross-appeal of Muskovitch as against all other parties thereto with costs.

The application based on discovery of new evidence is dismissed as against all respondents except Muskovitch with costs but as I understood counsel for Muskovitch to lend

[1] [1941] S.C.R. 384 at 387, 3 D.L.R. 397.
[2] [1963] S.C.R. 38 at 45, 36 D.L.R. (2d) 159.

support to the application he should not in my view be entitled to any costs in respect thereof.

JUDSON J. (*dissenting in part*):—There were three vehicles involved in the collision which gives rise to this litigation. There was first a car travelling towards Regina owned and operated by Larry Meikle, in which Mr. and Mrs. Untereiner were passengers. It was following and trying to overtake a half ton truck which was owned by Adam Ursel and was being driven by Henry Dormuth in a very erratic manner. The occupants of the Meikle car knew Dormuth and had good reason to suspect that he was not in fit condition to drive. Their purpose in trying to overtake him was to persuade him to discontinue driving. They did not succeed.

The trial judge found that the Dormuth truck interfered in some way with an oncoming car owned and driven by Martin Muskovitch, that Muskovitch was forced on to the shoulder of the road and then came across the road to the wrong side and struck the Meikle car head on. Mr. Untereiner was killed and his wife, Meikle and another passenger, Grant W. Chamberlain were injured. Muskovitch was also injured.

Meikle, Chamberlain and Mrs. Untereiner sued to recover damages for their injuries. Mrs. Untereiner also sued under *The Fatal Accidents Act*, R.S.S. 1953, c. 102, for herself and five young children. The defendants in each action were Dormuth, Ursel and Muskovitch. Muskovitch also sued Dormuth and Ursel and in this action Meikle was brought in as defendant by counterclaim. The actions were all tried together and the result was that the learned trial judge found that both Dormuth, the truck driver, and Muskovitch, the driver of the oncoming car, were at fault. He apportioned the fault two-thirds to Muskovitch and one-third to Dormuth. He found that Meikle was free of blame.

The Court of Appeal reversed this apportionment and made Dormuth two-thirds responsible and Muskovitch one-third responsible. They also exonerated Meikle. In this Court Dormuth and Ursel appeal against liability on the ground that their truck was not the one involved in the accident, Muskovitch cross-appeals to ask that he be freed from blame on the ground that he acted reasonably in an

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emergency created by the bad driving of Dormuth. Both Courts have found that the Dormuth truck was the one involved, and that both Dormuth and Muskovitch were at fault. These are concurrent findings of fact and there is no ground for interference. I would also sustain the judgment of the Court of Appeal in attributing the greater part of the blame to Dormuth. On the ground of liability, therefore, I would not interfere with the judgment of the Court of Appeal.

In Mrs. Untereiner's action under *The Fatal Accidents Act,* the trial judge awarded $37,500, but delayed in making any apportionment between her on the one hand and the five children on the other. This apportionment still has not been made. The Court of Appeal, as a result of a cross-appeal by Mrs. Untereiner, increased this award to $60,000 and in my respectful opinion there was error in so doing. I cannot find that there was error in principle on the part of the learned trial judge or that the award was so inordinately low as to call for interference, as being a wholly erroneous estimate of the damages, and on this ground alone I would restore the assessment of the learned trial judge.

I set out in full that part of the reasons for judgment of the learned trial judge dealing with the assessment of Mrs. Untereiner's damages under *The Fatal Accidents Act*:

> The deceased Ignace Untereiner was married to the plaintiff, Ruth V. Untereiner, in April of 1949. At that time he was just a taxi driver but later became a truck driver. In 1956 he entered the service of North Star Oil Limited as the driver of a heavy duty oil truck and in 1957 purchased the truck he had been driving and entered into a contract with the said company under which he was paid on a gallonage basis. As a truck driver he had been working regularly and had been earning about $375.00 per month. As an independent operator, however, his earnings were larger. His income tax return for 1957 shows a net income for that year of $11,609.18. The income tax return filed by Mrs. Untereiner on his behalf for the six and one-half months of 1958, however, shows a net income of $3,067.36 for that period which indicates a somewhat lower income.
>
> Upon the death of her husband, Mrs. Untereiner employed a driver for the truck and continued to transport oil under the contract her husband had made with North Star Oil Limited until the month of September of 1959. In that year, however, the said company changed its policy. It appears that at or about that time the Railway Companies made a new deal with the Oil Companies to transport petroleum products in tank cars at special rates and the Oil Companies discontinued the transport of their products by truck except to those places which could not be served by the railway. As a result North Star Oil Limited cancelled its contracts with all of its truckers and Mrs. Untereiner, as administratrix of her husband's estate, sold the truck and equipment. It is a reasonable inference that, even if

Untereiner had survived, his contract would have been cancelled and he would then have had to find other employment which might not have been so remunerative. It is clear from the evidence of the Branch Manager of North Star Oil Limited, however, that Untereiner was a good and thoroughly efficient operator and I am satisfied that he would have found profitable employment even though his earnings might have been somewhat reduced.

I gather from the evidence that the handling of these heavy trucking outfits is strenuous and exacting work and somewhat hazardous. Mr. Barber, the Branch Manager of North Star Oil Limited, admitted under cross examination that his company ordinarily would not hire men for this work who were more than fifty years of age unless they were in first class physical condition and as a rule did not hire men who were more than fifty-five years of age as drivers of such equipment. He expressed the opinion that these men, if physically fit, could carry on until they reached the age of fifty-five years or possibly in some cases sixty years. It would seem, therefore, that the early age of retirement is something that should be taken into consideration in fixing damages in this case.

At the time of his death Untereiner was thirty-six years of age and in good health. He was survived by Mrs. Untereiner and five children whose names and ages were correctly set out in paragraph 10 of the Statement of Claim. The evidence indicates that he was a good father and an excellent husband and as his earnings increased he made better provision for his wife and family. He, however, left an estate of relatively small value. According to the schedule filed for Succession Duty purposes the total value of his estate was only $13,078.67 from which must be deducted debts and liabilities estimated at $6,930.74, leaving a net worth before making any allowance for costs of administration of only $6,147.93. The principal asset was the house and lot which I understand was the family home. This property was valued at $6,000.00 and really represents the net equity in the estate. The title thereto, however, was registered in the names of the deceased and his wife as joint tenants and if the value of this house property be deducted there is practically nothing left in the estate.

The principles which apply in assessing damages under The Fatal Accidents Act are not in doubt. They are outlined and explained in detail by the learned author of Charlesworth on Negligence, 3rd Edition, at pages 557 to 565 inclusive. In dealing with the measure of damages the said author at page 557 says:

> The measure of damages is the pecuniary loss suffered by the dependants as a result of the death. "What the court has to try to ascertain in these cases is: How much have the widow and family lost by the father's death?" No damages can be given for the mental sufferings they have undergone, or by way of solatium for their wounded feelings or the pain and suffering of the deceased. The pecuniary loss in question means the actual financial benefit of which the dependants have in fact been deprived, whether the benefit was a result of a legal obligation or of what may reasonably have been expected to take place in the future. It is the amount of the pecuniary benefit which it is reasonably probable the dependants would have received if the deceased had remained alive.

Applying as best I can the principles set forth in Charlesworth on Negligence and approved in Pollock (otherwise Bruno) v. Marsden Kooler Transport Limited and Piche, [1953] 1 S.C.R. 66; Royal Trust Company v. Canadian Pacific Railway Company [1922] 3 W.W.R. 24 (P.C.) and Nance v. B.C. Electric Railway Company [1951] 2 W.W.R. (N.S.) 665 (P.C.),

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I assess the general damages to which the plaintiff and the children of the deceased are entitled at $37,500.00. Counsel have agreed that the special damages of the plaintiff in this action amount to $616.37. She, however, has received $232.50 from the Saskatchewan Government Insurance Office on account thereof which must be deducted. That would leave a balance of $383.87 to which the plaintiff is entitled as special damages. The plaintiff, Ruth V. Untereiner, as administratrix of her husband's estate, will, therefore, have judgment on behalf of herself and her children against the defendants for the total sum of $37,883.87 and the costs of and incidental to her action.

The eldest of the Untereiner children is only ten years and the youngest three years of age. This is a case in which no apportionment of the amount allowed as general damages should be made until someone is appointed to represent these infants. See remarks of Gordon, J.A., in McKenna and Kargus v. Noland and McQuatt, 28 W.W.R. (N.S.) 572 at p. 573. I will, therefore, defer the apportionment so that arrangements can be made for the appointment of a guardian or, failing that, for the official guardian to appear on behalf of these children. The interested parties will have leave to apply further as may be necessary for the proper disposition of the matter. As indicated by Gordon, J.A., in McKenna and Kargus v. Noland and McQuatt, supra, the defendants are not interested in this phase of the matter and need not appear on any such application.

The Court of Appeal appears to have increased the assessment on two grounds. They were of the opinion that the learned trial judge had erred in restricting his estimate of the probable earnings of the deceased to what he might have earned as a truck driver, with its incidence of early retirement, and that he underestimated the probability that Untereiner would have been self-employed, with many productive years ahead of him, unhampered by compulsory retirement.

As to this ground, it seems to me that the learned trial judge clearly contemplated the prospect that the deceased might find employment in other walks of life, and that he properly considered the contingency that such other employment "might not have been so remunerative".

Further, the Court of Appeal held that "The evidence established that in all probability he would have been an employer rather than an employee, and as such not obligated either to find suitable employment, or to retire as an employee".

As to this finding, my respectful opinion is that the evidence falls short of establishing a probability that the deceased would have continued as an employer, and that in any event the reasons for judgment of the learned trial judge cannot be construed as showing that he disregarded the occupational alternatives facing the deceased.

This makes it unnecessary to consider the application made for the first time in this Court to introduce evidence to show that Mrs. Untereiner remarried on October 15, 1960. The trial judgment is dated March 31, 1960. Muskovitch appealed to ask for complete exoneration on the ground that he was not negligent. Mrs. Untereiner cross-appealed. The appeal was heard on the 5th, 6th and 7th days of March, 1962, and the judgment delivered on August 20, 1962. Apparently it never came to the attention of the Court of Appeal that Mrs. Untereiner had remarried. Remarriage while an appeal is pending has recently been considered in a limited way in *Curwen v. James and others*[1]. I wish to say nothing about this problem until it arises squarely for decision.

This appeal should be dismissed with costs in so far as Meikle and Chamberlain and Muskovitch are concerned. The cross-appeal of Muskovitch should be dismissed with costs in so far as Dormuth, Ursel, Meikle and Chamberlain are concerned. As to Mrs. Untereiner she succeeds both on the appeal and cross-appeal on the question of liability but fails on the question of quantum. On this, I would allow the appeal and restore the trial judge's assessment of $37,500. There should be no order for costs to or against her.

The motion to introduce new evidence should be dismissed with costs.

Appeal and cross-appeal dismissed with costs; application based on discovery of new evidence dismissed with costs as against all respondents except Muskovitch, the latter not entitled to any costs in respect thereof; JUDSON J. *dissenting in part as to quantum.*

Solicitors for the defendants, appellants: Noonan, Embury, Heald & Molisky, Regina.

Solicitors for the plaintiff, respondent, Ruth V. Untereiner: MacPherson, Leslie & Tyerman, Regina.

Solicitors for the defendant, respondent, Martin Muskovitch: McDougall, Ready & Hodges, Regina.

[1] [1963] 2 All E.R. 619.

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Solicitors for the defendant, respondent, Martin Muskovitch: Barr & Morgan, Regina.

Solicitors for the plaintiff, respondent, Grant W. Chamberlain: Robinson & Alexander, Regina.

Solicitors for the plaintiff, respondent, Larry Meikle: Johnson, Bayda & Trudelle, Regina.

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*Nov. 9

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Jan. 22

HENRI ROTONDO** ..... APPELANT;

ET

SA MAJESTÉ LA REINE ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Criminal law—Possession of stolen article—Proof of possession within meaning of s. 296 of the Criminal Code.

The appellant was found guilty of having in his possession an automobile radio knowing that it had been stolen. The radio was stolen by one Corbin and hidden by him somewhere in the lower town of Montreal. A few hours later, in the evening, Corbin and two other persons were in an automobile driven by the appellant who was accompanied by one Whitworth. The car was driven towards the lower town and stopped in the vicinity of the place where Corbin had hidden the radio. At that time or a few minutes earlier Corbin told the appellant that he had something to give him. Corbin went to get the radio and brought it back, hiding it under his coat. After dropping off Corbin and his two companions, the appellant drove Whitworth to a place where the latter hid the radio. The appellant testified that during the trip he had declared "Moi je veux rien avoir avec ça".

The Court of Appeal, by a majority judgment, dismissed the appeal. The dissenting judge held that it has not been established that the appellant had had physical possession or control of the radio. The appellant was granted leave to appeal to this Court on the question as to whether there was in the record legal proof justifying the conclusion that he had had possession within the meaning of s. 296 of the *Criminal Code*.

Held: The appeal should be dismissed.

The evidence reasonably established that the trial judge could judicially conclude—as he did—that the appellant knew that the article given to him by Corbin was the radio, that he knew that this was a stolen article and that he had possession at least for an appreciable time. If the declaration of the appellant, as testified to by him, justified the

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*CORAM: Les Juges Taschereau, Fauteux, Martland, Judson et Ritchie.

**This case is reprinted so as to append an English translation of the head-note which, unfortunately, was omitted at page 496 of the [1963] S.C.R.

trial judge to conclude that the appellant knew that this was a stolen article, the trial judge was free to believe or disbelieve that the appellant had really made that declaration. Having regard to ss. 3(4) and 300 of the Code and having regard to the record, nothing could justify to validly set aside the verdict of guilty.

Droit criminel—Possession d'un objet volé—Preuve de possession au sens de l'art. 296 du Code Criminel.

L'appelant fut trouvé coupable d'avoir eu en sa possession un radio d'automobile sachant qu'il avait été volé. Ce radio fut volé par un nommé Corbin qui le cacha dans le bas de la ville de Montréal. Quelques heures plus tard, dans la soirée, Corbin et deux autres personnes prirent place dans le nord de la ville dans l'automobile de l'appelant qui était accompagné d'un nommé Whitworth. Ils descendirent vers le bas de la ville pour s'arrêter dans le voisinage de l'endroit où Corbin avait caché le radio. A ce moment ou quelques instants auparavant Corbin informa l'appelant qu'il avait quelque chose à lui donner. Corbin alla chercher le radio et le rapporta en le cachant sous son manteau. Après avoir laissé Corbin et ses deux compagnons en cours de route, l'appelant conduisit Whitworth à un endroit où celui-ci cacha le radio. L'appelant témoigna qu'au cours de la randonnée il avait déclaré: «Moi je veux rien avoir avec ça».

La Cour d'Appel, par un jugement majoritaire, rejeta l'appel. Le juge dissident jugea qu'il n'avait pas été établi que l'appelant avait eu la possession physique ou le contrôle du radio. L'appelant a obtenu permission d'appeler devant cette Cour sur la question de savoir s'il y avait au dossier une preuve légale justifiant la conclusion qu'il y avait eu possession au sens de l'art. 296 du *Code Criminel*.

Arrêt: L'appel doit être rejeté.

L'ensemble de la preuve établit raisonnablement que le juge au procès pouvait judicieusement conclure—comme il le fit—que l'appelant savait que l'objet dont Corbin lui fit don était le radio, qu'il savait qu'il s'agissait d'un objet volé, et qu'il en avait eu, au moins pour un temps appréciable, la possession. Si la déclaration de l'appelant, rapportée dans son témoignage, permettait au juge de déduire qu'il savait alors qu'il s'agissait d'un objet volé, le juge était libre de croire ou de ne pas croire que l'appelant avait véritablement fait cette déclaration. Au regard des arts. 3(4) et 300 du Code et du dossier, rien ne permet d'écarter validement la déclaration de culpabilité.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant le verdict de culpabilité prononcé contre l'appelant. Appel rejeté.

N. Losier, pour l'appelant.

J. Bellemare, pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Accusé d'avoir à Montréal, le 30 mars 1961, (i) volé un radio d'automobile, d'une valeur de $135, et (ii) eu en sa possession ce radio, sachant qu'il était

[1] [1962] B.R. 653.

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volé, l'appelant, à l'issue du procès, fut acquitté du vol et trouvé coupable de recel.

Il appela de cette condamnation à la Cour du banc de la reine[1] siégeant en appel, où il soutint en somme que les éléments du recel n'avaient pas été légalement prouvés. Cette prétention fut rejetée comme non fondée par MM. les Juges Taschereau et Owen, formant la majorité. M. le Juge Bissonnette, dissident, fut d'avis qu'il n'était pas établi que l'accusé avait eu la possession physique ou le contrôle du radio. L'appel fut rejeté.

Dans un pourvoi subséquent à cette Cour, l'appelant invoqua la dissidence prononcée en Cour d'Appel et soumit particulièrement, comme grief d'appel, suivant la permission d'appeler par lui obtenue, qu'il n'y a au dossier aucune preuve légale justifiant la Cour de conclure que l'appelant a eu la possession de ce radio au sens de l'art. 296 du *Code Criminel* sous lequel il avait été accusé.

Les témoins entendus sur les circonstances précédant et accompagnant le fait reproché à l'appelant sont tous plus ou moins impliqués en l'affaire. Leurs témoignages, non dépourvus de réticences ou de contradictions, permettent d'en faire ce résumé.

Dans l'après-midi du 30 mars 1961, Fernand Corbin vola le radio en question alors qu'il était fixé à une automobile stationnée dans le bas de la ville en arrière d'un immeuble de la rue St-Denis, près de la rue Notre-Dame-de-Lourdes, véhicule qu'il avait illégalement déplacé aux fins de ce vol. Il cacha le radio dans une cour privée attenante à la rue Notre-Dame-de-Lourdes et dont l'accès était protégé par une clôture. Le même jour, vers les neuf heures du soir, Corbin, Marcel Plante et Charles Vincent, se trouvant alors dans le nord de la ville, prirent place dans une automobile conduite par l'appelant, en compagnie duquel se trouvait déjà Wayne Whitworth. Tous ces occupants de la voiture, à l'exception de Rotondo qui était âgé de près de quarante ans, étaient des jeunes gens de quinze à dix-neuf ans. Ils descendirent tous vers le bas de la ville pour s'arrêter dans le voisinage immédiat de l'endroit où Corbin avait caché le radio. C'est alors que Corbin, muni d'outils, se rendit dans la cour privée, prit le radio et le rapporta à l'automobile en le cachant sous son manteau. Repartis de cet endroit, les occu-

[1] [1962] B.R. 653.

pants de la voiture, à l'exception de Rotondo et Wayne Whitworth, se firent laisser à une salle de pool et Rotondo conduisit Whitworth à un endroit où celui-ci cacha le radio. A un certain moment, avant ou au moment d'arriver à la cour privée, Corbin informa Rotondo qu'il avait quelque chose à lui donner. Il ne fait aucun doute, suivant la preuve, que ce quelque chose était le radio que Corbin avait rapporté à l'automobile avec ses outils, au vu de certains sinon de tous les occupants de la voiture. Sans entrer dans le détail et la discussion des témoignages rendus par ces jeunes gens et l'appelant, l'ensemble de la preuve faite par ces témoins, dont la tenue en Cour aussi bien que les témoignages ont pu être appréciés par le Juge au procès, établit raisonnablement que ce dernier pouvait judicieusement conclure—comme il le fit—que l'appelant savait que l'objet dont Corbin lui fit don était le radio, qu'il savait qu'il s'agissait d'un objet volé, et enfin qu'il en avait eu, au moins pour un temps appréciable, la possession. Entendu comme témoin, pour sa propre défense, Rotondo admit avoir déjà été condamné pour vol avec effraction et recel. Il témoigna qu'à un moment, au cours de cette randonnée en automobile, il avait déclaré:—«Moi je veux rien avoir à faire avec ça». Si cette déclaration, rapportée dans son témoignage, permettait au Juge de déduire que Rotondo savait alors qu'il s'agissait d'un objet volé, le Juge était libre de croire ou de ne pas croire que Rotondo avait véritablement fait cette déclaration au cours de l'affaire. La section 4 de l'art. 3 du *Code Criminel* définit ainsi la possession:

> Aux fins de la présente loi,
>
> *a*) Une personne est en possession d'une chose lorsqu'elle l'a en sa possession personnelle ou que, sciemment,
>
> (i) elle l'a en la possession ou garde réelle d'une autre personne, ou
>
> (ii) elle l'a en un lieu qui lui appartient ou non ou qu'elle occupe ou non, pour son propre usage ou avantage ou celui d'une autre personne; et
>
> *b*) Lorsqu'une de deux ou plusieurs personnes, au su et avec le consentement de l'autre ou des autres, a une chose en sa garde ou possession, cette chose est censée sous la garde et en la possession de toutes ces personnes et de chacune d'elles.

Et l'article 300 édicte:

> Pour l'application de l'article 296 et de l'alinéa *b*) du paragraphe (1) de l'article 298, l'infraction consistant à avoir en sa possession est consommée lorsqu'une personne a, seule ou conjointement avec une autre, la

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possession ou le contrôle d'une chose mentionnée dans ces articles ou lorsqu'elle aide à la cacher ou à en disposer, selon le cas.

Ayant attentivement considéré la preuve et tous les moyens de droit soulevés de la part de l'appelant, je dirais qu'au regard de la loi et du dossier, rien ne permet d'écarter validement la déclaration de culpabilité prononcée contre l'appelant en première instance et confirmée par le jugement de la Cour du banc de la reine siégeant en appel.

Je renverrais l'appel.

Appel rejeté.

Procureur de l'appelant: Norbert Losier, Montréal.

Procureur de l'intimée: Michael Franklin, Montréal.

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*Mar. 12, 13
Dec. 16

NATIONAL GYPSUM COMPANY INC. (*Defendant*) ..... APPELLANT;

AND

NORTHERN SALES LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Charterparty—Arbitration clause in case of dispute—Motion to dismiss action on charterparty or stay proceedings—Jurisdiction of Exchequer Court to entertain action—Matter of substance or procedure—Whether arbitration clause void as against public policy—Whether arbitration proceedings in foreign country a bar to action in Canada—Admiralty Act, R.S.C. 1952, c. 1—Code of Civil Procedure, art. 94(3).

By a charterparty signed at New York, the defendant undertook that its ship would proceed to Montreal and there load a cargo of wheat. The vessel failed to do so, and the plaintiff, alleging that as a result it was unable to ship wheat it had contracted to deliver and was obliged to pay damages to the purchaser, sued for damages for breach of contract. The charterparty provided for the settlement of any dispute by arbitration at New York. The defendant moved before the Exchequer Court, Quebec Admiralty District, for the dismissal of the action on the main ground that the Court had no jurisdiction, or alternatively, for a stay of proceedings because of *lis pendens* in New York, where the Courts of that State had ordered the plaintiff to appoint an arbitrator. The

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

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trial judge rejected the motion as unfounded. The defendant appealed to this Court.

Held (Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Fauteux and Abbott JJ.: Without the presence of the arbitration clause in the charterparty, the Court below had jurisdiction, both *ratione materiae* and *ratione loci*, to hear and determine this case by virtue of ss. 18(3)(*a*)(i) and 20(1)(*e*) of *The Admiralty Act*, R.S.C. 1952, c. 1, and Rule 20(*b*) of the General Rules and Orders in Admiralty. That jurisdiction could not be interfered with by the arbitration clause. The object of such a clause is not to modify the rights of the parties but to enforce them and how a right might be enforced is a matter of procedure. Procedure is governed by the *lex fori* which, in the present case, was the procedure in force in the Superior Court of the Province of Quebec, in the absence of any provision relating to such agreements in the Admiralty Rules or in the General Rules and Orders of the Exchequer Court. Under art. 94(3) of the *Code of Civil Procedure*, such a clause, even if valid, was ineffective to preclude the institution of this action before the Court in the territorial jurisdiction of which the whole alleged cause of action had arisen. The Court below being properly seized with this action, its jurisdiction could not be interfered with by the arbitration clause and the Court could not be asked to enforce an agreement which was invalid as being against public policy under the *lex fori*, *i.e.*, the law of Quebec. *Vinette Construction Ltée v. Dobrinsky*, [1962] Que. Q.B. 62. The clause, being vitiated by absolute nullity, could not be acted upon in the Court below to oust its jurisdiction, and any decision reached by a Board of arbitration in New York would not be *res judicata* in the Province.

Per Cartwright J., *dissenting:* The substantive law applied by the Exchequer Court on its Admiralty side—and which is the same throughout Canada—is the English Maritime Law, and by virtue of s. 18(1) of *The Admiralty Act*, R.S.C. 1952, c. 1, its jurisdiction is the same as "the Admiralty jurisdiction now possessed by the High Court of Justice in England". The question as to whether an arbitration clause, contained in a contract, is enforceable is one of substance or of procedure, falls to be decided, pursuant to s. 18(1) of *The Admiralty Act*, in like manner as would be done by the High Court of Justice in England in the exercise of its Admiralty jurisdiction. It is settled by the decision of the House of Lords in *Hamlyn and Co. v. Talisker Distillery*, [1894] A.C. 202, that this is a matter of substance and not procedural. In the case at bar, it was the intention of the parties that this clause was to be interpreted and governed by the law of the United States. In the absence of evidence to the contrary it must be assumed that the substantive law of the United States is the same as that of the Exchequer Court on its Admiralty side. There was no doubt that by the law administered in the High Court of Justice in England the clause would be found to be valid and enforceable. The material filed in this case supported the view that by the law of the United States the arbitration clause was also valid and enforceable. This was a case in which the proper course was to stay the procedings in the Court below. This will give effect to the expressed intention of the parties and is favoured by every consideration of convenience.

Per Ritchie J., *dissenting:* The trial judge had jurisdiction both *ratione materiae* and territorially over the matter by virtue of ss. 18(3)(*a*)(i)

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and 20(1)(*e*) of *The Admiralty Act*, R.S.C. 1952, c. 1, and s. 22(1)(*a*)(xii)(1) of the Schedule to the Act. Under the law of Quebec such an arbitration clause is null as being against public policy and is unenforceable in the Courts of that Province. However, although the contract was to be performed in part in Quebec where the breach was alleged to have occurred, the Court in which the action was brought was a statutory Court whose jurisdiction by virtue of s. 18(1) of *The Admiralty Act* was made coextensive with that "now possessed by the High Court of Justice in England". The substantive law to be applied by the Exchequer Court on its Admiralty side is required to be the same in the various Admiralty District Courts. Having regard, *inter alia*, to the jurisdiction now possessed by the High Court of Justice in England and existing by virtue of the *Arbitration Act*, 1950 (Eng.), c. 26, the clause here in question, whether it be treated as a condition precedent to the right of action or not, was not null and unenforceable. The question of whether or not an agreement is null and void as being against public policy is not one which is determined by the rules regulating practice and procedure in the forum where the action is brought. Since neither the rules of the Admiralty Court nor those of the Exchequer Court contain any reference to proceedings for the enforcement of an arbitration agreement and since such a clause is not recognized in the Province of Quebec, the proceedings for the enforcement of such an agreement in the Quebec Admiralty District Court were to be regulated by the procedure, if any, in force with respect to such matters in Her Majesty's Supreme Court of Judicature in England. This procedure is to be found in *The Arbitration Act*, which, by s. 4(1), gives the Court a discretionary power to stay an action instituted in breach of an arbitration agreement. The defendant was in a position to invoke the provisions of that section. The proper course here was to stay the proceedings.

APPEAL from a judgment of Smith, District Judge for the Quebec Admiralty District[1], dismissing a motion to have plaintiff's action dismissed or proceedings stayed. Appeal dismissed, Cartwright and Ritchie JJ. dissenting.

Roger R. Beaulieu, Q.C., and *Robert A. Hope*, for the defendant, appellant.

L. S. Reycraft, Q.C., for the plaintiff, respondent.

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

FAUTEUX J.:—This is an appeal from a judgment of Smith D.J.A. in the Exchequer Court of Canada, the Quebec Admiralty District[1], rejecting as unfounded appellant's motion demanding the dismissal of respondent's action or alternatively the staying of all proceedings therein.

In its action, respondent alleges that by a charterparty, signed at New York on December 7, 1960, appellant under-

[1] [1963] Ex. C.R. 1.

took that its ship *Lewis R. Sanderson* would proceed with all convenient speed to Montreal and there load a cargo of wheat for carriage to Italy, and that in violation of this undertaking, the said vessel failed to do so in accordance with the terms of the agreement, with the result that respondent was unable to ship wheat it had contracted to deliver and was obliged to pay damages to the purchaser thereof. Respondent concludes that appellant be condemned to pay these damages, plus loss of profits and expenses, for breach of contract.

Appellant's motion for the dismissal of this action or alternatively for the staying of all proceedings therein rests mainly on the contention that owing to the following arbitration clause of the charterparty, the Canadian Court has no jurisdiction in the matter or, if it has any, the proceedings must be stayed because of *lis pendens* in New York:

NEW YORK PRODUCE EXCHANGE ARBITRATION CLAUSE

Should any dispute arise between owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

The record shows these facts:— Being requested to pay the above damages and advised that, failing payment, an action for their recovery would be instituted in the Exchequer Court of Canada, Quebec Admiralty District, appellant first asked for delay and eventually replied that according to the pre-cited clause, "the only forum for the determination of respondent's claim was by arbitration in New York city," that it had nominated one P. V. Everett as its arbitrator and that failing respondent to designate its own arbitrator on or before March 2, 1962, appropriate action would be taken. Respondent having abstained from doing so, appellant sought and obtained on March 7, an Order from the United States District Court, Southern District of New York, ordering respondent to show cause, on March 13, why it should not arbitrate. Respondent appeared in the United States District Court under protest and for the sole purpose of vacating the Order and obtaining the dismissal of the proceedings. Its objection to the jurisdiction of the Court was rejected on April 3, and it was ordered to appoint an arbitrator within ten days. Meanwhile, to wit, on March 9,

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respondent procured the issue of the writ of summons in the present action in which appellant appeared under protest. It is my understanding that the proceedings in the U.S. District Court are held in abeyance pending the disposition of the present appeal.

The submissions of the parties, which are generally the same in this Court as in the Court below, may be briefly stated. On behalf of appellant, it is contended that the Court below has no territorial jurisdiction; that the arbitration clause is valid and applicable, in the United States where the contract was executed, to maritime transactions and charterparties and that even if the Court had territorial jurisdiction, the arbitration clause is the law validly binding the parties thereto, in Canada as well as it is in the United States, hence, it is said, the Court below has no jurisdiction at all; that, in any event, the arbitration proceedings commenced in the New York jurisdiction preclude proceedings in Canada. Respondent's contentions, obviously challenged by appellant, are that the cause of action arose in Montreal and that of its nature the claim is one within the jurisdiction of the Exchequer Court of Canada, Quebec Admiralty District; that arbitration agreements and proceedings, as well as rules relating to *lis pendens* are of a procedural nature governed by the *lex fori* which, in the absence of any provision in the General Rules and Orders in Admiralty and of the Exchequer Court of Canada, is the law governing practice and procedure in the Superior Court of the Province of Quebec; that under the *lex fori,* this arbitration clause, admittedly a "clause compromissoire", is invalid as being against public policy, in violation of s. 13 of the *Civil Code* and thus totally ineffective to support appellant's motion.

If one consider the charterparty as if the arbitration clause was absent therefrom, the Court below, i.e., the Exchequer Court of Canada, Quebec Admiralty District, Montreal Registry, has clearly jurisdiction to hear and determine this case. *Ratione materiae,* the claim is in damages and arises out of an agreement relating to use or hire of a ship and, as such, a claim within the jurisdiction of the Court under s. 18, subs. 3(*a*)(i) of *The Admiralty Act,* 1934. This counsel for appellant conceded. His contention that jurisdiction *ratione loci* is lacking rests on the submission that the contract was not one to be performed at Mont-

real and that, even if it was, the alleged breach of the contract did not occur at Montreal; hence the action instituted within the territorial jurisdiction of the Court below and its service authorized to be made and actually made without that jurisdiction are invalid. Appellant's contention is untenable in view of the allegations of the statement of claim which incorporate by reference the charterparty and which, for the purpose of appellant's motion, must be deemed to be admitted. *Sternberg v. Home Lines Inc.*[1] The present action is one *in personam* and is founded on the breach, occurring within the Admiralty District where the action is instituted, of the primary and unseverable obligation which had to be performed in the said district within the period of time agreed upon. In the circumstances, the institution of the action in Montreal and the authorization to serve it and its service in New York are valid under s. 20(1)(*e*) of *The Admiralty Act,* 1934, and Rule 20(*b*) of the General Rules and Orders in Admiralty, respectively. The decision of the House of Lords in *Johnson v. Taylor Bros. and Company Ltd.*[2] does not assist appellant. The facts in that case are essentially different and the law, as stated therein by the House of Lords, supports, as I read it, respondent's contention which was accepted in the Court below.

On the view that, the arbitration clause being excluded from the consideration, the Court below has jurisdiction to hear and determine this case, the next question is whether that jurisdiction can be interfered with by the arbitration clause.

This clause requires no interpretation; it is clear. The parties have stipulated that should any dispute arise between them, they shall not have recourse to the ordinary Courts having, by law, jurisdiction to determine their rights under the charterparty, but undertook that they shall then refer the matter of dispute to three persons at New York who shall be commercial men and of whom the decision shall be final and the award made a rule of law for the purpose of its enforcement. Such an agreement to arbitrate any disputes that may arise pertains, as do agreements to arbitrate pending or impending disputes, to the law of remedies or procedure. The object of the clause is not to modify the rights of the parties under the charterparty but to enforce

[1] [1960] Ex. C.R. 218. [2] [1920] A.C. 144.

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them and how a right might be enforced is a matter of procedure. Procedure is governed by the *lex fori* which, in the present case, in the absence of any provision relating to such agreements in the Admiralty Rules or in the General Rules and Orders of the Exchequer Court, is the procedure in force in the Superior Court of the Province of Quebec according to Admiralty Rule 215 and Exchequer Court Rule 2(1)(*b*). That, under the *Code of Civil Procedure,* such a clause, even if valid, is ineffective to preclude the institution of this action before the Court in the territorial jurisdiction of which the whole alleged cause of action has arisen is settled by art. 94, para. 3, of the *Code of Civil Procedure.* In *Gordon and Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd.*[1], where the effect of art. 94 was considered by the Court of Appeal, St-Jacques J., with the concurrence of Létourneau, Bond and Galipeault JJ., said at p. 431:

> La loi a dit, et ce, d'une façon définitive qui ne me paraît pas souffrir de doute: Désormais, les tribunaux de la province, qui ont été institués en vertu de la prérogative royale et des dispositions du Code de procédure civile, ne tiendront aucun compte des «stipulations, conventions ou engagements» qui auraient pour objet de soustraire un litigant à la juridiction des tribunaux qui ont été institués dans cette province.

The clause in the latter case read as follows:

> It is also agreed that in the event of any dispute arising in connection with any claims, such dispute shall be decided by the Courts of the country of such final port of discharge and not by the Courts of any other country;

The Court below being properly seized with this action, its jurisdiction to try the merits of the case cannot be interfered with by the arbitration clause and the Court cannot be asked to enforce it if, as contended for by respondent and held by the Court of first instance, this arbitration agreement is invalid as being against public policy under the *lex fori,* to wit, the law of the Province of Quebec.

Admittedly, this arbitration agreement is, under the law of France and of the Province of Quebec, what is designated as a *clause compromissoire.* The validity of such a clause has given rise to conflicting jurisprudence, both in France and in the Province of Quebec. In France, this conflict was definitely resolved in 1843 when, in *Comp. l'Alliance v. Prunier, la Cour de Cassation* concluded to the invalidity of the clause, (*Sirey 1843.1.562*), except, of course, in mat-

[1] (1940), 68 Que. K.B. 428.

ters of maritime insurance in respect of which the clause was expressly authorized under art. 332 of *le Code du Commerce*. Received with satisfaction by certain jurists and dissatisfaction by others, this decision remained the law in France up to 1925. In 1925, the clause was, generally speaking, validated so far as commercial matters only were concerned, by art. 631 of *le Code du Commerce*. In the Province of Quebec, the clause is invalid as being against public policy, according to what appears to be the weight of jurisprudence and according to the more recent decision of the Court of Appeal of the Province of Quebec in *Vinette Construction Ltée v. Dame Dobrinsky*[1]. No useful purpose would be served in reciting and discussing here all the arguments advanced in favour of both the theses of validity and of invalidity of the clause. Sufficient it is to refer to Dalloz Répertoire, tome 4, verbo Arbitrage, p. 502, nos 454 et seq., where these arguments are collected, to the thesis favouring validity, written in 1945 by Walter S. Johnson, K.C., and to a summary of these arguments appearing in the dissent of Owen J. in the *Vinette* case, *supra,* at page 73.

Desirable as it may be in private international law, with respect to commercial matters, the Quebec legislature has not yet seen fit to make any enactment substantially similar to the one made in France to *le Code du Commerce*. And so far as it has expressed any policy in the matter, the legislature does not appear to favour the validity of such clause, as shown by the reasons for judgment of St-Jacques J. in *Gordon and Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd., supra*. After anxious consideration, I have formed the opinion that the *Vinette* case, *supra,* expresses the law of the Province in the matter and the arbitration clause pre-cited must, therefore, be held invalid as being against public policy.

In these views, the clause, being vitiated by absolute nullity, cannot obtain or be acted upon in the Court below either to oust or in any way interfere with its jurisdiction to be seized with and try the action on its merits. It also follows that whatever decision may be reached by the Arbitration Board in New York will not be *res judicata* in the Province, as held by the learned Judge of first instance.

Before closing, I should perhaps indicate that the above conclusions have not been reached without careful con-

[1] [1962] Que. Q.B. 62.

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sideration being given to the decisions referred to by my brothers Cartwright and Ritchie in support of their reasons for judgment. For the purpose of this case, all I care to say with respect to these decisions is that they do not, in my respectful view, affect the basis upon which the opinion I have formed has been reached.

I would dismiss the appeal with costs and order the record to be returned to the Court below for resumption of the proceedings.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Honourable Mr. Justice Smith, sitting as District Judge in Admiralty of the Exchequer Court of Canada in and for the Admiralty District of Quebec[1], dismissing a motion whereby the appellant asked:

> for the dismissal of plaintiff's action sauf recours or in the alternative the staying of proceedings until the terms of the arbitration clause appearing in the charterparty dated New York, December 7, 1960, between the parties have been complied with;

The relevant circumstances and the contentions of the parties are set out in the reasons of my brother Fauteux and I shall endeavour to avoid unnecessary repetition.

For the purposes of this appeal I will assume, without deciding, that the statement of claim sufficiently alleges a breach within the Admiralty District of Quebec of the contract between the parties and that were it not for the arbitration clause which forms part of that contract the action in the Court below should proceed in the usual way.

It is first necessary to consider what is the law applied by the Exchequer Court in the exercise of jurisdiction on its Admiralty side. In *Robillard v. The Sailing Sloop St. Roch and Charland*[2], Maclennan D.L.J.A. said at pp. 134 and 135:

> The first important question to be decided is:—Is it the Maritime Law of England or the Canadian Law which governs the rights of the parties in respect to plaintiff's claim for title and possession of the sailing sloop St. Roch? The Exchequer Court of Canada as a Court of Admiralty is a court having and exercising all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890 (Imp.), over the like places, persons, matters and things as are within the jurisdiction of the Admiralty Division of the High Court in England, whether exercised by virtue of a statute or otherwise, and as a Colonial Court of Admiralty it may exercise such jurisdiction in like manner and to as full an extent as the High Court in England.

[1] [1963] Ex. C.R. 1. [2] (1921), 21 Ex. C.R. 132, 62 D.L.R. 145.

In the Gaetano and Maria, 7 P.D. 137, Brett L.J., at p. 143, said:—

'The law which is administered in the Admiralty Court of England is the English Maritime Law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English Maritime Law.'

Although the Exchequer Court in Admiralty sits in Canada it administers the Maritime Law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty.

By s. 35 of *The Admiralty Act,* 1934 (Can.), 24-25 George V, c. 31, the *Colonial Courts of Admiralty Act,* 1890, was repealed "in so far as the said Act is part of the law of Canada", and the matter is now governed by the provisions of the *Admiralty Act,* R.S.C. 1952, c. 1, subs. (1) of s. 18 of which reads as follows:

(1) The jurisdiction of the Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters are within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.

Sub-section (2) of the same section provides that, in so far as it can apply, s. 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925,* of the United Kingdom, which is printed as Schedule A to the Act, shall be applied *mutatis mutandis* by the Exchequer Court on its Admiralty side.

While all jurisdiction formerly vested in the High Court of Admiralty now forms part of the Admiralty jurisdiction of the High Court of Justice the law administered is still the English Maritime law. In the article on "Admiralty" in Halsbury, 3rd ed., vol. 1, one of whose authors was Lord Merriman, it is said at p. 50, para. 92:

The law administered in Admiralty actions is not the ordinary municipal law of England, but is the law which by Act of Parliament or reiterated decisions, traditions, and principles, has become the English maritime law.

The substantive law applied by the Exchequer Court on its Admiralty side is, of course, the same throughout Canada and does not vary according to the Admiralty District in which the cause of action arises, but, by the combined effect of Admiralty Rule 215 and Exchequer Court Rule 2(1)(*b*), the practice and procedure, where it is not otherwise pro-

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vided by any Act of the Parliament of Canada or any general rule or order of the Court, shall:

(*b*) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Superior Court for the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England.

Smith D.J.A. has taken the view that the questions raised on the motion are procedural in nature. The learned Judge says in part:

> Arbitration agreements and proceedings, as well as the rules relating to lis pendens are procedural in nature. (C.P. 411 et seq; and C.P. 173) and, in the absence of any provision relating to same in the Admiralty Rules or in the General Rules and Orders of the Exchequer, they are governed by the practice and procedure in force in the Superior Court of this Province . . . .
>
> It must be determined therefore whether the said arbitration clause is valid according to the laws of the Province of Quebec and is one which our Courts will enforce and give effect to.

With respect, I am of opinion that the learned Judge has erred in treating the question in issue as one of procedure rather than one of substance. Whether it is the one or the other falls to be decided, pursuant to s. 18(1) of the *Admiralty Act* quoted above, in like manner as would be done by the High Court of Justice in England in the exercise of its Admiralty Jurisdiction. That the question whether effect should be given to an arbitration clause contained in a contract is one of substance and not procedural appears to me to be settled by the decision of the House of Lords in *Hamlyn & Co. v. Talisker Distillery*[1]. The effect of that case is succinctly stated in the head-note as follows:

> Where a contract is entered into between parties residing in different countries where different systems of law prevail, it is a question in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined.
>
> A contract between an English and a Scotch firm, signed in London but to be performed in Scotland, contained this stipulation: 'Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way'.
>
> In an action raised by the Scotch firm in Scotland for implement of the contract and for damages, the English firm pleaded that the action was

[1] [1894] A.C. 202.

excluded by the arbitration clause. The Scotch Courts held that the clause was governed by the law of Scotland inasmuch as that country was the locus solutionis, and that the reference, being to adbitrators unnamed, was therefore invalid:—

Held, reversing the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie) 204), that the contract was governed by English law, according to which the arbitration clause was valid, and deprived the Scotch Courts of jurisdiction to decide upon the merits of the case, unless the arbitration proved abortive.

The reasoning of this decision, applied to the facts of the case at bar, appears to me to establish (i) that the substantive law by which the parties intended that their rights under the contract should be determined was that of the United States of America, (ii) that the question whether the arbitration clause is enforceable is one of substantive law and not one of procedure and consequently, (iii) that if by the law of the United States of America the arbitration clause is valid and enforceable it should have been given effect in the Court below.

That the High Court of Justice in England in the exercise of its Admiralty jurisdiction would follow an applicable decision of the House of Lords goes without saying.

The speeches of all of the Law Lords who took part in the judgment bear on the questions with which we are concerned and it is difficult to refrain from unduly lengthy quotation.

At pp. 206 and 207, Lord Herschell L.C. said:

> It is not in controversy that the arbitration clause is according to the law of England, a valid and binding contract between the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the Court below is thus expressed by Lord Adam: 'So far as I see, nothing required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the lex loci solutionis, that is, by the law of Scotland'.
>
> It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the lex loci solutionis. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the

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face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

At pp. 208 and 209, Lord Herschell L.C. said:

Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be 'settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way,' it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties, thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and, for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

At p. 211, Lord Watson after referring to the two pleas, '(1) No jurisdiction; (2) The action is excluded by the clause of reference', which had been repelled in the Courts below, said:

With reference to the two pleas which have been repelled, I wish to observe that, although they seem to have become stereotyped in cases like the present, they do not correctly represent the rights of a defender who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration, from any cause, prove abortive, the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded in limine, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration.

At pp. 213 and 214, Lord Watson said:

It has never, so far as I am aware, been seriously disputed, that, whatever may be the domicile of a contract, any Court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the lex fori, such as those which relate to procedure or to proof. *Don v. Lippman* 2 Sh. & McL. 682, which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But all the rules noticed by Lord Brougham in his elaborate judgment as belonging to

that class refer to the action of the Court in investigating the merits of a suit in which its jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the Court ought to disregard an agreement to refer which is pars contractûs, and binding according to the law of the contract, because it would not be valid if tested by the lex fori. Without clear authority, I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that, if two persons domiciled in England made a contract there containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scotch Court, if the other happened to be temporarily resident in Scotland, or to have personal estate in that country capable of being arrested.

All of the Law Lords held that the arbitration clause made it clear that it was the intention of the parties that its operation and effect should be governed by the law of England. In the case at bar, on reading the whole contract and particularly having regard to the wording of the "New York Produce Exchange Arbitration Clause" which forms part of it, I am of opinion that it was the intention of the parties that this clause, setting out the agreement for the settlement of disputes which might arise out of the contract, was to be interpreted and governed by the law of the United States.

In the absence of evidence to the contrary it would be assumed that the substantive law of the United States is the same as that of the Court in which this action is pending, that is the Exchequer Court of Canada on its Admiralty side. That by the law administered in the High Court of Justice in England in the exercise of its Admiralty jurisdiction the clause would be found to be valid and enforceable does not appear to me to admit of doubt. On this point it is scarcely necessary to multiply authorities but in addition to the *Hamlyn & Co.* case, *supra,* reference may be made to the decision of the House of Lords in *Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co.*[1] The clause under consideration in that case reads as follows:

All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and/or grain trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this

[1] [1922] 2 A.C. 250.

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provision is not complied with the claim shall be deemed to be waived and absolutely barred.

The Court of Appeal had taken the view that the meaning of the clause was that under no circumstances should a claimant be allowed to enter His Majesty's Courts at all and that it was bad in that it completely ousted the jurisdiction of the Court. With this the House of Lords unanimously disagreed, although the judgment of the Court of Appeal was affirmed on another ground which has no relevance to the question before us.

At pp. 255 and 256, Lord Dunedin said:

> My Lords, under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad, as an ousting of the jurisdiction of the Courts, but that position was finally abandoned in *Scott v. Avery* 5 H.L.C. 811. As I read that case, it can no longer be said that the jurisdiction of the Court is ousted by such an agreement; on the contrary the jurisdiction of the Court is invoked to enforce it, and there is nothing wrong in persons agreeing that their disputes should be decided by arbitration. It follows that the clause here is not obnoxious so far as it provides for arbitration.

At pp. 258 and 259, Lord Summer said:

> I think the words do not exclude the cargo owner from such recourse to the Courts as is always open by virtue of the provisions of the Arbitration Act to a party who has agreed to arbitrate. If so, as of course the Court of Appeal would have been the first to recognize, the jurisdiction of the Courts is not ousted, so as to make this arbitration clause bad altogether. Its terms can be enforced.

In the case at bar, by a written agreement signed by the solicitors for the parties it was provided, *inter alia*:

> 2. That the Arbitration Act of the United States of America (Title Number 9—Arbitration) referred to in paragraph 3 of Defendant's amended motion is the applicable and binding law of the United States of America relating to the arbitration of maritime transactions and charterparties, and that the copy of the said law produced herewith as Defendant's Exhibit M-4 is a true copy thereof.
>
> 3. That the Plaintiff admits the appearance referred to in paragraph 4 of Defendant's amended motion but adds that the said appearance was specially, or under protest, for the sole purpose of vacating the order to show cause and for the dismissal of the proceedings before the said United States District Court.
>
> 4. The Plaintiff admits that pursuant to the decision of Judge Edelstein of the District Court of the Southern District of New York dated April 3rd, 1962, an Order issued from the said Court on April 12th, 1962, overruling the objection of the Plaintiff to the jurisdiction of the said Court and ordering the Plaintiff herein to appoint an arbitrator within ten days from the entry of the said Order and to proceed to arbitration within thirty days from the entry of said Order, and that said Order is a final judgment,

subject to appeal, according to the Federal Rules of Civil Procedure of the United States of America, a certified true copy of said Order, produced herewith as Defendant's Exhibit M-5.

A perusal of the statute referred to as Exhibit M-4 supports the view, which in the absence of evidence would have been presumed, that by the law of the United States the arbitration clause is valid and enforceable.

In the course of his reasons, Smith D.J.A. said:

> Counsel for the defendant argued however that the validity of the said arbitration clause must be determined in accordance with the laws of the United States, where the contract was made. It is no doubt true that our Courts in adjudicating in respect of contracts executed in foreign jurisdiction are obliged to give consideration to the lex loci contractus, but they will not enforce or give effect to a contract which, under the laws of this Province, is against public order, even though the said contract may be legal and binding in the jurisdiction in which it was made.

It is no doubt true that if an agreement made in a jurisdiction other than that in which it is sought to be enforced is opposed to a fundamental principle of the law of the country in the courts of which the action to enforce it is pending those courts will not enforce it. But the question as to whether or not the agreement is opposed to such a principle must be decided by the substantive law administered by the Court in which the action is pending. In the case at bar, that law, as has been pointed out above, is not the law of the Province of Quebec; it is the Maritime law of England. The enforcement of the arbitration clause with which we are concerned is not opposed to any principle of the last mentioned law.

Because of this I do not find it necessary to consider whether a clause which makes a reference to arbitration a condition precedent to the bringing of an action is opposed to any fundamental principle of the law of Quebec. Had we been called upon to examine that question it would have been necessary to consider the effect of many cases of which I shall mention only one, *Guerin v. The Manchester Fire Assurance Co*[1]., a decision of this Court on appeal from the Court of Queen's Bench for Quebec (Appeal Side). At pp. 151 and 152, Sir Henry Strong C.J. with whom Sedgewick and King JJ. agreed, said:

> Further the arbitration clause, added to the conditions by the variation to condition sixteen, provides that no action should be maintainable until after an award had been obtained pursuant to the terms of the conditions

[1] (1898), 29 S.C.R. 139.

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fixing the amount of the claim. The Court of Review considered this provision void as tending to oust the jurisdiction of the courts of law and so contrary to public policy. I do not think this view can be maintained. The law of England provides that any agreement renouncing the jurisdiction of legally established courts of justice is null, but nevertheless in the case of Scott v. Avery, 5 H.L. Cas. 811, the House of Lords determined that a clause of this nature and almost in the same words as that before us making an award a condition precedent, was perfectly valid and that no action was maintainable until after an award had been made. This decision, which has been followed in many later cases, though of course not a binding authority on the courts of Quebec, proceeds upon a principle of law which is as applicable under French as under English law. This principle applies not merely to cases where the amount of damages is to be ascertained by an arbitrator, but also to cases where it is made a condition precedent that the question of liability should first be determined by arbitration.

The learned Judge having held that as a matter of law he could not give effect to the arbitration clause did not find it necessary to exercise any discretion in the matter. A reading of the record makes it plain that it was the intention of the contracting parties that any dispute arising between them out of the terms of the contract should be settled by arbitration at New York and that the United States Arbitration Act, referred to above, should be the governing statute as to the conduct of the arbitration. The inconvenience of permitting the action in the Exchequer Court of Canada to proceed is manifest. In my opinion this is a case in which the proper course is to stay proceedings in the Court below in order that the matter in dispute may be settled by arbitration in accordance with the terms of the contract. This will give effect to the expressed intention of the parties and is favoured by every consideration of convenience. Such an order will leave the parties at liberty to apply to the Court in the event, which on the material before us appears to be unlikely, that the reference proves abortive.

For these reasons I would allow the appeal, set aside the order of the Court below, direct that an order be entered staying proceedings in the action until arbitration has been had in accordance with the terms of the agreement between the parties, and that the costs of the motion before Smith D.J.A. and of this appeal be paid by the respondent to the appellant forthwith after taxation thereof.

RITCHIE J. (*dissenting*):—The circumstances giving rise to this appeal have been fully described in the reasons for judgment of my brothers Cartwright and Fauteux, which I have had the advantage of reading, and I will endeavour to

confine any repetition of what they have said to such material as is necessary for the purpose of making my own views clear.

This is an action for damages arising out of the alleged breach by the appellant within the Quebec Admiralty District "of an agreement relating to the use and hire of a ship" and I agree with the learned trial judge that as the District Judge in Admiralty of the Exchequer Court of Canada for the Quebec Admiralty District, he had jurisdiction both *ratione materiae* and territorially over the matter by virtue of the provisions of ss. 18(3)(*a*)(i) and 20(1)(*e*) of the *Admiralty Act*, R.S.C. 1952, c. 1, and s. 22(1)(*a*)(xii)(1) of the Schedule to that Act.

The arbitration clause which the appellant seeks to invoke as a ground for the dismissal of this action or in the alternative for a stay of proceedings reads as follows:

> Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

The reasons for judgment of my brother Fauteux and of the learned trial judge make it apparent that under the law of the Province of Quebec this clause is what is described as a "clause compromissoire" and that as such it is "vitiated by absolute nullity" as being against public policy and is unenforceable in the courts of that Province. I take the effect of this to be that the existence of such a clause, providing as it does that the decision of arbitrators appointed by the parties to the contract rather than by the court "shall be final" as to "any dispute" arising between the owners and charterers, is simply not recognized by the courts of the Province of Quebec. This appears to me to be borne out by the fact that there are no provisions in the *Code of Civil Procedure* for the enforcement of such a clause and that the articles of that Code dealing with arbitrators (see art. 411 *et seq*) are confined to arbitrators who are, whether by consent of the parties or otherwise, appointed by the court. The provisions of art. 94(3), read in the light of the decision of St. Jacques J. in *Gordon and Gotch (Australasia) v. Montreal Australia-New Zealand Line Limited*[1], serve to

[1] (1940), 68 Que. K.B. 428.

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further confirm the fact that such a clause is totally ineffective to supplant the jurisdiction of the courts of the Province of Quebec.

The peculiarity of the present case, however, is that although the contract in question was to be performed, at least in part, in the Province of Quebec where the breach is alleged to have occurred, the court in which this action is brought is not a court of that Province but a statutory court which is required by the provisions of s. 18(1) of the *Admiralty Act* to exercise its jurisdiction "in like manner and to as full an extent" as the same jurisdiction is exercised by the High Court of Justice in England notwithstanding the fact that the territorial limits of the Admiralty district within which such jurisdiction is exercised coincide with the boundaries of the Province of Quebec.

The history of the Admiralty Court in Quebec from the time of its organization in 1717 is recounted in the reasons for judgment of Girouard J. in *Inverness Railway and Coal Company v. Jones*[1], and in these reasons, after having dealt extensively with the early French law of Admiralty, Girouard J. described the situation as it existed in 1908 in the following terms at p. 55:

> After the cession of the country to Great Britain the ordinance and the French law generally ceased to be enforced in the Quebec admiralty court and the English law was substituted for them as part of the public law of Great Britain. By his commission, the first admiralty judge in Quebec, appointed in 1764, was empowered to hold a vice-admiralty court like the High Court of Admiralty in England, and, of course, according to the English laws. The Civil Code of Quebec, art. 2383, recognized that rule in express terms:
>
> > The provisions in this chapter (chapter 4th relating to privilege and maritime lien) do not apply in cases before the court of vice-admiralty.
> >
> > Cases in that court are determined according to the civil and maritime laws of England.
>
> Finally, the Imperial statute, 53 and 54 Vict. ch. 27, passed in 1890, empowering the legislature of a British possession to create colonial courts of admiralty, declares that the jurisdiction of such courts shall be
>
> as the admiralty jurisdiction of the High Court in England . . . .

The fact that these observations were made in the course of a dissenting opinion does not, in my view, in any way affect their accuracy.

By the *Colonial Courts of Admiralty Act*, 1890 (Imp.), the jurisdiction of the Admiralty Districts in Canada was

[1] (1908), 40 S.C.R. 45.

limited to the Admiralty jurisdiction of the High Court in England as it existed at the time of the passing of that Act, (see *The Yuri Maru*[1]) and this continued to be the situation until 1934 when the Parliament of Canada enacted the *Admiralty Act*, 1934 (Can.), 31 (now R.S.C. 1952, c. 1) whereby the jurisdiction was made coextensive with that "now possessed by the High Court of Justice in England", "whether by virtue of any statute or otherwise".

It appears to me to be clear from the *Admiralty Act* that the substantive law to be applied by the Exchequer Court of Canada on its Admiralty side is by the very nature of the jurisdiction conferred by that Statute required to be the same in the various Admiralty District Courts which have been established to exercise it.

In this respect the Admiralty jurisdiction of the Exchequer Court differs from that conferred upon it by the *Exchequer Court Act* as is indicated by the fact that in the exercise of the latter jurisdiction there are cases in which the liability of the Crown is to be determined by the law of the Province. (See *King v. Laperrière*[2]).

As was said by the District Judge in Admiralty in the recent case of *Savoy Shipping Limited v. La Commission Hydro-Electrique de Quebec*[3]:

> By Section 91 of the British North America Act the Parliament of Canada was given exclusive jurisdiction to legislate in respect of "Shipping and navigation". The Admiralty Court, although constituted as that part of the Exchequer Court having jurisdiction in Admiralty matters, is given a jurisdiction which is different and distinct from that vested in the Exchequer Court by the Exchequer Court Act.

For the reasons hereinafter stated, I do not consider that the clause here in question, whether it be treated as a condition precedent to the right of action under the contract or not, is such as to be "vitiated by obsolute nullity" and therefore unenforceable in the High Court of Justice in England having regard, *inter alia*, to the jurisdiction now possessed by that Court and existing by virtue of the *Arbitration Act*, 1950 (Eng.), c. 26.

The question of whether or not an agreement is null and void as being against public policy is not, in my respectful opinion, one which is determined by the rules regulating

[1] [1927] A.C. 906.
[2] [1946] S.C.R. 415 at 443, 3 D.L.R. 1.
[3] [1959] Que. R.L. 270 at 274, [1959] Ex. C.R. 292.

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practice and procedure in the forum where the action is brought although such rules undoubtedly control the means, if any, by which the agreement is to be enforced.

As has been pointed out by my brother Cartwright, the practice and procedure of the Exchequer Court on its Admiralty side, where it is not provided by an act of the Parliament of Canada or in the Admiralty rules or the General Rules and Orders of the Exchequer Court shall "if the cause of action arises in the Province of Quebec be regulated as near as may be by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Superior Court of the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England." (See Admiralty Rule 215 and Exchequer Court Rule 21(*b*)).

Since neither the rules of the Admiralty Court nor those of the Exchequer Court contain any reference to proceedings for the enforcement of an arbitration agreement, and since a "clause compromissoire" is not recognized in the Province of Quebec and the only provisions in the *Code of Civil Procedure* of that Province relating to arbitrators are concerned with arbitrators appointed by the Court, it appears to me that the proceedings for the enforcement of such an agreement in the Quebec Admiralty District Court are to be regulated by the procedure, if any, in force with respect to such matters in Her Majesty's Supreme Court of Judicature in England. This, in my view, is borne out by what was said in another connection by Mr. Justice A. I. Smith in *Savoy Shipping Limited v. La Commission Hydro-Electrique de Quebec, supra,* at p. 273.

The law and practice in England with respect to arbitration clauses is concisely stated in Chitty on Contracts, 22nd ed. (1961), in para. 741 at p. 309, where it is said:

> Arbitration clauses in contracts are of two main kinds, namely bare arbitration agreements, when the parties agree that disputes arising out of the contract, or certain types of dispute, shall be referred to arbitration; and agreements making an arbitrator's award a condition precedent to any right of action under the contract . . . .
>
> Bare agreements to arbitrate were not specifically enforceable in equity; and while damages for breach of such an agreement could be granted at common law, it was difficult for the party seeking arbitration to prove more than nominal damages. It was therefore necessary for statute to

provide machinery for the indirect specific enforcement of bare arbitration agreements. This was first provided by the Common Law Procedure Act, 1854, now section 4(1) of the Arbitration Act, 1950, which gives the court a discretionary power to stay an action begun in breach of an arbitration agreement.

Section 4(1) of *The Arbitration Act,* 1950 (Eng.), reads as follows:

> If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or any judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The appellant has delivered no pleadings nor taken any other steps in these proceedings and is accordingly in the position to invoke the provisions of this section.

The High Court of Justice in England exercises its jurisdiction in relation to such arbitration clauses by virtue of the *Arbitration Act* and that the procedure for which provision is made in s. 41(1) of that Act has been held to apply in the Exchequer Court on its Admiralty side is shown by the case of *Birks Crawford Limited v. The Ship Stromboli*[1]. In that case the parties to a bill of lading had agreed to litigate any dispute arising thereunder by Italian law at Genoa, Italy, and Sidney Smith, D.J.A. (B.C.) adopted the order made by Sir Samuel Evans in *The Cap Blanco*[2] and accordingly ordered that the proceedings in the action taken in the B.C. Admiralty District be stayed in order that the parties could litigate in Genoa, Italy, as they had agreed to do. In *The Cap Blanco, supra,* the clause in issue provided that "any disputes concerning the interpretation of the bill of lading are to be decided in Hamburg according to German law, and it was held that such a clause was to be treated as a submission to arbitration within the meaning of s. 4 of the *Arbitration Act* 1889" (now s. 4 of the *Arbitration Act,* 1950).

[1] [1955] Ex. C.R. 1.

[2] [1913] P. 130.

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In the course of his reasons for judgment, Sir Samuel Evans said:

> In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be deal with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg Court.
>
> Although, therefore, this Court is invested with jurisdiction, I order that the proceedings in the action be stayed, in order that the parties may litigate in Germany, as they have agreed to do.

As the Exchequer Court of Canada, in the exercise of its Admiralty jurisdiction is a statutory court clothed with authority to exercise its jurisdiction in like manner and to as full an extent as the High Court of Justice in England, and as there is no practice or procedure in force in the Superior Court of the Province of Quebec relating to an arbitration clause such as is here sought to be invoked, I am of opinion that the court is required to conform to the practice and procedure in such matters in Her Majesty's Supreme Court of Judicature in England, and that this procedure is to be found in the *Arbitration Act*, 1950, s. 4(1).

I agree with my brother Cartwright that this is a case in which the proper course is to stay the proceedings in the court below, and I would dispose of this appeal in the manner proposed by him.

Appeal dismissed with costs, CARTWRIGHT *and* RITCHIE JJ. *dissenting.*

Solicitors for the defendant, appellant: Martineau, Chauvin, Walker, Allison, Beaulieu & Tetley, Montreal.

Solicitors for the plaintiff, respondent: Beauregard, Brisset, Reycraft & Chauvin, Montreal.

THE BRITISH AMERICAN OIL COMPANY LIMITED (*Plaintiff*) APPELLANT;

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*Oct. 30
Dec. 16

AND

JAROSLAW KOS AND HAZEL KOS (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Homestead mortgage executed in owner's name by brother —False declaration as to consent of wife—Estoppel not established— Mortgage invalid—Dower Act, R.S.A. 1955, c. 90.

The defendant, the registered owner of a homestead, applied to the plaintiff company for a loan to assist in financing the construction of a building on the property. The company prepared a mortgage and an agreement for loan for execution by the defendant owner and, in his absence, the company's agent had the owner's brother sign these documents in the owner's name. An affidavit purporting to be that of the owner, stating that neither he nor his wife had lived on the land since their marriage, was completed on each document and the certificate of acknowledgment under *The Dower Act,* R.S.A. 1955, c. 90, was completed and signed by a commissioner of oaths, although the owner's wife was not present. Her name was signed by the brother's wife after the documents had left the commissioner's office. The mortgage was registered by the plaintiff under *The Land Titles Act,* R.S.A. 1955, c. 170. The wife admitted that she was aware that her husband was applying for a loan and also that she had been told that her name had been signed on some papers. She found either a copy of the mortgage or of the agreement for loan among some papers of her husband's about a year later and then noticed her "signature" on it. At that time the last of the advances by the plaintiff had long since been made.

In an action of foreclosure the trial judge held that the owner was estopped from denying the validity of the execution of the mortgage and that both he and his wife were estopped from raising the objection that the formalities for consent to the release of dower under *The Dower Act* were not complied with. This judgment was reversed by a unanimous decision of the Appellate Division and the company then appealed to this Court.

Held: The appeal should be dismissed.

Sections 4 (2)(a) and 12(1) of *The Dower Act,* which contemplate that certain legal consequences may result in some instances from a disposition by a married person of a homestead made in breach of s. 3, had no application where the disposition was not by way of transfer, but was a disposition by agreement for sale, lease, mortgage or other instrument that did not finally disposed of the interest of the married person in the homestead. Dispositions of this kind were expressly forbidden and there were no provisions in the Act which accorded

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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them any validity. The disposition in question here was, therefore, invalid, unless it was open to the appellant successfully to contend that it was entitled to succeed on the grounds of estoppel.

Whether the statutory requirement for a written consent to the disposition of a homesead could be released by estoppel was questionable. However, it was not necessary to determine the point here because no evidence was found on which it could be said that there was any estoppel created which could preclude the wife from asserting her right to refuse consent to the mortgage.

The appellant failed to establish the existence of any duty, as between the wife and itself, which would obligate her to make a disclosure to it of the circumstances which she discovered, even assuming that she then discovered the existence of what purported to be her husband's affidavit falsely stating that the lands had not been the residence of himself or her since their marriage. In the absence of such a duty, no estoppel could be established merely by remaining silent.

The wife was, therefore, properly entitled to set up, as against the company, the absence of any written consent given by her to a disposition of her husband's homestead by mortgage. The fact that the land was the homestead and that no written consent was given by her was fully established. Under these circumstances the mortgage executed in breach of s. 3 had no validity and the appellant's claim to enforce it failed.

Meduk v. Soja, [1958] S.C.R. 167, followed; *Pinsky v. Waas* [1953] 1 S.C.R. 399; *Maritime Electric Co. Ltd. v. General Dairies Ltd.*, [1937] A.C. 610, referred to.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], allowing an appeal from a judgment of Kirby J. Appeal dismissed.

W. G. Morrow, Q.C., and *J. R. Dunnet*, for the plaintiff, appellant.

A. Dubensky, for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The issue in this appeal is as to the validity of a mortgage, dated February 12, 1957, and registered on February 27 of that year, pursuant to *The Land Titles Act*, on the Northwest quarter of Section 9, Township 51, Range 7, West of the 5th Meridian, at Moon Lake, in the Province of Alberta, of which the respondent Jaroslaw Kos is the registered owner. The respondent Hazel Kos is his wife. It is conceded that this land is their homestead within the meaning of *The Dower Act*, R.S.A. 1955, c. 90.

[1] (1964), 46 W.W.R. 36, 36 D.L.R. (2d) 422.

The purported execution of this document was effected in unusual circumstances. The respondent Jaroslaw Kos commenced the construction of a garage and filling station on a portion of the quarter-section in the year 1956. On November 7 of that year he applied, in writing, to the appellant for a loan of $12,000, to assist in financing this construction, to be secured by a first mortgage upon the lands described in the application. The description contained in that document referred to:

> N.W. ¼ (Section) .....9..... (Township) .....51..... (Range) .....7 W. of 5th M., ... registered in the .....Land Titles Office—Edmonton..... Frontage of Lot .....400..... feet, Depth of Lot .....400..... feet.

The land thus described comprised three acres.

The appellant prepared, for execution by Jaroslaw Kos, a mortgage upon the whole of the quarter-section and an agreement for loan, which referred to the loan of $12,000 to be made on the security of a first mortgage and which contained covenants by the borrower regarding the exclusive sale on the premises of the appellant's products for a period of ten years.

These documents were brought to Moon Lake by one Froeland, an agent of the appellant, to be executed. According to the evidence of Ernest Kos, the brother of Jaroslaw Kos, Froeland inquired as to the whereabouts of Jaroslaw Kos and, finding he was absent, suggested that Ernest Kos should sign them. The evidence of Ernest Kos generally did not impress the learned trial judge as being truthful. However, it is clear from the evidence of one Jensen, a commissioner for oaths called as a witness by the appellant, that both the mortgage and the agreement were signed with the name "Jaroslaw Kos" in his presence and in that of Froeland. At that time, Jensen says, he thought that the signatory was, in fact, Jaroslaw Kos. In fact it appears that both documents were signed by Ernest Kos.

An affidavit was completed on each document in Form B, as provided in *The Dower Act,* purporting to be that of Jaroslaw Kos, stating that he was the mortgagor and that neither he nor his wife had resided on the mortgaged land at any time since their marriage. This affidavit bore the

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signature "Jaroslaw Kos" and that of the commissioner for oaths, Jensen. Beneath the signature "Jaroslaw Kos" there appeared a signature "Hazel Kos". This latter signature is struck out on the affidavit which is part of the mortgage form, but was not struck out on the affidavit which is a part of the agreement for loan form.

Jensen's evidence makes it quite clear that there was no one present at the time the various signatures were placed on these two documents, other than the signatory, Froeland and himself.

On each of the two documents the form of Consent of Spouse, as provided in Form A of *The Dower Act,* had been typed out ready for signature by Hazel Kos, but they were not signed by anyone.

The Certificate of Acknowledgment by Spouse, as provided in Form C of *The Dower Act,* stating that Hazel Kos was aware of the disposition, was aware of her rights regarding the homestead under *The Dower Act* and that she had voluntarily consented to the execution of the document, was completed and signed by Jensen. His signature to this certificate was struck out on the mortgage form, but not on the other document.

There was evidence to the effect that where the signatures "Hazel Kos" appeared on the two documents the actual signatory was Vicki Kos, the wife of Ernest Kos. She did not give evidence at the trial, nor did Froeland. It is, however, clear, from Jensen's evidence, that the signatures of "Hazel Kos" were not placed on the documents until after they had been taken away from his office.

The mortgage was registered by the appellant at the appropriate Land Titles Office. It is clear that the appellant, from the form of the instruments and through the knowledge of its agent Froeland, must have been aware that he had obtained the execution of a mortgage which carried no consent by the mortgagor's wife and that the signature "Hazel Kos" on the affidavit forms had been added after the affidavits had been sworn by Jensen and after the documents had left his office.

The appellant made advances of money, to the amount of the $12,000 applied for, either directly to Jaroslaw Kos or in the form of payments to material men. Jaroslaw Kos had been told by Ernest Kos that the latter had signed his

brother's name to some papers regarding the loan. The appellant filed a caveat in respect of the agreement for loan, of which Jaroslaw Kos had some knowledge. He admitted that he had told his wife he was expecting a loan from the appellant on the garage. At no time did he advise the appellant that he had not actually signed either the mortgage or the agreement.

Hazel Kos admitted that she was aware that her husband was applying for a loan on the garage and also that she had been told by Vicki Kos that the latter had signed Hazel's name on some papers. She found either a copy of the mortgage or of the agreement for loan among some papers of her husband's about a year later and then noticed her "signature" on it.

The appellant commenced action against the respondents claiming a declaration of the amount owing under the mortgage of $13,667.85 as at March 1, 1959, with interest thereafter; judgment for such amount; and, in default, foreclosure of the mortgage.

The learned trial judge decided in the appellant's favour. After stating that none of the defence witnesses impressed him as being truthful and referring to the respondents, he went on to say:

> I am unable to accept their story that Ernest Kos did not sign with the knowledge and authority of Jaroslaw Kos; that they did not know the nature of the documents signed by the Defendant Ernest Kos, using the name Jaroslaw Kos; I am satisfied and find that the Defendant Jaroslaw Kos received the proceeds from the mortgage from the Plaintiff company, knowing that the company advanced them in the belief that they were secured by a mortgage executed by the said Defendant, in which the Dower Act had been properly complied with; that the said Defendant knew that the mortgage had been improperly signed by his brother Ernest Kos, using his signature, and that The Dower Act had not been properly complied with. I am further satisfied and find that the Defendant Hazel Kos shared this knowledge and acquiesced in the conduct of the Defendant Jaroslaw Kos.

He held that Jaroslaw Kos was estopped from denying the validity of the execution of the mortgage and that both he and Hazel Kos were estopped from raising the objection that the formalities for consent to the release of dower under *The Dower Act* were not complied with.

This judgment was reversed on appeal by unanimous decision of the Appellate Division of the Supreme Court of

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Alberta[1], which held that neither of the respondents was estopped from saying that Hazel Kos had not consented to the disposition of the homestead property made in the mortgage. In consequence, the mortgage was not valid by virtue of the provisions of *The Dower Act*. Personal judgment in favour of the appellant as against Jaroslaw Kos was granted. The appellant appeals from the judgment in relation to the mortgage.

The Dower Act of Alberta, in the form in which it now appears, was first enacted by 1948 (Alta.), c. 7. It repealed and replaced an earlier statute, R.S.A. 1942, c. 206, which had provided that a dispositon by a husband of his homestead without his wife's consent was "absolutely null and void for all purposes". The purpose of its enactment appears to have been to prevent conflict in principle between that protection afforded to a wife by *The Dower Act* and that protection afforded to a person relying upon the register under *The Land Titles Act*. It also extended the protection which it afforded to both spouses, and not merely to the wife.

The portions of *The Dower Act* which are relevant to this appeal are as follows:

> 2. In this Act,
>
> (*a*) "disposition"
>
> (i) means a disposition by act *inter vivos* that is required to be executed by the owner of the land disposed of, and
>
> (ii) includes
>
> * * *
>
> (B) a mortgage or encumbrance intended to charge land with the payment of a sum of money, and required to be executed by the owner of the land mortgaged or encumbered,
>
> * * *
>
> (*b*) "dower rights" means all rights given by this Act to the spouse of a married person in respect of the homestead and property of the married person, and without restricting the generality of the foregoing, includes
>
> (i) the right to prevent disposition of the homestead by withholding consent,
>
> * * *
>
> (c) "homestead" means a parcel of land
>
> (i) on which the dwelling house occupied by the owner of the parcel as his residence is situated, and
>
> (ii) that consists of

[1] (1964), 46 W.W.R. 36, 36 D.L.R. (2d) 422.

(B) not more than one quarter section of land other than land in a city, town or village;

* * *

3. (1) No married person shall by act *inter vivos* make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time

(*a*) during the life of the married person, or

(*b*) during the life of the spouse of the married person living at the date of the disposition,

unless the spouse consents thereto in writing, or unless a judge has made an order dispensing with the consent of the spouse as provided for in section 11.

(2) A married person who makes any such disposition of a homestead without the consent in writing of the spouse of the married person or without an order dispensing with the consent of the spouse is guilty of an offence and liable on summary conviction to a fine of not more than one thousand dollars or to imprisonment for a term of not more than two years.

4. (1) When land becomes the homestead of a married person it continues to be his homestead within the meaning of this Act until the land ceases to be a homestead pursuant to subsection (2), notwithstanding the acquisition of another homestead or a change of residence of the married person.

(2) Land ceases to be the homestead of a married person

(*a*) when a transfer of the land by that married person is registered in the proper land titles office,

(*b*) when a release of dower rights by the spouse of that married person is registered in the proper land titles office as provided in section 8, or

(*c*) when a judgment for damages against that married person is obtained by the spouse of the married person pursuant to sections 12 to 18 in respect of any land disposed of by the married person and is registered in the proper land titles office.

12. (1) A married person who without obtaining

(*a*) the consent in writing of the spouse of the married person, or

(*b*) an order dispensing with the consent of the spouse,

makes a disposition to which a consent is required by this Act and that results in the registration of the title in the name of any other person, is liable to the spouse in an action for damages.

* * *

13. (1) Where a spouse recovers a judgment against the married person pursuant to section 12, the married person upon producing proof satisfactory to the Registrar that the judgment has been paid in full may register a certified copy of the judgment in the proper land titles office.

(2) Upon the registration of the certified copy of the judgment the spouse ceases to have any dower rights in any lands registered or to be registered in the name of the married person and all such lands cease to be homesteads for the purposes of this Act.

The effect of these sections is that a married person is expressly forbidden under penalty from disposing of the homestead of that married person without the written consent of the spouse. If, however, notwithstanding the pro-

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hibition contained in s. 3, a transfer of the homestead land by that married person is registered in the proper land titles office, the land ceases to be the homestead of that married person. In such event, the spouse is given a right to recover damages against the married person who made the wrongful disposition. If a judgment is recovered in such an action, and paid in full, a certified copy of the judgment may be registered in the proper land titles office, and, thereafter, the spouse who recovered the judgment ceases to have any dower rights in any lands registered or to be registered in the name of the married person.

It must be noted immediately that, although the apparent purpose of *The Dower Act* of 1948 was to bring the law as to dower into harmony with the basic principles of *The Land Titles Act,* the provisions of s. 4(2)(*a*) and of s. 12(1) are limited to the situation which occurs where a transfer is registered under the provisions of *The Land Titles Act,* thus resulting in the creation of a new title in the name of the transferee. These provisions of *The Dower Act,* which contemplate that legal consequences may result in some instances from a disposition by a married person of a homestead made in breach of s. 3, have no application where the disposition is not by way of transfer, but is a disposition by agreement for sale, lease, mortgage, encumbrance or other instrument that does not finally dispose of the interest of the married person in the homestead. Dispositions of this kind are expressly forbidden and there are no provisions in the Act which accord to them any validity, nor which would afford the non-consenting spouse any remedy in damages.

The effect of s. 3 upon an agreement for sale was considered by Estey J., giving the opinion of himself and Kerwin J. (as he then was), in *Pinsky v. Wass*[1]. He expressed the view that, under the general rule, a contract made in breach of a statutory prohibition would be void, but that, in the light of the provisions contained in ss. 4 and 12, contemplating the registration of a transfer, it was indicated that the Legislature intended that an agreement for sale made in breach of the prohibition should be voidable rather than void.

The other members of the Court did not express any opinion with respect to this point.

[1] [1953] 1 S.C.R. 399 at 405-406, 2 D.L.R. 545.

In 1958 the effect of s. 3 was again considered by this Court in relation to an agreement for sale, in *Meduk v. Soja*[1]. In that case a married woman, the registered owner of land, accepted an offer made to her to purchase the lands. Her husband did not consent in writing to the agreement. He was asked by the real estate agent, in the presence of the prospective purchasers, whether he would sign the agreement and said that he would not, since the property belonged to his wife and she could do what she pleased with it.

Cartwright J., who delivered the unanimous decision of the Court, said at p. 175:

> No doubt the acceptance by Bessie Meduk of the respondents' offer would have formed a contract if the property had not been the homestead, but, since it was so, the making of the agreement by her without the consent in writing of her spouse was expressly forbidden by s. 3(1) of the Act and unless John Meduk did consent in writing, her acceptance was ineffective to form a contract.

In my opinion the same reasoning applies in relation to a disposition of land by way of mortgage, which is made in breach of s. 3. Such a disposition is expressly forbidden by the statute. As previously pointed out, there is nothing in the statute which would purport to give such a disposition any validity whatever. The disposition in question here is, therefore, invalid, unless it is open to the appellant successfully to contend that it is entitled to succeed on the grounds of estoppel.

Whether the statutory requirement for a written consent to the disposition of a homestead could be released by estoppel is, I think, questionable (*Maritime Electric Co. Ltd. v. General Dairies Ltd.*[2]). However, as in the case of *Meduk v. Soja, supra,* I do not think it is necessary to determine the point in this case, because I do not find any evidence on which it could be said that there was any estoppel created in the present case which would preclude Hazel Kos from asserting her right to refuse consent to the mortgage.

The position is that the appellant registered a mortgage upon lands, which are now admitted to be homestead property, knowing that no consent had been given to its registration by the wife of the registered owner. Reliance was placed by the appellant on the affidavit purporting to have been

[1] [1958] S.C.R. 167, 12 D.L.R. (2d) 289.
[2] [1937] A.C. 610.

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taken by Jaroslaw Kos, stating that neither he nor his wife had lived on the land since their marriage, but no representation to that effect was made in such affidavit by Hazel Kos. It is clear that the purported signature of Hazel Kos to that affidavit could not have been made when the affidavit was sworn and that Froeland must have been fully aware of that fact. Furthermore, the name "Hazel Kos" was struck out from that affidavit attached to the mortgage and it must be presumed that it was struck out before the mortgage was registered.

The fact that Hazel Kos knew that her husband was applying for a loan on the garage, that she knew that her name had been placed on some documents by Vicki Kos and that about a year later she discovered her name, either on the mortgage form or on the agreement form, cannot be construed as any representation by her to the appellant that the lands covered by the mortgage were not the homestead of her husband.

I am extremely doubtful whether, upon the evidence adduced in this case, it would be possible to bring home to Hazel Kos actual knowledge, at any relevant time, that a purported affidavit had been made to the effect that the land in question had never been occupied since the marriage by either herself or her husband. The only basis upon which it can be suggested that she obtained any such knowledge would be the evidence as to her discovery, about a year after the mortgage was completed, among her husband's papers, of a paper that looked like a mortgage. That discovery was made at a time long after the last of the advances by the appellant had been made, so that, even if she did acquire that knowledge at that time, any representation which might be inferred from non-disclosure of that knowledge to the appellant did not cause it to act to its detriment in consequence thereof.

In any event, it is my view that the appellant has failed to establish the existence of any duty, as between Hazel Kos and itself, which would obligate her to make a disclosure to it of the circumstances which she discovered, even assuming that she then discovered the existence of what purported to be her husband's affidavit falsely stating that the lands had not been the residence of himself or her since their marriage. In the absence of such a duty, no estoppel can be established merely by remaining silent.

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In my opinion, therefore, the respondent Hazel Kos was properly entitled to set up, as against the appellant, the absence of any written consent given by her to a disposition of her husband's homestead by mortgage. The fact that the land was the homestead and that no written consent was given by her is fully established. Under these circumstances the mortgage executed in breach of s. 3 has no validity and the appellant's claim to enforce it must fail.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitors for the defendants, respondents: Dubensky & Hughson, Edmonton.

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*Nov. 19
Dec. 16

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

JOSEPH SEDGWICK ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Partnership—Advances to stock-broker for share of profits—Termination of agreement—Profit in respect of current fiscal year, not yet ended, set at negotiated amount—Whether negotiated amount income or capital receipt—Income Tax Act, R.S.C. 1952, c. 148, ss. 6(1)(c), 15(1), (2).

In 1949, the respondent and four others entered into an agreement with P to advance him funds with which to purchase a seat on the Toronto Stock Exchange and to provide working capital for his stock brokerage business. It was provided that the "lenders" would receive a percentage of the net profits of the business but no interest. The agreement further provided that no partnership should be deemed to be created. However, the trial judge held that a partnership was constituted, and this finding was not challenged before this Court.

As this agreement was in conflict with the rules of the Stock Exchange, it was terminated on February 1, 1956, two months before the end of the then fiscal year. P agreed to pay the lenders a sum of $550,000, made up of (1) the total of all advances, (2) the increase in value of the seat on the Exchange, (3) the share of the lenders in the cash surrender value of an insurance policy, (4) their share in the net profits of the

*PRESENT: Abbott, Martland, Judson, Hall and Spence JJ.

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business for the fiscal year ending two months hence and fixed at $300,000, and (5) a share in the goodwill of the business. The Minister sought to assess as profit from a partnership the respondent's share of the $300,000. The respondent argued that this amount was part of the consideration for the sale of his partnership interest and as such was a capital receipt. The assessment was confirmed by the Tax Appeal Board but was set aside by the Exchequer Court. The Minister appealed to this Court.

Held (Spence J. dissenting): The appeal should be allowed and the assessment restored.

Per Abbott, Martland, Judson and Hall JJ.: Under ss. 6(1)(*c*) and 15(1) and (2) of *The Income Tax Act*, R.S.C. 1952, c. 148, the respondent became liable to tax for the year 1956 in respect of his share of the partnership income (even though not withdrawn) for the fiscal period of the partnership which ended in 1956. That period ended when the partnership was terminated on February 1, but the partnership profits were determined by the agreement up to the end of the normal fiscal period ending March 31. There was no evidence to establish that his share of income was less than that established by the termination agreement. This agreement could not be construed as being one for the sale of interests in a partnership. It was rather an agreement for the winding-up of the partnership, which was necessitated by the rules of the Stock Exchange. In essence, the lenders withdrew from the business the capital value of that which they had provided in the form of capital assets and were paid out the profits which they had acquired out of the operation of the business. The respondent was therefore liable to income tax in respect of his share of the partnership profits.

Per Spence J., *dissenting:* Some of the amounts set out in the termination agreement were merely negotiated or estimated. The respondent never became entitled to receive any income from the operation of the partnership during the fiscal year 1956 because, by the termination agreement, the lenders conveyed to P all their rights to the profits for that year's operation and all the rights they had to any other assets of the partnership. The termination agreement was not a mere dissolution of the partnership but a sale by all the partners of their interests in all the partnership assets. The sale price must therefore be considered as a capital receipt and the same result applied even when the sale price was calculated by including as part thereof an estimate of the already earned but undistributed profits. It follows that no part of the purchase price should have been included in the respondent's income.

APPEAL from a judgment of Ritchie D.J. of the Exchequer Court of Canada[1], setting aside the respondent's assessment for income tax. Appeal allowed, Spence J. dissenting.

E. J. Cross and *P. M. Troop*, for the appellant.

Terence Sheard, Q.C., and *H. Sedgwick*, for the respondent.

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

[1] [1962] Ex. C.R. 337, 36 D.L.R. (2d) 97, 62 D.T.C. 1253.

MARTLAND J.:—On March 31, 1949, the respondent, along with four other parties, entered into an agreement with John Edward Purcell, pursuant to which they advanced funds to Purcell to enable him to purchase a seat on the Toronto Stock Exchange and to provide working capital for his stock brokerage business. It is conceded that the respondent's interest under this agreement was held by him on behalf of another person as to one-half of the respondent's interest, so that his actual interest was a one-tenth interest.

The advances made by the parties to the agreement (who were therein described as "the Lenders" and who will, for purposes of convenience, be thus described hereinafter) were described as being "by way of loan", but no interest was payable to them by Purcell. Instead, the agreement provided that each of the Lenders would receive a percentage of the net profits of the business. It was provided that Purcell should receive an annual payment for his services, plus 10 per cent of the net profits of the business. He agreed not to engage in any other business and to devote his whole time and attention to the business. He also agreed to obey all lawful directions of the Lenders in writing. He undertook to hold the Stock Exchange seat, and any other assets acquired by reason of the operation of the business, in trust for the Lenders.

By letter, dated March 31, 1953, to Purcell, the respondent agreed that the provisions with respect to the giving of directions to Purcell by the Lenders and the holding of his Stock Exchange seat in trust be deleted. Similar letters were written by the other Lenders. The reason for the deletion of these provisions was that they conflicted with the policy of the Toronto Stock Exchange.

One clause of the agreement provided that nothing in the agreement should be deemed to constitute the Lenders as partners in the brokerage business. However, the learned trial judge[1] has held that, notwithstanding this provision, a partnership was constituted by virtue of the provisions of the agreement and this finding was not challenged on the appeal to this Court. The appeal was argued on the basis that a partnership was created.

The business prospered and profits were earned in each year from 1950 to 1955 inclusive. In 1955, however, the

[1] [1962] Ex. C.R. 337, 36 D.L.R. (2d) 97, 62 D.T.C. 1253.

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Board of Governors of the Toronto Stock Exchange ruled that, as the Lenders were not actively engaged in the business, they could not take a share of the net profits of the business and the profit-sharing arrangement was required to be terminated by the end of that year.

In consequence of this, on February 1, 1956, a second agreement was made between Purcell and the Lenders or their successors in interest, referred to in this agreement as "the Creditors". It recited the ruling of the Board of Governors of the Toronto Stock Exchange and further, notwithstanding the letters regarding the deletions from the first agreement, recited that the Stock Exchange seat was held in trust for the Lenders. The agreement then went on to provide:

> 1. It is mutually agreed:
>
> (*a*) That to date the advances of money to Purcell by the Creditors amount to $112,500.
>
> (*b*) That the increase in the market value of the said seat on the Toronto Stock Exchange is fixed at $63,000.
>
> (*c*) That the share of the Creditors in the cash surrender value of the insurance policy is hereby fixed at $4,850.
>
> (*d*) That the share of the Creditors in the net profits of the business for the fiscal year ending March 31st, 1956, is hereby fixed at $300,000.
>
> (*e*) That the share to which the Creditors are entitled in the good will of the business is hereby fixed at $69,650.
>
> Total $550,000.

The agreement stated that the original agreement should be terminated by mutual consent, that the Creditors would no longer be entitled to share in the net profits of the business and that, as consideration for the termination of the original agreement, the giving up of their interest in the Stock Exchange seat and in the physical assets of the business and their right to share in the profits of the business, Purcell would pay to the Creditors a total amount of $550,000. Provision was then made for the terms of payment of this sum of $550,000. $150,000 was to be paid by Purcell by April 15, 1956. The balance of $400,000, until paid, was to carry interest at the rate of 10 per cent per annum, payable quarterly, the first such payment falling due on the last day of June 1956.

The respondent was assessed for income tax for the year 1956 in respect of the amount of $30,000, being his one-

tenth interest in the $300,000 referred to in para. (*d*) of cl. 1 of the agreement recited above.

The assessment was confirmed by the Tax Appeal Board but, on appeal, the Exchequer Court[1] held that, although the relationship between Purcell and the Lenders was that of partners, the real effect of the second agreement was that Purcell had agreed to purchase from the Lenders their interest in the partnership for a total consideration of $550,000. It was further held that this consideration must be regarded as a whole and that the recipients thereof would be in receipt of a capital payment. It was held that the fact that the consideration included an item associated with profits did not affect its character or quality.

The governing provisions of the *Income Tax Act*, R.S.C. 1952, c. 148, are the following:

> 6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year
>
> * * *
>
> (*c*) the taxpayer's income from a partnership or syndicate for the year whether or not he has withdrawn it during the year;
>
> 15. (1) Where a person is a partner or an individual is a proprietor of a business, his income from the partnership or business for a taxation year shall be deemed to be his income from the partnership or business for the fiscal period or periods that ended in the year.
>
> (2) Where an individual was a member of a partnership the affairs of which were wound up during a fiscal period of the partnership by reason of the death or withdrawal of a partner or by reason of a new member being taken into the partnership, for the purpose of subsection (1), the fiscal period may, if the taxpayer so elects, be deemed to have ended at the time it would have ended if the affairs of the partnership had not been so wound up.

Their effect is that income from a partnership must be included in a taxpayer's income for a taxation year, whether or not he has withdrawn it during that year. Such income in a taxation year is his share of the partnership income for the fiscal period ending in that year. If a partnership is wound up during a fiscal period by reason of the death or withdrawal of a partner, the taxpayer may elect to have the fiscal period of the partnership deemed to end at the time it would have ended if the partnership affairs had not been wound up.

Applying these provisions to the present case, the respondent would become liable to tax for the year 1956 in respect of his share of the partnership income (even though

[1] [1962] Ex. C.R. 337, 36 D.L.R. (2d) 97, 62 D.T.C. 1253.

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not withdrawn by him) for the fiscal period of the partnership which ended in 1956. That period ended when the partnership was wound up on the date of the second agreement, February 1, 1956, but the partnership profits were determined by the agreement itself up to the end of the normal fiscal period ending March 31, 1956. If the respondent were entitled to invoke subs. (2) of s. 15, that is the date at which the profits would be ascertained.

Unless he were able to establish that his income from the partnership was less than that established by the agreement, it would appear that he is liable for income tax in respect of it (*Johnston v. Minister of National Revenue*[1]). No evidence was led to establish that his share of income was less.

Counsel for the respondent contended that these profits were not taxable in the respondent's hands, but in the hands of Purcell, because the respondent, by the agreement, sold his interest in the partnership business to Purcell and the whole of the payment to which the respondent became entitled would be a receipt of capital. He submitted that the fact that the price was determined, in part, by the share of the Lenders in the partnership profits for the fiscal year ending March 31, 1956, does not alter the quality of the payment to be made to them by Purcell. He cited the statement of Lord Macmillan in *Van Den Berghs, Limited v. Clark*[2]:

> But even if a payment is measured by annual receipts, it is not necessarily itself an item of income. As Lord Buckmaster pointed out in the case of *Glenboig Union Fireclay Co. v. Commissioners of Inland Revenue* ((1922) S.C. (H.L.) 112): "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."

In my opinion this argument fails and I am unable, with respect, to agree with the conclusions reached by the learned trial judge because I cannot construe the agreement of February 1, 1956, as being one for the sale of interests in a partnership. It is rather an agreement for the winding-up of the partnership, which had been necessitated by the decision of the Board of Governors of the Toronto Stock Exchange. As a result of that decision, the Lenders were thereafter precluded from sharing in the profits of the business. That right they gave up in the agreement because they had been compelled to do so.

[1] [1948] S.C.R. 486, 4 D.L.R. 321, C.T.C. 195, 3 D.T.C. 1182.
[2] [1935] A.C. 431 at 442.

The agreement determined the amount of the advances by the Lenders to Purcell (out of which the seat on the Toronto Stock Exchange had been purchased), the increase in value of that seat, the cash surrender value of a certain insurance policy, the value of the goodwill of the business and the amount of the Lenders' share in the profits of the business for the year ending March 31, 1956. Purcell agreed to pay to the Lenders the total of those various amounts, and the $400,000 balance remaining after the payment of $150,000 is referred to in the agreement as a "loan", which bore interest as in the agreement provided. Essentially, therefore, the Lenders were withdrawing from the business the capital value of that which they had provided to it in the form of capital assets and were to be paid out the profits which they had acquired out of the operation of the business. The character of each of the items described in cl. 1 was not altered by the fact that they were totalled at the end of the clause.

This being so, in my opinion the respondent is liable to income tax in respect of his share of the partnership profits, as determined by cl. 1(*d*) of that agreement.

The appeal should be allowed and the assessment restored with costs both here and in the Exchequer Court.

SPENCE J. (*dissenting*):—I have read the reasons of my brother Martland herein and I wish to adopt his outline of the relevant facts.

The learned Exchequer Court Judge[1] found that the arrangement carried on between the Creditors and Mr. Purcell under the agreement of March 31, 1949 (ex. 1) was a partnership and neither party disputed that finding in this Court.

When the respondent was absent in England, his secretary, as was her usual course, made up his income tax return form T.1 General and a photostat copy thereof was filed as ex. A upon the trial before Ritchie D.J. in the Exchequer Court. In the schedule attached to the said income tax return there was shown in the recapitulation of income an item which read "Purcell invest. account, $32,000" and written opposite the words "Purcell investment account" are the words "T.20 in file of Jack Purcell". There was no explanation at the trial as to who endorsed

[1] [1962] Ex. C.R. 337, 36 D.L.R. (2d) 97, 62 D.T.C. 1253.

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the last mentioned memoranda on the form. The Minister of National Revenue issued a re-assessment notice to the respondent under date of March 5, 1958, adding to the tax assessment the sum of $697.57 plus $33 interest, a total of $728.57. The respondent filed notice of objection to that re-assessment under date of March 31, 1958, and in a "Statement of Facts and Statement of Reasons for Objection" attached thereto took the position for the first time that as to $30,000 of the sum of $32,000 referred to, *supra,* the respondent received on his own account only the sum of $15,000 and not $30,000, and that that receipt was a capital receipt and should not be taxed as income. It will be seen that the sum of $15,000 is 10 per cent of the sum of $150,000 which was, by virtue of the agreement of February 1, 1956, to be paid immediately to the "Creditors" and the respondent was entitled to 10 per cent of the amounts payable under that agreement.

The discussions preceding the execution of the agreement of February 1, 1956, are dealt with in the evidence of the respondent at trial. It should be noted that the respondent was the only witness called at the trial and therefore there is no denial of any evidence given by him. At p. 37, line 21, the respondent said:

> The agreement sets it out in detail as to how the $550,000 was reached.
>
> MR. CROSS: Do you remember the figure of $550,000 was reached; was there any audit of the books of Jack Purcell made?
>
> A. I don't remember if there was any audit but I do recall his auditor attended one or more than one meeting and gave some sort of estimate as to how much money would be there but I don't think he would be able to make an audit at the end of December because his year ended in March and no one would know what he would do. It was an indication, not an audit. It couldn't have been an audited figure—$300,000 is obviously an error—.
>
> Q. Had there been a quick audit by the Stock Exchange shortly before that?
>
> A. I don't know, I couldn't tell you. I know they do a sub-audit but I don't know—. I paid no attention to the business. I was in the office twice; once at Christmas time and—.
>
> Q. If the lenders were partners, you say they were not, and if they were, as partners, entitled to profits at the time the agreement of February 1st, 1956, was entered into, you do not dispute the amount of those profits would be $300,000?
>
> A. I don't dispute or deny.

Then, at p. 38, line 21:

> HIS LORDSHIP: And then on this seat, $30,000 profits for period. It does not show what period. I have the fixed impression from the evidence

I have heard that this was an end agreement in consideration of the lenders relinquishing any rights, any further right, for a negotiated settlement.

THE WITNESS: That was the point.

MR. CROSS: I think the $550,000—.

HIS LORDSHIP: The $550,000 made up of the other items I have mentioned, an amount of $112,500 and then the cash surrender value, the increase of the Stock Exchange seat and then those items total $150,000. Is that right?

THE WITNESS: Yes, my lord, you put it perfectly and that is the situation. It was an end agreement and the figure of $300,000 may, for all I know, bear some relation to some profit that had been earned but it was an agreed on figure, it is not an accounting figure.

HIS LORDSHIP: I think it is a negotiated figure.

THE WITNESS: A negotiated figure.

I have come to the conclusion that some of the amounts set out in para. (1) of the agreement of February 1, 1956, which total $550,000 must have been on the basis of negotiation or estimate. Paragraph (*a*), the advances made by the Creditors to Mr. Purcell, $112,500, is a fixed and easily ascertainable item. Paragraph (*b*), the increase in the market value of the seat on the Toronto Stock Exchange, $63,000, can only be an estimate or judgment of what the seat would be worth if it had been sold on the market on that day. Such an estimate might well be based on the last similar sale of such a seat but the estimate might be higher than or lower than the amount of the sale price in the last previous sale depending on the difference in stock market conditions between the date of the last previous sale and February 1, 1956. Paragraph (*c*), the share of the Creditors in the cash surrender value of the insurance policy, ($4,850) is, of course, a figure which could be ascertained exactly. Paragraph (*d*), the one in question in this appeal and which reads "That the share of the Creditors in the net profits of the business for the fiscal year ending March 31, 1956, is hereby fixed at $300,000" must be considered in the light of the evidence given at trial part of which has been set out above. There was no division of profits during the course of a fiscal year in this partnership and there was no audit which would enable anyone to say with any exactness what the profits would be at the end of the fiscal year March 31, 1956. One need only consider the nature of the business of the partnership to understand how inaccurate an estimate might be of the profits for the year when that estimate was made two full months prior to the end of the fiscal year.

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In a stock brokerage business those two final months might have been disastrous so that the profits could have been reduced drastically or they may have been very profitable so that the profits would far exceed the estimate. It would appear, from one question put to the respondent upon the trial, that the profits actually much exceeded the figure of $300,000. The share of the goodwill to which the Creditors were entitled, $69,650, again illustrates the negotiated or estimated character of the various items set out in these paragraphs as no one could put an exact amount to include a $50 item, upon such a nebulous asset as goodwill. It is quite evident that para. (*a*), the advances, and (*c*), the cash surrender value of the insurance policy, were the only fixed amounts in the calculation and that the other three paras. (*b*), (*d*) and (*e*) were all negotiated or estimated figures to reach the total of $550,000. The Minister has assessed the tax upon the item of $30,000 as being profits to which the respondent was entitled for the operation of the business in the fiscal year ending March 31, 1956, and which would eventually have been paid to him apart from the agreement made on February 1, 1956. The Minister relies on s. 6(*c*) of the *Income Tax Act*, R.S.C. 1952, c. 148, and s. 15(1) and (2) of the said statute. Certainly, if the respondent had or was entitled to receive an income from the operation of this partnership in the year 1956, he must pay tax upon that income. The position, however, of the respondent is that he never did become entitled to receive any income from the operation of the partnership during the fiscal year 1956, because on February 1, 1956, by the agreement of that date he and his fellow Creditors conveyed to Mr. Purcell all of their rights to the profits for that year's operations and all the rights they had to any other assets of the partnership.

By para. 2 of the said agreement:

> It is further agreed that the Original Agreement shall be terminated by mutual consent of the Parties hereto for the reasons set out in the third recital hereof, and that the Creditors shall no longer be entitled to share in the net profits of the business. As consideration for the Creditors terminating the Original Agreement and giving up their interest in the Stock Exchange seat, and in the physical assets of the business as aforesaid, Purcell covenants and agrees to pay to each of the Creditors the amount

set opposite his name below, totalling in all $550,000, payable at the times hereinafter set forth:

I am of the opinion that what the Creditors and Mr. Purcell accomplished by the agreement (ex. 3) dated February 1, 1956, was not a mere dissolution of the previously existing partnership but a sale by all of the partners except Purcell of their interests in all of the partnership assets to Purcell. I am of the opinion that a dissolution of a partnership necessarily implies a division of the assets of the partnership, after payment of its creditors, amongst the partners in proportion of their respective shares in the partnership. In the present case, there was no attempt at realization of the partnership assets and no division of the assets either by money or in specie between the former partners who were designated in the said agreement (ex. 3) as Creditors, nor does there seem to have been even an accurate evaluation of those assets. The business of the partnership was carried on exactly as before by Mr. Purcell who had been prior to that date the manager and one of the partners of the partnership business and who thereafter became the sole proprietor subject to the payment of the unpaid portion of the purchase price. It is true that this purchase price was arrived at by taking the actual value of some of the partnership assets and an estimate of the monetary value of other of the partnership assets but this was merely a method of calculating a sale price. I am therefore of the opinion that the recital of the sum of $300,000 as being the fixed share of the Creditors in the net profits of the business for the fiscal year ending on March 31, 1956, is merely a recital of how one of the items used to determine the sale price was arrived at.

It would appear from three cases that such a device for the calculation of a purchase price cannot change the fact that the actual price calculated and paid was a capital receipt and not receipt of income. In *Glenboig Union Fire Clay Co. v. The Commissioners of Inland Revenue*[1], the House of Lords was dealing with a transaction whereby a railway company paid to the taxpayer the sum of £15,316 as compensation for their foregoing the right to remove clay from certain of their lands adjacent to the line of the railway company. It was said and not disputed that that amount was assessed by considering that the fire clay to

[1] [1922] S.C. (H.L.) 112.

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which it related could be worked only for some two and a half years before it would be exhausted and that the amount represented the actual profit for two and a half years had the fire clay been worked, which was, under the agreement, received in one lump sum, and that therefore the amount should be treated as profits. Lord Buckmaster said, at p. 115:

> It is unsound to consider the fact that the measure adopted for the purpose of seeing what the amount should be was based on considering what were the profits that would have been earned. That no doubt is a perfectly exact and accurate way of determining the compensation, for it is now well settled that the compensation payable in such circumstances is the full value of the minerals that are to be left unworked, less the cost of working, and that is of course the profit that would be obtained were they in fact worked. But there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test. I am unable to regard this sum of money as anything but capital money, and I think therefore it was erroneously entered in the balance-sheet ending 31st August 1913 as a profit on the part of the Fireclay Company.

It is true that decision dealt with the foregoing of profits which were to be earned in the future by a lump sum payment while the present case deals with forgoing profits which were payable in the future although jointly earned in the past. But again I stress that on February 1, 1956, neither the respondent nor any of his fellow Creditors were entitled to any profits and that the $300,000 was only an estimate of what had been earned during the past 10 months and would have been earned during the following two months.

Rutherford v. Commissioners of Inland Revenue[1] dealt with the situation where on October 31, 1921, one partner who had been entitled to 18/64ths of the profits of a partnership retired and on December 7, 1921, by agreement it was provided that the retiring partner should receive £1,500 "in full settlement of his whole share and interest in the profits of the firm for the year ending the 31st of December 1921" and further decreasing amounts in subsequent years. The remaining partner who up to October 31, 1921, was entitled to 36/64ths of the profits attempted to take the sum of £1,500 which was payable to the retiring person from the

[1] (1926), 10 Tax Cas. 683.

firm's profits before his own share was calculated for taxation. The learned President, Clyde, said at p. 692:

> The sum of £1,500 was made payable to the retiring partner independently of what might turn out to be the profits actually made in the current year, either as a whole, or during that part of it which preceded the date of dissolution. It was nothing but the consideration in respect of which the retiring partner gave up any right he might have had in the profits made in that part of the year; and it would have remained a debt due to him by the remaining partners, personally, even if no profits at all had been shown on a balance struck by the remaining partners—whether at the date of dissolution or at the end of the current year.

And at p. 693:

> (2) The sum of £1,500 was not a share of those profits but the price or consideration paid by the remaining partners for a discharge of any claims on the part of the retiring partner to participate in them.

Lord Blackburn said at p. 697:

> The fair construction of the agreement does not appear to me to provide any justification for treating this sum as a charge upon the profits. In my opinion, it must be regarded as a price paid to the retiring partner for his share in the profits and a sum for which the remaining partners remained liable irrespective altogether of what the profits of the firm for the year might prove to amount to.

It may be noted that that decision dealt only with payment for an agreement to forgo a share of profits to which the taxpayer would become entitled in the future, such profits having been earned in the past, while in the present case, the sum of $550,000 payable to the Creditors was for the discharge of not only the Creditors' rights to the profits which would, on March 31, 1956, be determined as having been earned in the fiscal year at that time, but to release all of the Creditors' other claims to partnership assets, and the $300,000 (item (*d*)) was merely one of the items included in the calculation to arrive at the said sum of $550,000. I am of the opinion, therefore, that the facts in the present case are more favourable to the contention of the respondent than were those in *Rutherford v. Commissioners of Inland Revenue.*

In *Van Den Berghs, Ltd. v. Clark*[1], the House of Lords considered a payment of £450,000 by a Dutch company to an English company made in the year 1927, to settle the claim of the English company, the appellant for a share in the profits of the Dutch company during the First War and

[1] [1935] A.C. 431.

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for the release of their right to a share in the profits which might be earned by the Dutch company in the years following and up to 1940. The English company had been entitled to those shares of profits up to the year 1940 under a series of agreements between the two companies. The appellant had, in calculating the amount it should claim in the arbitration to fix the amount due between the companies, worked out a sum of £449,042 which it alleged the Dutch company owed them already. The special commissioners held that the £450,000 was paid in respect of the pooling agreements and must be brought in for the purpose of arriving at the balance of the profits and gains of the appellant for the year ending December 31, 1927. Lord Macmillan said, at p. 442:

> But even if payment is measured by annual receipts, it is not necessarily itself an item of income. As Lord Buckmaster pointed out in the case of the *Glenboig Union Fireclay Co. v. Commissioners of Inland Revenue,* 1922 S.C. (H.L.) 112, 115, "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."

If the arrangement arrived at by virtue of the agreement of February 1, 1956, (ex. 3) is, as I have found it to be, a sale of partnership assets by the various partners to the continuing partner and included in those assets the right of the retiring partners to share in any profits of the partnership, either those which were earned before the agreement or those which would be earned thereafter, then I am of the opinion that the authorities quoted require the sale price to be considered as a capital receipt, and I am of the opinion that if, when the sale price was calculated by including as part thereof an estimate of the already earned but undistributed profits, the same result applies. Counsel for the Minister cited in reply the *Commissioner of Taxation v. Melrose*[1], a decision of the Supreme Court of Western Australia. That was an appeal from the decision of a magistrate of the Court of Review. Melrose was the owner of 4/7ths shares in a partnership operating a very large agricultural enterprise. The partnership agreement provided for the division of profits on June 30 annually. On June 24, 1920, Melrose delivered $\frac{1}{4}$th of his interest to each of three members of his family and then attempted to resist the claim of the Commissioner of Taxation for tax on the profits which

[1] (1923), 26 W.A.L.R. 22.

would be payable upon those 3/7ths interest. McMillan C.J. said, at p. 25:

> It seems to me that it is a very clear case. During the year in question considerable profits accrued, to which, when they had been ascertained, the present respondent would have been entitled. Those were the profits which he would have got from the business. But a few days before the time for taking the accounts he handed over portion of his share of the partnership profits to different members of his family. It seems to me that if profits have once accrued, as they did in this case, although the actual amount of them had not been ascertained, there is taxable income upon which the Commissioner is entitled to require the usual amount to be paid.

The decision of the Court does not cite any authority nor is any authority mentioned in the notes of the argument. The transfer of the shares to members of his family was evidently gratuitous. I am unwilling to accept this decision in view of the decision of the House of Lords in *Rutherford v. Commissioners of Inland Revenue,* and *Van Den Berghs Ltd. v. Clark, supra.* In my view, Mr. Purcell and the Creditors, i.e., his former partners, made an agreement whereby Purcell for a price, bought the physical assets of the partnership, and any rights which his partners might have in the future, whether that future be near or far, to obtain profits from the operation of the partnership business. The purchase price was a capital receipt and no part of it should have been included in the respondent's income. I would dismiss the appeal with costs.

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

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitors for the respondent: Johnston, Sheard, Johnston & Heighington, Toronto.

1963
*Dec. 16
Dec. 16

ROBERT J. WRIGHT, JOSEPH P. McDERMOTT AND VINCENT B. FEELEY ..... APPLICANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

MOTION FOR A REHEARING

Criminal law—Conspiracy to effect unlawful purpose—Obtaining from constable information which it was his duty not to divulge—Whether indictment disclosed an offence under Criminal Code—Criminal Code, 1953-54 (Can.), c. 51, ss. 103, 408(2)—The Ontario Provincial Police Act, R.S.C. 1960, c. 298—Rule 61 of the Supreme Court of Canada.

Following the dismissal of their appeal to this Court in June 1963, two of the appellants, M and F, applied for a rehearing of the appeal in December 1963. They argued that the indictment that they conspired to effect the unlawful purpose of obtaining from a constable of the Ontario Provincial Police information which it was his duty not to divulge, did not disclose an offence under the *Criminal Code* of Canada.

Held: Assuming that this Court had jurisdiction to entertain the application, it should be dismissed.

The purpose alleged in the charge was an unlawful purpose. The fact that the purpose or the breach of trust contemplated by the conspirators, whether as their ultimate aim or only as a means to it, could be, if carried into effect, punishable either under s. 103 of the *Criminal Code* or under s. 60 of the *Ontario Provincial Police Act*, manifested the unlawfulness of the purpose within the meaning of the law attending Common Law conspiracies.

APPLICATION by two of the appellants for a rehearing of this appeal following the judgment rendered by this Court[1]. Appeal dismissed.

C. Thomson, for the applicants.

C. Powell, contra.

The judgment of the Court was delivered by

FAUTEUX J.:—On June 24, 1963, this Court dismissed an appeal[1] entered by Robert J. Wright, Joseph P. McDermott and Vincent B. Feeley against their conviction on the following charge:

2. And further that the said Robert J. Wright, Joseph P. McDermott and Vincent Bernard Feeley between the 1st day of January, 1960 and the

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Judson and Hall JJ.

[1] [1963] S.C.R. 539.

1st day of July, 1960 in the Province of Ontario did unlawfully agree and conspire together to effect an unlawful purpose, to wit:

To obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408(2).

Some six months later, in December 1963, both McDermott and Feeley, purporting to be so entitled under rule 61 of the Rules of this Court, applied to this Court for an order granting a rehearing of the appeal on the ground that the above indictment did not disclose an offence under the *Criminal Code* of Canada. Having heard and considered the submissions of counsel for the applicants, the Court, indicating that reasons would later be delivered, declared that, assuming it had jurisdiction to entertain the application, the ground upon which it was made was ill-founded. The application was dismissed.

The charge is laid under s. 408(2) of the *Criminal Code* providing that:

> 408.(2) Every one who conspires with any one
> (*a*) to effect an unlawful purpose or,
> (*b*) to effect a lawful purpose by unlawful means,
> is guilty of an indictable offence and is liable to imprisonment for two years.

The argument made in support of the application is centred upon the meaning to be ascribed to the term "unlawful purpose". It was contended that the unlawful purpose contemplated in the section must be one which, if carried into effect, would constitute an act declared to be criminal by the *Criminal Code* of Canada and that, as the purpose alleged in the charge was made unlawful under s. 60 of *The Police Act,* R.S.O. 1960, c. 298, the charge did not disclose an offence under the *Criminal Code.* The case of *Regina v. Sommervill and Kaylich*[1] was particularly relied on.

While marginal notes in the body of an Act form no part of the Act, the marginal note appended to s. 408(2) accurately designates as "Common Law conspiracy" the offence described in this section which, as defined by Lord Denman in *Rex v. Jones*[2], consists in a combination "either to do an unlawful act, or a lawful act by unlawful means". Common Law conspiracy is one of the few Common Law offences which, upon the 1954 revision of the *Criminal*

[1] (1963), 2 C.C.C. 178.
[2] (1832), 4 B. & A. 345, 110 E.R. 485.

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Code, Parliament thought advisable to perpetuate by codification. Martin's Criminal Code 1955 ed., p. 35. Hence the law pertaining to this offence, its elements and the wide embracing import of the term "unlawful purpose", remains unchanged. While the term, as shown in Harrison The Law of Conspiracy, encompasses more than criminal offences, sufficient it is to say, for the purpose of this case, that the purpose alleged in the charge, to wit, the obtention from a constable of information which it is his duty not to divulge, is an unlawful purpose. In the language of Lord Mansfield, in *Rex v. Bembridge*[1]:

> A man accepting an office of trust concerning the public, especially if attended by profit, is answerable criminally to the King for misbehaviour in his office.

The fact that the purpose or the breach of trust contemplated by the conspirators, whether as their ultimate aim or only as a means to it, be, if carried into effect, punishable either under s. 103 of the *Criminal Code* (vide *Rex v. McMorran*[2]) or under s. 60 of the Ontario Provincial *Police Act,* adequately manifests the unlawfulness of the purpose within the meaning of the law attending Common Law conspiracies.

With deference, I am unable to agree with the decision rendered in *Regina v. Sommervill and Kaylich, supra,* and to accept as well founded the ground alleged in support of this application which, as indicated above, has been dismissed at the issue of the hearing.

Application dismissed.

1 (1783), 3 Doug. K.B. 327 at 332, 99 E.R. 679.
2 (1948), 5 C.R. 338 at 345 et seq., O.R. 384, 91 C.C.C. 19, 3 D.L.R. 237.

1963

*Nov. 8
Nov. 8

TAYLOR BLVD. REALTIES LTD., BELLEVUE HOUSING CORP., ALVYN DEVELOPMENT LTD., HYMAN BAER MILLER AND EARL GREENBLATT (*Petitioners*) APPELLANTS;

AND

THE CITY OF MONTREAL (*Defendant*) RESPONDENT.

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

Municipal corporations—Mandamus—Adoption of new zoning by-law—Vested rights of land owner—Whether entitled to indemnity—Charter of the City of Montreal, art. 300, para. 44(a), enacted in 1954-55, 3-4 Eliz. II, c. 52, art. 4(c)—Charter of the City of Montreal, art. 524, para. 2, enacted in 1959-60, 8-9 Eliz. II, c. 102—By-laws 1920 and 2414 of the City of Montreal.

In 1953 the appellants acquired a vacant emplacement in Montreal where the building of multifamily dwellings was permitted by the zoning by-law then in force. In 1958 the City adopted a by-law restricting to single-family dwellings the type of building that could be erected in the locality. In 1961 the appellants sought to resort to the procedure of arbitration provided for under para. 44(*a*) of art. 300 of the City Charter for the recovery of an indemnity for loss of vested rights. It was conceded that the appellants never obtained nor sought to obtain a building permit nor did they make any subdivision, opening of streets or similar works with respect to this land. It was argued by the City that the appellants had not been deprived of any vested rights. Upon the refusal of the City to appoint its own arbitrator, the appellants applied for a writ of mandamus. The trial judge dismissed the action, and his judgment was affirmed by the Court of Queen's Bench. The appellants appealed to this Court.

Held: The appeal should be dismissed.

The true import in para. 44(*a*) of the expression "having vested rights" or "droits acquis" could not be ascertained adequately without regard to the context, the nature, object and purpose of the enactment in which it appeared. The presence of this expression in the text would be superfluous had the Legislature considered sufficient for one to possess rights common to all "owners, tenants or occupants", to be entitled to an indemnity. The appellant's claim could not be entertained. *Canadian Petronina Ltd. v. Martin and Ville de St-Lambert,* [1959] S.C.R. 453, applied.

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

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

[1] [1963] Que. Q.B. 839.

1963

TAYLOR BLVD. REALTIES LTD. *et al.* *v.* CITY OF MONTREAL

Gordon F. Henderson, Q.C., and *J. Richard,* for the petitioners, appellants.

P. Casgrain and *J. P. Lamoureux,* for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—The facts giving rise to this litigation are simple and undisputed. In November 1953, appellants acquired a vacant emplacement on Dudemaine Street in the City of Montreal. At that time, the building of multi-family dwellings, two storeys in height, was there permitted under City by-law no. 1920. In June 1958, the City adopted by-law no. 2414 further restricting to single family dwelling units only the type of buildings that could be erected in the locality. Three years later, in May 1961, appellants, contending that the value of their vacant emplacement had been substantially reduced as a result of this new building restriction, sought to resort to the procedure of arbitration provided for under para. 44(*a*) of art. 300 of the City Charter for the recovery of the indemnity therein contemplated for loss of vested rights. Having appointed their arbitrator, they requested the City to appoint its own, and upon the refusal of the latter to do so, procured the issue of a writ of mandamus to compel the City to arbitrate.

Contested by the City, this action of the appellants was dismissed by a judgment of the Superior Court which, being appealed to the Court of Queen's Bench[1], was affirmed by a majority judgment. A further appeal entered in this Court was dismissed at the issue of the hearing, the Court indicating that reasons would later be delivered.

It was conceded that the City adopted By-Law 2414 in the public interest and that the appellants never obtained nor sought to obtain a building permit for this emplacement which they had bought with the intention to sell. It may be added that the record does not disclose any subdivision, opening of streets or similar works having been done by the appellants with respect to their land.

At the hearing, it was common ground that the only issue was whether, as contended for by the appellants and

[1] [1963] Que. Q.B. 839.

obviously denied by the respondent, the two Courts below erred in failing to find that appellants were, as a result of by-law 2414, deprived of any vested rights within the meaning of the term under para. 44(*a*) of art. 300 of the City Charter.

Article 300 of the Charter enables the City to make by-laws. As it stood, prior to the date of acquisition of appellants' emplacement, art. 44(*a*) thereof authorized the City:

> To regulate the kind of buildings that may be erected on certain streets, parts or sections of streets or on any land fronting on any public place or park; to compel the proprietors or constructors of buildings, hereafter erected, containing ten stories or more, to reserve an adequate space as a garage for the use of the occupants of such buildings; to determine at what distance from the line of the streets, public places or parks the houses shall be built, provided that such distance shall not be fixed at more than twenty-five feet from the said line, or to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on said land fronting on any public place or park, saving the indemnity, if any, payable to the proprietors, tenants or occupants of the buildings now built or being built or who have building permits, which indemnity shall be determined by three arbitrators, one to be appointed by the city, one by the proprietor, tenant or occupant interested and the third by the two former and, in default of agreement, by a judge of the Superior Court; and the city shall have the right to pass a by-law to compel every proprietor to have an opening made in the outer door of his house or houses, even those already built, to enable the postman to insert the mail;

The provisions of this section were replaced, on February 22, 1955, by the following:

> To classify buildings and establishments; to divide the municipality into zones, whose number, shape and area seem suitable; to regulate and restrict differently according to the location in such zones, parts or sections of certain zones or in certain streets, parts or sections of certain streets or at any place whatsoever, the use and occupation of lands, the kind, destination, occupation and use of buildings which may be erected as well as the maintenance, reconstruction, alteration, repair, enlargement, destination, occupation and use of buildings already erected, saving the indemnity, if any, payable to the owners, lessees or occupants, having vested rights, which indemnity must be determined by three arbitrators, one to be appointed by the city, one by the interested party and the third by the two former and, in default of agreement, by a judge of the Magistrate's Court, to prescribe the area of lots, the proportion thereof which may be occupied by the buildings, the number of parking units which are to be laid out, the space to be left between the buildings and between the buildings and the line of streets, lanes, public places or parks, to prohibit any construction, reconstruction, alteration, repair, destination, occupation and any enlargement and usage not in conformity, to have them cease and even provide for the demolition of the construction;

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TAYLOR BLVD. REALTIES LTD. *et al.* *v.* CITY OF MONTREAL

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The wording of the two texts differs in that the words ". . . saving the indemnity, if any, payable to the proprietors, tenants or occupants of the buildings now built or being built or who have building permits . . .", appearing in the former, have been replaced, in the latter, by the words ". . . saving the indemnity, if any, payable to the owners, lessees or occupants, having vested rights . . ." This difference, it was argued, evidences an intention of the Legislature to enlarge the group of persons entitled to an indemnity to all those whose vested rights are injuriously affected. With deference, I fail to appreciate the relevancy of this submission to solve the question in issue which is centred on the effect to be given to the expression "having vested rights" or, as it appears in the French version, "*ayant des droits acquis*". Whatever be generally the meaning of the term "vested rights" or "*droits acquis*", the true import, in art. 44(*a*), of the expression "having vested rights" or "*ayant des droits acquis*" cannot be ascertained adequately without regard to the context, the nature, object and purpose of the enactment in which it appears. In the context, this expression qualifies the words "owners, tenants or occupants". As held by Taschereau J., with the concurrence of Tremblay C.J. and Rivard J., the presence of this expression in the text would be superfluous had the Legislature considered sufficient for one to possess rights common to all "owners, tenants or occupants", to be entitled to an indemnity. The extent to which such rights, as those invoked by appellants in the circumstances of this case, are affected by legislation of a nature and having an object and purpose substantially similar to art. 44(*a*) has often been considered by the Courts. To admit appellants' claim to an indemnity would be disregarding virtually the general principles attending such legislation. These general principles were particularly formulated by the Judicial Committee of the Privy Council in *Toronto Corporation v. Roman Catholic Separate Schools Trustees*[1], and recently applied by this Court in *Canadian Petrofina Limited v. Martin and Ville de Saint-Lambert*[2].

Appellants' claim to an indemnity could not be entertained. And as above indicated, their appeal against the

[1] [1926] A.C. 81, [1925] 3 D.L.R. 880.
[2] [1959] S.C.R. 453, 18 D.L.R. (2d) 761.

dismissal of their action was, at the issue of the hearing, dismissed with costs.

Appeal dismissed with costs.

Attorneys for the petitioners, appellants: Louis & Berger, Montreal.

Attorneys for the defendant, respondent: Parent, McDonald & Mercier, Montreal.

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TAYLOR BLVD. REALTIES LTD. *et al.* *v.* CITY OF MONTREAL

Fauteux J.

LOUIS JARRY .....APPELANT;

-ET-

LE MINISTRE DU REVENU NATIONAL ..INTIMÉ.

1963

*Oct. 31
*Nov. 31
Dec. 19

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA

Taxation—Impôt sur le revenu—Notaire en association avec contracteurs—Achat et vente de terrains—Placement de capital ou à titre spéculatif—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 4, 46(6), 139(1)(e).

En 1953 l'appelant, un notaire, a acheté en société avec deux contracteurs un terrain avec, dit-il, l'intention de construire un centre d'achats. Il était depuis plusieurs années engagé à de nombreuses transactions immobilières. Vu les difficultés de financer leur projet, les associés ont vendu une partie du terrain en 1955 à une compagnie qui a par la suite construit un centre d'achats sur le site. L'appelant, ayant acquis de ses associés une partie du résidu de la propriété, en revendit une partie en 1955. Il prétendit qu'il avait eu l'intention de construire une taverne sur ce site. De ces deux ventes, l'appelant a réalisé des profits respectifs de $69,406.93 et $24,603. Le Ministre, par la méthode dite de conciliation de capital, a ajouté ces deux montants au revenu imposable de l'appelant pour les années 1953, 1954 et 1955. C'est la prétention de l'appelant que ces montants étaient des gains en capital. La Cour de l'Échiquier a conclu qu'il s'agissait d'une entreprise ayant un caractère spéculatif. D'où le pourvoi devant cette Cour.

Arrêt: L'appel doit être rejeté.

La preuve au dossier justifiait la Cour de l'Échiquier de conclure qu'en achetant le terrain en question, l'appelant était indifférent à l'utilisation ou, alternativement, à la vente éventuelle de ce terrain en tout ou en partie, et que la spéculation avait été le facteur déterminant son acquisition. Les profits réalisés par l'appelant étaient donc imposables.

Taxation—Income—Notary in partnership with builders—Purchase and resale of land—Whether capital gain or income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 46(6), 139(1)(e).

*CORAM: Le Juge en Chef Taschereau et les Juges Fauteux, Martland, Judson et Hall.

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In 1953 the appellant, a notary, purchased in partnership with two builders a parcel of land with the alleged intention of building a shopping centre. He had frequently before engaged in real estate transactions. The difficulties of financing the project forced them to sell part of the property in 1955 to a company which later constructed a shopping centre on the site. The appellant, having acquired from his associates part of the remainder of the property, resold part of it, also in 1955. He claimed that he had intended to build a tavern on that site. The appellant realized profits of $69,406.93 and $24,603 respectively on the two sales. The Minister, using the method of capital reconciliation, added these two amounts to the appellant's income for the years 1953, 1954 and 1955. The appellant contended that they were capital gains. The Exchequer Court held that the appellant had engaged in a scheme of profit making. The appellant appealed to this Court.

Held: The appeal should be dismissed.

The evidence justified the trial judge's conclusion that, when acquiring the land in question, the appellant was indifferent as to its use or, alternatively, as to its eventual sale, and that speculation was the determining factor in the acquisition. The profits realized by the appellant were therefore taxable as income.

APPEL d'un jugement du juge Kearney de la Cour de l'Échiquier du Canada[1], confirmant la cotisation de l'appelant pour impôt sur le revenu. Appel rejeté.

H. Paul Lemay, C.R., pour l'appelant.

Paul Boivin, C.R., pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Par jugement du 14 juillet 1961, la Cour de l'Échiquier[1] disposa d'un appel logé par l'appelant à l'encontre des cotisations d'impôt sur le revenu établies par l'intimé pour les années d'imposition 1953, 1954 et 1955. Donnant effet à l'admission écrite, faite par l'intimé à l'ouverture de l'enquête, qu'il y avait eu erreur au bilan préparé lors de l'établissement de la réconciliation du capital, la Cour maintint l'appel pour autant, avec dépens, contre l'intimé jusqu'à la production de cette admission mais rejeta cet appel quant aux autres item non couverts par l'admission, et ce avec dépens contre l'appelant. Le présent appel est de cette dernière partie du jugement.

Le point en litige est de savoir si un profit de $69,406.93 et un profit de $24,603 réalisés par l'appelant lors de la vente d'une partie du lot 122 à Ivanhoe Corporation

[1] [1961] C.T.C. 402, 61 D.T.C. 1239.

et d'une autre partie du même lot à Léon Jeannotte, respectivement, doivent être considérés comme revenus imposables au sens des dispositions des arts. 3(*a*) et 139(1)(*e*) de la *Loi de l'impôt sur le revenu*, R.C.S. 1952, c. 148, ainsi qu'il fut jugé par M. le Juge Kearney de la Cour de l'Échiquier.

En somme, l'appelant a-t-il fait l'acquisition des terrains dont parties devinrent l'objet de ces ventes, à titre de placement de capital, comme il le prétend, ou à titre spéculatif, comme le soumet l'intimé? C'est là une question de fait à déterminer suivant la preuve au dossier; chaque cause où une telle question se présente étant une cause d'espèce. *Sutton Lumber and Trading Company Limited v. Minister of National Revenue*[1].

Il n'y a pas lieu de reprendre ici la revue minutieuse de la preuve apparaissant aux raisons de jugement de M. le Juge Kearney. Cette preuve manifeste particulièrement que l'appelant, notaire, homme d'affaires très averti, était, depuis plusieurs années, engagé à de nombreuses transactions immobilières et ce dans la région même où sont situés les immeubles précités, qu'en raison particulièrement des fonctions publiques qu'il exerçait dans cette région, il avait une grande connaissance des expectatives d'accroissement de valeur des immeubles de l'endroit. Au regard de toutes les circonstances révélées par la preuve, le Juge au procès est arrivé à la conclusion qu'en achetant les terrains en question, l'appelant était indifférent à l'utilisation ou, alternativement, à la vente éventuelle de ces terrains ou de parties d'iceux, et que la spéculation était le facteur déterminant leur acquisition. Aussi bien le Juge rejeta-t-il la prétention de l'appelant que, relativement aux parties vendues de ces terrains, il entendait, contrairement à ce qui avait été le cas dans ses autres transactions immobilières, faire un placement de capital. La preuve au dossier justifie l'opinion à laquelle le savant Juge s'est arrêté sur les faits et l'application en droit des principes supportant la décision de cette Cour dans *Regal Heights Limited v. Minister of National Revenue*[2].

Pour les raisons exprimées au jugement *a quo*, je rejetterais l'appel avec dépens.

[1] [1953] 2 R.C.S. 77, 4 D.L.R. 801, C.T.C. 237, D.T.C. 1158.
[2] [1960] R.C.S. 902, C.T.C. 384, 60 D.T.C. 1270, 26 D.L.R. (2d) 51.

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Appel rejeté avec dépens.

Procureurs de l'appelant: Lemay, Martel, Poulin & Corbeil, Montreal.

Procureur de l'intimé: E. S. McLatchy, Ottawa.

1963

*Nov. 26
Dec. 16

METCALFE TELEPHONES LIMITED ..APPELLANT;

AND

WALTER J. McKENNA AND THE BELL TELEPHONE COMPANY OF CANADA ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Public utilities—Telephone company—Order by Transport Board to provide service—Area not served by Bell Telephone Company—Absence of jurisdiction—An act respecting the Bell Telephone Company of Canada, 1902 (Can.), c. 41, s. 2—The Railway Act, R.S.C. 1952, c. 234, s. 33.

The respondent lived on the south side of a road served by the appellant company. The Bell Telephone Company served the north side of that road. The respondent was granted an order by the Transport Board directing the Bell Telephone Company to provide him with telephone service. The appellant was granted leave to appeal to this Court.

Held: The appeal should be allowed and the order of the Board set aside.

Under s. 2 of *An Act respecting the Bell Telephone Company of Canada*, 1902 (Can.), c. 41, the Transport Board could require the Bell Telephone Company to serve all persons within a territory "within which it gave a general service". It was not intended that it could impose a requirement upon the Bell Telephone Company to extend its services into new areas or to enter a territory already served by another telephone company. The evidence in this case disclosed that the general service provided in that territory in which the respondent lived, was provided by the appellant. Consequently, the respondent did not come within the section of the Act and the Transport Board was without jurisdiction to make the order.

APPEAL by leave from an order of the Transport Board. Appeal allowed.

J. P. Nelligan, for the appellant.

No one appearing for the respondents.

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*PRESENT: Taschereau C.J. and Abbott, Judson, Ritchie and Spence JJ.

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METCALFE TELEPHONES LTD. v. MCKENNA et al.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from an Order of the Board of Transport Commissioners for Canada made under s. 33 of the *Railway Act,* the Assistant Chief Commissioner dissenting, which ordered the Bell Telephone Company of Canada to give telephone service to the respondent Walter J. McKenna.

Before the Transport Board the Bell company denied that it was obliged to give service to Mr. McKenna, the reasons given being the same as those relied upon by the appellant in this appeal. Although entered as a respondent, the Bell company takes the position that it has no reason to oppose the appeal but on the contrary that it is in agreement with the position taken by the appellant Metcalfe Telephones Limited (formerly The Metcalfe Rural Telephone Company Limited), a rural telephone company incorporated under the laws of Ontario.

The facts are not in dispute. The respondent McKenna resides on the south side of Edwards Road which at that point is the dividing line between the townships of Gloucester and Osgoode in the County of Carleton. Mr. McKenna's residence is in the Township of Osgoode. The Metcalfe company has a telephone line running along the south side of Edwards Road in the township of Osgoode which passes the McKenna residence. The Bell company has a line on the opposite (the north) side of Edwards Road in Gloucester Township. The respondent McKenna can be served by the Metcalfe company and it is ready to serve him. An agreement exists between the Bell company and the Metcalfe company dated December 21, 1951, which was approved by the Transport Board on February 26, 1952, providing for an interchange of services and which contains the following clause:

> Neither company shall enter into competition with the other, except as may be agreed upon in writing, but nothing in this agreement shall be deemed or construed to prevent the Bell Company from accepting application for direct connection from any other system already connected with and forming part of the system of the Connecting Company, and entering into an agreement for such purpose.

On August 8, 1962, the respondent McKenna applied to the Transport Board for an Order directing the Bell company to provide him with telephone service. After

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Abbott J.

correspondence with the parties (an oral hearing having been waived) the Board on May 1, 1963, issued the Order requested. The present appeal, by leave, is from that decision.

The jurisdiction of the Board to make the Order complained of, depends upon the interpretation and effect of s. 2 of c. 41 of the Statutes of Canada 1902, entitled *"An Act respecting the Bell Telephone Company of Canada"*. It reads as follows:

> Upon the application of any person, firm or corporation within the city, town or village or other territory within which a general service is given and where a telephone is required for any lawful purpose, the Company shall, with all reasonable despatch, furnish telephones, of the latest improved design then in use by the Company in the locality, and telephone service for premises fronting upon any highway, street, lane, or other place along, over, under or upon which the Company has constructed, or may hereafter construct, a main or branch telephone service or system, upon tender or payment of the lawful rates semi-annually in advance, provided that the instrument be not situate further than two hundred feet from such highway, street, lane or other place.

In my opinion the purpose of this section is clear. That purpose is to require the Bell company to serve all persons within a territory "within which a general service is given" by Bell, who comply with the other requirements of the section. It is not intended to impose a requirement upon the Bell company to extend its services into new areas or to enter a territory already served by another telephone company. On this point I adopt the following statement of the Assistant Chief Commissioner in his written reasons:

> By its nature a public utility usually operates in an area or territory in which it alone provides the service. This is the area or territory in which its general service is given. The boundaries may be clearly defined but usually they are not.
>
> A customer, consumer or subscriber in such an area (with very few exceptions) cannot elect by which utility he will be served. He has available to him only the services provided by the utility giving general service in the area. Hence the reason for much legislation to protect him.
>
> Instances have occurred in the past where rivalries have arisen between utilities to serve certain areas with resulting intrusion by one utility into the territory served by another.
>
> At the time of the passage of the amendment of 1902 (with which we are concerned), the pattern of utilities providing a general service in a particular territory was well established. At that time there were in the Provinces of Quebec and Ontario many private and municipal telephone systems.

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In my opinion, the wording of the 1902 amendment recognized the necessity of one telephone system only providing a general service in any one city, town or village, or in any one territory or service area.

The material in the record shows that general telephone service in Osgoode Township is provided by the Metcalfe company although, about its perimeter, portions of the township are served by Bell. Nevertheless the general service that is provided in the major portion of the said township—and more particularly in that portion in which Mr. McKenna resides—is provided by appellant.

In my opinion, therefore, the respondent McKenna does not come within s. 2 of the statute II Ed. VII, c. 41, as being a person within a territory in which general telephone service is furnished by the Bell company. It follows that the Transport Board was without jurisdiction to make the Order which it did.

The appeal should be allowed and the Order of the Board of Transport Commissioners for Canada dated May 1, 1963, set aside. Counsel for appellant agreed that there should be no order as to costs.

Appeal allowed; no order as to costs.

Solicitor for the appellant: J. P. Nelligan, Ottawa.

1963

*Oct. 1
Oct. 1

G. A. FALLIS AND D. M. DEACON (*Appellants*) ..... } APPLICANTS;

AND

UNITED FUEL INVESTMENTS, LIMITED ..... } RESPONDENT.

MOTION TO VARY JUDGMENT

Costs—Practice and procedure—Companies—Petition for winding-up order—Discretion to grant order—Unsuccessful opposition by preference shareholders—Disposition of costs.

Following the judgment of this Court, dated June 24, 1963, and reported at [1963] S.C.R. 397, dismissing the appeal with costs, the applicants applied for an order varying the judgment as to costs. This application was heard on October 1, 1963, and it was then ordered that the judgment be varied so that there would be no order as to costs in this Court and in the Courts below.

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

1963

FALLIS AND DEACON v. UNITED FUEL INVESTMENTS LTD.

Application by the appellant to vary the judgment of this Court as to costs. Application granted without costs.

B. A. Kelsey, for the applicants.

D. J. Wright, for the respondent.

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*Oct. 28

1964

Jan. 28

BARBARA MURRAY BATER AND FRANCES LYNNE BROCK, as Executrices of the will of the late George Benjamin Gordon Bater, and the said BARBARA MURRAY BATER *(Plaintiffs)* ..... APPELLANTS;

AND

ISAAC KARE *(Defendant)* .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Suretyship—Co-sureties—Agreement as to payment of company's indebtedness—Payment by one surety—Claim for contribution dismissed.

B and K entered into an agreement under the terms of which they were to associate themselves together in a company to carry on the business of livestock commission buying. K advanced $50,000 to the company pursuant to para. 7 of the agreement and B deposited certain life insurance policies with the Royal Bank pursuant to para. 6, under which B agreed to "give such security as may be required by the Royal Bank . . . to enable the said company to borrow from said bank from time to time as may be required such sum or sums not exceeding in the aggregate at any time $50,000." In addition to this security the bank required written guarantees and postponements of claims from both B and K. These were signed and given to the bank, each guarantee being limited to $50,000. The bank later increased the company's line of credit to $80,000, and B and K each signed separate forms of guarantee in favour of the bank for that amount.

K subsequently withdrew from the company; the amount standing to his credit ($29,850) was transferred to the credit of B and all shares held by K and his wife were transferred to B. The consideration passing from B to K was agreed at $29,850 and a mortgage to K to secure payment of this amount was signed by B and his wife. B continued to carry on the business until his death. He and his estate paid to the bank a total of approximately $60,000, being the balance of the company's indebtedness.

The plaintiffs, executrices of B's will, asked that the mortgage from B to K be set aside *in toto* and alternatively that it be set aside as against B's

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

wife, and claimed $29,517.10 by way of contribution being one-half of the amount claimed to have been paid to the bank pursuant to B's guarantee. The trial judge dismissed the claim as to the mortgage but allowed the claim for contribution. K appealed to the Court of Appeal and the plaintiffs cross-appealed. The appeal was allowed and the cross-appeal dismissed. The plaintiffs then appealed to this Court.

Held: The appeal should be dismissed.

The claim to set aside the mortgage failed on the facts as to which there were concurrent findings in the Courts below, that there was good consideration, that there was no misrepresentation made to B's wife and that no undue influence was exercised.

The claim for contribution also failed. Co-sureties were free to agree as to the proportions in which as between themselves they should contribute or that one of them should pay the whole amount. Such an agreement would not affect the right of the creditor to whom they were bound to claim against any one or more of them as he saw fit, but it would be binding as between the sureties. The agreement in question obligated B to pay the first $50,000 of the liability of the company to the bank for which he and K were both sureties. Nor were the appellants entitled to contribution as to the $9,034.21 paid by B and his estate in excess of the $50,000. From the date of K's withdrawal from the company, as between B and K, the whole benefit resulting from the suretyship was B's. The rule that the one who gets the whole benefit must bear the whole burden was equally applicable in equity as at common law, and was applicable to and decisive against the appellants' claim for contribution in regard to the sum of $9,034.21.

APPEAL from a judgment of the Court of Appeal for Manitoba allowing an appeal and dismissing a cross-appeal from a judgment of Bastin J. Appeal dismissed.

A. S. Dewar, Q.C., and *R. R. Brock,* for the plaintiffs, appellants.

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

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba allowing an appeal and dismissing a cross-appeal from a judgment of Bastin J. In the result the action of the plaintiffs was dismissed *in toto.*

For some time prior to the year 1956 the late George Benjamin Gordon Bater, hereinafter referred to as "Bater" had been employed by others in the business of livestock commission buying. In that year he decided to go into business for himself. The respondent, who had been in the horse business for many years, had substantial financial resources.

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BATER *et al.* v. KARE

Cartwright J.

On October 1, 1956, Bater, as party of the first part and Kare as party of the second part entered into an agreement under the terms of which they were to associate themselves together in a company to be incorporated under the name of G. B. Bater Agencies Ltd., hereinafter referred to as "the company", to carry on the business of livestock commission buying at the Union Stock Yards in St. Boniface, Manitoba. This agreement provided that the authorized capital of the company should be $50,000 divided into 1,000 Class "A" common shares of $1 each, 1,000 Class "B" common shares of $1 each and 480 redeemable preference shares of $100 each and that Bater should subscribe for 600 Class "A" common shares and Kare for 600 Class "B" common shares. This was done in due course and apparently no other shares were issued. The agreement provided that the holders of "B" shares should be entitled to receive dividends equal to one-third of the amount of the dividends declared on "A" shares, that the directors of the company should be Bater, Mrs. Bater, Kare and Mrs. Kare, that Bater should be president, Mrs. Bater vice-president and Kare secretary-treasurer.

Paragraphs 6 and 7 of the agreement read as follows:

> 6. The Party of the First Part shall give such security as may be required by the Royal Bank of Canada, Stock Yards Branch, St. Boniface, Manitoba, to enable the said company to borrow from said bank from time to time as may be required such sum or sums not exceeding in the aggregate at any time $50,000.
>
> 7. The Party of the Second Part shall whenever requested by the Party of the First Part or by said company to do so, shall advance from time to time to said company such sum or sums as may be required not exceeding at any time $50,000 in the aggregate, the advances to be made to said company without interest and in consideration of this agreement being entered into.

When the company had been organized Kare advanced $50,000 to it pursuant to paragraph 7 and Bater deposited certain life insurance policies with the Royal Bank pursuant to paragraph 6 but in addition to this security the bank required written guarantees and postponements of claims from both Bater and Kare. These were signed and given to the bank, each guarantee being limited to $50,000.

In October 1958, the bank increased the company's line of credit to $80,000 and Bater and Kare each signed separate forms of guarantee, identically worded, in favour

of the bank for that amount. These documents contained the following paragraph:

> (4) The undersigned or any of them may, by notice in writing delivered to the Manager of the branch or agency of the Bank receiving this instrument, determine their or his liability under this guarantee in respect of liabilities thereafter incurred or arising but not in respect of any liabilities theretofore incurred or arising even though not then matured, provided, however, that notwithstanding receipt of any such notice the Bank may fulfil any requirements of the customer based on agreements express or implied made prior to the receipt of such notice and any resulting liabilities shall be covered by this guarantee; and provided further that in the event of the determination of this guarantee as to one or more of the undersigned it shall remain a continuing guarantee as to the other or others of the undersigned.

Up to this time the business had prospered and it continued to do so until in December 1959 an American customer defaulted in its account with the company to the extent of about $50,000.

In the summer of 1960 the respondent withdrew from the company. At this time the amount standing to his credit in the books of the company was $29,850. This amount was transferred from the credit of Kare to that of Bater. All the shares held by Kare and Mrs. Kare were transferred to Bater. The Kares ceased to be directors of the company and Bater became its sole signing officer. A letter, dated September 27, 1960, from the firm of solicitors who acted for Bater reported to him "upon the completion of your settlement with Isaac Kare".

The consideration passing from Bater to Kare was agreed at $29,850 and a mortgage to Kare to secure payment of this amount was signed by Bater and Mrs. Bater. The mortgage was for $37,400; the additional amount was that of a first mortgage which Kare agreed to pay off out of the moneys paid to him under his mortgage. The mortgaged property was the home of Mr. and Mrs. Bater and was owned jointly by them. The mortgage was dated August 30, 1960; it was repayable $100 weekly until the first Monday in August 1967, when the balance became due; it bore interest at 7 per cent.

Following this settlement the respondent had no further connection with the company but the bank retained his guarantee and he gave no notice determining his liability thereunder.

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BATER *et al.* v. KARE

Cartwright J.

Bater continued to carry on the business of the company until his death on January 15, 1962. During this period he made payments on account of the mortgage totalling $1,250. No suggestion was made during Bater's lifetime that the mortgage was not valid.

Between the date of Kare's withdrawal from the company and the date of Bater's death the amount of the company's indebtedness to the bank varied widely. As of September 1, 1958, it appears to have been $50,179.31. Thereafter the indebtedness at the end of each month was sometimes more than $50,000 and sometimes less than that amount.

On December 30, 1960, Bater cashed a pension policy and paid to the bank on account of the company's indebtedness $15,976.78. After Bater's death his executors paid $43,560.79 the balance of the company's indebtedness to the bank, making a total paid under Bater's guarantee to the bank of $59,437.57. In the statement of claim it was alleged that the amount so paid was $59,034.21; this figure does not appear to have been questioned and was accepted by the learned trial judge. The bank did not at any time call upon Kare under his guarantee.

On March 19, 1962, probate of Bater's will was granted to the appellants. On July 11, 1962, the statement of claim in this action was issued asking that the mortgage from Bater to Kare be set aside *in toto* and alternatively that it be set aside as against Mrs. Bater, and claiming $29,517.10 by way of contribution being one-half of the amount claimed to have been paid to the bank pursuant to Bater's guarantee.

The learned trial judge dismissed the claim as to the mortgage but allowed the claim for contribution. Kare appealed to the Court of Appeal and the present appellants cross-appealed. The appeal was allowed and the cross-appeal dismissed. The appellants now appeal to this Court.

The claim to set aside the mortgage fails on the facts as to which there are concurrent findings in the Courts below, that there was good consideration, that there was no misrepresentation made to Mrs. Bater and that no undue influence was exercised. All of these findings are supported by the evidence. On this branch of the matter I am in substantial agreement with the reasons for judgment

of the learned trial judge and those of the Court of Appeal.

Turning to the claim for contribution, the general rule is well settled; it is stated as follows in de Colyar on Guarantees, 3rd ed., 1897, at p. 338:

> It often happens that where there are more sureties than one for the *same* principal debtor, the creditor makes one surety pay the *whole* debt, or more than his just share or proportion of such debt. Whenever this occurs, the surety who has thus been made to pay has a right to recover from his co-sureties their respective shares of the sum which he has paid to the common creditor.

That this is the general rule was not questioned in the Courts below or before us; the question is whether the special circumstances of this case have rendered the rule inapplicable; in my opinion, they have done so.

There can be no doubt that co-sureties are free to agree as to the proportions in which as between themselves they shall contribute or that one of them shall pay the whole amount. Such an agreement, of course, would not affect the right of the creditor to whom they are bound to claim against any one or more of them as he saw fit, but it would be binding as between the sureties.

For the reasons given in the Court of Appeal I agree that, on its true construction, the agreement of October 1, 1956, and particularly paragraph 6 thereof, obligated Bater to pay the first $50,000 of the liability of the company to the bank for which he and Kare were both sureties.

It remains to consider the final argument of Mr. Dewar that, at all events, the appellants are entitled to contribution as to the $9,034.21 paid by Bater and his estate in excess of the $50,000.

In my opinion, this argument is not entitled to prevail. In this case the benefit derived from Bater and Kare continuing as sureties for the company's running account with the bank after Kare had made his settlement with Bater and withdrawn from the company was in the first instance that of the company but Bater alone was then interested in the company and alone stood to gain from its continued operations. From the date of Kare's withdrawal, as between Bater and Kare, the whole benefit resulting from the suretyship was Bater's. The principle here applicable is accurately stated in the notes to *Lampleigh v. Brathwait*

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BATER *et al.* v. KARE

Cartwright J.

in Smith's Leading Cases, 13th ed., vol. 1, p. 163, as follows:

> The right to contribution exists even though the co-sureties became bound by separate instruments and without the knowledge the one of the other; in such a case the right of contribution, although it may have originated in equity upon the principle *equality is equity* (see *per* Parke, B., in *Davies v. Humphreys*, 6 M. & W. 168) nevertheless is more properly put at law upon the principle that "where two persons are under an obligation to the same performance, though by different instruments, if both share the benefit which forms the consideration, they must divide the burden; if one only gets the benefit he must bear the whole".

The rule that the one who gets the whole benefit must bear the whole burden is equally applicable in equity; indeed it has been said that the maxim *qui sentit commodum sentire debet et onus* is but one aspect of the comprehensive rule "equality is equity". (See Broom's Legal Maxims, 10th ed., p. 484.) In my opinion, on the facts of this case, the maxim referred to is applicable to and decisive against the appellants' claim for contribution in regard to the sum of $9,034.21.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Thompson, Dilts, Jones, Hall, Dewar & Ritchie, Winnipeg.

Solicitors for the defendant, respondent: Keith & Westbury, Winnipeg.

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*Nov. 19, 20

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Jan. 28

HENRY KOURY .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Conviction for fraud—Acquittal on charge of conspiracy—Whether inconsistency—Criminal Code, 1953-54 (Can.), c. 51, ss. 592, 597.

The appellant and three others were charged on an indictment containing, *inter alia*, a count of fraud and a count of conspiracy to commit the fraud. He was convicted with the others on the count of fraud and, while he was acquitted on the count of conspiracy, the three others

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

were convicted on that count. The appellant's defence was that he withdrew from the association at a certain time and took no part in the actual fraud except as a friendly bystander without criminal intent. The case put against him by the Crown was that he was an aider and abettor. The Court of Appeal maintained the convictions. The appellant alone appealed to this Court by leave on the ground that his conviction for fraud should be set aside as inconsistent with his acquittal for conspiracy.

Held (Cartwright, Ritchie and Hall JJ. dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Fauteux, Abbott, Martland, Judson and Spence JJ.: The judge's charge was correct in both fact and law and he was under no compulsion to direct that if the jury acquitted the appellant on the conspiracy count he could not be convicted with the others on a count of committing that very offence.

The two offences dealt with in these two counts were distinct and separate offences. There was no inconsistency requiring the quashing of the conviction for fraud because of the acquittal for conspiracy. The appellant was convicted for fraud on ample evidence and pursuant to a correct instruction that it was necessary for the Crown to show a common intent or design among all four accused in doing whatever the jury found they did. Aiding and abetting pursuant to a common intent and design is not necessarily the same thing as the conspiracy charge in this case and it was not.

On the evidence the error, if any, was in the acquittal on the charge of conspiracy and not in the conviction on the substantive offence. The appellant was properly convicted and his acquittal on the charge of conspiracy did not vitiate this conviction or give rise to any substantial wrong or miscarriage of justice. This Court was not compelled to defer to this acquittal for the purpose of quashing the conviction for fraud, and was entitled to look at the facts behind the record of the acquittal. There was no error in the conduct of this trial, the appellant was properly convicted on the count of fraud and there was no substantial wrong or miscarriage of justice.

It was doubtful as to whether there was in this case any question of law which would give this Court jurisdiction under s. 597 of the *Criminal Code*. But it was not necessary to decide this.

Per Cartwright, Ritchie and Hall JJ., *dissenting*: The trial judge ought to have told the jury that if they acquitted the accused on either of these two counts they should acquit him on both. It was impossible to see how the jury could consistently acquit the appellant on the count of conspiracy and convict him on the count of fraud. In the circumstances of this case if, as was the theory of the Crown, the appellant aided the others in carrying out their dishonest purposes he would have been guilty of conspiring with them and this was negatived by the verdict of not guilty on the count of conspiracy which stands unimpeached. The appellant could only be convicted on the count of fraud if the jury were satisfied that he was acting in concert with the others. The appellant was said to be guilty of acting together with three others, which was of course conspiracy, while at the same time he was said to be not guilty of conspiring with the three others. His conviction on the count of fraud was inconsistent with his acquittal on the count of conspiracy and could not stand.

Per Ritchie J., *dissenting*: The verdict of the jury on the conspiracy count constituted a finding that three of the accused agreed to a plan to

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defraud but that the appellant, who was familiar with the details of the plan, joined the others and played a vital role in putting the plan into effect without having agreed to do so. The verdict on the fraud count was inconsistent with the finding on the conspiracy count. Before a conspiracy can be complete, there must be evidence both of common design and of an agreement to carry that design into effect. If the appellant had been a party to the conspiracy to defraud, then his acts of participation in the perpetration of the fraud would have been an essential part of the conduct which caused the common unlawful design to pass from the stage of intention into that of action. As he was found not guilty of that conspiracy, his acts could not have that quality and could not justify a finding of guilty on the fraud count. The evidence against the appellant, if believed, was only consistent with mutual consent between himself and the others in the execution of their common unlawful design and the finding that there was no such mutual consent carried with it the corollary that the appellant could not have participated jointly with the others in the manner alleged in the fraud count. It was strongly suggested that the jury treated the acts of the appellant as being the acts of an aider and abettor rather than being the innocent acts of courtesy which the appellant swore they were. This suggestion could not be accepted. The two verdicts were irreconcilable on their face and this Court could not inquire as to the underlying causes which may have contributed to this inconsistency.

APPEAL from a judgment of the Court of Appeal for Ontario affirmining the appellant's conviction for fraud. Appeal dismissed, Cartwright, Ritchie and Hall JJ. dissenting.

G. A. Martin, Q.C., and *E. P. Hartt, Q.C.,* for the appellant.

J. A. Hoolihan, for the respondent.

The judgment of Taschereau C.J. and Fauteux, Abbott, Martland, Judson and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario dismissing the appeal by Henry Koury from his conviction after a trial before Gale J. and jury upon a charge that Roy Robertson, Henry Koury (the present appellant), Andre Begin and D. Charles Stuart, in the month of March 1960, did obtain certain moneys therein set out by deceit, falsehood or other fraudulent means. At the trial, these four accused were charged in an indictment containing, *inter alia,* the following counts:

1. The jurors for Her Majesty the Queen present that Roy Robertson, Henry Koury, Andre Begin, and D. Charles Stuart in or about

the month of March, in the year 1960, at the City of Toronto, in the County of York, did unlawfully by deceit, falsehood or other fraudulent means, defraud Stadacona Mines (1944) Limited of valuable securities, equipment and machinery, a cheque in the amount of $300,000 drawn by Stadacona Mines (1944) Limited payable to Norado Mines Limited, $50,000 in trust money, and choses in action, to the total value of approximately Three Hundred Thousand ($300,000) Dollars, contrary to the Criminal Code.

* * *

5. The said jurors further present that the said Roy Robertson, Henry Koury, Andre Begin and D. Charles Stuart, in or about the months of January, February and March, in the year 1960, at the City of Toronto, in the County of York, and elsewhere, did unlawfully conspire and agree together and with one another to commit the indictable offence of fraud, to wit: by deceit, falsehood or other fraudulent means, to defraud Stadacona Mines (1944) Limited of valuable securities, equipment and machinery, a cheque in the amount of $300,000 drawn by Stadacona Mines (1944) Limited payable to Norado Mines Limited, $50,000 in trust money, and choses in action, to the total value of approximately Three Hundred Thousand ($300,000) Dollars contrary to the Criminal Code.

All four of the accused were convicted on count number 1. The three accused Robertson, Begin and Stuart were convicted on count number 5 but Koury was acquitted on that count. On appeal to the Court of Appeal for Ontario by all four accused, the appeals were dismissed. Koury now appeals to this Court. Leave for such appeal was granted under the provisions of s. 597(1)(*b*) of the *Criminal Code* upon the following grounds:

1. Did the Court of Appeal for Ontario err in law in holding that the conviction of Koury on Count One was not inconsistent with his acquittal on Count Five?
2. Did the Court of Appeal for Ontario err in failing to hold that the conviction of Koury on Count One was bad in law?
3. Did the Court of Appeal for Ontario err in law in failing to hold that there was no evidence by virtue of which the conviction of Koury on Count One could be sustained consistently with the acquittal of Koury on Count Five?

Ground 2 does not state a question of law for the consideration of this Court and the sole issue in this appeal is whether the conviction of Koury with his three co-accused on count 1 should be set aside as inconsistent with his acquittal on count 5.

The appellant submits that since he was acquitted on the charge of conspiracy to commit the indictable offence, he could not be convicted with others on a count of com-

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Spence J.

mitting that very offence. He also repeats in this Court his submission made for the first time in the Court of Appeal that the judge's charge should have contained a direction to that effect. In my opinion, the judge's charge was correct in both fact and law and he was under no compulsion to give this direction, which was not even asked for.

In spite of the complexity of detail and the lengthy trial, the issue, as far as this person is concerned, can be stated in a few words. The appellant says that at a certain time he withdrew from his association with his co-accused, whatever that association may have amounted to at that time, and that he took no further part in the scheme. But the evidence shows that notwithstanding this protestation, he went on, together with the other three co-accused, to take part in the stripping of the valuable assets of this company in return for worthless assets or promises. On this evidence the jury properly convicted the appellant of fraud and had that count stood alone, it could not have been set aside on appeal. We have, therefore, this assumed position of error. This man participated in the commission of the fraud but he did not conspire to commit the fraud.

The trial judge correctly instructed the jury on counts 1 and 5 and he put to the jury the accused's defence that he withdrew from the association at a certain point of time and that he took no part in the actual fraud except as a friendly bystander without criminal intent. In acquitting the accused of conspiracy, the jury must have found that he withdrew from the association before the conspiracy had been entered into, for the judge made it very clear in his charge that the offence of conspiracy was complete once the agreement was made.

On count 1 (the substantive offence) the judge made it equally clear that the Crown had to show a conscious participation in a common design and conscious and deliberate assistance between the aider and abettor and the other persons. The case put against Koury on count 1 was that he was an aider and abettor.

The two offences dealt within these two counts are distinct and separate offences (*The Queen v. Kravenia*[1]). There is no inconsistency that requires the quashing of the conviction of Koury on count 1 because of his acquittal

[1] [1955] S.C.R. 615, 21 C.R. 232, 112 C.C.C. 81.

on count 5. As to the conviction on count 1, there was ample evidence to support it. The recent case in the Court of Criminal Appeal in England, *Regina v. Scaramanga*[1], has no application here. This accused was convicted on count 1 pursuant to a correct instruction that it was necessary for the Crown to show a common intent or design among all four accused in doing whatever the jury found they did. Aiding and abetting pursuant to a common intent and design is not necessarily the same thing as the conspiracy charged in count 5 and it is not the same thing in this case. On this ground alone I would dismiss the appeal.

There are, however, broader implications in the argument submitted in this case. The argument is that once it is shown on the face of the record that there is an inconsistency then the quashing of the conviction must follow automatically citing *Regina v. Sweetland*[2]. That theory of inconsistent verdicts grew up at common law. I can well understand its application before the constitution of a Court of Criminal Appeal when the only mode of review, apart from the Court of Crown Cases Reserved, was the Writ of Error, which brought before the reviewing tribunal only the indictment, the plea and the verdict. With a vitiating inconsistency appearing on the face of this limited record, all that the Court of Queen's Bench could do was to quash the conviction.

But a case does not now come before a provincial Court of Appeal on this limited record. We have, in addition, the Judge's charge to the jury and the whole of the evidence on which it is based. We can also see in a limited way from the objections made to the charge, how defence counsel wishes to have his defence put to the jury. A Court of Appeal has had no difficulty in dealing with inconsistent convictions for theft, receiving and obtaining by fraud relating to the same property; *Kelly v. The King*[3]. In the same way in *Cox and Paton v. The Queen*[4], when the accused were charged with conspiracy to steal and stealing, and conspiracy to defraud and fraud in connection with the same property and were convicted by the jury on all four counts, this Court decided, in affirming the Manitoba Court of Appeal, that the offence disclosed was fraud and

[1] (1963), 47 Cr. App. R. 213. [2] (1957), 42 Cr. App. R. 62.
[3] (1916), 54 S.C.R. 220.
[4] [1963] S.C.R. 500, 40 C.R. 52, 2 C.C.C. 148.

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conspiracy to defraud and not theft. To the extent indicated in these cases, the Court of Appeal then can sort out the inconsistency.

The appellant, however, argues that this case is different and that even if the Court may look at the complete proceedings the verdicts are inconsistent. Four accused are jointly charged with doing the act and the same four are jointly charged with conspiracy to do that very act. The appellant says that in this situation it must be all or nothing and that he cannot be found guilty of doing the act with others because the jury has found that he did not conspire to do this act with them.

In my view, this argument adopts a wrong interpretation of the judgment in *Regina v. Sweetland,* where Goddard L.C.J. said at p. 66:

> This Court is not laying down in this case, and has no intention of allowing this case to be quoted as an authority for saying, that, whenever a verdict of Not Guilty is returned on a count for conspiracy to commit offences and Guilty on other counts in the same indictment charging those specific offences, or contrariwise when a verdict of Guilty is returned on the count of conspiracy and Not Guilty on the counts charging specific offences, the verdict is necessarily inconsistent. Each case must depend on its particular circumstances, and it is very dangerous in circumstances of this sort to lay down general rules which could be quoted when the facts might be entirely different.

To give effect to this submission would be to ignore the common sense of the trial. Courts of Appeal do not now operate under 19th century procedural limitations. On the evidence that we can now examine, the error, if any, is in the acquittal on the charge of conspiracy and not in the conviction on the substantive offence. We can say with assurance that on this record, which includes the whole of the evidence, the judge's charge and the objections of defence counsel to the charge, that this man was properly convicted and that his acquittal on conspiracy does not vitiate this conviction or give rise to any substantial wrong or miscarriage of justice. We are not compelled to defer to this acquittal for the purpose of quashing the conviction on fraud. We are not engaged in a process of logic chopping and we are entitled to look at the facts behind the record of the acquittal.

It has been stated that there was error on the part of the trial judge in not instructing the jury that they could not acquit on conspiracy and at the same time bring in a

verdict of guilty on the substantive offence. This seems to me to ignore the theory put forward by the defence at the trial and which the trial judge submitted to the jury. This was that the appellant withdrew from association with his co-accused at a certain time before there was any conspiracy and that he should be acquitted on this count. Further, the defence submitted that the jury should find that he did not participate in the commission of the fraud because he was merely there as a friendly bystander without any criminal intent. The two defences had to be put together. There would have been error if the judge had not instructed the jury along these lines. The jury rejected one of these defences but gave effect to the other, which merely means that they were saying that at a certain time this man did withdraw from his association. I think that they were wrong in so finding in view of the subsequent conduct of the accused but this makes no difference. I do not think that the trial judge could have put it to the jury that it was all or nothing.

It was never put to the trial judge that he should consider the possibility of inconsistent verdicts and instruct the jury accordingly. Indeed, when the jury came back with these verdicts which are now said to be inconsistent, he was not asked to instruct the jury to deal with the supposed inconsistency. There was no error in the conduct of this trial and I am prepared to decide (*a*) that the appellant was properly convicted on count 1; (*b*) that there was no substantial wrong or miscarriage of justice.

The principle stated in *Regina v. Sweetland, supra,* that there is no general rule that whenever there is an acquittal on a count of conspiracy to commit certain offences and a conviction on other counts in the same indictment charging those specific offences, the verdict is necessarily inconsistent, was never challenged in argument by the appellant. In view of that principle, I have some doubt as to whether there is any question of law which would give this Court jurisdiction under s. 597 of the *Criminal Code.*

The jurisdiction of the Court of Appeal to have allowed the appellant's appeal, had it thought fit so to do, is defined in s. 592 of the *Criminal Code.* It could have done so if it were of the opinion that:

> (i) The verdict of the jury on count one was unreasonable or could not be supported by the evidence.

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(ii) The judgment of the trial court should be set aside on the ground of a wrong decision on a question of law.
(iii) There was a miscarriage of justice.

There has been no submission that there was a wrong decision on a question of law by the trial Court, other than the suggestion, not made at the trial, that the jury ought to have been instructed in the charge regarding the possibility of inconsistency of verdicts, which submission I do not accept. The case before the Court of Appeal must have been based upon the proposition that the verdict of the jury on count one was unreasonable and could not be supported by the evidence in the light of the appellant's acquittal on count five.

Does the refusal of the Court of Appeal to allow the appellant's appeal on those grounds raise an issue of law?

This is not a case within those authorities cited by the appellant in which one person has been found guilty of conspiracy and all the other alleged conspirators have been acquitted, or in which one person has been found guilty of being accessory to a murder when all of the alleged murderers have been acquitted. In this case the law is that the verdict of guilty of the specific offence is not necessarily inconsistent with an acquittal on a charge of conspiracy to commit that offence. Whether or not the verdict of guilty was unreasonable or could not be supported by the evidence would appear to involve a decision, in the light of all the circumstances of the case, on a question of mixed law and fact.

I do not, however, wish to express any final opinion on this isue, particularly as it was not raised by the respondent and consequently was not argued before us.

I would therefore dismiss the appeal.

The judgment of Cartwright, Ritchie and Hall JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Appeal for Ontario dismissing an appeal from the conviction of the appellant before Gale J. and a jury at the Toronto assizes.

The trial commenced on March 19, 1962, and ended on May 16, 1962.

The appellant was indicted jointly with three other persons, Robertson, Begin and Stuart. The indictment contained eight counts in each of which the four accused were jointly charged.

Counts 1 and 5 with which we are chiefly concerned read as follows:

1. The jurors for Her Majesty the Queen present that Roy Robertson, Henry Koury, Andre Begin and D. Charles Stuart in or about the month of March, in the year 1960, at the City of Toronto, in the County of York, did unlawfully by deceit, falsehood or other fraudulent means, defraud Stadacona Mines (1944) Limited of valuable securities, equipment and machinery, a cheque in the amount of $300,000 drawn by Stadacona Mines (1944) Limited payable to Norado Mines Limited, $50,000 in trust money, and choses in action, to the total value of approximately Three Hundred Thousand ($300,000) Dollars, contrary to the Criminal Code.

5. The said jurors further present that the said Roy Robertson, Henry Koury, Andre Begin, and D. Charles Stuart in or about the months of January, February, and March, in the year 1960, at the City of Toronto, in the County of York, and elsewhere, did unlawfully conspire and agree together and with one another to commit the indictable offence of fraud, to wit: by deceit, falsehood or other fraudulent means, to defraud Stadacona Mines (1944) Limited of valuable securities, equipment and machinery, a cheque in the amount of $300,000 drawn by Stadacona Mines (1944) Limited payable to Norado Mines Limited, $50,000 in trust money, and choses in action, to the total value of approximately Three Hundred Thousand ($300,000) Dollars contrary to the Criminal Code.

It will be observed that the indictable offence which it is alleged in count 5 that the four accused conspired to commit is the substantive offence which it is charged in count 1 that they did commit.

Count 2 charged the four accused with having defrauded Guaranty Trust Company of Canada of $50,000 in trust money. This is the same $50,000 as that referred to in count 1. Count 2 was framed to cover the possibility of this money at the time it was taken being regarded as the property of the Trust Company rather than of Stadacona Mines (1944) Limited.

Counts 3 and 4 were alternative to counts 1 and 2, they charged theft (rather than fraud) in regard to the same property as was described in counts 1 and 2.

Counts 6, 7 and 8 charged the four accused with conspiring to commit the substantive offences charged in counts 2, 3 and 4.

The jury found all four of the accused guilty on count 1, adding a recommendation for leniency as to Koury and

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Begin; they found Robertson, Begin and Stuart guilty on count 5, adding a recommendation for leniency as to Begin; they found the appellant not guilty on count 5; they found Stuart alone guilty on count 2; on all the remaining counts they found all the accused not guilty.

All of the accused appealed against their convictions to the Court of Appeal. All of the appeals were dismissed. Koury alone has appealed to this Court.

The questions of law upon which leave to appeal to this Court was given are as follows:

1. Did the Court of Appeal for Ontario err in law in holding that the conviction of Koury on count one was not inconsistent with his acquittal on count five?

2. Did the Court of Appeal for Ontario err in failing to hold that the conviction of Koury on count one was bad in law?

3. Did the Court of Appeal for Ontario err in law in failing to hold that there was no evidence by virtue of which the conviction of Koury on count one could be sustained consistently with the acquittal of Koury on count five?

It is not necessary to state the facts at any great length. Stadacona Mines (1944) Limited, hereinafter referred to as "Stadacona", was a mining company. Early in 1960 it no longer had a producing property and was losing money. Prior to March 10, 1960, Robertson owned, or controlled through other companies, 625,000 shares of Stadacona; this was said to be a sufficient number of shares to give him working control of that company. He was its president.

On the morning of March 10, 1960, Stadacona owned assets of $368,196 consisting of the following:

Mining equipment valued at $35,000;

Negotiable securities valued at $40,000;

Accounts receivable in the form of call loans owed to it almost entirely by the accused Robertson and his companies; $175,000;

Cash deposited in a new bank account at the Guaranty Trust Company, Toronto on March 10, 1960, $118,196.

By the end of that day Stadacona had parted with all of the above-mentioned assets except $68,196. The main step by which this was brought about was the making of a call loan by Stadacona to a company called Norado Mines Limited, hereinafter referred to as "Norado", which was said to be without assets.

On March 7, 1960, Koury, who had previously controlled Norado, had turned over the control of that company to Stuart.

As a result of the transactions carried out on March 10 Robertson received in money, equipment, securities and by the extinguishment of his indebtedness to Stadacona $250,000. For this he transferred his 625,000 shares to Norado; these were said to be worth less than $75,000; Norado which had no other assets paid for these shares with the money loaned to it, without security, by Stadacona. The transaction was put through by new directors of both companies, who had little business experience, and were selected by Stuart. Shortly afterwards Stuart caused Norado to pay out to him the $50,000 remaining in its bank account in the Guaranty Trust Company in exchange for some mining claims stated to be of little value. As Stuart alone was convicted on count 2 and all the accused were acquitted on count 6 the jury must have taken the view that this last-mentioned transaction was that of Stuart and that the other three accused were not involved in it.

In the negotiations between Robertson and Stuart leading up to the main transaction above referred to Begin acted as Robertson's lawyer and Koury acted as Stuart's lawyer. Koury from time to time consulted Mr. Stirrett a solicitor in Toronto. It was the theory of Koury's defence that as soon as Stirrett advised him that the proposed transaction, and particularly the making of the call loan of $300,000, was an improper one he dissociated himself from it and that anything he did thereafter was done as a mere matter of courtesy. The theory of the Crown, on the other hand, was that Koury took an active part in the completion of the transaction and particularly that he co-operated in arranging the necessary meetings, indicated the manner in which the call loan to Norado should be authorized and assisted in carrying out the delivery of the share certificates from Robertson to Stuart.

The charge of the learned trial judge was, of necessity, a lengthy one. He made it clear to the jury that in his view it was open to them to convict or to acquit Koury on count 1 and also on count 5. He did not tell them that if they acquitted him on either of these counts they should acquit him on both. With respect, in my opinion, he ought

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to have done so. After reading the opening address to the jury of counsel for the Crown, the charge of the learned trial judge and the relevant evidence which counsel for the appellant and for the respondent called to our attention, I find it impossible to see how the jury could consistently acquit the appellant on count 5 and convict him on count 1.

There is no evidence that Koury sought for himself or obtained any part of the assets of which Stadacona was defrauded. The theory of the Crown was that knowing the dishonest purposes of Robertson and Stuart he aided them in carrying them out. If he did this, in the circumstances of this case, he would have been guilty of conspiring with them and that he did so conspire has been negatived by the verdict of not guilty on count 5 which stands unimpeached.

It is well settled, and indeed I did not understand it to be questioned in argument, that where an accused is convicted on one charge and acquitted on another and the verdicts are inconsistent the conviction cannot stand. Whether or not two verdicts are inconsistent depends upon the particular circumstances of the case in which the question arises.

The judgment of the Court of Appeal was delivered orally by the learned Chief Justice of Ontario at the conclusion of the argument which had taken up four days. The question with which we are concerned was dealt with as follows:

> As to the accused Koury, it was argued on his behalf, . . . secondly, that the conviction on count 1 was inconsistent with the acquittal on count 5. . . . As to the second contention, Mr. Martin referred to and relied particularly and mainly upon the case of *Regina v. Sweetland,* 42 C.A.R. p. 62. It was made abundantly plain in that case that the decision was reached on the particular facts and that the Court was not laying down any principle of law. We are of the opinion that the facts in the case at bar are different from those in the *Sweetland* case, 42 Cr. App. R. 62. In our opinion the proper principles were stated in *Rex v. Lenton* (1947) O.R. 155 at p. 161 and *R. v. Kupferberg* 13 Cr. App. R. 166 at p. 168.

In *R. v. Kupferberg*[1], the conviction of the appellant was at a trial subsequent to the one at which he had been acquitted of conspiracy. The argument of the defence was based on a plea of *autrefois acquit*. There appears to have been no direct reference to the rule that inconsistent verdicts cannot stand or to an argument based on *res judicata* such,

[1] (1918), 13 Cr. App. R. 166, 34 T.L.R. 587.

for example, as was dealt with in *Sambasivam v. Public Prosecutor, Federation of Malaya*[1]. The passage in the judgment in *Kupferberg's* case on which counsel for the respondent relies is at p. 168 and reads as follows:

> Counsel further contended that the appellant was entitled successfully to plead *autrefois acquit* at the second trial, because at the first trial he had been acquitted of certain charges of conspiracy which were framed under the same Regulation as that which formed the basis of the charges made against him at the second trial. That also appears to the Court to be an erroneous contention. A charge of conspiracy is not the same as one of aiding and abetting. It is true that in many cases aiding and abetting is done by the mutual consent of the criminals, but it is not essential that it should be. For a plea of *autrefois acquit* to be maintainable, the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients. The facts which constitute the one must be sufficient to justify a conviction for the other. To prove conspiracy against the appellant, it is necessary that an agreement, express or implied, should be proved to the satisfaction of the jury, but it is quite unnecessary to prove such agreement where the charge is one of aiding and abetting. In the latter case, it is only necessary to show that the appellant appreciated what was going on and did something to further it.

It seems clear that if the Court in *Kupferberg's* case had considered that the aiding and abetting by the accused was done with the mutual consent of those who had been indicted with him on the conspiracy count his appeal would have been allowed.

In the case at bar there is no room for the suggestion that Koury gave any unsolicited aid or did anything to further the perpetration of the fraud otherwise than with the consent of and in co-operation with the other accused. Whenever he indicated a desire to withdraw either Stuart or Begin or both of them pressed him to continue his assistance.

In *Lenton's* case[2], the accused and one Hicks were charged with conspiring to commit the indictable offence of forcibly seizing or confining one Neilson and also with the substantive offence of unlawfully seizing and confining him. Both the accused and Hicks were acquitted on the conspiracy count and convicted of the substantive offence. The part played by the accused was confined to the sending of telegrams. He first learned of the matter after Neilson had been

[1] [1950] A.C. 458.
[2] [1947] O.R. 155, 3 C.R. 41, 88 C.C.C. 1.

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seized and confined. Following the receipt of a telegram from one Schmaltz reading:

> Arrived Jackfish met nine scabs aboard train they return with J. Osipindo union men steamer Kenora has 26 scabs aboard they hollered from boat they were locked aboard two days we hold company man F. Neilson Steamer Kenora gone out to anchor advice immediately what to do urgent two steamers in bay boys are under pressure to sail contact police.

the accused sent a telegram to Hicks reading:

> Hold official stop have two pickets inform citizens of our case stop request them wire Minister of Justice to take action stop hold the fort we are taking case to R.C.M.P. and will swear out warrant stop excellent work.

The only passage in the reasons touching the question with which we are concerned reads as follows:

> As to the first point, it was quite open to the jury to find that although appellant and his alleged co-conspirators arrived at no common agreement to commit the indictable offences as charged, yet appellant, within the meaning of s. 69 of the Code, and independently of any conspiracy counselled or procured the confining of Neilson. Upon the evidence there is no inconsistency in these findings. Even accepting appellant's own evidence as to the contents of the telegram of 6.55 a.m., it was quite open to the jury to believe that appellant was counselling or procuring Hicks to detain Neilson in the complete absence of any conspiracy between them to bring about such detention.

The Court amended the conviction to read guilty of unlawfully confining Neilson instead of guilty of unlawfully and forcibly seizing and confining Neilson.

It seems obvious that the accused could not have been a party to a conspiracy to bring about Neilson's detention since that had been brought about before the accused was brought into the matter at all. I cannot find that this judgment enunciates any principle helpful in the decision of the case at bar.

In *R. v. Sweetland*[1], Lord Goddard, giving the judgment of the Court of Criminal Appeal, said at p. 66:

> This Court is not laying down in this case, and has no intention of allowing this case to be quoted as an authority for saying, that, whenever a verdict of Not Guilty is returned on a count for conspiracy to commit offences and Guilty on other counts in the same indictment charging those specific offences, or contrariwise when a verdict of Guilty is returned on the count of conspiracy and Not Guilty on the counts charging specific offences, the verdict is necessarily inconsistent. Each case must depend on its particular circumstances, and it is very dangerous in circumstances of

[1] (1957), 42 Cr. App. R. 62.

this sort to lay down general rules which could be quoted when the facts might be entirely different.

At p. 68 the Lord Chief Justice said:

> It may be that this matter would have been cleared up if the Recorder had told the jury to consider their verdict further. As he did not do so, we think that Mr. Clarke is justified in saying that in this particular case there does appear to be on the face of it an inconsistency in the verdict. Persons are said to be guilty of acting together, which is of course, conspiracy, in obtaining cheques by false pretences while at the same time they are said to be not guilty of conspiring to obtain them by false pretences.

In the case at bar Koury could only be convicted on count 1 if the jury were satisfied that he was acting in concert with the other accused. There is no suggestion in the evidence that he committed some independent act of fraud on Stadacona and had there been such evidence he could not have been convicted of that independent act on a count charging him jointly with the other three accused who were convicted. The authorities on this point are collected in the recent judgment of the Court of Criminal Appeal, delivered by Lord Parker of Waddington, in *R. v. Scaramanga*[1]. The effect of the judgment is summarized in the following paragraph at p. 220:

> In our judgment, except where provided by statute, when two persons are jointly charged with one offence, judgment cannot stand against both of them on a finding that an offence has been committed by each independently.

The circumstances of the case at bar appear to me to fall directly within the last sentence quoted above from the judgment of Lord Goddard at p. 68 of *Sweetland's* case. Adapting his words to the facts of the case before us, Koury is said to be guilty of acting together with Robertson, Begin and Stuart, which is of course conspiracy, in defrauding Stadacona while at the same time he is said to be not guilty of conspiring with Robertson, Begin and Stuart to defraud Stadacona. In my opinion the conviction of Koury on count 1 is inconsistent with his acquittal on count 5 and cannot stand.

When these two inconsistent verdicts were rendered it would have been proper for the learned trial judge to have given the jury a further direction, pointing out the inconsistency, and to have sent them back to reconsider their

[1] (1963), 47 Cr. App. R. 213.

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verdicts as to Koury on counts 1 and 5. Had this course been followed no one can say what the result would have been.

I would allow the appeal, direct that the verdict finding the appellant guilty on count 1 of the indictment be quashed and that a verdict of acquittal be entered.

RITCHIE J. (*dissenting*):—The facts giving rise to this appeal have been fully set forth in the reasons of other members of the Court and I will endeavour not to repeat more of what they have said than is absolutely necessary for the purpose of making my views clear.

Having regard to the charge of the learned trial judge and to those parts of the evidence to which our attention was directed by both counsel, I am of opinion that the verdict of the jury on count 5 of this indictment constitutes a finding that three of the accused agreed to a plan for defrauding the Stadacona Mines (1944) Limited but that the fourth (the appellant) who was familiar with the details of the plan, joined the others and played a vital role in putting the plan into effect without having agreed to do so. The verdict on count 1, which means that the appellant's acts of co-operation in the perpetration of the fraud were acts done in furtherance of a common unlawful intent to defraud, is, in my opinion, inconsistent with the finding on the conspiracy count.

There can be no doubt that a clear distinction exists between the crime of conspiracy to commit an indictable offence and the crime of committing that offence, and it is also clear to me that a man who has been tried and acquitted of conspiracy to commit an offence could later, when tried alone, be properly convicted of having aided and abetted in the commission of the same offence, providing that the acts of those participating in its commission were not so inter-dependent as to be consistent only with their having been the product of pre-arrangement between the participants. (See *Rex v. Kupferberg*[1]; *Preston v. The King*[2]).

It is to be observed also that where two people are tried together on two counts—one of conspiracy and the other of committing the substantive offence—there is not necessarily any inconsistency in a verdict which acquitted them

[1] (1918), 13 Cr. App. R. 166 at 168, 34 T.L.R. 587.
[2] [1949] S.C.R. 156, 7 C.R. 72, 93 C.C.C. 81.

both of conspiracy and found one only to be guilty of the substantive offence. In such a case the verdict is consistent with the crime having been committed by one alone and with there having been no conspiracy. (See the recent case of *Anandagoda v. The Queen*[1]).

The most frequently quoted definition of conspiracy is that to be found in the reasons for judgment of Willes J. in *Mulcahy v. The Queen*[2], where he said:

> A conspiracy consists, not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object, or for the use of criminal means.

This definition has frequently been cited in support of the proposition that before the conspiracy can be complete there must be evidence both of common design and of an agreement to carry that design into effect. It is, however, well to remember what was said by Lord Alverston in *Rex v. Tibbets*[3], where he commented on the *Mulcahy* definition in the following terms:

> It is plain that the very learned Judge was there speaking of a case in which the criminal intention has not been carried into effect, and he says that in such a case the very promise to do—such a promise as would be binding for a lawful purpose—is an act which negatives the suggestion that the matter rests in intention only. He never said that when the unlawful purpose had been carried out no indictment for conspiracy can be maintained unless a concerted action has been preceded by such a contract between the conspirators as if the purpose had been lawful, would have given ground for a lawsuit. His definition is not of conspiracy, but of a kind of conduct which is sufficient to make the concerted action pass from the stage of intention into that of action.

If the appellant had been a party to the conspiracy to defraud for which his co-accused were convicted, then his acts of participation in the perpetration of the fraud itself would, as I see it, have been a part, and an essential part, of the conduct which caused the common unlawful design of the conspirators to pass from the stage of intention into that of action. As he has been found not guilty of that conspiracy, his acts cannot have that quality and if they were not acts done in furtherance of the common unlawful intent

[1] [1962] 1 W.L.R. 817. [2] (1868), L.R. 3 H.L. 306 at 317.
[3] [1902] 1 K.B. 77 at 89.

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and design to which his fellow defrauders had been found to have agreed, then they cannot, in my view, justify a finding of guilty on the first count of the indictment.

If the appellant had withdrawn from the conspiracy and rejoined it in time to assist in knowingly carrying out its illegal object, then his participation would, in my opinion, have made him a co-conspirator and the finding that he had no part in the conspiracy could therefore in my view, only be justified on the basis of his active participation having been innocent and devoid of fraudulent intent.

The evidence against the appellant, if believed, was, in my opinion, only consistent with mutual consent between himself and his fellow accused in the execution of their common unlawful design and, as I have indicated, the finding that there was no such mutual consent carries with it the corollary that the appellant cannot have participated jointly with his co-accused in the manner alleged in count 1.

It was strongly suggested by counsel for the respondent that the verdict should be construed as an acceptance by the jury of the accused's story that he had withdrawn from the conspiracy before the fraud was actually perpetrated, but that they treated the acts which he thereafter performed in furtherance of the common unlawful design as being the acts of an aider and abettor rather than being the innocent acts of courtesy which the appellant swore that they were. It appears to me, as I have indicated, that the verdicts on counts 1 and 5 are irreconcilable on the face of it and I do not feel competent to inquire as to the underlying causes which may have contributed to this inconsistency.

In the case of *Rex v. Cooper and Compton*[1], the jury had returned a verdict finding the appellants guilty on a count charging conspiracy but not guilty on several other counts charging the commission of the substantive offences involved in the conspiracy. Having regard to the circumstances disclosed in the evidence, the Court of Criminal Appeal found the verdicts to be unreasonable and in the course of his reasons for judgment Humphreys J. said:

> The learned Judge then said to counsel for the defence: "As I understand the verdict . . . . what they have found is that there was a conspiracy existing between these two men to steal in the course of their duties, but that they are agreed, so far as the particular instances before the court are

[1] (1947), 32 Cr. App. R. 102.

concerned, that conspiracy was not in fact carried out", and counsel for the defence said that that was the way he understood the verdict.

That is the way in which the verdict has been construed in this court, and it may be that it is correct, but this court takes the view, and always has taken the view, that we are not prepared to speculate on what a jury meant by a verdict which they have returned. We can only deal with the actual language used by the jury in returning the verdict. In the course of the argument a number of theories have been put forward on what the jury may have thought. We do not join in that speculation. All we can say is that the jury have said in terms: "We are not satisfied with the case for the prosecution on counts 2 to 9. We are satisfied with the case for the prosecution on count 1", and they returned verdicts accordingly.

These observations, in my opinion, apply to the consideration of the jury's verdict in the present case.

For these reasons as well as those stated in the reasons for judgment of my brother Cartwright, I would allow this appeal and direct that the matter be disposed of in the manner proposed by him.

Appeal dismissed, CARTWRIGHT, RITCHIE *and* HALL JJ. *dissenting.*

Solicitor for the appellant: G. Arthur Martin, Toronto.

Solicitor for the respondent: John A. Hoolihan, Toronto.

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DAME ENNI PARTANEN AND OTHERS (*Plaintiffs*) ..... APPELLANTS; *Oct. 30, 31

Jan. 28

AND

LA COMMISSION DE TRANSPORT DE MONTREAL (*Defendant*) .... RESPONDENT.

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

Motor Vehicles—Pedestrian—Fatal accident—Onus of proof—Presumptions of facts—Possibilities—Balance of probabilities—Civil Code, arts. 1056, 1242—Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53.

The plaintiff's husband was found dead lying face down on the roadway with his legs on the sidewalk. His numerous injuries, all to the upper part of the body, were the result of pressure having been applied on his left side while his right side was pressed against a stationary object, presumably the curb of the sidewalk. Marks made by a big tire

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Hall JJ.

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were found on his right wrist and part of the sleeve of his shirt. One of the defendant's autobuses had passed the scene of the accident at about that time and the tread of its right back wheel matched the marks on the wrist and sleeve of the victim. There were no eye-witnesses to the accident. The plaintiff alleged that her husband died as a result of his having been crushed by the wheel of an autobus owned and operated on behalf of the defendant.

The trial judge held that the plaintiff had not made the proof necessary to bring into play the presumption of s. 53 of the *Motor Vehicles Act*, R.S.Q. 1941, c. 142, and that, in any event, the presumption has been rebutted. The majority in the Court of Appeal held that the presumption did not apply, and the dissenting judge held that it applied and that the defendant had failed to rebut it. The plaintiff appealed to this Court.

Held: The appeal should be allowed.

Per Curiam: The evidence clearly demonstrated that there has been a contact between the victim and the tire of the defendant's autobus. The presumption of fault established under s. 53 of the *Motor Vehicles Act* was raised. The only defence was that the defendant's vehicle had not struck the victim and that its driver had driven in a careful and prudent manner. The presumption was not rebutted. The damages were not excessive.

Per Cartwright J.: Upon the balance of probabilities the chances of the marks on the victim's wrist and shirt having been made by any other vehicle were negligible. The most probable inference to be drawn from the known facts was that the same vehicle inflicted all the injuries. The defendant did not discharge the onus cast upon it by s. 53 of the *Motor Vehicles Act*.

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

Pierre Durand, for the plaintiffs, appellants.

Robert Bouchard, Q.C., for the defendant, respondent.

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

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench[1] confirming a judgment of the Superior Court which dismissed claims in damages by appellants personally and by the appellant Dame Enni Partanen, as tutrix, on behalf of her five minor children. These claims arose out of the death of one Joseph Niggemann, the hus-

[1] [1962] Que. Q.B. 701.

band of the appellant Enni Partanen, which occurred on the evening of February 5, 1955, allegedly as a result of his having been crushed by the wheel of an autobus owned by and operated on behalf of the respondent.

There were no eye-witnesses of the accident. The facts—as to which there is now no real dispute—were found by the learned trial judge to be as follows:

Le 5 février 1955, un peu après 9.30 heures du soir, Roger Clavel, conduisait vers l'est, sur l'avenue Notre-Dame de Grâce, un autobus de la Commission de Transport de Montréal. En dépassant l'intersection de l'avenue Oxford, il aperçut du côté nord, un homme gisant sans mouvement. Il arrêta son véhicule immédiatement et en descendit suivi de deux passagers: Louis Emile Vigneault et Ginette Désaulniers, pour lui porter secours.

L'homme était étendu à plat ventre, de biais, moitié dans la rue, moitié sur le trottoir. Sa tête était face contre le pavé de la rue, dans la direction ouest, ses jambes étaient sur le trottoir en direction est. Sa main droite était étendue dans le prolongement de sa tête. Son chapeau était un peu en avant de sa tête. On le retourna. Il était mort.

L'endroit où reposait le cadavre était l'asphalte de la rue, puis une déclivité s'élevant abruptement de la rue vers le trottoir à une hauteur d'environ 18 pouces. Cette pente et le trottoir étaient glacés, sales et raboteux.

L'homme mort fut identifié comme Joseph Niggemann, 50 ans, demeurant à 4200 Oxford, Montréal. Il était l'époux de la demanderesse, Dame Enni Partanèn, poursuivant en son nom et en qualité de tutrice à ses cinq enfants mineurs, et le père de l'autre demandeur: ROBERT NIGGEMANN.

L'autopsie a révélé plusieurs blessures et ecchymoses allongées et étroites sur le flanc gauche et l'hémithorax gauche, la face antérieure et latérale gauche, des fractures à neuf côtes du côté gauche et à sept du côté droit, une fracture de la clavicule droite, un embrochement des poumons, la rupture du cœur et des poumons, une hémorragie abondante. On a relevé des blessures au menton et à la tempe du côté droit faites par choc sur une surface dure ou par frottement.

Le Docteur Jean-Marie Roussel, médecin-légiste, qui a procédé à cette autopsie, a déclaré que les blessures ci-dessus décrites étaient dues, non à un écrasement, mais à une pression exercée particulièrement sur le côté gauche du défunt, alors qu'il avait le côté droit appuyé contre une surface dure, telle qu'une chaîne de trottoir.

Le Docteur Roussel, en faisant ses expertises, a constaté que le défunt portait sur la peau du poignet droit une empreinte d'un gros pneu. Cette empreinte se prolongeait sur l'extrémité de la manche droite de la chemise du défunt, produite comme pièce P-5. Il en a été conclu que cette empreinte avait été laissée par le passage d'un véhicule lourd.

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Le détective Marc Maurice, de la cité de Montréal, faisant enquête, retraça sur l'autobus 1195 de la Commission de Transport de Montréal, un pneu sur la roue droite arrière dudit véhicule, pouvant avoir fait ces empreintes. Cet autobus avait circulé avenue Notre-Dame de Grâce, près de l'avenue Oxford, vers le temps où Joseph Niggemann y fut trouvé mort.

As I have said, there is no serious dispute as to these facts as found by the learned trial judge. The principles of law to be applied are also well established; *Rousseau v. Bennett*[1]. The questions in issue are as to the inferences to be drawn from the established facts and in particular—

1. Whether the death of Niggemann was caused by his having been struck by the wheel of an autobus owned and operated on behalf of respondent, thus giving rise to the presumption of fault established under s. 53 of the *Motor Vehicles Act*, R.S.Q. 1941, c. 142 and
2. If it was, whether respondent has rebutted such presumption.

As to the first of these questions the learned trial judge held that the appellants had not made the proof necessary to bring the presumption into play and that even if it did apply, such presumption had been rebutted. Rinfret and Owen JJ. in the Court below held that on the evidence the presumption of fault under s. 53 of the *Motor Vehicles Act* did not apply. Bissonnette J. dissenting, held that it did, and that respondents had failed to rebut such presumption. I am in respectful agreement with him on both points.

Whether the victim's death was due to his having been crushed by the rear wheel of autobus no. 1195 owned by and operated on behalf of respondent, depends primarily upon the evidence given by Dr. Roussel and by Detective Maurice. As to this, I adopt the following statement of Bissonnette J.:

> Il est prouvé sans aucune contradiction que l'examen de Niggemann indiquait une empreinte sur son poignet droit, que celle-ci se prolongeait sur sa chemise et que les sculptures antidérapantes qu'on y relevait étaient nettement identiques à celles que comportait la semelle du pneu. Je souligne immédiatement qu'il serait, hors de toute vraisemblance, que ces empreintes auraient été faites par le pneu d'un autre véhicule qui se serait trouvé au même endroit deux ou trois minutes plus tôt. Et la raison qui confirme cette assertion, c'est que ce pneu avait été non seulement rechapé mais qu'à cette fin, on avait employé un moule particulier importé de Lidi,

[1] [1956] S.C.R. 89.

Californie. Cette preuve émane d'un contremaître de l'intimée et elle est par elle-même concluante sur ce point. Refuser de trouver là une présomption répondant aux exigences jurisprudentielles, ce serait élever les simples présomptions de l'homme au degré d'une preuve métaphysique et mathématique.

La preuve incontestée d'un rapport direct, étroit et uniquement concluante dans un sens établit que se produisit entre le défunt et l'autobus un contact et que l'intensité de celui-ci n'a pu avoir un effet autre que de provoquer la mort. En effet, selon le témoignage du Dr Roussel, de par la nature des blessures qui en sont résultées, la seule déduction médicale possible, c'est de retenir que coincé entre l'autobus et la levée de glace, Niggemann a subi une telle pression que celle-ci fut cause d'une hémorragie abondante de la poitrine, de la perforation des poumons et de la rupture du cœur. La force de cette pression latérale fut telle qu'elle entraîna la mort, même si la victime ne passa pas sous la roue du lourd véhicule. Or, il est impossible de concevoir qu'il pût exister un rapport de cause à effet avec un autre véhicule. En raison de la relation parfaite qui a été prouvée entre les empreintes sur le corps et la chemise du défunt et celle relevée sur la roue, empreinte, dans ce dernier cas, qui était le prolongement des autres, un peu comme la réunion de deux pièces dans un casse-tête qui ne peuvent s'ajuster autrement, il devient absolument invraisemblable de poser même l'hypothèse que les empreintes pourraient résulter d'un contact avec un autre véhicule. De même qu'il est d'un illogisme évident de prétendre que le défunt aurait pu être renversé par une autre voiture; bref, tant qu'il ne sera pas possible de repousser ou d'expliquer l'empreinte sur la roue, marque qui est la continuation de celle apparaissant sur le poignet droit, on demeure en face d'un fait qui, physiquement, métaphysiquement conduit à une conclusion irréfutable, irrésistible. Et alors il ne s'agit pas d'une simple présomption susceptible, en raison de sa force, de faire accepter un rapport causal mais de la preuve d'un fait matériel qui, parce qu'il rendait invraisemblable toute autre déduction, devait suffire à convaincre le tribunal que l'autobus était entré en contact avec le corps de la victime.

Au reste, même si, dans ce fait matériel, on y veut voir qu'une simple présomption de l'homme, celle-ci a des caractères tels d'intensité, de puissance et de logique qu'elle repousse même toute théorie de possibilités, de conjectures.

Respondent's defence was that its vehicle had not struck Niggemann. The only evidence tendered on behalf of respondent to rebut the presumption of fault, was that of the driver Boucher, who testified that he had driven his autobus in a careful and prudent manner. In agreement with Bissonnette J. and for the reasons which he has given, in my opinion the respondent failed to rebut the presumption of fault under s. 53.

There remains the question as to the quantum of damages. At the time of his death the victim was fifty years of age. He was sole proprietor of a modest business enterprise, his net annual revenue having been in the vicinity of $5,000 per annum. After his death this small business was sold for a low price. He left surviving him six children of

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whom five were minors at the time this action was instituted, their ages ranging from six to nineteen years. In his dissenting reasons Bissonnette J. fixed the damages sustained at the sum of $35,500, apportioned as follows:

Dame Enni Partanen personally	$ 18,000
Robert Niggemann personally	500
Barbara aged 19 years	1,500
Peter Alfred aged 12 years	3,000
Thomas Otto aged 11 years	3,000
Carola Enni aged 8 years	4,500
Irma Rita aged 6 years	5,000
	$ 35,500

In my opinion these amounts are not excessive and I am prepared to accept them.

I would therefore allow the appeal, maintain the appellants' action, and condemn the respondent to pay to the appellant Dame Enni Partanen personally, the sum of $18,000, to the appellant Robert Niggemann the sum of $500, and to the appellant Dame Enni Partanen ès qualité, the sum of $17,000, all with interest from September 3, 1957, the date of the judgment in the Superior Court. The appellants are entitled to their costs throughout.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Abbott and there is little that I wish to add.

The learned trial judge was of opinion that the marks left on the wrist and shirt of the deceased were probably made by the tire of the respondent's bus, but that it was for the appellants to prove that no other vehicle used similar tires. The passage in his reasons dealing with this point is as follows:

> Que les empreintes laissées sur le poignet et la chemise de Joseph Niggemann aient été tracées par la roue de l'autobus de la défenderesse la Commission de Transport de Montréal, cela est possible et même probable. Mais la preuve qui en a été faite n'est pas concluante. Il n'était pas suffisant de dire à la Commission de Transport de Montréal: «Vous aviez, au moment, de l'accident, un pneu pouvant faire les marques trouvées, donc c'est votre pneu qui a fait ces marques». Ladite défenderesse n'était pas tenue de démontrer que des pneus semblables ont pu être employés sur d'autres véhicules circulant dans les rues de Montréal. Il appartenait aux demandeurs de démontrer qu'aucun autre véhicule que celui impliqué n'utilisait ces pneus et que seule la défenderesse en faisait usage. Par la preuve faite, les demandeurs n'ont pas exclu la possibilité que les dites

empreintes peuvent provenir d'un autre véhicule usageant le même genre de pneus. Il est en preuve que des camions livrant l'huile de chauffage circulent parfois sur la rue où le cadavre a été trouvé.

Il n'est nullement impossible qu'un de ces camions ait passé près de l'intersection de l'avenue Notre-Dame-de-Grâce et de l'avenue Oxford, le 5 février 1955, portant un pneu capable de laisser l'empreinte trouvée sur la manche de chemise de Joseph Niggemann.

With respect, I think that the learned Judge erred. Civil cases are decided upon the balance of probabilities. In view particularly of the evidence of the witness Maurice as to the comparison of the marks on the wrist and shirt with the tread of the tire on bus number 1195 and that of the witness Urquhart as to the tire having been recapped by the use of a mould imported from California the chances of the marks having been made by any other vehicle were negligible.

The view of the learned trial Judge on this point was not shared by any of the judges in the Court of Queen's Bench[1].

The view of Bissonnette J. has been set out in the reasons of my brother Abbott.

Rinfret J. dealt with the point as follows:

L'on reste avec la seule probabilité que la roue en question aurait écrasé le poignet droit de la victime.

Cette probabilité est, à mon avis, suffisante pour qu'entre en jeu la présomption de l'article 53, mais uniquement pour la perte ou le dommage occasionné par tel écrasement.

Owen J. said:

As far as the autobus is concerned the only definite proof is that it ran over the victim's right hand.

Rinfret J. and Owen J. both were of opinion that although it was shewn that the bus ran over the deceased's wrist it was not established that the bus caused the injuries to his chest which were the immediate cause of death.

With the greatest respect I am of opinion that by far the most probable inference to be drawn from the known facts is that the same vehicle inflicted all the injuries.

The two other possible inferences which Owen J. regarded as equally probable with the inference that the victim was killed by the bus are stated by him as follows:

The victim could have had a heart attack or some other seizure which caused him to drop dead, partly on the roadway, before any motor vehicle ran over him.

[1] [1962] Que. Q.B. 701.

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An equally plausible inference, in view of the multiple injuries to both sides of the chest without any fracture of the spine, would be that the victim was run over and killed by one or more other motor vehicles before he was run over by the autobus.

In order to draw either of these inferences it would be necessary to find that Boucher, the driver of the bus, who was bringing it to a stop at a well lighted spot failed to see the lifeless body lying in front of him. The suggested inferences are not impossible; but, remembering always that the question is whether the appellants established their case on the balance of probabilities, it appears to me that the conclusion reached by Bissonnette J. is the right one.

Once the finding of fact that the death of the deceased was caused by the bus has been made, the reasons of Bissonnette J. satisfy me that the respondent did not discharge the onus cast upon it by s. 53(2) of the *Motor Vehicles Act*.

I have already stated my agreement with the reasons given by my brother Abbott, and I would dispose of the appeal as he proposes.

Appeal allowed with costs.

Attorneys for the plaintiffs, appellants: Birtz, Pouliot, Mercure & LeBel, Montreal.

Attorneys for the defendant, respondent: Letourneau, Quinlan, Forest, Raymond & Bouchard, Montreal.

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CANADIAN ADMIRAL CORPORATION LTD. (*Defendant*) ..... APPELLANT;

AND

L. F. DOMMERICH & COMPANY INCORPORATED (*Plaintiff*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assignment—Manufacturer entering into factoring agreement—Assignment of accounts receivable—Debt from assignor to debtor resulting from independent transaction—Whether debtor may exercise right of set-off against assignee which it would have had against assignor.

A, a manufacturer of television sets, purchased materials from R, a manufacturer of electrical equipment, and made payment direct to that

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

company. R subsequently entered into a "factoring agreement" with D, the substance of which was that R would assign its accounts receivable to D and D would notify the customers and make the collections for a stated charge to R. R notified A of its factoring arrangement and assigned A's account to D. Thereafter the invoices to A, prepared by R and sent by D, were stamped with notices of assignment of the accounts to D.

R went into bankruptcy; at the date of the bankruptcy it owed A a considerable amount of money for certain equipment with which it had been supplied by A. In an action brought by D in respect of A's purchases from R, A sought to set off in complete extinction of the claim the same amount owing by R to it. Judgment at trial was given in favour of D; an appeal from that judgment was dismissed by the Court of Appeal. A then appealed to this Court.

Held: The appeal should be allowed.

Per Cartwright, Martland and Ritchie JJ.: The debtor had as against the assignee the same right of set-off as he would have had against the assignor at the time at which he received notice of the assignment; it was for the assignee to make inquiries and, in the absence of fraud, the debtor was not under a duty to volunteer information. The circumstances fell short of establishing knowledge on the part of A that R would request or accept payment from D without disclosing to it that R was indebted to A in amounts which the latter was entitled to set off against its liability to R. A had no express notice that R was concealing the existence of this right of set-off from D or that the latter was not making such inquiries from R as were necessary to protect its interest. The course of dealing was not such as should necessarily have led A to realize that D was being deceived by R. In the absence of such knowledge A was not under a duty to volunteer information to D.

Mangles v. Dixon and others (1852), 3 H.L. Cas. 702, referred to.

Per Curiam: The Court of Appeal was in error in finding that the factoring agreement constituted an equitable assignment of future choses in action. It was an agreement to transfer book accounts each month on payments being made in accordance with the agreement and there was no transfer of any account either at law or in equity until R assigned the various accounts specifically at the end of each month. A received notice of assignment of each account for the first time when the invoice stamped with notice of assignment was received by it. The result was that on receipt of the invoice stamped with the assignment, A was not entitled after this date to set off against that invoice an indebtedness of R which arose subsequent to the date of notice of the assignment of that account but the converse also held true. A was entitled to assert with respect to any particular assignment that on the date when notice of that assignment was given, on a proper accounting between A and R, there was nothing owing to R.

No duty was imposed on A to speak and to warn of a potential right of set-off because it knew the course of dealing between D and R. A did not mislead D and was under no obligation to disclose its own dealings and to volunteer information. The onus was on D, as assignee, to satisfy itself as to the equities which might exist when it took the assignments month by month.

If this factoring agreement was to be treated as a present and immediate equitable assignment of future choses in action, another problem arose.

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It was then within the terms of *The Assignment of Book Debts Act*, R.S.O. 1950, c. 25, and was absolutely void against the creditors of R for non-compliance with the Act.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Smily J. Appeal allowed.

J. D. Arnup, Q.C., for the defendant, appellant.

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

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

CARTWRIGHT J.:—The relevant facts are set out in the reasons of my brother Judson.

For the reasons which he has given I agree with his conclusion that the rights of the parties are to be determined on the basis that Admiral received notice of the assignment of each account for the first time when the invoice stamped with notice of assignment was received by it. At these times as between Admiral and Rotor the former had the right to set off against its debt to Rotor whatever amount was due from Rotor to it for the tuners delivered up to that time. The question as to which I wish to add a few words is whether, in the particular circumstances of this case, Admiral is prevented from taking advantage of this equity as between itself and Dommerich.

There is no doubt as to the general rule. The debtor has as against the assignee the same right of set-off as he would have had against the assignor at the time at which he receives notice of the assignment; it is for the assignee to make inquiries and the debtor is not under a duty to volunteer information. There is, however, an exception to this rule which is enunciated in the following passage from the judgment of the House of Lords, delivered by Lord St. Leonards L.C., in *Mangles v. Dixon* and others[2]:

> I must take care and guard myself upon this important point, as not for a moment meaning to say that if that notice of the bankers had shown that they had been deceived, that they were advancing money upon a ground that they misunderstood, and if the charterers, Messrs. *Mangles* and Co., had stood by, well knowing that circumstance, and had been silent, the result would have been the same: I agree that the case would be altogether different. It would then have been incumbent upon the

[1] [1962] O.R. 902, 34 D.L.R. (2d) 530. [2] (1852), 3 H.L. Cas. 702 at 733.

Messrs. *Mangles* to disclose the real circumstances of the case to Messrs. *Dixon*; and if they had not done so, they would be just as much bound as it is now contended they ought to be bound.

The limitation of the exception is made clear by the following sentence at p. 734 of the same judgment:

> I admit the books do not establish the rule; but I think the principle is perfectly clear, that where there is no fraud, nothing to lead to the conclusion in the mind of the party who receives the notice, that the party who gives it has been deceived and is likely to sustain a loss; I say it is clear that the former is not bound to volunteer information.

It is argued for the respondent that the course of dealing between the parties must have resulted in Admiral knowing that Dommerich would pay over to Rotor the amounts shewn due to Rotor in the invoices which had been assigned by it to Dommerich in ignorance of the fact that Admiral was entitled to the right of set-off which is now asserted. Stress is laid particularly on the facts, (i) that all invoices for goods sold by Rotor to Admiral had for some years been assigned to Dommerich, (ii) that the notation "Cheque payable to L. F. Dommerich & Co. Inc." appeared throughout this period at the top of each page of Admiral's ledger of accounts payable to Rotor, (iii) that a letter from Dommerich to Admiral dated March 10, 1959, asking for payment of a small balance said to be overdue, contained the following paragraph:

> We trust that you understand that we as factors must account to our client for the value of any invoice on the maturity date of said invoice and must look to our customers for payment of interest for any additional time taken.

(iv) that the notice of assignment stamped on every invoice included the following paragraph:

> Any objection to this bill or its terms must be reported on receipt of same to L. F. DOMMERICH & CO., INC., 271 Madison Ave., New York, 16, N.Y.

All these circumstances appear to me to fall short of establishing knowledge on the part of Admiral that Rotor would request or accept payment from Dommerich without disclosing to it that Rotor was indebted to Admiral in amounts which the latter was entitled to set off against its liability to Rotor. Admiral had no express notice that Rotor was concealing the existence of this right of set-off from Dommerich or that the latter was not making such inquiries

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Cartwright J.

from Rotor as were necessary to protect its interest. I am unable to find that the course of dealing was such as should necessarily have led Admiral to realize that Dommerich was being deceived by Rotor. In the absence of such knowledge Admiral was not under a duty to volunteer information to Dommerich.

For the reasons given by my brother Judson and those set out above I would dispose of the appeal as he proposes.

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

JUDSON J.:—L. F. Dommerich & Company Incorporated, as assignee of accounts payable to Rotor Electric Company Limited, obtained a judgment against Canadian Admiral Corporation Ltd. for $46,181 and held it on appeal[1]. The question is whether Admiral may exercise a right of set-off against the assignee, which it would have had against Rotor, the assignor.

Until September 1954, Admiral purchased materials from Rotor and made payment direct to that company. In September 1954, Rotor entered into a "factoring agreement" with Dommerich, the substance of which was that Rotor would assign its accounts receivable to Dommerich and Dommerich would notify the customers and make the collections for a stated charge to Rotor.

The factoring agreement is in the form of a letter addressed by Dommerich to Rotor. I set out now the provisions with which we are concerned in this appeal:

> You agree to do all your business through us; to promptly assign to us, as absolute owners, all accounts arising from sales of your merchandise made during the period of this agreement, together with your rights in the merchandise sold; and to furnish us with duly executed confirmatory assignments thereof in form satisfactory to us.
>
> No sales or deliveries of merchandise shall be made without our written approval as to the amount, terms of sale and credit of the customer, and we agree to purchase all of such accounts receivable in accordance with the terms of this agrement. We assume any loss on sales finally approved by us in writing which is due to the insolvency of the customer, provided the customer has received and finally accepted the merchandise without dispute, offset or counterclaim . . . .
>
> We will credit you on the last day of each month with the net of the current month's sales, such credit to be as of the average due date of such sales, plus ten (10) days provided the terms of sale and the credit of the customers have been approved by us. This credit shall constitute our purchase price of the accounts assigned to us. We will remit to you on the

[1] [1962] O.R. 902, 34 D.L.R. (2d) 530.

average maturity date of customers' invoices, in Canadian funds, or more often, if requested, but in remitting we may reserve a reasonable amount to protect ourselves against the returns and claims of, and allowances to, customers.

You will notify us promptly of all disputes and claims and settle them promptly at your own expense. Our purchase of an account arising out of the sale which is the subject of an offset, claim or dispute, is automatically rescinded forthwith and the amount theretofore credited to you for such sale, together with interest thereon from the date of such credit, at our sole option, may be charged back by us in your account. Irrespective of such rescission or chargeback, the assignment of such account to us shall continue in full force until we are fully reimbursed.

For our services we are to charge to and receive from you as of the fifteenth of the month in which the sales are made a commission of one and one-half (1½) per cent of the net amount of all sales.

When this agreement was signed, Rotor sent to Admiral a form letter dated September 13, 1954, notifying Admiral that Dommerich would act as its factor. A statement of the then current indebtedness of Admiral to Rotor was attached, with the following endorsement:

This account has now been assigned to L. F. Dommerich and Company, Inc. and should be paid to them when due.

Admiral then began to remit to Dommerich the amounts from time to time accruing due by it to Rotor. In addition, in a ledger kept by Admiral, called "Vendors Ledger", showing the name of Rotor, a notation appeared in the ledger sheet commencing August 30, 1954, reading:

CHEQUE PAYABLE TO—
L. F. DOMMERICH & CO. INC.,
271 MADISON AVENUE,
NEW YORK 16, N.Y.

A similar notation appeared in the ledger throughout the whole of the relevant period.

The procedure followed is set out in the reasons delivered by Laidlaw J.A. Rotor prepared the invoices, addressing them to Admiral, and stamped each with two notices as follows:

Any objection to this bill or its terms, must be reported on receipt of same to L.F. Dommerich & Co., Inc., 271 Madison Avenue, New York 16, N.Y.

For valuable consideration received this account has been transferred and assigned to L. F. Dommerich & Co. Inc., 271 Madison Avenue, New York 16, N.Y., and is owned by and payable only to it in Canadian funds.

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Each invoice was given an account number. The invoices to Admiral and other purchasers of merchandise from Rotor were sent to Dommerich together with a document signed by Rotor in these terms:

> We hereby confirm that for valuable consideration received, we have transferred and assigned to you all our rights, title and interest in and to the attached accounts aggregating $.....and numbered from ..... to ..... and that, in consequence, they are owned by and payable only to you.

Dommerich sent to the various purchasers the invoices received from Rotor stamped with the assignment.

In the period from 1954 until the fall of 1959, Admiral issued to Rotor a large number of "debit memos", primarily arising from "charge-backs" for defective transformers delivered by Rotor to Admiral. These debit memos were set off against amounts owing by Admiral to Rotor.

Before September 23, 1959, negotiations were carried on between the President of Admiral and the President of Rotor for the sale by Admiral to Rotor of certain equipment called "tuners" to be incorporated in stereo phonographs to be manufactured and sold by Rotor. Rotor issued to Admiral a purchase order for 550 stereo tuners, to be delivered in instalments. The total purchase price for such tuners was $43,942.52. The first delivery of these tuners was made by Admiral to Rotor on October 13, 1959, and the order was completed by the last delivery on November 25, 1959.

At the time of the first delivery of these tuners to Rotor on October 13, 1959, the amount owing by Admiral on invoices issued by Rotor for goods sold by Rotor to Admiral was $62,470.67. Because the President of Rotor had been associated in some way with another business which had failed and had paid nothing to creditors, the President of Admiral wanted to ensure that his company would always owe more to Rotor than Rotor would owe to Admiral. He had the account checked and learned that his company then owed to Rotor something in excess of $60,000.

The result was that Admiral's supervisor of accounts payable held enough in reserve on the accounts payable to Rotor to offset what was on the accounts receivable from Rotor. At some stage someone wrote a memorandum in Admiral's ledger relating to Rotor "Leave balance at $43,942.52."

By arrangement between counsel for the appellant and the respondent at the trial, the precise accounting between the parties was not gone into at the trial, it being understood that if this became necessary, it would be dealt with on a reference. As a result, the individual remittances and invoices, together with any accompanying memoranda as to the particular debt in respect of which Admiral was making payments to Rotor's assignee, were not filed as exhibits. This probably led to the comment of the trial judge that the evidence did not show what accounts were due and payable from time to time by Rotor to Admiral although the ledger sheet did show the dates when they were charged. He went on to find, however, that there was no right of set-off, because of the prior knowledge of the appellant "of the assignments being made of these last-mentioned accounts to the plaintiff."

Rotor went into bankruptcy; at the date of the bankruptcy Rotor owed Admiral $43,942.52 for the tuners. Dommerich, in this action, claimed from Admiral $49,871.57, of which Admiral paid $5,699.44 without prejudice to its position. The claim is for $43,942.52, against which Admiral seeks to set off in complete extinction of the claim the same amount owing by Rotor to it.

The trial judge made a clear finding against the evidence given on behalf of Rotor that there was an agreement between the two companies (Admiral and Rotor) that Admiral would not "contra the accounts".

Dommerich did not argue at the trial that the original factoring agreement constituted an equitable assignment of future accounts owing by Admiral to Rotor, and the reasons for judgment do not deal in any way with the point. The trial judge dealt with the matter on the basis that Admiral must have known (even if its President did not) of the existence of the factoring agreement and that the invoices were being assigned to the respondent. His opinion was that it would be contrary to the principles of equity to permit such a set-off as was claimed by Admiral. He also held that the type of set-off here claimed arose from an independent transaction and was not the type of "off-set" or counter-claim which had been referred to in the factoring agreement. On the question whether the onus was upon Admiral or Dommerich to make inquiry, he held that Admiral should have inquired whether Dommerich was

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aware that such a claim of set-off might arise, or should have notified Dommerich that such accounts were arising. He therefore gave judgment in favour of Dommerich for $43,942.52, with interest from the date of the writ.

The Court of Appeal held that Admiral knew that Dommerich was the assignee not only of existing debts owed by Admiral to Rotor but also of future debts, and that Admiral was not entitled to impair Dommerich's rights by any set-off or counter-claim for an independent debt between Admiral and Rotor unconnected with the dealings giving rise to the assignment from Rotor to Dommerich. The Court of Appeal also held on a point raised by Dommerich for the first time that the factoring agreement of 1954 constituted an equitable assignment of all future debts owing by Admiral to Rotor.

With respect, I think there was error in finding that the factoring agreement constitued an equitable assignment of future choses in action. I have set out the relevant provisions above and I can find nothing in them beyond an agreement between Rotor and Dommerich binding each of them to do certain things in the future. The document does not contain words of present effect or transfer which could bind the subject-matter when it might come into existence (4 Hals., 3rd ed., p. 493). It is an agreement to transfer these book accounts each month on payments being made in accordance with the agreement and there was no transfer of any account either at law or in equity until Rotor assigned the various accounts specifically at the end of each month. That specific assignment is set out on p. 244 of these reasons. Admiral, therefore, received notice of assignment of each account for the first time when the invoice was submitted in accordance with the procedure outlined above. The result was that on receipt of the invoice stamped with the assignment, Admiral was not entitled after this date to set off against that invoice an indebtedness of Rotor which arose subsequent to the date of notice of the assignment of that account but the converse also holds true. Admiral was entitled to assert with respect to any particular assignment that on the date when notice of that assignment was given, on a proper accounting between Admiral and Rotor, there was nothing owing to Rotor.

There is some significance in the way in which the case was pleaded and put in at the trial. The statement of claim

is based upon a series of specific assignments with a balance owing of $49,871.57 at the date of the writ, and the case was put in at the trial pursuant to this statement of claim. The sole basis of the judgment at trial was the imposition of a duty to speak and to warn of a potential right of set-off because Admiral knew the course of dealing between Dommerich and Rotor.

But Admiral was in no way concerned with the arrangements between Dommerich and Rotor except to pay in accordance with the assignments when notice was received. The arrangement was entirely for the financial advantage and convenience of Rotor and Dommerich. Dommerich earned a fee and Rotor avoided the trouble of running a collection department. I can see no reason why such an arrangement should impose additional duties on Admiral as a purchaser of Rotor's products or restrict the rights which it would otherwise have in dealing back and forth with this supplier and customer. Dommerich could have instructed Rotor that it was not to get into a position which might enable a customer to exercise a right of set-off and could have examined Rotor's books to see that this instruction was being followed.

On the other hand, what kind of notice should Admiral have given to Dommerich? Should it have said: "We are now selling goods to Rotor and may have a right of set-off?" Should it have gone further and said that because of doubts concerning the financial position of Rotor, it intended to keep its accounts in such a way that it would not be caught in a bankruptcy. It was for Dommerich to look after its own business and for Admiral to mind its own business. Admiral did not mislead Dommerich and was under no obligation to disclose its own dealings and to volunteer information. The onus was on Dommerich, as assignee, to satisfy itself as to the equities which might exist when it took these assignments month by month.

If this factoring agreement is to be treated as a present and immediate equitable assignment of future choses in action, another problem arises. It is then within the terms of *The Assignment of Book Debts Act*, R.S.O. 1950, c. 25, and is absolutely void against the creditors of Rotor for non-

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compliance with the Act. This document was never registered. The Act requires registration within thirty days of its execution, together with an affidavit of an attesting witness and an affidavit of *bona fides*. Admiral was a creditor entitled to the protection of the Act and the fact that Admiral knew in a general way of the arrangement between Dommerich and Rotor does not remove it from this classification. I cannot understand the criticism of Laidlaw J.A. of Admiral's position on this branch of the appeal. It was Dommerich that argued for the first time in the Court of Appeal that the factoring agreement was an equitable assignment. To answer this argument counsel for Admiral put forward a defence based upon *The Assignment of Book Debts Act*.

Dommerich, on appeal, claimed to appropriate the payments already made by Admiral to the accounts arising after October 13, 1959. This was fully answered on the argument by Admiral, whose payments were clearly appropriated to the accounts arising before that date.

I would make the following order. The appeal should be allowed with costs both here and in the Court of Appeal and the judgment at trial and in the Court of Appeal set aside. The order should include

(*a*) a declaration that the letter of September 1954 is not an equitable assignment of future debts owing to Rotor by Admiral;

(*b*) a declaration that with respect to each assignment from Rotor to Dommerich after October 13, 1959, Admiral is entitled to set off amounts owing to it by Rotor for goods delivered by Admiral to Rotor prior to notice of such assignment; and is obligated to Dommerich with respect to the accounts covered by such assignment for any difference between the total of such accounts and the allowable set-off;

(*c*) if the plaintiff so elects within 15 days from the delivery of these reasons, a direction for a reference to the Master at Toronto to determine what amount, if any, is owing by Admiral to Dommerich on the basis of an accounting with respect to each assignment on the basis set out above.

If the plaintiff elects to take a reference, the costs of the trial and of the reference are reserved to the trial judge. If the plaintiff does not so elect, the action is dismissed with costs.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Arnoldi, Parry, Campbell, Pyle, Godfrey & Lewtas, Toronto.

Solicitors for the plaintiff, respondent: Garvey, Ferris & Murphy, Toronto.

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*Feb. 14, 17
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THE CITY OF EDMONTON (*Defendant*) ..... APPELLANT;

AND

WALTER WOODS LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Municipal corporations—Expropriation—Compensation—Injurious affection—Damages for loss of business—Overpass built on street in front of plaintiff's property—No expropriation of plaintiff's land—Claim for land injuriously affected—The City Act, R.S.A. 1955, c. 42, ss. 203, 309, as amended by 1960 (Alta.), c. 15, ss. 12, 13.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming an award of compensation made by Milvain J. for injurious affection under *The City Act*, R.S.A. 1955, c. 42, as amended. Appeal dismissed.

Alan F. Macdonald, Q.C., for the defendant, appellant.

C. W. Clement, Q.C., for the plaintiff, respondent.

At the conclusion of the hearing, the following judgment was delivered.

THE COURT (orally):—We are all of the opinion that the appeal fails. We agree with Mr. Justice Milvain's interpretation of the relevant sections of the *City Act*, and we can find no sufficient reason for interfering with the amount of compensation which he fixed and which was confirmed by the unanimous judgment of the Court of Appeal.

The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Alan F. Macdonald, Edmonton.

Solicitors for the plaintiff, respondent: Clement, Parlee, Whittaker, Irving, Mustard & Rodney, Edmonton.

[1] (1963), 42 W.W.R. 370, 39 D.L.R. (2d) 167.

*PRESENT: Cartwright, Martland, Ritchie, Hall and Spence JJ.

DOMINION NEWS & GIFTS (1962) LTD. ..... APPELLANT;

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*Feb. 20, 21
March 9

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Obscenity—Forfeiture of two magazines as obscene publications—Test applied—Criminal Code, 1953-54 (Can.), c. 51, s. 150(8) (as enacted by 1959, c. 41, s. 11), and s. 150A(4) (as enacted by 1959, c. 41, s. 12).

On an information based on s. 150A of the *Criminal Code*, issues of two magazines, which the accused had offered for sale in the ordinary course of its business, were seized as obscene publications under s. 150(8) of the *Criminal Code*. The trial judge found the magazines to be obscene and ordered their forfeiture to the Crown. This judgment was affirmed by a majority in the Court of Appeal, Freedman J.A. dissenting. The accused appealed to this Court.

Held: The appeals should be allowed for the reasons given by Freedman J.A.

APPEALS from two judgments of the Court of Appeal for Manitoba[1], affirming forfeiture orders made by Macdonell Co. Ct. J. Appeals allowed.

Joseph Sedgwick, Q.C., and *John A. Campbell*, for the appellant, Escapade Magazine.

Mannie Brown, for the appellant, Dude Magazine.

J. J. Enns, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—These two appeals, one relating to the December 1962 issue of a magazine called "Escapade" and the other to the September 1962 issue of a magazine called "Dude", were argued together.

We are all of opinion that the appeals should be allowed. We agree with the reasons given by Freedman J.A. in the Court of Appeal for Manitoba[1]. We wish to adopt those reasons in their entirety and do not find it necessary to add anything to them.

[1] (1963), 42 W.W.R. 65, 2 C.C.C. 103, 40 C.R. 109.

*PRESENT: Taschereau C.J. and Cartwright, Martland, Judson, Ritchie, Hall and Spence JJ.

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The appeals are accordingly allowed, the judgments in the Courts below are set aside, the orders directing that the matter seized be forfeited to Her Majesty in the Right of the Province of Manitoba are quashed, and it is directed that the matter seized be returned to the appellant.

There will be no order as to costs in any Court.

Appeals allowed

Solicitors for the appellant, Escapade Magazine: Smith, Rae, Greer, Toronto.

Solicitor for the appellant, Dude Magazine: M. Brown, Toronto.

Solicitor for the respondent: The Attorney-General for Manitoba.

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*Novembre 14, 15

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LAURIER SAUMUR ET LES TÉMOINS DE JÉHOVAH (*Demandeurs*) ..... APPELANTS;

ET

LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC (*Défendeur*) ..... INTIMÉ;

ET

LE PROCUREUR GÉNÉRAL DU CANADA ..... INTERVENANT.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Actions—Procédure—Jugement déclaratoire dans Québec—Validité d'un statut provincial—Intérêt requis pour prendre action—Loi concernant la liberté des cultes et le bon ordre, 1953-54 (Qué.), c. 15—Code de Procédure Civile, art. 77.

Par action instituée le lendemain du jour où fut sanctionnée la *Loi concernant la liberté des cultes et le bon ordre, 1953-54 (Qué.), c. 15,* les demandeurs ont demandé que cette législation soit déclarée *ultra vires.* Les demandeurs ont prétendu que cette législation pourrait leur occasionner des troubles. La Cour Supérieure a jugé que le statut était

*CORAM: Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall et Spence.

intra vires. Sans se prononcer sur la validité du statut, la Cour d'Appel a renvoyé l'action parce qu'une semblable action ne pouvait être instituée dans la province. Les demandeurs se sont pourvus devant cette Cour et le Procureur général du Canada a produit une intervention.

Arrêt: L'appel doit être rejeté ainsi que l'intervention.

L'action déclaratoire n'existe pas dans Québec, sauf en quelques cas isolés. Les tribunaux de cette province ne jugent que les litiges. Les questions académiques et théoriques où aucun *lis* n'existe leur ont toujours été étrangères. La porte des tribunaux n'est pas ouverte à quiconque n'a pas d'intérêt né et actuel dans un litige. L'article 77 du *Code de Procédure Civile* est péremptoire à ce sujet. Selon cet article, pour poursuivre, l'intérêt doit être immédiat même s'il est éventuel. La seule crainte que peut avoir un citoyen qu'un jour une action possible puisse être instituée contre lui ne justifie pas *per se* un recours en justice. Puisque l'action n'existe pas, il est inutile d'examiner la validité du statut. Il s'ensuit aussi que l'intervention du Procureur général du Canada doit être rejetée.

Actions—Practice and procedure—Declaratory judgment in Quebec—Validity of provincial statute—Necessary interest required to institute action—An Act Respecting Freedom of Worship and the Maintenance of Good Order, 1953-54 (Que.), c. 15—Code of Civil Procedure, art. 77.

The day after the Quebec statute, *An Act Respecting Freedom of Worship and the Maintenance of Good Order, 1953-54 (Que.) c. 15,* came into force, the plaintiffs instituted an action to have it declared *ultra vires*. The plaintiffs contended that they were threatened with prosecution under the statute. The Superior Court held that the statute was *intra vires*. Without passing on the constitutional question, the Court of Appeal dismissed the action on the ground that such an action could not be instituted in the province. The plaintiffs appealed to this Court and the Attorney General for Canada intervened.

Held: The appeal should be dismissed as well as the intervention.

Except in some isolated instances provided for by the code or statutes, a declaratory action does not exist in Quebec. The Courts of that province deal only with actual disputes and not with theoretical and academic questions where there is no *lis*. To have a right of action one must have an interest in a dispute. Art. 77 of the *Code of Civil Procedure* is peremptory. Under that article no person could bring an action unless he had an interest therein. Although such interest could be eventual, it had to be an existing and actual interest. It could not be based merely on the fear of future injury. Since the action did not exist, it would be useless to examine the validity of the statute. It follows also that the intervention by the Attorney General of Canada should be dismissed.

APPEL d'un jugement de la Cour du Banc de la Reine, province de Québec[1], affirmant un jugement du Juge Lizotte. Appel rejeté.

Glen How, Q.C., Sam S. Bard, Q.C., et *F. Mott-Trille,* pour les demandeurs, appelants.

[1] [1963] B.R. 116.

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Georges A. Pouliot, pour le procureur général de Québec,

Rodrigue Bédard, C.R. et *G. A. Beaudoin,* pour le procureur général du Canada.

Le jugement de la Cour fut rendu par

LE JUGE EN CHEF: Le 28 janvier 1954, une loi de la province de Québec a été sanctionnée intitulée: *Loi concernant la liberté des cultes et le bon ordre* et qui se lit en partie de la façon suivante:

2*a*. Ne constitue pas la jouissance ni le libre exercice du culte d'une profession religieuse le fait

a) de distribuer, dans des places publiques ou à domicile, des livres, revues, tracts, pamphlets, papiers, documents, photographies, ou autres publications contenant des attaques outrageantes ou injurieuses contre le culte d'une profession religieuse ou les croyances religieuses d'une partie quelconque de la population de la province, ou des propos de caractère outrageant ou injurieux pour les membres ou adhérents d'une profession religieuse; ou

b) de se porter, dans des discours ou conférences prononcés sur la place publique, ou transmis au public au moyen de haut-parleurs ou autres appareils, à des attaques outrageantes ou injurieuses contre le culte d'une profession religieuse ou les croyances religieuses d'une partie quelconque de la population de la province, ou à des propos de caractère outrageant ou injurieux pour les membres ou adhérents d'une profession religieuse; ou

c) de diffuser ou de reproduire, au moyen de la radiophonie, de la télévision ou de la presse, de telles attaques ou de tels propos.

* * *

10*a*. Quiconque commet un acte mentionné au paragraphe *a*, au paragraphe *b* ou au paragraphe *c* de l'article 2*a* se rend coupable d'une infraction à l'article 2*c* et est passible, sur poursuite en vertu de la première partie de la Loi des convictions sommaires de Québec, d'une amende d'au moins cent dollars et d'au plus deux cents dollars pour une première infraction, d'au moins deux cents dollars et d'au plus quatre cents dollars pour une deuxième infraction et d'au moins quatre cents dollars et d'au plus mille dollars pour toute infraction subséquente, avec dépens dans chaque cas; et, à défaut de paiement de l'amende et des frais, d'un emprisonnement d'au moins quinze jours et d'au plus trente jours pour la première infraction, d'au moins trente jours et d'au plus soixante jours pour la deuxième et d'au moins cent vingt jours et d'au plus cent quatre-vingts jours pour toute infraction subséquente.

Lorsque l'infraction consiste à distribuer un livre ou un écrit mentionné au paragraphe *a* de l'article 2*a*, ce livre ou cet écrit peuvent être saisis sans mandat et tous leurs exemplaires dans la province peuvent être saisis avec mandat. S'il y a condamnation, le juge qui la prononce doit en ordonner la destruction.

10*b*. Sur requête, appuyée du serment d'une personne digne de foi et alléguant une infraction ou l'imminence d'une infraction aux dispositions de l'article 2*c*, présentée par le procureur général ou avec son autorisation ou par la corporation municipale dans le territoire de laquelle l'infraction a été

commise ou est sur le point d'être commise, la Cour supérieure ou l'un de ses juges peut émettre une ordonnance d'injonction interlocutoire pour empêcher la commission, la continuation ou la répétition de cette infraction.

Une injonction interlocutoire peut être demandée et décernée contre toute personne et contre toute organisation, association ou collectivité d'individus, jouissant ou non de l'entité juridique, qui enfreint ou est sur le point d'enfriendre les dispositions de l'article 2*c*.

Dans le cas d'une organisation, association ou collectivité d'individus ne jouissant pas de l'entité juridique, il suffit, pour les fins de la requête, de l'ordonnance d'injonction et des procédures qui s'y rattachent, de la désigner par le nom collectif sous lequel elle se désigne elle-même ou sous lequel elle est communément connue et désignée, et la signification de la requête, de l'ordonnance d'injonction ou de toute autre procédure peut lui être valablement faite à l'un de ses bureaux, ou à l'un de ses lieux d'organisation ou de réunion, ou à l'une de ses places d'affaires, dans la province.

L'ordonnance d'injonction rendue contre une telle organisation, association ou collectivité lie toutes les personnes qui en font partie et est exécutoire contre chacune d'elles.

La demande en injonction peut être faite et l'injonction accordée sans l'émission d'un bref d'assignation. Cette demande constitue alors une instance par elle-même.

Le recours prévu au présent article est, quant au surplus et sauf incompatibilité avec les dispositions ci-dessus, sujet à l'application des articles 959 à 972 du Code de procédure civile, sauf qu'aucun cautionnement n'est requis dans aucun cas.

10*c*. L'exercice de l'un des recours prévus par les articles 10*a* et 10*b* n'exclut pas l'exercice de l'autre.

Le demandeur-appelant, Laurier Saumur, un témoin de Jéhovah, a institué devant les tribunaux de la province de Québec une action dans laquelle il demande que cette législation soit déclarée *ultra vires* des pouvoirs de la province.

La Cour supérieure a rejeté cette action et ce jugement a été confirmé par la Cour d'Appel[1]. Ce dernier tribunal ne s'est pas prononcé sur la constitutionnalité de la loi mais a déclaré qu'une semblable action ne pouvait être instituée dans la province de Québec. Devant cette Cour, lors des arguments, le tribunal a informé le procureur de l'appelant qu'il ne serait entendu que sur son droit qu'il peut avoir de prendre une telle action déclaratoire. La Cour a cru et croit encore que, si tel droit existe, l'appel doit être maintenu, et le dossier retourné à la Cour d'Appel afin que nous puissions avoir le bénéfice de l'opinion du plus haut tribunal de la province sur la question constitutionnelle. L'unique question qui se pose est donc de savoir si l'action qui a été instituée a un fondement légal et si elle est reconnue par la loi et la jurisprudence de la province da Québec.

[1] [1963] B.R. 116.

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Taschereau J.C.

Il est certain que le demandeur n'a pas été lésé depuis que la loi est entrée en vigueur. Au surplus, le procureur de Saumur a affirmé qu'il n'entre pas dans les activités des Témoins de Jéhovah de faire ce que défend la loi en question. Il nous demande de prévenir les troubles que cette législation pourrait peut-être plus tard lui occasionner, et de le préserver de l'inconvénient dont il n'a pas encore souffert.

Le demandeur-appelant fait partie d'une secte religieuse connue sous le nom des «Témoins de Jéhovah». Ces derniers évidemment ont le droit de pratiquer cette religion, et, comme j'ai eu l'occasion de le dire dans le cause de *Chaput v. Romain*[1]:

> . . . Dans notre pays, il n'existe pas de religion d'État. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité. Ce serait une erreur fâcheuse de croire qu'on sert son pays ou sa religion, en refusant dans une province, à une minorité, les mêmes droits que l'on revendique soi-même avec raison, dans une autre province.

Mais ceci n'est pas le point essentiel qui doit déterminer le sort du présent litige. Je suis d'opinion, pour les raisons suivantes, que cet appel ne peut réussir, parce que le demandeur-appelant ne pouvait instituer la présente action, et qu'il n'est donc pas nécessaire d'examiner la question de la constitutionnalité de la loi. Le demandeur-appelant voudrait par une action instituée en Cour supérieure, et dont il a pris l'initiative, faire déclarer invalide une loi de la Législature avant même qu'il ne soit lésé. En vertu du chapitre 8 des Statuts Refondus de la province de Québec 1941, le Lieutenant-gouverneur en conseil peut soumettre à la Cour du banc de la reine, jurisdiction d'appel, pour audition et examen, toute question quelconque qu'il juge à propos et obtenir ainsi l'opinion des juges. L'opinion de la Cour, bien que ne comportant qu'un avis, est traitée pour toutes les fins d'appel à la Cour Suprême du Canada, comme un jugement décisif rendu par ladite Cour entre les parties. De plus, le Gouverneur Général en conseil peut, en vertu de la *Loi sur la Cour suprême* du Canada, art. 55, soumettre à notre Cour des questions importantes de droit ou de faits, l'interprétation de l'*Acte de l'Amérique Britannique du*

[1] [1955] R.C.S. 834 à 840, 114 C.C.C. 170, 1 D.L.R. (2d) 241.

Nord, la constitutionnalité ou l'interprétation d'une législation, et, enfin, toute autre matière, qu'elle soit ou non, dans l'opinion de la Cour, *ejusdem generis,* que celles qui sont énumérées à l'art. 55. Mais un tel droit n'appartient pas à un citoyen.

Dans la province de Québec l'action déclaratoire n'existe pas. Ses tribunaux ne donnent pas de consultations légales; ils jugent les litiges. Les questions académiques et théoriques où aucun *lis* n'existe leur ont toujours été étrangères. La seule crainte que peut avoir un citoyen qu'un jour une action possible peut être instituée contre lui ne justifie pas *per se* un recours en justice. La porte des tribunaux n'est pas ouverte à quiconque n'a pas d'intérêt né et actuel dans un litige. L'article 77 du *Code de Procédure civile* est péremptoire à ce sujet. Il se lit comme suit:

> 77. Pour former une demande en justice, il faut y avoir intérêt.
> Cet intérêt, excepté dans les cas de dispositions contraires, peut n'être qu'éventuel.

Mais cet intérêt doit être né et actuel malgré que les conséquences ne puissent se faire sentir que plus tard. C'est ainsi que dans *Bélanger v. Théberge*[1], la Cour supérieure de Québec a décidé:

> Une action basée uniquement sur la crainte de dommages futurs n'est pas fondée, et le Demandeur ne peut dans de telles circonstances exiger un cautionnement du Défendeur.

Dans *Ouimet v. Fleury*[2], la Cour d'Appel de Québec a décidé:

> Les tribunaux sont constitués pour décider les litiges . . . entre citoyens . . . non pour donner des opinions sur la légalité de leurs actions; . . . pour intenter une action, il faut y avoir un intérêt né et actuel, et . . . les jugements doivent être susceptibles d'exécution.

Dans *Harbour Commissioners of Montreal v. The Record Foundry & Machine Co.*[3], la Cour a décidé ce qui suit:

> Neither do I consider that the fact, that the action stops short by asking for the annulment of the deed, without going on to ask for consequential relief, such as recovery of land or for a boundary procedure, indicates that the action is unfounded because of not having any useful object. A judgment which sets aside a deed, is not a mere judgment of declaration, but is a judgment which executes itself, if I may make use of such an expression. The relief consists in the annulment. I realize that a contrary view was taken recently by the majority of judges who decided

[1] (1904), 10 R. de J. 447. [2] (1909), 19 B.R. 301.
[3] (1911), 21 B.R. 241 à 247.

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the case of *Daveluy vs Lamothe*, in the particular state of facts which presented itself in that case, and to which I referred later in the case of *Angers vs Langelier* (20 K.B., 351).

Dans *Village de la Malbaie v. Warren*[1], la Cour a affirmé les principes suivants:

> Mais, l'action actuelle n'est pas un de ces cas connus dans la doctrine et la jurisprudence, et on n'a jamais vu d'action pour demander au tribunal de déclarer que des obligations ou des droits consignés en toutes lettres dans un contrat existent, lorsque l'existence n'en est pas niée, ou encore quelle en est l'étendue. Il ne suffit pas, en effet pour instituer une action qu'un droit existe, il faut aussi une lésion de ce droit qui produit l'intérêt, lequel seul justifie l'institution d'une action.

Vide également *Rochefort v. Godbout*[2], où M. le Magistrat de district en chef Ferdinand Roy fait une revue complète des autorités sur la matière et en conclut qu'aucune action ne peut être instituée à moins qu'un droit ne soit lésé. C'est ce qui produit l'intérêt dans un procès. Pour poursuivre, l'intérêt doit être immédiat même s'il est éventuel.

Je n'oublie pas qu'en vertu de l'art. 509 du *Code de Procédure civile* de la province de Québec, les parties qui ne s'entendent pas sur une question de droit susceptible de faire la base d'une action, lorsqu'elles s'accordent sur les faits, peuvent la soumettre au tribunal pour adjudication, en produisant au greffe un factum ou mémoire conjoint contenant un exposé de la question de droit en litige et des faits qui y donnent lieu, et les conclusions de chacune des parties. Ce factum doit être accompagné d'une déposition sous serment de chacune des parties, attestant que les faits sont vrais, que le débat est réel, et qu'il n'a pas seulement pour objet *l'obtention d'une opinion*. Mais, évidemment, ceci est une exception à la règle générale et ne peut en aucune façon affecter la cause qui nous préoccupe.

De plus, il peut arriver que le tribunal soit appelé à se prononcer sur la validité d'un règlement d'un conseil municipal ou d'une commission scolaire, mais ceci est spécifiquement autorisé par les lois municipales ou scolaires.

Cette Cour a eu l'occasion de se prononcer sur cette question dans une cause de *L'Hôpital Sainte-Jeanne d'Arc v. Garneau*[3], et à la page 435, voici comment se sont exprimés les membres du tribunal:

> L'appelante a enfin invoqué l'argument que le jugement rendu par la Cour du Banc de la Reine n'est qu'un jugement déclaratoire, non susceptible

[1] (1923), 36 B.R. 71. [2] [1948] C.S. 310.
[3] [1961] R.C.S. 426 à 435.

d'exécution. Je ne puis m'accorder avec cette prétention que je crois non fondée. Il est certain que les tribunaux ne doivent pas donner des consultations légales, et qu'ils doivent s'abstenir de se prononcer sur des questions académiques, mais tel n'est pas le cas qui se présente. Ici, le jugement de la Cour du Banc de la Reine, s'il refuse le mandamus demandé, il annule une résolution et redresse un tort dont l'intimé souffrait préjudice. Il apporte un remède qui est l'annulation de la résolution, et comme le dit M. le Juge Cross, c'est là même que se trouve l'exécution du jugement. *Harbour Commissioners of Montreal v. Record Foundry Company* (1911) 21 Qué. K.B. 241.

Ce qui importe de retenir dans la présente cause c'est que l'action déclaratoire n'existe pas, sauf en quelques cas isolés. Il est donc impossible, dans le droit de Québec, d'instituer une action comme celle qui l'a été, où l'on demande au tribunal, sans qu'il y ait de litige et sans qu'aucun droit ne soit lésé, de déclarer inconstitutionnelle une loi de la Législature. La conclusion doit donc être que, si l'action n'existe pas, il est inutile d'examiner la validité du statut qui est attaqué.

Le Procureur général du Canada est intervenu dans la présente cause, mais, comme je suis d'opinion que l'action principale n'est pas fondée, il s'ensuit que l'intervention doit être rejetée.

L'appel est donc renvoyé avec dépens et l'intervention sera également rejetée, mais sans frais pour ou contre le Procureur général du Canada.

Appel rejeté avec dépens.

Procureurs des demandeurs, appelants: W. G. How, Toronto et Sam S. Bard, Québec.

Procureur du Procureur général de Québec: G. A. Pouliot, Québec.

Procureur du Procureur général du Canada: R. Bédard, Ottawa.

1963
*Oct. 24
1964
Jan. 28

MIKE MAMCZASZ AND C. MAMCZASZ, MAMCZASZ CONSTRUCTION, IRVING BABLITZ AND JOHN McBRIDE (*Defendants*) .. APPELLANTS;

AND

OLIVE BRUENS (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Motor vehicles—Motorist colliding at night with road construction equipment—No breach of statutory duty with respect to lighting of equipment—Negligence in failing to give adequate warning of presence of stationary packer on highway not established—The Vehicles and Highway Traffic Act, R.S.A. 1955, c. 356, ss. 42, 46.

The plaintiff brought an action for damages for personal injuries and property damage resulting from a collision between a motor vehicle, owned and operated by her, and a stationary packer, which was part of some road equipment being used on road construction work. The particular equipment involved consisted of a tractor behind which, in tandem, were two packers. The packers were owned by the defendants MM and CM who were the contractors carrying on the road construction. The defendant B owned the tractor and the defendant McB was the operator of the equipment.

The plaintiff's vehicle drove directly into the back of the rear packer. The accident occurred on a clear night; there was no dust and there was no other traffic in the vicinity. The trial judge found that the plaintiff's rate of speed was too fast for the area in question and this finding was not disturbed on appeal. Flare pots had been placed at certain positions on the stretch of the road under construction for the purpose of giving warning of danger, and similar flare pots had been placed on the top and at the corners of each of the two packers, two at the front of the first and two at the back corners of the rear one. The packers also had red reflectors on the rear end.

The action was dismissed at trial. On appeal the Appellate Division of the Supreme Court of Alberta held that there had been negligence on the part of the defendants as well as on the part of the plaintiff and that responsibility should be apportioned as to two-thirds to the defendants and as to one-third to the plaintiff. The defendants appealed to this Court.

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

The conclusion reached by the Appellate Division was based in part upon the provisions of subss. (1) and (2) of s. 42 of *The Vehicles and Highway Traffic Act,* R.S.A. 1955, c. 356. However, these subsections related to the provision of equipment on vehicles, but did not lay down any statutory duty as to when that equipment was to be used. It was necessary to look elsewhere to ascertain the requirements of the Act as to

*PRESENT: Taschereau C.J. and Martland, Ritchie, Hall and Spence JJ.

lighting. The only provisions in relation to stationary vehicles on the highway which might be relevant in this case were paras. (*d*), (*e*) and (*f*) of s. 46. It was evident, from an examination of these provisions, that there had not been established, as against the defendants, any breach of a statutory duty with respect to the lighting of the rear packer.

On the remaining issue as to whether the plaintiff had successfully established negligence on the part of the defendants in failing to give adequate warning of the presence of the stationary packer on the highway, the trial judge had found that the construction area and the packers were adequately lighted so as to warn a reasonably careful driver. This finding was supported by the evidence. This Court did not infer from the evidence, as did the Appellate Division, that it was probable that the two flare pots placed at the back of the rear packer, some five to six feet apart, would induce confusion in the mind of an approaching driver, or mislead such driver as to the true danger.

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

H. L. Irving, for the defendants, appellants.

H. P. Macdonald, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1], which reversed the judgment at the trial, which had dismissed the respondent's claim for damages for personal injuries and property damage resulting from a collision between a motor vehicle, owned and operated by her, and a stationary packer, sometimes referred to in the evidence as a "wobbly". The packer was a part of some road equipment being used on road construction work on provincial highway No. 13, near the town of Sedgwick, Alberta. The particular equipment involved in this case consisted of a tractor behind which, in tandem, were two packers. The appellants Mike Mamczasz and C. Mamczasz, carrying on business as Mamczasz Construction, were the contractors who were carrying on the road construction work and the owners of the packers. The appellant Bablitz owned the tractor and the appellant McBride was the operator of the equipment at the time the accident giving rise to the respondent's claim occurred.

This accident took place shortly after 10:00 p.m. on August 20, 1956. The respondent was driving her Austin

[1] (1962), 39 W.W.R. 157, 33 D.L.R. (2d) 209.

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automobile west along provincial highway No. 13 which, in relation to the scene of the accident, runs generally in an east and west direction. The highway in question was under construction, at that time, for a distance of approximately three miles. The respondent had entered the construction area at its easterly end and had travelled, through the construction area, a distance of some two to two and one-half miles before the collision occurred.

As she proceeded west, at the commencement of the construction area, the respondent would pass five signs, each of which was marked with a flare pot, warning of the existence of construction ahead and advising of a speed limit in the construction area of 25 miles per hour. She would then reach a section of the highway where there was a gravel windrow extending down the centre of the road. It was marked by flare pots placed upon it at intervals of 300 to 400 yards.

On the night in question the respondent drove past a tractor, to which were attached two wobblies in tandem, which was also proceeding west and which was travelling between the centre windrow and the north side of the highway. The rear packer was marked by two flare pots, one at each side of the back of the packer, and by two reflectors. The respondent, in passing this equipment, drove to the south of the centre windrow. The operator of the equipment had seen her pass by earlier in the evening, when she had been driving in an easterly direction through the construction area toward Lougheed.

After passing this equipment the respondent returned to the north side of the centre windrow and proceeded up a rise in the road. After reaching the crest of this rise there was a gradual descent for a distance of some 400 to 500 yards to the scene of the collision.

Prior to the collision the respondent had travelled beyond the west end of the centre windrow from where, for a distance of a few hundred feet, there was no obstruction on the highway. She then reached the east end of another windrow which was located along the north boundary of the highway. This windrow was some seven feet in width, occupying that amount of what otherwise would have been a part of the travelled road surface. It was approximately one and one-half feet in height and it continued along the north

boundary of the highway for a distance of about 2,000 feet to the west. It was marked at its easterly end by two flare pots and was then marked along its length by further flare pots placed upon it and spaced about 300 to 400 yards apart. At the west end of the construction area there were also warning signs placed on the south side of the road, each of which was marked by a flare pot.

The packer with which the respondent's automobile collided was standing facing west alongside and close to the north windrow and about 200 feet from the easterly end of that windrow. The packer consisted of a box-type body, filled with gravel, mounted on axles front and back, on each of which were eight to ten rubber-tired wheels. The box was yellow in colour and had red reflectors some three to four inches in diameter on its rear end. Flare pots, similar to those on the ground and upon the windrows, were placed on the top and at the corners of each of the two wobblies, two at the front of the first and two at the back corners of the rear one.

The appellant McBride, the operator of this equipment, shortly before the accident, had been proceeding east along the highway. He proceeded to turn in order to travel west and, while turning, observed a light glow on the top of the rise in the highway to the east. He completed his turn and observed that the glow had been caused by two headlights which were those on the respondent's vehicle. In making the turn he had noticed that one tire on the wobbly did not seem to be packing properly and accordingly he drove alongside the north windrow and stopped, waiting to dismount until the approaching vehicle should pass the equipment. Instead of passing, the respondent's vehicle drove directly into the rear of the back wobbly with sufficient force to move the wobbly slightly toward the left and toward the front and to cause substantial damage to it. The front end of the respondent's automobile was demolished.

The highway at the point of collision was 39½ feet wide. The travelled portion, allowing for the seven-foot windrow, was 32½ feet. The distance from the left rear wheel of the wobbly to the south edge of the road was 22 feet four inches.

The night was clear, there was no dust and there was no other traffic in the vicinity when the accident occurred. There were no marks on the surface of the highway to

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indicate that the brakes of the respondent's car had been applied prior to the collision occurring.

There was some evidence as to the speed of the respondent's vehicle, on the basis of which the learned trial judge made a finding that the respondent's rate of speed was too fast for the area in question. This finding was not disturbed on appeal.

The learned trial judge stated the issue in the case and his conclusion as follows:

> The simple question arises as to whether the road, a construction area, and the wobblies, were adequately lighted so as to warn any reasonably careful driver. In all the surrounding circumstances it appears to me that the driver Bruens was negligent, and that the road operators were without fault.

On appeal the Appellate Division of the Supreme Court of Alberta held that there had been negligence on the part of the appellants as well as on the part of the respondent and that the responsibility should be apportioned as to two-thirds to the appellants and as to one-third to the respondent. This conclusion was based in part upon the provisions of subss. (1) and (2) of s. 42 of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356, which provide as follows:

> 42. (1) A motor vehicle, any trailer and any vehicle being drawn at the end of a train of vehicles, shall be equipped with at least one tail lamp mounted on the rear and capable, when lighted as required by this Act, of emitting a red light plainly visible from a distance of five hundred feet to the rear.
>
> (2) Notwithstanding subsection (1), in the case of a train of vehicles, only the tail lamp on the rear-most vehicle need be seen from a distance of five hundred feet to the rear.

The word "vehicle" is defined in this Act, in s. 2(*t*), as follows:

> "vehicle" means a motor vehicle, trailer, traction engine and any vehicle drawn, propelled, or driven by any kind of power, including muscular power, but does not include the cars of electric or steam railways running only upon rails.

The Court held that the equipment in question constituted a "train of vehicles" within the meaning of s. 42(1) and that there had been a breach by the appellants of the statutory duty imposed upon them by that subsection which had contributed to the accident. The Court was of the opinion that the appellants had substituted their own

method of providing protection for users of the highway and held that they did so at their own peril.

With respect, I am unable to agree that the appellants were in breach of any statutory duty imposed upon them which could be held to be a cause of this accident. Subsections (1) and (2) of s. 42 of the Act require that, in the case of a train of vehicles, the rear-most vehicle be equipped with a tail lamp at the rear. They provide that such light must be capable, *when lighted as required by the Act,* of emitting a red light visible at a distance of 500 feet to the rear. These subsections relate to the provision of equipment on vehicles, but do not lay down any statutory duty as to when that equipment must be used. It is necessary to look elsewhere to ascertain the requirements of the Act as to lighting. These requirements are contained in s. 46. Subsection (1)(*c*) of that section states:

> 46. (1) At any time during the period between one hour after sunset and one hour before sunrise or at any other time when atmospheric conditions are such that objects on the highway are not plainly visible at a distance of three hundred feet
>
> * * *
>
> (*c*) no motor vehicle or tractor shall be in motion upon any highway unless the tail lamp with which it is required to be equipped is alight,

This is the only provision which contains a requirement as to the lighting of the tail lamp which is mentioned in subss. (1) and (2) of s. 42.

Section 46 contains separate provisions in relation to stationary vehicles on the highway. The only ones which might be relevant in this case are paras. (*d*), (*e*) and (*f*), which provide that, during the period defined in subs. (1),

> (*d*) no motor vehicle or tractor shall be stationary on any highway outside the corporate limits of any city, town or village unless either
>
> (i) it has a lighted tail lamp, or
>
> (ii) it has affixed to the left of the rear thereof a reflector of any type approved by the Lieutenant Governor in Council and so fixed as to reflect the lights of any motor vehicle approaching the stationary vehicle from the rear,
>
> (*e*) no vehicle other than a motor vehicle, motor cycle or bicycle shall be upon any highway whether in motion or stationary unless there is displayed thereon at least one light visible at a distance of at least one hundred feet from the front of and behind that vehicle, or in the alternative, there are affixed thereon one reflector towards the front and one reflector at the rear thereof of a type approved by the Lieutenant Governor in Council, so fixed as to reflect the

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lights of any motor vehicle approaching from the front and the other so fixed as to reflect the lights of any motor vehicle approaching from the rear,

(*f*) no vehicle drawn by or attached to a motor vehicle and commonly known as a trailer shall be upon any highway unless it has affixed at the rear thereof a reflector of a type approved by the Lieutenant Governor in Council so fixed as to reflect the lights of any motor vehicle approaching from the rear,

In the result, therefore, there has not been established, as against the appellants, any breach of a statutory duty with respect to the lighting of the rear packer.

Apart from the issue as to statutory duty, there remains the question as to whether the respondent has successfully established negligence on the part of the appellants in failing to give adequate warning of the presence of the stationary packer on the highway. On this issue the learned trial judge has found that the construction area and the wobblies were adequately lighted so as to warn a reasonably careful driver. In my opinion this finding is supported by the evidence.

I do not infer from the evidence, as did the Appellate Division, that it is probable that the two flare pots placed at the rear of the back wobbly, some five to six feet apart, would induce confusion in the mind of an approaching driver, or mislead such driver as to the true danger. The respondent had travelled past 21 flare pots before the collision occurred, each of which had obviously been placed in its position for the purpose of giving warning of danger. She had passed, shortly earlier, similar road equipment, which had been similarly marked. At no place along the road under construction, to the point of the accident, had flare pots been placed on each side of the travelled route so as to mark a course between them. I do not, therefore, draw the inference that the two flare pots at the rear of the wobbly, situated some two and one-half feet higher than those which marked the right-hand windrow, would have led an approaching driver, taking reasonable care for her own safety, to conclude that they constituted an invitation to pass between them.

In my opinion, the appeal should be allowed and the judgment of the learned trial judge restored with costs to

the appellants in the Appellate Division of the Supreme Court of Alberta and in this Court.

Appeal allowed with costs.

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Solicitors for the defendants, appellants: Clement, Parlee, Whittaker, Irving, Mustard & Rodney, Edmonton.

Solicitors for the plaintiff, respondent: Macdonald & Dean, Edmonton.

PHILIP SPRINGMAN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1964

*Jan. 31

Mar. 23

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Arson—Whether bunkhouses mounted on wheels "buildings or structures" within the meaning of s. 374(1)(a) of the Criminal Code, 1953-54 (Can.), c. 51.

The accused was convicted of arson under s. 374(1)(*a*) of the *Criminal Code*. The case for the Crown was that he had counselled another man to set fire to his construction camp consisting of mobile or portable equipment, namely, *inter alia,* two bunkhouses and a combined bunkhouse and office. It was admitted that these were mounted on wheels for the purpose of ready movement from place to place. The Court of Appeal, by a majority judgment, held that, although some of the equipment was not a building or structure within s. 374(1)(*a*) of the Code, the bunkhouses fell within that meaning. The accused appealed to this Court, the appeal being limited as to the bunkhouses only.

Held: The appeal should be allowed and the conviction quashed.

The items in question were not buildings or structures within the meaning of s. 374(1)(*a*) of the *Criminal Code*. To fall within the section, a building or structure must be an unmovable property. In the present case the equipment was fundamentally movable property, without fixed or permanent foundations.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming the conviction of the appellant for arson. Appeal allowed.

George J. D. Taylor, Q.C. and *Calvin F. Tallis,* for the appellant.

S. Kujawa, for the respondent.

[1] (1963-64), 45 W.W.R. 501.

*PRESENT: Taschereau C.J. and Fauteux, Ritchie, Hall and Spence JJ.

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SPRINGMAN v. THE QUEEN

THE CHIEF JUSTICE:—The appellant Philip Springman, formerly of Nipawin, Saskatchewan, now of Vancouver, B.C., was on April 2, 1963, convicted by His Honour Judge Forbes at Regina on the following charge:

> That he, the said Philip Springman, did on or about the 16th day of September, 1961, in the Davin District, Saskatchewan, without legal justification or excuse and without colour of right, unlawfully and wilfully set fire to the Nipawin Construction Company Limited camp, and did thereby commit arson, contrary to section 374(1)(*a*) of the Criminal Code.

The appellant was sentenced to imprisonment for a term of two years. The appellant appealed to the Court of Appeal against both the conviction and the sentence. Both appeals were dismissed.

The charge was laid under s. 374(1)(*a*) of the *Criminal Code* which says that every one who wilfully sets fire to a building or structure, whether completed or not, is guilty of an indictable offence and is liable to imprisonment for 14 years.

The evidence reveals that the Nipawin Construction Company Limited, owned by the appellant and his wife, had a substantial amount of equipment and that, during the summer of 1961, this equipment was situated near Davin. The company was engaged in supplying sand, gravel and crushed rock, and the equipment that was burnt was being made use of in this operation. It consisted of a crusher, loaders, trucks, bunkhouses and work-shops. It is the contention of the respondent that all this equipment was within the meaning of s. 374(1)(*a*) and was a building or structure, whether completed or not. The appellant contends that the Courts below erred in holding that this equipment should thus be classified because it was completely mobile, being either self-propelled or mounted on wheels and designed to be moved by power units. It is therefore contended on behalf of the appellant that if he did set fire to this equipment, he should have been prosecuted under s. 374(2) of the *Criminal Code* which is in the following terms:

> (2) Every one who wilfully and for a fraudulent purpose sets fire to personal property not mentioned in subsection (1) is guilty of an indictable offence and is liable to imprisonment for five years.

The maximum punishment if the appellant is found guilty under s. 374(1)(*a*) is 14 years, and 5 years if convicted under s. 374(2).

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Taschereau J.C.

Parliament has carefully divided s. 374 in two groups, and I am satisfied that subs. (*a*) of s. 374 "a building or structure" covers immovable property and that the balance of subs. (1) also covers property which has a more considerable value than all that is contained in the residuary clause s. 374(2) (the whole subject to s. 375).

In the present case, as previously stated, the equipment to which the fire was set could be easily moved from one place to another. I think that fundamentally this equipment was movable property.

This I believe is the law in the common law provinces and in the province of Quebec. In the province of Quebec it has been decided by this Court in *Dulac v. Nadeau*[1]:

> Mais il y a plus. En effet, et quant au bâtiment de Nadeau,—et on pourrait ajouter, celui de Morin,—il s'agit clairement d'immeubles par nature suivant les dispositions de l'article 376 C.C. Sans doute, on peut bien, ainsi qu'on le fait remarquer dans Colin et Capitant, Cours Elémentaire de Droit Civil Français, XIè édition, tome 1, N° 922, ou dans les termes de Planiol et Ripert, Traité Pratique de Droit Civil Français (1926) tome 3, 75, rappeler que «les constructions volantes établies à la surface du sol pour quelques jours et réédifiées ailleurs, de place en place, telles que les baraques de foire, ne sont pas des immeubles parce que ces édifices légers n'ont pas de place fixe.» Mais les deux auteurs reconnaissent, aux mêmes pages, le principe que «pour qu'une construction soit immeuble, il n'est pas nécessaire qu'elle soit élevée à perpétuité, que les bâtiments construits pour une exposition sont immeubles quoiqu'ils soient destinés à être démolis.»

It will be easily realized by the reading of the opinions of these authors that the French law is quite similar to the English law, and that an immovable is something that is not to be forced from its place. It has the characteristics of things real or land, although constructions built on the surface of the soil for some length of time, and later rebuilt somewhere else, from place to place, are not immovables because these buildings have no fixed or permanent foundations.

I therefore agree with the reasons of my colleague Mr. Justice Hall, and I would allow the appeal and quash the conviction.

The judgment of Fauteux, Ritchie, Hall and Spence JJ. was delivered by

HALL J.:—The facts in connection with this appeal are set out fully in the judgment of Culliton C.J.S. and shortly are as follows: the accused was charged that he, the said

[1] [1953] 1 S.C.R. 164 at 204.

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Hall J.

Philip Springman, did on or about the 16th day of September, 1961, in the Davin District, Saskatchewan, without legal justification or excuse, and without colour of right, unlawfully and wilfully set fire to the Nipawin Construction Company Limited camp and did thereby commit arson contrary to s. 374(1)(*a*) of the *Criminal Code*. The accused was first tried by a judge and jury at which trial the jury were unable to agree upon a verdict. He then elected to be tried by a judge without a jury and was tried by His Honour Judge Forbes who found him guilty and sentenced him to a term of two years in a penitentiary.

The Nipawin Construction Company was a limited company, all of the shares of which had been held by the appellant Springman and his wife. The company owned a large amount of equipment, and, immediately prior to the fire on September 16, 1961, had been engaged in the production of crushed rock under a contract with Concrete Rock Products Limited of Regina. The operation was being carried out near Davin, Saskatchewan, and as production was too slow at that point, the appellant had given instructions to his foreman, Charles Wingert, to line up the camp for a move. The camp was lined up for movement so that everything could be moved quickly, and, while stationary, could be served by the central propane unit which supplied heat to the bunkhouses and electricity from the portable light plant. The machinery and equipment consisted of a propane truck, welding truck, a number of other trucks and power units, a house trailer with a half-ton truck, a rock crusher, a front end loader, a light plant, a cook car, two bunkhouses and a combined bunkhouse and office. It was admitted that the bunkhouses, cook car and house trailer were all mounted on wheels for the purpose of ready movement from place to place wherever rock crushing operations were to be carried on.

The fire which destroyed this machinery and equipment was set by Charles Wingert, the foreman, and Peter Mihailuk, an employee. The case for the Crown was that the appellant counselled Mihailuk to set the fire. Mihailuk gave evidence that he had been induced by the appellant to set the fire and he was to receive a new truck or car and $4,000 or $5,000 for so doing.

Following his conviction by His Honour Judge Forbes, the appellant appealed to the Court of Appeal[1] for Saskatchewan from both conviction and sentence. The grounds of appeal were as follows:

(1) That on the facts, including the facts as to source and credibility of the evidence of the commission of the crime and the connection of the accused therewith, the verdict is unreasonable, or cannot be supported, and therefore ought to be quashed;

(2) That as a matter of law there is no evidence of any offence against Section 374(1)(*a*) of the Criminal Code, since the "camp" referred to in the charge (being mobile or portable equipment consisting of a gravel crusher, trucks, trailers, bunkhouses, etc. . . . is not within the meaning of the words "a building or structure" appearing in the said Section 374(1)(*a*).

The Court of Appeal for Saskatchewan unanimously rejected the appeal under ground 1, holding that the learned trial judge's findings on the evidence should not be disturbed.

The Court, however, (Maguire J.A. dissenting) while accepting the argument that the trucks and power units, the rock crusher, the front end loader and the light plant were not buildings or structures within the meaning of s. 374(1)(*a*) of the *Criminal Code,* held that the two bunkhouses and the combined bunkhouse and office were buildings or structures within the meaning of the said section.

Maguire J.A. in his dissenting judgment held that, in addition to the items which the majority found were not "buildings or structures whether completed or not", the two bunkhouses and the combined bunkhouse and office were also not "buildings or structures whether completed or not" within the meaning of the said section on the grounds that:

. . . being designed and constructed upon a wheeled chassis, for the purpose of ready movement from place to place, and the temporary use in each said place, do not fall within "a building or structure".

The appeal to this Court is limited to the question as to whether the two bunkhouses and the combined bunkhouse and office were "buildings or structures" within the meaning of s. 374(1)(*a*) of the *Criminal Code.*

With respect, I think that Maguire J.A. was right in holding that the two bunkhouses and the combined bunkhouse and office were not buildings or structures within the meaning of the section in question.

[1] (1963-64), 45 W.W.R. 501.

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I accept that the term "structure" is not to be construed *ejusdem generis* with the term "building": *London County Council v. Tann*[1]. However, both "buildings" and "structures" do possess certain essential characteristics, some of which are common to both.

The case of *London County Council v. Pearce*[2] appears to be in point. There the question whether a builders' office constructed of wood and roofed with zinc, and placed upon iron wheels for the purpose of enabling it to be wheeled about to any place where building operations were being carried on, was, when not required at any such place, kept in the builder's own yard and used as a pay-office for his men was a "wooden structure or erection of a moveable or temporary character" within the meaning of s. 13 of the *Metropolis Management and Building Acts Amendment Act,* 1882. Pollock B. said at p. 111:

> No special meaning can be given to the word "structure" or the word "erection" as something distinct from a building; and it cannot be supposed that the legislature intended that everything which could in any sense be called a wooden building of a temporary character should be within the section. It is the duty of the magistrate to say whether a particular thing (I purposely use an indefinite expression) is within the definition. It is obvious that there are many things which, in a sense, would be wooden structures or erections, but could not possibly be held to come within the section, such as a dog-kennel or a van for removing furniture, which would be a much larger and heavier thing than such a pay-office as that in question. There are, therefore, many considerations which ought legitimately to influence the magistrate in coming to his decision. I think that in the present case the learned magistrate was perfectly right in holding that this pay-office was a part of a builder's plant; it is a thing which is moved from one set of buildings to another as occasion requires, and when not in use in the ordinary way it is at rest upon the builder's premises, and is used for the convenience of paying his men, which seems a very reasonable proceeding.

and Vaughan Williams J. said at pp. 112-3:

> The magistrate was of opinion that primâ facie a carriage on wheels was not a wooden structure or erection within the meaning of the section. I do not mean to say that a man is to be allowed to evade the Act of Parliament by building on wheels what he intends to be a wooden structure, and then saying that it is not within the Act because it is on wheels. In all cases we must be guided by what I may call the intentions of the structure, and must inquire with what intention it was made. This seems clear from the case of *Hall v. Smallpiece,* 59 L.J. (M.C.) 97, where it was held that a steam roundabout was not a wooden structure or erection within the meaning of the Act. Why was that held? Not because a thing on wheels cannot be within the section, but because when one looks into the intention with which the thing was made, it becomes plain that it

[1] [1954] 1 All E.R. 389 at 390. [2] [1892] 2 Q.B. 109.

was made for the purpose of locomotion and for erection in any place where it might be required.

In *Cardiff Rating Authority v. Guest Keen, Limited*[1], Denning L.J. (as he then was), in discussing what is a "building or structure or in the nature of a structure" said at p. 31:

> A structure is something which is constructed, but not everything which is constructed is a structure. A ship, for instance, is constructed, but it is not a structure. A *structure* is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation, but it is still a structure even though some of its parts may be moveable, as, for instance, about a pivot. Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a *structure*, but it may be "in the nature of a structure" if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site.

We are not concerned here with anything "that is in the nature of a structure". We have to deal with items that are either "buildings" or "structures".

My view that the items in question in this appeal are neither "buildings" nor "structures" is strengthened by the judgment of the Manitoba Court of Appeal in *Rex v. Arpin*[2], in which it was held that a railway freight car was not a "building" within the meaning of s. 461 of the *Criminal Code* of Canada, and by the judgment of the Supreme Court of Nova Scotia en banc in *The King v. Levy and Gray*[3], in which it was held that the buffet of a parlour car on a railway was not a "building" within s. 461 of the Code. In this latter case Chisholm J. (as he then was) said at p. 232:

> I have come to the conclusion that the buffet of a parlour car is not a building within the meaning of section 461 of the Criminal Code. A building is defined by *Bouvier* (p. 400) as "an edifice", erected by art and fixed upon or over the soil, composed of brick, marble, wood or other proper substance, connected together, and designed for use in the position in which it is so fixed.

The appeal should, therefore, be allowed and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitors for the appellant: Goldenberg, Taylor, Tallis & Goldenberg, Saskatoon.

Solicitor for the respondent: S. Kujawa, Regina.

[1] [1949] 1 All E.R. 27 at 31, 1 K.B. 385.
[2] [1939] 1 W.W.R. 564, 47 Man. R. 40, 72 C.C.C. 49, 50 C.R.T.C. 116, 2 D.L.R. 584.
[3] (1919), 53 N.S.R. 229 at 232, 31 C.C.C. 19.

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*Nov. 21, 22
1964
Jan. 28

ALFRED K. HERRINGTON ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF HAMILTON ..... } RESPONDENT;

AND

GISELE FERNANDE HERRINGTON AND SAMUEL TAYLOR ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Compensation fixed by Municipal Board—Books of going business almost non-existent—Valuation based on land values plus replacement cost of buildings less depreciation—Revision of Board's figures not to be attempted unless Board exercised judgment upon improper principles.

The City of Hamilton expropriated certain lands of which the appellant and his wife were owners as joint tenants and which formed part of the property of a partnership in which they were the only partners. One T was appointed receiver of all the assets of the partnership with power to manage the business of the partnership until the conclusion of the expropriation proceedings. The Ontario Municipal Board, which was appointed the sole arbitrator, fixed the compensation at $50,525. The husband, the wife and T appealed to ask that the compensation be increased. The appeal was dismissed. The husband alone decided to appeal to this Court, and served notice of appeal upon the solicitors for the City and the solicitor for his wife and T. A motion by the City to quash the appeal on the ground that the appellant had no status to maintain the appeal because a partner cannot sue alone to recover a debt due to the partnership was dismissed ([1964] S.C.R. 69.). The husband then proceeded with his appeal.

Held: The appeal should be dismissed.

The Municipal Board could not base a valuation of the expropriated premises on the profit situation of the business as the claimants' so-called books were almost non-existent. It was not possible for the Board to adjourn the matter for further and better evidence on the subject of profits. Such evidence did not exist and could not be created as the foundation data itself did not exist. The Board then proceeded to consider the evidence of value on the basis of land values plus replacement cost of buildings less depreciation. The board members heard the witnesses and had an opportunity to weigh and compare the value of the various pieces of evidence given, and the figures set out in their finding represented their judgment of the probative value of those various pieces of evidence. Unless it appeared that the Board were exercising their judgment upon improper principles, this Court should not attempt to revise their figures. The Court might have found much less drastic rates of depreciation but if that could be done only

*PRESENT: Cartwright, Fauteux, Judson, Ritchie and Spence JJ.

by exercising judgment upon the evidence, the Court should not apply its opinion of the evidence to amend that of the members of the Board who heard the evidence.

As to the claim for certain groynes, despite the fact that they must have cost the claimants a very considerable sum, albeit one quite impossible to determine on the evidence, the Court below was right in saying that the groynes simply were necessary for the preservation of the lands upon which the buildings stood; if the groynes had been absent there would be no land to be expropriated, and the claimants would have simply been able to claim for a useless water-covered lot. Therefore, the Board would not have been justified in making an allowance for the cost of the groynes.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming an expropriation award fixed by the Ontario Municipal Board. Appeal dismissed.

Alfred K. Herrington, in person.

J. T. Weir, Q.C., and *B. H. Kellock,* for the respondent corporation.

The judgment of the Court was delivered by

SPENCE J.:—This appeal from the judgment of the Court of Appeal for Ontario was argued by the appellant in person. The appellant, however, was represented by skilled counsel both in the Court of Appeal and at the hearing before the Municipal Board when all the evidence was the subject of minute examination and cross-examination. That Board fixed the compensation payable to the appellants for the expropriation of the lands and buildings in the City of Hamilton at a total of $50,525 made up as follows:

1.	Duplex	$ 6,500
2.	Cottage property	2,000
3.	Vacant lots	3,025
4.	Cove Restaurant	30,000
5.	Allowance for disturbance	6,000
6.	Allowance for possibility that Van Wagner's Beach Road be rebuilt	3,000
		$ 50,525

In the Court of Appeal and again in this Court no question was raised as to any of the first three amounts. We are, therefore, concerned with the latter three only.

The Board, dealing with restaurant property after reciting the history of the purchase of the various portions of it, the lease of certain other lands, the construction of the groynes

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to prevent erosion and of certain additions and also the complete washing out of the Van Wagner's Beach Road access, turned to the fixing of compensation upon the following basis:

1. Land Values.

2. Replacement value of buildings, less depreciation.

In the notice of appeal from the decision of the Board to the Court of Appeal for Ontario, the grounds of appeal include:

> 1. The Ontario Municipal Board erred in not applying the test of value to the owner in disallowing the Claimants compensation for the Groynes and for the partly completed addition to the restaurant.
>
> 2. The Board erred in not applying the test of value to the owner in awarding the Claimants compensation for the value of the leasehold interest.
>
> * * *
>
> 4. The Board erred in assessing compensation for the restaurant in not taking into account the income received from the business which the Claimants were carrying on in those premises.

Examining these grounds of appeal, Laidlaw J.A. said:

> It is sufficient to say that in my opinion the amounts of gross estimated profits shown on that statement are dependent to such an extent upon such uncertainties, speculation and estimates upon which no reliance can be placed as to render the probative value of that report nil. It would not be safe in my opinion for any tribunal exercising judicial functions to found an appraisal or an award of compensation on that evidence. In my opinion the claimant has failed entirely to establish the amount of gross profits from the operation of this business as a reliable and proper basis on which to award compensation. . . .
>
> Then in such circumstances what was the Board to do to ascertain the proper amount of compensation payable to the claimants? It was the duty of the Board, in my humble opinion, to consider the available evidence that would best enable them to value these properties and to fix a compensation that would be adequate and sufficient to indemnify the owners. The only basis upon which the Board could proceed in the particular circumstances was to consider the replacement value of the property expropriated less proper depreciation from the value of each of the various items.

Having read the evidence given upon the expropriation proceedings by Mr. Samuel Taylor, the receiver appointed by the Court in Ontario in an action by the female claimant against the male claimant, and also the evidence given by the male claimant A. K. Herrington and the other witnesses called by him, I am of the opinion that Laidlaw J.A.'s view as to the probative value of the evidence as to profits is a sound one and I would not have agreed to have based any

valuation of this expropriated restaurant premises upon such a haphazard conjecture.

Then, I turn to the same query as Laidlaw J.A. expressed upon what was the Board's task. It would naturally occur to one that the Board might have set the matter over for further evidence in order to obtain reliable information upon the profit situation for admittedly the concept of value to the owner in the case of a going business would require a valuation based on this profit situation. *Woods Manufacturing Company v. The King*[1], *per* Rinfret C.J., at p. 514. It is by such an investigation that there could be determined what amount the owner, as a prudent business man, would have been prepared to pay for the property on the date of the expropriation rather than be forced to give up title and possession.

It appears, however, from a survey of the evidence to which I referred that such information simply could not be produced. The claimants' so-called books were almost non-existent and consisted of some rather haphazard entries in a series of diaries from 1951 to 1958, and those entries bore little if any relation to the statement worked out by Mr. Taylor, the receiver. It would appear, moreover, that the data given with some degree of detail to Mr. Lounsbury, acting as adviser for the respondent corporation, again bore little relation to either the original data in these diaries or to Mr. Taylor's subsequently produced summaries. It is significant, in passing, that if Mr. Lounsbury informally offered $75,000 as compensation, an offer which it was stated, the claimant refused, he could only have done so on the inflated figures given to him by the claimant, to which I have just referred.

In the light of these circumstances, it was not possible for the Municipal Board to adjourn the matter for further and better evidence on the subject of profits. Such evidence did not exist and could not be created as the foundation data itself did not exist. The Municipal Board then proceeded to consider the evidence of value on the basis of land values plus replacement cost of buildings less depreciation, and the Board said:

> Essentially therefore the Board accepts the evidence of the respondent's witnesses as to the value of the restaurant and the leasehold interest in the parking lot.

[1] [1951] S.C.R. 504, 2 D.L.R. 465.

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The Board then proceeded to cite the evidence of C. E. Parnell as to the value of the lands and the leasehold interest, *i.e.*, land $6,750, leasehold interest $1,080, and the evidence of Donald Hall as to the value of the restaurant buildings at $17,500, being able to verify one item in Hall's valuation by comparing his valuation of the duplex with that of Mason, a claimant's witness. The Board found that Mason was only 10 per cent higher than Hall on that item and so the Board added 10 per cent to Hall's estimate of $17,500. With the addition of $2,920 for fixtures not included in Hall's valuation, these amounts totalled $30,000. It was this question of the valuation of the restaurant buildings at $17,500 plus 10 per cent which gave me the most concern. Donald Hall gave the replacement value of each of the various portions of the buildings at February 1961 costs and said that those costs were about 10 per cent higher than the cost in the year 1958, the date of the actual expropriation. This would, of course, give the claimants the advantage of that increase in cost. His depreciation allowance was, however, very drastic varying from 33 per cent on the unfinished reinforced concrete addition to 60 per cent on some other portions of the building. Such depreciation items are somewhat shocking. They were, however, the subject of astute cross-examination by skilled counsel for the claimant and no evidence contra other than the haphazard estimates of the claimant himself was introduced. It must be remembered that the Board members heard the witnesses and had an opportunity to weigh and compare the value of the various pieces of evidence given and that the figures set out in their finding represented their judgment of the probative value of those various pieces of evidence. Unless in this Court it appears that the Board were exercising their judgment upon improper principles, this Court should not attempt to revise their figures. So this Court might have found much less drastic rates of depreciation but if we could only do so by exercising our judgment upon the evidence, we should not apply our opinion of the evidence to amend that of the members of the Board who heard the evidence.

As I have noted, the Board itself figured the rates of depreciation were excessive and added 10 per cent in an attempt to overcome that excessive depreciation. Again, it is a matter for the Board's judgment whether that 10 per cent was a sufficient allowance to cover the excess. The

various photograph exhibits, particularly those in exhibit 43, seem to show a tumble-down series of buildings and might give considerable support for what would appear an abnormally high depreciation.

The complaints to the Court of Appeal that the Board failed to allow the claimants' compensation for the groynes is dealt with by Laidlaw J.A. in the reasons for judgment. Firstly, reading the record, it would be very difficult to come to a proper ascertainment of the cost of these groynes upon the evidence given at the arbitration hearing before the Board. The evidence of the claimants again is haphazard at the best and the evidence given by others both for the claimants and for the respondent as to the costs of the groynes varied enormously. This factor, however, is not so important as the view taken in the Court of Appeal, and I think the proper view, as to the principle upon which the groynes should be considered. The Board in its reasons said:

> The Board feels that the claim presented by the claimants for expenditures on the groyne and on the proposed addition, and on the loss on the chattel property, and the value of the leasehold interest and of the goodwill, were all essentially without substance unless Van Wagner's Beach Road was to be rebuilt.

In the Court of Appeal, on the other hand, Laidlaw J.A. dealt with the value of the groynes on a different basis, and said:

> If the groynes had not been in existence and had not been in place at the time of expropriation, I think that no prudent purchaser would have given much if anything for the land having regard to the probability that it might be washed out for all useful purposes by storm waters. It is because of the existence of the groynes and the value of the land which they protect that the land has a value of $6,750.00. I think it would have been highly improper for the Board to have determined any separate amount as proposed by the claimants as an allowance to the owner for the groynes.

Despite the fact that these groynes must have cost the claimants a very considerable sum, albeit one quite impossible to determine on the evidence, I have come to the conclusion that Laidlaw J.A. was right in saying that the groynes simply were necessary for the preservation of the lands upon which the buildings stood; if the groynes had been absent there would be no land to be expropriated, and the claimants would have simply been able to claim for a useless water-covered lot. Therefore, the Board would not have been justified in making an allowance for the cost of

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the groynes. In this Court, no particular argument was addressed to two other complaints before the Court of Appeal, *i.e.*, the failure to value the air conditioning system in the building on the basis that it was a mere chattel, and the failure to make an allowance for a fresh water well on the land. Both of these matters were dealt with by Laidlaw J.A.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the respondent corporation: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

1963

*Oct. 29

1964

Jan. 28

WINNIPEG FILM SOCIETY (*Accused*) ..APPELLANT;

AND

JOHN C. WEBSTER (*Informant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Sunday observance—Non-profit film society providing dues-paying members with showings of films in a theatre on Sunday—No charge made for admission—Whether a performance elsewhere than in a church at which a fee was charged directly or indirectly contrary to the Lord's Day Act, R.S.C. 1952, c. 171, s. 6(1).

The appellant film society, a non-profit organization whose main function was to provide its members with the opportunity to enjoy films of a character not usually shown at commercial theatres, provided a "performance" by the showing of two films elsewhere than in a church on a Sunday. The society was convicted of violating s. 6(1) of the *Lord's Day Act*, R.S.C. 1952, c. 171. An appeal from the conviction was dismissed in the County Court and a further appeal was dismissed by the Court of Appeal.

The society's membership dues, which were determined in accordance with its financial position and the anticipated expenses of the coming year, were fixed for the year 1961-62 at $6, in exchange for which the members were entitled to attend the showings of the society's films without payment of any admission charge and to participate in the affairs of the society generally.

On appeal to this Court, the main question to be determined was whether the appellant by providing its dues-paying members with showings of films in a theatre on Sunday without making a charge for admission at such theatre did unlawfully provide a performance elsewhere than in a church at which a fee was charged directly or indirectly for admission to such performance.

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Hall JJ.

Held: The appeal should be allowed and the conviction quashed.

There was nothing in the *Lord's Day Act* to prevent the society from providing any kind of performance anywhere on Sunday provided that it was not one at which a fee was charged directly or indirectly.

The Court was of the opinion that the fee charged for annual membership in the society bore no relationship to the number of times the individual members actually attended the performances which the society provided, and having regard to all the circumstances, these payments had more of the character of "membership" than of "admission" fees. This would not, however, necessarily conclude the matter if it had been shown that the performance provided by the appellant was one *at which* any kind of fee was charged directly or indirectly which entitled the person paying it to admission to the performance.

This was not a case where money or money's worth was paid *at the performance* under some device intended to give the payment the appearance of being charged for something other than admission (*Recreation Operators Ltd. v. R.* (1952), 15 C.R. 360), nor was it a case in which the admission charge was defrayed by the tender of money's worth in the form of a ticket purchased in advance (*Marin v. United Amusement Corporation Ltd.* (1929), 47 Que. K.B. 1).

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Philp Co. Ct. J. whereby appellant's appeal from its conviction by Dubienski P.M. for a violation of s. 6(1) of the *Lord's Day Act,* R.S.C. 1952, c. 171, was dismissed. Appeal allowed.

M. J. Arpin, Q.C., for the appellant.

J. J. Enns, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Court of Appeal of Manitoba[1] which affirmed a judgment of Judge Philp of the County Court of Winnipeg whereby the learned County Court Judge dismissed the appellant's appeal from its conviction by Magistrate Dubienski at the Winnipeg Magistrate's Court on the charge that it

> On the Lord's Day, to wit: the 7th day of January, A.D. 1962, at the City of Winnipeg aforesaid did unlawfully provide a performance elsewhere than in a church at which a fee was charged, directly or indirectly, for admission to such performance, contrary to the provisions of the statute in such case made and provided . . .

[1] [1963] 3 C.C.C. 18, 40 W.W.R. 643.

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WINNIPEG FILM SOCIETY v. WEBSTER

Ritchie J.

The statutory provisions which the appellant is alleged to have contravened are those contained in s. 6(1) of the *Lord's Day Act*, R.S.C. 1952, c. 171, which read as follows:

> It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

A breach of this section exposes the offender to the penalty provided by s. 12 of the Act and upon conviction the appellant in the present case was sentenced to pay a fine of twenty-five dollars and costs and in default to have distress levied upon it for the said fine and costs.

It is not disputed that the appellant was duly incorporated in January of 1960 under the provisions of *The Companies Act*, R.S.M. 1954, c. 43, for the purposes of carrying on without pecuniary gain, objects of a national, patriotic, philanthropic, scientific, artistic or social character or the like and it is admitted that this society provided a "performance" by the showing of two films elsewhere than in a church on Sunday, January 7, 1962.

The main function of the society is to provide its members with the opportunity to enjoy films of a character not usually shown at commercial theatres; it is affiliated with the Canadian Federation of Film Societies and the work of its unpaid executive includes obtaining such films as the membership may desire, renting the premises where the films can be displayed, advising the membership of the nature of available film material and attending to the financial and social affairs of the society. The annual membership dues, which are determined in accordance with the financial position of the society and the anticipated expenses of the coming year, were fixed for the year 1961-62 at six dollars, in exchange for which the members were entitled to attend the showings of the society's films without payment of any admission charge and to participate in the affairs of the society generally. Membership in the society also included the privilege of bringing guests to the theatre if seats were available, but no fee of any kind was charged to anyone at the performance. It is relevant to note that

many members of the society did not attend all film showings during any year and that some did not attend any at all.

Leave to appeal to this Court was granted in general terms and twelve grounds of appeal are set out in the notice of appeal, but the main question to be determined is whether the appellant by providing its dues-paying members with showings of films in a theatre on Sunday without making any charge for admission at such theatre "did" to employ the words of the charge "unlawfully provide a performance elsewhere than in a church at which a fee was charged directly or indirectly for admission to such performance".

The final paragraph of the reasons for judgment delivered by Schultz J.A. on behalf of himself and Miller C.J.M., reads as follows:

> The evidence is clear that in the instant case the society provided a showing of films for 850 of its members on Sunday, January 7, 1962, at a place other than a church; that no persons other than members of the society could, or did, obtain admission thereto; that such showing was paid for from the proceeds of the society's annual membership fees. In my opinion this constituted payment of an indirect charge and was a breach of sec. 6(1) of the Lord's Day Act.

Monnin J.A., whose reasons for judgment were concurred in by Guy J.A., concluded by saying:

> The society, under the umbrella of the duly incorporated non-profit organization was attempting to do what was forbidden to commercial organizations and to other individuals or groups of individuals. The annual membership fee for all practical purposes is a season ticket but for an undetermined number of performances. The membership fee, being an indirect fee, is a violation of sec. 6(1) of the Lord's Day Act.

The question of whether an annual membership fee entitling the member to repeated and general use of the facilities of a club or society is to be treated, for taxation purposes, as an "admission fee" for each occasion of actual use of those facilities, was considered in the case of *Executives Club of Louisville v. Glen*[1], in which Circuit Court Judge Miller had occasion to refer to the test of what constitutes a "due or membership fee" laid down by Mr. Justice Jackson in the Supreme Court of the United States in *White v. Winchester Club*[2] in the following terms:

> Consideration of the nature of club activity is a necessary preliminary to the formulation of a test of what constitutes a "due or membership fee." So far as finances go, the fundamental notion of club activity is that operating expenses are shared without insistence upon equivalence between

[1] (1952), 107 Fed. Supp. 668. [2] (1941), 315 U.S. 32 at 41.

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the proportion of an individual's contributions and the proportion of the benefits he receives. Thus, on the one hand, payment of the price of an individual dinner at the club dining room or of a single round of golf lacks the element of making common cause inherent in the idea of club activity. But, on the other hand, payment for the right to repeated and general use of a common club facility for an appreciable period of time has that element and amounts to a "due or membership fee" if the payment is not fixed by each occasion of actual use.

The same test was applied in *Merion Cricket Club v. United States*[1].

The appellant is a *bona fide* non-profit organization with national associations, the members of which, in addition to being admitted without charge to its performances, enjoy many of the intangible benefits to be derived from the sharing of common interests with fellow club members and from participating in guiding the administrative policy of the organization, including the selection of its films.

I am satisfied that the charge of six dollars for annual membership in the Winnipeg Film Society bears no relationship to the number of times the individual members actually attend the performances which the society provides, and having regard to all the circumstances, I think that these payments have more of the character of "membership" than of "admission" fees. This would not, however, in my view, necessarily conclude the matter if it had been shown that the performance provided by the appellant on January 7, 1962, was one *at which* any kind of fee was charged directly or indirectly which entitled the person paying it to admission to the performance.

It is to be noted that s. 6(1) of the *Lord's Day Act* does not make it unlawful for any person to provide "a performance" elsewhere than in a church on Sunday, and there is nothing in the *Lord's Day Act* to prevent any society from providing any kind of performance anywhere on Sunday provided that it is not one "at which any fee is charged directly or indirectly".

It appears to me that s. 6(1) of the *Lord's Day Act* has its origin in the statute entitled "An Act for preventing certain Abuses and Profanations on the Lord's Day, called Sunday" which was passed in England in 1781 as 23 Geo. III, c. 49, and it is interesting to note that no offence is created by s. 1 of that statute for keeping open a place of

[1] (1941), 315 U.S. 42.

entertainment on Sunday unless it be an entertainment "to which persons shall be admitted by the payment of money or by tickets sold for money". The section in question reads in part:

> That, from and after the passing of this present Act, any house, room or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place, shall forfeit the sum of two hundred pounds for every day that such house, room, or place, shall be opened or used as aforesaid. . . .

It is clear that payment of money or money's worth for admission to a Sunday performance was an essential ingredient of the offence so created, but the meaning of the words "admitted by the payment of money" as used in this section was expressly extended by s. 2 of the same statute which reads, in part, as follows:

> . . . any house, room, or place, which shall be opened or used for any public entertainment or amusement, or for public debate, on the Lord's Day at the expense of any number of subscribers or contributors to the carrying on any such entertainment or amusement, or debate, on the Lord's Day, and to which persons shall be admitted by tickets, to which the subscribers or contributors shall be entitled, shall be deemed a house, room, or place, to which persons are admitted by the payment of money, within the meaning of this Act.

The Parliament of Canada has, however, not seen fit to extend the meaning of the words "any performance . . . at which any fee is charged directly or indirectly for admission . . ." as they occur in s. 6(1) of the *Lord's Day Act,* and it appears to me that these words are clearly open to the interpretation that the charging of a fee either directly or indirectly *at the performance* is an essential ingredient of the offence here charged. It is contended on behalf of the respondent that the language of the charge and of the statute refers not only to a fee which is charged *directly or indirectly at the performance,* but also to an annual subscription which is charged at a place other than the performance in exchange for the privilege of belonging to the society which provides the performance. This appears to me to be tantamount to saying that a performance for which a fee is charged indirectly at another place and not necessarily on Sunday shall be treated for the purposes of the *Lord's Day Act* as being ". . . a performance . . . at which a fee is charged . . . indirectly" on Sunday.

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This latter construction does not appear to me to reflect the primary meaning of the language used in the charge by which the appellant is accused that it "did unlawfully provide a performance elsewhere than in a church *at which* a fee was charged directly or indirectly for admission . . .". If these words were capable of the extended meaning sought to be placed upon them by the respondent they would, in my opinion, at best be ambiguous and if the two interpretations could both be sustained, the penal character of the statute would entitle the appellant to the benefit of the construction more favourable to it.

The relevant rule governing the construction of penal statutes is well summarized in Halsbury's Laws of England, 3rd ed., vol. 36 at p. 415:

> It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.

The matter was succinctly stated by Lord Simonds in *London and North Eastern Ry. Co. v. Berriman*[1], where he said:

> A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court.

This is not a case where money or money's worth was paid *at the performance* under some device intended to give the payment the appearance of being charged for something other than admission (e.g. food, see *Recreation Operators Ltd. v. The Queen*[2]), nor is it a case in which the admission charge was defrayed by the tender of money's worth in the form of a ticket purchased in advance (*Marin v. United Amusement Corporation Ltd.*[3]).

Under all these circumstances it cannot in my opinion be said that the language of s. 6(1) of the *Lord's Day Act* and of the charge here laid is such as to apply without doubt or ambiguity to the performance provided by the appellant on Sunday, January 7, 1962.

[1] [1946] A.C. 278 at 313-14. [2] (1952), 15 C.R. 360, 104 C.C.C. 284.
[3] (1929), 47 Que. K.B. 1.

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I would accordingly allow this appeal with costs throughout and direct that the conviction of the appellant be quashed.

Appeal allowed with costs and conviction quashed.

Solicitors for the appellant: Arpin, Rich, Houston & Karlicki, Winnipeg.

Solicitor for the respondent: O. M. M. Kay, Winnipeg.

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*Feb. 6, 7
Mar. 12

ONE CHESTNUT PARK ROAD LIMITED, PAUL F. McGOEY, DONALD B. MORAN, WILLIAM E. HALL, ANTHONY CECUTTI, ANNJANE CARTER, MARJORIE SWANSON, JOHN G. EVANS, WILLIAM J. HORSEY, MARY N. SAURIOL (*Defendants*) ..... APPELLANTS;

AND

THE CORPORATION OF THE CITY OF TORONTO (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Use of building in contravention of zoning by-law—Injunction—Whether municipality had status to maintain action—The Municipal Act, R.S.O. 1950, c. 243, s. 497—The Planning Act, 1955 (Ont.), c. 61, as amended by 1960 (Ont.), c. 83, s. 5.

The defendants used certain premises as offices for doctors and a physiotherapist in contravention of a zoning by-law of the plaintiff municipality. The infringement of the by-law was clear and had been persistent, continuous and defiant since 1957. The defendants attempted to have the by-law amended but their efforts were without success. Finally, on October 24, 1960, the city issued a writ for an injunction and obtained judgment on October 30, 1961. This was affirmed by the Court of Appeal on September 14, 1962.

The zoning by-law was invalid because it lacked the approval of the Ontario Municipal Board before it was passed, but this defect was overcome by an amendment to *The Planning Act* by 1960 (Ont.), c. 83, s. 5. The defendants' claim that their rights were preserved by subs. (2) of s. 5 was rejected. The defendants had no acquired rights as defined in subs. (2) and there were no pending proceedings commenced on or before the date specified in that subsection.

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

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ONE CHESTNUT PARK ROAD LTD. *et al.* v. CITY OF TORONTO

The main issue in the present appeal was a new submission by the defendants that s. 497 of *The Municipal Act*, R.S.O. 1950, c. 243, gave the city no status to maintain this action and that the action could only be maintained by the Attorney General as plaintiff or as plaintiff on the relation of any interested person. The defendants sought to draw an analogy between the action authorized by s. 497 of the Act and one for the abatement of a public nuisance.

Held: The appeal should be dismissed.

Section 497 of *The Municipal Act* should be construed according to its plain terms so as to give the municipality a right of action. The municipality, acting within the limits of its legislative power, had an interest in the specific performance of its by-laws and was the logical plaintiff to enforce them.

Township of Scarborough v. Bondi, [1959] S.C.R. 444; *City of Toronto v. Solway* (1919), 46 O.L.R. 24; City of Toronto v. Rudd, [1952] O.R. 84; *City of Toronto v. Hutton*, [1953] O.W.N. 205; *City of Toronto v. Ellis*, [1954] O.W.N. 521, referred to; *Wallasey Local Board v. Gracey* (1887), 36 Ch. D. 593; *Tottenham Urban District Council v. Williamson & Sons Ltd.*, [1896] 2 Q.B. 353; *Boyce v. Paddington Borough Council*, [1903] 1 Ch. D. 109, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Aylen J. Appeal dismissed.

F. A. Brewin, Q.C., for the defendants, appellants.

M. E. Fram and *D. D. MacRae*, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellants are under an injunction to refrain from using 1 Chestnut Park Road, Toronto, as offices for doctors and a physiotherapist. The injunction is based upon a continuous violation of the City of Toronto Zoning By-law No. 18642, as amended by By-laws Nos. 18878 and 19093. The injunction was granted on October 30, 1961.

The unlawful user began in 1957 after the appellant Paul F. McGoey purchased a large residential building containing about thirty rooms and converted it into offices. The infringement of the by-law is clear and has been persistent, continuous and defiant since 1957. The details are set out in the reasons for judgment of Aylen J.

Every possible step seems to have been taken by the appellants to obtain an amendment to the by-law but they

[1] (1962), 35 D.L.R. (2d) 106.

have all failed. Finally, on October 24, 1960, the city issued a writ for an injunction and obtained judgment on October 30, 1961. This was affirmed by the Court of Appeal[1] on September 14, 1962.

The claim for the injunction was based on s. 497 of *The Municipal Act*, R.S.O. 1950, c. 243, which reads:

> 497. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.

The substantial defence at trial and before the Court of Appeal was based upon the effect of the decision of this Court in *Township of Scarborough v. Bondi*[2], and the validating legislation of 1960. The result of the decision in *Township of Scarborough v. Bondi* was that the zoning by-law 18642 was invalid because of the lack of the approval of the Ontario Municipal Board before it was passed. To overcome this defect, the Legislature enacted an amendment to *The Planning Act* by 8-9 Eliz. II (1960), c. 83, s. 5, which reads:

> 5. (1) A by-law repealing or amending a by-law passed under section 390 of *The Municipal Act* or a predecessor of that section is not invalid and shall be deemed never to have been invalid solely because of the lack of approval by the Ontario Municipal Board prior to the passing thereof by the municipal council.
>
> (2) Subsection 1 does not apply to a by-law that never at any time received approval by the Ontario Municipal Board and does not affect the rights acquired by any person from a judgment or order of any court prior to the day on which this Act comes into force, or affect the outcome of any litigation or proceedings commenced on or before the 23rd day of March, 1960.

The appellants claimed that their rights were preserved by subs. (2). This submission was rejected by Aylen J. and the Court of Appeal and at the conclusion of argument of counsel for the appellants, we were all of the opinion that this decision was correct and so notified counsel for the respondent. The appellants had no acquired rights as defined in subs. (2) and there were no pending proceedings commenced on or before March 23, 1960.

The main issue in this appeal was a new submission by counsel for the appellants that s. 497 of *The Municipal Act*

[1] (1962), 35 D.L.R. (2d) 106. [2] [1959] S.C.R. 444, 18 D.L.R. (2d) 161.

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gave the city no status to maintain this action and that the action could only be maintained by the Attorney General as plaintiff or as plaintiff on the relation of any interested person. The appellants seek to draw an analogy between the action authorized by s. 497, above quoted, and one for the abatement of a public nuisance. In the case of a public nuisance, the Attorney General may, on the information of a private individual, maintain an action for nuisance. A private individual can only maintain an action for a public nuisance if he can show some particular and special loss over and above the ordinary inconvenience suffered by the public at large. Then the nuisance becomes a private one and he can sue in tort. The reason for the rule is to prevent multiplicity of actions.

I can see no analogy between the right of action given by s. 497 for the enforcement of a municipal by-law and the enforcement of a remedy for a public nuisance. The principal cases on which the appellants rely are: *Wallasey Local Board v. Gracey*[1]; *Tottenham Urban District Council v. Williamson & Sons, Limited*[2]; *Boyce v. Paddington Borough Council*[3]. These are based on this principle. When public health legislation in the 19th century began to create nuisances by statute, at the same time it gave local authorities the right to cause proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under the Act. The Courts held that these were public nuisances and would have to be restrained in the usual way at the suit of the Attorney General.

This procedural technicality, for which there was sound reason in the case of a public nuisance, has no application to a proceeding by a municipality to enforce its own by-law. Municipal by-laws usually provide for a penalty for non-observance but the legislature has recognized that unless there is a stronger remedy, a penalty may become a mere licence fee. Something equivalent to s. 497 may be traced back in the legislation to 4 Edw. VII (1904), c. 22, s. 19.

The Ontario Court of Appeal had held in *City of Toronto v. Solway*[4] that the infringement of a by-law relating to the location, erection and use of buildings for stables for horses

[1] (1887), 36 Ch. D. 593.
[2] [1896] 2 Q.B. 353.
[3] [1903] 1 Ch. D. 109.
[4] (1919), 46 O.L.R. 24, 49 D.L.R. 473.

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for delivery purposes, could be restrained by injunction. The section itself has been invoked with the city as plaintiff in *City of Toronto v. Rudd*[1]; *City of Toronto v. Hutton*[2], and *City of Toronto v. Ellis*[3]. There is every reason why the section should be so construed according to its plain terms so as to give the municipality a right of action. The municipality, acting within the limits of its legislative power, has an interest in the specific performance of its by-laws and is the logical plaintiff to enforce them.

There are no equitable defences available to the appellants in this case. The granting of the injunction should be affirmed and the appeal dismissed with costs. I would allow the appellants three months, and no more, for the purpose of arranging their affairs. They have been acting in defiance of this by-law since 1957.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Cameron, Weldon, Brewin, McCallum & Skells, Toronto.

Solicitor for the plaintiff, respondent: W. R. Callow, Toronto.

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*Feb. 4, 5, 6
Mar. 12

LEVI J. JEROME (*Plaintiff*) .....APPELLANT;

AND

DONALD J. ANDERSON, DAVID CASS-BEGGS, SASKATCHEWAN POWER CORPORATION (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Libel—Express malice—Defence of qualified privilege destroyed—Discretion of trial judge to permit plaintiff to postpone evidence in rebuttal of plea of justification until after defendant has given evidence in support of plea—Cross-examination.

The plaintiff had been employed by the defendant power corporation for some eighteen years and had attained the position of a project foreman. The defendant C was the corporation's general manager and the defendant A was powerline construction engineer. The plain-

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

[1] [1952] O.R. 84, 2 D.L.R. 578. [2] [1953] O.W.N. 205.

[3] [1954] O.W.N. 521.

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tiff was told to report to the corporation's headquarters and on his arrival there was taken to A's office where, without any previous question or discussion, he was handed a letter of dismissal. The letter, copies of which were sent to four departmental officers, impugned the integrity, honesty and character of the plaintiff. In an action for libel the trial judge gave judgment in favour of the plantiff against A and the corporation for $28,500 and dismissed the action against C without costs. An appeal was allowed by the Court of Appeal and the action against all three defendants was dismissed with costs.

Held: The appeal should be allowed.

Per Cartwright, Martland, Ritchie and Hall JJ.: The finding of the trial judge that express malice had been proved was supported by the evidence and ought not to have been disturbed by the Court of Appeal. The words of the letter complained of were clearly defamatory of the plaintiff; their falsity was presumed and no evidence was led to rebut that presumption; the defence of qualified privilege ceased to avail the defendants in view of the finding of express malice.

Where a plea of justification is raised it is within the discretion of the court to allow the plaintiff either to give all the evidence he intends to offer in rebuttal at the outset, or to postpone giving such evidence and leave it to the defendant to make out his plea, and then give evidence on any matters which are properly admissible to rebut the plea. There is no hard and fast rule, and the practice is based on general convenience. Where the court has ruled that the plaintiff may so reserve his evidence, it rests in the discretion of the court to rule that the right to cross-examine the plaintiff's witnesses in support of the plea of justification be postponed as was done in the present case, or if counsel for the defendants is allowed in cross-examination to elicit facts in support of the plea of justification the fact of his having done so is not to deprive the plaintiff of the benefit of the ruling that he may reserve his general evidence in rebuttal of the plea of justification until after the defendants have given their evidence in support of that plea.

As to the question of the quantum of damages it could not be said that the amount at which these were assessed by the trial judge was excessive. The sum of $2,212 which had been paid by the defendants to the plaintiff, but not on account of the plaintiff's claim for damages for libel, should not have been deducted from the amount of damages. Accordingly, the amount of the judgment was increased by this amount.

Dickson v. Wilton (Earl) (1859), 1 F. & F. 419; *Turner v. M.G.M. Pictures Ltd.*, [1950] 1 All E.R. 449; *Maclaren and Sons v. Davis* (1890), 6 T.L.R. 372; *Browne v. Murray* (1825), 1 Ry. & M. 254; *Beevis v. Dawson,* [1957] 1 Q.B. 195; *Rees v. Smith* (1816), 2 Stark 31, referred to.

Per Judson J.: The ruling of the trial judge permitting the plaintiff to postpone evidence in rebuttal of the defendants' plea of justification was erroneous. The plaintiff had given evidence—most of it directed to showing malice on the part of the defendants. It was the right of counsel for the defendants to then cross-examine at large and the normal conduct of a trial should not have been interfered with except

on very grave grounds that did not exist in this case. *Beevis v. Dawson, supra,* distinguished.

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APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of McKercher J. Appeal allowed.

L. J. Jerome, in person.

G. J. D. Taylor, Q.C., and *C. F. Tallis,* for the defendants, respondents.

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

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] whereby an appeal from a judgment of McKercher J. in an action for damages for libel was allowed and the action as against all three defendants was dismissed with costs. Following a trial without a jury which occupied twelve days, the learned trial judge had given judgment in favour of the appellant against the defendants Anderson and Saskatchewan Power Corporation for $28,500 and had dismissed the action as against the defendant Cass-Beggs without costs.

In the month of July 1959 and for some years prior thereto the appellant was employed by the respondent, the Saskatchewan Power Corporation; he had 18 years' seniority in service, some of which had been acquired with another company which was purchased by the defendant corporation. The appellant had attained the position of a project foreman.

The respondent corporation was incorporated under *The Power Corporation Act,* R.S.S. 1953, c. 35. The members of the board are appointed by the Lieutenant-Governor in Council, who also designates the chairman. The corporation now controls all rural electrification in the province of Saskatchewan.

At all material times the respondent Cass-Beggs was the general manager and the respondent Anderson was power-line construction engineer of the corporation.

The appellant was a project foreman with headquarters in Swift Current, Saskatchewan; he was under the direct

[1] (1963), 42 W.W.R. 641, 39 D.L.R. (2d) 641.

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supervision of L. A. Dowie, superintendent of light construction; Dowie in turn was under the direct supervision of Anderson. The appellant's duties consisted mainly of the supervision of contractors constructing rural power lines in the southern portion of Saskatchewan and included dealing with difficulties of contractors in respect of clearing right-of-way problems with property owners and tenant farmers along line routes. As of June 1, 1959, the appellant's salary had been raised from $456 to $474 per month.

On the afternoon of July 17, 1959, the appellant was working in the Coronach area checking rural power lines. At 1:30 that afternoon he received a note that he was to call Dowie in Regina immediately. He did so and Dowie told him that he was to come to Regina at once, because a Mr. Buehler had written a letter of a very serious nature. The distance the appellant had to travel was 161 miles and it was agreed he should try to be in Regina by 4:30 p.m. On his arrival in Regina Dowie took the appellant to Anderson's office. Without any previous question or discussion, Anderson handed to the appellant a letter of dismissal, dated July 17, 1959, which is the libel complained of. This reads as follows:

TO: L. J. Jerome, FROM: D. J. Anderson,

I regret that the Saskatchewan Power Corporation must terminate your employment with the Corporation as of Friday night, July 17, 1959. As you are no doubt aware, your work has not been entirely satisfactory for the last two and a half years. Mr. Dowie has been forced to register several letters and to administer a large number of verbal reprimands for various things ranging from quantity and quality of your work to reporting private long distance telephone charges as being legitimate calls made for Company business, your attitude towards farmers and land owners and your practices in dealing with other Corporation staff. There is also a question of time which was taken off this past winter and spring, supposedly sick leave, which to my mind is at least very questionable although we have an indication from the doctor at Swift Current that some sick leave was required.

All these previously mentioned things add up to one thing, mainly that you do not have the type of integrity and character which is required by this Corporation for out of scope staff. In other words, we have arrived at the state where we now do not feel we can trust you.

The incident which brought all this to a head was the altercation which you had with Mr. Henry Buehler of Burstall. The type of language which you used to Mr. Buehler and the approach and attitude you made to him clearly show to me that you are no longer fitted for the type of work which you are now doing. If this were the only case, or if there were no other factors, then you would probably be demoted to some other position. However, in view of the factors mentioned previously, I feel that I am entirely justified in the suspension of your services.

If you wish to submit your resignation to me in writing this afternoon, it will be accepted. This procedure will probably make it somewhat easier for you to obtain other employment.

We are very sorry to have to do this, however, your record over the past two and a half years and this last incident leaves me no choice.

"D. J. Anderson"
Power line Construction Engineer

DJA/pa

cc: W. B. Clipsham — Asst. G. M. i/c Engineering
D. G. Brown — Industrial Relations
R. J. Waller — Personnel
C. E. Smith — Public and Employee Relations

The second paragraph of this letter is set out verbatim in the statement of claim but the whole letter is complained of.

Evidence was given that the expression "out of scope staff" describes persons employed by the respondent corporation, the nature of whose duties and responsibilities is such that they are not eligible for membership in the union of the corporation's employees.

After the appellant had read this letter of dismissal, Anderson handed him a "Department memo" from the Honourable Russel Brown, chairman of the respondent corporation, addressed to Mr. Cass-Beggs, the general manager. This is dated July 14, 1959, and is headed "Re Henry Buehler, P.O. Box 60, Burstall". It reads as follows:

Some time ago the above mentioned called on me to discuss what he termed the abusive and disgusting approach of one of our foremen.

As the charges were, in my opinion, somewhat serious I asked Mr. Buehler to put his complaint in writing and assured him that on receipt of a letter from him I would have an investigation made.

I have now received a letter from Mr. Buehler in which in order to set out the facts and indicate the language used by our employee he uses some rather, shall we say, improper expressions. Hardly, I must say, fit for the eyes and ears of our respective secretaries. In any event, I am forwarding the letter to you and would ask that an immediate investigation be made of the charges contained therein. I would appreciate a detailed report at the earliest possible time.

Attached to this was Buehler's letter. The appellant read the memorandum and part of the Buehler letter; he put them in his pocket and stated he would read them when he had time. Anderson said they were not his letters and requested that they be returned to him and the appellant did this. Buehler's letter does not form part of the record.

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A conversation followed, Anderson, Dowie and the appellant being present. The appellant testified that he said to Anderson in discussing the memorandum of dismissal: "Don, what did you—what got into you to fire me like that?" and that Anderson replied: "Well, we are using that, Levi, but it's not that". The making of this answer was neither denied nor explained by Anderson. Dowie was not called as a witness.

It will be observed that Mr. Brown's memorandum requested an immediate investigation and a detailed report. Anderson said that he received Mr. Brown's letter on either the afternoon of July 16 or the morning of July 17. Asked whether he conducted any investigation, Anderson's reply was: "I discussed the matter with Mr. Dowie and this was all the investigation I conducted". Asked whether Dowie had urged him to fire Jerome, Anderson replied that he had not. Asked whether he had ever reprimanded Jerome, his answer was "No".

Anderson stated that after he had discharged Jerome and circulated the letter of dismissal, an investigation of Buehler's complaint was carried out by Mr. L. J. Bright. Mr. Bright's report was filed as an exhibit. It is dated August 5, 1959, addressed from "L. J. Bright, Field Relations" to "C. E. Smith, Public and Employee Relations". It contains a lengthy and detailed report of the investigation. The gist of it is that in the matter out of which his complaint arose Buehler had been unco-operative throughout and that Jerome had done all that could be expected of anyone. The only passage in any way derogatory of Jerome is the following:

> I have already given you my impression of Mr. Jerome which from a public relations viewpoint and trouble prevention viewpoint was second to none in the Province; but, while I am sure that the vulgar language is greatly exaggerated, I do not condone it. However, in other cases which I have investigated, I have always taken into consideration education, occupation, characteristic adjectives, general attitude, and the amount of provocation. On this basis, I have exonerated men who habitually use far worse language than that quoted.

The report contains such statements as the following:

> My only criticism having looked at the line would be that Mr. Jerome went to too much trouble to please a man who was non co-operative, obviously is generally disliked, and who wrote the defamatory and slanderous letter as a thank you note.

He (a District Operator) said that Mr. Jerome was the best Foreman he had ever worked with that he was always pleased to see him come and that when Mr. Jerome checked the line he carried his hooks and shovel and used both of them. He said when I heard a good man like Mr. Jerome was fired, I could not sleep at night.

* * *

In reply to questions, Mr. Everest (a District Superintendent) stated that he had always found Mr. Jerome's public relations more than good. He further stated that Mr. Jerome was very conscientious in checking lines. He said he climbed poles to check tie-ins and walked out into fields to check poles otherwise not in view. He said that when he heard that Mr. Jerome was let out, he just didn't believe it.

* * *

He (Jerome) sure goes through a lot of trouble to avoid trouble.

Of course, this document is not evidence of the truth of the facts stated in it. Its significance is in the effect, or lack of effect, it had upon the defendants' attitude towards the appellant.

The appellant refused to resign, consistently maintained that the charges contained in the memorandum of dismissal were false and sought reinstatement in the position from which he had been discharged. After lengthy negotiations, the appellant was offered re-employment in an inferior position at reduced pay; the offer was couched in terms which implied that the charges were persisted in. It is not surprising that the appellant refused the offer. On the assumption that the charges were false, as they must now be taken to be, a self-respecting man could hardly have done otherwise. On February 29, 1960, this action was commenced.

The amended statement of claim alleged that Anderson, with the approval and authority of Cass-Beggs, had falsely and maliciously written the letter of July 17, 1959, that he had published it to W. B. Clipsham, D. G. Brown, R. J. Waller and C. E. Smith, and that both Anderson and Cass-Beggs were acting within the scope of their employment with the Saskatchewan Power Corporation. General damages of $100,000 were claimed.

The defendants filed a single statement of defence, pleading (i) qualified privilege, (ii) justification, (iii) that Cass-Beggs had assented to the dismissal of the plaintiff but not to the contents of the letter of July 17, 1959, and (iv) that the plaintiff's claim had been settled.

The statement of defence also recited an interlocutory order made in the action by Graham J. holding that the

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action was one for libel only and not an action for libel and in addition for damages for wrongful dismissal and stated that the statement of defence was pleaded on the basis of that order.

The ground on which the defendants asserted that the letter of July 17, 1959, was published on an occasion of qualified privilege is set out in particulars delivered by them as follows:

> The memorandum was sent to the Plaintiff and also to Mr. W. B. Clipsham, Assistant General Manager in charge of Engineering, Mr. D. G. Brown, Industrial Relations Director, Mr. R. J. Waller, Personnel Director and Mr. C. E. Smith, Public and Employee Relations Director, all being persons employed by the Defendant Corporation in capacities which invested them with a right to receive the information in question, and to whom the Defendant Anderson had an obligation of communicating the said information.

The defendants delivered particulars of their plea of justification consisting of a little over eight pages of approximately 50 lines each. For reasons that will appear I do not find it necessary to refer to these in detail.

No evidence was led to support the plea of justification. This defence and that of settlement were rightly rejected by both Courts below and nothing more need be said about them except as to the conduct of the trial in regard to the plea of justification.

The learned trial judge held that the defence of qualified privilege was not established. He reached this conclusion on several grounds. On the view that the occasion giving rise to the suggested duty to publish was the request for an investigation and report made by Mr. Russell Brown, he held there was no duty to publish to any of the four persons named in the statement of claim. On the view that the occasion was the dismissal of the plaintiff by Anderson he held that there was no duty to publish to R. J. Waller or D. G. Brown. The Court of Appeal, on the other hand, were of opinion that the occasion was the dismissal of the plaintiff and that the privilege was not exceeded by publication to the four persons named.

I do not find it necessary to choose between these conflicting views as I am satisfied that the finding of the learned trial judge that express malice had been proved was supported by the evidence and ought not to have been disturbed by the Court of Appeal.

On the assumption that the defamatory statement was published on an occasion of qualified privilege the onus of proving the existence of malice rested upon the plaintiff. Malice, in this connection, does not necessarily mean personal spite or ill-will; it may consist in some indirect motive not connected with the privilege or, as it was put by Lord Campbell in *Dickson v. Wilton (Earl)*[1] at p. 427:

> But by that term is meant, not only spite, for any indirect motive, other than a sense of duty, is what the law calls "malice".

The decision whether or not malice has been established involves an inquiry into the state of mind of the defendant at the time when the libel was published. The difficulty of proving the state of a man's mind at a particular time was commented on by Bowen L.J. in his famous dictum in *Edgington v. Fitzmaurice*[2] at p. 483; but as was said by Lord Wright in *Clayton v. Ramsden*[3] at p. 331: "States of mind are capable of proof like other matters of fact".

Questions of fact arising in civil cases are decided on the balance of probabilities. In *Turner v. M.G.M. Pictures Ltd.*[4], an action for libel in which it was conceded that the publication was made on a privileged occasion, Lord Oaksey, at p. 470, stated the question as follows:

> Did the appellant prove that it was more probable than not that the respondents were actuated by malice?

In the same case at pp. 454 and 455 Lord Porter said:

> It is common ground, as I have indicated, that qualified privilege is rightly claimed by the respondents, but it is said that any reliance on it is ruled out by the existence of express malice on their part. Where such an allegation is made it is the duty of the plaintiff to establish the existence of malice and, unless he does so, the defendant succeeds. If, however, the plaintiff can show any example of spite or indirect motive, whether before or after the publication, he would establish his case provided that the examples given are so connected with the state of mind of the defendant as to lead to the conclusion that he was malicious at the date when the libel was published. No doubt, the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given and the question left to, or withdrawn from, the jury by ascertaining which way the scale is tipped when they are weighed in the balance one against

[1] (1859), 1 F. & F. 419, 175 E.R. 790.
[2] (1885), 29 Ch. D. 459, 55 L.J. Ch. 650.
[3] [1943] A.C. 320, 112 L.J. Ch. 22.
[4] [1950] 1 All E.R. 449, 66(1) T.L.R. 342.

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the other. On the contrary, each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff. Nevertheless, each particular instance of alleged malice must be carefully analysed, and if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances.

I do not take the last sentence in this passage to mean that a number of items of evidence, each in itself insufficient to satisfy the tribunal of the existence of the fact sought to be proved, may not in combination be sufficient to attain that result.

I accept as accurate the statement in *Wills on Circumstantial Evidence*, 7th ed., at p. 435:

> The effect of a body of circumstantial evidence is sometimes compared to that of a chain, but the metaphor is inaccurate, since the weakest part of the chain is also its strongest. Such evidence is more aptly to be compared to a rope made up of many strands twisted together. The rope has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for the purpose.

I do not find it necessary to go through all the grounds on which the learned trial judge found that express malice existed. He said in the course of his reasons while speaking of the letter of July 17, 1959, which was exhibit P. 14:

> I find that such charges were made by Anderson recklessly and not in honest belief on the part of Anderson that all the allegations in P. 14 were true; and I further find that Anderson knew or should have known that the allegations were untrue.

In my opinion the learned trial judge was justified in making this finding on the statement made by Anderson, quoted earlier in these reasons, "Well we are using that, Levi, but it's not that." The fact that Anderson used these words is accepted by the Court of Appeal. It seems obvious that if Anderson had not used them he would have denied having done so and that Dowie, who was present, would have been called as a witness to support his denial. The making of the statement must be considered in the light of the other relevant evidence. Anderson's conduct, (i) in writing P. 14, within a matter of hours after receiving a request for an investigation and detailed report of the Buehler incident and without having made any investigation worthy of the name, (ii) calling the plaintiff in from a distance of 160

miles and then giving him no opportunity to say a word of explanation or defence before publishing the libel, and (iii) failing to modify his stand when Bright's report was received, appears to me to be more consistent with the existence than with the absence of malice. I would, however, be prepared to support the finding of the learned trial judge as to the existence of malice on Anderson's undenied and unexplained statement. If there was any explanation of what he meant by the words quoted which was consistent with the absence of malice and of indirect motive surely it would have been brought out by counsel for the defendants.

The view taken by the Court of Appeal on this branch of the matter appears sufficiently in the following paragraph of their reasons:

> The whole of the occurrence does give rise to some questioning in one's mind, but this question or suspicion does not supplant the evidence, substantially not contradicted, nor reasonably incapable of belief, that Anderson acted in good faith, on grounds which he believed to be adequate and true. A suspicion engendered by what was said and done, that some reason or reasons other than those given, actuated the defendant Anderson, unsupported, by evidence and thus remaining, at best, a suspicion, cannot be taken, as I have just said, to support a valid inference or conclusion of the existence of some improper motive or purpose. Accepting Anderson's evidence that he believed just cause existed to discharge the plaintiff, and that an employer need not give all or any reasons for discharging an employee, I cannot infer that Anderson wrote and published the letter intending to harm the plaintiff thereby, or for any other improper reason, or any reason other than to effectuate the discharge and give reasons therefor.

With respect, this passage appears to me to give insufficient weight to the finding of the learned trial judge expressed as follows:

> I find—and I regret to have to do this—I find that from his, Mr. Anderson's demeanour in the witness box and his attitude there that Mr. Anderson is not a credible witness.

It is only in exceptional circumstances that an appellate court is justified in accepting and acting upon the evidence of a witness whom the trial judge has expressly disbelieved. I can find no such circumstances in this case.

It follows from what I have said above that the appeal must succeed. The words of the letter complained of are clearly defamatory of the plaintiff; their falsity is presumed and no evidence was led to rebut that presumption; the defence of qualified privilege ceases to avail the defendants in view of the finding of express malice.

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Before proceeding to the question of damages it is necessary to examine the contention of the respondents that if the judgment of the Court of Appeal is not affirmed a new trial should be ordered by reason of matters occurring in the course of the trial.

In this regard the respondents complain, (i) that the learned trial judge limited and interfered with the cross-examination of the plaintiff, (ii) that the plaintiff was permitted to adduce hearsay and irrelevant evidence, and (iii) that the plaintiff was permitted to split his case.

The first witness called by the plaintiff at the trial was D. G. Brown. He was neither examined nor cross-examined in regard to the matters alleged in the defendants' particulars of justification. Before calling the plaintiff, who was the next witness, his counsel, Mr. Wellman, told the Court that he proposed to postpone giving evidence to rebut the defendants' plea of justification until after the defendants had given their evidence in support of that plea. This course was objected to by counsel for the defendants. After a somewhat lengthy discussion the learned trial judge ruled that the course proposed by counsel for the plaintiff should be followed and that while counsel for the defendants would be at liberty to cross-examine the plaintiff's witnesses on matters going to credit he would not be permitted to elicit evidence in support of the plea of justification under the guise of attacking credit.

I think it clear that it was in the discretion of the learned trial judge to make this ruling, although, as was pointed out by Cave J. in *Maclaren and Sons v. Davis et al.*[1], the exercise of that discretion may, in a proper case, be reviewed in an appellate court.

The judgment of Abbott Ld. C.J. in *Browne v. Murray*[2], which was a ruling made during the course of the trial, appears to indicate the view that the plaintiff in a libel action has a right to choose which course he will take. The judgment reads as follows:

> In actions of this nature, the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification, and then the plaintiff may, in reply, rebut the evidence produced by the defendant. But if the plaintiff in the outset, thinks fit to call any evidence to repel the justification, then, I am of opinion, that he should go through *all* the evidence he proposes to give

[1] (1890), 6 T.L.R. 372 at p. 373. [2] (1825), 1 Ry. & M. 254.

for that purpose, and he shall not be permitted to give further evidence in reply. It is much more convenient for the due administration of justice that this course should be adopted, otherwise there will be no end to evidence on either side, as the defendant would be entitled again to call witnesses to answer those last produced by the plaintiff to rebut the justification.

In *Maclaren and Sons v. Davis, supra,* the libel complained of described the plaintiffs as "unmitigated literary thieves" and accused them of stealing articles from the defendants' paper and misleading advertisers into thinking that the plaintiffs' paper was that of the defendants. Cave J. said at p. 373:

> The plaintiff might wait till the evidence of the defendant was given, and then the Judge should allow the plaintiff to give evidence in reply. Here there were two charges in the libel, one that the plaintiffs had stolen Davis's articles; secondly, that he had stolen Lowe's advertisements. The words were that he was "an unmitigated literary thief." Upon the question whether the plaintiff had stolen Davis's articles, the evidence of his securing advertisements, which should properly have gone to Lowe's paper, would have been irrelevant. It would have been most inconvenient for the plaintiff to have gone through all the articles and then have attempted to prove that they were not taken from the defendant's paper. It was obviously more convenient for the plaintiff to wait till he found what articles or what advertisements were dealt with by the defendants. That was shown in this case, as the defendants were not able to give proof of any advertisers having been misled. A great deal of time would have been wasted if the plaintiff had gone through all the advertisements. It was never convenient to prove a negative. When the defendant had set up something affirmative then was the time to dispose of it. The learned Baron had exercised an erroneous discretion in refusing to allow the rebutting evidence.

The report states that A. L. Smith and Vaughan Williams JJ. "concurred in saying there must be a new trial". It may be taken that they did not disagree with the reasons given by Cave J.

The proper practice in such circumstances is discussed in the judgments delivered in the Court of Appeal in *Beevis v. Dawson*[1]. In that case counsel for the plaintiff did not call upon the trial judge to rule as to the course which he proposed to follow. At p. 213, Singleton L.J. said:

> The judge ought to have been asked to decide early on the mode or manner in which the case should be heard. If he had decided what, in his view, was most convenient, counsel should have followed that.

In the case at bar the request for a ruling and the ruling of the judge were made sufficiently early in the trial.

[1] [1957] 1 Q.B. 195.

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At p. 203, Singleton L.J. said:

It is claimed on behalf of the plaintiff that, there being a plea of justification in the defence, the plaintiff was entitled to reserve his evidence upon that part of the case until later, and then to give evidence in rebuttal. That submission is based on statements of practice in several textbooks. I refer to one only Gatley on Libel and Slander, 4th ed., at p. 582: "Where there is a plea of justification on the record it is usual, and more convenient, for the plaintiff not to call any evidence in rebuttal as part of his own case, but to leave it to the defendant to make out his plea. The plaintiff may, however, anticipate, if he thinks fit, and give all the evidence he intends to offer in rebuttal at the outset. But he is not entitled to call some evidence in rebuttal in the first instance, and to reserve the remainder for reply to the defendant's case."

Singleton L.J. then quotes the whole of the judgment of Abbott Ld. C.J. in *Browne v. Murray, supra*, and considers the case of *Rees v. Smith and Others*[1], an action for trespass, in the course of which, at pp. 32 and 33 of the report, Lord Ellenborough said:

As a general rule, I beg that it may be understood that a case is not to be cut into parts, but that when it is known what the question in issue is, it must be met at once. If, indeed, any one fact may be adduced by the defendant to which an answer can be given, the plaintiff must have an opportunity given for so doing; but this must be understood of a specific fact, he cannot go into general evidence in reply to the defendant's case. There is no instance in which the plaintiff is entitled to go into half his case and reserve the remainder.

Having referred to these two cases, Singleton L.J. continued at pp. 204 and 205:

I venture to doubt whether there is a hard and fast rule either way. The authorities seem to me to show that the practice is based on general convenience. It must depend, of course, upon the issues which are raised; obviously it must depend upon the pleadings in the case in which the issues are set out. If publication is admitted and justification is set up as a defence, the plaintiff is entitled to say that the onus is upon the defendant; that it is for him to prove his case. Equally if, by the answer to an interrogatory, the plaintiff can prove his case, and does so, the onus on the issue of justification is upon the defendant. In most cases there are other pleas, and the question arises as to what is the most convenient way of dealing with the matter in the interests of justice, in the interests of parties, and from the point of view of the court. Those interests are really all the same. If, after hearing submissions, the judge decides that one course is preferable to another, his decision should in general be treated as final. He will not deprive the plaintiff of the opportunity of reserving his evidence until he has heard the evidence of the defendant in support of the plea of justification, if he considers that any injustice can be done to the plaintiff by such a ruling. If the judge considers that the better course is that the plaintiff should be allowed to reserve his answer to the plea of justification until after

[1] (1816), 2 Stark. 31.

the defendant's evidence in support of the plea has been given, the defendant's counsel cannot offset that by asking questions on that issue to draw the plaintiff's witnesses, as Mr. Platts-Mills suggests. It is not for the defendant to decide how the trial shall be conducted.

The judgment of Jenkins L.J. is to the same effect. He says at p. 215:

> For my part, I do not think the principle which is stated in the case of *Browne v. Murray*, to which my Lord has referred, really amounts to a rule of law, or a right to which the plaintiff may invariably lay claim as a matter of law. The first sentence of Abbott C.J.'s judgment, if I may read it again, is this: "In actions of this nature, the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant." Then the Lord Chief Justice went on to say that the plaintiff should not sever his evidence on the issue of justification, leading some of the evidence in presenting his own case and some of it in rebuttal of the defendant's case. I think that the principle there stated may well reflect a practice which in appropriate circumstances it is right to follow, but is subject to the over-riding discretion of the court to give such directions as to the order in which the onus of proof is to be dealt with and in which witnesses are to be called as the court may find just and convenient in the circumstances of the particular case.

and at p. 216:

> The rule of practice, as the learned Baron called it, may be the best to follow in some cases, whereas in other cases it could not but be productive of inconvenience. It seems to me that the decision must rest in the discretion of the court.

In the fifth edition of Gatley the passage corresponding to that quoted by Singleton L.J. is to be found at pp. 561 and 562 and reads:

> Where there is a plea of justification on the record, it is within the discretion of the court to allow the plaintiff either to give all the evidence he intends to offer in rebuttal at the outset, or to postpone giving such evidence and leave it to the defendant to make out his plea, and then give evidence on any matters which are properly admissible to rebut the plea. There is no hard and fast rule, and the practice is based on general convenience. If the judge does consider that the plaintiff should be allowed to reserve his answer to the plea of justification, the defendant's counsel cannot offset that by asking questions on that issue in order to draw the plaintiff's witness. In any event, the plaintiff is not entitled to call some evidence in rebuttal in the first instance, and reserve the remainder for reply to the defendant's case.

This passage appears to me to be an accurate summary of the effect of the judgments in *Beevis v. Dawson.*

The earlier cases do not discuss the effect which the making of a ruling that the plaintiff may postpone giving

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evidence in rebuttal of a plea of justification has upon the right of defendant's counsel to cross-examine witnesses called by the plaintiff to prove other matters, such as *e.g.* publication; and there is no lengthy discussion of this question in the judgments delivered in *Beevis v. Dawson*. The following sentence from the judgment of Singleton L.J., at p. 205, has already been quoted:

> If the judge considers that the better course is that the plaintiff should be allowed to reserve his answer to the plea of justification until after the defendant's evidence in support of the plea has been given, the defendant's counsel cannot offset that by asking questions on that issue to draw the plaintiff's witnesses, as Mr. Platts-Mills suggests. It is not for the defendant to decide how the trial shall be conducted.

This appears to have reference to passages in the argument of Mr. Platts-Mills which are reported as follows at p. 198:

> The witnesses called by the plaintiff at the outset were known as close associates of his and some of those witnesses in their cross-examination had revealed a good deal of the matter relied on in justification, which may have affected the jury in coming to their verdict.

and at p. 199:

> Where the plaintiff's case is made suspect by his own witnesses he may not exercise an option to call rebutting evidence. The answers given by the plaintiff's witnesses in cross-examination, although they are called only on the issue of publication, may alter the right of the plaintiff as to the order in which he deals with the issue of justification. It is not open to the judge to rule that counsel for the defence cannot cross-examine as to the issue of justification plaintiff's witnesses called on the issue of publication. If the judge has already given a ruling as to procedure, the position will be quite different, but here the judge had given no ruling. The evidence can change the onus of proof. The moment there is evidence given by the plaintiff's witnesses tending to prove justification, they must be treated as rebutting witnesses, and the plaintiff no longer has a right to reserve further evidence in rebuttal until after the defendant's case is closed.

At this point in the argument Singleton L.J. interjected:

> I think it was a matter of discretion for the judge, as a question of general convenience.

These passages appear to me to be susceptible of either or both of the following interpretations in cases in which the trial judge has ruled that the plaintiff may reserve his evidence in rebuttal of the plea of justification; (i) that the trial judge may rule that the right to cross-examine the plaintiff's witnesses in support of the plea of justification be

postponed as was done in the case at bar, and (ii) that if counsel for the defendants is allowed in cross-examination to elicit facts in support of the plea of justification the fact of his having done so shall not deprive the plaintiff of the benefit of the ruling that he may reserve his general evidence in rebuttal of the plea of justification until after the defendants have given their evidence in support of that plea.

In my opinion it rests in the discretion of the trial judge to follow either of these courses and the manner in which that discretion should be exercised will depend on the circumstances of the particular case. There may well be cases in which it will prove more convenient, while preserving the plaintiff's right to reserve his rebuttal, to permit counsel for the defendant to cross-examine the plaintiff at large when he is first called; I do not think any hard and fast rule can be laid down.

I have already indicated my view that in the case at bar, it was within the discretion of the learned trial judge to make the ruling which he did make. I do not think it can be said that he exercised that discretion wrongly. In view of the nature of the particulars of the plea of justification delivered in this action it would, I think, have been highly inconvenient to call upon the plaintiff to prove the negative of that issue before having heard the evidence offered by the defendants in support of it.

It may well be, as counsel for the respondents contends, that from time to time during the putting in of the plaintiff's case his cross-examination was unduly limited even on the basis of the ruling which had been made; but it was made clear that the right of the defendants' counsel to cross-examine at large was not denied but was merely postponed. Had he wished to do so he could, after leading his evidence in support of the plea of justification, have asked that the plaintiff be recalled for cross-examination in regard to the matters raised by that plea. He did not do this; and when the plaintiff was recalled towards the end of the trial he did not cross-examine him. He had decided to pursue a different course.

Before calling the first witness for the defendants their counsel made the following statement:

> Your Lordship will recall that on Thursday morning last, October 26th, Your Lordship ruled that the defendants were not, at the then stage of this

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trial, to be allowed to cross-examine the plaintiff in respect to paragraph 6 of the statement of defence and the whole of the particulars furnished with respect thereto, either to support the defendants' plea of justification or for the purpose of bringing into question the credibility of the plaintiff in respect of the testimony which he had already given in support of his claim. In the exercise of my best judgment on behalf of all the defendants, I wish to advise Your Lordship most respectfully that the defendants do not propose to adduce any evidence in proof of the plea of justification contained in paragraph 6 of the defendants' statement of defence or in respect of the particulars furnished pursuant thereto. I do this, My Lord, because it is my most respectful submission that Your Lordship's ruling is wrong in law and has made it impossible for the defendants to adequately present their defence based on paragraph 6 of the statement of defence and the particulars delivered in respect thereof, and for the further reason that the defendants do not wish, by leading evidence on paragraph 6 of the statement of defence and the particulars furnished with respect thereto, to be taken to have waived any rights whatsoever which the defendants may have with respect to an appeal from Your Lordship's ruling.

To order a new trial because the defence decided to adopt this course would be to disregard the statement of Singleton L.J., with which I have already indicated my agreement, that "it is not for the defendant to decide how the trial shall be conducted."

An examination of the lengthy record satisfies me that none of the matters of which the respondents complain in respect of the conduct of the trial resulted in a miscarriage of justice. To order a new trial in the circumstances of this case would, in my opinion, be a denial of justice to the plaintiff.

There remains the question of the quantum of damages. I am quite unable to say that the amount at which these were assessed by the learned trial judge was excessive. Without justification and without being heard in his own defence, the plaintiff, who had spent the greater part of his working life in the service of the respondent company and that of another company which it had acquired, was defamed as incompetent and untrustworthy and these charges were persisted in up to and during the trial. That the defendants were aware of the effect that these imputations would have on the plaintiff's chance of obtaining future employment is plain from the penultimate paragraph of the libel:

> If you wish to submit your resignation to me in writing this afternoon, it will be accepted. This procedure will probably make it somewhat easier for you to obtain other employment.

In arriving at the final figure for which judgment should be entered the learned trial judge deducted from the amount at which he decided the damages should be assessed the sum of $2,212 which had been paid by the defendants to the plaintiff. With respect I think this amount should not have been deducted. It was not paid on account of the plaintiff's claim for damages for libel, but either *ex gratia* or on account of his claim for damages for wrongful dismissal which, under the order of Graham J. and by the reasons of the learned trial judge, was excluded as a head of damage in this action. It is therefore my opinion that the amount of the judgment should be increased by this sum of $2,212.

It remains only to consider what order should be made as to the costs of the defendant Cass-Beggs. In my opinion, the learned trial judge did not err in deciding not to award costs to this defendant.

I would allow the appeal, set aside the judgment of the Court of Appeal, direct that the judgment at the trial be varied to provide that the plaintiff do recover from the defendants Donald J. Anderson and the Saskatchewan Power Corporation the sum of $30,712 and that, subject to this variation, the judgment at the trial be restored. The appellant will recover his costs in the Court of Appeal and in this Court from the defendants Donald J. Anderson and Saskatchewan Power Corporation. The action as against the defendant Cass-Beggs stands dismissed without costs and there will be no order as to his costs in the Court of Appeal or in this Court.

JUDSON J. (*dissenting in part*):—I think that the ruling of the learned trial judge in this case was erroneous and that it should not receive any approval in this Court based on what was said in *Beevis v. Dawson*[1]. *Beevis v. Dawson* was a case where the plaintiff did not give evidence himself. His counsel stated that he would call the plaintiff to give evidence in rebuttal after the defendant's evidence of justification had been heard. If a plaintiff wishes to conduct his case in this way, with its incidental risks, there is nothing to prevent him. No rule requires that he go into the witness box initially.

[1] [1957] 1 Q.B. 195.

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But the present case is different. This plaintiff did give evidence—a lot of evidence—most of it directed to showing malice on the part of the defendants. Counsel for the defendants then proposed to cross-examine at large. This was his right and the normal conduct of a trial should not have been interfered with except on very grave grounds that do not exist in this case.

The defendants had delivered particulars which covered nine pages in the record. These are mostly concerned with alleged fraudulent expense accounts filed by the plaintiff. I refer to only one of them—car expense account for 1958, for which the plaintiff claimed 34,858 miles, which, according to the speedometer reading, was the total mileage of the car, less three miles. Surely counsel for the defendants was entitled to cross-examine on this and similar matters when the witness was in the box, having given evidence of malice. After cross-examination on these matters it might well have been that the judge would have had a very different impression of the case and particularly of the reason given for the dismissal and testified to by Jerome.

It is also possible that the defendants could have gone a long way towards proving justification and absence of malice by cross-examination when the plaintiff was in the box initially. I see no reason why they should have to postpone the exercise of this right until they had put in their defence. If this had been a jury trial they had the right to make out their whole defence from the plaintiff when he was in the witness box. There is no doubt left by Singleton L.J. in *Beevis v. Dawson* on what he thought was the better course to follow. At p. 205 he said:

> In these days particulars of justification have to be given, and the defendant is bound by them and cannot go beyond them. So that the plaintiff knows, before the hearing commences, what charges he has to meet. Thus there can be no element of surprise in the case before us. There were given abundant particulars of justification. One might have thought that a plaintiff seeking damages for libel would have been only too anxious to answer those charges. The plaintiff was not. He might have followed that which I regard as the usual practice, and have gone into the witness box; but he did not do so. His counsel said often that he proposed to do so later. The judge told him of the position, though he did not rule either way. As to general convenience, it cannot be doubted that it would have been better had the plaintiff been called and examined and cross-examined on the particulars of justification. That which happened in the present case gives as good an instance of inconvenience as could be found.

Had this been a jury trial, I would have been prepared to hold that the error was so serious that it warranted the ordering of a new trial. However, there was no jury in this case. At some inconvenience the defence could have given evidence on the defence of justification and insisted on the plaintiff being called back for cross-examination. Instead of taking this course, counsel for the defence said that he would not call any evidence on the plea of justification in view of the serious error that he said existed in the judge's ruling. He took this course deliberately. He went on with the trial and there have been two appeals. In the circumstances, I do not think that a new trial should be ordered, but I wish to emphasize that in my opinion, there can be very few cases where a judge, in circumstances such as existed in this case, would be justified in ruling as the trial judge did here.

I agree that the appeal be disposed of according to the reasons of Cartwright J.

Appeal allowed with costs.

Solicitors for the defendants, respondents: Goldenberg, Taylor & Tallis, Saskatoon.

1963
*Oct. 4
1964
Mar. 23

JOHN HEWITT WATSON .....APPELLANT;

AND

KENNETH J. CONANT AND MARGARET WAIT CONANT ..... } RESPONDENTS;

AND

THE OFFICIAL GUARDIAN representing Kenneth J. Conant III, Anne Marie Conant, Margaret Mary Conant and Jean Frances Conant, the infant children of Kenneth J. Conant;

AND

CROWN TRUST COMPANY and OSWALD NOEL EDWARDS, Executors and Trustees of the Estate of the late LEONA ANNETTE SCHNEIDER WATSON.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Interpretation—Provision for annuity from residue—Surplus income in the residue—Whether intestacy as to surplus income.

A testatrix's will by which she left all her property to trustees upon certain trusts provided, *inter alia,* that the trustees should keep the residue of her estate invested and pay to her husband during his life or until his remarriage a sum which, together with the salary, if any, he might receive from a company of which the testatrix was the majority shareholder, would amount to $1,000 a month. The residue of the estate was to go to a nephew of the testatrix or alternatively to his wife and family in the event that he predeceased the survivor of the testatrix and her husband. As a result of the sale of the testatrix's interest in the company following her death, the residue of the estate was currently producing an income of more than $16,000 per annum or approximately $4,000 more than the amount of the annuity to the husband. On an application to construe the will, the trial judge held that there was no intestacy as to the surplus income and that it should continue to be accumulated until the death or remarriage of the husband or until the expiration of 21 years from the death of the testatrix. This decision was affirmed by the Court of Appeal.

Held: The appeal should be dismissed.

As found by the trial judge, there was a clear expression of intention on the part of the testatrix that the husband was to have nothing from the estate except enough to make up $12,000 per year if the salary from the company fell short of that sum and that income not required for this purpose became part of the residue of the estate then remaining and was to go to the nephew and his family. In addition, the principle, that the accumulated surplus income should be held to

*PRESENT: Cartwright, Abbott, Judson, Hall and Spence JJ.

follow the principal as an accessory, was applicable in this case. *Re Hammond,* [1935] S.C.R. 550, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of McRuer C.J.H.C. Appeal dismissed.

Terence Sheard, Q.C., for the appellant.

D. J. Wright, for the respondents.

G. C. Hollyer, for the executors and trustees.

S. M. McBride, for the Official Guardian.

The judgment of the Court was delivered by

JUDSON J.:—The appellant John Hewitt Watson is the husband of the testatrix, Leona Watson, who died in 1959. He was left an annuity of $12,000 and the question in this appeal is what is to happen to surplus income in the residue. Both the judgments of McRuer C.J.H.C. and the Court of Appeal[1] have held that there was no intestacy as to the surplus income and that it should be added to the residue. The appellant husband contends that there is an intestacy and that he is entitled to his share over and above the annual sum that is given to him by the will.

The residuary clauses with which we are concerned are:

(*f*) To keep invested the residue of my Estate and to pay my husband during his life or until his remarriage a sum which with the salary he may then be receiving from the Canada Law Book Company Limited, if any, will aggregate $1,000 per month, and if the income shall be at any time insufficient to provide the amount so as to make up the said aggregate sum, then the deficiency shall be made up from the capital of my estate and so often as such shall be necessary. Provided always if the above provision which I have made to my husband should in any year or years be impossible to comply with due to the lack of capital funds available therefor, or occasion any difficulties in the administration of my estate, all as may be determined by my Executors in their sole and unfettered discretion and judgment, then to the extent of the moneys above directed to be paid out of the capital of my estate, shall abate by such amount as my Executors in their sole discretion and judgment may determine and so often as same may happen.

(*g*) Upon the death of the survivor of me and my said husband or his remarriage after my death, to hold the residue of my estate then remaining in trust to pay and transfer the same to my nephew Kenneth John Conant of Green Bay, Wisconsin, U.S.A., provided

[1] [1963] 1 O.R. 416, 37 D.L.R. (2d) 370.

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> however, if he shall predecease the survivor of my husband and myself then the residue of my estate shall be divided between his widow and children in equal shares per capita. Provided further that my Trustees in their absolute discretion may carry on the business of the said Canada Law Book Company Limited for a period of not more than three (3) years after the death of the survivor of me and my said husband, within which time I express the hope that they shall have been able to dispose of the common shares belonging to my estate.

The testatrix was the owner of the majority of the shares of the Canada Law Book Company and as a result of the sale of these shares and a parcel of real estate held in connection with the business of the company, the residue is currently producing an income of more than $16,000 per annum or approximately $4,000 more than the amount of the annuity to the husband.

Both the Chief Justice and the Court of Appeal have held that the surplus income should continue to be accumulated until the death or remarriage of the husband of the testatrix or until the expiration of twenty-one years from the death of the testatrix. The husband's annuity is being paid out of income. He is not receiving any salary from the Canada Law Book Company and, as far as the material shows, never received any such salary since the death of the testatrix.

The judgment of McRuer C.J.H.C. found on the part of the testatrix a clear expression of intention that the husband was to have nothing from the estate except enough to make up $12,000 per year if the salary from Canada Law Book Company fell short of that sum and that income not required for this purpose became part of the "residue of my estate then remaining" under clause (*g*) of the will above quoted and was to go to Kenneth Conant or his family.

The appellant submits that clause (*f*) first directs the executors to keep invested "the residue of my estate", and that this phrase means the whole of the assets as they existed at the time of the death less legacies, debts and succession duties, and that the annuity of the husband is charged on the capital and income of this residue. So far I agree. He then goes on to say that "the residue of my estate then remaining" in clause (*g*) cannot include surplus income because residue must be given the same meaning in clauses (*f*) and (*g*). According to him, then, "residue of my estate then remaining" means capital as it stood at the

date of the death less the above-mentioned deductions and less encroachments on capital which may have been made to make up the annuity but does not include surplus income.

This mathematical interpretation of the will ignores the force of the inference drawn by McRuer C.J.H.C. that the intention of the testatrix was to augment from the estate an outside source of income up to a maximum of $12,000 per year from both sources and no more. I would affirm the judgment in favour of the residuary interests and their right to the surplus income on the construction put upon the will by McRuer C.J.H.C.

The Court of Appeal found in this will an implied power and trust to accumulate surplus income. I have some hesitation about a disposition of the case on this ground. The annuitant has no right to compel the accumulation of surplus income to meet possible future deficiencies. His right is to have his annuity fully secured (*Re Coller's Deed Trusts, Coller v. Coller*[1]). Further, a corresponding conclusion that the remainder interests had a right to have surplus income accumulated to safeguard them against a possible need to resort to capital assumes in their favour the very question in dispute—whether they have any interest in surplus income. I prefer to rest my decision on the ground of interpretation and the second ground stated by the Court of Appeal, namely, that the case is governed by *Re Hammond*[2].

Re Hammond decided that surplus income in the one half of the residuary estate which was under consideration had accumulated for a period of 21 years for the benefit of those who had vested defeasible interests in the residue. In spite of the absence of a direction to accumulate, the Court made this finding as a clear implication to be gathered from the entire will and, in addition, approved of the judgment of Middleton J.A. in the Court of Appeal[3] that the accumulated surplus income should be held to follow the principal as an accessory. Middleton J.A. had founded his judgment on *Wharton v. Masterman*[4] and the dictum of Westbury L.C. in *Countess of Bective v. Hodgson*[5]. To me the present case is governed by *Re Hammond* and I agree with the Court of Appeal in so finding.

[1] [1939] Ch. 277 at 283.
[2] [1935] S.C.R. 550, 4 D.L.R. 209.
[3] [1935] O.W.N. 1, 1 D.L.R. 263.
[4] [1895] A.C. 186.
[5] (1864), 10 H.L.C. 656 at 664.

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Judson J.

Counsel for the annuitant urged us to accept the principle that only a contingent residuary bequest can carry the intermediate income and cited in support of his argument *Berry v. Geen*[1]; *Re Oliver, Watkins v. Fitton*[2]; *Re Gillett's Will Trusts, Barclays Bank Ld. et al. v. Gillett*[3]; *Re Wragg, Hollingsworth et al. v. Wragg et al.*[4] This seems to have been the opinion expressed in all editions of Theobald on Wills from the 8th ed. (1927) to the present date. On the other hand, Jarman on Wills, 6th ed. (1910) p. 1046, held the opinion that the principle applied both to deferred and contingent residuary bequests. This was repeated in the 7th ed. (1930) p. 1006, and was abandoned in the 8th ed. (1951) p. 1021, doubtless as a result of the cases then recently decided. I am not sure that I understand even now the logical basis for the distinction between contingent residuary bequests and future vested interests whether indefeasible or defeasible when surplus intermediate income is involved but I am certain that in 1935 the matter was settled as far as this Court is concerned in *Re Hammond.*

The appeal is dismissed with costs of all parties payable out of the estate, those of the executor as between solicitor and client.

Appeal dismissed.

Solicitors for the appellant: Johnston, Sheard, Johnston & Heighington, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

The Official Guardian, Toronto.

Solicitors for Crown Trust Co. and O. N. Edwards, Executors and Trustees: Kingsmill, Mills, Price, Barret & Finlayson, Toronto.

[1] [1938] A.C. 575.
[2] [1947] 2 All E.R. 162 at 166.
[3] [1950] Ch. 102.
[4] [1959] 2 All E.R. 717.

ELIZABETH MacDONALD WARDROPE MONTANO (*Respondent*) .. APPELLANT;

AND

MARIA GUADALUPE WARDROPE SANCHEZ (*Respondent*) ..... RESPONDENT;

AND

WILLIAM HUGH MASSON WARDROPE, Trustee under the last Will and Testament of John Duff MacDonald, deceased (*Applicant*) ..... RESPONDENT.

1963
*Oct. 15, 16
1964
Mar. 23

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of laws—Wills—Personalty bequeathed under will of Ontario testator to "issue" of grandson—Grandson and his two children domiciled in foreign jurisdiction—One child born out of wedlock—Status of child—Whether entitled to share in estate.

Under the will of an Ontario testator certain personalty was bequeathed to the "issue" of a grandson. The grandson who was domiciled in the State of Michoacan in the Republic of Mexico died intestate and was survived by two daughters. The second daughter was born out of wedlock on December 12, 1937. Her parents were married in a religious ceremony on January 22, 1953, although they were never married by the civil ceremony which was a prerequisite to legitimation by subsequent marriage under the *Civil Code* of Mexico. The daughter obtained an order from the appropriate Court in Michoacan declaring that for all legal effects she was the daughter of the testator's grandson having the right to bear his name and to receive a portion of his estate and a living allowance as prescribed by law. The trustees of the testator's estate sought the advice of the Supreme Court of Ontario as to whether the daughter was entitled to share in that estate. The trial judge's decision that she was not so entitled was reversed by the Court of Appeal.

Held: The appeal should be dismissed.

The Court of Appeal was not precluded from looking behind the name which the foreign law attached to the sum total of the capacities and obligations accorded to a person in the position of the daughter, so as to determine whether these capacities and obligations would in fact be recognized in Ontario as fulfilling the requirements necessary to the status of a legitimate child in that province. The daughter, the sum total of whose capacities and obligations under the law of the State of Michoacan included all those of a child born in wedlock in Ontario, had the status of a legitimate child in that province for the purpose here in question and the fact that under the law of the domicile some social limitations might attach to her position in

*PRESENT: Taschereau C.J. and Cartwright, Judson, Ritchie and Spence JJ.

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Mexico, and that her status in that country was therefore described as "illegitimate", could have no effect on the standards required in order to qualify as a legitimate child for the purpose of benefiting as one of "the issue" of the grandson of an Ontario testator.

Re Andros, Andros v. Andros (1883), 24 Ch. D. 637; *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441; *Re Wright's Will Trusts* (1856), 2 K. & J. 595; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Re Grove, Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216; *Re Luck's Settlement Trusts*, [1940] 1 Ch. D. 864; *Re Donald, Baldwin v. Mooney*, [1929] S.C.R. 306; *Re Gage, Ketterer et al. v. Griffith et al.*, [1962] S.C.R. 241, referred to; *Atkinson v. Anderson* (1882), 21 Ch. D. 100, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside a judgment of Landreville J. Appeal dismissed.

J. D. Arnup, Q.C., for the appellant.

Colin D. Gibson, for the respondent, Maria Guadalupe Wardrope Sanchez.

F. S. Weatherston, Q.C., for the respondent, William Hugh Masson Wardrope.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which set aside the judgment of Landreville J. and gave an affirmative answer to the following question upon which the opinion, advice and direction of the Court had been sought at the instance of the trustees of the estate of the late John Duff MacDonald:

> Is Maria Guadalupe Wardrope Sanchez entitled to share in the estate of John Duff MacDonald Wardrope?

John Duff MacDonald was domiciled at Hamilton, Ontario, at the date of his death on March 10, 1961, and by his last will provided *inter alia* that:

> As to the Capital of the Trust fund (including any accretions thereto) my Will is that if my daughter Sarah remain unmarried or if she marry and die without issue then on her death and subject to the rights of her sisters and their children in the income one third of the trust fund shall on the youngest of my surviving grandchildren attaining twenty one years be divided in equal shares among all my grandchildren living at the period of division and the issue of any deceased grandchild such issue taking the share their parent would have taken if alive at such division and as to the remainder of the trust fund the same shall as it becomes freed from the rights of my daughters in the income of the whole or part thereof be

[1] [1962] O.R. 762, 34 D.L.R. (2d) 14.

divided in equal shares among all my grandchildren living at the period or periods of such division and the issue then living of any grandchild such issue taking the share their parent would have taken if then alive, provided always that if any grandchild living at the period or periods of division of the remainder of the trust fund shall die before attaining twenty-five years of age he or she shall not be entitled to any of such capital but the same shall go in equal shares to those who attain twenty-five years and the children of any deceased grandchild whether dying before or after the period of division.

The testator's grandson, John MacDonald Wardrope, hereinafter referred to as John Wardrope, who died intestate and domiciled in the State of Michoacan in the Republic of Mexico before the death of the last surviving life tenant under the terms of the said will, left two surviving daughters, one of whom, Elizabeth Lucia MacDonald Wardrope was born on April 3, 1929, the issue of his lawful marriage with Lucia Montano Bosque, and the other of whom, Maria Sanchez, was born on December 12, 1937, the child of his union with Gudelia Sanchez, to whom he was not married.

It appears to be agreed by all concerned that John Wardrope was domiciled in Mexico at the date of the birth of his second daughter and at the time when he acknowledged her to be his child. Nor is it questioned that being still domiciled in Mexico, he married Gudelia Sanchez in a religious ceremony on January 22, 1953, although they were never married by the civil ceremony which is a prerequisite to legitimation by subsequent marriage under the *Civil Code* of Mexico.

The sole question to be determined is whether Maria Sanchez is one of the "issue of any deceased grandchild" of the testator so as to be entitled under the law of Ontario to share in that portion of the personal estate of the testator now available for distribution among such issue.

It is conceded that in construing an Ontario will the word "issue" is to be treated as meaning "legitimate children", and it is accordingly first necessary to determine the status of any child claiming to be entitled under such a will.

Some of the difficulties to which the present circumstances give rise were expressed by Kay J. in *Re Andros, Andros v. Andros*[1], at p. 639 in the following language:

A bequest in an English will to the children of A. means to his legitimate children, but the rule of construction goes no further. The question

[1] (1883), 24 Ch. D. 637.

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Ritchie J.

remains who are his legitimate children. That certainly is not a question of construction of the will. It is a question of *status*. By what law is that *status* to be determined. That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended A.'s legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?

Before the enactment of the *Legitimacy Act, 1926,* 16 & 17 Geo. 5 (U.K.), c. 60, it was well established in England that in the case of a child born out of wedlock whose father was domiciled in that country at the time of its birth, the indelible taint of bastardy could not be removed, but at least since the early 1880's, it has been equally well recognized in the English Courts that if the laws of the country in which the putative father was domiciled at the date of the birth of an illegitimate child provide for legitimation by a subsequent marriage of the parents, then such a child would be recognized as being legitimate for the purpose of inheriting personal property in England if the father, being still domiciled in the foreign country, complied with the condition of marrying the mother. In this regard I refer to *Udny v. Udny*[1]; *Re Wright's Will Trusts*[2]; *Re Goodman's Trusts*[3]; *Re Grove, Vaucher v. Treasury Solicitor*[4] and other cases which are reviewed in the reasons for judgment delivered by MacKay J.A. on behalf of the Court of Appeal for Ontario.

The principle underlying many of these decisions is to the effect that recognition of legitimation by subsequent marriage is predicated upon the domicile of the father at the date of birth having given to the child a capacity of being made legitimate by such marriage, (see *Re Grove, supra, per* Cotton L.J. at p. 233), and it appears from the decision of the majority of the Court of Appeal in England in *Re Luck's Settlement Trusts*[5], that that Court would have extended this principle to include legitimation by recognition if the father in that case had been domiciled in the foreign jurisdiction at the date of the child's birth. We are not concerned in the present case with the somewhat

[1] (1869), L.R. 1 Sc. & Div. 441.
[2] (1856), 2 K. & J. 595.
[3] (1881), 17 Ch. D. 266.
[4] (1888), 40 Ch. D. 216.
[5] [1940] 1 Ch. D. 864.

vexed questions which have been raised by legal writers as to the soundness of the proposition that subsequent legitimation should be made dependent for its validity upon the law of the domicile of the father at the date of the birth because, as has been indicated, it is conceded that John Wardrope was domiciled in Mexico at all material times, and I am of opinion that under the circumstances of the present case, the status of Maria Sanchez is to be determined according to the law of the State of Michoacan. The question to be decided is whether that status is such as to enable Maria Sanchez to participate in the estate of the late John Duff MacDonald as one of the "issue" of his grandson.

In the case of *Re Donald, Baldwin v. Mooney*[1], this Court declined to apply the cases dealing with legitimation by subsequent marriage to the case of a foreign adoption and considered that the question was not one of status but rather whether the child in question was a child within the meaning of the will which the Court was there considering. "Adoption" appears to me to differ from "legitimation by recognition" in the sense that the latter can only apply to an illegitimate natural child of the father who recognizes it whereas the former may apply to a legitimate orphan who is adopted by strangers in blood. This would, in my opinion, provide a distinction between the case of *Re Donald, supra,* and the present case, but in any event, the *Donald* case is, in my view, to be regarded as subject to the limitations explained by Judson J. in *Re Gage; Ketterer et al. v. Griffith et al.*[2] at pp. 249 and 250, to which reference is made in the reasons for judgment of MacKay J.A.

It is to be noted that after her father's death, Maria Sanchez obtained an order from the appropriate Court in the State of Michoacan which read, in part, as follows:

> It is hereby declared for all legal effects that Maria Guadalupe Wardrope Sanchez is the daughter of John Duff MacDonald Wardrope having the right to bear his name and to receive a portion of the estate and a living allowance as prescribed by law.

The Courts in the present case have been assisted in determining the law of the State of Michoacan by the evidence of Tomas Sanchez Baylon, a lawyer who practised

[1] [1929] S.C.R. 306, 2 D.L.R. 244.
[2] [1962] S.C.R. 241, 31 D.L.R. (2d) 662.

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for the last ten years in that state and a substantial part of whose evidence is reproduced in the reasons for judgment rendered on behalf of the Court of Appeal of Ontario by MacKay J.A. I confine myself to reciting the following excerpts from Mr. Baylon's evidence:

> Q. May I take it that Miss Guadalupe Wardrope Sanchez has the status of legitimacy in the State of Michoacan with respect to inheriting property? A. Yes.
>
> Q. May I take it also that Guadalupe Sanchez Wardrope is lawful issue and has the right of inheriting property by law of the State of Michoacan? A. Yes.
>
> Q. I gather then that Sanchez has the status of legitimacy with respect to inheritance of property within an estate? A. Yes.
>
> Q. In no way then, the law considers it otherwise with respect to inheritance? A. In no way.
>
> Q. Then I suggest that she has a status of legitimacy for all purposes? A. She does.

At a later stage Mr. Baylon was asked with respect to the *Civil Code* of Michoacan:

> Q. I ask whether the Code provides anywhere that children whose paternity is established without marriage are to be treated as born in wedlock? A. I think this question requires a long explained answer. The Code does not have an article which specifies clearly that children born out of wedlock and legitimate children are to be treated equally, but that is precisely one of the motives of Mexican law, that children born in and out of wedlock are treated as children only, without referring to legitimacy or illegitimacy in the whole Code. Besides, the Legislature contain very clear reasonings to that effect.

These questions and answers must be read together with the following:

> Q. In view of the judgment Exhibit No. 1, would you describe Miss Sanchez as legitimate or illegitimate? A. We consider her as illegitimate according to the Civil Code of Mexico although she is a legitimate daughter by canonical law.
>
> Q. Is the canonical law part of the law of the State of Michoacan? A. No.
>
> Q. Once paternity has been established, does that confer on Miss Sanchez as the status of legitimacy? A. No, but we must have in mind that legitimacy does not affect the rights of sons or daughters toward the parents, as they are the same for legitimate or illegitimate sons and daughters.

In the course of his evidence Mr. Baylon quoted from the following articles of the *Civil Code* of Michoacan:

> ART. 318—The filiation of children born out of wedlock is derived, with respect to the mother, from the mere fact of birth. With respect to

the father, it is established only by acknowledgement or by a judgment declaring his paternity.

ART. 312—The subsequent marriage of the parents causes the child, had before such marriage, to be considered as born in wedlock.

ART. 329—The husband may acknowledge a child born before his marriage, or during the same, but shall not have the right to take it to live in the marital home, except with the express consent of the wife.

Being questioned on these articles, Mr. Baylon said:

Q. I put it to you that the results of the subsequent marriage referred to in Article 312 of the Code, of the parents of a child of theirs which was previously born, is to make that child for all purposes the legitimate child of those parents? A. Yes.

Q. I put it to you, that there is a distinction in the Mexican Law between the child whose parents so marry and the child who establishes as a fact that a certain man was her father? A. There is a distinction, but I want to make clear that the purpose and spirit of the Law in this case is only to obligate parents to marry and certainly not to deprive the sons of their rights.

Q. Now I want to draw your attention to Article 329. Does it not impose a limitation upon rights of the child as compared with rights of a legitimate child, that is, a child born of the union of married people. A. No, there is no limitation on his or her rights. About Art. 329, its purpose is to establish harmony in a marriage whose child is to be born and certainly not to establish a limitation whatsoever on the child's rights.

Q. Does Art. 329 not prevent a child, whose paternity has been established by acknowledgement of the father, from living with the father if he has a living wife who objects? A. It does not prevent the child from having its rights, but merely prevents the father from taking the child to live with him.

Mr. Baylon also said of Maria Sanchez: "She cannot be called legitimate because her parents were not legally married they were just married by the church."

From the whole of Mr. Baylon's evidence, I conclude that all the rights and capacities and obligations requisite for the purpose of attaining the status of a legitimate child in the Province of Ontario are enjoyed by Maria Sanchez by virtue of the law of Michoacan.

There do, however, appear to be certain limitations having to do with parental control and with the father's inability to bring a child born out of wedlock into his home without the consent of his wife, which afford a distinction recognized in Mexico and giving rise to the differentiation there made between a natural child who has been recognized by its parents and is still characterized as "illegitimate" and a child who is characterized as "legitimate" by reason of its

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parents having been married in a civil ceremony after its birth.

In the course of his most persuasive argument, counsel for the appellant submitted that the rights which are given to Maria Sanchez in Mexico are not accorded to her by virtue of her having attained the status of "legitimate child" in that jurisdiction, and that unless the Court of Appeal of Ontario could have found (which on the evidence it could not do) that under the law of Mexico she is a legitimate child of her father, it was bound to find that under that law she was illegitimate and therefore under the Ontario law could not inherit.

In support of this proposition reliance was placed on the decision of Hall V.C. in *Atkinson v. Anderson*[1], where it was held that the recognized natural children of an English native domiciled in Rome although capable of taking property by succession according to Roman law were to be regarded as "strangers in blood" to their natural father for the purpose of construing s. 10 of the *Succession Duty Act*, 1853.

This case had to do with the rate of tax to be levied on the proceeds of the sale of English real estate which were to be divided under the terms of a valid English will between the testator's "four natural sons" who were named in the will, and the sole question was whether these sons were "lineal issue of the testator" and as such liable to pay duty at the rate of one per cent only or "strangers in blood" to him and as such liable to pay at the rate of ten per cent.

This decision appears to me to be an isolated case turning on the construction of the statute in question, and it does not, in my view, stand as an authority for the proposition that the Court of Appeal of Ontario is precluded from looking behind the name which the foreign law attaches to the sum total of the capacities and obligations accorded to a person in the position of Maria Sanchez, so as to determine whether these capacities and obligations would in fact be recognized in the Province of Ontario as fulfilling the requirements necessary to the status of a legitimate child in that province.

In my opinion the title of "legitimacy" or "illegitimacy" when attached to the status of an individual in any juris-

[1] (1882), 21 Ch. D. 100.

diction reflects the capacity or lack of capacity which the law of that jurisdiction recognizes in the case of the individual concerned. Just as "legitimate" when used in relation to a child is only a symbol employed to designate the legal rights and obligations which flow from being born in wedlock, so the word "illegitimate" is used to denote the limitations of capacity which attach to being born out of wedlock, and the word "legitimitation" is descriptive of the legal effects incident to being relieved of those limitations.

Maria Sanchez, the sum total of whose capacities and obligations under the law of the State of Michoacan include all those of a child born in wedlock in Ontario, in my opinion has the status of a legitimate child in that province for the purpose here in question and the fact that some social limitations may attach to her position in Mexico, and that her status in that country is therefore described as "illegitimate", can, in my view have no effect on the standards required in order to qualify as a legitimate child for the purpose of benefiting as one of "the issue" of the grandson of an Ontario testator.

For these reasons, as well as for those stated in the very full judgment delivered by MacKay J.A., I would dismiss this appeal with costs of all parties to be paid out of the trust fund established under the will of the late John Duff MacDonald. The costs of the trustee to be taxed on a solicitor-client basis.

Appeal dismissed.

Solicitor for the appellant: Grant W. Howell, Hamilton.

Solicitor for the respondent, Maria Guadalupe Wardrope Sanchez: Colin D. Gibson, Hamilton.

Solicitors for the respondent, William Hugh Masson Wardrope: Griffin, Jones, Weatherston, Bowlby, Malcolm & Stringer, Soule & Soule, Hamilton.

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*Feb. 17, 18, 19 Mar. 23

GEORGE (PORKY) JACOBS ENTERPRISES LTD. (*Plaintiff*) ..... APPELLANT;

AND

CITY OF REGINA (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mistake—Annual licence fee—Overpayment—Mistake as to existence of by-laws calling for licence fee on per day basis—Mistake of fact—Payments made under compulsion—Right of taxpayer to recover.

One J, who was engaged in the business of promoting wrestling matches, caused the appellant company to be incorporated and subsequently assigned his business to that company. However, notwithstanding the incorporation of the company, J continued to conduct the business. Under a by-law passed by the respondent city in 1947 a licensing fee for professional boxing or wrestling exhibitions was fixed at $100 and by virtue of schedule "A" of the by-law this was an annual fee. The by-law was amended on three occasions, namely, in 1948, 1955 and 1957. The 1948 amendment changed the fee to a "per day" fee of $25; the 1955 amendment increased the fee to $37.50 and the 1957 amendment further increased it to $50. Neither the amendment of 1955 nor that of 1957 fixed the fee as a per day fee, and, accordingly, under schedule "A" of the original by-law the fee was an annual fee, not having been otherwise specified. The city's licensing inspector and J erroneously believed that the 1955 and 1957 amendments provided for per day fees. In the years 1955 to 1959 J paid on the per day basis $8,125 more than he would have paid had the licence fees been collected on an annual basis. After the discovery of the error the appellant brought an action in which it claimed repayment of the $8,125; the trial judgment in favour of the appellant was reversed by the Court of Appeal.

Held: The appeal should be allowed.

The appellant was entitled to succeed on either or both of the following grounds: (1) The payments were made not under a mistake of law but under a mistake of fact. The mutual mistake of fact was as to the existence of one or more by-laws calling for a licence fee on a per day basis. Both the licence inspector and J believed that such by-laws existed in fact but they did not actually exist at all so the mistake was one as to the fact of the existence of the by-laws and not one of interpretation of by-laws that in any way purported to stipulate a per day fee. (2) The payments were made under compulsion of urgent and pressing necessity and not voluntarily as claimed by the respondent.

Other grounds raised by the respondent, *i.e.*, (i) that the appellant company had never been organized and capable of doing business as required by *The Companies Act*, R.S.S. 1953, c. 124, (ii) that any right which J may have had was not assigned to the appellant company and that the appellant company never at any time acquired any rights against the respondent, (iii) that the claim was barred by the provisions of s. 34 of *The Tax Enforcement Act*, R.S.S. 1953, c. 156, and

*PRESENT: Taschereau C.J. and Martland, Ritchie, Hall and Spence JJ.

(iv) that the appellant was not entitled to recover because of laches, also failed.

Maskell v. Horner (1915), 84 L.J.K.B. 1752; *Municipality of Saint John et al. v. Fraser-Brace Overseas Corporation et al.*, [1958] S.C.R. 263; *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] A.C. 192, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of MacPherson J. Appeal allowed.

E. C. Leslie, Q.C., for the plaintiff, appellant.

A. M. Nicol, Q.C., and *H. F. Feuring*, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—For a considerable period prior to August 1956, one George Jacobs promoted and put on periodic wrestling exhibitions within the city of Regina, a municipal corporation in the province of Saskatchewan. On June 8, 1956, Jacobs caused the appellant company to be incorporated under *The Companies Act* of Saskatchewan. By an agreement in writing made in August 1956 but undated, Jacobs assigned to the appellant his business as a wrestling promoter in the province of Saskatchewan including his property and assets, if any, and also all debts owing to him in connection with the said business. Notwithstanding the incorporation of the company, he continued to conduct the business and promote his wrestling exhibitions as he had done prior to incorporation and prior to the agreement just mentioned.

In the year 1947 the respondent city of Regina passed a by-law, no. 2252, providing, amongst other things, for the licensing of professional boxing or wrestling exhibitions in the city of Regina. The by-law provided in s. 6 that unless specifically mentioned therein to be for a shorter period the licence granted was for the current year, and in Schedule "A" of the said by-law it was provided that the licence fee was an annual fee unless otherwise specified.

The said by-law no. 2252 was amended on three occasions as follows:

(a) By-law no. 2313—passed December 7, 1948, amending by-law no. 2252.

[1] (1963), 47 W.W.R. 233, 37 D.L.R. (2d) 757.

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Boxing or wrestling exhibitions (Professional) per day .....$ 25.00

(b) By-law no. 2741—passed January 6, 1955, amending by-law no. 2252.

Boxing or wrestling exhibitions (Professional) ...$ 37.50

(c) By-law no. 3043—passed December 24, 1957, amending by-law no. 2252.

Boxing or wrestling exhibitions (Professional) ...$ 50.00

The licence fee in by-law no. 2252 was $100, and by virtue of Schedule "A" it was an annual fee. By-law no. 2313 changed the fee to a "per day" fee of $25. By-law no. 2741 changed the licence fee to $37.50 and by-law no. 3043 increased the licence fee to $50. Neither by-law no. 2741 nor by-law no. 3043 fixed the fee as a per day fee, and, accordingly, under Schedule "A" of the original by-law no. 2252 the fee was an annual fee, not having been otherwise specified.

It was said by counsel for the respondent that the omission of the "per day" provisions in by-laws 2741 and 3043 was due to an error. Mr. Justice Brownridge seems to have accepted the error theory when he said:

> On January 6, 1955, the licensing by-law was amended. From the exhibits filed, there is no doubt that the amendment was intended to raise the licence fee from $25 per day to $37.50 per day, but through an error, the words "per day" were omitted and it was clearly stated in the schedule of fees, "licence fee annual unless otherwise specified".

A careful reading of the whole record and of the exhibits fails to disclose any admissible evidence of this so-called error by the body which had the legislative power to pass amending by-laws 2741 and 3043, namely, the Regina city council. It is true the licence inspector erroneously believed that the amending by-laws provided for per day fees and so did Jacobs but that is not evidence of an actual error by the council which enacted the amendments.

There was no suggestion that either by-law 2741 or by-law 3043 was invalid in any way nor was the right of the city of Regina to a licence fee either on an annual or a per day basis challenged. The city of Regina had the power to impose a per day fee. It could exercise that power by by-law but it did not do so.

Prior to each wrestling exhibition, Jacobs applied to the Regina Boxing and Wrestling Commission for a permit to hold the exhibition. After by-law 2741 was passed on January 6, 1955, Jacobs was required to pay a per day

licence fee of $37.50 for each exhibition until by-law 3043 was passed on December 24, 1957, after which he was required to pay a per day fee of $50 for each exhibition. He paid altogether the sum of $8,125 on this per day basis in the years 1955 to 1959 inclusive, more than he would have paid had the licence fees been collected on an annual basis. The appellant's position is that this $8,125 was paid: (a) under a mutual mistake of fact; and (b) under compulsion. In either event it claims repayment of the $8,125 so paid to the city of Regina.

It is common ground that the licence inspector for the respondent city erroneously believed that the amending by-laws 2741 and 3043 provided for per day fees and so did Jacobs. The respondent city takes the position that the $8,125 was a voluntary payment and that it was not paid under a mutual mistake of fact but under mistake of law and that the appellant has no right to recover. The respondent city goes further and says that any right which Jacobs may have had was not assigned to the appellant company and that the appellant company never at any time acquired any rights as against the city of Regina and that, in fact, the appellant company had never been organized and capable of doing business as required by the Saskatchewan *Companies Act,* R.S.S. 1953, c. 124. The respondent also argued that the claim, whether by Jacobs or the appellant company, was barred by the provisions of s. 34 of *The Tax Enforcement Act,* R.S.S. 1953, c. 156, and in any event that the appellant was not entitled to recover because of laches.

Dealing, first, with the question of whether the mistake was one of fact or of law, I am of opinion that it was a mistake of fact. I agree with Brownridge J. when he states that the distinction between what is a mistake in law and what is a mistake in fact is often one of difficulty but I do not see the distinction here as being a difficult one. Interpretation of the amending by-laws 2741 and 3043 was never in question in the action. These by-laws never purported to stipulate for a per day fee. There was no mistake either of fact or of law in respect of what the by-laws actually said. The mutual mistake of fact here was as to the existence of one or more by-laws calling for a licence fee on a per day basis. Both the licence inspector and Jacobs believed that such by-laws existed in fact but they did not actually exist at all so the mistake is one as to the fact of

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the existence of the by-laws and not one of interpretation of by-laws that in any way purported to stipulate for a per day fee.

I am also of opinion that the payments were made under compulsion of urgent and pressing necessity and not voluntarily as claimed by the respondent. The law on this subject was aptly summarized by Lord Reading C.J. in *Maskell v. Horner*[1] at p. 1755 as follows:

> If a person with knowledge of the facts pays money which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be re-opened. If a person pays money which he is not bound to pay, under the compulsion of urgent and pressing necessity, or of seizure, actual or threatened, of his goods, he can recover it as money had and received. The money is paid, not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods, which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction—*Atlee v. Backhouse* (7 L.J. Ex. 234, *per* Lord Chief Baron Abinger, at p. 237, and *per* Baron Parke, at pp. 238-9; 3 M. & W. 633, at pp. 645-6, 650). The payment is made for the purpose of averting a threatened evil, and is made, not with the intention of giving up a right, but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.

The question was reviewed by this Court in *Municipality of Saint John et al. v. Fraser-Brace Overseas Corporation et al.*[2] Rand J. at p. 272 dealt with the subject of voluntariness as follows:

> In considering the question of voluntariness or coercion, the status and circumstance of the party resisting is a matter to be taken into account. As representing the United States the contractors were firm in their objection to the taxation, and the municipal authorities, with all the information before them, equally insistent on pressing it. In that state of things, to require either the contractors or the United States Government to take proceedings that might later be obviated, or to await action taken to seize the property is going beyond what is necessary to rebut the inference of voluntary payment. *"Voluntariness" implies acquiescence, the absence of pressure inducing payment.* (The italics are mine.)

The learned trial judge found that the per day licence fees were paid under compulsion. With that finding I respectfully agree. It is clear from the evidence that the licence inspectors were firm in telling Jacobs that a per day fee had to be paid if he was to continue the business of promoting wrestling exhibitions in the city of Regina.

[1] (1915), 84 L.J.K.B. 1752, [1915] 3 K.B. 106.
[2] [1958] S.C.R. 263.

Believing that the by-law in force for the time being called for a per day fee, Jacobs had no actual alternative but to pay the fee being demanded by the agents of the respondent. Jacobs had asked to be shown the by-law and was told that there was not a copy available. In these circumstances the statement by Lord Denning in *Kiriri Cotton Co. Ltd. v. Dewani*[1] is particularly in point. He said at p. 204:

> Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James L.J. pointed that out in *Rogers v. Ingham*, (1876) 3 Ch. D. 351, 355. If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not in pari delicto and the money can be recovered back; see *Browning v. Morris*, (1778) 2 Cowp. 790, 792, by Lord Mansfield. Likewise, if the responsibility for the mistake lies more on the one than the other—because he has misled the other when he ought to know better—then again they are not in pari delicto and the money can be recovered back; see *Harse v. Pearl Life Assurance Co.*, [1904] 1 K.B. 558, 564, by Romer L.J. These propositions are in full accord with the principles laid down by Lord Mansfield relating to the action for money had and received.

On either or both of these grounds the appellant is entitled to succeed unless the other defences urged by the respondent are fatal to the appellant.

The first point taken by the respondent was that the appellant company had never been organized and capable of doing business as required by the Saskatchewan *Companies Act*, R.S.S. 1953, c. 124, if it was a public company. In the first place there was no evidence that it was a public company, and in the second by para. 2 of its defence the respondent admitted the allegation contained in para. 2 of the statement of claim that: "The Plaintiff is a body corporate, duly registered and licensed to carry on business in the Province of Saskatchewan."

The next objection was based on the contention that, after purporting to assign his business to the appellant company, Jacobs continued to carry on business in his own name as he had previously done and that the respondent city was never advised of the assignment or that the appellant company had any interest in Jacobs' business as a

[1] [1960] A.C. 192.

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promoter. The learned trial judge rightly disposed of this objection. He accepted Jacobs' evidence that the payments made after the execution of the agreement in August 1956 had been made on behalf of the appellant company. With respect, he was entitled to apply the rule set out in Bowstead on Agency, 12th ed., p. 202, where the learned author states:

> A principal is entitled to sue for the recovery of money paid by an agent on the principal's behalf where the payment is made under mistake of fact or upon a consideration that fails or in consequence of fraud, duress or any other circumstance ordinarily entitling a person paying money to recover it from the payee.

Jacobs' right to recover the excess payments made prior to the agreement of August 1956 was, as the learned trial judge found, a chose in action which was assigned to the appellant company by Jacobs under the agreement of August 1956 and was covered by the clause in the agreement which read: "All other property and assets, if any, of the Vendor in connection with the said business."

It was also objected that the appellant's claim was barred by s. 34 of *The Tax Enforcement Act,* R.S.S. 1953, c. 156, which reads:

> No action for the return by the municipality of any moneys paid to it, whether under protest or otherwise, on account of a claim, whether valid or invalid, made by the municipality for taxes shall be commenced after the expiration of six months from the date of payment of such moneys, and after the expiration of such period of six months without any action having been commenced, the payment made to the municipality shall be deemed to have been a voluntary payment.

This limitation section was not pleaded in the defence. Rule 145 of the Rules of Court of the Court of Queen's Bench for the province of Saskatchewan requires that such a defence be pleaded. That disposes of this objection, but, apart from the matter of pleading, it is doubtful if the section relied upon applies in the instant case at all. A similar section in *The Tax Recovery Act,* R.S.A. 1942, c. 161, s. 27 was held not applicable in *Wells Construction Co. Ltd. v. Municipal District of Sugar City No. 5*[1].

The respondent also alleged laches. It is impossible on the facts of this case to discern any laches on the part of the appellant. It appears to have acted without undue delay after it learned that it had been paying on a per day basis when it should not have been required to do so.

[1] (1953-54), 10 W.W.R. (N.S.) 586.

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The appeal should accordingly be allowed and the judgment of the learned trial judge restored with costs throughout.

Appeal allowed and judgment at trial restored with costs throughout.

Solicitors for the plaintiff, appellant: Goetz & Murphy, Regina.

Solicitor for the defendant, respondent: C. R. Johnson, Regina.

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*Mar. 5
Mar. 23

SIMPSON SAND COMPANY LIMITED AND WELLS CHARLES SIMPSON (*Defendants*) ..... APPELLANTS;

AND

BLACK DOUGLAS CONTRACTORS LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Waters and watercourses—Creation of bay in shore lot result of sand-removing operations—Obstructions to navigation placed in bay by lot owner—Injunction—Whether navigable waters—Right to navigation of third parties.

The defendants' excavation operations in the course of removing sand from lot 3 on Grenadier Island in the St. Lawrence River resulted in the formation of a bay some 600 feet in depth and about 545 feet in width at its mouth. Similar operations on the part of the defendants created a bay into the adjacent lot 4 the mouth of which opened into the bay already created in lot 3. The plaintiff company subsequently obtained the rights to remove sand from the said lot 4, the defendants' rights to do so having lapsed, and permission was requested to cross the bay of lot 3 so as to gain access to lot 4. The defendants refused this permission. However, the plaintiffs later commenced sailing through the bay of lot 3 into the bay of lot 4 with sand-removing equipment and barges. The defendants then placed obstructions to navigation in the bay of lot 3 and the plaintiff brought action for an injunction. An injunction was granted by the trial judge and his judgment was affirmed, on appeal, by the Court of Appeal. A further appeal was brought to this Court.

Held: The appeal should be dismissed.

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*PRESENT: Cartwright, Fauteux, Judson, Hall and Spence JJ.

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The bay into lot 3 was navigable water and the defendants had no right to prevent navigation in that bay by either the plaintiffs or anyone else. This conclusion was reached without making any finding as to the ownership of the lands now under water but which originally formed part of lot 3, although the Court presumed that such lands were still the property of the defendants.

It was, of course, to be understood that the Court did not imply that the plaintiffs had any rights in the waters of the bay in lot 3 except the right of navigation.

Cram v. Ryan et al. (1894), 24 O.R. 500 and 25 O.R. 524, approved; *Sim E. Bak et al. v. Ang Yong Huat,* [1923] A.C. 429, distinguished.

Defendant—Individual defendant properly enjoined from continuance of illegal acts.

The individual defendant had conveyed his interests in lot 3 to the corporate defendant long before the circumstances which were the subject of the present litigation arose. His submission that the evidence did not support a judgment against him, and that his refusal to permit the passage of the plaintiffs' vessels, and any obstruction which the defendants put to the plaintiffs' navigation, was only the act of the corporate defendant for whom he merely acted as the officer and agent, was rejected.

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

Adrian T. Hewitt, Q.C., for the defendants, appellants.

A. B. R. Lawrence, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal of Ontario affirming the judgment at trial of Stewart J. In that latter judgment, the learned trial judge granted the injunction as prayed for in the statement of claim and referred the question of damages to the Master at Ottawa.

The appellants (defendants) had from 1929 or 1930 taken sand from lot 3 on Grenadier Island in the St. Lawrence River some miles above the City of Brockville. They had previously taken sand from the river bed in front of the said lot 3 and then purchased lot 3 on the island itself and proceeded to remove sand therefrom, using a ship with sand-sucking equipment known as the *S. M. Douglas*. Prior to 1950, this work was done by the individual defendant but in that year he sold all his interest in the enterprise to the corporate defendant. In the course of removing the sand

from the said lot 3, the appellants cut northerly into the lands on the foreshore of the said lot 3 resulting in the formation of a bay now in places about 600 feet in depth and about 545 feet in width at the mouth. This bay had a sufficient depth of water to admit the appellants' ship the *S. M. Douglas* and various scows and other equipment.

In 1957, the corporate appellant made arrangements with the owner of lot 4, the lot immediately adjacent to the east of lot 3, to remove sand from the said lot 4, and in the course of such excavation operations by the similar process of sand-sucking created a bay into lot 4 the mouth of which opened into the bay already created in lot 3. Both of these bays may be observed clearly in a photograph filed at trial as exhibit 2, and are shown on a large plan produced by one K. M. Wiseman, a surveyor, and marked exhibit 1 at the trial. In the year 1958, the respondent, through one Douglas McIntosh, obtained the rights to remove sand from the said lot 4, the appellants' rights to do so having lapsed, and in June 1959, the said Douglas McIntosh requested from the individual appellant (defendant) permission to cross the bay of lot 3 with barge and tug to gain access to lot 4 for the purpose of removing sand. This permission was refused. The respondent company then attempted to excavate a channel from the main waters of the St. Lawrence River northerly across the point between the bay of lot 4 and such main channel so that its equipment could enter the bay of lot 4 without crossing the appellants' lands. Due to the existence of a rock spur, this effort proved economically unfeasible and the respondents then commenced sailing through the bay of lot 3 into the bay of lot 4 with their sand-sucking equipment and barges.

The learned trial judge found, as a fact:

> During this time they experienced great difficulty in that the defendants blocked their activities as much as possible, placing hawsers across the mouth of the channel into the bay and building barricades of screenings, earth and sand, slightly to the west of the lot line, blocking the entrance to it from Lot 3.

As a result, the respondent brought these proceedings.

It is implicit in the findings of the learned trial judge, and it is stated in the reasons for judgment of Porter C.J.O. in the Court of Appeal, that the bay of lot 3 was created not for any use which the appellants should make of it but resulted incidentally from the removal of sand. In argument

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Spence J.

in this Court, counsel for the appellants stressed also that the bay was dug to a sufficient depth to permit the entry of its crane the *S. M. Douglas* but such procedure was only incidental to the removal of the sand, first from the waters below the foreshore and then from the actual foreshore, and later the main body of the island itself.

I think it is proper to summarize the reasons for judgment of the learned trial judge as being an acceptance of an application of the decision in *Cram v. Ryan et al.*[1] It is also I think a brief summary of the argument made by the appellant in this Court that he relied most strongly on the decision of the Privy Council in *Sim E. Bak et al. v. Ang Yong Huat*[2], although counsel for the appellant cited many other cases. The facts in *Cram v. Ryan* bear considerable resemblance to those in the present case. There, a purchaser of lands along the shore of the St. Mary's River near Sault Ste. Marie held the same under a grant from the Crown which grant contained two reservations:

> Reserving free access to the shore of the lands hereby granted for all vessels, boats and persons,
> and
>
> Reserving nevertheless unto Us, our Heirs and Successors the free use, passage, and enjoyment of, in, over and upon all navigable waters that shall or may hereinafter be found on or under, or be flowing through or upon, any part of the said parcel or tract of land hereby granted as aforesaid.

In the present case, the grant to the appellants' predecessor in title dated October 8, 1877, and produced at trial as exhibit 21, contained this provision:

> saving, excepting and reserving nevertheless unto Us, Our Heirs and Successors, the free use, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said Parcel or Tract of land hereby granted as aforesaid.

It will be seen this is exactly the second reservation recited above from the deed considered in *Cram v. Ryan*.

The defendants in *Cram v. Ryan* had a licence to remove sand from the said lands and in the course of such removal had created a bay which extended about 150 feet back from the original shore line. The bay had a mouth of about 60 feet and was about twice that width back of the mouth.

[1] (1894), 24 O.R. 500, and on appeal 25 O.R. 524.
[2] [1923] A.C. 429.

In this bay, thus created, the plaintiff moored its boarding scow and when the defendant proceeded to operate its sand-removing equipment sparks from the stack thereof ignited the plaintiff's scow and it was destroyed. It was held on appeal that the plaintiff was not a trespasser as the plaintiff was moored on navigable waters and not in any private waters. At p. 528 of 25 O.R., Armour C.J. said:

> It is unnecessary to discuss the question whether the removal of the shore line back from its natural line, by the license of Fitzsimmons and Moran, had the effect of removing the boundary of their land back to the new shore line, and of making the land covered with water, by reason of such removal, the property of the Crown.
>
> But it is plain, I think, that the effect of such removal was that the water so let in was as much *publici juris* as any other part of the water of the river, and the removal of the shore line back from its natural line did not take away the free access to the shore so removed for all vessels, boats and persons.

It must be noted that in *Cram v. Ryan* and in the present case, the bays or indentations cut into the foreshore by the owner of the foreshore terrain were cut for the purpose of removing sand and not so that the water could be allowed over the land to be used for any such purpose as the operation of machinery, channels, canals, boat harbours, etc., and it should further be noted that in both cases the waters flowing into these bays were a recognized navigable water resulting in the increase of the channel.

Sim E. Bak et al. v. Ang Yong Huat, supra, was concerned with the following circumstances. The Kalang River was evidently a shallow river which, in the course of nature, moved from place to place. At p. 432, Lord Wrenbury said:

> The Kalang River must have shifted its bed between 1843 and the present time, a matter which is highly probable in a place which obviously is more like a mango swamp than a public navigable river.

Two parcels of land lay alongside of what appeared to be a 10 foot reservation which had run at one time along the course of the said Kalang River. These parcels of land both contained brick clay and the owners of the plots had, from time to time, dug out the clay leaving large and deep holes. More than thirty years before, there had come into existence a bridge through which the waters of the Kalang River had been admitted and these waters filled the holes made by the excavation of the brick clay so that the lands in question and many adjacent plots had become ponds or

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lagoons. The defendants' land had as well been excavated to remove brick clay with the result that there was one of these ponds on his land, and he cut through the bank so that the tidal water could obtain access to this pond, his purpose being to allow prawns and fish to come up with the tide, flow into the pond on his land and there be intercepted by a sluice which he had erected. The plaintiff thereafter erected on the soil of his land and extending across the mouth of the defendants' sluice, a fence with the result that the prawns and fish were intercepted and could not get into the defendants' pond. The defendants tore down this fence and the plaintiff took action. The Judicial Committee held that the waters in these ponds were not navigable waters and that the defendants could not object to any erection such as the fence made by the plaintiff on his own lands despite the fact that those lands were from time to time covered by tidal waters. At p. 433, Lord Wrenbury said:

> The learned judge of first instance was of opinion that the creek formed part of a tidal navigable river. That it is tidal in the sense that the water in all the ponds or excavations which formed the creek rises and falls with the tide there is no doubt. That it is navigable in the sense that boats within limits of size could and did pass through the bridge and up the waterway and could and did bring away brick, earth or bricks burnt in kilns which have been erected there there is also no doubt. But from these facts it does not follow that the creek is a tidal navigable river. The question is one of degree, to be determined by reference to all the facts. "The flowing and re-flowing of the tide does not make it so", i.e., a navigable river; "for there are many places into which the tide flows which are not navigable rivers; and the place in question may be a creek in their own private estate": per Lord Mansfield in *Mayor of Lynn v. Turner*, 1 Cowp. 86. An instance of this might be a boathouse or boat harbour which an owner might create on his own land. "It does not necessarily follow, because the tide flows and re-flows in any particular place, that it is therefore a public navigation although of sufficient size": per Bayley J., in *Rex v. Montague*, 4 B. & C. 598, 601. The flowing of the tide is strong prima facie evidence of the existence of a public navigable river, but whether it is one or not depends upon the situation and nature of the channel. Not every ditch or cutting which is reached by the tide forms part of the public navigable river, even though it be large enough to admit of the passage of a boat. The question is one of degree, and is for the jury, having regard to all the facts.
>
> The evidence as to user is that "boats come in and go out over 100 times a month", say, four a day. There is no evidence at all that these are not boats used by the owners of the plots to bring out their bricks—and presumably they are. There is absolutely nothing to induce any member of the public to take a boat up this creek, and there is no evidence that any member of the public did so. On the other hand, it is the convenient and obvious way of bringing out the bricks.

I am of the opinion that even the paramount authority of this decision in the Privy Council does not govern the present case and cannot be seen as over-riding the decision in *Cram v. Ryan,* which has stood as the law of the Province of Ontario for 70 years. I am of the view that there the learned Lordships were dealing with quite different circumstances. These so-called ponds were not on the Kalang River but they were some little distance away from the then flow of the river and they only received the tidal flow of water by means of channels constructed to bring the water into them. Such channels evidently passed under a bridge so that in fact the ponds were artificially created holes first and only became ponds when the tidal waters were introduced into them through the channels. This is a very different situation from the mere broadening of the St. Lawrence River by digging a bay into its banks or to be more accurate the bank of an island in this navigable river.

Counsel for the appellants argued that the bay on lot 3 on Grenadier Island could not be considered navigable water despite the fact that it was admittedly navigable in fact because there was no evidence of commercial utility and cited, *inter alia,* (1) *Attorney-General of Quebec v. Fraser*[1], per Girouard J. at p. 597:

> The test of navigability is its utility for commercial purposes. Every river is not equally useful. The Moisie, which is in the wilderness, with few fishing and mineral establishments for 15 or 17 miles from its mouth, cannot be compared with the River St. Lawrence, where the state has spent millions to improve its navigation possibilities.

(2) *Keewatin Power Co. v. Town of Kenora*[2], at p. 243, where Anglin J. adopted the statement of Davis J. in *The Montello*[3] where, delivering the opinion of the Supreme Court of the United States, he said:

> The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted nor the difficulties attending navigation. . . . It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.

(3) *Ratte v. Booth*[4].

[1] (1906), 37 S.C.R. 577.
[2] (1907), 13 O.L.R. 237.
[3] (1874), 20 Wallace 430.
[4] (1886), 11 O.R. 491 at 498.

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(4) *Gordon v. Hall and Hall*[1], where McRuer C.J.H.C. said at p. 382:

> In the first place, to be regarded as a navigable water, it must have something of the characteristics of a highway, that is, it must afford a means of transportation between terminal points to which the members of the public have a right to go as distinct from a means of transportation between one private terminus and another.

It is sufficient to say that if these are tests which must be passed before waters can be considered navigable, then the bay into lot 3 on Grenadier Island complies with such tests. The respondent certainly operated the bay for commerce and was concerned with access thereto only for the purpose of carrying on its business. The bay was used not only by the respondent itself but by the respondent's customers who resorted to the bay for the purpose of taking delivery of sand and also by others both for personal and for business reasons. Douglas McIntosh, president of the respondent company, swore:

> We had five boats, the dredge which had a draught of approximately four feet, the tug which had a draught of four feet, six inches, the four scows the draught was ten feet.
>
> I have seen quite a few boats some of which I knew and some of which I did not know. I have seen people—I do not know how many small boats in the bay along the beach and I have seen boats from Andrews and Huckmarine bringing people up there and I have seen most of the people that live around about with small boats coming in from time to time.
>
> They have come in sometimes fishing and sometimes bathing and sometimes on business errands to see us or see Simpson Sand.

Certainly, the travel is not between one private terminus and another. One terminus is undoubtedly the respondent's bay but the other terminus may be any place to which the sand recovered from the bay in lot 4 is hauled by the respondent or its customers.

For these reasons, I am of the opinion that the bay into lot 3 on Grenadier Island is navigable water as was the bay formed into the land along the St. Mary's River in *Cram v. Ryan,* and the appellants have no right to prevent navigation in that bay by either the respondents or anyone else. I have come to this conclusion without making any finding as to the ownership of the lands now under water but which

[1] (1959), 16 D.L.R. (2d) 379.

originally formed part of lot 3, and have presumed for the purpose of these reasons, that such lands under water are still the property of the appellants. This was the course taken by the Divisional Court in *Cram v. Ryan.*

It must, of course, be understood that I do not imply that the respondents have any rights in the waters of the bay in lot 3 except the right of navigation.

There remains to be disposed of the appeal of the personal appellant Wells Charles Simpson. Counsel submits that the evidence does not support a judgment against the individual appellant who had conveyed his interest in lot 3 to the corporate appellant in 1950, long before the circumstances which are the subject of this litigation arose, and that his refusal to permit the passage of the respondents' vessels, and any obstruction which the appellants put to the respondents' navigation, was only the act of the corporate appellant for whom the individual appellant merely acted as the officer and agent. I am of the opinion that there is no merit in this contention. If the refusal to permit navigation and the obstruction of that navigation are illegal acts and I have so found, then the carrying out of such illegal acts by the individual appellant results in his liability therefor whether or not he was instructed to do so by the corporate defendant, and he is properly enjoined from the continuance of such illegal acts.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Hewitt, Hewitt & Nesbitt, Ottawa.

Solicitors for the plaintiff, respondent: Honeywell, Baker, Gibson, Wotherspoon, Lawrence & Diplock, Ottawa.

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*Nov. 7
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Mar. 23

LA COMMISSION DES RELATIONS OUVRIÈRES DE LA PROVINCE DE QUÉBEC (*Defendant*) ..... APPELLANT;

AND

BURLINGTON MILLS HOSIERY COMPANY OF CANADA LIMITED (*Plaintiff*) ..... RESPONDENT.

AND

THE UNITED TEXTILE WORKERS OF AMERICA, LOCAL 311 ..... MIS-EN-CAUSE.

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

Labour—Certification—Exclusion from unit of employees under sixteen years of age—Writ of prohibition—Jurisdiction of Labour Board—Question of law—Whether decision of Board reviewable—Labour Relations Act, R.S.Q. 1941, c. 162A, ss. 2, 4, 5, 6, 7, 27, 41a—Article 3(a) of By-law No. 1 of the Board.

The mis-en-cause union applied to the Quebec Labour Relations Board for recognition as collective bargaining agent for certain employees of the respondent company. The Board granted the certificate, but for the purposes of determining the representative character of the union and the appropriateness of the unit, excluded, among others, all employees under sixteen years of age, as it was authorized to do by one of its own by-laws. Had employees under sixteen been included in the bargaining unit, the union would not have had the majority called for under the Act. A writ of prohibition taken by the employer was refused by the trial judge, but the Court of Appeal, by a majority judgment, granted the writ and set aside the certification. The Board was granted leave to appeal to this Court. It was argued, *inter alia*, that the Board had exceeded its jurisdiction in excluding from the bargaining unit employees less than sixteen years old.

Held (Cartwright and Fauteux JJ. dissenting): The appeal should be allowed and the writ of prohibiton dismissed.

Per Taschereau C.J. and Abbot and Judson JJ.: Under *The Labour Relations Act*, the Board was given the powers, *inter alia*, to determine (1) the unit of employees which was appropriate for collective bargaining purposes and (2) the representative character of the union seeking certification as the agent of the employees in that unit. The responsibility of determining what employees were to be included or excluded from a bargaining unit had been committed to the exclusive jurisdiction of the Board. Aside from being prohibited by the Act from including certain specified categories of employees, the Board was free

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

to include or exclude other categories, and provided it exercised that discretion in good faith its decision was not subject to judicial review. To hold otherwise would fail to give effect to the plain words of s. 41a of the Act. The decisions of *L'Alliance des Professeurs Catholiques de Montréal v. The Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140, and *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18, had no application to the present case.

Les Juges Cartwright et Fauteux, dissidents: La Commission n'avait pas le pouvoir d'exclure les moins de seize ans, comme elle l'a fait, en suivant un procédé et en s'appuyant sur un motif dont la constante application aurait inévitablement pour conséquence de priver définitivement les moins de seize ans d'être représentés dans une unité de négociations et d'avoir les bénéfices que la Loi accorde aux salariés. De plus, en agissant ainsi, la Commission s'est attribué le pouvoir d'imposer à l'employeur la reconnaissance d'une association minoritaire, contrairement aux prescriptions des arts. 4 et 5 de la Loi. Ayant ainsi rendu une décision *ultra vires*, la Commission ne peut validement invoquer l'art. 41*a* de la Loi pour faire obstacle au recours adopté par l'employeur.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Bertrand J. Appeal allowed, Cartwright and Fauteux JJ. dissenting.

François Mercier, Q.C., and *G. Vaillancourt, Q.C.*, for the defendant, appellant.

Lawrence Marks, Q.C., and *Guy Gagnon*, for the plaintiff, respondent.

Philip Cutler, for the mis-en-cause.

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

ABBOTT J.:—This appeal, by leave, is from a majoriy judgment of the Court of Queen's Bench[1] allowing an appeal from a judgment of the Superior Court, granting a writ of prohibition against the appellant Board and declaring void certain of its decisions.

The facts are not now in dispute. On March 21, 1956, the mis-en-cause (which I shall refer to as the Union) applied to the Board for recognition as collective bargaining agent for certain employees of the respondent company at its Lachine plant, described as follows in the application:

tous les employés payés à l'heure et à la pièce, excepté les contremaîtres, contremaîtresses, arrangeurs de machines, personnes ayant fonction de surveillance, employés de bureau, chauffeurs, les personnes payées à la semaine, et ceux automatiquement exclus par la Loi des Relations Ouvrières.

[1] [1962] Que. Q.B. 469.

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That application was opposed by the respondent. On November 13, 1956, following a series of hearings, the Board rendered a decision certifying the Union as bargaining agent to represent—

> tous les employés payés sur une base horaire ou à la pièce excepté les contremaîtres, contremaîtresses, personnes ayant fonction de surveillance, employés de bureau, les personnes payées à la semaine, les «production supervisors», le chef mécanicien, les mineurs de moins de seize ans et ceux automatiquement exclus par la Loi des Relations Ouvrières, à l'emploi de l'Intimée Burlington Mills Hosiery Company of Canada Limited, 130 rue St-Joseph, Lachine, P.Q.

A petition to have this certificate cancelled was filed with the Board by respondent on December 6, 1956, and after a hearing was dismissed on January 17, 1957. The present proceedings were launched by respondent on February 12, 1957, asking for the issuance of a writ of prohibition and that the decisions of the Board be set aside as having been made outside its jurisdiction.

In the Courts below and before this Court, respondent challenged the decisions of the Board upon two grounds namely, that the Board had exceeded its jurisdiction in

(1) recognizing as bargaining agent a Union which had neither constitution nor by-laws and which had not complied with s. 27 of the *Labour Relations Act* and

(2) excluding from the bargaining unit employees less than sixteen years old.

As to the first of these grounds the learned trial judge held that the Union had complied with the provisions of the statute and that view was shared by Taschereau J. in the Court below. After hearing counsel for respondent, counsel for appellant was advised that this Court did not need to hear him in reply on this point.

Turning now to respondent's second grounds of objection to the jurisdiction of the Board. The relevant sections of the *Labour Relations Act,* R.S.Q. 1941, c. 162A, as amended, are as follows:

> 2. In this act and in its application, unless the context requires otherwise, the following words and expressions have the meaning hereinafter given to them:
>
> *a*) "Employee" means any apprentice, unskilled labourer or workman, skilled workman or journeyman, artisan, clerk or employee, working individually or in a crew or in partnership; but it does not include:
>
> 1° persons employed as manager, superintendent, foreman or representative of an employer in his relations with his employees;

2° the directors and managers of a corporation;

3° any person belonging to one of the professions contemplated in chapters 262 to 275, or admitted to the study of one of such professions;

4° domestic servants or persons employed in an agricultural exploitation.

4. Every employer shall be bound to recognize as the collective representative of his employees the representatives of any association comprising the absolute majority of his said employees and to negotiate with them, in good faith, a collective labour agreement.

Several associations of employees may join to make up such majority and appoint representatives for purposes of collective negotiation upon such conditions, not inconsistent with this act, as they may deem expedient.

5. The employer shall incur the obligation contemplated in the preceding section, as the Board may decide, either towards the aggregate of his employees or towards each group of the said employees which the Board declares is to form a separate group for the purposes of this act.

* * *

6. Every association desiring to be recognized, for the purposes of this act, as representing a group of employees or of employers, shall apply by petition in writing to the Board and the latter, after inquiry, shall determine whether such association is entitled to be so recognized and what group of employees it shall represent, or in the case of an association of employers, with respect to what group of the employees of its members it is qualified to represent them.

* * *

7. The Board shall assure itself of the representative character of the association and of its right to be recognized and, for such purpose, shall examine its books and records.

In order to assure itself of such representative character, the Board may, by by-law subject to the formalities of section 38, determine the conditions on which a person may be recognized as a member of an association.

41*a*. Notwithstanding any legislative provision inconsistent herewith,

a) the decisions of the Board shall be without appeal and cannot be revised by the courts;

b) no writ of quo warranto, of mandamus, of certiorari, of prohibition or injunction may be issued against the Board or against any of its members, acting in their official capacity;

c) the provisions of article 50 of the Code of Civil Procedure shall not apply to the Board, or to its members acting in their official capacity.

In establishing the bargaining unit, for which it certified the Union as collective bargaining agent, the Board excluded from such unit, among others, all employees under sixteen years of age. For the purpose of determining the representative character of the Union it also excluded members of the Union under that age. On this basis the Board found that the bargaining unit contained 324 employees

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and that the eligible members of the Union totalled 165. Had employees under sixteen been included in the bargaining unit, the Union would not have had the majority called for under the Act.

No doubt the Board had sound reasons for excluding these young persons from the bargaining unit, and it might be observed in passing, that By-law 3*a* of the Board adopted pursuant to s. 7 of the Act (which by-law has been in force since 1946) specifically excludes them as members of a union for the purpose of determining its representative character. At all events, in my opinion the decision to include or exclude such young persons as members of a bargaining unit is one which is clearly within the jurisdiction of the appellant Board.

Under the Act the Board is given the powers *inter alia* to determine (1) the unit of employees which is appropriate for collective bargaining purposes and (2) the representative character of the Union seeking certification as the collective bargaining agent of the employees in that unit. It is clear that the absolute majority referred to in s. 4 means the absolute majority of a bargaining unit, where that unit does not comprise all employees.

The responsibility of determining what employees are to be included or excluded from a bargaining unit has been committed to the exclusive jurisdiction of the Appellant Board. Indeed that is one of its principal functions. The Act prohibits the inclusion of certain specified categories of employees in such a bargaining unit, but aside from these prohibitions, the Board is free to include or exclude other categories, and provided it exercises that discretion in good faith its decision is not subject to judicial review. In my respectful opinion, to hold otherwise fails to give effect to the plain words of s. 41*a* of the Act.

In my view the decisions of this Court in the *Alliance des Professeurs*[1] case and the *Toronto Newspaper Guild*[2] case, which were cited in argument, have no application here. In the *Alliance* case it was held that the rule *audi alteram partem* applies to the hearings of a Board such as the Labour Relations Board, and that in issuing the order complained of in that case, without holding a hearing, the Quebec Labour Relations Board had acted without jurisdiction. No

[1] [1953] 2 S.C.R. 140, 4 D.L.R. 161.
[2] [1953] 2 S.C.R. 18, 106 C.C.C. 225, 3 D.L.R. 561.

such situation existed here. The Board in this case held not merely one hearing, but a series of hearings. In the *Toronto Newspaper Guild* case the majority of this Court held that the Ontario Labour Relations Board, at a hearing before it, had refused to allow cross-examination of a union secretary and that, in so doing, it had declined jurisdiction. Nothing of this sort is in issue here.

One other point. In his argument before us Mr. Mercier drew attention to the following dictum of Choquette J. who delivered the majority opinion in the Court below—

> J'ajouterai que la Commission n'est pas un tribunal judiciaire, mais un tribunal administratif exerçant certains pouvoirs judiciaires. Ces pouvoirs, à mon avis, sont du domaine des faits et non du domaine du droit.

With respect, the statement made by the learned judge in the second sentence as to the powers of the Board, while perhaps obiter, is in error. The judgment in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*[1] and other decisions which have held that a board of this kind is competent to decide questions of law, were reviewed recently by my brother Judson in *Farrell v. Workmen's Compensation Board*[2].

I would allow the appeal and restore the judgment of the learned trial judge. The appellant is entitled to its costs throughout.

The judgment of Cartwright and Fauteux JJ. was delivered by

LE JUGE FAUTEUX (*dissident*):—La mise-en-cause a demandé à la Commission de Relations Ouvrières de la Province de Québec d'être reconnue, aux fins de la *Loi des Relations Ouvrières,* comme représentante d'un groupe de salariés formé de

> . . . tous les employés payés à l'heure et à la pièce, excepté les contremaîtres, contremaîtresses, arrangeurs de machines, personnes ayant fonction de surveillance, employés de bureau, chauffeurs, les personnes payées à la semaine et ceux automatiquement exclus par la Loi des Relations Ouvrières, à l'emploi de Burlington Mills Hosiery Co. of Canada Ltd . . .

Après contestation, la Commission décida d'émettre un certificat de reconnaissance syndicale à la mise-en-cause pour représenter

> . . . tous les employés payés sur une base horaire ou à la pièce, excepté les contremaîtres, contremaîtresses, personnes ayant fonction de sur-

[1] [1949] A.C. 134.
[2] [1962] S.C.R. 48 at 52, 37 W.W.R. 39, 31 D.L.R. (2d) 177.

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veillance, employés de bureau, personnes payées à la semaine, les «production supervisors», les mineurs de moins de seize ans, et ceux automatiquement exclus par la Loi des Relations Ouvrières à l'emploi de l'intimée Burlington Mills Hosiery Company of Canada Limited . . .

D'où l'on voit que les moins de seize ans, faisant partie du groupe de salariés payés sur une base horaire ou à la pièce, furent exclus par la Commission de ce groupe de salariés pour lequel la mise-en-cause demandait d'être accréditée comme agent négociateur. On aperçoit, à l'extrait suivant de la décision rendue par la Commission le 13 novembre 1956, le procédé et le motif par elle adoptés pour justifier cette exclusion:

> ATTENDU que le 31 juillet 1956, la Commission écrivait au Procureur de la compagnie intimée, l'avisant qu'elle avait pris connaissance de sa lettre du 19 juillet et . . . qu'elle l'informait à nouveau, en regard des mineurs de moins de seize ans, qu'il appartenait à la Commission de déterminer le groupe faisant partie des négociations et qu'elle considérait que, vu qu'elle les enlevait pour déterminer la majorité, elle les enlevait également dans l'unité des négociations;

Il est concédé que si la Commission n'avait pas soustrait le nombre des moins de seize ans du nombre total des salariés payés sur une base horaire ou à la pièce, il aurait été impossible pour l'union mise-en-cause de prétendre compter dans ses rangs la majorité absolue de tous les salariés. Et, comme on le sait, c'est la majorité absolue qui conditionne essentiellement le titre à la reconnaissance syndicale et le pouvoir de la Commission de l'accorder à l'union qui la recherche.

Étant d'opinion que la Commission n'avait aucune juridiction pour ainsi agir, l'intimée fit émettre un bref de prohibition, demandant particulièrement que cette décision de la Commission soit déclarée illégale, nulle et sans effet et qu'il soit enjoint à la Commission de ne faire aucun acte—procédure de négociations ou autres—pour donner effet à cette décision.

Rejeté en Cour supérieure, ce recours fut admis en Cour du banc de la reine[1] par une décision majoritaire. Par la suite, l'appelante demanda et obtint la permission d'en appeler à cette Cour.

La Commission avait-elle le pouvoir d'ainsi procéder pour accorder la reconnaissance syndicale à l'union mise-en-cause et, dans la négative, y a-t-il, en l'espèce, un excès de juridiction donnant lieu au bref de prohibition, nonobstant l'art.

[1] [1962] B.R. 469.

41*a* de la *Loi des Relations Ouvrières* qui écarte tout recours en revision des décisions de la Commission. Tels sont les deux points qui ont été soulevés à l'audition.

Pour justifier cette décision, on s'est appuyé sur les dispositions de l'art. 3(*a*) du Règlement N° 1 des Règlements de la Commission et sur celles de l'art. 5 de la *Loi des Relations Ouvrières*.

Il convient de reproduire en entier l'art. 3 du Règlement N° 1:

3. Pour l'appréciation du caractère représentatif d'une association, les conditions auxquelles une personne peut être reconnue membre d'une association, sont les suivantes:

a) être âgée d'au moins seize ans;

b) avoir été régulièrement admise membre et avoir signé une carte d'adhésion dûment datée;

c) avoir personnellement payé un droit d'entrée ou d'initiation d'au moins un dollar ($1);

d) être tenue de payer personnellement des cotisations à un taux non inférieur à cinquante cents (.50¢) par mois;

e) avoir personnellement payé les cotisations pour au moins un mois, s'il s'agit d'un nouveau membre;

f) n'avoir pas d'arriérés de cotisations pour plus de trois mois, s'il s'agit d'un membre déjà initié;

g) occuper régulièrement un emploi se rattachant aux occupations professionnelles normales de l'employeur à l'égard duquel la reconnaissance est demandée;

h) les conditions prévues pour établir le caractère représentatif d'une association doivent avoir été remplies le ou avant le jour du dépôt de la requête pour reconnaissance syndicale à la Commission de relations ouvrières.

Nous ne sommes pas appelés à nous prononcer sur la validité des dispositions du para. (*a*) de l'art. 3. Ce qui est certain, c'est que si, pour apprécier le caractère représentatif d'une union, la Commission doit écarter de ceux qui en sont membres les personnes qui sont âgées de moins de seize ans, il ne s'ensuit pas qu'elle doive aussi les exclure pour établir la somme totale des salariés, somme dont elle doit tenir compte pour décider si l'union réunit comme membres la majorité absolue. Comme le note M. le Juge Choquette, l'exclusion des moins de seize ans est prescrite par l'art. 3(*a*) pour l'appréciation du caractère représentatif d'une union et non pour la détermination du nombre total des salariés de l'entreprise ou du groupe. Et si, ajoute-t-il, parce que, en obéissance au Règlement, on les exclut pour apprécier le caractère représentatif, on doit également

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les exclure pour établir le nombre total de salariés, il faudrait, pour être conséquent, adopter le même procédé en ce qui concerne ceux qui ne répondent pas aux exigences des paras. *b*), *c*), *d*), *e*) et *f*) du même article du Règlement. L'article 2 de la Loi définit le mot «salarié»; les moins de seize ans ne sont pas de ceux qui sont exclus de cette définition. Ils ont donc droit au bénéfice que la Loi accorde aux salariés d'être représentés pour fins de négociations.

Quand à l'art. 5 de la Loi, il autorise bien la Commission à former des groupes distincts de salariés pour les fins de la Loi, ce qui implique évidemment, comme l'a soumis le procureur de l'appelante, l'exclusion d'une partie des salariés dans la formation d'un groupe distinct. En l'espèce, cependant, la Commission n'a pas exclu les moins de seize ans afin de former un groupe distinct, mais elle a formé un groupe distinct parce qu'elle les avait exclus pour l'appréciation du caractère représentatif de l'union et la détermination de la question de savoir si celle-ci réunissait parmi ses membres la majorité absolue. En tout respect pour les tenants de l'opinion contraire, la Commission n'avait pas le pouvoir d'exclure les moins de seize ans, comme elle l'a fait, en suivant un procédé et s'appuyant sur un motif dont la constante application aurait inévitablement pour conséquence de priver définitivement les moins de seize ans d'être représentés dans une unité de négociations et d'avoir les bénéfices que la Loi accorde aux salariés.

De plus, et en agissant comme susdit, la Commission s'est attribué le pouvoir d'imposer à l'employeur la reconnaissance d'une association minoritaire, contrairement aux prescriptions des arts. 4 et 5 de la Loi.

Ayant ainsi rendu une décision *ultra vires*, la Commission ne peut validement invoquer l'art. 41*a* de la *Loi des Relations Ouvrières* pour échapper au pouvoir de contrôle et de surveillance de la Cour supérieure. Comme en a jugé la majorité en Cour d'Appel, en s'appuyant particulièrement sur les principes formulés par cette Cour dans *L'Alliance des Professeurs Catholiques de Montréal v. La Commission de Relations Ouvrières de la Province de Québec*[1] et *Toronto Newspaper Guild Local 87, American Newspaper Guild (C.I.O.) v. Globe Printing Company*[2], cet article ne fait pas obstacle, en l'espèce, au recours adopté par l'intimée.

[1] [1953] 2 R.C.S. 140, 4 D.L.R. 161.
[2] [1953] 2 R.C.S. 18, 106 C.C.C. 225, 3 D.L.R. 561.

Je renverrais l'appel avec dépens.

Appeal allowed with costs, CARTWRIGHT *and* FAUTEUX JJ. *dissenting.*

Attorney for the defendant Board, appellant: François Mercier, Montreal.

Attorneys for the plaintiff, respondent: Lawrence Marks and Lafleur & Gagnon, Montreal.

Attorneys for the Mis-en-cause Union: Cutler & Lachapelle, Montreal.

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COMMISSION DES RELATIONS OUVRIÈRES DE QUÉBEC *v.* BURLINGTON MILLS HOSIERY CO. OF CANADA *et al.*

Fauteux J.

PARKE, DAVIS & COMPANY (*Plaintiff*) ..... APPELLANT;

AND

EMPIRE LABORATORIES LIMITED (*Defendant*) ..... RESPONDENT.

1963

*Nov. 28, 29

1964

Mar. 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade marks—Infringement—Use of coloured bands around pharmaceutical capsules—Injunction—Relevancy of evidence of prior patent held in the United States—Trade Marks Act, 1952-53 (Can.), c. 49.

The plaintiff, a pharmaceutical company, claimed damages from the defendant, also a pharmaceutical company, for infringement of two of its registered trade marks consisting of a grey band encircling a capsule containing "chloramphenicol", and a green band encircling a capsule containing "digitalis". An injunction was also sought to restrain the defendant from selling any pharmaceutical preparations in association with any of the plaintiff's ten trade marks consisting of different coloured bands for encircling capsules, including the grey and green bands, all of which have been registered in Canada in 1950. The capsule is a small cylindrical gelatine container made up of two halves intended to contain a measured quantity of medicament. The coloured band is placed around the centre of the capsule at the point where the two halves are joined. It is made of the same substance as the capsule itself which it seals. The trial judge dismissed the action. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The plaintiff's ten registered trade marks had a functional use or characteristic and could not, therefore, be the subject of a trade mark. There was ample evidence to support such a finding. There was also evidence that the plaintiff held between 1932 and 1949 a United States patent

*PRESENT: Cartwright, Fauteux, Ritchie, Hall and Spence JJ.

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on sealed capsules with similar bands. That evidence was relevant on this question of fact as to whether these bands had a functional use or characteristic. Evidence that the plaintiff so considered its bands when it applied for the U.S. patent in 1932 was surely some evidence that the bands had in fact a functional use.

As to the passing-off claim, the plaintiff had failed to show that the trade marks had been relied upon to distinguish its goods from any others.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada, dismissing an action for infringement. Appeal dismissed.

Christopher Robinson, Q.C., and *Peter L. Beck*, for the plaintiff, appellant.

Morris M. Kertzer, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—The appellant is the owner of 10 trade marks registered in Canada on September 19, 1950, as set out in the judgment of Noël J. from which this appeal is taken. These trade marks are identical except that each of the 10 refers to a distinct band colour, white, black, etc. The trade mark covering the white band reads in part as follows:

> The mark of which registration is requested is a design mark, of which five accurate and complete representations are furnished herewith, its principal features requiring to be indexed being in the applicant's opinion, a white band applied approximately around the middle of a capsule and encircling the same.

The capsule referred to in all 10 trade mark registrations is a small cylindrical gelatin container made up of two halves intended to contain one measured quantity of some drug or other medicament for human consumption by swallowing the capsule and contents. The band, whether white or one of the other nine colours, is placed around the centre of the capsule at the point where the two halves are joined one into the other. The band is a strip of the same substance as the capsule itself which, when applied, creates a small bulge around the capsule and seals it.

The action proceeded to trial upon the following admission:

ADMISSION

For the purposes of this action only, the parties hereto admit the following facts:

1. Before February 18, 1960, the defendant sold in Canada a pharmaceutical preparation identified by it as chloramphenicol in bottles of

100 capsules of which the bottles and its contents marked Exhibit A to the affidavit herein of Thomas V. Grubb, dated February 15, 1960, is a typical sample.

2. The capsules of chloramphenicol referred to in paragraph 1 sold by the defendant were not manufactured by the defendant but were bought by it from a European supplier in the state in which they are found in the said Exhibit A and were then bottled and labelled by the defendant.

3. After February 18, 1960, the defendant sold in Canada a pharmaceutical preparation identified by it as chloramphenical in bottles of 100 capsules of which the bottle and their contents identified as Exhibits I and II to this admission are typical samples.

4. The capsules of chloramphenical referred to in paragraph 3 sold by the defendant were not manufactured by the defendant but were bought by it from a European supplier in the state in which they are found in the said Exhibits I and II and were then bottled and labelled by the defendant.

By an interim injunction made on February 18, 1960, the date of the commencement of the action, and by subsequent interlocutory injunctions dated February 23, 1960, March 8, 1960, April 14, 1960, and May 17, 1960, the respondent company was restrained until the trial or other disposition of the action from further sale of any pharmaceutical preparations in association with the appellant's gray banded or green banded trade marks or any trade mark confusing with them.

The issues in the action are fully set out in the judgment of Noël J. as follows:

After the first of the interlocutory orders, the defendant company, subsequent to February 18, 1960, changed over to a green band around its chloramphenicol capsules. Mr. Winters, president of the defendant company, states that a saleswoman from the Joint Marsing Co. came in to see him and showed him some samples of green banded capsules of chloramphenicol. As he put it at p. 82 of the transcript:

> When we were ordered to stop selling the gray banded capsules, we said: "Fine, we are not interested in the colour, we will sell green banded capsules and gave her an order for the green banded chloramphenical capsules".

The plaintiff, therefore, claims that the defendant, by its actions, has infringed its rights in the trade marks registered under number N.S. 148/37803 (green) and N.S. 148/37804 (gray), has directed public attention to its pharmaceutical preparations in such a way as to be likely to cause confusion in Canada between the pharmaceutical preparations of the defendant and theirs and has passed off, and enabled others to pass off, its pharmaceutical preparations as and for theirs. It also states that it is apprehensive that if the defendant is restrained from using the green bands it will then begin to use, in association with the sale of its pharmaceutical preparations, one of the other of its registered colour banded marks and, therefore, requests an injunction restraining the defendant from selling, distributing and advertising any pharmaceutical preparations in association with any of the plaintiff's ten registered trade marks, an order directing the defendant to deliver on oath to the plaintiff all such pharmaceutical

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preparations as may be in the possession or power of the defendant bearing the plaintiff's said trade marks registered under number N.S. 148/37803 and N.S. 148/37804 or any trade mark confusing with either of the said trade marks, or alternatively, for the destruction on oath of such pharmaceutical preparations, damages or an account of the profits made by the defendant as to the plaintiff may elect, such further and other relief as the justice of the case requires and, finally, costs. The defendant, on the other hand, denies the plaintiff's allegations made in its statement of claim and adds that the plaintiff is not entitled to the exclusive use of the pharmaceutical preparation known as chloramphenicol and that it is, therefore, entitled to sell in Canada this pharmaceutical preparation.

An amended counterclaim granted on January 12, 1961, produced by the defendant, attacks the validity of the plaintiff's ten trade marks in that they would not be distinctive on their face nor capable of distinguishing one preparation from another. The defendant further alleges that the plaintiff's trade marks are distinguishing guises incapable of constituting a trade mark in that the gelatin band encircling the middle of each capsule performs the function of sealing the capsule; that this function is described in U.S.A. patent number 1861047, granted on May 31, 1932, and owned by the plaintiff prior to its expiry and that the plaintiff is thereby estopped from denying that the gelatin band encircling each capsule performs the said function. The defendant adds that bands of coloured gelatin around a gelatin capsule containing a pharmaceutical preparation were incapable of constituting a trade mark and that such bands are incapable of distinguishing particular pharmaceutical preparations. The defendant further states that the plaintiff is attempting to monopolize the process of using this process by registering the said trade marks. He finally urges that it is unlawful or contrary to good practice within the trade to distribute capsules containing chloramphenicol identified solely by a gray band encircling each. It then claims that the ten above mentioned registered trade marks be expunged and finally that it be allowed costs and such further and other relief as this Court may order.

The plaintiff never claimed, nor does it now, that it is entitled to the exclusive use of chloramphenicol nor that the defendant cannot sell this product in Canada. What it does say, however, is that defendant cannot sell any of its pharmaceutical products, be it chloramphenicol or any other, under the plaintiff's registered trade marks.

The validity of the trade marks may, in my view, be disposed of on the ground that the coloured bands have a functional use or characteristic and cannot, therefore, be the subject of a trade mark.

The law appears to be well settled that if what is sought to be registered as a trade mark has a functional use or characteristic, it cannot be the subject of a trade mark. With respect, I agree with Maclean J. when, in *Imperial Tobacco Company of Canada, Limited v. The Registrar of Trade Marks*[1], he said:

In my opinion any combination of elements which are primarily designed to perform a function, here, a transparent wrapper which is mois-

[1] [1939] Ex. C.R. 141 at 145, 2 D.L.R. 65.

ture proof and a band to open the wrapper, is not fit subject matter for a trade mark, and if permitted would lead to grave abuses.

Noël J. found as a fact that the gelatin band performed a function. There was ample evidence to support that finding. The appellant's Canadian manager, Mr. William Speed, said in his evidence:

> Q. 4 Forget for the moment any advantages or disadvantages of banding and forget for the moment colouring. Can we agree on one thing and that what a gelatin band does when it is put around a capsule is that it performs the function of sealing the capsule. Is that correct?
>
> A. It performs the function of sealing the cap to the body.
>
> * * *
>
> Q. 1 And in view of the fact that the band is also composed of gelatin it sort of combines with the gelatin cap and body and makes it one whole capsule without any joints in it. Is that correct?
>
> A. Yes.

But in addition to the evidence relied on by Noël J., there was evidence that the appellant at one time held a United States patent on sealed capsules with similar bands from 1932 until it expired in 1949. The relevant part of that patent read:

> The present invention relates to capsules for containing measured quantities of materials such as drugs or other medicaments, including liquids, such as oils.
>
> Heretofore, in enclosing dry materials in the ordinary two-part capsule, there has always been present the possibility and often the probability that the two parts, i.e., the cap and body, may become disengaged and the contents lost. Also, the many attempts to retain liquid material in the ordinary two-part capsule have been without success due to several causes. If the liquid be placed in the capsule without sealing in some manner, the liquid may creep between the two parts and be lost.
>
> Many attempts at sealing have been restored to, one such being the moistening of the body before applying the cap. This method is unsuccessful due to the shrinkage of the body away from the cap.
>
> Among the objects of the present invention is to obviate all of these difficulties and provide the ordinary hardened gelatin capsule with an effective seal and thereby prevent losses of contents whether liquid or solid.
>
> Another object is to provide a means of identification of the sealed in contents of such capsules.
>
> * * *
>
> It is also proposed to use different colors of sealing material so as to furnish a visible indication of the identity or general character of the contents and this is believed to be a novel feature in itself.
>
> Now, having described the invention and the preferred form of embodiment thereof, it is to be understood that the said invention is to be lim-

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ited, not to the specific details herein described and illustrated, but only by the scope of the claims which follow:

I claim:—

1. As a new article of manufacture, a hardened gelatin capsule comprising telescopically engaged body and cap portions, each of uniform diameter throughout its length with oppositely disposed convex rounded ends and a circular band of hardened gelatin of substantially the same solubility as said capsule gelatin, said band being integrally united to both said body and cap and enveloping the annular edge of said cap.

2. As a new article of manufacture, a hardened gelatin capsule comprising telescopically engaged body and cap portions, each of uniform diameter throughout its length with oppositely disposed convex rounded ends and a circular band of hardened gelatin of substantially the same solubility as said capsule gelatin, said band being integrally united to both said body and cap and enveloping the annular edge of said cap, said band having incorporated therein means for imparting a color contrasting to the color of said body and cap.

3. As a new article of manufacture, a hardened gelatin capsule comprising telescopically engaged body and cap portions, each of uniform diameter throughout its length with oppositely disposed convex rounded ends and a circular soluble sealing band integrally united to both said body and cap and enveloping the annular edge of said cap.

Then, after the patent had expired, the appellant registered its 10 trade marks in Canada on September 19, 1950. In this way it sought to perpetuate its monopoly of the patent by applying for registration of the trade marks which, if regularly renewed, may be perpetuated. A similar situation arose in the case of *Canadian Shredded Wheat Company v. Kellogg Company et al.*[1]

The shredded biscuit involved in that case was produced by an apparatus protected by a Canadian patent which expired in 1919. For some years thereafter the appellant continued in fact to enjoy the monopoly in Canada as no rival manufacturers appeared upon the scene. In 1928 the words "shredded wheat" were registered as the appellant's trade mark to be applied to the sale of biscuits and crackers and in 1929 the same words were registered with respect to cereal foods.

Lord Russell ((1938) D.L.R.) at p. 150 stated:

> . . . There can be little doubt that had the plaintiff, when the patent expired, attempted to register the words "Shredded Wheat" as a trade mark for the sale of biscuits and crackers, the application would have met with short shrift. It would be attempting by registering the name of the patented product to prolong the patent monopoly; and this may not be done.

[1] [1938] 2 D.L.R. 145, 1 All E.R. 618, 55 R.P.C. 125.

And Lord Russell goes on to approve the dictum of Lindley L.J. in *Re Palmer's Trade Mark*[1]:

> I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article so as to be entitled to the exclusive use of that mark after the patent has expired; for instance, if he impressed on the patented articles a griffin, or some other device; but if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers.

In the present case the appellant's patent was not a Canadian but a United States patent, and the learned trial judge held the fact of the appellant having obtained the United States patent was not relevant to the question regarding Canadian trade mark rights and he declined to give any weight to the fact that the appellant had had the United States patent from 1932 to 1949. In the circumstances, it seems to me that the evidence was relevant. We are dealing here with what is essentially a question of fact, namely, have these coloured bands a functional use or characteristic? Evidence that the appellant so considered its bands when it applied for the United States patent in 1932 is surely some evidence that the bands have in fact a functional use.

It will not, therefore, be necessary to pass upon the contention that the appellant's trade marks reside in colour alone and cannot be the subject of a valid trade mark.

There remains to be dealt with the appellant's passing-off claim.

Section 7(*b*) of the *Trade Marks Act,* 1953, reads:

> 7. No person shall
>
> * * *
>
> (*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another.

The learned trial judge, with respect, correctly stated the law and the burden that was on the appellant when he said, quoting from *J. B. Williams Company v. H. Bronnley & Company*[2]:

[1] (1883), 24 Ch. D. 504 at 521. [2] (1909), 26 R.P.C. 765 at 771.

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What is it necessary for a trader who is plaintiff in a passing off action to establish? It seems to me that in the first place, he must, in order to succeed, establish that he has selected a peculiar—a novel—design as a distinguishing feature of his goods and that his goods are known in the market, and have acquired a reputation in the market by reascn of that distinguishing feature, and that unless he establishes that, the very foundation of his case fails.

The learned trial judge then proceeded to analyze the relevant law. I find myself so completely in accord with his reasons that I adopt them and his conclusion stated by him as follows:

> I have reached the conclusion that the plaintiff has not successfully discharged the burden of establishing that these trade marks distinguish its wares or indicate their common origin. I am also of the opinion that the plaintiff has not established that the manner in which its goods or wares were done up has become associated in the mind of the consumer or purchaser with its goods or wares and the evidence does not show that these marks have been relied upon by the pharmacists, physicians nor the public who consumes its goods as distinguishing them from all cthers.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Smart & Biggar, Ottawa.

Solicitors for the defendant, respondent: Horwitz & Kertzer, Ottawa.

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*Janv. 29, 30
Mars 23

SA MAJESTÉ LA REINE .....APPELANTE;

ET

MARCEL CÔTÉ .....INTIMÉ;

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUEBEC

Droit criminel—Meurtre qualifié—Crime commis à l'occasion d'un vol qualifié—Adresse du juge—Reproche de ne pas avoir soumis un moyen de défense basé sur l'ivresse—Reproche de ne pas avoir fait la distinction entre le meurtre qualifié et le meurtre simple—Tort important ou erreur judiciaire grave—Nouveau procès ordonné par la Cour d'Appel—Code Criminel, 1953-54 (Can.), c. 51, arts. 21(2), 202(a)(i), 202A(2)(b)(i), 592(1)(b)(iii), 598(1)(a).

*CORAM: Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall et Spence.

L'intimé et un nommé Dumas se sont introduits de nuit dans la résidence d'un octogénaire pour le voler. A la faveur d'une obscurité relative, Dumas se dirigea à la chambre où se trouvait une valise dans laquelle ils avaient appris que la victime gardait de l'argent, pendant que l'intimé entrait dans la chambre où couchait le vieillard. Dumas témoigna qu'il entendit un bruit de lutte et qu'il fut appelé par l'intimé. Lorsque Dumas se rendit à cet appel, la victime était debout et résistait alors que l'intimé la retenait contre lui avec une main sur la bouche. Dumas bâillonna le vieillard, lui attacha les mains derrière le dos et lui ligota les pieds. Après quoi, l'intimé coucha la victime sur son lit, et les deux s'emparèrent de la valise et se sauvèrent. Dumas déclara de plus qu'après avoir bâillonné la victime, il sentit sur ses mains quelque chose de liquide et chaud qu'il réalisa une fois dehors être du sang. Au moment de leur départ, le vieillard gémissait à travers son bâillon. Deux jours plus tard, le vieillard fut trouvé gisant près de son lit, horriblement blessé et sans vie, ayant des liens, particulièrement aux pieds et à la main gauche. L'autopsie révéla que la victime avait été sauvagement attaquée et que l'hémorragie et l'asphyxie avaient été la cause conjuguée de la mort.

La preuve de ces faits ainsi que celle des événements qui ont précédé et suivi l'attentat n'a pas été contredite par les témoins produits par la défense. La défense a suggéré au jury la possibilité qu'après le vol d'autres personnes se seraient introduites dans la maison pour commettre l'assaut qui entraîna la mort de la victime. L'intimé ne s'est pas fait entendre comme témoin.

L'intimé a été trouvé coupable de meurtre qualifié. Par une décision majoritaire, la Cour d'Appel infirma le verdict et ordonna un nouveau procès sur l'accusation telle que portée. La Cour d'Appel a retenu deux griefs contre l'adresse du juge: (1) Une défense basée sur l'ivresse aurait dû être soumise aux jurés; (2) le juge aurait par une application non qualifiée de l'art. 21(2) omis de préciser les rôles respectifs de l'intimé et de Dumas pour décider s'il y avait eu meurtre simple ou qualifié. D'où l'appel de la Couronne devant cette Cour en vertu des dispositions de l'art. 598(1)(*a*) du *Code Criminel*.

Arrêt: L'appel doit être maintenu et le verdict des jurés rétabli, les Juges Cartwright, Hall et Spence étant dissidents.

Par la Cour: Aucune preuve de fait ne suggère que la boisson consommée par l'intimé et Dumas les ait rendus incapables de former et exécuter l'intention spécifique ou d'avoir la volonté de causer des lésions corporelles aux fins de faciliter la perpétration du vol ou leur fuite après l'avoir commis. En l'absence de cette preuve, le juge au procès n'avait pas à inviter les jurés à considérer l'ivresse comme moyen de défense. D'ailleurs le procureur de l'accusé n'a même pas soulevé ce moyen devant les jurés.

Le Juge en Chef Taschereau et les Juges Fauteux, Abbott, Martland, Judson et Ritchie: Ne peut être retenue, l'objection que le juge au procès aurait laissé les jurés sous l'impression que même si les blessures mortelles avaient été causées par Dumas seul, sans aucune assistance de l'intimé, ils pouvaient trouver ce dernier coupable de meurtre qualifié. Appliquant les directives que l'on trouve dans *Director of Public Prosecutions v. Beard,* [1920] A.C. 479, à l'effet que les paroles du juge au procès doivent être considérées en regard des faits spéciaux qui sont alors soumis au jury, et considérant la charge comme un tout, ce grief n'est pas bien fondé. L'entraide de l'intimé et de

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Dumas pour assaillir, bâillonner et ligoter la victime était un facteur inséparablement inhérent à la théorie de la Couronne fondée sur la condition dans laquelle fut trouvée la victime et sur le témoignage non contredit de Dumas. Plus d'une fois, le juge au procès a insisté sur l'obligation de la Couronne de prouver que la mort du vieillard avait été causée par des coups donnés par l'intimé et son compagnon. Aussi bien est-il impossible de dire que les jurés ont pu avoir l'impression qu'ils pouvaient trouver l'intimé coupable de meurtre qualifié sans être convaincus hors de tout doute raisonnable qu'il avait, par son propre fait, causé ou aidé à causer les blessures entraînant la mort du vieillard.

Dans les circonstances de cette cause, le juge au procès a validement écarté, comme possible en droit, un verdict de coupable de meurtre simple. Ayant accepté, comme ils en avaient le droit, le témoignage de Dumas sur l'attentat, les jurés étaient inévitablement conduits à accepter que ce qui s'était passé ne pouvait être en fait que l'œuvre des deux agresseurs et que Côté avait, par son propre fait, soit causé ou aidé à causer les blessures, ce qui faisait du meurtre commis un meurtre qualifié.

Les Juges Cartwright, Hall et Spence, *dissidents:* Le juge au procès a erré en laissant les jurés sous l'impression que si les blessures avaient été infligées soit par l'intimé ou soit par Dumas, il importait peu qui des deux les avait infligées, ils pouvaient trouver l'accusé coupable de meurtre qualifié. Dans toutes les parties de la charge invoquées par le procureur de la Couronne comme supprimant de l'esprit des jurés l'effet de cette erreur, le juge attirait l'attention des jurés sur la théorie de la défense à l'effet que le meurtre avait été commis par une tierce personne, après que l'accusé et Dumas aient laissé la victime, peut-être blessée, mais non mourante. Ces parties de la charge n'étaient pas destinées à changer l'impression antérieure qui avait été donnée aux jurés. A l'endroit où se trouvent ces passages, l'esprit des jurés était dirigé sur la question de savoir si les blessures avaient été causées par l'intimé et Dumas ou par une tierce personne. On ne trouve dans la charge aucune directive clairement exprimée à l'effet que les jurés pouvaient trouver l'intimé coupable de meurtre qualifié, en opposition à un meurtre simple, seulement dans le cas où ils étaient satisfaits que l'intimé par son propre fait avait causé ou aidé à causer les blessures qui avaient entraîné la mort.

Les dispositions de l'art. 592(1)(*b*)(iii) du *Code Criminel* ne peuvent être invoquées avec succès dans une cause où les jurés ont été erronément dirigés sur un élément essentiel de la charge qu'ils avaient à juger.

Criminal law—Capital murder—Crime committed during commission of burglary—Trial judge's charge—Whether jury should have been charged as to suggested drunkenness of accused—Whether jury properly instructed as to the distinction between capital and non-capital murder—Whether substantial wrong or miscarriage of justice—New trial ordered by Court of Appeal—Criminal Code, 1953-54 (Can.), c. 51, ss. 21(2), 202(a)(i), 202A(2)(b)(i), 592(1)(b)(iii), 598(1)(a).

The accused and one Dumas broke into the dwelling-house of an elderly man with the intent to steal. Dumas entered the room containing a valise in which they had learned the victim kept his money. At the same time, the accused went into the room where the victim was sleeping. Dumas testified that he heard noises of a struggle and that

the accused called for his help. When Dumas entered that room, the victim was standing and struggling with the accused who was holding him and had a hand on his mouth. Dumas gagged the victim and tied his hands and feet. The accused then laid the victim on his bed and the two companions grabbed the valise and fled. Dumas further declared that after gagging the victim, he felt something liquid and hot on his hands which, when outside, he realized was blood. When they left, the victim was moaning. Two days later the victim was found dead near his bed with his feet and left hand tied. The autopsy revealed that he had been savagely attacked and had died from hemorrhage and asphyxiation.

That evidence and the evidence of other incidents which preceded and followed the crime were not contradicted by any defence witnesses. The defence suggested to the jury that the murder was committed by third persons who later came on the scene. The accused was not heard as a witness.

The accused was found guilty of capital murder. By a majority judgment, the Court of Appeal ordered a new trial on the charge as laid. The Court of Appeal found (1) that the trial judge should have charged the jury as to drunkenness; and (2) that in applying art. 21(2) of the *Code* the trial judge failed to define the respective parts played by the accused and Dumas in order for the jury to decide whether there had been capital or non-capital murder. The Crown appealed to this Court pursuant to s. 598(1)(*a*) of the *Code*.

Held (Cartwright, Hall and Spence JJ. *dissenting*): The appeal should be allowed and the verdict of the jury restored.

Per Curiam: There was no evidence to suggest that the alcoholic liquor consumed by the accused and Dumas prevented them from forming and executing the specific intention or from having the will to cause bodily harm in order to facilitate the burglary or their subsequent escape. In the absence of such evidence, the trial judge did not have to draw to the attention of the jury the defence of drunkenness. Furthermore, defence counsel did not even raise that defence at the trial.

Per Taschereau C.J. and Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The objection that the trial judge had left the jury under the impression that even if the bodily harm which caused the death of the victim was inflicted by Dumas alone, without any assistance from the accused, they could find the latter guilty of capital murder, could not be sustained. Applying the directives found in *Director of Public Prosecutions v. Beard,* [1920] A.C. 479, that the language of the trial judge must always be considered with regard to the special facts then before the jury, and considering the charge as a whole, this objection was not founded. The mutual aid of the accused and Dumas to assault, gag, and bind the victim was a factor unseparately inherent in the Crown's theory based as it was on the state in which the victim was found and on the uncontradicted testimony of Dumas. More than once, the trial judge insisted on the obligation of the Crown to establish that the death of the victim had been caused by the injuries inflicted by the accused and Dumas. Hence it is impossible to say that the jury could have had the impression that they could find the accused guilty of capital murder without being convinced beyond a reasonable doubt that he had, by his own act, caused or assisted in causing the bodily harm from which death ensued.

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In the circumstances of this case, the trial judge rightly omitted to mention, as possible in law, a verdict of guilty of non-capital murder. Having accepted, as they had the right to do, the testimony of Dumas, the jury were inevitably driven to accept that what had happened was the result of the deeds of both aggressors and that Côté had, by his own act, either caused or assisted in causing the injuries, which made the murder a capital murder.

Per Cartwright, Hall and Spence JJ., *dissenting:* The trial judge erred in leaving the jury with the impression that if the injuries which proved fatal were inflicted by either the respondent or Dumas it was of no importance by which of the two they were inflicted, and they could find the accused guilty of capital murder. In all the passages of the charge referred to by counsel for the Crown, as removing from the minds of the jury the effect of this error, the attention of the jury was being directed to the theory of the defence that the murder was committed by a third person after the accused and Dumas had left the victim, perhaps injured, but not dying. These passages were not intended to alter the previous impression given to the jury. At the stage where these passages occurred, the minds of the jury were being directed to the question whether the fatal injuries were caused by the accused and Dumas or by a third person. Nowhere in the charge was there a clear direction to the jury that they could find the respondent guilty of capital murder, as distinguished from non-capital murder, only if they were satisfied that the accused by his own act had caused or assisted in causing the injuries from which the death of the victim ensued.

The provisions of s. 592(1)(*b*)(iii) of *The Criminal Code* could not be successfully invoked in a case in which the jury have been misdirected as to an essential element of the charge which they were trying.

APPEL d'un jugement de la Cour du Banc de la Reine, Province de Québec[1], ordonnant un nouveau procès sur une charge de meurtre qualifié. Appel maintenu, les Juges Cartwright, Hall et Spence dissidents.

Laurent Trottier, C.R., et *Yvan Mignault,* pour l'appelante.

Gilles Bélanger, pour l'intimé.

Le jugement du Juge en chef Taschereau et des Juges Fauteux, Abbott, Martland, Judson et Ritchie fut rendu par

LE JUGE FAUTEUX:—L'intimé, Marcel Côté, a été accusé et trouvé coupable d'avoir, dans la nuit du 25 au 26 octobre 1961, à St-Nicéphore, dans la province de Québec, causé la mort de Philippe Raymond, à l'occasion et aux fins de la perpétration d'un vol qualifié, commettant, dans les circonstances, l'offense de meurtre qualifié décrite à l'art. 202A(2)(*b*)(i) du *Code Criminel.*

[1] [1963] B.R. 895.

Par une décision majoritaire, la Cour d'Appel[1] infirma ce verdict et ordonna un nouveau procès sur l'accusation telle que portée.

Cette divergence de vues en Cour d'Appel porte sur les instructions données aux jurés par le Juge au procès. Deux des Juges majoritaires, M. le Juge en chef et M. le Juge Hyde, lui font le reproche d'avoir, par une application non qualifiée de l'art. 21(2) du *Code Criminel*, omis de préciser les rôles respectifs de Côté et Dumas, son complice, pour décider s'il y avait eu meurtre simple ou qualifié. M. le Juge Hyde est de plus d'avis, avec M. le Juge Casey également de la majorité, qu'une défense basée sur l'ivresse aurait dû être soumise aux jurés. Quant aux Juges minoritaires, M. le Juge Choquette déclare que les faits et questions en litige sont exposés de façon complète par M. le Juge Rivard et que, d'accord avec lui, il est d'avis que (i), sur le fait, le verdict ne saurait être infirmé pour le motif qu'il est déraisonnable ou non supporté par la preuve et (ii), sur le droit, aucun tort important, aucune erreur judiciaire grave ne s'est produite; M. le Juge Rivard écarte comme non fondés tous les griefs soulevés à l'adresse du Juge et ajoute qu'après avoir fait un examen du dossier pour y déceler la présence d'erreurs ou d'illégalités préjudiciables, il n'en a trouvé aucune.

Se prévalant des dispositions de l'art. 598(1)(*a*), l'appelant en appelle de cette décision majoritaire.

Sur les faits, M. le Juge Rivard est le seul de tous les Juges à relater la preuve. Le récit qu'il donne sur le fait même de l'attentat, ainsi que des événements pertinents qui l'ont précédé et suivi, n'est pas contesté. Sur le fait même de l'attentat commis dans la nuit du 25 au 26 octobre 1961, en la résidence de la victime, Dumas est le seul à témoigner. Voici la substance de son témoignage: Lui et Côté, sachant que Philippe Raymond, un octogénaire vivant seul dans sa maison, y gardait de l'argent dans une valise, se sont introduits de nuit dans sa résidence pour le voler. La disposition des lieux leur était connue. A la faveur d'une obscurité relative, Dumas se dirigea à la chambre où se trouvait la valise; il heurta une chaise près de la valise et entendit alors du bruit dans la chambre opposée, où couchait le vieillard. Côté entra dans cette chambre. Alors que, dans l'autre pièce, Dumas tentait d'ouvrir la valise avec un couteau, il entendit «un bruit de lutte». Le vieillard appela à l'aide en criant à

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deux ou trois reprises: «Omer». D'autre part, Côté cria à Dumas: «Viens ici». Dumas se rendit à la chambre à coucher; la victime était debout et résistait alors que Côté la retenait contre lui et avait une main appuyée sur sa bouche. Côté ayant dit à Dumas: «Il faut l'attacher», celui-ci se fit des liens en déchirant un des vêtements portés par la victime, une taie d'oreiller et un coussin qu'il alla chercher sur un sofa dans la cuisine. Puis, il bâillonna le vieillard, lui attacha les mains derrière le dos et lui ligota les pieds. Après quoi, Côté coucha la victime sur son lit, et les deux s'emparèrent de la valise et déguerpirent. Dumas déclare de plus qu'après avoir bâillonné la victime, il sentit sur ses mains quelque chose de liquide et chaud, qu'une fois à l'extérieur, il réalisa être du sang. Au moment de leur départ, le vieillard gémissait à travers son bâillon.

Deux jours plus tard, le 28 octobre 1961, Dolorès Raymond, nièce de la victime, s'étant rendue à la demeure de son oncle, le trouva gisant près de son lit, horriblement blessé et sans vie, ayant des liens, particulièrement aux pieds et à la main gauche. Elle alerta les autorités policières qui, arrivées sur les lieux, constatèrent la mort de Raymond et la disparition de la valise. L'autopsie révéla que Raymond avait été sauvagement attaqué; outre de nombreuses éraflures, tous les os de la face, ou à peu près, étaient fracturés en plusieurs morceaux de même que plusieurs côtes de chaque côté du thorax. La trachée, les bronches et l'estomac étaient remplis de sang. Le pathologiste en conclut que l'hémorragie et l'asphyxie avaient été la cause conjuguée de la mort.

A cette preuve sur les détails du fait de l'attentat s'ajoute celle des événements qui l'ont précédé et suivi, dont, particulièrement, les suivants:— Bien avant le mois d'octobre, Côté avait été informé par un nommé Gauthier du fait que la victime gardait plusieurs milliers de dollars dans une valise en sa résidence; pour cette information, Côté promit à Gauthier une commission de dix pour cent sur le produit du vol envisagé, ainsi qu'en a témoigné Denis McMahon, garçon de table de l'hôtel Normandie, qui entendit la conversation entre Côté et Gauthier sur le sujet; le soir du crime, Dumas, accompagné de Côté, loua d'Yvan Gagnon, à Granby, l'automobile dans laquelle ils se rendirent de cet endroit à la résidence de Raymond, à St-Nicéphore; avant leur départ, comme durant les quelques arrêts faits au cours

de ce voyage de plusieurs milles, des boissons alcooliques furent consommées; en cours de route, Dumas revêtit des vêtements trouvés dans l'automobile de Gagnon et que celui-ci avait oublié d'enlever; arrivés à St-Nicéphore, ils stationnèrent la voiture à quelque distance de la maison de Raymond où ils entrèrent après avoir enjambé une clôture. Dumas témoigne qu'après l'attentat, la valise vidée de l'argent ainsi que les vêtements qu'il avait revêtus furent abandonnés à divers endroits le long d'un chemin de terre pris pour le retour à Granby; après la découverte du crime, on retouva ces effets aux différents endroits indiqués par Dumas. Sur les vêtements, identifiés par Gagnon, comme sur la porte avant droite de son automobile, on trouva du sang humain; le 26 octobre, Côté visita le docteur Dubé pour traitement d'un bleu et d'un œdème à la main droite; enfin, le 26 octobre également, Côté paya, tel que convenu, une commission à Gauthier.

Aucun des faits ci-dessus rapportés par les témoins produits par la poursuite n'a été contredit par les témoins produits par la défense. La preuve offerte par ceux-ci avait pour objet, suivant la déclaration faite aux jurés par l'avocat de l'accusé avant de procéder à la leur faire entendre, de tendre à démontrer la possibilité d'un doute raisonnable en faveur de l'accusé. Bref, cette preuve rapporte ce qui suit. D'une part, une chicane intervenue en juillet 1960 entre le vieillard et son neveu, Roland Raymond, et, d'autre part, l'opinion d'un médecin sur un certain «état psychique et psychologique» de l'accusé. Par le premier de ces faits, la défense entendait suggérer aux jurés la possibilité qu'après le vol, ce neveu ou d'autres personnes soient—par une étrange coïncidence—entrés dans la maison, entre le 26 et le 28 octobre, pour commettre sur la personne du vieillard l'assaut qui entraîna sa mort. Par l'opinion du médecin, on voulut prouver que Côté était facilement influençable. Cette preuve offerte par la défense a été soumise par le Juge aux jurés qui, manifestement, ont refusé de l'accepter ou d'y donner suite. Enfin, nonobstant la preuve accablante faite contre lui, l'accusé lui-même se s'est pas fait entendre comme témoin.

Différant, pour l'insant, la considération des deux seuls griefs retenus en appel sur l'adresse du Juge, notons qu'après avoir instruit les jurés que Dumas et Gauthier étaient des complices, le Juge a plus d'une fois insisté pour les prévenir

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du danger qu'il y avait d'accepter leurs témoignages et surtout celui de Dumas. Il leur a de plus expliqué les raisons de ce danger. Dans la dernière partie de son adresse il a précisé les verdicts qui pouvaient être rendus. Il leur a dit qu'à moins d'être convaincus hors de tout doute raisonnable de la culpabilité de l'accusé, ils devaient l'acquitter. S'il a, à mon avis, vu l'accusation, erronément indiqué, comme possible en droit, un verdict de coupable de vol qualifié—ce dont l'accusé ne saurait se plaindre—, il a validement, dans les circonstances de cette cause et pour les raisons qui suivent, écarté, comme possible en droit, un verdict de coupable de meurtre simple. Comme l'a déclaré le procureur de l'accusé à l'audition de cet appel, la preuve des faits antérieurs et subséquents à l'attentat ne permet pas, à elle seule et sans le témoignage de Dumas, de savoir ce qui s'est passé entre la victime et celui ou ceux qui l'ont assaillie, même si, dans cette preuve, on trouve par ailleurs une corroboration du témoignage de Dumas. De toute évidence, les jurés, pour pouvoir, comme ils l'ont fait, trouver l'accusé coupable, ont accepté, comme ils en avaient le droit, le témoignage de Dumas sur le fait circonstancié de l'attentat. Suivant ce témoignage:— Côté et Dumas étaient les agresseurs de la victime; une bataille entre celle-ci et Côté était déjà engagée quand l'assistance de Dumas fut requise par Côté; étant alors intervenu pour aider Côté, Dumas se procura les liens dont il se servit pour bâillonner et ligoter le vieillard qui, encore debout, résistait et criait à l'aide pendant que Côté le retenait. Ces mêmes liens on les trouva par la suite attachés aux pieds et à la main gauche de la victime. Les jurés pouvaient-ils raisonnablement concevoir que, pendant que l'un des agresseurs se procurait les liens, qu'il bâillonnait et ligotait les mains et les pieds de la victime, l'autre demeurait inactif et n'apportait aucune participation en l'affaire. Il reste que les deux se sont entraidés dans cet assaut pour maîtriser, blesser, bâillonner, garrotter et abandonner, dans cette condition, le vieillard seul dans la nuit, le tout à l'occasion et aux fins d'un vol, et que l'un comme l'autre a par son fait soit causé ou, à tout le moins, aidé l'autre à causer les blessures, l'hémorragie, l'asphyxie entraînant la mort. Dans les circonstances, l'acceptation par les jurés du témoignage de Dumas ne pouvait justifier et ne pouvait autoriser le Juge à suggérer, comme possible en droit, un verdict de meurtre simple, mais uniquement un

verdict de meurtre qualifié, tel que défini aux dispositions pertinentes des arts. 202, 202A et 288 du *Code Criminel*. Les jurés ne pouvaient rendre un verdict de meurtre simple sous l'art. 202 sans accepter le témoignage de Dumas où seulement ils pouvaient trouver les éléments de cette offense. De là, ils étaient inévitablement conduits à accepter que l'assaut, l'application de bâillon et de liens, et l'abandon du vieillard, ne pouvaient être en fait que l'œuvre des deux agresseurs et que Côté avait, par son propre fait, soit causé ou aidé à causer les blessures entraînant la mort, ce qui faisait du meurtre commis un meurtre qualifié, en vertu de l'art. 202A.

En Cour d'Appel[1], on a reproché au Juge d'avoir, dans son adresse aux jurés, omis (i) de leur soumettre un moyen de défense basé sur l'ivresse et (ii) de les inviter à se préoccuper des rôles respectifs de Côté et Dumas dans l'assaut sur le vieillard pour décider s'il y avait eu meurtre simple ou qualifié. M. le Juge Hyde est le seul à retenir ces deux reproches; le Juge en chef retient le second et M. le Juge Casey, le premier.

Premier grief: Côté et Dumas ont quitté Granby vers 8.30 heures et sont arrivés à St-Nicéphore environ quatre heures plus tard. Peu de temps avant leur départ de Granby, comme lors d'un arrêt fait à Roxton Falls et un autre à Actonvale au cours de ce trajet de plusieurs milles, on a pris quelques consommations de boissons alcooliques. Loin d'indiquer qu'il en soit résulté chez Côté ou Dumas un état d'ébriété susceptible de supporter un moyen de défense, la preuve manifeste, au contraire, qu'ils ont poursuivi et exécuté leur projet nonobstant la résistance prévisible qu'ils ont rencontrée, qu'après s'être emparés de l'argent, ils se sont débarrassés de la valise et des vêtements en abandonnant ces effets à différents endroits le long du chemin de terre emprunté pour le retour et qu'ils ont retourné l'automobile de Gagnon, à Granby, à l'heure dont ils avaient convenu avec lui au début de la soirée. Aucune preuve de fait ne suggère que la boisson consommée les ait rendus incapables de former et exécuter l'intention spécifique ou d'avoir la volonté de causer des lésions corporelles aux fins de faciliter la perpétration du vol ou leur fuite après l'avoir commis. En l'absence de cette preuve, le Juge au procès n'avait pas à inviter les jurés à considérer l'ivresse comme moyen de

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défense. Le procureur de l'accusé n'a même pas soulevé ce moyen devant les jurés. A une question posée par un des membres de cette Cour, il a candidement déclaré qu'il s'était délibérément abstenu de ce faire pour pouvoir soulever ce moyen en Cour d'Appel. C'est là une technique dont la justice ne saurait s'inspirer.

Deuxième grief: Le Juge au procès, dit-on, aurait laissé les jurés sous l'impression que même si les blessures entraînant la mort de Raymond avaient été causées par Dumas seul, sans aucune assistance de Côté, ils pouvaient trouver ce dernier coupable de meurtre qualifié. Les parties de la charge invoquées au soutien de ce reproche sont reproduites aux raisons de notre collègue M. le Juge Cartwright. Certes, ainsi isolée du contexte entier de la charge et du contexte de la cause soumise en l'espèce aux jurés, et considérée *in abstracto* comme proposition générale de droit, la teneur de certains de ces extraits ne peut être acceptée comme conforme à la loi. Dans la critique adéquate d'une charge aux jurés, il importe cependant, comme l'a noté M. le Juge Rivard dans ses raisons de jugement, de retenir et donner effet aux directives suivantes de Lord Birkenhead dans *Director of Public Prosecutions v. Beard*[1]:

> In examining the language used in these and later cases it is extremely necessary to bear in mind that the judge when directing the jury with reference to the facts and circumstances of a particular case is not writing in abstracto a treatise upon the criminal law, and that his words must always be considered with regard to the special facts then before the jury.

Appliquant ces directives à l'espèce et considérant la charge comme un tout en rattachant la somme des instructions données par le Juge aux jurés aux faits et circonstances placés devant eux, tant par la poursuite que par la défense, et à la substance véritable des questions en découlant, je ne puis, en tout respect pour les tenants de l'opinion contraire, conclure au bien-fondé de ce grief. L'entraide, en fait, de Côté et Dumas pour assaillir, bâillonner, ligoter la victime abandonnée seule dans la nuit, était un facteur inséparablement inhérent à la théorie de la Couronne fondée sur la condition dans laquelle fut trouvée la victime le 28 octobre et sur le témoignage non contredit de Dumas. Plus d'une fois après avoir dit ce qu'on lui reproche, le Juge au procès a insisté sur l'obligation de la Couronne de prouver que la

[1] [1920] A.C. 479 at 495-96, 89 L.J.K.B. 437.

mort de Raymond avait été causée par des coups donnés par Côté ou par des coups donnés par Côté et son compagnon. Aussi bien m'est-il impossible de dire que les jurés aient pu avoir l'impression qu'il était en leur pouvoir de trouver Côté coupable de meurtre qualifié sans être convaincus hors de tout doute raisonnable qu'il avait, par son propre fait, causé ou aidé à causer les blessures entraînant la mort de Raymond.

A l'audition, bien qu'invité à ce faire s'il y avait lieu, le procureur de l'intimé ne formula aucun grief additionnel pour supporter le jugement majoritaire de la Cour du banc de la reine. De plus, alors que la cause était en délibéré, la Cour lui permit, à sa demande, de fournir un factum supplémentaire, dans lequel, cependant, je n'ai trouvé aucun motif de modifier l'opinion ci-dessus exprimée.

Dans les circonstances, je maintiendrais l'appel et rétablirais le verdict des jurés.

The judgment of Cartwright, Hall and Spence JJ. was delivered by

CARTWRIGHT J. (*dissenting*):— The relevant facts out of which this appeal arises and the manner in which the matter was dealt with in the Court of Queen's Bench (Appeal Side)[1] are set out in the reasons of my brother Fauteux, which I have had the advantage of reading.

For the reasons given by my brother Fauteux I agree with his conclusion that the learned trial judge did not err in omitting to charge the jury in regard to the effect in law of the suggested drunkenness of the respondent.

The other ground on which the Court of Queen's Bench held that the conviction of the respondent should be quashed and a new trial directed is set out in the reasons of Tremblay C.J. P.Q. I find myself so fully in accord with the reasons of the learned Chief Justice that I would be content simply to adopt them. However, in view of the differences of opinion in the Court of Queen's Bench and in this Court I shall state my reasons, as briefly as possible.

The theory of the Crown was that the respondent was guilty of capital murder by the combined effect of s. 202(*a*)(i) and s. 202A(2)(*b*)(i) of the *Criminal Code*, in that Côté and Dumas acting together had decided to break into the dwelling-house of Philippe Raymond by night and

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to steal the money which they had learned was in a valise in the victim's house, that for the purpose of facilitating the commission of this offence and meaning to cause bodily harm to the victim they had inflicted the injuries from which his death ensued, and that Côté by his own act caused or assisted Dumas in causing the bodily harm from which the death ensued.

The error in the charge of the learned trial judge which Tremblay C.J. found to be fatal to the validity of the conviction was that the jury were given to understand that if they were satisfied beyond a reasonable doubt that Dumas and Côté had formed the intention in common to carry out the burglary mentioned above and to assist each other therein and that Côté knew or ought to have known that the infliction of bodily harm on the victim would be a probable consequence of carrying out that common purpose then Côté would be guilty of capital murder even if the bodily harm which caused the death was inflicted by Dumas alone and Côté neither inflicted it nor aided in its infliction.

That this was the effect of the charge of the learned trial judge appears from the following passages:

> Je dois vous lire à ce sujet, ce que dit l'article 21 au paragraphe (deux) du Code Criminel: «Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale», le vol est une fin illégale «et de s'y entraider et que l'une d'entre elles commet une infraction» en l'occurrence c'est un assaut avec violence, «en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpétration de l'infraction, chacune est partie à cette infraction».
>
> Quand on va commettre un vol dans une résidence privée, évidemment on peut bien espérer le faire sans que la personne ou les personnes qui sont là ne se réveillent, c'est évident, ça, seulement, je pense bien qu'on peut dire que c'est toujours possible et même probable que quelqu'un se réveille et alors, évidemment il y a deux choses qu'on peut faire, que peut faire le voleur, déguerpir au plus vite s'il a fini son ouvrage ou bien prendre les moyens pour que la personne ou les personnes qui sont là ne soient pas des obstacles.
>
> C'est à vous messieurs, de dire si l'assaut commis sur le vieillard Raymond était une conséquence probable, si l'un comme l'autre de ceux qui y sont allés pouvait prévoir la probabilité qu'ils auraient à maîtriser le vieillard qui pouvait être réveillé à leur arrivée ou qui pouvait se réveiller pendant qu'ils étaient dans la maison.
>
> Et, il n'y a pas de problème dans le fait qu'ils soient deux. S'ils étaient deux et que vous en venez à la conclusion qu'ils ont fait ce qu'on leur reproche, que ça ait été fait par Côté ou que ça ait été fait par Dumas quand ils étaient ensemble, ça n'a aucune importance.

Dumas, au point de vue du Code Criminel serait responsable de tout ce qu'a pu faire Côté, et Côté serait responsable de tout ce qu'a pu faire Dumas.

Vous savez c'est la consécration du vieux dicton: celui qui tient le sac est aussi coupable que celui qui commet le vol.

* * *

Vous avez le droit d'asseoir votre verdict uniquement sur la preuve directe faite par Dumas, du moment que vous êtes convaincus qu'il a dit la vérité quand il nous dit qu'ils sont allés chez Raymond ce soir-là, qu'ils ont volé, qu'il y a eu des coups de donnés évidemment, Dumas nous dit qu'il y en a eu plus de donnés par l'accusé que par lui-même, c'est un détail, ça, mais qu'il y a eu des coups de donnés.

* * *

En regard de la preuve de circonstances, sans tenir compte de la preuve directe, si cette preuve vous satisfait que Côté et Dumas sont allés chez Raymond, y ont commis un vol et au cours du vol que l'un ou l'autre ou les deux ensemble, ont blessé le vieillard avec la conséquence que la mort a été le résultat des coups portés, et si cette preuve est telle que dans vos esprits, elle exclut toute possibilité raisonnable que d'autres ont pu faire le coup.

Alors vous pouvez rendre un verdict contre l'accusé.

Et, combien de verdicts messieurs pouvez-vous rendre.

L'Article 202A, je vous l'ai lu, dit:— «Que le meurtre est dit qualifié» lorsqu'il tombe, à l'égard de toute personne, lorsqu'il tombe sous le coup de l'Article 202.» L'Article, sous paragraphe (3) dit: «Tout meurtre autre qu'un meurtre qualifié est un meurtre non qualifié». Mais le premier alinéa du 202A nous parle du meurtre qualifié: «celui qui est projeté et commis de propos délibéré.»

Ce meurtre, ce n'est pas celui que vous avez à juger. Si c'était celui-là, je vous dirais que vous pouvez rendre un verdict de meurtre non qualifié, dans le cas par exemple où vous ne seriez pas satisfaits que l'accusé aurait eu une préméditation suffisante pour constituer un meurtre qualifié.

Seulement, comme il s'agit ici, d'après la preuve apportée par la Couronne, d'un meurtre non qualifié qui tombe sous l'Article 202 et qu'il suffit qu'il y ait eu blessures et mort en résultant le tout accompagné d'un vol qualifié pour que le meurtre soit le meurtre qualifié, je crois qu'il n'y a pas de place ici pour un verdict de meurtre ordinaire.

For the appellant it is said that the charge must, of course, be read as a whole and that it contains other passages which would remove from the minds of the jury the effect of the error, if error there was, in the passages which I have just quoted.

The following portions of the charge are referred to and particular emphasis is laid upon the phrases which I have italicized:

Par ailleurs messieurs, je dois tenir compte, je dois dire que j'y ai pensé pas mal, je dois tenir compte de la théorie prouvée par la défense, théorie qui serait celle-ci et sur laquelle évidemment je vous l'ai dit la défense a droit au bénéfice du doute raisonnable.

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La Couronne est obligée de prouver que la mort est le résultat *des coups portés par l'accusé et son compagnon.* Là-dessus, vous avez le médecin, et vous avez évidemment le fait que le vieux était un vieillard qui était tout seul, qui vivait solitaire, il n'y a pas de toute, qu'il a été attaché, ligoté enfin.

La suggestion que l'on vous fait, basée sur une certaine preuve du moins, c'est qu'on aurait laissé le vieillard bien vivant, non pas en danger de mort et que ça serait une autre personne qui serait venue le tuer, disons le mot . . .

Là-dessus, si vous avez un doute raisonnable, après avoir bien pesé la preuve et que vous pensez qu'il y a place pour un doute raisonnable là-dedans, c'est votre affaire, et bien, je crois qu'il y aurait lieu, dans ce cas-là seulement, j'insiste, dans ce cas-là seulement, la Couronne n'aurait pas satisfait vos esprits hors de tout doute raisonnable que *la mort à résulté des coups donnés par l'accusé.*

Et il faudrait que vous en veniez à la conclusion qu'il y a quelque chose dans la théorie de la défense, qu'un autre serait venu le finir.

Si vous êtes de l'opinion que le vieillard est resté seul dans la maison et que personne n'est allé lui donner d'autres coups pour le tuer et qu'il est mort soit au bout d'une heure, ou deux heures, ou d'une journée, ça n'a pas d'importance, des suites, quand bien même qu'il serait mort de faim, parce qu'il était attaché, ou de la perte de son sang, *des suites des coups donnés par l'accusé,* messieurs, ça c'est du meurtre.

* * *

Mais si vous entretenez un doute sur la théorie apportée par la défense, un doute raisonnable que quelqu'un est allé après, alors que le vieillard n'était pas en danger de mort, qu'il avait été laissé blessé, évidemment, mais rien de grave, qu'il ne serait pas mort, et que cette autre personne est venue le finir, bien alors là, il faudrait en conclure que la mort n'est pas résultée *des coups donnés par l'accusé,* dans le cas présent, mais que la mort est résultée des coups donnés par une tierce personne.

* * *

Si vous avez un doute quant à la suggestion apportée par la défense, et vous pouvez en tenir compte de cette suggestion-là en autant que dans la preuve vous trouvez des éléments pour vous baser, alors si vous avez un doute là-dessus, ce serait que la Couronne n'a pas prouvé à votre satisfaction que la mort est le résultat *des coups donnés par l'accusé* et dans ce cas-là, il resterait quoi? Il resterait le fait qu'on est allé voler le vieillard qu'on l'a frappé mais que possiblement ce sont d'autres qui sont allés le finir.

Si c'est là, votre sentiment, messieurs, vous avez le droit de rapporter un verdict de vol qualifié.

* * *

Coupable de vol qualifié ce serait si vous n'êtes pas satisfaits hors de tout doute raisonnable que la mort est le résultat . . . mais là-dessus par exemple j'ai bien dit si vous êtes convaincus hors de tout doute raisonnable qu'aucun étranger n'est intervenu *après les coups portés par l'accusé et son compagnon,* pour finir le vieillard. . . .

(The suggestion in the two last quoted passages that the respondent could be convicted of robbery is wrong in law, being contrary to the provisions of s. 569(2) of the *Criminal*

Code, but this error is not relevant to the question now under discussion.)

I am unable to accept this argument of the appellant. In all these passages the attention of the jury is being directed to the theory of the defence that the murder was committed by third persons who came on the scene after Côté and Dumas had left the victim, perhaps injured, but not dying.

I am not satisfied that these portions of the charge would alter the impression previously given to the jury that if the injuries which proved fatal were inflicted by either Côte or Dumas it was of no importance by which of the two they were inflicted. As I read the charge, they were not intended to have this effect; at this stage of the charge, the minds of the jury were being directed to the question whether the fatal injuries were caused (i) as the Crown submitted, by Côté and Dumas or (ii) as the defence suggested, by third persons.

It was in the part of his charge dealing with the theory of the defence that the learned trial judge said:

> Si vous croyez que personne n'est intervenu, je ne crois pas qu'il y ait de place pour un verdict de meurtre ordinaire parce que l'intention n'a rien à faire dans ça.

Nowhere in the charge was there a clear direction to the jury that they could find the respondent guilty of capital murder, as distinguished from non-capital murder, only if they were satisfied beyond a reasonable doubt that he, Côté, by his own act either caused or assisted in causing the injuries from which the death of the victim ensued. This was, in my opinion, a fatal omission.

On the question whether, notwithstanding the errors in the charge to the jury, it can be affirmed that no substantial wrong or miscarriage of justice occurred I agree with what was said by Tremblay C.J. The provisions of s. 592(1)(*b*)(iii) of the *Criminal Code* cannot, in my opinion, be successfully invoked in a case in which the jury have been misdirected as to an essential element of the charge which they are trying. To hold otherwise would be to substitute, in a capital case, the decision of an appellate Court for the verdict of a properly instructed jury.

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Cartwright J.

For the reasons given by Tremblay C.J. and those set out above, I would dismiss the appeal.

Appel maintenu et verdict des jurés retabli, les Juges CARTWRIGHT, HALL *et* SPENCE *étant dissidents.*

Procureur de l'appelante: L. Trottier, Victoriaville.

Procureur de l'intimé: G. Bélanger, Granby.

MONARCH TIMBER EXPORTERS LTD., McCORKLE BROTHERS LOGGING LTD., MENLO CONSTRUCTION CO. LTD., RUE CREEK SERVICE CO. LTD. (*Plaintiffs*) .....APPELLANTS;

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*Feb. 10, 11
Mar. 23

AND

IAN H. BELL, THE CANADA TRUST COMPANY, MacMILLAN, BLOEDEL & POWELL RIVER INDUSTRIES LTD. (*Defendants*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Breach of loan agreement—Notice of default sent by lender to borrower—Appointment of receiver—Validity of notice.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Munroe J. dismissing the appellants' action for a declaration that the appointment of a receiver of their property was void. Appeal dismissed.

A. W. Johnson, for the plaintiffs, appellants.

J. J. Robinette, Q.C., and *C. W. Brazier, Q.C.,* for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from the unanimous judgment of the Court of Appeal for British Columbia[1], dismissing the appellants' appeal from the judgment given at the trial in favour of the respondents.

In my opinion this appeal fails. I agree with the reasons given by Tysoe J.A., who delivered the judgment of the Court of Appeal, in finding that the defaults alleged by the respondent, MacMillan, Bloedel & Powell River Industries Ltd., in paragraphs 1 and 2 of its notice of default dated May 16, 1961, addressed to the appellants, in respect of the agreement dated September 17, 1957, had been successfully established.

It was conceded in argument by counsel for the appellants, and I agree, that the contention of counsel for the

[1] (1964), 41 D.L.R. (2d) 535.

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

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MONARCH TIMBER EXPORTERS LTD. *et al.* v. BELL *et al.*

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respondents, that the notice of default was valid if any one or more of the defaults alleged in it was successfully established, is sound. This being so, it is unnecessary to determine whether or not there had been defaults as alleged in paragraphs 3 and 4 of the notice.

In my opinion, therefore, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiffs, appellants: A. W. Johnson, Vancouver.

Solicitors for the defendants, respondents: Davis, Campbell, Brazier & McLorg, Vancouver.

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*May 15 and 17

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Mar. 23

RALPH SWIFT WIDRIG (*Plaintiff*) .....APPELLANT;

AND

SHIRLEY MAE STRAZER and LLOYD W. GARDINER, the Public Trustee of the Province of Alberta, Executors of the Estate of Richard R. Strazer, deceased, and JOHN W. D. BUCHANAN (*Defendants*) .....RESPONDENTS;

AND

SHIRLEY MAE STRAZER, LLOYD W. GARDINER, HAROLD KOMISH and B.C. YUKON AIR SERVICE LIMITED (*Defendants*)

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Executors and administrators—Direction in will to sell testator's shares in company for cash and to first offer them to person or persons holding other shares in company—Whether right of first refusal given to only other shareholder—Whether contract to sell to another party binding.

Judgments and orders—Alternative remedies—Judgment not entered—Jurisdiction of trial judge to recall original judgment and substitute another.

Damages—No interference by Supreme Court with amount allowed by Court of appeal unless error of principle on part of latter.

A clause in a testator's will directed his trustees to sell his shares (which constituted 49 per cent of the issued shares) in an air service company

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Hall JJ.

"for cash at any price which they in their uncontrolled discretion deem reasonable" and further directed them "to first offer my shares . . . to the person or persons holding other shares in the company at my death, with such person or persons to have a reasonable and just opportunity in which to accept or reject the offer to purchase my said shares." The respondents S and G were the executors named in the will and the respondent B, who held 2 per cent of the issued shares as trustee for the testator, was the solicitor of the estate. One K held the remaining 49 per cent of the issued share capital. K made offers for the testator's shares which were refused by the executors. After rejecting what was specified by K as his final offer, the executors and B entered into an agreement with the appellant W to sell the shares to him. K's solicitors, acting on K's behalf, then sent a letter to the executors which read in part ". . . exercising our right of first refusal . . . we hereby agree to match the best offer that you are proposing to accept . . ." As the result of an action instituted by K, an interim injunction was granted restraining the estate from offering for sale, disposing of or otherwise dealing with the shares. B and the executors thereupon proceeded to sell the shares to K.

On hearing that B and the executors were not going to complete the sale of the shares to him, W commenced an action claiming specific performance, damages for breach of contract and costs. The trial judge gave judgment for specific performance, damages in the sum of $6,000 and costs. However, the formal judgment was not entered. W applied to the trial judge to reopen the case to substitute a judgment for damages and not for specific performance on the grounds that a decree for specific performance was no longer an adequate remedy. The trial judge directed that his original judgment be reconsidered and, following argument by counsel, gave judgment against the respondents as executors of the estate and also against the said respondents personally for damages in the sum of $40,000. On appeal, the Court of Appeal sustained the judgment against the respondents as executors but reduced the damages to $12,000. The appeal was allowed insofar as judgment had been given against the respondents personally.

W appealed to this Court to have restored the award of $40,000 damages given him by the trial judge. The respondents cross-appealed to have the action dismissed or alternatively to have the damages awarded to the appellant by the Court of Appeal further reduced.

Held: The appeal should be allowed and the trial judgment restored except insofar as it directed that the appellant recover damages and costs from S and G in their personal capacities. The cross-appeal should be dismissed.

The Court agreed with the Court of Appeal in rejecting the respondents' contention that the trial judge had no jurisdiction to reopen the trial and to give the judgment for damages on the grounds that the appellant had elected to claim specific performance, and, having been given judgment for specific performance, he was bound thereby. *United Australia, Ld. v. Barclays Bank, Ld.*, [1941] A.C. 1; *Dobson v. Winton and Robbins Ltd.*, [1959] S.C.R. 775, followed.

The clause in the will directing the executors to *first offer* the shares to the person or persons holding other shares in the company did not give K a right of first refusal. He was the only person who, in fact, qualified as a person holding other shares, but there might well have been two or more such other persons for the clause specifically said "to the person or persons". A right of first refusal could not be given to two or more

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such persons, and was not, in fact, given to K. There was no doubt as to the power of the executors to sell to the appellant after they had duly considered and rejected K's offer expressly stated by him to be his final offer. An additional ground upon which the executors were precluded from asserting that they were bound to accept K's offer was the fact that the said offer was not a cash offer. The will had specifically directed the executors to sell for cash. Accordingly, as held by the trial judge and the Court of Appeal, there was a binding contract to sell the shares to the appellant.

As to the quantum of damages, this Court would not interfere with an amount allowed for damages by the Court of last resort in a province unless there was error in principle on the part of the Court of Appeal in reducing the amount of damages. In this case there were errors of principle on the part of the Court of Appeal in reducing the amount of damages. Having regard to all the circumstances and the matters which the trial judge took into account in arriving at the amount of $40,000, it could not be said that in assessing the damages the trial judge applied a wrong principle of law or that the amount was so high as to be a wholly erroneous estimate of the damage. *Nance v. British Columbia Electric Railway Company Ld.*, [1951] A.C. 601; *Lang and Joseph v. Pollard and Murphy*, [1957] S.C.R. 858, applied.

APPEAL by plaintiff and cross-appeal by defendants from a judgment of the Supreme Court of Alberta, Appellate Division[1], sustaining a judgment against the defendants as executors but reducing the amount of damages and allowing an appeal from judgment against the defendants personally. Appeal allowed and cross-appeal dismissed.

W. A. McGillivray, Q.C., for the plaintiff, appellant.

A. F. Moir, Q.C., and *J. P. Brumlik*, for the defendants, respondents.

The judgment of the Court was delivered by

HALL J.:—On July 3, 1962, the appellant Widrig recovered judgment in an action tried by Milvain J. against the respondents John W. D. Buchanan, Shirley Mae Strazer and Lloyd W. Gardiner, the Public Trustee of the Province of Alberta, as executors of the estate of Richard R. Strazer and also against the said Shirley Mae Strazer, Lloyd W. Gardiner and John W. D. Buchanan personally for damages in the sum of $40,000. The action against two other defendants Harold Komish and B.C. Yukon Air Service Limited was dismissed without costs. The defendants Buchanan, Strazer and Gardiner appealed to the Court of Appeal for Alberta[1] which Court sustained the judgment against the

[1] (1963), 41 W.W.R. 257, 37 D.L.R. (2d) 629.

defendants as executors but reduced the damages to $12,000. The appeal was allowed insofar as judgment had been given against the said Buchanan, Strazer and Gardiner personally.

The appellant Widrig has appealed to this Court to have restored the award of $40,000 damages given him by Milvain J. The respondents Buchanan, Strazer and Gardiner have cross-appealed to have the action dismissed or alternatively to have the damages awarded to the appellant by the Court of Appeal further reduced.

The facts and circumstances giving rise to this litigation are unusual and complicated.

One Richard R. Strazer died on November 15, 1960. A grant of probate of his will issued on June 29, 1961, to the executors named therein, the respondent Shirley Mae Strazer and the Public Trustee of the Province of Alberta. The respondent Lloyd W. Gardiner is and was at all material times the Public Trustee for the Province of Alberta.

Prior to his death the said Richard R. Strazer was the owner of 49 per cent of the issued shares in the company B.C. Yukon Air Service Limited. The respondent Buchanan held 2 per cent of the issued shares as trustee for Richard R. Strazer. The said Komish held the remaining 49 per cent of the issued share capital. Buchanan was at all times solicitor for the Strazer estate.

Clause (*c*) of the will of the deceased Richard R. Strazer provided:

> I direct my trustees to sell my shares in B.C. Yukon Air Service Limited for cash at any price which they in their uncontrolled discretion, deem reasonable. I further direct my trustees to first offer my shares in B.C. Yukon Air Service Limited to the person or persons holding other shares in the company at my death, with such person or persons to have a reasonable and just opportunity in which to accept or reject the offer to purchase my said shares.

Following the death of Richard R. Strazer, the operations of the company, B.C. Yukon Air Service Limited (an Alberta company) based at Watson Lake in the Yukon Territory continued under the management of Komish. That was the state of affairs when in July of 1961 Widrig, who was an experienced and licensed pilot, became interested in purchasing the 51 per cent of the issued share capital in the company from the executors and Buchanan. He had been employed as a pilot by the company during the years 1953, 1954 and until the fall of 1955. His father-in-law, one

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G. C. F. Dalziel, had been the founder of the company but in 1961 had no interest in the company, having sold out his interest a year or two before. It was through Dalziel that Widrig learned that the majority share holdings in the company might be for sale.

Having heard this, he went to Watson Lake about July 10th and there he saw Mrs. Strazer who told him she was very anxious to sell the controlling shares in the company held by the estate of her late husband. Mrs. Strazer told Widrig that Buchanan was her solicitor and that she would have Buchanan communicate with him. Widrig returned to Seattle. He had a 'phone call from Buchanan about July 18th. He received a letter from Buchanan inviting him to come to Edmonton to meet with Mrs. Strazer who would come from Watson Lake.

Widrig went to Edmonton the following week. He met with Buchanan and Mrs. Strazer on July 27th. He then was told that there was a provision in Strazer's will that before the shares could be sold they would first have to be offered to Komish and Komish given a reasonable opportunity to come forward with an offer. Widrig was not shown a copy of the will. He was told, however, that Komish had been informed of his interest in the shares and had been asked to come forward with an offer before July 31st. On the following day, July 28th, Widrig met Gardiner with Buchanan and Mrs. Strazer and was advised by them that Komish had requested more time and that he had been given until August 15th to come forward with an offer.

Widrig thereupon returned to Seattle. He kept in touch with Buchanan by 'phone. With Buchanan's encouragement he returned to Edmonton on August 14th. He saw Buchanan on the 15th and was told by him that Komish had made several offers but that these offers were inadequate and the executors were now perfectly free to deal with him.

Widrig then made certain offers which were not accepted, the principal difficulty being whether he could find the cash to purchase the shares. He had $10,000 of his own available. The executors had to sell for cash as directed by Strazer's will. Widrig went to Watson Lake where he arranged to borrow $50,000 from his father-in-law Dalziel, the former owner of the company. He returned to Edmonton on August 24th. He was then in a position to offer

$60,000 cash for the shares. Widrig in his testimony tells how the deal progressed from that point:

A. Well, after I made that offer he said, he advised me that there was liability from the company to the estate in the amount of slightly over $20,000 and that if I would go another fifteen or twenty thousand dollars they would assign that over to me, make it part of the same deal and I told him I couldn't get any more cash but I would certainly be willing to give them promissory notes for the balance and, so, with a little negotiation we finally arrived at a purchase price for the shares and that liability of $75,000, ten thousand cash and promissory notes for $15,000.

Q. Yes.

A. And when we reached that point he, Mr. Buchanan telephoned, while I was there, Mr. Gardiner and just made the proposal briefly to him and from what I gathered from the conversation that was fine. Then Mr. Buchanan advised me that his office would draft up some agreements for signature and that, as we had outlined our deal there and advised me to come back in a couple of hours and look them over.

* * *

Q. Mr. McGILLIVRAY: Yes, sir, go ahead.

A. So I returned back to Mr. Buchanan's office a short time later, several hours later and the agreements were prepared and he said, well, let us take them over to Mr. Gardiner's office, we will show them to him and if he approves of them you can take them over then to your solicitor's office, Mr. Becker, and if he approves of them you can sign them with him as a witness and bring them back. So, we did that and I walked over with him to Mr. Gardiner's office, he took them in to Mr. Gardiner, showed them to him and from what I gathered Mr. Gardiner was in accord with the proposal as set forth in the agreement. And Mr. Buchanan then gave me the agreements and asked me to take them over to my solicitor and have him read them and if they were satisfactory to sign them.

* * *

A. The agreements called for $10,000 down which I then gave to Mr. Buchanan who gave me a receipt for the $10,000 and he said, well, that is it, it is a deal, you might as well go to Watson Lake for good and you can take the agreements with you and have Mrs. Strazer sign them when you get there and return them to me on Monday's plane, which would be the next plane, and Mr. Gardiner and I both will sign them and we'll schedule a directors' meeting for Thursday, that would be August the 31st, at which time we will officially appoint you as manager and transfer the shares on the books of the company.

* * *

Q. By the way, you had, how many copies of the agreement that you signed were there?

A. It was prepared in four copies, I had signed the copies he prepared, in a large envelope with a return address that I was to mail them back to him in and, I believe, he also wrote an accompanying letter to Mrs. Strazer which he sealed and gave to me to give to her.

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That letter reads:

We are enclosing herewith the original and three copies of an agreement between the Estate and Mr. Widrig covering the sale of shares, etc. to him.

Lengthy discussions took place today between our Mr. Buchanan and Mr. Widrig and later between our Mr. Buchanan and Mr. Gardiner. The upshot of the discussions was that Mr. Widrig put forward an offer to purchase the estate's shares in B.C. Yukon and the estate's debt due from B.C. Yukon for a total price of $75,000, this amount to be paid in the manner set out in the enclosed agreement.

Mr. Widrig's offer will result in the estate receiving $60,000 cash immediately. The remaining $15,000 is secured by two Promissory Notes on which Mr. Dalziel is a co-signer. From the writer's and your own knowledge of Mr. Dalziel we would feel that the $15,000 is well secured.

By dealing with Mr. Widrig the estate will be free to collect from Mr. Komish the personal liability of approximately $10,000 which he owes the estate. As soon as the sale to Mr. Widrig is finalized it is our intention to make a formal demand on Mr. Komish for the payment of the amount due from him.

After you have perused the agreement enclosed and given this matter your consideration we would appreciate your signing the agreement in the presence of a witness (Burns McEathron would be a good witness) and return all copies of the agreement to us in the envelope provided.

We might add that it is Mr. Widrig's hope that Mr. Dalziel will arrange further financing so that the two Promissory Notes totalling $15,000 can be eliminated and the total of $75,000 paid in cash. If this is done, you might amend Clause 2(*b*) to read $65,000 and strike out Clauses 2(*c*) and 2(*d*). If these changes in the agreement are made they should be initialled by yourself and Mr. Widrig.

We are handing this letter to Mr. Widrig who is going up by plane tomorrow. If everything works out according to plan all documents necessary should come down on Monday's plane and we would be in a position to finalize the transaction on Tuesday or Wednesday of next week.

We will keep you posted as to developments.

Although we would be pleased to see you again it does not seem necessary for you to come into Edmonton at this time. Should there be anything arise, though, you might contact our Mr. Buchanan by telephone.

Widrig took the letter containing the documents to Watson Lake. Mrs. Strazer signed the documents and they were returned by 'plane on August 28th.

On August 30th, Widrig 'phoned Buchanan who acknowledged receipt of the documents. He was advised by Buchanan that the $50,000 had been received and a court order approving of the sale had been obtained, the agreements had been signed and that "the matter was finished". The following day, August 31st, Widrig received a 'phone call from Buchanan telling him that the directors of the company were holding a meeting at which Komish's solicitor had appeared but that the sale to him (Widrig) was

completely finished and he was being appointed as manager of the company. Widrig did receive the following telegram later that same day:

> You are employed as manager of B.C. Yukon Air Service effective immediately copy of minutes being forwarded by mail Mr. Komish has been advised.
>
> J. W. D. Buchanan Secretary.

The agreements had in fact been signed and approval obtained from the Court to the sale on August 30th. Buchanan denied having told Widrig that the agreements had been signed. The learned trial judge accepted Widrig's evidence in preference to that of Buchanan and, in my opinion, was justified on the evidence in doing so. Having received that wire, Widrig attempted to take control of the company's operations at Watson Lake but this was resisted by Komish. Eventually the R.C.M.P. were called in but Widrig found it impossible to take over due to Komish's interference.

Things continued in this state until September 5th when Widrig wired Buchanan as follows:

> Due circumstances beyond my control I hereby resign as manager B.C. Yukon Air Service effective immediately stop Komish assuming control
>
> Ralph Widrig

Meanwhile, on September 1st, Widrig had received the following telegram:

> Take notice that by an injunction order of the Honourable Mr. Justice M. E. Manning the Estate of Richard Strazer is restrained from offering for sale disposing of or otherwise dealing with its shares in B.C. Yukon Air Service Limited You are also so restrained by such order
>
> Morrow Hurlburt Reynolds Stevenson and Kane.

The injunction referred to in this letter was obtained from Mr. Justice Manning on September 1st in an action instituted by Komish naming Widrig as one of the defendants. Messrs. Morrow, Hurlburt, Reynolds, Stevenson and Kane were Komish's solicitors. The injunction provided, amongst other things, that:

> IT IS ORDERED that the Defendants and each of them, their agents and employees, be enjoined until the determination of this action from offering for sale, disposing of, transferring or otherwise dealing with the shares of B.C. Yukon Air Service Limited held by the late Richard Robert Strazer.

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We must now go back in time to the events after August 15th which preceded the granting of this injunction at the suit of Komish.

Komish had made offers for the shares which had been refused by the executors. The situation as of August 14th is shown by exhibit no. 37 sent August 14th and which reads:

"19"

August ~~14~~th, 1961.

(Date Stamp: RECEIVED AUG 14 1961)

Messrs. Haddad, Cavanagh & Buchanan,
Barristers and Solicitors,
618 McLeod Building,
EDMONTON, Alberta.

Attention: Mr. Buchanan

Dear Sirs: Re: B.C. Yukon Air Service Limited
Estate of Richard R. Strazer
and Harold T. Komish

On behalf of our client H. Komish, and referring to his offer to the Public Trustee and yourself on behalf of the Strazer Estate of August 8th, 1961, we are authorized to state that our client is prepared to increase his offer to purchase the same items and on the same terms except where changed herein, as contained in his offer of August 8th, 1961, to a new firm bid of $85,000 to be payable in one or the other of the following two ways:

"30"

"WM" (*a*) ~~$25~~,000 cash, $55,000 within Sixty (60) days subject to the hypothecation arrangement referred to in the offer of August 8th, 1961. ~~The remaining $5,000 payable September 30th, 1962, secured by a note by Komish to carry interest to be charged if payment made on or before the due date.~~

(*b*) In the alternative, $25,000 cash, $60,000 within Six (6) months, subject to the normal hypothecation arrangement as contained in the offer of August 8th, 1961.

"withdrawn."

These offers are open for acceptance until ~~5:00 o'clock today, August 14th, 1961.~~ This is our client's final offer.

Yours very truly,

WGM/es MORROW, HURLBURT, REYNOLDS, STEVENSON & KANE
Per: "W. G. Morrow"

cc. H. Komish, Esq.

The alterations and deletions as they appear in the foregoing were made by Komish's solicitor on August 19th when, having been advised by Buchanan that the offer was not acceptable, amended the letter as it now appears. Although other parts were changed or deleted, it is important to note that the final sentence "This is our client's final offer" remained.

It was after rejecting this final offer by Komish that the executors and Buchanan proceeded to sell the shares to Widrig.

While the company's directors were concluding the sale to Widrig on August 31st, Komish's solicitor appeared at the meeting, and, on being told that the shares were being sold to Widrig, he produced and left with Buchanan the following letter:

August 31st, 1961
(Date Stamp: "RECEIVED
AUG 31 1961")

The Public Trustee,
The Executor of the Estate of
Richard R. Strazer and
J. W. Buchanan.

Dear Sirs: Re: B.C. YUKON AIR SERVICE LIMITED

On behalf of our client, Harold Komish, and exercising our right of first refusal under the Will of the above deceased, we hereby agree to match the best offer that you are proposing to accept, and hereby agree to purchase on the same basis, same price and same terms in all respects.

Yours truly,

MORROW, HURLBURT, REYNOLDS, STEVENSON & KANE,

WGM/ns Per: "W. G. Morrow"

Komish on September 1st instituted the action previously mentioned and obtained the injunction from Mr. Justice Manning referred to above. Buchanan and the executors thereupon proceeded to sell the shares to Komish, the deal being concluded on or about September 29th.

On hearing that Buchanan and the executors were not going to complete the sale of the shares to him, Widrig commenced this action on September 22nd claiming specific performance, damages for breach of contract and costs.

Milvain J., at the conclusion of the trial, gave judgment on June 11, 1962, for specific performance, damages in the sum of $6,000 and costs. There was also to be an accounting

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to determine the company's indebtedness to the Strazer estate. However, the formal judgment was not entered.

In this situation, counsel for Widrig applied to Milvain J. on June 27, 1962, to reopen the case to substitute a judgment for damages and not for specific performance on the grounds that a decree for specific performance was no longer an adequate remedy having regard to the time that had elapsed with Komish in control of the company and which would elapse while an appeal was being disposed of.

Milvain J. directed that the judgment delivered by him on June 11th be reconsidered. Following argument by counsel, the learned trial judge delivered the judgment referred to in the opening paragraph hereof.

The respondents argued in the Court of Appeal and in this Court that Milvain J. had no jurisdiction to reopen the trial and to give the judgment for damages on the grounds that Widrig had elected to claim specific performance and, having been given judgment for specific performance, he was bound thereby. The Court of Appeal rejected this contention. With respect, I agree with Johnson J.A. when he said that the argument is answered by a passage from the judgment of Lord Atkin in *United Australia, Ld. v. Barclays Bank, Ld.*[1]:

> "I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one, and his cause of action on both will then be merged in the one."

A claim for damages was in the prayer for relief in the statement of claim. The trial judge's right to recall his original judgment and substitute another was settled, if in fact there was any doubt about his right to do so, by the case of *Re Harrison's Settlement*, [1955] 1 All E.R. 185. See also *Stevenson v. Dandy*, (1918), 14 A.L.R. 99 (a judgment of this Division). No election therefore took place until the later judgment was signed and entered.

The statement by Judson J. in *Dobson v. Winton and Robbins Ltd.*[2], which reads:

> On the purchaser's repudiation of the contract, the vendor could have forfeited the deposit and claimed for loss of bargain and out-of-pocket expenses. *The Judicature Act* gives him the right to join this claim with one of specific performance. At some stage of the proceedings he must, of course, elect which remedy he will take. He cannot have both specific

[1] [1941] A.C. 1 at 30.

[2] [1959] S.C.R. 775 at 779, 20 D.L.R. (2d) 164.

performance and a common law claim for loss of bargain. But he is under no compulsion to elect until judgment, and the defendant is not entitled to assume that by issuing the writ for specific performance with a common law claim for damages in the alternative, the vendor has elected at the institution of the action to claim specific performance and nothing else.

put this question of election beyond doubt.

The learned trial judge found that a binding agreement was completed between Widrig and the executors and Buchanan as of August 30th. This was upheld by the Court of Appeal.

However, the power of the executors to enter into the agreement was questioned in this Court. The issue arises out of the clause in Strazer's will previously quoted and which reads:

> I direct my trustees to sell my shares in B.C. Yukon Air Service Limited for cash at any price which they in their uncontrolled discretion, deem reasonable. I further direct my trustees to first offer my shares in B.C. Yukon Air Service Limited to the person or persons holding other shares in the company at my death, with such person or persons to have a reasonable and just opportunity in which to accept or reject the offer to purchase my said shares.

It was contended on behalf of Komish that this clause gave Komish a right of first refusal and the right to match the best offer that the executors had received from Widrig.

I do not read the clause in question as giving Komish a right of first refusal. As the situation stood in August 1961, the will directed the executors to *first offer* the shares to the person or persons holding other shares in the company. Komish was the only person who, in fact, qualified as a person holding other shares, but there might well have been two or more such other persons for the clause specifically says "to the person or persons". A right of first refusal could not be given to two or more such persons, and was not, in fact, given to Komish. Komish was offered the shares. He asked for and was given further time to make his offer and it was not until his final offer contained in exhibit 37 as amended by his solicitor on August 19th had been rejected that the executors proceeded to sell to Widrig. I entertain no doubt as to the power of the executors to sell to Widrig after they had duly considered and rejected Komish's offer expressly stated by him to be his final offer.

There is another ground upon which the executors are in my view precluded from asserting that they were bound to accept Komish's offer which was in fact so near in amount

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to Widrig's as to be substantially the same. The will of the deceased Strazer specifically directed the executors to sell the shares for cash. Komish's offer of August 14th, as amended on August 19th, was not a cash offer. In his first alternative, he was offering to put up $30,000 cash and the balance subject to an hypothecation arrangement within 60 days, and in his second alternative, he was offering $25,000 cash and $60,000 within six months. Widrig's offer, on the other hand, was a cash offer for the shares. The $60,000 put up by him was more than the value of the shares which had been fixed at $55,000. The balance of his offer was to cover the indebtedness of the company to the Strazer estate in an amount of $20,671.24 which was being assigned to him.

The judgment of Milvain J. and of the Court of Appeal that there was a binding contract to sell the shares to Widrig must, therefore, be sustained.

There remain for consideration the appeal and the cross-appeal as to the quantum of the damages.

The Court of Appeal reduced the trial judge's award of $40,000 to $12,000. The right of the Court of Appeal to review a trial judge's award is governed by well-settled principles as stated by Viscount Simon in *Nance v. British Columbia Electric Railway Company Ld.*[1], as follows:

> Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

Unless there was error of principle on the part of the Court of Appeal, this Court will not interfere with an amount allowed for damages by the court of last resort in a province. I adopt what Cartwright J., speaking for himself and Taschereau J. (as he then was) said in *Lang and Joseph v. Pollard and Murphy*[2]:

> Under these circumstances where no error of principle and no misapprehension of any feature of the evidence is indicated I think that the rule which we should follow is that stated by Anglin J., as he then was,

[1] [1951] A.C. 601 at 613.

[2] [1957] S.C.R. 858 at 862, 11 D.L.R. (2d) 161.

giving the unanimous judgment of the Court, in *Pratt v. Beaman* [1930] S.C.R. 284 at 287:

> The second ground of appeal is that the damages allowed for pain and suffering by the trial judge, $1,500, should not have been reduced, as they were on appeal, to $500. While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.

This decision was followed in the unanimous judgment of this Court, delivered by Kerwin J., as he then was, in *Hanes et al. v. Kennedy et al.*, [1941] S.C.R. 384 at 387.

> The principle appears to me to be equally applicable whether the first appellate Court has increased or decreased the general damages awarded at the trial.

In my view there were errors of principle on the part of the Court of Appeal in reducing the amount of the damages. The Court of Appeal appears to have equated share control of the company with a partnership in which the parties share control of a business. The two situations are not comparable. Widrig was desirous of acquiring control of the company because he was an experienced pilot and would have continuous employment in a going concern which had certain flying rights and which showed every indication of being a profitable undertaking. Widrig knew the company's potentialities. He had been employed as one of its pilots and was experienced in the specialized nature of the company's operations. Johnson J.A. appears to have overlooked these considerations in referring to Widrig's lack of experience in relation to this type of business. Widrig had been looking for an opportunity to get into this kind of business. He had looked as far as Australia for a suitable situation or opportunity to get into the commercial flying business. He was justified in not going away from Alberta while there was a reasonable chance that he would get control of the company. Also, in giving the weight which the Court did to the price actually paid by Komish for the shares, it overlooked that Komish was interested only in meeting Widrig's offer and not in making an objective offer based on his own ideas of the actual value of the shares which he was so anxious to obtain and which he got under the threat of litigation. It is of interest that when Komish took the action before referred to in which the injunction was obtained that

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resulted in Widrig being pushed aside and the shares sold to Komish, he, Komish, claimed $100,000 damages in lieu of the shares in question. That claim was, no doubt, somewhat exaggerated but it shows that Komish placed a high value on these shares when he was contending for them.

Johnson J.A. placed some importance on the fact that the net average profit of the company for the years 1959, 1960 and 1961 was $10,250. I am unable to reconcile this figure with the total of $36,900.29 which he gives for the three-year period which works out at an average of $12,300 a year. In any event, he appears to have overlooked that the figures for these three years were arrived at after depreciation allowances had been deducted which were not in fact reflected in the actual value of the aircraft. The income figures, after paying $10,372.94 income tax for these three years, before deducting depreciation were $42,063.10 for 1959, $37,329.47 for 1960 and $41,912.22 for 1961. These figures are indicative of the earning capacity of the company as a going concern and this is what Widrig was acquiring in buying share control of the company.

Having regard to all of these circumstances and the matters which the learned trial judge said he took into account in arriving at the amount of $40,000, I cannot say that in assessing the damages Milvain J. either applied a wrong principle of law or that the amount was so high as to be a wholly erroneous estimate of the damage.

In the result, Widrig's appeal to restore the amount awarded to him by the learned trial judge will be allowed and the judgment of the trial Court restored except insofar as it directed that the appellant recover damages and costs from Shirley Mae Strazer and Lloyd W. Gardiner in their personal capacities. The cross-appeal to have the action dismissed or, alternatively, to have the damages awarded to the appellant by the Court of Appeal further reduced will be dismissed. The appellant will be entitled to his costs here and in the Courts below.

Appeal allowed and cross-appeal dismissed with costs.

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

Solicitors for the defendants, respondents: Wood, Moir, Hyde & Ross, Edmonton.

CROWN TRUST COMPANY (*Defendant*) ..... APPELLANT;

AND

DAME MARY AGNES MACAULAY (*Plaintiff*) ..... RESPONDENT;

AND

PETER CHARLES MACAULAY AND SARAH ANN MACAULAY (*Intervenants*) ..... RESPONDENTS.

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*Mar. 3, 4
Apr. 28

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

Appeals—Right of—Practice and procedure—Consent judgment—Not subject to appeal if acquiesced—Code of Civil Procedure, art. 1220.

The plaintiff instituted this action against the defendant trustee asking to be declared solely entitled to a trust fund administered by the defendant. The trustee submitted itself to the decision of the Court and concluded its plea in the following terms: "Wherefore defendant prays for judgment . . . instructing it as to the disposition of this trust property . . . by dismissing or by allowing plaintiff's action . . ." Subsequently, the intervenants intervened to ask that the action be dismissed. The case proceeded to trial and, after hearing but before judgment, the plaintiff and the intervenants, at the suggestion of the trial judge, met to discuss settlement and in due course executed a Deed of Transaction, each party agreeing that the trust property would be divided on the basis of 50 per cent for the plaintiff and 50 per cent for the intervenants; the trustee was advised thereof but was not a party thereto. The trial judge then rendered judgment confirming the transaction and ordering the trustee to render an account. The trustee appealed to the Court of Appeal, but that appeal was quashed on the ground that the trustee had no right to appeal. The trustee appealed to this Court.

Held: The appeal should be dismissed.

The material filed in the record disclosed that the trustee, through its attorneys of record and at least one of its officers, was fully aware at all times of the discussions for settlement and with the Deed of Transaction entered into and that it acquiesced in the settlement agreed upon and in the judgment confirming such settlement. Having acquiesced both in anticipation and after the judgment was rendered, the trustee thereby bandoned its right to appeal under the provisions of art. 1220 of the *Code of Civil Procedure*.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], quashing an

[1] [1963] Que. Q.B. 267.

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Judson and Ritchie JJ.

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appeal from a judgment of Chief Justice Scott. Appeal dismissed.

P. N. Thorsteinsson, for the appellant.

R. Stewart Willis and *L. A. Poitras,* for the respondents.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from a judgment of the Court of Queen's Bench[1] maintaining motions of the plaintiff-respondent and intervenants-respondents to quash the appeal of the present appellant from a judgment of the Superior Court rendered November 5, 1962. That judgment confirmed a transaction entered into between plaintiff-respondent and intervenants-respondents and ordered the appellant to render an account of the administration of a certain trust fund referred to in the transaction and to dispose forthwith of the said trust fund, including all revenues accrued thereon from and after July 18, 1959, the whole in accordance with the terms of the transaction.

The relevant facts are as follows. By Deed of Donation executed before Edouard Cholette, Notary, on February 10, 1931, one Agnes L. Holliday, mother of the plaintiff-respondent, conveyed, *inter vivos,* to the appellant certain securities as a trust fund to be held by it in trust:

1. to pay the revenues during a five-year period in certain proportions to her two sons, Thomas J. R. Macaulay and Norman Holliday Macaulay;
2. upon the expiration of the five-year period to pay all the revenues to the said Thomas J. R. Macaulay during his lifetime;
3. on his death to pay such revenues to his widow during her lifetime or until her remarriage;
4. upon his death, and that of his widow, or her remarriage, to pay the capital, with all accumulated income, if any, to his lawful child or children in equal shares upon each attaining the age of thirty years.

The Deed provided that if the said Thomas J. R. Macaulay died unmarried or without leaving any lawful child or children, the capital was to go as to one half to the said Norman Holliday Macaulay and as to the other half to the plaintiff-respondent. If there should be no child or

[1] [1963] Que. Q.B. 267.

children issue of the marriage of the said Norman Holliday Macaulay, and of the plaintiff-respondent, the capital was to go to the survivor of the said Norman Holliday Macaulay and the plaintiff-respondent.

Thomas J. R. Macaulay died August 16, 1954 and his widow, Marjory Dorothy Prodgers Macaulay remarried on July 18, 1959.

There were no children issue of the marriage of Thomas J. R. Macaulay and the said Marjory Dorothy Prodgers but they had legally adopted, in England where they were then residing, the two intervenants-respondents.

Norman Holliday Macaulay died on October 20, 1957 without lawful issue.

Upon the remarriage of the widow of Thomas J. R. Macaulay, the plaintiff-respondent claimed the capital of the trust fund, and all revenues accumulated in it since the remarriage, on the ground that the intervenants-respondents were not the lawful children of her brother Thomas J. R. Macaulay within the meaning of the Deed of Donation, and that by reason of the death of Norman Holliday Macaulay, without lawful issue, she was solely entitled to the trust fund.

Upon the refusal of the appellant to comply with her request she took the present action.

Appellant in its plea alleged that conflicting claims had been made against it by the intervenants-respondents but submitted itself to the decision of the Court, concluding its plea as follows:

> WHEREFORE defendant prays for judgment of this Honourable Court instructing it as to the disposition of the Trust property held by it under the Deed of Trust entered into before Edouard Cholette, Notary, on the 10th day of February 1931, by dismissing or by allowing plaintiff's action, with or without costs as this Honourable Court shall see fit to do.

Subsequently, the intervenants-respondents intervened alleging that the plaintiff-respondent was not entitled to what she asked and prayed that their intervention be received and maintained and the action dismissed with costs.

The case then proceeded to trial in March 1962 and, after hearing but before judgment, the plaintiff-respondent and

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the intervenants-respondents, at the suggestion of the presiding judge, met to discuss settlement and in due course executed a Deed of Transaction on November 1, 1962, each party agreeing that the trust property and revenues thereon would be divided on the basis of 50 per cent for the plaintiff-respondent and 50 per cent for the intervenants-respondents and the appellant-trustee was advised thereof but was not a party thereto.

On November 5, 1962, judgment was rendered reciting the transaction in full and it concludes as follows:

> NOW THEREFORE THE COURT, as requested by plaintiff and intervenants hereby renders judgment confirming the said transaction in all respects and for all legal purposes, and doth hereby order the defendant, Crown Trust Company, to render an account of the administration of the said trust fund and to dispose forthwith of the said trust fund, including all revenues accrued thereon from and after July 18, 1959, in accordance with the terms of the aforesaid transaction.

The sole question in issue both in the Court below and before this Court is whether the appellant had a right to appeal from that judgment. We are not here concerned with the interpretation and effect of the Deed of Donation of February 10, 1931.

From the material filed in the record I am satisfied that appellant, through its attorneys of record and at least one of its trust officers, was fully aware at all times of the discussions for settlement and with the Deed of Transaction entered into and that it acquiesced in the settlement agreed upon and in the judgment confirming such settlement. That settlement was of course binding upon both the plaintiff-respondent, Dame Mary Agnes Macaulay, and the intervenants-respondents Peter Charles Macaulay and Sarah Ann Macaulay.

As I have said the sole question now in issue is whether the appellant acquiesced in the judgment of the Superior Court both in anticipation and after the judgment was rendered, thereby abandoning its right to appeal under the provisions of art. 1220 of the *Code of Civil Procedure*. The Court of Queen's Bench held unanimously that appellant had so acquiesced and I am in agreement with that finding.

At the opening of the hearing before this Court appellant filed a discontinuance of its appeal against the plaintiff-

respondent Dame Mary Agnes Macaulay, and the appeal was argued only as against the intervenants-respondents. For the reasons which I have given I would dismiss that appeal with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Stikeman & Elliott, Montreal.

Attorneys for the plaintiff, respondent: Deschenes, Forget & Crépeau, Montreal.

Attorneys for the intervenants, respondents: Duquet, MacKay, Weldon, Bronstetter, Willis & Johnston, Montreal.

DOCTEUR ROSAIRE CAUCHON (*Defendant and plaintiff in warranty*) .. APPELLANT;

AND

LA COMMISSION DES ACCIDENTS DU TRAVAIL DE QUEBEC (*Plaintiff*) ..... RESPONDENT;

AND

ALEXANDRE LECLERC (*Defendant in warranty*) ..... RESPONDENT.

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

Damages—Liability—Employee injured—Explosion of jacket-heater—Employee indemnified by Workmen's Compensation Board—Claim by Board against owner of premises—Owner suing employer of injured employee in warranty—Findings of fact by lower Court—Whether they should be disturbed.

In the course of his employment, an employee of L, a heating and plumbing contractor, was injured by the explosion of a jacket-heater on the premises of the appellant C. At that time, L was carrying out a contract with C involving the replacement of the heating system. The employee elected to claim compensation under *The Workmen's Compensation Act*. Having been subrogated in the rights of the employee, the Workmen's Compensation Board sued C for the amounts paid by

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Spence JJ.

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it. C contested that action and at the same time instituted an action in warranty against L, alleging that L or his servants had made alterations or repairs to the heater. Both actions were joined for purposes of proof and hearing.

The heater had been used for some years by the appellant for the domestic supply of hot water and was designed to use either wood or coal as fuel. The fire box was surrounded by a metal cylinder in which water circulated entering through a pipe inserted at the base of the cylinder and passing out to the hot water reservoir through a similar opening near the top. The heater was disconnected from these pipes and a hot water heater operated by electricity was installed. Following this the appellant continued to use the heater for the purpose of burning rubbish but found that it gave off a nauseating odour, whereby L's foreman plugged the two holes so that the cylinder was now hermatically sealed and transformed into a highly dangerous thing.

The claim of the Board was allowed and the action in warranty dismissed by the trial judge. This judgment was upheld by a majority judgment of the Court of Appeal. C appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be dismissed.

The trial judge and the majority in the Court below found that the effective cause of the accident was an imprudent use of the heater by the appellant or by persons for whom he was responsible. The appellant has failed to satisfactorily show that this was a case in which concurrent findings of fact should be interfered with.

Per Cartwright J., *dissenting*: As between the appellant and L the whole blame for the occurrence of the explosion rested upon the latter. He was employed to do what was necessary to prevent the heater giving off offensive smells. While there were suggestions in the evidence that neither L nor his foreman fully realised the danger of sealing the cylinder, it was clearly the duty of L to know and guard against this danger. Having sealed the cylinder, L had the duty to give a clear and explicit warning to the appellant of the potential danger; this he failed to do.

Assuming that as "gardien juridique" of the heater the appellant would have been responsible to the employee under art. 1054 of the *Civil Code*, if the latter had not claimed under the Act, it was clear that L would have been liable to indemnify the appellant against the damages the latter would have been called upon to pay to the employee. Since, however, the employee elected to take compensation under the Act, to order the appellant to pay the employee's damages and to order L to indemnify the appellant would in the result be to order L to pay the damages suffered by his employee. This would be contrary to the Act; the law does not permit to do indirectly that which it forbids to do directly. The action in warranty was therefore unnecessary.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Chief Justice Sévigny. Appeal dismissed, Cartwright J. dissenting.

Jacques de Billy, Q.C., for the defendant and plaintiff in warranty, appellant.

[1] [1961] Que. Q.B. 269.

Guy Dorion, for the plaintiff Commission, respondent.

André Levesque, for the defendant in warranty, respondent.

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

ABBOTT J.:—These two appeals are from judgments of the Court of Queen's Bench[1], Marchand J. dissenting, which confirmed two judgments of the Superior Court, the one condemning the appellant to pay to respondent a sum of $4,490.50, and the other dismissing appellant's action in warranty against the respondent Leclerc.

This litigation is the result of the explosion of a jacket-heater which occurred on January 18, 1952, in the basement of a property belonging to appellant, in which one Clément Richard, a plumber in the employ of the respondent Leclerc was injured. The business of the respondent Leclerc, a plumbing contractor, came under the provisions of the Quebec *Workmen's Compensation Act.*

Subrogated in the rights of the said Clément Richard for the amounts paid to him under the said Act, the respondent Commission on January 14, 1953, sued the appellant Cauchon for the amounts paid by it. Cauchon contested that action and at the same time instituted an action in warranty against the respondent Leclerc asking that he, Cauchon, be indemnified against any condemnation which might be rendered against him in the principal action. The action in warranty was contested and both actions joined for purposes of proof and hearing. Judgment was rendered in both actions on February 22, 1956.

The facts relating to the accident are fully set out in the reasons of the learned trial judge and in those of St. Jacques J. in the Court below. Both the learned trial judge and the majority in the Court below found that the effective cause of the accident was an imprudent use of the jacket-heater by appellant or by persons for whom he is responsible, and appellant has failed to satisfy me that this is a case in which these concurrent findings of fact should be interfered with.

For the reasons given by St. Jacques and Montgomery JJ., with which I am in respectful agrement, I would dismiss both appeals with costs.

[1] [1961] Que. Q.B. 269.

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Cartwright J.

CARTWRIGHT J. (*dissenting*):—These are appeals from two judgments of the Court of Queen's Bench of the Province of Quebec (Appeal Side)[1] which confirmed judgments of the Superior Court for the District of Quebec whereby the appellant was ordered to pay to the respondent, La Commission des Accidents du Travail de Québec, hereinafter referred to as "The Commission", the sum of $4,490.50 and his action in warranty against the respondent Leclerc was dismissed. Marchand J., dissenting, would have allowed the appeals and dismissed the Commission's action; as a result he would have affirmed the dismissal of the action in warranty on the ground that it was unnecessary.

There does not appear to me to be any serious dispute as to the facts on which the rights of the parties depend.

The Commission brought its action against the appellant by virtue of its right to be subrogated to the claim of Clément Richard who was an employee of the defendant in warranty Leclerc. The business of Leclerc, that of a plumbing and heating contractor, was subject to the provisions of the Quebec *Workmen's Compensation Act*, hereinafter referred to as "the Act."

On January 18, 1952, Richard was an employee of Leclerc; while in the course of his employment he was seriously injured by the explosion of a jacket-heater in the basement of the appellant's cottage in which Leclerc was carrying out a contract with the appellant involving the replacement of the heating system. Richard elected to claim compensation under the *Workmen's Compensation Act*.

The jacket-heater, which exploded, had been used for some years by the appellant for the domestic supply of hot water. It was designed to use either wood or coal as fuel. The fire box was surrounded by a metal cylinder in which water circulated entering through a pipe inserted in an opening one inch in diameter about one inch above the base of the cylinder and passing out to the hot water reservoir through a similar opening near the top of the cylinder.

In December 1951, Leclerc in the course of performing his contract with the appellant disconnected the jacket-heater from the pipes mentioned above and installed a hot water heater operated by electricity.

[1] [1961] Que. Q.B. 269.

The appellant's evidence was that he intended to get rid of the jacket-heater; Leclerc's evidence as to the conversation between them was as follows:

> Q. Et est-ce qu'après ça, le docteur Cauchon ne vous a pas dit qu'il n'en avait plus besoin et qu'il allait s'en débarrasser, de ce chauffe-eau-là?
>
> R. Non, il m'a demandé par exemple s'il pouvait le chauffer. J'ai dit: «Je ne vois pas d'inconvénient, il peut chauffer pareil comme un autre petit poêle, dans la condition où il était.»

Following this the appellant used the jacket-heater on several occasions for the purpose of burning rubbish consisting of discarded papers of various sorts but found that it gave off a nauseating odour. The appellant says that he reported this to Leclerc, the latter denies this, but it would seem probable that he is in error as it is established that his foreman Delisle went to the appellant's house and plugged the two holes in the water-jacket so that, in the result, the cylinder in which formerly the water circulated was now hermetically sealed.

While there is some conflict in the evidence as to matters of detail, if taken at its worst against the appellant it establishes the following facts.

The appellant told Leclerc that he would continue to use the jacket-heater for the burning of waste-paper. Prior to the plugging of the holes Leclerc had told the appellant that he could use the jacket-heater like any other little stove. The holes were plugged by the servant of Leclerc acting in the course of his employment. This action, on the uncontradicted evidence of the expert witnesses, transformed the jacket-heater from an ordinary and harmless stove into a highly dangerous thing. Leclerc gave the appellant neither notice nor warning of this danger. The appellant had no knowledge of the danger created and relied on Leclerc, as an experienced heating and plumbing contractor, to do what was necessary to get rid of the disagreeable smell which the heater had been causing. The immediate cause of the explosion was the use made of the jacket-heater by the appellant and his wife to heat the basement while the normal supply of heat was cut off owing to the work being done on the furnace. Instead of merely burning waste paper on January 17, the appellant burned fire-wood in the stove. Before it was re-lighted on January 18 the appellant's wife cleaned out the ashes which had accumulated in the stove;

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Cartwright J.

to some extent these had acted as insulation and when the stove was re-lighted and fire-wood added to it on January 18 a sufficiently high temperature was generated to cause the explosion by which Richard was injured. Both Leclerc and Delisle were present while wood was being burned in the stove on January 17 and January 18.

On this state of facts, it appears to me that as between the appellant and Leclerc the whole blame for the occurrence of the explosion rests upon the latter. The appellant employed Leclerc to do what was necessary to prevent the jacket-heater giving off offensive smells. The appellant whose profession was that of a physician did not know, and would not be expected to know, how this should be accomplished. On the other hand, while there are suggestions in the evidence that neither Leclerc nor his employee Delisle fully realized the danger of hermetically sealing the cylinder while it contained rust or moisture, it was clearly the duty of Leclerc to know and guard against this danger; *spondet peritiam artis*. It is clear that the appellant relied entirely upon Leclerc in the matter. Leclerc committed a grave fault in sealing the cylinder. Having done this it was his duty to give a clear and explicit warning to the appellant of the potential danger which he had created; this he failed to do.

I do not find it necessary to consider whether, if Richard had not been entitled to compensation under the Act, the fact that as between the appellant and Leclerc all the blame rested upon the latter would have afforded a defence to the appellant against the claim made by Richard. I will assume that as "gardien juridique" of the jacket-heater the appellant would have been responsible to Richard under art. 1054 of the *Civil Code*; on that assumption I think it clear that Leclerc would have been liable to indemnify the appellant against the damages the latter was called upon to pay to Richard. Since, however, Richard is entitled to, and has elected to take, compensation under the Act, to order the appellant to pay Richard's damages and to order Leclerc to indemnify the appellant would, in the result, be to order Leclerc to pay the damages suffered by his employee; such a result would be contrary to the provisions of the Act; the law does not permit that to be done indirectly which is forbidden to be done directly. In my view Marchand J. was right in holding that the action of the Commission should be dismissed. It follows from this, as Marchand J. held, that

the action in warranty becomes unnecessary and should be dismissed but as, in my opinion, the fault of Leclerc was the sole effective cause of the injuries suffered by Richard I would not award any costs to him.

I would allow the appeals, set aside the judgments in the Courts below and direct that judgment be entered dismissing the action of the Commission against the appellant with costs throughout and dismissing the action in warranty of the appellant against Leclerc without costs; I would make no order as to costs in the last mentioned action in the Court of Queen's Bench (Appeal Side) or in this Court.

SPENCE J.:—I have had the advantage of reading the reasons of both Cartwright J. and Abbott J. in this appeal, and I have further re-read much of the evidence and all of the judgments in the courts below. I have come to the conclusion that the judgment of Sevigny C.J. in the Superior Court was a finding of fact made after considering conflicting evidence and that judgment was confirmed by the judgment of the Court of Queen's Bench (Appeal Side)[1].

This Court cannot reverse the finding of fact made in the trial court and confirmed on appeal unless there was evident error in the lower courts: *Paradis v. Limoilou*[2], *per* Girouard J.

I adopt what was said by Anglin J. in *Frith v. Alliance Investment Company*[3]:

> While not satisfied that, if I had been presiding at the trial of this action, I should, upon my present appreciation of the evidence, have reached the conclusion that the defendants had fully discharged their duty to the plaintiff as his agents, I am not prepared to reverse the concurrent finding of two courts upon that point, which must to a considerable extent, in the case of the learned trial judge, have rested upon the view taken by him of the credibility and weight of the testimony of the several witnesses.

I find myself in the same position in this case and I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Attorneys for the defendant, appellant: Gagnon & de Billy, Quebec.

Attorney for the plaintiff, respondent: G. Dorion, Quebec.

Attorneys for the defendant in warranty, respondent: Pelletier & Levesque, Quebec.

[1] [1961] Que. Q.B. 269. [2] (1900), 30 S.C.R. 405 at 406.
[3] (1914), 49 S.C.R. 384 at 391, 20 D.L.R. 365.

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*Feb. 24, 25, 26
Apr. 28

IMPERIAL OIL LIMITED (*Plaintiff*) ....APPELLANT;

AND

M/S *WILLOWBRANCH* (*Defendant*) ...RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision between two tankers in approach to Halifax harbour—Negligence of parties—Dense fog—Alteration of course—Excessive speed—Improper radar look-out—Narrow channel rule.

The plaintiff's tanker *Imperial Halifax* outbound from Halifax collided in a dense fog with the defendant's tanker *Willowbranch* inbound, in the approach to Halifax harbour. Both vessels were equipped with radar sets. The *Imperial Halifax* maintained full speed until entering a fog bank at which time the echo of an approaching ship 3° on the starboard bow and about one and a half miles ahead was noticed on the radar. Her engines were then reduced to half speed and about one-half minute later to slow. When the ships were about a mile apart and the angle of the approaching ship appeared to have broadened to 4° on the starboard bow, the Master of the *Imperial Halifax* assumed that the two ships would pass starboard to starboard if each maintained her course. He therefore continued his course until a ship's whistle was heard on the starboard bow. The radar indicated to him that the approaching ship was on a course that would cross that of the *Imperial Halifax* from starboard to port. He then stopped engines and altered course 4° to port. Within one minute of that order the approaching vessel was heard directly ahead and the engines were reversed. The *Imperial Halifax* was going at about four knots when the collision took place.

After observing on the radar a ship at 10° on the port bow and one directly ahead and about two and a half miles away, the *Willowbranch*, which was then at half speed, altered her course four times to starboard by gradual degrees. All these alterations were made within four to four and a half minutes before the collision and their effect was to bring the *Willowbranch* directly across the bow of the *Imperial Halifax*. Although the whistle of the latter ship was first heard about two minutes before the collision and a second whistle was heard before they met, no action was taken to stop the engines of the *Willowbranch*. When the aproaching vessel came into view about 300 feet away the engines were reversed and the *Willowbranch* was practically stopped at the time of the collision.

The trial judge held the *Imperial Halifax* one-third to blame and the *Willowbranch* two-thirds to blame. On appeal to the Exchequer Court, the fault was divided in exactly the reverse proportions. The plaintiff appealed to this Court. The defendant contended that the narrow channel rule or alternatively the meeting end-on rule applied and justified her four alterations of course to starboard in order to pass port to port. The *Imperial Halifax* contended that the area was open sea and that it was the duty of the *Willowbranch* to maintain her course without alteration so that the ships would pass starboard to starboard.

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

Held: The appeal should be allowed.

The parties were equally responsible for the collision. The evidence did not justify the finding that the area was a narrow channel. It was a general rule that in fog, when by one vessel the course of another within a danger zone was not yet ascertained, without sufficient indication to justify action, no change of course should be made. The plaintiff was negligent in not reducing speed earlier. The defendant was guilty of an act of negligence by changing course before he had ascertained the course of the incoming ship. The position of difficulty would not have arisen if the radar sets had been tended with care and intelligence by the operators. Different degrees of fault not having been established, the liability should be shared equally by both parties.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], allowing an appeal from a judgment of Pottier D.J.A. Appeal allowed.

Donald McInnis, Q.C., and *John Dickey, Q.C.*, for the plaintiff, appellant.

Donald Kerr and *R. N. Pugsley*, for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Thurlow of the Exchequer Court of Canada[1] allowing an appeal from a judgment of Mr. Justice Pottier, District Judge in Admiralty for the Admiralty District of Nova Scotia, whereby the latter judge had found the M.S. *Willowbranch* chiefly to blame for a collision between that ship and the *Imperial Halifax*, two radar-equipped motor driven oil tankers which collided in the dense fog in the approaches to Halifax Harbour at 8.23 or 8.23½ a.m. on July 16, 1959, when the sea was calm, the wind light and the tide ebbing at about one-quarter knot.

Mr. Justice Pottier would have apportioned the blame for the collision two-thirds of the *Willowbranch* and one-third to *Imperial Halifax*. Mr. Justice Thurlow, however, divided the fault in exactly the reverse proportions.

There appears to be direct conflict between the parties as to many of the details relating to the movements, courses and speeds of the two ships at the time of the collision and for a period of approximately twenty minutes which preceded it, but apart from one major difference, to which reference will hereafter be made, the trial judge and the

[1] [1964] Ex. C.R. 255.

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judge sitting in appeal are in substantial agreement as to what happened, and where they agree I do not hesitate to accept the version which they have adopted.

The movements of the two ships can most conveniently be considered separately and after reading the reasons for judgment in light of the evidence and listening to exhaustive argument from the counsel concerned, it appears to me that the essential factors contributing to the collision can be summarized as follows:

The appellant's motor ship, *Imperial Halifax*, of 3,734 gross tons, 357 feet length overall and 48 feet in width, left Imperoyal on the east side of Halifax Harbour at 7.51 a.m., outbound for Charlottetown, P.E.I., and proceeding seaward in clear weather and without a pilot on a course of 163° True, she had attained her full speed of 12 knots by about 8.13 when the master first observed a bank of fog one and a half miles away. Two minutes later the course was altered to 159° True so as to veer to the eastward and thus avoid a group of American naval vessels which appeared to be taking the westerly route out of the harbour. When the course was so altered the order "standby engines" was rung on the telegraph, and sounding of the fog whistle at one-minute intervals was commenced. Full speed was, however, maintained until entering the fog bank about four minutes later, at which time the echo of an approaching ship was first seen on the radar, whereupon engines were reduced to "half speed" and about one half minute later to "slow". The Captain estimated the approaching ship to be approximately one and a half miles ahead and without plotting its course he further estimated that it was bearing 3° on the starboard bow. When the ships were about a mile apart and the angle of the approaching ship appeared to have broadened to 4° on the starboard bow, the Captain of the *Imperial Halifax* assumed that the two ships could pass starboard to starboard if each maintained its course, and he therefore continued on a course of 159° True until a ship's whistle was heard on the starboard bow when he stopped engines and altered course 4° to port. He states that at this time the radar indicated to him that the approaching ship was on a course that would have crossed that of the *Imperial Halifax* from starboard to port. I agree with Mr. Justice Thurlow that the 4° alteration to port was too late to have any bearing on the collision, as within one minute of that

order the approaching vessel was heard directly ahead and engines were reversed. In the result, *Imperial Halifax* was going at about four knots when the collision took place and was heading 155° True.

The *Willowbranch,* on the other hand, which is 259 feet in length, 43.9 feet in breadth and of 2,153 gross tons, was entering the harbour enroute from Montreal and having taken on her pilot at 8.00, the course was set at 330° True, but on the pilot advising that the American warships were proceeding out of the harbour probably to the westward of Neverfail Buoy, the course was altered to 340° and at the same time the engines were put to "full ahead". Shortly afterwards the course was further altered to 345° True, but "full ahead" was maintained on the engines for about ten minutes when the Captain decided to reduce to "half speed". The course was again altered to 340° True shortly before the echo of an approaching ship was first seen on the radar. Various accounts are given by the officers and the pilot as to exactly what was seen, but it can be gathered from the pilot's evidence that there was one ship at 10° on the port bow and one directly ahead. The latter ship was estimated to be about two and one-half miles away, and when it had been under observation for approximately two or three minutes, the course of the *Willowbranch* was again altered to 345° True and later to 350° in the hope of putting her to the eastward out of the path of the oncoming ship. Shortly afterwards it appearing that this ship was approaching at a high speed and that the angle of her approach on the port bow was not broadening, the course was altered to 355°. True and still later to 360° True. It appears from the evidence that the alterations in course from 340° to 345° to 350° to 355° to 360° were all made within four to four and a half minutes before the collision, and the effect of these changes was to bring the *Willowbranch* directly across the bow of the *Imperial Halifax.* The whistle of *Imperial Halifax* was first heard on the *Willowbranch* about two minutes before the collision and a second whistle was heard before they met. No action was taken to stop the engines of the *Willowbranch* on hearing these whistles, but when the approaching vessel came into view about 300 feet away, the order "hard astarboard" and "full astern" was given and *Willowbranch* was practically stopped at the time of collision.

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Pottier D.J.A. expressed the opinion, with which I am in full accord, that the course of prudence on the part of those in charge of both vessels would have been to stop after sighting each other on the radar so that each could determine the course of the other before coming to close quarters, but he found the *Willowbranch* chiefly to blame on the ground that her course was altered to starboard by gradual degrees in fog without the course of the *Imperial Halifax* having first been determined, and that she was thus placed directly in the path of the approaching vessel when they came in sight of each other through the fog, by which time it was too late to avoid the collision.

In assessing the degree of fault to be attributed to the *Imperial Halifax,* Pottier D.J.A. proceeded on the assumption that this ship had run into thick fog at 8.15 and had then put her engines at "half speed", whereas it is now agreed that she did not run into the fog until about 8.19 and that she was travelling at full speed until that time. In view of the fact that Thurlow J. found the grossly excessive speed of the *Imperial Halifax* while in fog to be one of the chief elements of her fault, it will be seen that the discrepancy is a significant one.

By virtue of the provisions of s. 645(1) of *The Canada Shipping Act,* the Governor-in-Council is empowered to make rules and regulations for the prevention of collisions at sea, and by s. 647 such regulations, subject to any local rules or by-laws, are required to be obeyed by all masters of vessels and a fine is provided "not exceeding $200 for failure, without reasonable cause, to comply with such regulations".

By P.C. 1953-1287, The International Regulations for Preventing Collisions at Sea (hereinafter referred to as The Regulations) are made applicable to the waters here in question, and the conduct of ships in fog is governed by Rule 16 of those Regulations, sub-para. (*a*) of which reads as follows:

> 16(*a*) Every vessel, or seaplane when taxi-ing on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.

In my opinion, entirely apart from the provisions of Rule 16, the Captain of the *Imperial Halifax* should, as a

matter of seamanship, have reduced his speed on first sighting the bank of fog a mile and a half away. I agree with the following excerpt from Marsden's Work, The Law of Collisions at Sea, 11th ed., page 770:

> Apart from the regulations, the law requires a ship to be navigated in or near a fog at a moderate speed; the regulations make no alteration in the law in this respect.
>
> Vessels approaching a bank of fog or snow, which they are about to enter, should, as a matter of seamanship, go at a moderate speed. Failure to comply with this duty does not, however, amount to a breach of rule 16; but if, in the result, her speed when she enters the fog is not moderate she may then be in breach . . .

The appellant's counsel discounted the speed of the *Imperial Halifax* as a factor contributing to the collision saying that although it may have had some bearing on the extent of the damage which was done to the respective ships, it was not shown to have been in any sense a cause of their coming together. It appears to me that the requirement of Rule 16(*a*) is not designed merely for the purpose of lessening the violence of collisions between ships, but rather that its primary purpose is to prevent collisions altogether by providing that each ship shall go at such a speed as to afford the maximum time for the taking of avoiding action when another suddenly comes into view at a short distance. I can see no answer in the present case to the contention that if the *Imperial Halifax* had started reducing speed four minutes sooner than she did (i.e., when she first sighted the fog), her ability to stop before the collision occurred would have been proportionately increased.

I agree with Mr. Justice Thurlow that the speed of the *Imperial Halifax* on entering fog, taken together with her master's failure to sooner identify the approaching vessel on radar and his error in judgment when he did see it in deciding to take the chance of passing at such close quarters in fog, are factors which substantially contributed to the collision, and I agree also that Pottier D.J.A.'s error as to the time when speed was first reduced affected his judgment as to the degree of fault to be attributed to the *Imperial Halifax*. I have, however, reached the conclusion, for the reasons hereinafter set forth, that the *Willowbranch* was equally at fault.

In reducing the fault attributable to the *Willowbranch* from two-thirds to one-third, Thurlow J. adopted the view

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that immediately before and at the time of the collision, these ships were proceeding along the course of a "narrow channel" within the meaning of Rule 25(*a*) of the Collision Regulations which reads as follows:

> (*a*) In a narrow channel every power-driven vessel when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

In this regard, Mr. Justice Thurlow said:

> . . . the locality in which the collision occurred is a narrow channel within the meaning of Rule 25 and adopting this view of the nature of the locality I am of the opinion, again relying to a considerable extent on Captain Bird's advice, that in the particular circumstances it was not wrong for the *Willowbranch* on detecting the approach of the *Imperial Halifax* directly ahead to alter to starboard in an effort to get to her side of the mid-channel or fairway.

The test to be employed in determining whether or not an area is a "narrow channel" within the meaning of Rule 25(*a*) is discussed by Wilmer J. in *Anna Salen*[1], where he says:

> As I understand it the question whether article 25 of the Collision Regulations applies in relation to a given piece of water is one to be determined on the evidence given in the particular case, the Court being assisted by the knowledge and experience of the Elder Brethren.

And again in *The Sedgepool*[2], where he says:

> As I understand the law, one of the determining factors in deciding whether a given area is or is not within the "narrow channel" rule is the way in which seamen in fact regard it and behave in it.

In reaching his conclusion in this regard, Thurlow J. undoubtedly relied in great degree, as he was entitled to do, on the advice of the nautical assessor sitting with him on appeal, but the advice of the learned assessor who sat at the trial did not lead Pottier D.J.A. to the same conclusion, and there does not appear to be any case deciding that the area of this collision is within a "narrow channel". Under the circumstances the matter appears to me to be one to be decided upon the evidence.

Apart from the fact that the Captain of the *Willowbranch* referred to the easterly route into Halifax Harbour as "the eastern channel in the approach to the harbour" and his pilot and first officer both referred to the area of the collision

[1] [1954] 1 Lloyds Rep. 474 at 487. [2] [1956] 2 Lloyds Rep. 668 at 678.

as a channel, there is no direct evidence whatever in the record which could, in my view, be said to establish that seamen make a practice of treating the area here in question as a "narrow channel" within the meaning of Rule 25(*a*). It is true the Captain of the *Imperial Halifax* uses the word "channel", but he expressely states that he did not regard these waters as a place to which Rule 25 applied.

On such evidence I am not prepared to make any finding that the area described by the learned judge in appeal is a "narrow channel", but this should, of course, not be construed as precluding the making of such a finding in another case if evidence can be adduced to support such a conclusion.

Thurlow J., however, also expressed the view that even treating the narrow channel rule as inapplicable, it was nevertheless not "wrong for the *Willowbranch* to alter to starboard to take herself out of the way in case the oncoming ship should be passing to the east". In so finding, Mr. Justice Thurlow took into consideration the fact that the *Willowbranch* had a ship dead ahead of her proceeding at a high rate of speed and had no means of knowing whether that ship was going to attempt to pass to the east or to the west.

In this regard, counsel for the *Willowbranch* sought to invoke the provisions of Rule 18 of the Regulations, the opening sentence of which reads as follows:

> Rule 18: When two power-driven vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

It is, I think, important to remember that Rules 17 to 27 inclusive are contained in part C of the Regulations which is entitled "Steering and Sailing Rules", and which contains the following preliminary paragraph:

> In obeying and construing these Rules, any action taken should be positive, in ample time, and with due regard to the observance of good seamanship.

I agree with Thurlow J. that the action of the *Willowbranch* in altering course as she did was neither sufficiently positive nor in time, and it appears also that alteration of course in fog when the position of an approaching ship has not been ascertained is anything but good seamanship. As was said by Rand J. *The Dagmar Salen v. The Chinook*[1]:

[1] [1951] S.C.R. 608 at 612, 4 D.L.R. 1.

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It is a general rule as old as navigation that in fog, when by one vessel the course of another within a danger zone is not yet ascertained, without sufficient indication to justify action, no change of course should be made: *Vindomore v. Haswell*, 1891 A.C. 1; and in *The "Wear"*, 164 E.R. 419, Hill J. used this language:

> It has been said over and over again in this court that when in a fog you sight a ship whose direction or course you do not know the worst thing you can do is to take helm action.

I am accordingly of opinion that the actions of the *Willowbranch* in altering course as she did cannot be justified as a compliance with Rule 18 of the Regulations.

In my opinion, however, the fault of these two ships is not to be assessed only in terms of their respective actions at close quarters, and I adopt the language used by Wilmer J. in *The Billings Victory*[1], where he said:

> It appears to me that the most important thing to give effect to in considering degrees of blame is the question which of the two vessels created the position of difficulty.

In this regard, I am of opinion that the overriding negligence common to both ships in the present case lay in the use made of their respective radar equipment, and I am satisfied that "the position of difficulty" would not have arisen at all if the radar sets with which both ships were equipped had been tended with the degree of care to which Rand J. referred in *The Dagmar v. The Chinook, supra,* at page 612 where he said:

> If radar is to furnish a new sight through fog the report which it brings must be interpreted by active and constant intelligence on the part of the operator.

Rule 16(*b*) of the Regulations provides that:

> 16(*b*) A power-driven vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The considerations giving rise to this rule appear to me to apply with added force when a ship is equipped with radar and thereby has available a means of detecting an approaching ship at a greater distance and with greater accuracy than any fog signals could afford. The ships involved in this collision detected each other forward of their respective beams before hearing each other's fog signals

[1] [1949] Lloyds Rep. 877 at 883.

or sighting each other visually, and they were thus in a position to take early and substantial action to avoid coming to close quarters. In lieu of taking such action, the proper course for both would have been to stop engines and not to proceed again until each had established the position of the other so that both could proceed without risk of collision.

As I have indicated, I take the view that the *Imperial Halifax* should have seen the echo of the *Willowbranch* sooner, but the greater negligence consisted in the Captain, after he had detected the presence of the approaching ship by radar, proceeding on the assumption that the ships would pass starboard to starboard without first having plotted the course of the ship ahead. It seems probable that the ships would indeed have passed if *Willowbranch* had not altered course, but under all the circumstances, Captain Kent's decision to proceed, based on his own unverified estimate, exposed both ships unnecessarily to the risk of collision.

The negligence of the *Willowbranch* was of the same character. The echo of the *Imperial Halifax* was detected on the radar two and a half miles away and yet, despite this warning, the course of the approaching ship was never plotted. On the contrary, the *Willowbranch* appears to have adopted a series of courses which resulted in the ship edging her way directly into the path of the *Imperial Halifax*. If the radar information had been "interpreted by active and constant intelligence on the part of the operator". I find it difficult to believe that this action would have been taken.

Under all the circumstances, I have reached the conclusion that the two ships were equally to blame for this collision. In so doing I am conscious of the fact that where each of the courts below has assessed the fault between the parties in different proportions, the cases are rare in which this Court will undertake to allocate the responsibility without adopting one or other of such assessments. In the present case, however, I find that in holding *Imperial Halifax* less than one-half to blame, Pottier D.J.A. was mistaken as to the time when that ship started to reduce speed, and that in reducing the degree of fault attributable to the *Willowbranch* to less than one-half, Thurlow J. took the view, with which I do not agree, that that ship was not wrong in altering course to starboard in fog and that her

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only fault in this regard lay in the fact that the alterations were not sufficiently bold or timely.

In the result, as I am unable to conclude that different degrees of fault have been established, it follows that liability should be borne equally between the two ships in accordance with the provisions of s. 648(2) of *The Canada Shipping Act*.

I would accordingly allow this appeal with costs in this Court and direct that the order of Pottier D.J.A., including his disposition of the costs, be varied so as to give effect to this decision. I see no reason for disturbing the disposition of the costs in the Exchequer Court as directed by Thurlow J.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: D. McInnes, Halifax.

Solicitor for the defendant, respondent: D. E. Kerr, Halifax.

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*Nov. 12, 13

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Mai 11

LE MINISTRE DU REVENU NATIONAL POUR LE CANADA, GEAR McENTYRE ET GUSTAVE J. H. WAECHTER ..... APPELLANTS;

ET

RENE LAFLEUR .....INTIMÉ.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Juridiction—Bref de prohibition en matière criminelle—Objection à la juridiction de la Cour des Sessions de la Paix—Violations de la loi fédérale de l'Impôt sur le revenu—Compétence de la Cour Supérieure pour émettre un tel bref—Code Criminel, 1953-54 (Can.), c. 51, arts. 2, 424, 680.

L'intimé fut assigné en Cour des Sessions de la Paix pour répondre à des dénonciations l'accusant de violations de la loi fédérale de l'*Impôt sur le revenu*. Il déclina la juridiction de la Cour et, avant la date fixée pour les enquêtes préliminaires, obtint de la Cour Supérieure l'émission d'un bref de prohibition suspendant les procédures. Le Ministre, par voie d'exception déclinatoire, attaqua la juridiction de la Cour Supérieure sur le motif que ce tribunal n'avait pas la compétence pour

*CORAM: Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall et Spence.

émettre un bref de prohibition dans une affaire à caractère criminel. Cette exception fut rejetée. Porté en appel, ce jugement fut confirmé par une décision majoritaire. La Cour d'Appel jugea qu'elle n'avait pas juridiction pour entendre l'appel pour le motif que le jugement rejetant l'exception déclinatoire était un jugement en matière criminelle pour lequel le *Code Criminel* ne prévoyait pas d'appel. Cette Cour, [1962] R.C.S. 588, infirma ce jugement et retourna le dossier à la Cour d'Appel pour adjudication sur le mérite du jugement rejetant l'exception déclinatoire. Par un jugement majoritaire, la Cour d'Appel jugea que la Cour Supérieure avait juridiction pour émettre des brefs de prohibition en matière criminelle en vertu de statuts adoptés avant la Confédération et non expressément ni implicitement rappelés depuis par le Parlement. Le Ministre se pourvoit devant cette Cour à l'encontre de ce dernier jugement.

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Arrêt: L'appel doit être maintenu et le bref de prohibition annulé.

Les expressions «Toute Cour Supérieure de juridiction criminelle, ainsi que toute Cour d'Appel» que l'on trouve à l'art. 424 du *Code Criminel,* lequel confère à ces cours le pouvoir d'établir des règles de cour s'appliquant à toute matière de leur compétence, sont définies aux arts. 2(14) et 2(12) du Code comme étant la Cour du Banc de la Reine (Crown Side) et la Cour du Banc de la Reine (Division d'Appel), respectivement, toutes deux dans l'exercice de leur juridiction criminelle. La Cour Supérieure se trouve donc à être exclue de l'art. 424. On ne peut qu'inférer que le Parlement ne reconnaît plus cette juridiction que la Cour Supérieure pouvait avoir en matière criminelle, en vertu des statuts d'avant Confédération.

Les dispositions de la partie XXIII du Code supportent la proposition que le Parlement a intégralement absorbé la juridiction sur les brefs de prohibition en matière criminelle. L'art. 680 du Code statue que cette partie s'applique aux procédures en matière criminelle sous forme de certiorari, habeas corpus, mandamus et de prohibition. Puisque les dispositions et les parties du Code forment un tout, il n'était pas nécessaire de répéter en cette partie ce qui résultait déjà des dispositions de l'art. 424, tel que complété par les arts. 2(12) et 2(14), lesquels n'incluent pas la Cour Supérieure. En somme, le Parlement a légiféré sur le bref de prohibition en matière criminelle, tant en ce qui concerne la juridiction de première instance que la juridiction d'appel, et cette législation ne reconnaît pas la compétence de la Cour Supérieure. Le droit antérieur à la Confédération ne se concilie plus avec le droit résultant de la législation depuis adoptée sur la question par l'autorité compétente surtout si l'on tient compte de la décision de cette Cour dans In Re Storgoff, [1945] R.C.S. 526. Le droit prévalant sous l'Union, transitoirement maintenu par l'art. 129 de l'*Acte de l'Amérique Britannique du Nord,* a été abrogé et la Cour Supérieure n'a pas juridiction sur les procédures de prohibition en matière criminelle.

Jurisdiction—Writ of prohibition in criminal matters—Objection to jurisdiction of Sessions Court to hear complaints under the Income Tax Act—Competency of Superior Court to issue writ—Criminal Code, 1953-54 (Can.), c. 51, ss. 2, 424, 680.

The respondent was summoned before the Court of Sessions to answer complaints under the Dominion *Income Tax Act.* He objected to the jurisdiction of the Court, and prior to the date set for the preliminary inquiry obtained the issue of a writ of prohibition suspending the

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proceedings. The Minister, by a declinatory exception, objected to the jurisdiction of the Superior Court to issue a writ of prohibition against a Court of criminal jurisdiction in a criminal matter. The exception was dismissed. The Court of Queen's Bench, by a majority decision, found that it had no jurisdiction to hear the appeal on the ground that the judgment dismissing the declinatory exception was a judgment in a criminal matter from which no appeal was provided for under the Criminal Code. This Court, [1962] S.C.R. 588, allowed the Minister's appeal and returned the case to the Court of Queen's Bench to hear the appeal on the merits. That Court, by a majority judgment, found that the Superior Court had jurisdiction to issue writs of prohibition in a criminal matter by virtue of pre-Confederation statutes which had neither been expressly nor implicitly repealed by Parliament. The Minister appealed to this Court.

Held: The appeal should be allowed and the writ of prohibition annulled.

The expressions "Every Superior Court of criminal jurisdiction and every Court of Appeal" found in s. 424 of the *Criminal Code*, which confers on these Courts the jurisdiction relating to procedure in criminal matters, are defined in ss. 2(14) and 2(12) of the Code as the Court of Queen's Bench (Crown Side) and the Court of Queen's Bench (Appeal Side), respectively, both in the exercise of their criminal jurisdiction. The Superior Court is excluded from the provisions of s. 424. It must be inferred that Parliament does not recognize any more this jurisdiction which the Superior Court had in criminal matters by virtue of pre-Confederation statutes.

The provisions of Part XXIII of the Code support the proposition that the Parliament has absorbed all the jurisdiction respecting writs of prohibition in criminal matters. Section 680 of the Code provides that this part applies to proceedings in criminal matters by way of certiorari, habeas corpus, mandamus and prohibition. Since the provisions and parts of the Code form a whole, it was not necessary to repeat in this part what was the result of the provisions of s. 424 as completed by ss. 2(12) and 2(14), which do not include the Superior Court. In short, the Parliament has legislated on the writ of prohibition in criminal matters both as to the jurisdiction of first instance and the jurisdiction on appeal, and this legislation does not recognize the competence of the Superior Court. The pre-Confederation law is not in harmony any more with the subsequent law adopted by competent authority, especially if the decision of In Re Storgoff, [1945] S.C.R. 526, is taken into account. The law under the Union, transitorily maintained by s. 129 of the *B.N.A. Act*, has been abrogated and the Superior Court has no jurisdiction over proceedings by way of prohibition in criminal matters.

APPEL d'un jugement de la Cour du Banc de la Reine, province de Québec[1], affirmant un jugement du Juge Reid. Appel maintenu.

Rodrigue Bédard, C.R., et *Maurice Charbonneau* pour l'appelant.

[1] [1963] B.R. 595.

Rodolphe Paré, C.R., pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Assigné en Cour des Sessions de la Paix du District de Montréal pour répondre à sept dénonciations l'accusant de diverses violations de la loi fédérale de l'*Impôt sur le revenu*, l'intimé, dans chaque cause, comparut, déclina la juridiction de la Cour et, avant la date fixée pour les enquêtes préliminaires, requit et obtint de la Cour supérieure l'émission d'un bref de prohibition introductif d'instance et un ordre de sursis à l'adresse de la Cour des Sessions de la Paix et des appelants.

Les appelants, ainsi assignés en Cour supérieure, comparurent et, par voie d'exception déclinatoire *in limine litis*, en attaquèrent la juridiction sur le motif qu'étant un tribunal de juridiction civile, la Cour supérieure n'avait pas la compétence pour émettre un bref de prohibition dans une affaire à caractère criminel. La Cour supérieure affirma sa juridiction et rejeta cette exception.

Porté en appel, son jugement fut confirmé par une décision majoritaire. La majorité, formée de M. le Juge en chef Tremblay et de MM. les Juges Rinfret, Taschereau et Owen, jugea que la Cour d'Appel n'avait pas juridiction et, pour cette raison, n'eut pas à considérer au mérite le jugement de la Cour supérieure. D'opinion contraire sur la question de juridiction, M. le Juge Casey aurait, au mérite, infirmé le jugement de première instance.

Sur appel de cette décision à la Cour Suprême[1], celle-ci affirma la juridiction de la Cour d'Appel et lui retourna le dossier pour audition et adjudication sur le mérite du jugement de la Cour supérieure rejetant l'exception déclinatoire.

Ayant considéré l'affaire au mérite, la Cour d'Appel[2], par une décision majoritaire, trouva bien fondé le rejet de cette exception. Aux vues de MM. les Juges Hyde, Rinfret, Owen et Montgomery, de la majorité, la Cour supérieure a juridiction pour émettre un bref de prohibition en matières criminelles en vertu de statuts adoptés avant la Confédération et non expressément ni implicitement rappelés depuis par le Parlement fédéral. Dissident, M. le Juge Bissonnette est d'avis que le droit antérieur à la Confédération a été modifié par les codifications du *Code Criminel* faites en 1892 et en 1953 par le Parlement fédéral.

[1] [1962] R.C.S. 588. [2] [1963] B.R. 595.

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Les appelants se pourvoient maintenant à l'encontre de ce dernier jugement de la Cour du banc de la reine (Division d'appel).

A venir jusqu'à la décision de cette Cour dans *In re Storgoff*[1], la jurisprudence attribuait à la Cour supérieure du Québec une juridiction sur les brefs de prérogative en matières criminelles comme en matières civiles. C'est qu'on considérait que ces brefs de prérogative étaient des brefs d'ordre civil même dans le cas où ils étaient incidents à des matières criminelles. Depuis *In re Storgoff, supra,* on considère qu'un bref de prohibition est une procédure civile ou criminelle selon la matière à laquelle il se rattache. La prétention de l'intimé, admise en Cour d'Appel par la majorité, rejetée par M. le Juge Bissonnette, dissident, aussi bien que par M. le Juge Casey lors du premier appel[2] est que même dans le cas où le bref de prohibition est, en raison de la matière à laquelle il se rattache, une procédure de nature criminelle, la Cour supérieure a juridiction en vertu de ces statuts antérieurs à 1867 et non abrogés depuis. Telle est la question qui nous est soumise.

Ainsi qu'il appert des préambules préfaçant les chapitres 37, 38 et 41 du Statut 12-Victoria sanctionnés le même jour sous l'Union en 1849, la Législature du Bas-Canada procéda alors à changer et réformer le système judiciaire du Bas-Canada et à définir, entre autres, le mode de procédure adopté dans les cours de justice relativement aux brefs de prérogative. Les dispositions pertinentes de cette législation peuvent être ainsi résumées.

Au chapitre 37, intitulé «Acte pour établir une cour ayant jurisdiction en appel et en matières criminelles, pour le Bas-Canada», on constitue la Cour du banc de la reine à laquelle on donne une juridiction d'appel en matières civiles et criminelles, et de première instance en matières criminelles, lui accordant à ces fins tous les pouvoirs jusqu'alors attribués à ce qui était avant la Cour du banc de la reine. On a donc la Cour du banc de la reine, Division d'appel ou Crown side, suivant qu'on réfère à sa juridiction d'appel tant en matières civiles ou criminelles, ou de première instance en matières criminelles, respectivement.

Au chapitre 38, intitulé «Acte pour amender les lois relatives aux cours de juridiction civile en première instance,

[1] [1945] R.C.S. 526.

[2] [1962] B.R. 327 à 333.

dans le Bas-Canada», on crée la Cour supérieure à laquelle on transfère et confère la juridiction civile de première instance jusqu'alors exercée par la Cour du banc de la reine, avec tous les pouvoirs qu'avait celle-ci «*en matières civiles mais non en matières criminelles*». De plus, on lui transfère et confère également le droit de surveillance et de contrôle exercé jusqu'alors par la Cour du banc de la reine sur toutes les Cours, sauf évidemment la Cour du banc de la reine; cette juridiction s'étendant à la Cour supérieure et à ses Juges et pouvant être exercée durant les termes ou les vacances.

Au chapitre 41, intitulé «Acte pour définir le mode des procédures à adopter dans les cours de justice du Bas-Canada dans les matières relatives à la protection et à la régie des droits de corporation et aux writs de prérogative, et pour d'autres fins y mentionnées», on statue que tous les «writs» émaneront de la Cour supérieure et qu'il y aura un droit d'appel à la Cour du banc de la reine (Division d'appel) dans tous les cas, sauf dans le cas de *certiorari.*

La juridiction et les pouvoirs ainsi attribués à la Cour supérieure lui furent conservés substantiellement dans la même forme en 1860, par le Statut 23-Victoria ch. 78 et 89 et étaient tenants en 1867 au moment de l'adoption de l'Acte de l'Amérique Britannique du Nord, 1867, 30-31 Victoria ch. 3. Si, par ailleurs, on tient compte du fait que jusqu'à la décision dans *In re Storgoff, supra,* on considérait que les brefs de prérogative étaient des brefs civils même dans les cas où ils se rattachent à des matières criminelles, on peut se demander si, en donnant alors cette juridiction et ces pouvoirs, sur le sujet, à la Cour supérieure,—comme elle avait, d'ailleurs, le droit de ce faire—la Législature du Bas-Canada manifestait vraiment une intention de lui donner, à cet égard, une juridiction en matières criminelles plutôt qu'une juridiction en matières civiles. Quoi qu'il soit de l'intention de la Législature du Bas-Canada ou, à tout événement, de l'effet de cette législation jusqu'à la Confédération, il reste que ces pouvoirs, et ce droit de la Cour supérieure de les exercer en matières criminelles, transitoirement maintenus par la nouvelle constitution de 1867 (art. 129), relevaient désormais, à compter d'icelle, de la compétence exclusive du Parlement (art. 91 para. 27). C'est dire que, depuis lors, la Législature du Québec ne peut, sur le sujet, poser aucun acte législatif. Et comme toute législature

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est présumée légiférer dans les limites de sa compétence, toute législation adoptée par la Législature du Québec depuis la Confédération, sur le sujet du droit de contrôle et de surveillance des tribunaux inférieurs et des brefs de prérogative au moyen desquels ce droit s'exerce, ne saurait en principe s'interpréter comme s'étendant aux matières criminelles ou, de toutes façons, être tenue comme valide sous cet aspect. La constitution, le maintien et l'organisation des cours provinciales de juridiction criminelle sont de la compétence exclusive de la Législature (art. 92 para. 14), mais seul le Parlement peut attribuer à ces cours provinciales une juridiction criminelle. Aussi bien suffit-il à la solution de la question qui nous est soumise d'examiner la législation que le Parlement peut avoir adoptée sur le sujet.

Si l'on tient que cette juridiction et ces pouvoirs attribués sous l'Union à la Cour supérieure s'appliquaient en matières criminelles comme en matières civiles, on ne saurait s'étonner de ne trouver aucune législation fédérale les abrogeant *in toto* et sans que ne soit faite la distinction que requièrent les limites de la compétence du Parlement. On ne trouve, par ailleurs, aucune loi du Parlement référant spécifiquement à ces statuts d'avant Confédération pour abroger cette juridiction et ces pouvoirs en ce qui concerne leur application en matières criminelles.

Il est manifeste cependant que, particulièrement en ce qui a trait à la procédure, le droit criminel, prévalant jusqu'en 1867 dans les diverses juridictions territoriales depuis réunies pour constituer ce qui est maintenant la juridiction territoriale de la Confédération canadienne, a considérablement évolué durant cette période bientôt séculaire. Cette évolution, orientée vers l'uniformité d'un droit criminel canadien, s'est accomplie par des changements résultant expressément ou implicitement de diverses dispositions législatives successivement adoptées au cours des ans par le Parlement. Ce droit perfectionné, non pas par de simples refontes (consolidations), mais par deux codifications, apparaît aujourd'hui dans cet ensemble de dispositions législatives que le Parlement a systématiquement réunies dans un seul corps—le *Code Criminel* de 1953—après avoir apporté au *Code Criminel* précédent des additions, soustractions, modifications, aussi bien que des changements dans la structure. La relative interdépendance des dispositions ainsi que des

diverses parties du *Code Criminel* a déjà été notée dans *Welch v. The King*[1] où référant, dans l'espèce, aux pouvoirs conférés au Procureur Général à l'art. 873, cette Cour disait:

> Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions of the same Act.

Ces considérations doivent être retenues dans l'examen des dispositions du *Code Criminel* relativement à la question qui nous occupe, soit: (i) Celles de l'art. 424 conférant aux cours y désignées le pouvoir d'établir des règles de cour s'appliquant à toutes matières de leur compétence et (ii) celles apparaissant à la Partie XXIII du Code intitulée: Recours extraordinaires.

Les dispositions pertinentes de l'art. 424 prescrivent que:

> 424. (1) Toute cour supérieure de juridiction criminelle, ainsi que toute cour d'appel, peut en tout temps, avec l'assentiment de la majorité de ses juges présents à une réunion tenue à cette fin, établir des règles de cour non incompatibles avec la présente loi ou quelque autre loi du Parlement du Canada, et les règles ainsi établies s'appliquent à toute poursuite, procédure, action ou appel, selon le cas, de la compétence de ladite cour, intenté à l'égard de toute matière de nature criminelle ou découlant de quelque semblable poursuite, procédure, action ou appel, ou s'y rattachant.
>
> (2) Les règles prévues par le paragraphe (1) peuvent être établies
>
> *a*) .....
>
> *b*) .....
>
> *c*) pour réglementer, en matière criminelle, la plaidoirie, la pratique et la procédure devant la cour, y compris les actes de procédure concernant les *mandamus, certiorari, habeas corpus,* prohibition, cautionnement et frais, et les actes de procédure sur une demande, à une cour des poursuites sommaires, d'exposer une cause pour l'opinion de la cour à l'égard d'une déclaration de culpabilité, ordonnance, décision ou autre procédure; et
>
> *d*) .....
>
> (3) Lorsque, dans une province, des règles de cour sur des matières criminelles sont en vigueur au moment de l'entrée en application de la présente loi, ces règles demeurent en vigueur sauf dans la mesure où elles peuvent être modifiées ou abrogées, à l'occasion, par la cour que le présent article autorise à établir des règles.
>
> (4) .....
>
> (5) Nonobstant les dispositions du présent article, le gouverneur en conseil peut établir les dispositions qu'il juge opportunes pour assurer l'uniformité des règles de cour en matière criminelle, et toutes règles uniformes établies sous l'autorité du présent paragraphe auront cours et seront exécutoires comme si elles étaient édictées par la présente loi.

On notera que peu de temps après avoir adopté ses premières lois concernant la procédure dans les causes

[1] [1950] R.C.S. 412 à 427.

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criminelles, en 1869, aux chapitres 29 et suivants, 32-33 Victoria et, en 1886, aux chapitres 174 et suivants, 49-Victoria, le Parlement adoptait en 1889, au chapitre 40, 52-Victoria, un «Acte concernant les règles de cour au sujet des affaires criminelles» édictant particulièrement:

1. Toute cour supérieure du Canada ayant juridiction en matières criminelles, pourra en tout temps, avec le concours d'une majorité de ses juges présents à toute réunion tenue à cet effet, établir des règles de cour, non incompatibles avec les statuts du Canada, qui s'appliqueront à toutes les procédures se rattachant à toute poursuite, procédure ou action intentée au sujet de toute affaire d'une nature criminelle, ou résultant ou découlant d'une affaire criminelle, et particulièrement pour tous ou aucun des objets suivants:—

a) .....

b) Pour régler la plaidoirie, la pratique et la procédure de la Cour en matières criminelles et concernant les *mandamus, certiorari, habeas corpus,* la prohibition, le *quo warranto,* l'admission à caution et les dépens;

c) .....

2. .....

Cette loi ne comportait pas de dispositions similaires à celles qui apparaissent aux paragraphes 3 et 5 de l'art. 424. A cette époque, comme aujourd'hui suivant le chapitre 15 des Statuts Revisés de 1941, on classifiait les tribunaux de la province en trois catégories: les tribunaux de juridiction civile, ceux de juridiction criminelle et ceux de juridiction mixte; la Cour du banc de la reine ayant une juridiction d'appel en matières criminelles et civiles et juridiction de première instance en matières criminelles; et la Cour supérieure était une Cour de juridiction civile. *Cf.* Statuts Refondus de Québec, 1888, Vol. I, Titre VI.

Les dispositions de l'art. 424 doivent être complétées par celles de l'art. 2 du *Code Criminel.* Selon l'art. 2(14), l'expression «cour supérieure de juridiction criminelle» désigne «la Cour du banc de la reine» et, selon l'art. 2(12), l'expression «cour d'appel» signifie «la Cour du banc de la reine, Division d'appel». De toute évidence, dans le contexte de l'art. 424, on doit entendre par «Toute cour supérieure de juridiction criminelle, ainsi que toute cour d'appel,» la Cour du banc de la reine (Crown side) et la Cour du banc de la reine (Division d'appel), respectivement, toutes deux dans l'exercice de leur juridiction criminelle. D'où l'on voit que la Cour supérieure est exclue de la disposition de l'art. 424.

Le Parlement, à mon avis, a, par les dispositions de cet art. 424, intégralement absorbé toute la juridiction en

matières criminelles sur tous les sujets relativement auxquels il attribue, d'une part, à la Cour du banc de la reine (Division d'appel) et à la Cour du banc de la reine (Crown side) le pouvoir d'établir des règles de cour et, d'autre part, au gouverneur en conseil le pouvoir d'assurer l'uniformité de ces règles de cour par tout le Canada. En décrétant, au paragraphe 1 que

> . . . les règles ainsi établies s'appliquent à toute poursuite, procédure, action ou appel, selon le cas, de la *compétence* de ladite cour, intenté à l'égard de toute matière de nature criminelle ou découlant de quelque semblable poursuite, procédure, action ou appel, ou s'y rattachant.

le Parlement reconnaît et affirme la compétence des cours mentionnées en l'article sur les sujets qui y sont énumérés. De plus, si l'on considère que l'article ne fait aucune mention de la Cour supérieure, qu'en l'absence d'aucun texte à cet effet les règles établies par les membres d'une Cour ne régissent pas la conduite des affaires venant devant une autre Cour que la leur, que les règles autorisées par l'article n'ont en fait d'application que pour la réglementation des affaires venant devant les cours y mentionnées, et si, de plus, on tient compte du souci du Parlement de pourvoir, par les dispositions du paragraphe 5, à l'uniformité des règles que les différentes cours provinciales autorisées par l'article peuvent établir en matières criminelles, on ne peut qu'inférer que le Parlement ne reconnaît plus cette juridiction que la Cour supérieure pouvait avoir en matières criminelles sur les sujets mentionnés, en vertu des statuts d'avant Confédération.

Les dispositions de la Partie XXIII supportent la proposition que le Parlement a intégralement absorbé la juridiction sur les brefs de prohibition en matières criminelles.

L'art. 680, disposition nouvelle insérée au Code de 1953, statue que cette partie s'applique aux procédures en matière criminelle sous forme de *certiorari, habeas corpus, mandamus* et de prohibition. Alléguant, cependant, qu'aucune disposition de cette partie ne désigne nommément la cour ayant juridiction en la matière, l'intimé en déduit qu'aucune de ces dispositions n'abroge la compétence de la Cour supérieure. Comme déjà indiqué, les dispositions et les parties du *Code Criminel* forment un tout. Il n'était pas nécessaire, à mon avis, de répéter en cette partie ce qui résultait déjà des dispositions de l'art. 424, telles que com-

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plétées par l'art. 2(12) et 2(14); ces dispositions n'incluent pas la Cour supérieure.

De plus, l'art. 691 de la Partie XXIII du *Code Criminel* prescrit ce qui suit:

> 691. (1) Appel peut être interjeté à la cour d'appel contre une décision qui accorde ou refuse le secours demandé dans des procédures par voie de *mandamus*, de *certiorari* ou de prohibition.
>
> (2) Les dispositions de la Partie XVIII s'appliquent, *mutatis mutandis*, aux appels prévus au présent article.

Suivant l'art. 586(1) de la Partie XVIII, le délai d'appel est le délai fixé par les règles de la Cour d'Appel, lequel, suivant la règle 3, est de quinze jours. De plus, et suivant l'article 586(2), ce délai peut être prorogé à toute époque par la Cour d'Appel ou l'un de ses Juges.

D'autre part, au moment où l'Acte de 1867 est venu en vigueur, la procédure relative à l'exercice de la compétence que pouvait avoir la Cour supérieure, cour de juridiction civile, était réglée par le premier *Code de procédure civile,* adopté sous l'Union et mis en vigueur le 28 juin 1867. Suivant les dispositions de l'art. 1033 de ce premier *Code de procédure civile,* l'appel d'un jugement de la Cour supérieure en matière de prohibition devait être logé dans un délai de quarante jours à compter du prononcé du jugement et, passé ce délai, le droit d'appel était périmé. Deux jours après la mise en vigueur de ce *Code de procédure civile,* l'Acte de 1867 est lui-même venu en vigueur et, dès lors, il n'était plus loisible à la Législature de la province de Québec de faire acte de législation relativement au bref de prohibition en matière criminelle. Par la suite, le premier *Code de procédure civile* fut remplacé par le *Code de procédure civile* actuellement en vigueur. Suivant les dispositions de l'art. 1006 de ce nouveau Code, le délai d'appel en matière de prohibition est de trente jours et ce délai ne peut être prorogé. D'où l'on voit que les dispositions du *Code de procédure civile,* que ce soit celles de l'ancien ou du nouveau, sont en conflit, sur cette question du droit d'appel, avec les dispositions de l'art. 691 du *Code Criminel;* et les deux ne peuvent, conséquemment, coexister.

En somme, le Parlement a légiféré sur le bref de prohibition en matière criminelle, tant en ce qui concerne la juridiction de première instance que la juridiction d'appel et cette législation ne reconnaît pas de compétence à la Cour supérieure. Le droit antérieur à la Confédération, invoqué

par l'intimé, ne se concilie plus avec le droit résultant de la législation depuis adoptée sur la question par l'autorité compétente, surtout si, dans la considération de la question, on tient compte de la décision de cette Cour dans *In re Storgoff, supra.*

Aussi bien, d'accord avec MM. les Juges Bissonnette et Casey de la Cour du banc de la reine (Division d'appel), et en tout respect pour les tenants de l'opinion contraire, je dirais que le droit prévalant sous l'Union, transitoirement maintenu par l'art. 129 de l'Acte de 1867, a été abrogé et que la Cour supérieure n'a pas juridiction sur les procédures de prohibition en matières criminelles.

Je maintiendrais l'appel, infirmerais le jugement *a quo* et, statuant à nouveau, accorderais les conclusions de l'exception déclinatoire; déclarerais que la Cour supérieure était sans juridiction pour émettre le bref de prohibition; annulerais ce bref; débouterais l'intimé de ses conclusions, sauf à se pourvoir; le condamnerais à tous les dépens et permettrais aux appelants de retirer le dépôt consigné avec l'exception déclinatoire. Le présent jugement valant, selon la convention des parties, quant aux autres appels logés à cette Cour entre les mêmes parties et, partant, sur la même question.

Appel maintenu avec dépens.

Procureur de l'appelant: E. A. Driedger, Ottawa.

Procureurs de l'intimé: Pinard, Pigeon, Paré, Cantin & Thomas, Montréal.

1964
*Mar. 16
April 28

J. E. GIBSON HOLDINGS LIMITED (*Respondent*) ..... APPELLANT;

AND

PRINCIPAL INVESTMENTS LIMITED (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Landlord and tenant—Lease—Clause providing for renewal for successive 21-year terms in perpetuity—Validity of clause.

A motion was brought by the respondent company for a declaration that the covenant for renewal contained in its lease from the appellant company was a perpetually renewable clause and that the renewable term of 21 years, subject to the arbitration provision as to rent, was for an indefinite number of additional successive 21-year terms in perpetuity. The reversion was presently vested in the appellant company which attacked the validity of the clause. Both the judge at first instance and the Court of Appeal held that the clause was valid.

Held: The appeal should be dismissed.

There was no dispute that the lease was intended to be renewable in perpetuity and that clauses of this kind, if expressed in terms of an option to renew, do not offend the rule against perpetuities. The appellant's contention that this case was different because the renewal clause imposed an absolute obligation on the lessor to grant a new lease including the covenants for renewal (subject to arbitration as to rent) and a like obligation on the part of the lessee to accept the new lease failed. There was no logical distinction between a present contract for successive renewals in perpetuity and options to achieve the same end.

The further submission that this lease created a term which was indefinite or infinite in time and was in effect a term in perpetuity also failed. This was a lease for 21 years. When that term expired a new lease was drawn on the same terms except as to rent and that lease, in turn, had a term certain of 21 years.

Gooderham & Worts, Ltd. v. C.B.C., [1947] A.C. 66, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Fraser J. Appeal dismissed.

C. E. Woollcombe, for the appellant.

J. D. Arnup, Q.C., and *J. J. Carthy,* for the respondent.

The judgment of the Court was delivered by

[1] [1963] 2 O.R. 507, 40 D.L.R. (2d) 264.

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

1964

J. E. GIBSON HOLDINGS LTD. v. PRINCIPAL INVESTMENTS LTD.

JUDSON J.:—The subject-matter of this appeal is a clause in a lease which provides for renewal for successive twenty-one year terms in perpetuity, subject to arbitration provisions as to rent. The reversion is now vested in the appellant company which attacks the validity of the clause. Both Fraser J., at first instance, and the Court of Appeal[1] have held that the clause is valid.

The lease was made by John Elias Gibson and Principal Investments Limited for a term of 21 years from December 15, 1949. The renewal clause is in these terms:

> And further, that the said lessor, his heirs, executors, administrators and assigns will at the end or expiration of said term hereby granted and of every subsequent term of twenty-one years granted in pursuance of these presents, and whenever the rent for said future term shall have been fixed by arbitration as aforesaid, at the cost and charges of the said Lessee, its successors, as aforesaid, make execute and deliver unto the said Lessee, its successors and assigns, and that the said Lessee, its successors and assigns, will accept a new and further lease of the hereby demised premises with the appurtenances for the same and containing the same covenants and stipulations, including covenant for renewal, as are contained in this present lease (save only that the yearly rent of the said premises be the rent ascertained or agreed upon as stipulated by arbitration, as hereinbefore mentioned.)

Principal Investments Limited moved under R. 611 for a declaration of its rights. Fraser J. made the following declaration:

> THIS COURT DOTH DECLARE that the renewal clause in the lease between John Elias Gibson and Principal Investments Limited dated the 15th day of December, 1949 is a valid renewal clause for additional successive twenty-one year terms in perpetuity subject to the arbitration provisions as to rent contained in the said lease, AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

The Court of Appeal dismissed the appeal from this judgment and, in my opinion, the further appeal to this Court must also be dismissed.

There is no dispute between the parties that the lease was intended to be renewable in perpetuity and that clauses of this kind, if expressed in terms of an option to renew, do not offend the rule against perpetuities (Morris and Leach—The Rule against Perpetuities, 2d ed., p. 223). The appellant says that this case is different because the renewal clause imposes an absolute obligation on the lessor to grant a new lease including the covenants for renewal (subject to

[1] [1963] 2 O.R. 507, 40 D.L.R. (2d) 264.

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J. E. GIBSON HOLDINGS LTD. v. PRINCIPAL INVESTMENTS LTD.

Judson J.

arbitration as to rent) and a like obligation on the part of the lessee to accept the new lease.

There is a thorough historical survey of the case law on this subject in the reasons of Fraser J. which I wish to adopt. He is unable to find any logical distinction between a present contract for successive renewals in perpetuity and options to achieve the same end, and I agree with his conclusion. Further, *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation*[1], where the obligations of lessor and lessee concerning renewal were expressed in mutual covenants to grant and accept a lease, is against any such distinction.

The further submission that this lease creates a term which is indefinite or infinite in time and is in effect a term in perpetuity also fails. This is a lease for twenty-one years. When that term expires a new lease is drawn on the same terms except as to rent and that lease, in turn, has a term certain of twenty-one years.

The appellant also took objection that the application for a declaration of rights was premature, the lease not expiring until December 15, 1970, and that in the circumstances, the Court should not exercise its jurisdiction under R. 611. Both Fraser J. and the Court of Appeal ruled against this contention and we informed the respondent at the hearing that we did not need to hear him on this point. We agree with both Courts that the jurisdiction was properly exercised.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Fasken, Calvin, Mackenzie, Williston & Swackhamer, Toronto.

Solicitors for the respondent: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

[1] [1947] A.C. 66.

THE TRAVELERS INDEMNITY COMPANY et THE TRAVELERS FIRE INSURANCE COMPANY (*Défenderesses*) ..... APPELANTES;

1963
*Juin 3, 4
1964
Mars 23

ET

ARTHUR R. LAFLÈCHE, SENIOR et ARTHUR R. LAFLÈCHE, JUNIOR (*Demandeurs*) ..... INTIMÉS.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Assurance—Automobile—Clause omnibus—Propriétaire enregistré—Intérêt assurable—Véhicule conduit exclusivement par le fils de l'assuré—Changement dans la nature et l'étendue du risque—Action en garantie.

Une automobile, Chevrolet 1952, enregistrée au nom de l'intimé-père et conduite par son fils qui en avait l'usage exclusif, est venue en collision avec une autre automobile. Le père détenait une police d'assurance émise par les appelantes et qui contenait une clause omnibus. Sur refus des assureurs d'accepter la responsabilité, une action en garantie leur fut intentée par les intimés.

La police d'assurance en question avait été émise originairement en 1950 en faveur de l'intimé-père relativement à une automobile Chevrolet 1949 dont il était le propriétaire. Pour obtenir cette police, il avait dû signer une formule, fournie par les assureurs, aux termes de laquelle il représentait qu'il était le propriétaire enregistré de l'automobile. Cette police fut renouvelée d'année en année alors qu'elle fut amendée en 1953 pour couvrir une Chevrolet 1952 achetée à cette date et en paiements partiels de laquelle la Chevrolet 1949 fut donnée au vendeur. C'est le fils qui signa en son propre nom l'offre d'achat de cette automobile; c'est à ses nom et adresse que fut émise la facture du vendeur; c'est lui qui signa le contrat de finance relatif à la balance impayée sur le prix de vente; c'est lui qui paya par la suite la mensualité prévue à ce contrat. A la suite d'un accident survenu quelques mois avant et qui avait causé la démolition complète d'une automobile appartenant au fils, le père avait mis à la disposition de ce dernier la Chevrolet 1949 et s'était acheté pour son propre usage une Pontiac. Antérieurement à la date de l'achat de la Chevrolet 1952, il était de la connaissance du père ainsi que du fils que les compagnies d'assurance refusaient de consentir au fils des assurances automobiles.

Les assureurs plaidèrent que la Chevrolet 1952 n'avait jamais été la propriété, ni en la possession, ni sous la garde ou le contrôle du père mais bien de son fils; et qu'il y avait eu changement de la nature et de l'étendue du risque.

Le juge au procès jugea que le père n'avait aucun intérêt assurable dans la Chevrolet 1952 et n'en était pas le propriétaire, et qu'il y avait eu un changement matériel dans le risque. Il rejeta les deux actions

*CORAM: Le Juge en Chef Taschereau et les juges Fauteux, Abbott, Judson et Ritchie.

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intentées par les intimés. Ce jugement fut renversé par la Cour d'Appel qui jugea que le père, qui en fait était le propriétaire enregistré, avait un intérêt assurable même s'il n'était pas le véritable propriétaire et qu'il n'y avait eu par conséquent aucun changement dans la nature et l'étendue du risque. Les assureurs en appelèrent à cette Cour.

Arrêt: L'appel doit être maintenu et les actions rejetées, le Juge Abbott étant dissident.

Le Juge en Chef Taschereau et les Juges Fauteux et Judson: Sans doute le père était enregistré comme propriétaire de la Chevrolet 1952 mais fausse était la représentation qu'il était vraiment le propriétaire enregistré au sens de la *Loi des véhicules automobiles,* S.R.Q. 1941, c. 142. Ni au sens du droit commun, ni au sens plus large de la *Loi des véhicules automobiles,* le père n'avait droit à la propriété, la possession, l'usage, la garde ou le contrôle de la Chevrolet 1952 ou le pouvoir de permettre à autrui de l'utiliser, tel que le para. 23 de l'art. 2 de cette Loi définit le mot propriétaire. Admettre comme bien fondé le recours des intimés serait imposer aux appelantes une obligation que manifestement elles n'avaient jamais consenti d'assumer. Non seulement on ne peut trouver dans les actes des appelantes une intention nette et claire de couvrir la nullité de la police d'assurance, mais la ligne de conduite qu'elles ont suivie traduit une intention toute contraire.

Per Ritchie J.: Even if it be accepted that the father had an insurable interest in the 1952 Chevrolet, it was still an interest materially different from his interest in the car which was originally insured. The same applied if the case is put upon the footing that the father's interest was that of a registered owner. There was therefore a material change in the nature of the insurable interest, and as there was no statement or endorsement on the policy covering this change the insurors were relieved from liability by the provisions of statutory condition 6(*d*).

Per Abbott J., *dissenting:* The interest of the father in the 1952 Chevrolet was that of unconditional ownership and there was no material change in the nature of the insurable interest of the insured in the automobile within the meaning of statutory condition 6. From the time of its purchase, the father was the registered owner of the 1952 Chevrolet. The fact that the purchase was negotiated by the son, that the major portion of the balance on the purchase price was advanced by him, and that he appeared to have exclusive use of the car, was not sufficient to establish that he had any right of ownership in the new vehicle. It followed that statutory condition 6 had no application.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du juge Pager. Appel maintenu, le Juge Abbott dissident.

A. M. Watt, Q.C., et *M. Rioux,* pour les défenderesses, appelantes.

J. Duchesnes, pour les demandeurs, intimés.

[1] [1962] B.R. 909.

Le jugement du Juge en Chef Taschereau et des juges Fauteux et Judson fut rendu par

LE JUGE FAUTEUX:—Le 4 juillet 1953, une collision se produisit, à Montréal, entre une automobile conduite par son propriétaire, Maurice Svamvour, et un *Chevrolet 1952* enregistré au nom d'Arthur-R. Laflèche sr et conduit par son fils Arthur-R. Laflèche jr. Au moment de cet accident, Laflèche père détenait des appelantes une police d'assurance-automobile dont le bénéfice s'étendait à toute personne utilisant le véhicule avec permission de l'assuré.

Cet accident donna lieu à quatre actions:—Svamvour poursuivit les deux Laflèche en dommages; la compagnie Service Fire Insurance Company of New York poursuivit Laflèche jr pour le recouvrement d'une indemnité par elle payée avec subrogation à Svamvour, son assuré, pour dommages à l'automobile d'icelui; enfin, sur le refus des appelantes d'accepter une responsabilité sous la police d'assurance par elles émise à Laflèche père, une action en garantie leur fut intentée par les deux Laflèche et Laflèche père prit, contre elles, une action personnelle pour dommages au *Chevrolet 1952* enregistré en son nom.

Ces quatre causes furent entendues par feu M. le Juge Pager. La preuve faite dans chacune fut, du consentement de tous les intéressés, commune à toutes les causes. Par jugement subséquemment rendu, le 15 février 1960, dans chacune, les actions intentées par Svamvour et Service Fire Insurance Company of New York furent maintenues alors que les deux actions prises contre les appelantes furent renvoyées.

Trois de ces décisions furent portées en appel et modifiées par des arrêts rendus par la Cour du banc de la reine le 30 avril 1962. Le jugement dans la cause de Svamvour contre les deux Laflèche fut infirmé quant au père et confirmé quant au fils; sur cette action, il y a chose jugée. Le jugement sur l'action en garantie des Laflèche et le jugement sur l'action personnelle de Laflèche père furent infirmés et ces deux actions dirigées contre les appelantes furent accueillies.

D'où le pourvoi à cette Cour relatif à ces deux derniers jugements de la Cour d'Appel[1].

La police d'assurance sur laquelle se fondent les recours des intimés contre les appelantes a été émise originairement,

[1] [1962] B.R. 909.

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le 11 mai 1950, en faveur d'Arthur-R. Laflèche sr, relativement à une automobile *Chevrolet 1949* dont il était le véritable propriétaire. Pour obtenir cette police d'assurance, il avait dû signer une formule, fournie par les assureurs, aux termes de laquelle le signataire représente qu'il est le *propriétaire enregistré* de l'automobile. Tenante pour un an, cette police fut par la suite renouvelée d'année en année alors qu'advenant le 28 mai 1953, elle fut amendée pour couvrir un *Chevrolet 1952* acheté le même jour et en paiement partiel duquel le *Chevrolet 1949* fut donné au vendeur. Sujet à ce seul amendement, la police émise en 1950 en faveur de Laflèche père se continua et ce, sur la base de la déclaration faite lors de son émission que l'assuré est le *propriétaire enregistré* de la voiture indiquée en la police. Un peu plus d'un mois après cet incident se produisit l'accident donnant lieu aux actions dirigées contre les appelantes.

Niant toute responsabilité, elles plaidèrent particulièrement que le *Chevrolet 1952* n'avait jamais été la propriété, ni en la possession, ni sous la garde ou le contrôle de Laflèche père mais bien de son fils; qu'en raison d'accidents antérieurs en lesquels celui-ci avait été impliqué, il ne pouvait pas obtenir d'assurance des appelantes ou de toute autre compagnie d'assurance désignée comme «tariff company»; qu'on avait, par erreur ou à dessein, mal représenté ou non dévoilé aux appelantes la véritable situation quant à la propriété, la possession, la garde et le contrôle du *Chevrolet 1952*; qu'il y avait eu changement de la nature et de l'étendue du risque et qu'elles auraient refusé ce risque et annulé la police eussent-elles été informées de la véritable situation. Les appelantes conclurent à l'annulation de la police et au rejet des deux actions prises contre elles.

Le Juge de la Cour supérieure fit une revue et appréciation minutieuses de la preuve. Il jugea que si Laflèche père était, lors de l'émission de la police en 1950, le véritable propriétaire et, comme il l'avait alors représenté, le *propriétaire enregistré* du *Chevrolet 1949,* c'était son fils qui avait exclusivement le droit à la propriété aussi bien qu'à la possession, l'usage, la garde et le contrôle du *Chevrolet 1952* enregistré au nom de son père. Cette conclusion est amplement supportée par la preuve. C'est Laflèche jr qui signa, en son propre nom, l'offre d'achat de cette automobile; c'est à

ses nom et adresse que fut émise la facture du vendeur; c'est lui qui signa le contrat de finance relatif à la balance impayée sur le prix de vente; c'est lui qui paya par la suite la mensualité prévue à ce contrat. Le savant Juge n'attacha pas d'importance au fait que le *Chevrolet 1949* avait été donné au vendeur en paiement de ce qui représentait en fait moins de la moitié du prix du *Chevrolet 1952*; il considéra que si le père, banquier retiré résidant à Ste-Adèle-en-haut, n'avait pas fait don du *Chevrolet 1949* à son fils résidant et ayant ses affaires à Montréal, il lui en avait abandonné l'usage, la possession et le contrôle et s'était lui-même, pour obvier à la privation de son *Chevrolet 1949,* acheté un Pontiac pour son propre usage. En fait, c'est à la suite d'un accident survenu le 29 novembre 1952 et causant, outre la perte d'une vie humaine, la démolition complète d'une autre automobile alors conduite par le fils que Laflèche père mit ainsi à la disposition de ce dernier le *Chevrolet 1949.* Laflèche père affirma dans son témoignage qu'il avait donné instructions à son fils de négocier, pour et au nom de son père, l'achat du *Chevrolet 1952*; le Juge au procès déclara n'accorder aucune foi à cette affirmation et la rejeta. Quant au fait de l'enregistrement du *Chevrolet 1952* au nom du père, il apprécia comme révélateur le fait que la demande d'enregistrement avait d'abord été signée par le fils dont la signature fut subséquemment raturée et remplacée par celle du père. Retenant que la preuve révélait qu'antérieurement au 28 mai 1953, date d'achat du *Chevrolet 1952,* le fils avait été impliqué dans des accidents sérieux et que les compagnies de l'Association canadienne des assureurs, dont les appelantes, refusaient de lui consentir une assurance-automobile, le Juge trouva dans ces faits la raison de l'enregistrement du *Chevrolet 1952* au nom du père plutôt qu'à celui du fils et la raison de l'omission, réalisée par ce procédé, de dévoiler aux appelantes le nom du véritable propriétaire et usager de ce Chevrolet. Il a noté que c'est le fils qui, à titre de membre d'une firme de courtiers d'assurance agissant pour les appelantes, avait personnellement vu à effectuer, en leur nom, l'amendement qui fut fait à la police d'assurance pour couvrir le *Chevrolet 1952,* et que non seulement le fils n'ignorait rien de la véritable situation quant au titre de propriété de cette automobile et quant à l'impossibilité

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pour lui-même d'obtenir, en son propre nom, de l'assurance des appelantes, mais, ajouta le Juge:

> . . . son omission de porter à la connaissance des défenderesses le nom du véritable propriétaire de l'automobile Chevrolet 1952 constitue une réticence relative à un changement très important dans le risque qu'il cherchait à mettre à la charge des défenderesses, réticence qui a un caractère frauduleux.

D'autre part, retenant que le père avait expressément admis qu'il était bien au courant de l'accident du 29 novembre 1952 dans lequel son fils avait été impliqué, le Juge exprima et motiva la conviction qu'il avait que le père n'ignorait pas l'attitude prise par les compagnies membres de l'Association canadienne des assureurs quant à la possibilité pour son fils d'obtenir pour lui-même de l'assurance-automobile. Il trouva singulier que le père n'ait pas confié à son fils, mais à une autre firme de courtiers, l'assurance de son Pontiac et il rejeta, comme étant nettement contredite par la preuve, l'explication que le fils donna de ce fait. En somme, dit le Juge, relativement à la police d'assurance couvrant le Chevrolet 1952:

> En s'en remettant à son fils d'obtenir ce changement dans la police émise en sa faveur, en acceptant lui-même ce changement ainsi qu'il y a lieu de présumer qu'il l'a accepté, et en tenant par la suite de s'en prévaloir pour demander l'exécution par les défenderesses des obligations qu'elles avaient souscrites en émettant la police, Laflèche père a fait siennes la réticence et l'omission susdites, qui ont eu pour effet que le contrat d'assurance est apparemment resté en vigueur, alors que, sans aucun doute, les défenderesses eussent expressément mis fin à ce contrat, si elles avaient connu la vérité. Il en résulte donc que la police est devenue nulle dès le 29 mai 1953.

Il ressort enfin de l'appréciation qu'il fit des témoins que le Juge accorda peu de crédibilité, si aucune, aux témoignages des intimés. Violà, en substance, les principaux motifs adoptés par le Juge de première instance pour rejeter les actions des intimés.

En Cour d'Appel, on a considéré que, pour consentir ce contrat d'assurance, les appelantes s'étaient limitées à demander à Laflèche père s'il était le *propriétaire enregistré*; qu'en fait, il l'était, et qu'à ce titre à tout le moins, il avait un intérêt assurable, même s'il n'était pas le véritable propriétaire; que le fait que son droit de propriété pouvait être limité n'invalidait pas l'assurance; qu'en raison de la clause étendant l'assurance aux personnes auxquelles l'assuré

pouvait permettre l'usage de l'automobile, il n'y avait eu aucun changement dans la nature et l'étendue du risque.

Avec le plus grand respect, il m'est impossible de partager ces vues et, d'accord avec les raisons exprimées par le Juge au procès, je dirais que les deux actions prises contre les appelantes ne peuvent être accueillies.

Il ne s'agit pas en ce litige des obligations que peut encourir vis-à-vis des tiers, en vertu de la *Loi des véhicules automobiles,* S.R.Q. 1941, c. 142, celui qui n'étant pas propriétaire au sens étendu de cette loi est enregistré comme tel au Bureau d'enregistrement des automobiles; et il importe peu à la décision de la présente cause que celui qui est ainsi enregistré comme propriétaire quand il ne l'est pas puisse, en certaines circonstances qui ne se présentent pas en l'espèce, avoir un intérêt assurable. Le présent débat est entre les assureurs et leur assuré. Et la question à déterminer est de savoir si, en vertu du contrat d'assurance intervenu entre elles et Laflèche père, les appelantes ont, au regard de la somme des faits acceptés comme prouvés par le Juge de première instance, des obligations vis-à-vis Laflèche père et fils par suite de la police d'assurance.

Le consentement donné par les appelantes à ce contrat a été obtenu sur la représentation de Laflèche père qu'il était *propriétaire enregistré*. Manifestement cette représentation signifiait qu'il était *propriétaire enregistré* au sens de la *Loi des véhicules automobiles, supra.* Sans doute, il était enregistré comme propriétaire, mais fausse était le représentation qu'il était vraiment le *propriétaire enregistré* au sens de la *Loi des véhicules automobiles, supra.* Le paragraphe 23 de l'art. 2 de cette loi définit comme suit le mot «propriétaire»:

> 2. (23°) Le mot «propriétaire» s'applique à toute personne qui a acquis un véhicule automobile et le possède en vertu d'un titre soit absolu, soit conditionnel qui lui donne le droit d'en devenir le propriétaire ou d'en jouir comme propriétaire, à charge de rendre.

C'est au propriétaire ainsi défini que l'art. 4 impose l'obligation, sous les sanctions pénales de l'art. 49, d'enregistrer son automobile et de faire, personnellement ou par représentant, la demande de cet enregistrement, tel que l'exige l'art. 3. Ni au sens du droit commun ni au sens plus large de la *Loi des véhicules automobiles, supra,* Laflèche père n'avait droit à la propriété, la possession, l'usage, la garde ou le contrôle du *Chevrolet 1952* ou le pouvoir de permettre à autrui de l'utiliser. On ne saurait donner effet à la substitution de son

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nom à celui de son fils pour fins d'un enregistrement fait en vue d'obtenir une police d'assurance dont le bénéfice s'étendait au fils par le jeu de la clause omnibus, et imposer, par ce procédé, aux appelantes, un risque qu'à la connaissance du père comme à celle du fils, celles-ci ne voulaient pas assumer. Il se peut qu'en certains cas, la représentation, faite de bonne foi, qu'on est *propriétaire enregistré* s'avère juridiquement inexacte et que cette inexactitude soit indifférente à l'assureur; tel n'est pas le présent cas. Admettre comme bien fondés les recours des intimés serait imposer aux appelantes une obligation que, manifestement, elles n'ont jamais consenti d'assumer.

Les intimés ont prétendu que les appelantes ont renoncé à invoquer la nullité de la police d'assurance. Les faits qu'ils invoquent au soutien de cette prétention sont exposés et discutés en détails aux raisons de jugement données en Cour supérieure, auxquelles il suffit de référer. M. le Juge Pager, après avoir rappelé le principe que nul n'est présumé renoncer à son droit, a jugé, à bon droit, que non seulement on ne peut trouver dans les actes des appelantes une intention nette et claire de couvrir la nullité de la police d'assurance, mais que la ligne de conduite qu'elles ont suivie traduit une intention toute contraire.

En toute déférence pour ceux qui peuvent entretenir une opinion opposée, je dirais que les deux appels en cette cause doivent être maintenus avec dépens.

ABBOTT J. (*dissenting*):—The facts are fully set forth in the judgments below and in the reasons of my brothers Fauteux and Ritchie which I have had the advantage of considering.

I am in agreement with the reasons of Owen J. in the Court of Queen's Bench and there is little I could usefully add to them. Although the question was not discussed during the argument before us or in the judgments below, with respect, I am also of opinion that the interest of the respondent Arthur Laflèche Sr. in the 1952 Chevrolet was that of "unconditional ownership" and that there was no "material change in the nature of the insurable interest of the insured in the automobile", within the meaning of these expressions as used in Automobile Statutory Condition 6 quoted by my brother Ritchie. Admittedly that was so with respect to the 1949 Chevrolet turned in as part payment for the 1952 model. From the time of its purchase, Laflèche Sr. was the

registered owner of the 1952 Chevrolet. The fact that the purchase of this car was negotiated by Laflèche Jr., that the major portion of the balance of purchase price was advanced by him, and that he appears to have had exclusive use of the car, in my view, is not sufficient to establish that he had any right of ownership in the new vehicle. He may or may not have had a claim to recover from his father any amounts advanced. It follows that in my opinion the Statutory Condition referred to has no application.

I would therefore dismiss the appeals with costs.

RITCHIE J.:—Both the actions which are the subject of these appeals from the Court of Queen's Bench (Appeal Division) of the Province of Quebec[1] were brought to enforce the provisions of an automobile insurance policy whereby the appellants agreed to indemnify the respondent Arthur R. Lafleche, Sr., for "collision damage" to the insured automobile and also against liability imposed upon him by law for bodily injury accidentally sustained by any person and for damages for accidental injury to or destruction of property of others if such injury or damage was "caused by the *ownership, maintenance or use*" of the insured automobile. One of these actions is an action in warranty brought by both the respondents seeking indemnity in respect of a judgment recovered by one Svamour who had suffered injuries to his person and damage to his property as the result of a collision between his automobile and an automobile operated by Arthur R. Lafleche, Jr., which the respondents allege to have been covered by the insurance policy above referred to.

The other actions with which this appeal is concerned was brought by Arthur Lafleche, Sr., under the "collision damage" provisions of the said policy to recover damage sustained in the same accident by the automobile which he alleges to have been covered thereby.

The respondent Arthur R. Lafleche, Sr., is a retired banker and when the policy in question was first issued on May 11, 1950, he was the sole owner of the 1949 Chevrolet thereby insured. His son, Arthur R. Lafleche, Jr., is engaged in the insurance business with Lafleche, Wyndham & Co., Ltd., which company, at all times material hereto, was an agent

[1] [1962] Que. Q.B. 909.

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of the appellants for the purpose, *inter alia,* of issuing automobile insurance policies on their behalf.

In November 1952, the son, while driving his own MG Sports model car, was involved in a serious accident as a result of which a man was killed and the sports model car became a total loss. After this accident, none of the "tariff" insurance companies, including the appellants, would issue an automobile insurance policy to the younger Lafleche and, notwithstanding the fact that the father knew, as the trial judge has found, that his son could not obtain such insurance, he nevertheless turned over his 1949 Chevrolet to the exclusive custody of the son without notifying the appellants.

In May 1953, Lafleche Jr., acquired a 1952 Chevrolet convertible for which the dealer accepted the 1949 Chevrolet as part-payment, the son undertaking to pay the balance of the purchase price. The 1952 Chevrolet was registered in the father's name and the son, through his insurance agency, issued an amendment to the original insurance policy so that the 1952 convertible was covered thereby, and it was while operating this vehicle on July 4, 1953, that Lafleche, Jr., collided with Svamour causing the injuries and damage which gave rise to these actions.

The basis of the insurance company's denial of liability under the policy is set out in the following paragraphs of the pleadings:

> 5. That the 1952 Chevrolet convertible automobile was actually never the property of Arthur R. Lafleche, Sr., nor in his possession, care, custody and control, and defendants deny that the aforesaid insurance ever applied to that automobile in law or in fact and defendants deny any liability or obligation in respect of the aforesaid accident.
>
> * * *
>
> 10. That Arthur R. Lafleche, Sr., either by error or design, misrepresented or concealed from defendants the absolute change of possession, care and control, first, of the 1949 Chevrolet automobile, and secondly, the true facts of ownership and/or exclusive care, possession and control of the 1952 Chevrolet automobile.
>
> 11. That there was a material change of risk such that defendants, if notified or aware of it, would have refused the risk in the first instance or cancelled the policy instantly in the second case, and any insurance under said policy ceased to have any force or effect as and from that date when the 1949 Chevrolet automobile was transferred to the care, custody and control of Lafleche, Jr.

The respondents contend, as the Court of Queen's Bench has found, that the father as registered owner of the auto-

mobile had an insurable interest and that there was no material change in the risk by reason of the son taking over exclusive use and control of his father's 1949 Chevrolet and subsequenly of the 1952 convertible. The respondents further invoke and rely upon the provisions of s. 5 of the original insuring agreement by which the insurer agrees in respect of the public liability and property damage coverage, *inter alia,* "to extend this insurance . . . in the same manner and under the same conditions as this insurance is afforded the insured, to any person or persons while riding in or legally operating the automobile and to any person, firm or corporation legally responsible for the operation thereof; but upon the condition that such use or operation is with the permission of the insured; or if the insured is an individual, with the permission of an adult member of the insured's household other than a chauffeur or domestic servant".

The learned trial judge found that Lafleche, Sr., had no insurable interest in the 1952 Chevrolet and was in no sense the owner thereof, and he found also that Lafleche, Sr.'s act in turning over the custody and control of the insured automobile to his son who could not obtain such insurance from the appellants effected a "change material to the risk . . . within the control and knowledge of the insured" and that the father's failure to notify the insurers resulted in the voiding of the policy by reason of the provisions of s. 3 of the automobile Statutory Conditions which formed a part of the contract of insurance.

As to the first of these findings, Owen J.C.Q.B., with whose reasons for judgment all the members of the Court of Queen's Bench were in accord, had this to say:

> In my opinion the father had an insurable interest in the Chevrolet 1952. As the registered owner of the automobile, if for no other reason, he had an insurable interest. The only information required in this connection on the application for the policy was as to who was the registered owner. If the insurance company had wanted further information regarding ownership or those who would be driving the automobile they could have asked for it. The fact that the owner's ownership of the automobile may have been limited did not invalidate his insurance on the automobile placed with the defendants in warranty.

With the greatest respect, it appears to me that the learned members of the Court of Queen's Bench, in reaching

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this conclusion overlooked the provisions of s. 6 of the said automobile Statutory Conditions which provides in part:

> Unless otherwise specifically stated in the policy or endorsed thereon, the insurer shall not be liable . . . (*b*) if the interest of the insured in the automobile is other than unconditional sole ownership . . . (*d*) if there is any material change in the nature of the insurable interest of the insured in the automobile by sale, assignment or otherwise, except through change of title by succession or by death or by an authorized assignment under the Bankruptcy Act.

It is to be remembered that the 1952 Chevrolet which was involved in the accident which gave rise to this litigation was purchased by Arthur R. Lafleche, Jr., on May 25, 1953. The purchase price was $2,931 and with the consent of Lafleche, Sr., the 1949 Chevrolet was turned over to the dealer Harland Automobiles Ltd. and Lafleche, Jr., was given a credit of $1,250 in respect thereof, the balance of the purchase price, i.e., $1,681, was assumed as a personal obligation by Lafleche, Jr.

The trial judge viewed any interest which Lafleche, Sr., might have acquired in the 1952 Chevrolet by reason of his 1949 car being accepted in part payment as being nothing more than that of "un créancier chirographaire", but even if it be accepted that the credit given for the old Chevrolet gave the father an insurable interest in the new car it was still an interest materially different from his interest in the car which was originally insured. Similarly, if the case be put upon the footing, as the Appeal Division put it, that the father's interest in the 1952 Chevrolet was that of a "registered owner", this does not alter the fact that it was an interest of a different nature from that which the father had in the car originally insured.

The circumstances under which the 1952 model was purchased, when taken in conjunction with all the other evidence, satisfy me that Lafleche, Jr., assumed the obligation to pay $1,681 on his own behalf and for his own benefit, and that the highest interest which the father can have been said to have in the new car is limited to the value allowed by Harland Automobiles Ltd. in respect of the old one. There was, therefore, in my view, a material change in the nature of the insurable interest of Lafleche, Sr., which occurred between the time when the original policy was issued and the time of the accident.

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As there was no statement or endorsement on the policy covering this change, the provisions of Statutory Condition 6(*d*) would appear to relieve the insurers from liability.

I would accordingly allow these appeals and restore the judgment of the learned trial judge with costs.

Appeal maintenu avec dépens, LE JUGE ABBOTT *dissident.*

Procureurs des défenderesses, appelantes: Foster, Watt, Leggat & Colby, Montréal.

Procureurs des demandeurs, intimés: Pagé, Beauregard, Duchesne, Renaud & Reeves, Montréal.

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*Feb. 12, 13, 14 April 28

CANADA-CITIES SERVICE PETROLEUM CORPORATION (*Plaintiff*) APPELLANT;

AND

ORVILLA GERTRUDE KININMONTH, LEONARD WICKSON KININMONTH AND PRUDENTIAL TRUST COMPANY LIMITED (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mines and minerals—Petroleum and natural gas lease—Provision for extension of primary term if production obtained—Well drilled and made ready for fracturing treatment prior to expiry of term—Operations delayed beyond expiry date due to municipal road ban—Whether lease continued in force or terminated at end of primary term.

The *habendum* clause of a petroleum and natural gas lease, dated May 11, 1951, defined the term of the lease as "10 years from the date hereof, and so long thereafter as the said substances or any of them are being produced from the said lands." During the tenth year of the lease the appellant (the assignee of the lessee) obtained a licence from the Alberta Oil and Gas Conservation Board to drill a well to produce oil from the Jumping Pound Sand formation. The drilling of a well was commenced on March 21, 1961, and the formation in question was reached on March 27. The Jumping Pound Sand was dry, but crude oil had been encountered at a lesser depth in the Cardium Sand formation. On March 29, 1961, the appellant applied to the Board to obtain permission to plug back the well to complete it for the taking of production from the Cardium Sand. This application was approved on

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

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March 30, subject to a condition with respect to a spacing unit requirement.

On April 1, 1961, the well was ready for fracturing treatment designed to open up the producing formation so that the well would be in a position to produce commercial quantities of oil. The appellant did not, at that time, bring to the well location the necessary heavy equipment required for that purpose because, on March 17, a road ban had been imposed by the municipality in which the well was located, which ban continued until May 11. After the termination of the road ban, the equipment was brought to the well site and, in the result, production of oil from the well was obtained from the Cardium Sand between June 26, 1961, and July 6, 1961. The appellant was compelled to cease production by order of the Board because the taking of such production was in breach of the condition which had been imposed when approval had been given for the plugging back of the well.

In an action in which the appellant sought a declaration that the lease was valid and subsisting, the trial judge held that the lease was still subsisting. This decision was reversed on appeal by the Appellate Division of the Supreme Court of Alberta, one member of the Court dissenting. From that judgment an appeal was brought to this Court.

Held: The appeal should be dismissed.

The *habendum* clause granted a primary term of 10 years, which was to be extended if production of any of the substances had been obtained during that period, for so long as such production continued beyond the 10-year term. However, no production had been obtained prior to the expiration of the 10-year primary term. At the end of that period it could not be said that any of the substances "are being produced." Under those circumstances, the lease expired on May 10, 1961, and there was nothing in the provisions of the lease which enabled it to be revived after it had terminated. It was, therefore, unnecessary to consider whether the interruption of the operations which were in fact being carried on by the appellant was or was not the result of causes beyond its control.

The paragraph of the lease imposing a drilling commitment did not modify in any way the terms of the *habendum* clause. That clause specifically defined the period during which the lessee was entitled to exercise its rights respecting the land, including the right to drill. The drilling commitment did not create any overriding right to drill and to continue drilling operations after the 10-year term. On the contrary, it imposed a duty to drill within the specified period. The lessee deferred the performance of its drilling obligation to the last months of the 10-year term at its own risk. If it failed to be in production before that term expired, then the *habendum* clause came into play and the lease automatically terminated at the end of the primary term.

Shell Oil Co. v. Gunderson, [1960] S.C.R. 424, applied.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], reversing a judgment of McLaurin C.J.T.D. Appeal dismissed.

[1] (1963), 44 W.W.R. 392.

J. M. Robertson, Q.C., for the plaintiff, appellant.

W. B. Gill, for the defendants, respondents, O. G. Kininmonth and L. W. Kininmonth.

The judgment of the Court was delivered by

MARTLAND J.:—The matter in issue in this appeal is the interpretation of a petroleum and natural gas lease, dated May 11, 1951, made by James Kininmonth, as lessor, and Douglas M. Machon, as lessee, in respect of the south half of Section 26, Township 27, Range 2, West of the 5th Meridian, in the Province of Alberta, which will be hereinafter referred to as "the land." The respondents Orvilla Gertrude Kininmonth and Leonard Wickson Kininmonth are the successors in title of the lessor. The respondent company claims an interest in the land under a royalty trust agreement made by it with the lessor. The appellant is the assignee of the lessee's interest under the lease.

After describing the land, the lease went on to provide that the lessor:

DOTH HEREBY GRANT AND LEASE unto the Lessee the said Petroleum, Natural Gas and Related Hydrocarbons with the exclusive right and privilege to prospect and drill for, remove, store and dispose of, the said substances, and for the said purposes, so far as the Lessor has the right so to grant, to enter upon the said lands and use and occupy so much thereof as may be necessary or convenient for any or all of the said purposes or operations incidental thereto, or associated therewith, including drilling for, producing, treating, processing and transporting the said substances.

TO HAVE AND ENJOY the same for the term of ..10.. years from the date hereof, and so long thereafter as the said substances or any of them are being produced from the said lands, subject to the sooner termination of the said term as hereinafter provided.

PROVIDED that if operations for the drilling of a well are not commenced on the said lands within One (1) year from the date hereof, this lease shall thereupon terminate and be at an end, unless the Lessee shall have paid or tendered to the Lessor the sum of ...Three hundred twenty —00/100— ($..320.00..) Dollars, as rental, which payment shall confer the privilege of deferring the commencement of drilling operations for a period of One (1) year, and that, in like manner and upon like payments or tenders, the commencement of drilling operations shall be further deferred for like periods successively;

PROVIDED FURTHER that if at any time during the said ....10.... year term and prior to the discovery of production on the said lands, the Lessee shall drill a dry well or wells thereon, or if at any time during such term and after the discovery of production on the said lands such production shall cease, then this lease shall terminate on the next ensuing anniversary date hereof unless further operations for the recovery of the said substances from the said lands shall have been commenced or unless the Lessee shall have paid or tendered the said rental, in which latter event the immediately preceding proviso hereof governing the payment of the said rental and effect thereof, shall be deemed to have continued in force;

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AND FURTHER ALWAYS PROVIDED that if at any time after the expiration of the said ....10.... year term the said substances are not being produced on the said lands and the Lessee is then engaged in drilling or working operations thereon, this Lease shall remain in force so long as such operations are prosecuted, and if they result in the production of the said substances or any of them, so long thereafter as the said substances or any of them are produced from the said lands, provided that if drilling, working or production operations are interrupted or suspended as the result of any cause whatsoever beyond the Lessee's control, other than the Lessee's lack of funds, the time of such interruption or suspension shall not be counted against the Lessee, anything hereinbefore contained or implied to the contrary notwithstanding.

The appellant availed itself of the right to postpone from year to year its drilling commitment by the payment of the stipulated delay rentals. During the tenth year of the lease, on February 24, 1961, the appellant applied to the Alberta Oil and Gas Conservation Board for a licence to drill a well on legal subdivision 8 of the land to produce oil from the Jumping Pound Sandstone. A licence was granted by the Board on February 27. The spacing unit prescribed by the Drilling & Production Regulations under *The Oil and Gas Conservation Act,* 1957 (Alta.), c. 63, for the geological formation in question, was 80 acres.

The appellant commenced to drill a well on March 21, 1961, and reached the formation in question on March 27. The Jumping Pound Sand was dry, but crude oil had been encountered at a lesser depth in the Cardium Sand formation. The evidence indicates that the finding of oil in that formation was a reasonable probability in the light of development which had occurred in the area in which the land is located. The discovery of oil in the Jumping Pound Sand was much more uncertain.

The Alberta Oil and Gas Conservation Board had, on April 27, 1960, by Order SU 172, prescribed a spacing unit for a well drilled in a defined area, in which the land was situated, to obtain oil production from the Cardium Sand, of one half section of land comprising the east half or the west half of a section. As the land consisted of the south half of a section it did not constitute a spacing unit within that Order for the drilling of a well to the Cardium Sand, or for the production of oil therefrom.

On March 29, 1961, the appellant applied to the Board to obtain permission to plug back the well to complete it for the taking of production from the Cardium Sand. This application was approved by the Board on March 30, but

subject to the express condition that "This well shall not be produced as a Cardium Oil well until the licensee has indicated to the Board that he has the right to produce from the entire spacing unit."

On April 1, 1961, the well was ready for fracturing treatment designed to open up the producing formation so that the well would be in a position to produce commercial quantities of oil from the Cardium Sand. The appellant did not, at that time, bring to the well location the necessary heavy equipment required for that purpose because, on March 17, a road ban had been imposed by the municipality in which the well was located, which ban continued until May 11.

After the termination of the road ban, the equipment was brought to the well site and, in the result, production of oil from the well was obtained from the Cardium Sand between June 26, 1961, and July 6, 1961. The appellant was compelled to cease production by order of the Board because the taking of such production was in breach of the condition which had been imposed when approval had been given for the plugging back of the well.

On June 1, 1961, Order No. SU 172 was superseded by Order No. SU 185, but the provision as to required spacing units was similar to that which had been contained in the earlier Order.

Various efforts were made by the appellant, which it is unnecessary to describe in detail, to put itself into a position whereby it could lawfully produce oil from the well from the Cardium Sand, but, up to the time of the trial of this action, which commenced on September 24, 1962, these had been unsuccessful.

A caveat had been filed by the appellant, under the provisions of *The Land Titles Act*, R.S.A. 1955, c. 170, to protect its interest under the lease. The respondents gave the form of notice prescribed in that Act, whereby the caveat ceases to have effect after the expiration of 60 days next ensuing the date of the notice, unless proceedings are commenced by the caveator on the caveat. Following receipt of this notice and prior to the expiration of the 60 day period, the appellant commenced this action, seeking a declaration that the lease was valid and subsisting.

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The question in issue was as to whether the petroleum and natural gas lease still subsists, or whether it terminated at the end of the 10-year primary term.

The learned trial judge held that the lease was still subsisting. This decision was reversed, on appeal, by the Appellate Division of the Supreme Court of Alberta, Macdonald J.A. dissenting[1]. From that judgment the present appeal has been brought.

I construe the five paragraphs which were cited earlier to provide as follows:

The first paragraph defines the rights granted by the lease in respect of the land. In particular, it gives to the lessee the right to drill for petroleum, natural gas and related hydrocarbons, which will be referred to hereafter, as they were in the lease, as "the substances."

The second paragraph is the *habendum* clause. It defines the term during which the lessee may enjoy the rights which had been granted to it in the first paragraph. The term is "10 years from the date hereof, and so long thereafter as the said substances or any of them are being produced from the said lands." I interpret this paragraph as granting a primary term of 10 years, which is to be extended if production of any of the substances has been obtained during that period, for so long as such production continues beyond the 10-year term. At the end of the 10-year term the lease is extended if any of the substances "are being produced."

The third paragraph obligates the lessee to commence drilling a well within one year from the date of the lease. This obligation may, however, be postponed from year to year by payment of delay rentals. Failure to commence drilling as required, unless the stipulated payments to postpone drilling are made, results in the termination of the lease within the 10-year period.

The fourth paragraph deals with the situation which occurs if the lessee, during the primary term, before production has been discovered, drills a dry well; or if, during the primary term, production has been discovered, but ceases.

The fifth paragraph commences with the words "if at any time after the expiration of the said 10 year term the said substances are not being produced on the said lands." The *habendum* clause spoke of a 10-year term "and so long there-

[1] (1963), 44 W.W.R. 392.

after as the said substances or any of them are being produced." When the two expressions "are being produced" and "are not being produced" are read together, it is my opinion that this fifth paragraph is obviously designed to deal with the situation which occurs if the primary term has been extended by production from the land and then such production ceases. Without the fifth paragraph, the lease would automatically terminate upon the cessation of production. This paragraph, however, prevents that termination occurring if, when such production ceases, the lessee is then engaged in drilling or working operations on the land, or so long as such operations are prosecuted. If such operations result in further production, the lease continues during such production.

I cannot construe the paragraph as meaning that, even though no production has been obtained within the 10-year primary term, the lessee may thereafter carry on drilling operations on the land which, if successful, will then serve to extend the lease for a further period during the continuance of such production.

The latter part of the fifth paragraph covers the situation which may occur if drilling, working or production operations are interrupted or suspended by causes beyond the lessee's control. In my opinion this portion of the paragraph only comes into play if the lease has already been extended beyond the 10-year primary term, as a result of production, and then such production ceases.

In the present case no production had been obtained prior to the expiration of the 10-year primary term. At the end of that period it could not be said that any of the substances "are being produced." Under those circumstances, in my opinion, the lease expired on May 10, 1961, and there is nothing in the provisions of the lease which enabled it to be revived after it had terminated. It is, therefore, unnecessary to consider whether the interruption of the operations which were in fact being carried on by the appellant was or was not the result of causes beyond its control.

The views which I have expressed regarding the meaning and effect of the provisions of the lease under consideration are in accordance with what was stated in relation to similar provisions contained in the petroleum and natural gas lease

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which was under consideration in this Court in the case of *Shell Oil Company v. Gunderson*[1]. At p. 429 it was said:

> Drilling operations, in order to be effective to continue the lease in force beyond the five-year term, would have to be of the kind defined in the proviso to the habendum clause, which has been previously quoted. That proviso refers to drilling operations "after the expiration of the five-year term". The proviso takes effect only if the lease has been extended as a result of production and if, when production ceases, the lessee is then engaged in drilling operations.

The contention of the appellant is that it had the right to commence drilling at any time within the final year of the 10-year term and that it must be inferred that the lease contemplated that, if it did commence drilling within such time, it would then have the right to complete its drilling operations and to take production from the well drilled after the end of the 10-year period. The appellant further contends that it did commence drilling operations within the 10-year period and was only precluded from continuing them by reason of their interruption by causes beyond the appellant's control.

The appellant's argument involves the proposition that the drilling obligation imposed upon the lessee, coupled with the lessee's right to postpone the commencement of drilling by payment of delay rentals, has the effect of modifying the *habendum* clause to the extent that the lease is extended beyond the 10-year term if drilling of a well is commenced within that period and thereafter continued and completed.

I do not construe the paragraph which imposes the drilling commitment as modifying in any way the terms of the *habendum* clause. That clause specifically defined the period during which the lessee was entitled to exercise its rights respecting the land, including the right to drill. The drilling commitment did not create any overriding right to drill and to continue drilling operations after the 10-year term. On the contrary, it imposed a duty to drill within the specified period. The fact that the lessee was under a contractual obligation to commence the drilling of a well, in this case, in the tenth year of the term of the lease did not have the effect of enabling him to defer the commencement of drilling until practically the end of the 10-year term and then to claim, as a right, an extension of the term during such time as it might take to complete the drilling of the well. In my

[1] [1960] S.C.R. 424.

view the lessee deferred the performance of its drilling obligation to the last months of the 10-year term at its own risk. If it failed to be in production before that term expired, then the *habendum* clause came into play and the lease automatically terminated at the end of the primary term.

The appellant cited American authorities, some of which were the basis for the reasons for the dissenting opinion of Macdonald J.A. in the Appellate Division. He cited a summary of the effect of the cases on which he relied, which is contained in certain "Discussion Notes" found in 17 Oil & Gas Reporter at p. 785:

> Where a lease contains an habendum clause providing that the lease shall be for a fixed term and so long thereafter as oil or gas is produced, and such lease also contains a drilling clause which provides that the lease will terminate unless a well is commenced on or before a certain date or payment made of delay rentals, there is division of authority as to the effect of a well commenced prior to the termination of the primary term and completed as a producing well after the primary term. A series of cases in Oklahoma makes it clear that Oklahoma follows the view that the lessee under such a lease has the right to complete such well and that the lease will remain effective during drilling operations in good faith after the primary term.

In particular he cited a portion of the judgment of Lewis J., delivering the judgment of the Court, in *Moncrief v. Pasotex Petroleum Company*[1]:

> The right to commence a well during the primary term carries with it, by necessary legal implication, the right to complete the well after expiration of the primary term unless negatived by contract terms or loss by abandonment. *Simons v. McDaniel* [7 P.2d 419].

It may be noted that in Summers' "The Law of Oil & Gas", Permanent ed., vol. 2, the learned author deals with the interpretation of the *habendum* clause in a petroleum and natural gas lease in c. 10. In particular, in ss. 292 to 301 in that chapter, he refers, on various occasions, to the general rule that production within the definite term is a condition precedent to the extension of the lease beyond that term. He refers, with apparent disapproval, to the fact that courts in some states have created exceptions to the general rule and refers in this regard, among other cases, to the case of *Simons v. McDaniel*, the case which was relied upon by Lewis J. in the passage from his judgment previously quoted.

However, irrespective of what construction may have been placed by courts upon other leases, the essential task in the

[1] 280 F. 2d 235 at 237.

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CANADA-CITIES SERVICE PETROLEUM CORPN. v. KININMONTH *et al.*

Martland J.

present case is to construe the terms of the lease which is in question. For the reasons already given, it is my view that there is no provision in it to enable the extension of its term beyond 10 years, save only by the production of one of the substances from the land within and continuing beyond that period. Such production did not occur in the present case and, accordingly, in my opinion, the lease terminated at the end of its primary term.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitor for the defendants, respondents, O. G. Kininmonth and L. W. Kininmonth: W. B. Gill, Calgary.

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*Mar. 11, 12
April 28

SALIM AYOUB (*Plaintiff*) .....APPELLANT;

AND

EMILE BEAUPRE AND WALTER BENSE (*Defendants*) ..... } RESPONDENTS.

RUSSELL McMURTRY, LORNA KNIGHT, AND HELEN NEELANDS (*Plaintiffs*) ..... } APPELLANTS;

AND

EMILE BEAUPRE AND WALTER BENSE (*Defendants*) ..... } RESPONDENTS.

*PRESENT: Cartwright, Fauteux, Judson, Hall and Spence JJ.

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EMPIRE WALLPAPER AND PAINT LTD. (*Plaintiff*) ..... APPELLANT;

AYOUB *et al.* v. BEAUPRÉ *et al.*

AND

EMILE BEAUPRE AND WALTER BENSE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Damage resulting from fire commencing in defendant's garage and spreading to plaintiffs' premises—Defendant's failure to act with the care required in carrying out a dangerous operation—Liability—Non-applicability of The Accidental Fires Act, R.S.O. 1950, c. 3.

In three actions tried together, the owners and occupants of premises surrounding those occupied by the defendant Beaupré and in which the defendant Bense was employed by the defendant Beaupré claimed damages for destruction of the properties owned or occupied by them through a fire which commenced in the premises of the defendant Beaupré and spread to the premises which they owned or occupied. The fire which spread to the premises of the three plaintiffs was started when the defendant Bense, acting in the course of his employment as a mechanic of the defendant Beaupré and while draining a gasoline tank of an automobile preparatory to the removal of the tank, bumped into a light cord. This resulted in the bulb on the extension cord falling; combustion occurred and the fire commenced. The defendants pleaded the provisions of *The Accidental Fires Act*. The actions were dismissed by the trial judge and his judgment was affirmed by the Court of Appeal.

Held: The appeals should be allowed.

In the course of draining the gasoline, the defendant Bense failed to act with the very great care required from the dangerous operation in which he was engaged. The acts of negligence individually were of a very small degree, but that combination of acts resulted in the damage occurring to the plaintiffs' properties and resulted from the fact that the operation in which the defendant Bense was engaged was one where any small piece of negligence might have disastrous effects.

The defendant Beaupré was responsible in law for the acts of negligence of the defendant Bense, and the defence of *The Accidental Fires Act* did not apply. The provisions of that Act did not extend to fires which were the result of negligence.

Donoghue v. Stevenson, [1932] A.C. 562; *United Motors Service, Inc. v. Hutson et al.*, [1937] S.C.R. 294; *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156; *Dokuchia v. Domansch*, [1945] O.R. 141; *Canadian National Railway Co. v. Canada Steamship Lines Ltd.*, [1947] O.R. 585, affirmed [1948] O.R. 311 (Ont. C.A.), [1949] 2 D.L.R. 461 (S.C.C.), referred to.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Aylen J. Appeal allowed.

W. B. Williston, Q.C., O. F. Howe, Q.C., and *R. J. Rolls*, for the plaintiffs, appellants.

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C. F. MacMillan, Q.C., and *Roydon A. Hughes, Q.C.*, for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario dated January 14, 1963, whereby that Court affirmed the judgment of Aylen J. dated December 8, 1961. By the latter judgment, Aylen J. dismissed three actions which were tried together. In these actions the owners and occupants of premises surrounding those occupied by the defendant Beaupré and in which the defendant Bense was employed by the defendant Beaupré claimed damages for destruction of the properties owned or occupied by them through a fire which commenced in the premises of the defendant Beaupré and spread to the premises which they owned or occupied on Kent and Queen Streets, in Ottawa.

In this Court arguments were made on alternative bases of negligence, nuisance and liability under *Rylands v. Fletcher*[1]. In addition, in their factum, the appellants had advanced the principle of *res ipsa loquitur*, although in argument counsel for the appellants agreed it was not necessary to rely upon that principle since all of the facts had been demonstrated accurately at the trial.

I have come to the conclusion that the judgment of this Court may be based upon the ground of negligence only and it is, therefore, not necessary to consider the alternative grounds of liability under the rule in *Rylands v. Fletcher*, and of nuisance. Indeed, when one makes a detailed analysis of the proceedings at trial, it is apparent that the basis of negligence alone was there considered.

The fire which spread to the premises of the three plaintiffs was started when the defendant Bense, acting in the course of his employment as a mechanic of the defendant Beaupré and while draining a gasoline tank of an automobile preparatory to the removal of the tank, bumped into a light cord. This resulted in the bulb on the extension cord falling; combustion occurred and the fire commenced. With respect, I have come to the conclusion that the trial judge dismissed the action and the Court of Appeal affirmed that dismissal by the application to the circumstances, which shall be detailed hereafter, of the wrong standard of care.

[1] (1868), L.R. 3 H.L. 330.

The operation of draining gasoline from the tank of an automobile was stated throughout the trial to be a dangerous one and the appeal in this Court was argued upon the basis common to both appellant and respondent, that the operation was dangerous and that care was required. This may best be illustrated by quoting the evidence of Hugh Edward Thompson, the expert witness called for the defendants, who said:

> I would say, Mr. Rowe, it is dangerous to handle gasoline under any circumstances. The very nature of the material is inherently dangerous. The precaution and protection depends on the care of the operator.

The standard of care under such circumstances has been put in a dictum of Lord MacMillan in *Donoghue v. Stevenson*[1].

> I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence *where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.* (The italics are mine.)

This dictum has been cited on many occasions as giving the standard of care required of one when handling a dangerous thing or carrying out a dangerous operation. In *Hutson et al. v. United Motor Service Ltd.*[2], Middleton J.A. said at p. 230:

> Gasoline is a dangerous substance. Gasoline vapour is far more dangerous, and when it is exposed to contact with a flame or spark an explosion is inevitable. The care necessary in such cases is "consummate care" and as Pollock on Tort, 13th ed., p. 518, says: "It is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him."

Both of the other members of the Court agreed with the standard of care outlined by Middleton J.A. in the quotation above. The judgment of the Court of Appeal for Ontario in that case was affirmed in this Court[3]. At p. 301, Kerwin J., (as he then was) said:

> It is true that these witnesses testified that, where it was required to clean oil and grease from such floors, it was customary to use gasoline and scrapers and brushes followed by an application of some cleaning substance, the whole washed off with water. But the evidence falls short of proving that it was the usual practice to clean such an area in the elapsed time under the conditions that existed that day.

[1] [1932] A.C. 562 at 611. [2] [1936] O.R. 225.
[3] [1937] S.C.R. 294.

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In *Read v. J. Lyons & Co. Ltd.*[1], Lord MacMillan said at p. 171:

> In the first place, the expression "strict liability", though borrowed from authority, is ambiguous. If it means the absolute liability of an insurer irrespective of negligence then the answer in my opinion must be in the negative. If it means that an exacting standard of care is incumbent on manufacturers of explosive shells to prevent the occurrence of accidents causing personal injury I should answer the question in the affirmative, but this will not avail the appellant.

And at p. 172, the learned law Lord continued:

> I think that he succeeded in showing that in the case of dangerous things and operations the law has recognized that a special responsibility exists to take care. But I do not think that it has ever been laid down that there is absolute liability apart from negligence where persons are injured in consequence of the use of such things or the conduct of such operations. In truth it is a matter of degree. Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. *The more dangerous the act the greater is the care that must be taken in performing it.* This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result. (The italics are mine.)

And at p. 173:

> Strict liability, if you will, is imposed upon him in the sense that he must exercise a high degree of care, but that is all.

In *Dokuchia v. Domansch*[2], Laidlaw J.A. said, at p. 145:

> The undertaking of putting gasoline from a can into the carburetor of a defective engine was proposed by the defendant, and the law subjects him to strict responsibility for all mischief resulting therefrom.

Therefore, to determine these actions, it is the duty of the Court to apply to the facts which were found in the trial Court the very high standard of care to which I referred above.

The defendant Walter Bense, who had been employed by the defendant Beaupré for only about two months, was, on February 16, 1958, instructed by his foreman to remove a gas tank from a 1951 Oldsmobile automobile. He drove this automobile over top of a pit, then taking two five-gallon gasoline cans, he carried the same to the edge of the pit, left one sitting on the edge of the pit, and descended into the pit bringing with him the other gasoline can. In order to

[1] [1947] A.C. 156. [2] [1945] O.R. 141.

provide himself with illumination, Bense had attached an extension cord to a plug some six to eight yards away and brought with him into the pit an electric lamp at the end of this extension cord. The electric lamp was set in a fixture which had a rubber handle some one foot long and the bulb was protected by a guard which appears to have been solid on its back face but which had wire mesh, the wires being about one inch apart, on the front face. At the top of this housing or guard was an ordinary hook and Bense hung that hook over a wire cable at the rear of the automobile which would appear, from the rather indefinite evidence, to be the wire running to the tail light of the automobile and which wire, at the place where Bense hung the hook, was said by him, after some hesitation, to run horizontally. It should be noted that Bense had not tested the automobile or looked at the gauge to determine the amount of gasoline in the tank. As it happened, the amount in the tank was less than five gallons and this failure to check is not relevant to any thing which actually occurred in the disaster but does indicate the standard of care which Bense exercised throughout the operation. Bense removed the cap, placed a large funnel in the mouth of the gasoline can, and then held the gasoline tank with the funnel protruding from its top against his stomach beneath a one-quarter inch opening in the bottom of the gasoline tank on the automobile. He unplugged that one-quarter inch opening so that the gasoline ran from the tank into the funnel and then into the gasoline can. There was much discussion during the trial as to the exact distance between the opening in the bottom of the gasoline tank and the top of the funnel sitting in the can, and it was finally determined that that distance was about one foot. In my view of what occurred, the evidence is not important at any rate because there seems to have been little indication of any large amount of vapour lying in the bottom of this repair pit. It must, of course, be understood that gasoline vapour is much heavier than air and one would expect it to have dropped to the bottom of the pit but, of course, in a considerable building and with the doors being on some occasions opened, there may easily have been sufficient draught to have carried the gasoline vapour away. In my opinion, it was not vapour caused by evaporation as the gasoline flowed from the tank into the funnel which caused the catastrophe. When the gasoline can had been about

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three-quarters filled, it was apparent that the gasoline tank was well-nigh empty and only a few drips remained. This occurred at what Bense swore was, according to his watch, two minutes to twelve. The gasoline can was, of course, heavy by this time—a five gallon can three-quarters filled would be heavy—and therefore he lowered it from the position in which he held it up opposite his chest or stomach to the floor of the pit, leaving the funnel in it and leaving a few drops falling from the tank. Those drops would have had to fall about six feet and in my opinion it is the combustion of those drops or the vapour from them which caused the conflagration. They were only a few, but there can be no surety that the drops coming down that far would even hit the funnel, and, in fact, it would seem that some must have been on the top of the tank or even on its sides. At any rate, those drops of gasoline falling about that six-feet distance would result in a considerably more rapid evaporation than the gasoline which had been drained from the tank in a steady flow and fell only about one foot to sixteen inches before striking the funnel and running into the can. Moreover, such evaporation would occur below the level of the pit wall so the vapour could not be dissipated. When this dripping had ceased, which was evidently after only moments and after only a few drops had fallen, Bense inserted a plug in the bottom of the tank and turned it tight and then removed the funnel from the top of the gas can as it stood on the floor of the repair pit and put that funnel into an orifice at the side of the pit, then put the cap on the gasoline can. It is probable again, as the trial judge pointed out, that a few drops from the funnel ran onto the top of the gasoline can during this operation. It should be noted that it would have taken only a second to have swabbed the top of that gasoline tank as Bense capped it and every mechanic has in his coveralls someplace a cloth which he could use for such purpose.

Throughout this operation, the lamp hung by its hook from the wire cable beneath the automobile. It is true that counsel for the defendant asked Bense in the examination-in-chief this question:

> Q. And that light would be where, if it was three or four feet back from the tank? A. Yes.

But shortly thereafter, the trial judge put to the witness these questions and received these answers:

His Lordship: Q. Witness, that lamp has a handle at the bottom of it? A. Yes.

Q. You see? Now, how far was that handle from your left shoulder? A. I think maybe one and a half feet.

Q. Pardon? A. One and a half feet. Maybe two feet. I have place to walk. I cannot hit the light.

It would seem, however, that is exactly what Bense did, for he picked up the five-gallon gasoline can three-quarters full with his right hand and then turned to his left in order to climb the wooden ladder which stood in the rear corner of the pit. That lamp fell, and on examination-in-chief, the defendant Bense gave this evidence thereon:

Mr. Hughes: Q. Now, would you come back here, please? Thank you, Mr. Bense. Do you know what caused the extension lamp which was hooked on the cable to fall? What caused it to fall? A. I feel nothing, sir, but I think it was my shoulder.

Q. You think it was your shoulder? Your left shoulder? A. Yes, sir.

Q. And your left shoulder coming in contact with what? A. I think with the underside from the light here.

Q. With the underside of the light which— A. Was hanging.

Q. "the underside" he means by that below the handle. A. By that place.

Q. Below the rubber handle on the light? A. Yes.

Q. You think your shoulder must have touched that? A. Yes.

It must be remembered that the extension lamp from the end of its heavy rubber handle to the top of the hook was a solid and inflexible unit. It would seem, therefore, that it must have occurred when the defendant Bense's shoulder touched the end of the handle. Upon examination for discovery, the defendant Bense described the hanging of that light on the cable and said: "and I tried it to see if it was steady enough". It would appear from what occurred that in fact the light was not hung in a place where it would be secure, as the small movement of the defendant Bense's shoulder striking one end of the lamp handle must have dislodged the hook from the wire cable, a cable which was said to be about half-an-inch in diameter. The lamp fell and a metallic sound occurred followed by a sound which the defendant Bense described as a "poof", which would, of course indicate a very minor explosion or combustion of the gasoline vapour which was around the can. The actual extension lamp with all the other exhibits seemed to have

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disappeared during the course of a reconstruction at the Carleton County Courthouse and we are not able to inspect it. It would appear, however, to have been a standard type of an approved extension cord used in such occasions as the repair of automobiles. It was, in addition to the guard, furnished with a heavy duty electric light bulb, and the evidence given by various witnesses was that that bulb did not ordinarily break when the lamp fell. However, the witnesses added that such bulbs being glass do break and have broken on other occasions. The opinion that the bulb broke when the spout of the gasoline can, a spout of about three inches in length, pierced the space between two of the wire guards so that it came into direct contact with the glass bulb, would seem to be an accurate opinion. I am of the view that nothing particularly hinges on the type of equipment and that it was quite a proper type of equipment to use under the circumstances if it had been properly used.

I have come to the conclusion, however, that the use of the equipment by the defendant Bense failed to attain the very high standard of care required by his dangerous operations. In the first place, Bense, in my opinion, hung that lamp in a rather insecure fashion. Hyman Hershorn was called for the defendants and gave evidence that in his automobile repair shop they removed about fifteen or twenty gasoline tanks from automobiles each week. He was asked what was liable to make such an extension lamp fall and his answer was "an insecure place". He was then asked the following question:

> Q. There is some reference to a cable underneath this motor car. I don't know yet what the cable was doing there. Perhaps that will appear in the evidence but there are lots of places underneath a car to hook a lamp to? A. There is what they call cross-bars across. There is a cross member in the car and there is also there a brake cable usually for the emergency brake.

It would seem such a cross-member or a much heavier cable than the one used, as for instance a brake cable, would have been a much more secure place to hang the extension lamp. I find that to hang it as insecurely as it must have been hung under these circumstances was an act of negligence.

Secondly, to lower the gasoline can to the floor of the pit and permit the drops to fall some six feet from the bottom of the car to the funnel as it sat on the top of the can or

perhaps to the top of the can apart from the funnel, was an act of negligence, in view of the rapid vaporization of the small drops of gasoline.

Thirdly, to so remove the funnel from the top of the gasoline can as it sat on the floor of the pit as to permit the droplets which remained in the funnel to fall upon the top of the can is, in my opinion, an act of negligence.

Fourthly, having permitted the drops to fall the six feet from the opening in the gasoline tank to the top of the can and also to fall from the funnel to the can when the funnel was removed, to fail to wipe off the can immediately was again an act of negligence.

Fifthly, Bense's failure to move the lamp back from its insecure hanging place to a safe position on the border of the pit before he attempted to move around in the confined space and carrying the heavy can was, in view of the grave danger of fire, an act of negligence.

Finally, having failed to remove the lamp from its insecure hanging place the defendant Bense was negligent in that he permitted himself to bump into the vulnerable, hanging lamp and cause the lamp to fall, the cord pulling the lamp so that it struck the top of the gasoline can.

In all of these circumstances, I find that the defendant Bense failed to act with the very great care required from the dangerous operation in which he was engaged. It is true the acts individually are of a very small degree, but that combination of acts resulted in the damage occurring to the plaintiffs' properties and resulted from the fact that the operation in which the defendant Bense was engaged was one where any small piece of negligence might have disastrous effects.

I am further of the opinion that the above acts of negligence are covered by subparas. (*a*) and (*b*) of para. 4 of the statement of claim common to the three actions in which the plaintiffs set out the acts of negligence. Those paragraphs appear as follows:

> 4. The Plaintiff says that the Defendants were negligent in that:
>
> *a*) they failed to take adequate precautions to secure the said light and prevent it from falling and breaking and thereby causing a dangerous condition to arise.

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b) the Defendant Bense did not exercise care in moving about the area where the light was suspended.

The defendants plead the provisions of *The Accidental Fires Act*, R.S.O. 1950, c. 3. Section 1 of that Act reads as follows:

1. No action shall be brought against any person in whose house or building or on whose land any fire accidentally begins, nor shall any recompense be made by him for any damage suffered thereby; but no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

In *United Motors Service Inc. v. Hutson et al., supra*, Kerwin J., as he then was, said at p. 302:

Many years ago it was decided that this expression did not include a fire caused by negligence, *Filliter v. Phippard* (1847), 11 Q.B. 347, and this decision has been followed ever since. For two examples in this Court see *Canada Southern Ry. Co. v. Phelps* (1884), 14 Can. S.C.R. 132, and *Port Coquitlam v. Wilson*, [1923] S.C.R. 235.

In *Canadian National Railway Co. v. Canada Steamship Lines Ltd.*[1], Schroeder J. said at p. 603:

Counsel for the defendant argues that the fire might have been due to pure accident, and that under the provisions of The Accidental Fires Act, R.S.O. 1937, c. 161, there would be no liability on the defendant. That contention is entirely devoid of merit, in my opinion, since it is abundantly clear upon the evidence that the fire did not "accidentally begin" within the meaning of that Act as explained by numerous authorities. It would be quite superfluous to quote authorities upon the point, now so well established, that a fire cannot be said to begin accidentally if it is the result of negligence, or that "accidental" in the statute means "by mere chance", or "incapable of being traced to any cause", as opposed to the negligence of either servants or masters, rather than accidental in contradistinction to wilful.

An appeal from that judgment was dismissed both in the Court of Appeal for Ontario and in this Court.

Having found that the defendant Bense was guilty of acts of negligence for which the defendant Beaupré is responsible in law, I therefore must find that the defence of *The Accidental Fires Act* does not apply.

For these reasons, I would allow the three appeals with costs throughout, and give judgment in favour of the appellants in each of the three actions with a reference in each to the Master of the Supreme Court of Ontario at Ottawa to assess the damages. The costs of such reference

[1] [1947] O.R. 585.

should be determined by the Supreme Court of Ontario upon application by either party.

Appeals allowed with costs throughout.

Solicitors for the plaintiffs, appellants: Howe, Howe & Rowe, Ottawa.

Solicitors for the defendants, respondents: Hughes, Laishley & Mullen, Ottawa.

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*Oct. 7, 8, 9
1964
April 28

LOUIS N. SUKLOFF (*Plaintiff*) .....APPELLANT;

AND

A. H. RUSHFORTH & COMPANY LIMITED, REST PLAN PROPERTIES LIMITED, GUARANTY TRUST COMPANY OF CANADA, and J. S. WHITEHEAD, Trustee of the Estate of A. H. Rushforth & Company Limited and Rest Plan Properties Limited (*Defendants*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Money advanced for operations of companies in consideration of share in profits—Subsequent bankruptcies of companies—Loan claim—Security obtained for part of advance by way of equitable assignment—Bankruptcy Act, R.S.C. 1952, c. 14, s. 98—The Partnerships Act, R.S.O. 1960, c. 288, s. 4.

A scheme to finance the acquisition and resale of apartment house properties consisted in obtaining options on such properties and the promotion of syndicates to acquire them, the purchase money to be raised by the sale by one R or his company of units in the syndicates, which were secured under the provisions of deeds of trust pursuant to which a trust company was to carry out the purchase on behalf of each syndicate, pay the expenses and arrange for the reimbursement of the amount of any deposits which had been paid in consideration of obtaining the options.

The plaintiff S advanced moneys to R Co. and R P Co. under an agreement the terms of which were put in writing in a letter dated July 31, 1958. The letter was signed by R, as president of R Co., and stated that after the payment of the sums advanced by S and expenses, all profits were to be divided equally between S and R. By the latter part of October, neither of two proposed property purchases had been completed and, more money being required, S advanced a further sum of $5,000 to R Co. and R P Co. on October 31, 1958, under the terms of

*PRESENT: Cartwright, Abbott, Judson, Ritchie and Hall JJ.

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a written agreement entered into between him and the two companies and bearing that date.

After reciting that S had paid to the two companies under terms of the agreement of July 31, 1958, a sum of $45,000 of which $35,000 "is represented by preferred shares in Rest Plan Properties Limited", and that the companies required an additional $5,000, this agreement provided, *inter alia,* for the repayment of $35,000 on the closing of the purchase of either of the two properties, which sum was to be paid out of moneys being disbursed by the G Trust Co. to R P Co. under the terms of its trust agreements with respect to the said properties. The balance of $15,000 was to be paid on the closing of the purchase of the remaining property which sum was to be disbursed by the trust company as aforesaid. On the same date, R P Co. gave a written direction to the trust company to pay S the sum of $35,000 from the moneys due on the closing of either purchase. It later purported to revoke this direction. The purchase of one of the properties was completed and after payment of the purchase price there remained in the hands of the trust company a sum of $55,000 to be paid to the person or persons entitled thereto.

S brought action for recovery of $50,000 in December 1958, but in March 1960 R Co. and R P Co. made assignments in bankruptcy. S was granted leave to continue the action and the trustee in bankruptcy was added as a party defendant. The action was dismissed at trial and an appeal from the trial judgment was also dismissed by the Court of Appeal.

Held: The appeal should be allowed.

The two agreements of July 31 and October 31, 1958, taken together with the assignment to the trust company of October 31, constituted a valid equitable assignment of a future chose in action which was so assigned for the express purpose of providing S with security for the advance by way of loan which he made to the defendant companies. The provisions of s. 98 of the *Bankruptcy Act* and s. 4 of *The Partnerships Act* had no application to that part of the advance secured by this assignment. *Badeley v. Consolidated Bank* (1888), 38 Ch. D. 238, applied.

There was no validity in the plea that the assignment was void as constituting a fraudulent preference.

S was entitled to be paid $35,000 from the fund held by the trust company, and as to the $5,000 advanced on October 31, 1958, he was entitled to rank *pari passu* with the general creditors because at the time of that advance no stipulation was made for him to share in the profits of the company. As to the balance of the claim, S was postponed to the general creditors under s. 98 of the *Bankruptcy Act.*

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Spence J. Appeal allowed.

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

Hon. R. L. Kellock, Q.C., and *D. J. Wright* for the defendants, respondents: A. H. Rushforth & Co. Ltd., Rest Plan Properties Ltd., and J. S. Whitehead.

[1] [1962] O.R. 682, 4 C.B.R. (N.S.) 53, 33 D.L.R. (2d) 529.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment rendered at trial by Spence J. whereby he had dismissed the plaintiff's action for the recovery of $50,000 allegedly loaned to A. H. Rushforth and Company Limited, (hereinafter referred to as the Rushforth Company) and Rest Plan Properties Limited (hereinafter referred to as "Rest Plan") which the appellant claims to have been secured as a first lien on certain moneys lodged with the Guaranty Trust Company of Canada, in the course of providing the necessary financing for the purchase of two apartment houses in the City of Toronto.

The circumstances giving rise to this litigation may be summarized as follows:

In the summer of 1958 the appellant Sukloff entered into an arrangement with one A. H. Rushforth and the Rushforth Company (of which Rushforth and his appointees were the sole shareholders) to finance the acquisition and resale of apartment house properties in the City of Toronto. The scheme consisted in obtaining options on such properties and the promotion of syndicates to acquire them, the purchase money to be raised by the sale by A. H. Rushforth or his company of units in the syndicates, which were secured under the provisions of deeds of trust pursuant to which the Guaranty Trust Company of Canada was to carry out the purchase on behalf of each syndicate, pay the expenses including a commission to Rushforth and arrange for the reimbursement of the amount of any deposits which had been paid in consideration of obtaining the options.

In June 1958, Rushforth engaged in the promotion of two particular syndicates known as "Park Lane Apartments" and "Cliffview Apartments", Sukloff advancing the money required for the deposits on the options and for preliminary expenses. The agreement under which the advances were made was originally oral but was subsequently reduced to writing in a letter dated July 31, 1958, which was drafted by Sukloff. As I have said, deposits on the options for the Cliffview and Park Lane properties of $10,000 and $25,000 respectively were made with moneys provided by Sukloff.

[1] [1962] O.R. 682, 4 C.B.R. (N.S.) 53, 33 D.L.R. (2d) 529.

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The letter of July 31 reads as follows:

Mr. Louis Sukloff,
157 Old Forest Hill Road,
Toronto, Ontario.

Dear Mr. Sukloff,

In consideration of your having advanced the capital necessary for the operations of A. H. Rushforth & Company Limited, A. H. Rushforth & Company Limited agrees as follows:

(1) After payment of all legitimate obligations and expenses incurred in the normal course of its business the Company shall reimburse the whole amount or such amount as may conveniently be available to L. N. Sukloff with interest at 10%.

(2) In addition the Company shall cause to be issued to any Trustee nominated by L. N. Sukloff, 50% of the shares of A. H. Rushforth & Company Limited and or such other companies as may be formed or controlled by A. H. Rushforth & Company Limited and such issue shall be made as and when required by L. N. Sukloff. It being the intention that all profits after payment of the sums advanced by L. N. Sukloff and legitimate expenses as aforesaid be divided equally between L. N. Sukloff and A. H. Rushforth.

(3) The said Trustee shall retain the shares of L. N. Sukloff in trust for L. N. Sukloff—subject to such disposition of them as L. N. Sukloff may direct.

(4) Neither L. N. Sukloff nor A. H. Rushforth agree either directly or indirectly to purchase any property or engage in any similar activities without first giving A. H. Rushforth & Company Limited the right of first refusal. In the event of any dispute arising between L. N. Sukloff and A. H. Rushforth which cannot be resolved between the parties the matter shall be referred to arbitration.

(5) It is acknowledged that the sums advanced as aforesaid to date is:

June 17, 1958:	$ 1,000.00	
June 23, 1958:	3,500.00	
July 23, 1958:	15,000.00	
July 27, 1958:	5,500.00	$ 25,000.00

(6) Any other or further sums will be acknowledged by A. H. Rushforth & Company Limited by separate receipt.

Yours very truly,
(sgd) A. H. Rushforth
A. H. Rushforth Pres.

At that time advances of $25,000 had been made by Sukloff and, in fact, a further advance of $20,000 was made on the following day, August 1, 1958, and a receipt for that amount endorsed on the letter of July 31st.

Apparently, in order to comply with requirements of the Ontario Securities Commission, a company, Rest Plan Properties Limited, was incorporated on August 6, 1958, and organized on August 8, 1958. It is clear from the record that

the sole business of this company was to acquire the two options on the Cliffview and Park Lane properties and to transfer them to the syndicate, the Commission apparently taking the position that this should not be done in the name of the Rushforth Company, the promoter of the two syndicates.

By the latter part of October, neither of the property purchases had been completed and, more money being required, Sukloff advanced a further sum of $5,000 to the Rushforth Company and Rest Plan Company on October 31, 1958, under the terms of a written agreement entered into between him and the said two companies and bearing that date.

After reciting that he, Sukloff, had paid to the two companies under terms of the agreement of July 31, 1958, a sum of $45,000 of which $35,000 "is represented by preferred shares in Rest Plan Properties Limited", and that the said two companies required "an additional sum of $5,000 to continue the sale of Units of Participation" in Cliffview and Park Lane, this agreement provided—

NOW THEREFORE in consideration of the advance of Five thousand dollars ($5,000.00) by the party of the First Part to the Companies of the Second Part, other valuable consideration, and the mutual considerations herein appearing, the parties hereto agree as follows:—

1. The Companies of the Second Part acknowledge receipt from the Party of the First Part of the sum of $50,000.00 being the sum of Forty-five thousand dollars ($45,000.00) already advanced as referred to above and the sum of Five thousand dollars ($5,000.00) being advanced on the signing of this agreement and undertaking to repay same on the times as set out below along with interest at ten per cent (10%) per annum on the amount or amounts outstanding from time to time.

2. The Companies of the Second Part agree to repay to the Party of the First Part the sum of Thirty-five thousand dollars ($35,000.00) on the closing of the purchase of either the said Cliffview property or the said Park Lane property whichever shall occur first, which sum is to be paid out of the moneys being disbursed by Guaranty Trust Company of Canada to Rest Plan Properties Limited under the terms of its Trust Agreements with respect to the said properties.

3. The Companies of the Second Part agree to repay to the Party of the First Part the balance of Fifteen thousand dollars ($15,000.00) plus interest at the rate of ten percent (10%) per annum on the full amount advanced as aforesaid on the closing of the purchase of the Cliffview property or the Park Lane property, whichever shall second occur, which sum is to be disbursed by the Guaranty Trust Company of Canada as aforesaid.

4. In the event that either or both the purchase of the Cliffview property and Park Lane property are not closed then the Companies of the Second Part covenant and agree to repay the said sum of Fifty thousand dollars ($50,000.00) as soon as funds are available it being understood that if the said purchases are not closed as aforesaid and if either or both the

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deposits paid out therein are returned, then the said deposits in full will be paid over to the Party of the First Part, forthwith but if the Thirty five thousand dollars ($35,000.00) is paid by the Companies of the Second Part under Clause 2 hereof then the payment of moneys as provided under this Clause 4 shall not apply.

5. The Payment by the Companies of the Second Part to the Party of the First Part of the sum of thirty-five thousand dollars ($35,000.00) under this agreement shall constitute redemption by Rest Plan Properties Limited of its outstanding preference shares in the name of the Party of the First Part.

6. On receipt by the Party of the First Part of the return of the full amount of capital invested namely Fifty thousand dollars ($50,000.00), plus interest at the rate of ten percent (10%) per annum as aforesaid the Party of the First Part will surrender to the Companies of the Second Part all rights and title he may have to interests in the Companies of the Second Part under the terms of the agreement as set out in the letter dated July 31, 1958 as aforesaid and to release the Companies of the Second Part from all claims, costs, damages and liabilities arising from the said agreement other than the return of the capital and interest as aforesaid and to transfer to A. H. Rushforth all outstanding shares in the Companies of the Second Part.

7. In conclusion of the covenants herein set out the Companies of the Second Part and their Directors shall be absolved entirely of any further responsibility or liability to the said Party of the First Part in connection herewith.

8. This agreement shall enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and/or assigns respectively.

On the same date, October 31, 1958, the Rest Plan Company gave a written direction to the trust company to pay to Sukloff "the sum of thirty-five thousand dollars ($35,000) from the moneys due to us on the closing of the purchase of either Cliffview Apartments, Pell Street, Scarborough, or Park Lane Apartments, 110 St. Clair Avenue West, Toronto, whichever occurs the first". It later purported to revoke this direction.

The purchase of the Cliffview property was never completed but that of the Park Lane property was completed on December 19, 1958, and after payment of the purchase price there remained in the hands of the trust company a sum of $55,000 to be paid to the person or persons entitled thereto.

Sukloff's contention is that under the agreement of October 31, 1958, and the direction given by Rest Plan and Rushforth companies to Guaranty Trust bearing the same date, he had acquired by way of equitable assignment a first lien on the said fund of $55,000 held by the Guaranty Trust Company to the extent of $35,000 with interest at 5% from

December 19, 1958. The existence and enforceability of such charge or lien is the principal question at issue on this appeal.

This action was commenced by writ of summons dated December 29, 1958, but in the month of March, 1960, both the Rushforth and Rest Plan Companies made assignments for the benefit of their creditors under the provisions of the *Bankruptcy Act,* and J. S. Whitehead having been appointed trustee of their estates, leave was granted to continue the action and the said J. S. Whitehead as such trustee was added as a party defendant. The plaintiff also claims that he is entitled to rank as a creditor in the bankruptcy of the two defendant companies for the sum of $15,000 plus interest.

The trustee raised the following, amongst other, defences:

1. That the sums claimed were advances for the purpose of carrying on a business and as such were contributions to capital and could not be recovered until the trade creditors had been paid in full and in fact that the plaintiff and the two defendant companies were partners;

2. That either Rest Plan was insolvent at all material times since the execution of the agreement of October 31 or the redemption of its preferred shares pursuant to para. 5 of that agreement would have rendered it insolvent and accordingly the redemption was prohibited pursuant to s. 27(12) of *The Corporations Act,* R.S.O. 1960, c. 71.

3. That the agreement and the direction to Guaranty Trust Company of October 31 were void pursuant to the provisions of s. 2 of *The Fraudulent Conveyances Act,* R.S.O. 1950, c. 148;

4. That the plaintiff, Sukloff, is not entitled to recover anything in respect of advances made by him until the claims of all other creditors of the bankrupt companies have been satisfied, and in this regard the trustee relies upon the provisions of s. 98 of the *Bankruptcy Act,* R.S.C. 1952, c. 14, and ss. 3 and 4 of *The Partnerships Act,* R.S.O. 1960, c. 288.

In the course of his reasons for judgment, Spence J. made the express finding that although it was intended that Sukloff and A. H. Rushforth should be partners, the appellant never entered into any such relationship with either of the two limited companies, and that his relationship with these companies was confined to that of a lender or financier

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who had a right to share in the profits, if any, of the undertakings of these companies. I am satisfied that this is the proper conclusion on the evidence, but the learned trial judge and the Court of Appeal took the view that the relationship was one to which s. 98 of the *Bankruptcy Act* and s. 4 of *The Partnerships Act* were directly applicable so as to postpone the claim of the appellant to the rights of the trade creditors of the companies. Section 98 of the *Bankruptcy Act* reads as follows:

> Where a lender advances money to a borrower engaged or about to engage in trade or business under a contract with the borrower that the lender . . . shall receive a share of the profits arising from carrying on the trade or business and the borrower subsequently becomes bankrupt the lender of the money is not entitled to recover anything in respect of the loan until the claims of all other creditors of the borrower have been satisfied.

Section 4 of *The Partnerships Act* is to the same effect containing as it does, the provision that:

> . . . the lender of the loan is not entitled to recover anything in respect of his loan . . . until the claims of the other creditors of the borrower . . . for valuable consideration in money or money's worth, are satisfied.

These statutes appear to find their origins in "An Act to amend the Law of Partnership" (frequently referred to as *Bovill's Act*) passed in England in 1865 as c. 86 of 28-29 Victoria. By s. 5 of that Act it is provided:

> In the event of any such Trader as aforesaid being adjudged a Bankrupt, or taking the Benefit of any Act for the Relief of Insolvent Debtors, or entering into an Arrangement to pay his Creditors less than Twenty Shillings in the Pound . . . the Lender of any such Loan as aforesaid shall not be entitled to recover any Portion of his Principal, or of the Profits or Interest payable in respect of such Loan . . . until the Claims of the other Creditors of the said Trader for valuable Consideration in Money or Money's Worth, have been satisfied.

Laidlaw J.A., speaking on behalf of the Court of Appeal in this case, expressed the view that the moneys advanced by the appellant were not intended to be a mere loan of money, but rather that they were a contribution to the capital of a business enterprise in which the appellant had a personal and business interest, and in this regard he relied upon the decision of Rommer J. in *In re Meade*[1], in which the Court of Appeal in England followed the case of *In re Beale*[2]. *In re Meade* was a case in which a woman who was

[1] [1951] Ch. 774.

[2] (1876), 4 Ch. D. 246.

living with the debtor Meade as his wife, entered into a riding academy business with him and furnished him with the money to buy the riding academy and much of the equipment. The intention was that the two persons concerned should live together on the property and operate the business together living on the proceeds thereof. Laidlaw J.A. cites this case as authority for the proposition that:

> Where a person has authorized the employment of his assets in a business he cannot prove in competition with the creditors of the business in respect of the assets so authorized to be employed.

In my opinion, the key to the decision in the *Meade* case appears to be furnished by the following comment on the appellant's argument which occurs towards the end of Mr. Justice Rommer's judgment where he says:

> The truth of the matter is that the whole foundation of Mr. Davies' argument is undermined by the realization that the moneys which the appellant advanced did not constitute, and were never intended to constitute, a loan at all. They represented her contribution to the capital of a business enterprise in which she plainly had an interest herself; and in my judgment she is no more entitled, as against the ordinary creditors of the business, to prove in respect of her contribution than the proprietor is entitled to prove in respect of his.

In Halsbury's Laws of England, 3d ed., vol. 2 at p. 495, the cases of *Meade* and *Beale* are cited as authority for the proposition that:

> If a person advances money to another not by way of loan but as a contribution to the capital of a business carried on for their joint benefit, the person who has made the advance, even though he is not a partner in the business and has received no share of the profits as such, is debarred from proving in the bankruptcy of the recipient of the money in competition with the creditors of the business.

As I have indicated, I do not construe Mr. Sukloff's role as that of one who was supplying capital for a business carried on for the joint benefit of himself and the two limited companies. On the other hand, effect must be given to the terms of the assignment of October 31, 1958, which was addressed Guaranty Trust Company and reads as follows:

> We A. H. Rushforth & Company Limited and Rest Plan Properties Limited hereby authorize and direct you to pay to the order of Louis N. Sukloff, 157 Old Forest Hill Road, Toronto, the sum of Thirty-five thousand dollars ($35,000.00) from the moneys due to us on the closing of the purchase of either Cliffview Apartments, Pell Street, Scarborough or Park Lane Apartments, 110 St. Clair Avenue West, Toronto, whichever occurs the first and this shall be your good and sufficient authority for so doing.

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The evidence does not satisfy me that the companies were insolvent at the time when this assignment was given and it appears to me to constitute valid security for part of the advance made by the appellant.

In the course of the argument before this Court, counsel for the appellant made reference to the case of *Badeley v. Consolidated Bank*[1], which, as I understand it, was not drawn to the attention of either of the Courts below. That was a case in which the plaintiff advanced money to a contractor to enable him to carry out a contract with a railway company for the construction of a railroad and the parties executed a deed by which the contractor assigned to the plaintiff all his machinery, plant, etc., and all shares and debentures he might receive from the company to secure the repayment of the loan. The deed also provided that the plaintiff should receive 10 per cent interest on his money and 10 per cent of the net profits. Having held that the plaintiff and the railway company were not partners in the undertaking, Cotton L.J., commenting on the provisions of s. 5 of *Bovill's Act*, had this to say:

> Mr. Wallis says the Plaintiff is here seeking to recover within the meaning of the section. In my opinion he is not seeking to recover any principal or interest. These words must mean, recover as against the property of the debtor not comprised in the security. If there is a security then insisting upon that security is not recovering principal and interest from the debtor. It may enable him ultimately to get it; but insisting upon the security and realizing the security, or, in my opinion, taking any proceedings which are necessary in order to recover that which is comprised in the security, cannot be said to be recovering principal or interest within the meaning of that section. In my opinion, that section only means that the lender shall not come in and rank with other creditors in the bankruptcy independently of any security he has in respect of the principal, interest or profits. He is not in any way prevented from insisting upon his security . . .

It appears to me that *Badeley's* case provides a very close analogy to the present circumstances and that the reasoning advanced by the Court of Appeal in England in that case in relation to *Bovill's Act* applies with equal force to the provisions of s. 98 of the *Bankruptcy Act* and s. 4 of *The Partnerships Act*. It is, however, argued on behalf of the respondent that the principle of *Badeley's* case does not apply where the security is taken, as were the equitable assignments in this case, after the original loan. I can see nothing in either *Badeley's* case or in *Ex parte Sheil*[1] to limit their application to cases in which the taking of security is contemporaneous

[1] (1888), 38 Ch. D. 238.

[1] (1877), 4 Ch. D. 789.

with the making of an advance, and in any event, the present case is marked by the fact that a further advance of $5,000 was made at the time of the taking of the security on October 31, 1958.

The two agreements of July 31 and October 31, 1958, taken together with the direction addressed to the Guaranty Trust Company on October 31, in my opinion constitute a valid equitable assignment of a future chose in action which was so assigned for the express purpose of providing the plaintiff with security for the advance by way of loan which he made to the Rushforth and Rest Plan Companies, nor do I think that there is any validity in the plea that the assignment was void as constituting a fraudulent preference.

The agreement of October 31 states that $35,000 of the loan "is represented by preference shares in Rest Plan Properties Limited . . ." and it is contended that payment of this amount to the plaintiff would constitute a redemption of its preference shares by the company, and that such a transaction would contravene the provisions of s. 27(12) of *The Corporations Act,* R.S.O. 1960, c. 71, which provides that:

> (12) Preference shares shall not be redeemed or purchased for cancellation by the company if the company is insolvent or if the redemption or purchase would render the company insolvent.

It appears to me that the preference shares in question were issued to Sukloff as additional security for his loan, and it is apparent from the provisions of para. 6 of the agreement of October 31, that they were to be surrendered upon payment of the $50,000 which Sukloff had advanced.

The purchase of the Park Lane property was completed on December 19, 1958, and on the principle that equity regards that to be done which ought to have been done, it appears to me that the rights of parties are to be considered as if the shares had been redeemed on that date. This being the case, it is clear that in seeking to invoke the provisions of s. 27(12) of *The Corporations Act,* the defendants assume the burden of proving that the Rest Plan Company was insolvent at that date, or that the redemption of their shares would have rendered it insolvent, and I am not satisfied that the evidence is sufficient to discharge this burden.

In view of all the above, I have formed the opinion that the appellant is entitled to be paid $35,000 from the fund now held by the Guaranty Trust Company, and that as to

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the $5,000 advanced on October 31, 1958, he is entitled to rank *pari passu* with the general creditors because at the time of that advance no stipulation was made for him to share in the profits of the company. As to the balance of his claim, I think that he is postponed to the general creditors having regard to the terms of the agreement and to the provisions of s. 98 of the *Bankruptcy Act*.

I would accordingly allow this appeal and direct that the plaintiff should have judgment against the Guaranty Trust Company of Canada in the sum of $35,000 with interest at the rate of 5 per cent per annum from December 19, 1958, and that it be declared that the plaintiff is entitled to rank as an ordinary creditor in the bankruptcy of the two respondent companies in the amount of $5,000.

The appellant should have his costs as against the Rushforth and Rest Plan Companies, but there should be no costs against Guaranty Trust Company of Canada which played the role of a stakeholder throughout the proceedings.

[Editorial note:— On a motion to vary the minutes of the above judgment, the hearing of which was commenced on June 8, 1964, and adjourned to June 15, 1964, the following judgment was delivered on June 29, 1964.]

The formal judgment of this Court delivered on April 28, 1964, is amended to read as follows:

"The appeal is allowed, the judgments in the Courts below are set aside and it is directed that judgment be entered providing that the appellant do recover from the respondent, Guaranty Trust Company of Canada the sum of $35,000 with interest at the rate of 5 per cent per annum from December 19, 1958, and declaring that the appellant is entitled to rank as an ordinary creditor in the bankruptcy of the respondent companies, A. H. Rushforth & Company, Limited and Rest Plan Properties Limited for the amount of $5,000 with interest at 5 per cent per annum from October 21, 1958. The appellant shall recover his costs throughout from J. S. Whitehead, Trustee of the estate of A. H. Rushforth and Company Limited and Rest Plan Properties Limited. The costs of the respondent Guaranty Trust Company of Canada of the trial of the appeal to the Court of Appeal and of the appeal to this Court shall be paid out of the fund in its

hands and it is declared to be entitled to a lien therefor on that fund."

There will be no order as to the costs of this application.

Appeal allowed.

Solicitors for the plaintiff, appellant: Allen, Hunter, Campbell & Regan, Toronto.

Solicitors for the defendants, respondents, A. H. Rushforth & Co. Ltd., Rest Plan Properties Ltd., and J. S. Whitehead: Blake, Cassels & Graydon, Toronto.

Solicitors for the defendant, respondent, Guaranty Trust Company of Canada: Landriau & Dean, Toronto.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

DAVID MITCHELL .....RESPONDENT.

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*Feb. 19, 20
May 11

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Capital murder—Deliberate and planned—Instructions to jury—Whether deliberation negatived by provocation and drunkenness—Whether necessary to charge jury in accordance with Hodge's case on issue of planning and deliberation—Criminal Code, 1953-54 (Can.), c. 51, ss. 201, 202A(2)(a), 203.

The appellant was convicted of capital murder of his brother. There was evidence that on the day in question the brothers had been drinking and had quarrelled over a girl. The appellant obtained a gun from a friend, waited sometime for his brother to come out of the house and shot and killed him. The Court of Appeal having directed a new trial, the Crown was granted leave to appeal to this Court on the questions (1) as to whether the trial judge erred in failing to point out to the jury that deliberation might have been negatived by provocation and drunkenness; and (2) as to whether the jury should have been instructed respecting the rule in *Hodge's* case.

Held: The appeal should be dismissed.

Per Taschereau C.J. and Fauteux, Martland, Ritchie, Hall and Spence JJ.: The charge of the trial judge was defective in the failure to bring the questions of provocation and drunkenness to the attention of the jury upon the issue of planning and deliberation. In determining whether the accused committed the crime of capital murder, the jury

*PRESENT: TASCHEREAU C.J., and Cartwright, Fauteux, Martland, Ritchie, Hall and Spence JJ.

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should have available and should be directed to consider all the circumstances including not only the evidence of the accused actions but of his condition, his state of mind as affected by either real or even imagined insults and provoking actions of the victim and by the accused consumption of alcohol. This is a finding of fact. The jury should have been instructed upon provocation and drunkenness when the trial judge was dealing with murder, whether capital or non-capital, under s. 201 of the Code. Then, with clear indication that he was passing on to the other and important matter of the additional ingredient needed to establish capital murder, the trial judge should have brought the jury's attention to all relevant evidence to determine whether the murder was planned and deliberate. Such a procedure is necessary to illustrate to the jury the absolute necessity of considering the evidence firstly upon the issue of intent and the ameliorating provision as to provocation and then again, only if they find against the accused on the first issue, upon the issue of planning and deliberation. It could not be said, despite other evidence pointing strongly to the conclusion that the murder was planned and deliberate, that the jury might not at least have found a reasonable doubt that the accused might have acted in a frenzy and in such a highly emotional state influenced by intoxication so that it would not be planned and deliberate on his part.

Even though the evidence in respect of the issue of planning and deliberation was circumstantial, the trial judge was not required to instruct the jury in accordance with the rule in *Hodge's* case. In that case the direction was concerned only with the identification of the accused as being the person who had committed the crime. The rule is concerned with evidence as to the commission of an act. These instructions did not apply and were never intended to apply to the issue here. The task of a jury which is required to consider whether a murder is capital or not, is entirely different. Before it is called upon to determine the issue of planning and deliberation, it must already have reached the conclusion, beyond a reasonable doubt, that the accused has committed murder. It is then called upon to decide whether the murder was planned and deliberate and not whether the accused committed the act. It must consider the whole of the evidence in relation to the issue of planning and deliberation. The charge to be given by the judge to the jury with respect to this issue is that it must consider all the evidence before it, aided by his instruction as to what evidence is indicative of planning and deliberation and what indicates the contrary, including circumstances and conditions affecting the capacity and ability to plan and deliberate. Having weighed the evidence, the jury can only reach a verdict of capital murder if satisfied, beyond a reasonable doubt, that the murder was planned and deliberate.

Per Cartwright J.: The jury should have been instructed on the issue of planning and deliberation in accordance with the rule in *Hodge's* case. Having reached the conclusion that the accused was guilty of murder, the jury was then called upon to inquire whether the murder was planned and deliberate. There was ample evidence to support findings by the jury that the murder was planned and deliberate; but all of this evidence was circumstantial. Whether a murder is planned and whether it is deliberate are both questions of fact which involve an inquiry into the state of mind of the accused at the relevant time. The key word in the rule in *Hodge's* case is "rational". The jury could not find a verdict of capital murder unless convinced beyond a reasonable doubt that the only rational conclusion from the facts established by

the whole of the evidence was that the killing was planned and deliberate.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], directing a new trial on a charge of capital murder. Appeal dismissed.

W. G. Burke-Robertson, Q.C., for the appellant.

John E. Spencer, for the respondent.

The judgment of Taschereau C.J. and Fauteux, Martland, Ritchie, Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by the Crown from a unanimous judgment of the Court of Appeal of British Columbia[1] pronounced on November 7, 1963, allowing an appeal from the conviction by the Honourable Mr. Justice MacLean on September 6, 1963, upon the findings of a jury. The accused was convicted of capital murder *contra* the *Criminal Code,* s. 202A(2)(*a*). The Court of Appeal of British Columbia directed a new trial.

The appeal was by leave granted by this Court on December 9, 1963, upon the following questions:

(*a*) Did the Court of Appeal for British Columbia err in holding that the Learned Trial Judge should have told the jury that even if they rejected provocation as a defence to murder generally it was open to them to consider provocation as negativing deliberation and as a defence reducing capital murder to non-capital murder?

(*b*) Did the Court of Appeal for British Columbia err in holding that the Learned Trial Judge should have told the jury that they might consider evidence of the Respondent's drinking as showing that his passions had been inflamed by alcohol and therefore had a bearing on the important element of deliberation and as a defence reducing capital murder to non-capital murder and in failing to point out to the jury that deliberation might be negatived by drunkenness falling short of incapacity to form the intent to kill?

(*c*) Did the Court of Appeal for British Columbia err in holding that the Learned Trial Judge should have charged the jury on the rules relating to circumstantial evidence as set out in Hodge's case (1883) 168 E.R. 1186?

Whittaker J.A., with whom Davey and Sheppard JJ.A. agreed, gave reasons for allowing the appeal from the conviction upon the basis that the trial judge in his charge failed to direct the jury properly upon the issue of whether the murder had been "planned and deliberate" as those

[1] (1963-64), 45 W.W.R. 199, 42 C.R. 12, [1964] 2 C.C.C. 1.

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words are used in s. 202A(2)(*a*). Tysoe J.A. also delivered reasons for judgment in which he came to the same conclusion as Whittaker J.A. upon that issue but added that the charge of the learned trial judge was defective in that it did not contain the appropriate instruction upon circumstantial evidence as outlined in *Hodge's* case[1]. Sheppard J.A. disagreed with the latter conclusion and Whittaker J.A. did not deem it necessary to express any view thereon.

It must be realized that the learned trial judge did not have the advantage of the reasons for judgment of this Court in *More v. The Queen*[2], only delivered on July 23, 1963, and first reported in October 1963, when he charged the jury at this trial on September 6, 1963. In the *More* case, this Court dealt with the circumstance that the evidence of two doctors as to the mental condition of the accused, which stopped far short of diagnosing him as insane within the meaning of s. 16(2) of the *Criminal Code*, was to all intent and purpose removed from the consideration of the jury by the trial judge in his charge. Cartwright J. said at p. 534:

> The evidence of the two doctors is not relied on by the defence as raising the question whether the accused was legally sane. Its importance is that it would assist the jury in deciding the question whether the accused's action in pulling the trigger, which so far as this branch of the matter is concerned was admittedly the intentional act of a sane man, was also his deliberate act. The question is one of fact and its solution involves an inquiry as to the thinking of the accused at the moment of acting. If the jury accepted the evidence of the doctors it, in conjunction with the accused's own evidence, might well cause them to regard it as more probable that the accused's final act was prompted by sudden impulse rather than by consideration. On this question the accused was entitled to have the verdict of a properly instructed jury.

In a judgment of Ritchie J. in *Regina v. McMartin*[3] (delivered at the same time as are the reasons of the Court in this appeal), he said at p. 13:

> In my opinion, without the evidence of the appellant's mental history and condition, it cannot be said that all the circumstances bearing on the question of whether the murder was planned and deliberate have been passed upon by a jury, and I would accordingly allow this appeal, quash the conviction and direct that there be a new trial.

I am of the opinion that the judgments in these two cases have as their ratio decidendi the principle that in determining whether the accused committed the crime of capital

[1] (1838), 2 Lewin C.C. 227, 168 E.R. 1136.
[2] [1963] S.C.R. 522, 41 C.R. 98, 3 C.C.C. 289, 41 D.L.R. (2d) 380.
[3] [1964] S.C.R. 484.

murder in that it was "planned and deliberate on the part of such person" the jury should have available and should be directed to consider all the circumstances including not only the evidence of the accused's actions but of his condition, his state of mind as affected by either real or even imagined insults and provoking actions of the victim and by the accused's consumption of alcohol. There is no doubt this is a finding of fact. The questions which the jury must decide and decide beyond reasonable doubt before they may convict the accused of capital murder under the relevant subsection, section 202A(2)(*a*), are: Was the murder which he committed planned and was it deliberate? I separate the jury's problem in that form because I am in complete agreement with Whittaker J.A. when he said: "It is possible to imagine a murder to some degree planned and yet not deliberate." Therefore, to determine whether the charge to the jury delivered by the learned trial judge was adequate in submitting to them the issue of planning and deliberation the charge must be examined with some care.

It should be stated at once that the charge so far as it dealt with provocation under s. 203 and with drunkenness as it affects murder under the doctrine in *Director of Public Prosecutions v. Beard*[1] was, with respect, excellent. That, however, I believe, is not sufficient. The jury should have been instructed upon those topics when the trial judge was dealing with murder, whether capital or non-capital, under s. 201. Then, with clear indication that he was passing on to the other and important matter of the additional ingredient needed to establish capital murder under s. 202A(2)(*a*), the learned trial judge should have brought the jury's attention to all relevant evidence to determine whether the murder was planned and deliberate on the part of the accused, and therefore, capital murder. I am the first to agree that such a charge is difficult, onerous and may be, unless great care is exercised, somewhat repetitive, and no attempt should be made to force charges to the jury into an inflexible mould, yet I believe some such procedure is necessary to illustrate to the jury the absolute necessity of considering the evidence firstly upon the issue of intent and the ameliorating provision as to provocation and then again, only if they find against the accused on the first issue, upon

[1] [1920] A.C. 479, 89 L.J.K.B. 437.

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the issue of planning and deliberation. I adopt upon this latter issue the statement of Tysoe J.A. in his reasons:

> Our concern is with quite a different matter, namely, the effect of the drinking of the appellant and of the deceased's provocative conduct on the mind and mental processes of the appellant in his then condition in relation to the issue of planning and deliberation on his part.

It might be preferable, in discussing insults and the accused's state of mind as they affected deliberation, to avoid the use of the word "provocation" as that word would, in the mind of the jury, be associated with the exact technical sense in which the word is utilized in s. 203. Such circumstances have a broader and less exact scope in the determination of whether the murder was deliberate.

It is true that the learned trial judge in the charge, after defining "planned" and "deliberate", said:

> Now these two words must be read together, the meaning of one colours the meaning of the other, planned and deliberate. The circumstances must be such that there was time for the conception of a plan to deliberately kill, and it is for you to say whether in the circumstances of the case there was such time.
>
> Planned and deliberate conceives a killing not done under the stress of sudden passion or sudden emotion. Therefore before the accused can be found guilty of capital murder the Crown must not only prove that the accused is guilty of murder, as I have defined and explained it to you already, but must further prove beyond a reasonable doubt that the murder was planned and deliberate on his part.

And shortly thereafter in reciting the various actions of the accused which the jury could consider in determining whether the murder were planned and deliberate, he said:

> Now there was an argument between Harvey and the accused in the kitchen with regard to Corinne.

I am of the opinion that this reference to the conduct of the victim upon the issue of whether the murder was deliberate on the part of the accused is too slight under the circumstances and I subscribe to the opinion of Whittaker J.A. when he said:

> The jury were not told that even if they rejected provocation as a defence to murder generally, it was open to them to consider provocation as negativing deliberation and as a defence reducing capital murder to non-capital. I think this should have been put to them divorced from the somewhat complicated provisions of the Code which deal with provocation reducing murder to manslaughter.

The learned trial judge, as I have said, adequately instructed the jury on the issue of drunkenness as it affected

the question of intent under s. 201 but again I am in agreement with Whittaker J.A. when he said:

> The learned Judge was, of course, dealing with drunkenness as a defence to murder generally, but it was not anywhere suggested in the charge that the jury might consider the evidence of drink as showing that appellant's passions had been inflamed by alcohol and, therefore, having a bearing on the important element of deliberation and as a defence reducing capital murder to non-capital. Nor was it pointed out that deliberation might be negatived by drunkenness falling short of incapacity to form the intent to kill, if the jury thought such a finding supported by the evidence.

I have, therefore, concluded that the charge of the learned trial judge was defective in the failure to bring these elements to the attention of the jury upon the issue of planning and deliberation and I cannot say, despite other evidence pointing strongly to the conclusion that the murder was planned and deliberate, that the jury might not at least have found a reasonable doubt that the accused might have acted in a frenzy and in such a highly emotional state influenced by intoxication so that it would not be planned and deliberate on his part. I therefore would answer both questions (a) and (b) in the order granting leave to appeal in the negative.

In the Court below, three of the five judges considered the question as to whether, in respect of the issue of planning and deliberation, the jury should have been charged in accordance with the rule in *Hodge's* case[1]. Tysoe J.A., with whom Bird J.A. concurred, was of the opinion that, since the evidence on this issue was circumstantial, the jury should have been so charged. Sheppard J.A. took the view that the evidence in respect of the issue was direct, and it was, therefore, unnecessary so to charge the jury. No opinion was expressed by the other two members of the Court.

The issue is an important one. Planning and deliberation involve the exercise of mental processes. Because of that, in almost every case where a jury is required to reach a conclusion as to whether or not a murder was planned and deliberate on the part of the accused, it must reach a conclusion on the basis of evidence which is circumstantial. Does the fact that evidence is circumstantial necessarily require that an instruction be given to the jury in accordance with that which was given in *Hodge's* case?

[1] (1838), 2 Lewin C.C. 227, 168 E.R. 1136.

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To answer this question it is desirable to recall just what were the circumstances of *Hodge's* case. The report states that the prisoner was charged with murder, the case was one of circumstantial evidence altogether, and contained no one fact which, taken alone, amounted to a presumption of guilt.

Baron Alderson told the jury that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person".

It is quite clear that this direction was concerned only with the identification of the accused as being the person who had committed the crime. A murder had been committed. There was some circumstantial evidence which implicated the accused. One of the tasks of the jury was to decide whether the accused was the man who had perpetrated the crime. The direction given by Baron Alderson was to instruct the jury as to how far the evidence must go in order to warrant a decision that the accused was the person who had "committed the act".

The rule in *Hodge's* case was stated in the same way, in this Court, by Chief Justice Duff in *Comba v. The King*[1], and it has been referred to in several other decisions of this Court. By its own terms, however, the rule is concerned with evidence as to the commission of an act. In my opinion, that limitation is a proper one. A criminal charge is laid as a result of the commission of a certain act or certain acts. If the evidence against the accused is circumstantial in character, then a jury should only find him guilty in respect of those acts if consistent with his having committed them and inconsistent with any other rational conclusion than that he did.

The task of a jury which is required to consider whether a murder is capital or not, is entirely different. Before it is ever called upon to determine the issue of planning and deliberation it must already have reached the conclusion, beyond a reasonable doubt, that the accused has committed murder. What it is now called upon to decide is not whether the accused committed the act, but whether the murder, of

[1] [1938] S.C.R. 396, 70 C.C.C. 205, 3 D.L.R. 719.

which he is guilty, was planned and deliberate on his part. The pattern of evidence which it must now consider is not a series of facts, which, in order to establish guilt, must lead to a single conclusion. The jury is now concerned with the mental processes of a person who has committed a crime. In relation to that crime it has to consider his actions, his conduct, his statements, and his capacity and ability to plan and deliberate. It must consider the whole of the evidence in relation to the issue of planning and deliberation. In nearly every case some of this evidence may indicate planning and deliberation and some may indicate the contrary. The jury must weigh all of this evidence and arrive at a conclusion.

With respect to this issue, in my opinion, the charge to be given by the judge to the jury is that it must consider all of the evidence before it, aided by his instruction as to that evidence which is indicative of planning and deliberation and that, including circumstances and conditions affecting the capacity and ability to plan and deliberate, which indicates the contrary, and that, having weighed the evidence, it can only reach a verdict of capital murder if satisfied, beyond a reasonable doubt, that the murder committed by the accused was planned and also was deliberate on his part.

This does not, in the slightest degree, reduce the onus of proof which rests upon the Crown in criminal cases and does not substitute any other rule. The direction in *Hodge's* case did not add to or subtract from the requirement that proof of guilt in a criminal case must be beyond a reasonable doubt. It provided a formula to assist in applying the accepted standard of proof in relation to the first only of the two essential elements in a crime; i.e., the commission of the act as distinct from the intent which accompanied that act. The first element, assuming every circumstance could be established by evidence, would be capable of proof to a demonstration. The latter element, save perhaps out of the mouth of the accused himself, could never be so proved. The circumstances which establish the former not only can be, but must be consistent with each other, as otherwise a reasonable doubt on the issue arises. The circumstances which establish the latter, being evidence personal to one individual, will seldom, if ever, be wholly consistent with only one conclusion as to his mental state and yet the weight of evidence on the issue may be such as to satisfy the jury,

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beyond a reasonable doubt, as to the guilty intent of the accused. The instruction of Baron Alderson in *Hodge's* case does not apply and was never intended to apply to an issue of this kind.

For the reasons which I have outlined, I am of the opinion that Tysoe J.A., with whom Bird J.A. agreed, was in error in the view which he expressed in his reasons and I would answer question (c) in the affirmative. However, being of the opinion that questions (a) and (b) should be answered in the negative, I would dismiss the appeal.

CARTWRIGHT J.:—The questions on which leave to appeal was granted are set out in the reasons of my brother Spence, which I have had the advantage of reading.

I agree with the view which he expresses as to the manner in which it will generally be advisable for a trial judge to instruct the jury in regard to the proper way in which to deal with the question whether a murder, which they find was committed by the accused, was "planned and deliberate".

The appeal can succeed only if we give an affirmative answer to all three of the questions on which leave to appeal has been granted.

I do not find it necessary to express a final opinion on questions (a) and (b). The defects in the charge which are said to require a negative answer to these questions are the alleged failure of the learned trial judge to call to the attention of the jury the possible effect of the evidence as to drunkenness and provocation on the questions, (i) whether the accused was capable of planning and of deliberate action, (ii) whether he did in fact plan, and (iii) whether his action in firing the fatal shot was in fact a deliberate one.

It is true that the judge did not direct the jury specifically in relation to the possible effect of the evidence as to drunkenness and provocation on the answers they should make to these questions although he had dealt adequately with that evidence in discussing the differences between murder and manslaughter. On the other hand he directed the jury clearly on the meaning of the words "planned and deliberate" and emphasized the onus lying on the Crown to prove both planning and deliberate action beyond a reasonable doubt.

The reasons of the members of this Court in *More v. The Queen*[1], referred to in the reasons of my brother Spence, must be read in the light of the peculiar facts of that particular case, in which the accused had given evidence to the effect that over the course of some days he had contemplated taking the lives of his wife and himself and had made preparations to do this, but that, at the last moment, while still in a state of indecision and distress, he had fired the fatal shot without conscious volition and without realizing that he was doing so.

I incline to the view that the absence of any evidence similar to that given in *More v. The Queen* differentiates that case from the case at bar; but, as already indicated, I do not find it necessary to reach a final conclusion on questions (a) and (b). The reason for this is that, in my opinion, question (c) should be answered in the negative.

In considering question (c), it is to be assumed that the jury have reached the conclusion that the accused caused the death of his victim, that he intended to cause his death, that the circumstances were not such as to reduce the offence to manslaughter and that, consequently, the accused is guilty of murder. It is only when the jury have reached this conclusion that it becomes necessary for them to proceed to the further inquiry whether the murder was planned and deliberate on the part of the accused.

As there is to be a new trial in the case at bar it is desirable to say no more about the evidence than is necessary to make clear the reasons for decision. It is, I think, sufficient to say in this case that there was ample evidence to support findings by the jury that the murder was planned on the part of the accused and that his act in firing the fatal shot was deliberate, that is to say was considered rather than impulsive; but it is clear that all of this evidence was circumstantial.

It is equally clear that the questions whether the murder was planned and whether it was the deliberate act of the accused are both questions of fact, the solution of which involves an inquiry into the state of mind of the accused at the relevant time.

[1] [1963] S.C.R. 522, 41 C.R. 98, 3 C.C.C. 289, 41 D.L.R. (2d) 380.

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In *Edgington v. Fitzmaurice*[1], Bowen L.J. said:

> There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

In *Clayton v. Ramsden*[2], Lord Wright said:

> States of mind are capable of proof like other matters of fact.

In *Lizotte v. The Queen*[3], there is the following passage in the unanimous judgment of the Court:

> *Hodge's* case was a case where all the evidence against the accused was circumstantial. It is argued that the direction there prescribed is not necessary in a case where there is direct evidence against the accused as well as circumstantial evidence. However that may be, it is my opinion that where the proof of any essential ingredient of the offence charged depends upon circumstantial evidence it is necessary that the direction be given.

There is no doubt that an affirmative finding of fact that the murder was planned and deliberate on the part of the accused is essential to a conviction of capital murder where, as in this case, the charge is based on s. 202A(2)(*a*) of the *Criminal Code*.

It is argued, however, that although all the evidence put forward to support that essential finding of fact is circumstantial it is unnecessary and indeed, if I have understood the argument correctly, undesirable for the trial judge to instruct the jury on this issue in accordance with the rule in *Hodge's* case[4].

The substance of that rule is that, in a criminal case, where proof of any issue of fact essential to the case of the Crown consists of circumstantial evidence it is the duty of the judge to instruct the jury that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with an affirmative finding on the issue so sought to be proved but that the circumstances are inconsistent with any other rational conclusion. In my opinion this rule is one not merely of prudent practice but of positive law.

I do not pause to examine the long line of cases in which the rule is formulated because, apart altogether from those authorities, the rule appears to me to follow inevitably as

[1] (1885), 29 Ch. D. 459 at 483. [2] [1943] A.C. 320 at 331.
[3] [1951] S.C.R. 115 at 133, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.
[4] (1838), 2 Lewin C.C. 227, 168 E.R. 1136.

a corollary of the rule that the jury must not convict unless they are satisfied beyond a reasonable doubt of the guilt of the accused.

In the case at bar, for example, no one would question the assertion that the jury must not convict the accused of capital murder unless satisfied beyond a reasonable doubt that his act in firing the fatal shot was deliberate in the sense of being considered rather than impulsive. Suppose that the jury had returned a special verdict in the following words:—"We are all satisfied that the prisoner is guilty of murder; as to whether he is guilty of capital murder we are all satisfied that the circumstances which we find proved are consistent with the view that the prisoner's act in firing was deliberate and that it is highly probable that it was deliberate but we are all also of opinion that those circumstances are not rationally inconsistent with the view that his act was impulsive and not deliberate". I think it clear that on such a verdict the Court could record a conviction of murder only and not a conviction of capital murder.

The key word in the rule in *Hodge's* case is "rational". How, it may be asked, can the proof of circumstances which are rationally consistent with the innocence of the accused establish his guilt beyond reasonable doubt? How can the proof of circumstances rationally consistent with the act of the accused having been impulsive rather than considered establish beyond reasonable doubt that his act was deliberate?

In the case of a charge of capital murder based on s. 202A(2)(*a*) of the *Criminal Code* the Crown is called upon, as a condition precedent to the finding of a verdict of guilty, to prove a matter of fact which from its nature will frequently be susceptible of proof only by circumstantial evidence and which will often, to use the words of Bowen L.J., be "very difficult to prove". But the consideration that proof of a matter of fact which Parliament has seen fit to require will often be difficult does not permit the Court to modify the long established rules as to the standard of proof in criminal cases and to substitute the rule applicable in civil cases that issues may be decided upon the balance of probabilities.

In regard to question (*c*), I am in substantial agreement with the reasons of Tysoe J.A.

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For the above reasons I would answer question (c) on which leave to appeal was granted in the negative and would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: G. L. Murray, Vancouver.

Solicitor for the respondent: J. Spencer, Vancouver.

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*Jan. 30, 31
May 11

DAVID JAMES McMARTIN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Capital murder—Application by defence to adjourn trial to obtain further medical evidence—Application refused—Whether Court of Appeal right in refusing leave to adduce fresh evidence of mental disorder on issue of planned and deliberate. Criminal Code, 1953-54 (Can.), c. 51, ss. 202A(2)(a), 589(1)(b).

The appellant was convicted on a charge of capital murder of his common-law wife. He did not testify. The evidence for the Crown was that he had quarrelled with his wife after she returned to their house at 1:30 a.m. on the morning of October 11, 1962. When the children left for school at 8:15 a.m., the wife was alive. Sometime after 9 a.m. the appellant was seen at the back of his house with an axe; about a minute and a half later he was at his front gate and on his way to telephone the police. When the police arrived, the wife was dead with severe lacerations on the right side of the face and head. There was no evidence of any persons being in the house between 8:15 a.m. and 9:30 a.m. other than the appellant and his wife. The Court of Appeal affirmed the conviction and refused an application by the appellant to introduce fresh evidence before it as to his mental condition at the time of the crime. On appeal to this Court the Crown was called upon to answer only the grounds (1) as to whether the trial judge should have granted a defence motion for an adjournment in order for it to obtain and introduce further medical evidence; and (2) as to whether the defence motion before the Court of Appeal to adduce fresh evidence should have been granted.

Held: The appeal should be allowed, the conviction quashed and a new trial ordered.

Per Taschereau C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.: The application for an adjournment of the trial appeared to have been directed to the issue of insanity which was not pleaded at the trial. The question of whether or not an adjournment

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

is to be granted rests in the discretion of the judge who is trying the case, and the affidavit filed at the hearing of this appeal did not contain sufficient information as to the circumstances under which this application was made to justify the conclusion that there was any error in principle in refusing the adjournment.

The proposed evidence, which the defence sought to introduce in the Court of Appeal, was not directed towards proving that the appellant was legally insane at the time of the crime, but rather towards showing that a psychiatric examination after the trial had disclosed that he had long been suffering from a disorder of the mind which manifested itself in impulsive, unpredictable and dangerous behaviour, and that his long history of mental disorder was a relevant circumstance proper to be considered, together with all the other circumstances disclosed in the evidence, in determining whether or not the murder was planned and deliberate on his part. It is recognized that special grounds must be shown in order to justify the Court of Appeal in exercising the power conferred upon it by s. 589(1) of the *Criminal Code*. The evidence tendered on such an application was not to be judged and rejected on the ground that it did not disprove the verdict as found by the jury, or that it failed to discharge the burden of proving that the appellant was incapable of planning and deliberation or that it did not rebut inferences which appeared to have been drawn by the jury. It was enough if the proposed evidence was of sufficient strength that it might reasonably affect the verdict of a jury, *R. v. Buckle*, 94 C.C.C. 84, referred to. Under the present circumstances it could not be said that the conduct of the appellant's counsel indicated lack of reasonable diligence to obtain such evidence before the trial. The evidence in question, like that in *Regina v. More*, [1963] S.C.R. 522, might have caused the jury to regard it as more probable that the accused's final act was prompted by a sudden impulse rather than by consideration. It should have been admitted by the Court of Appeal. Without the evidence of the appellant's mental history and condition, it could not be said that all the circumstances bearing on the question of whether the murder was planned and deliberate have been passed upon by a jury.

CARTWRIGHT J. agrees subject to a reservation regarding the applicability of the rule in Hodge's case.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming the conviction of the appellant for capital murder and refusing leave to introduce further evidence. Appeal allowed and new trial ordered.

H. A. D. Oliver, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of Taschereau C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia[1] by which that Court,

[1] (1963), 43 W.W.R. 483, 41 C.R. 147 [1964] 1 C.C.C. 217.

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with Davey J.A. dissenting, affirmed the conviction of the appellant for the capital murder of Celestine Bob and unanimously refused an application made on his behalf to introduce further evidence before it as to his mental condition at the time of the crime.

The appellant did not testify and no evidence was introduced on his behalf at the trial so that the jury's verdict was of necessity based on the account given by the various Crown witnesses of the circumstances surrounding the killing.

This account disclosed that at about 1:30 a.m. on the morning of October 11, 1962, Celestine Bob returned to the house near the settlement of Lillooet, B.C., where she and the appellant had been living with their two children as man and wife for a number of years; she was accompanied by a man named Stavast who appears to have given her a lift in his car and who came into the house for half an hour and had a glass of beer and a discussion or argument with the appellant about "work". Marilyn Bob, a 14-year old child, testified that after Stavast had left she heard the appellant and her mother "arguing about how come that man took her home", but there is no evidence of any further incident until after the two children left for school at 8:15, at which time they both say that their mother was alive and the little boy, Percy Bob, says that he saw her waving to them when they were waiting for the school bus. Sometime after 9 a.m., a man named Whitney, who was walking along the road behind and to one side of the McMartin house, noticed the appellant at the back of his house pick up an axe and knock a piece of wood from its blade, and about a minute and a half later he encountered the appellant at his front gate; he was then breathing heavily and asked Whitney to come with him to the shoemaker's who appears to have had the only telephone in the immediate vicinity. On arriving at the shoemaker's, the appellant telephoned to the police at Lillooet saying, in part, "Come down as quick as possible and you'll find out for yourself". As a result, Corporal Chiunyk of the R.C.M. Police drove at once to the shoemaker's and accompanied the appellant to his house where he was shown the dead body of Celestine Bob with severe lacerations on the right side of her face and head, and he then noticed an axe in a box in the corner of the same room. The appellant declined to say anything until he saw his

lawyer and when the Corporal told him that he would have to take him into custody he replied, "I am prepared". At the trial Dr. Clark testified that it was very likely that the deceased had died as a result of blows from the axe found in the room and that she had probably been hit when asleep.

For the purpose of this case the relevant definition of capital murder is that contained in s. 202A(2)(*a*) of the *Criminal Code* which reads as follows:

> (2) Murder is capital murder, in respect of any person, where
> (*a*) it is planned and deliberate on the part of such person, . . .

In *More v. The Queen*[1], Cartwright J. commented on these provisions as follows:

> The evidence that the murder was planned was very strong, but, as was properly pointed out to the jury by the learned trial judge, they could not find the accused guilty of capital murder unless they were satisfied beyond a reasonable doubt not only that the murder was planned but also that it was deliberate. The learned trial Judge also rightly instructed the jury that the word "deliberate", as used in s. 202A(2)(*a*), means "considered, not impulsive".
>
> Other meanings of the adjective given in the Oxford Dictionary are "not hasty in decision", "slow in deciding" and "intentional". The word as used in the subsection cannot have simply the meaning "intentional" because it is only if the accused's act was intentional that he can be guilty of murder and the subsection is creating an additional ingredient to be proved as a condition of an accused being convicted of capital murder.

In dissenting from the opinion of the majority of the Court of Appeal in the present case, Davey J.A., would have ordered a new trial on the ground that, in light of the addresses of counsel, the charge of the learned trial judge might have caused the jurors to interpret the word "deliberate" as meaning "intentional" and that they might thus have failed to apply the proper test in determining whether the murder was "planned and deliberate" within the meaning of those words as they are used in the above Section. Mr. Justice Davey was also of opinion that the trial judge had erred in his directions to the jury as to the evidence of deliberation.

Counsel for the appellant adopted this reasoning of Davey J.A. and contended also that the trial judge erred in relating the evidence of the witness Whitney to the day of the crime as that witness had been unable to state the day of the week or month on which the events he described took place.

[1] [1963] S.C.R. 522 at 533, 534, 41 C.R. 98, 3 C.C.C. 289, 41 D.L.R. (2d) 380.

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In this Court, however, it was only considered necessary to call upon the respondent's counsel in respect of the 6th and 12th grounds of appeal, and as I am unable to find any errors of substance in the charge of the learned trial judge, I propose to limit myself to a consideration of the issues raised by these grounds which are set out in the notice of appeal as follows:

> 6. The Court of Appeal failed to hold that the learned trial judge erred in failing to grant defence counsel's motion for an adjournment to enable the defence to obtain and introduce further medical evidence.
>
> 12. The Court of Appeal erred in refusing to grant the appellant's motion to adduce fresh evidence before it.

The record of proceedings as contained in the Case on appeal in this Court makes no reference whatever to defence counsel's motion for an adjournment, and the only source of information as to what material the learned trial judge had before him on that motion is contained in an affidavit of David Moffett which was filed at the hearing of this appeal and which appears to have been used in support of the application to adduce fresh evidence which was made to the Court of Appeal of British Columbia.

This affidavit stated that before the preliminary hearing Mr. Moffett, who represented the appellant in the lower courts, suspected that the accused might be suffering from mental illness and might have been legally insane at the time of committing the offence, and that he asked the presiding magistrate for directions as to the obtaining of a psychiatric report and wrote to the Attorney-General of British Columbia requesting an examination of the accused to find out if he were medically fit to stand trial or mentally ill at the time of the commission of the offence. The last two paragraphs of this affidavit read as follows:

> 4. That in due course I was advised and verily believed that the accused had been examined by Dr. J. W. Thomas and I was not then aware that Dr. Thomas' terms of reference did not include any examination of the accused with a view to ascertaining his sanity or insanity at the time of the commission of the offence.
>
> 5. That shortly before the date of Trial I became aware of the contents of Dr. Thomas' medical report and thereupon applied to the learned presiding Judge at the Quennel assizes, the Honourable Mr. Justice Ruttan, for an adjournment to enable a further psychiatric examination to be carried out, which application was refused by the said learned presiding Judge.

The question of whether or not an adjournment is to be granted rests in the discretion of the judge who is trying the case, and the Moffett affidavit does not, in my opinion, contain sufficient information as to the circumstances under which this application was made to justify the conclusion that there was any error in principle in refusing the adjournment.

This application, like that which had earlier been made to the Attorney-General, appears to have been directed to the issue of insanity which was not pleaded at the trial, notwithstanding the fact that according to the report made to the Court of Appeal by Ruttan J. the psychiatrist, Dr. J. W. Thomas, was in the court throughout the proceedings and was not called by either the Crown or the defence. It is difficult to understand what material defence counsel was able to put before the trial judge on this issue, particularly in light of the fact that medical evidence ultimately obtained for the defence did not bear on the question of insanity at all.

The appellant's motion for an order granting leave to call fresh evidence at the hearing of the appeal stands, however, on a very different footing. The proposed evidence was not directed towards proving that the appellant was legally insane at the time of the crime, but rather towards showing that a psychiatric examination after the trial had disclosed that he had long been suffering from a disorder of the mind which manifested itself in impulsive, unpredictable and dangerous behaviour, and that his long history of mental disorder was a relevant circumstance proper to be considered, together with all the other circumstances disclosed in the evidence, in determining whether or not the murder was planned and deliberate on his part.

In addition to the affidavit of Mr. Moffett, to which reference has been made, this application was supported by the evidence of Dr. Gould and Dr. Tyhurst and by an affidavit of the appellant which disclosed that Dr. Tyhurst first examined him after his conviction and concluded by saying:

> I am advised by my legal advisers and verily believe that had the evidence of Dr. Tyhurst and Dr. Gould been introduced at my trial it might reasonably have induced the jury to change its view regarding my guilt.

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The jurisdiction of the Court of Appeal to admit fresh evidence is to be found in s. 589(1)(*b*) of the *Criminal Code* which reads, in part, as follows:

> 589. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interest of justice,
>
> (*b*) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
>
> (1) to attend and be examined before the court of appeal . . .

It is clearly not in the interests of justice that this privilege should be extended to an appellant as a matter of course, and although the rules applicable to introducing fresh evidence before the Court of Appeal in a civil case do not apply with the same force to criminal matters, it is nevertheless recognized that special grounds must be shown in order to justify the Court in exercising the power conferred upon it by s. 589(1).

One of the grounds advanced by Sheppard J.A. for rejecting the proposed evidence in the present case was that it had not been shown that the diligence required by *R. v. Martin*[1], had been exercised in obtaining it at or before the trial. In *R. v. Martin, supra,* Bird J.A. who delivered the decision of the majority of the Court of Appeal of British Columbia said, in regard to the evidence sought to be introduced in that case:

> No effort was then made to procure McLeod's attendance at the trial, nor was application made for an adjournment on account of his absence.
>
> In these circumstances it is reasonable to infer that the defence elected to proceed to trial without that evidence. Indeed, I understood counsel for appellant to concede before us that such was the case.
>
> The Court of Criminal Appeal in England refused such an application in what appears to me to be a parallel case, viz., *Rex v. Weisz,* (1920) 15 Cr. App. R. 85, wherein the Earl of Reading, C.J. said: "The appellant's legal advisers knew the case they would have to meet, and no application was made to adjourn the trial . . . The policy was deliberate of resting the defence upon the evidence of the accused . . . and no precedent could be cited for calling a fresh witness in those circumstances".

More recently, Bird J.A. speaking on behalf of the same Court in *R. v. Lakatos*[2] appears to have adopted the following interpretation of the requirements stated in *Rex v. Martin, supra*:

> . . . that before fresh evidence will be admitted by this Court, it must be shown: (a) At the time of the trial the accused (appellant) either was not aware of the evidence proposed to be adduced or if he then had knowl-

[1] (1945), 60 B.C.R. 554, 1 W.W.R. 1, 82 C.C.C. 311, 1 D.L.R. 128.

[2] (1961), 129 C.C.C. 387 at 389, 35 C.R. 15.

edge of it that all reasonable diligence had been exercised at or before the trial to adduce that evidence; (b) That the evidence if adduced might reasonably have induced the trial tribunal to change its view of the guilt of the accused.

It appears that in the present case, Dr. Tyhurst knew nothing of the matter until after the trial and although it may be said that further efforts could have been made before the trial to find out whether the evidence he would be able to give after examination might be relevant to the issue of planning and deliberation, it must at the same time be remembered that the provisions of s. 202A(2)(*a*) only became law in July, 1961, that the case of *Regina v. More, supra,* had not been decided at the time of the preliminary hearing and the trial in October and November of 1962, and that counsel then acting for the appellant apparently did not appreciate the full significance of psychiatric evidence on the issue of planning and deliberation. I am not prepared to say that this indicated lack of reasonable diligence on his part.

Furthermore, unlike the case of *Rex v. Martin, supra* and *Rex v. Weisz*[1], in the present case efforts were made to obtain a psychiatric report from the Attorney-General and a motion for an adjournment was made to the trial judge for the same purpose. It is true that Ruttan J. exercised his discretion by refusing the appellant's application, but this does not detract from the fact that an effort was made.

In all the circumstances, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.

Having heard the evidence which was sought to be introduced in the present case, the Court of Appeal dismissed the appellant's application, the majority of the Court (Bird, Davey and Tysoe JJ.A.) resting their judgment on the ground expressed by Davey J.A. in the concluding paragraph of his reasons for judgment in the following terms:

> I would dismiss the motion for leave to introduce evidence of appellant's alleged mental disorder, because appellant relates it to no incident proximate in time to the killing that could be said to rebut any inference of deliberation by showing that the killing was the result of sudden passion or emotion aroused in a disordered mind by the incident.

[1] (1920), 15 Cr. App. R. 85.

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As has been indicated, the evidence thus rejected by the Court of Appeal included that of Dr. Tyhurst, the Head of the Department of Psychiatry at the Vancouver General Hospital and the Shaughnessy Veterans Hospital, who testified that the appellant had been a patient in the psychiatric division of two hospitals as well as having been admitted to one mental hospital in Alberta, and that his family history was very disordered, his mother having committed suicide and family members having been in mental hospitals. This witness went on to express the following conclusion which he had reached after spending a good deal of time with the appellant:

> It is my conclusion that he is a very unstable paranoid individual, who has a lifelong history of personal instability, who responds impulsively and against his best interests on slight provocation, and sometimes on none at all, actually, because of his suspiciousness; that he is unpredictable and, I would say, dangerous, actually.

In rejecting this evidence because it could not be related to any incident proximate in time to the killing which might have aroused sudden passion or emotion in a disordered mind, the Court of Appeal appears to me to have left out of account the fact that the very evidence which was so rejected was to the effect that the disorder in the mind of the appellant was such that he sometimes acted impulsively, unpredictably and dangerously with no provocation at all.

The majority of the Court of Appeal also appear to have considered it to be a necessary condition for the admissibility of this evidence that it should be such as to "rebut any inference of deliberation" by showing affirmatively that the killing was the result of sudden passion or emotion. This thinking is also reflected in the reasons for judgment of Sheppard J.A. who said:

> There is no evidence that the accused was in fact provoked, and in any event, there was ample time between 2:00 a.m. and 9:00 a.m. for any passion to have cooled . . .
>
> As the result, there is no evidence for the accused that the recurring paranoic condition referred to by Dr. Tyhurst was operating to any extent at the time of the murder, and in any event, assuming the condition had recurred, such condition does not preclude the accused taking life by a murder planned and deliberate. Hence the evidence does not disprove the verdict as found by the jury.

Wilson J.A. expressed himself even more forcibly in the same vein saying:

> The attempt here is, with the flimsiest evidence of provocation, to prove that this man was incapable of planning and deliberation . . .

and later in his reasons:

> Further, I do not think the evidence of Dr. Tyhurst establishes that this man was incapable of planning and deliberation, however unreasonable the result of such planning and deliberation might appear to the reasonable man. I have no hesitation in rejecting this evidence.

With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a jury.

I would respectfully adopt the following views expressed on behalf of the majority of the Court of Appeal of British Columbia by Sloan C.J.B.C. in *R. v. Buckle*[1], where he said:

> In my opinion the rule to be applied in criminal cases in relation to the introduction of fresh evidence and consequential relief which may be granted by the Court, is wider in its discretionary scope than that applied by the Court in civil appeals. If the newly-discovered evidence is in its nature conclusive, then the Court of Appeal, in both civil and criminal cases, may itself finally deal with the matter . . . If, on the other hand, in a criminal case, the new evidence does not exert such a compelling influence, but is however of sufficient strength that it might reasonably affect the verdict of a jury, then, in my opinion, the Court may admit that evidence and direct a new trial, so that such evidence might be added to the scale and weighed by the trial tribunal in the light of all the facts.

It is to be noted that the reasons of Sloan C.J.B.C. in *R. v. Buckle, supra,* were expressly adopted on behalf of the Court of Appeal of British Columbia by Bird J.A. in the recent case of *R. v. Lakatos,* at page 391.

The bearing of psychiatric evidence on the question of whether or not a murder was planned and deliberate on the part of the accused was considered by this Court in *More*

[1] (1949), 94 C.C.C. 84 at 85, 86, 7 C.R. 485, 1 W.W.R. 833, 3 D.L.R. 418.

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v. R., supra, where Cartwright J., speaking of the medical evidence there tendered, said at p. 534:

> The evidence of the two doctors is not relied on by the defence as raising the question whether the accused was legally sane. Its importance is that it would assist the jury in deciding the question whether the accused's action in pulling the trigger, which so far as this branch of the matter is concerned was admittedly the intentional act of a sane man, was also his deliberate act. The question is one of fact and its solution involves an inquiry as to the thinking of the accused at the moment of acting. If the jury accepted the evidence of the doctors it, in conjunction with the accused's own evidence, might well cause them to regard it as more probable that the accused's final act was prompted by sudden impulse rather than by consideration. On this question the accused was entitled to have the verdict of a properly instructed jury.

In deciding whether or not the evidence sought to be introduced in the present case falls within the same category, it appears to me to be helpful to consider that evidence in light of the charge of the learned trial judge.

As has been indicated, the evidence identifying the appellant with the killing was entirely circumstantial and in this regard Ruttan J. properly instructed the jury as to the rule in *Hodges* case[1]. In dealing with the additional question of whether or not the murder was planned and deliberate on the part of the appellant, he made the following comment:

> As a final conclusion from circumstantial evidence the Crown asks you to find that not only did the accused commit this murder, but that the accused did it by planned and deliberate actions. I shall explain to you in a moment the significance of that last submission; briefly I will say that the ingredient of planning and deliberate action makes a difference between a capital murder and a non-capital murder.

And later in the same paragraph he said:

> I should point out to you, I think it was Crown counsel suggested it was a deliberate action because there were no less than six wounds found by the doctor. There were four lacerations on one side in the same wound area and one below and one on the other side of the face. Well, here is an illustration of two conclusions you may draw from the same circumstances, because that might indicate to you that the deed was committed in a frenzy and in a highly emotional state, delivering six blows where one would do, which might suggest to you that it wasn't planned, or deliberate. I just suggest this to you to illustrate the circumstantial evidence that is so significant and important in this case, and that you must consider in drawing your conclusions.

As I understand this part of the charge, the learned trial judge was indicating to the jury that the circumstances were not only consistent with the act having been planned

[1] (1838), 2 Lewin C.C. 227, 168 E.R. 1136.

and deliberate on the part of the appellant, but were also consistent with the deed having been committed "in a frenzy and in a highly emotional state . . . which might suggest . . . that it was not planned or deliberate". He was thus not telling the jury that because the circumstances were consistent with lack of planning and deliberation they must of necessity acquit the appellant, but rather that the circumstances were consistent with two alternative interpretations which must be weighed in the balance before a verdict could be reached. There was, in my view, no error in this direction.

Under all the circumstances, it appears to me that the evidence of Dr. Tyhurst, like that of the doctors in *More v. R., supra* might have caused the jury "to regard it as more probable that the accused's final act was prompted by sudden impulse rather than by consideration".

For these reasons I am of opinion that the evidence of Dr. Tyhurst should have been admitted by the Court of Appeal in accordance with the practice outlined by Sloan C.J.B.C. in *R. v. Buckle.* I do not, however, consider that there was any error in rejecting the evidence of Dr. Gould which does not appear to me to bear upon the question here at issue.

It is not suggested that the evidence in this case did not amply support the verdict of the jury. There are many circumstances in addition to the way the blows were delivered which are consistent with the murder having been planned and deliberate, but the question raised by this appeal is whether, if the evidence of Dr. Tyhurst had been before them, the jury would inevitably have reached the conclusion which they did.

In my opinion, without the evidence of the appellant's mental history and condition, it cannot be said that all the circumstances bearing on the question of whether the murder was planned and deliberate have been passed upon by a jury, and I would accordingly allow this appeal, quash the conviction and direct that there be a new trial.

CARTWRIGHT J.:—I concur in the disposition of this appeal proposed by my brother Ritchie and I agree with his reasons subject to one reservation.

After quoting certain passages from the charge of the learned trial judge to the jury my brother Ritchie says:

> As I understand this part of the charge, the learned trial judge was indicating to the jury that the circumstances were not only consistent with

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the act having been planned and deliberate on the part of the appellant, but were also consistent with the deed having been committed "in a frenzy and in a highly emotional state . . . which might suggest . . . that it was not planned or deliberate". He was thus not telling the jury that because the circumstances were consistent with lack of planning and deliberation they must of necessity acquit the appellant, but rather that the circumstances were consistent with two alternative interpretations which must be weighed in the balance before a verdict could be reached. There was, in my view, no erorr in this direction.

For the reasons given by me in the case of *The Queen v. David Mitchell*[1], judgment in which is being given at the same time as in this case, I am of opinion that where the evidence relevant to the issue whether or not a murder was planned and deliberate on the part of the accused is entirely circumstantial it is necessary for the trial judge to charge the jury on that issue in accordance with the rule in *Hodge's* case[2]. In so far as the passage quoted from the reasons of my brother Ritchie indicates a different view I am unable to agree with it.

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

Appeal allowed, conviction quashed and new trial ordered.

Solicitors for the appellant: Oliver, Millar & Co., Vancouver.

Solicitor for the respondent: R. D. Plommer, Vancouver.

1 [1964] S.C.R. 471.
2 (1838), 2 Lewin C.C. 227, 168 E.R. 1136.

MRS. BARBARA JARVIS (*Respondent*) ..APPELLANT;

AND

ASSOCIATED MEDICAL SERVICES, INCORPORATED (*Applicant*) ..... RESPONDENT;

AND

THE ONTARIO LABOUR RELATIONS BOARD, A. M. BRUNSKILL (*Respondents*) ..... RESPONDENTS.

1963
*Nov. 5
1964
Mar. 23

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour—Certiorari—Discharge for union activity—Reinstatement of complainant ordered by Labour Relations Board—Finding that complainant exercised managerial functions—Whether "person" within protection of s. 65 of Labour Relations Act—Whether Board had jurisdiction to order reinstatement—The Labour Relations Act, R.S.O. 1960, c. 202, ss. 1(3)(b), 50, 65, 80.

On the hearing of a complaint of the appellant made as to a breach by the respondent of the provisions of s. 50 of the Ontario *Labour Relations Act*, the Labour Relations Board found that the complainant had been dismissed for union activity, that she was a member of the Office Employees International Union, Local 131, to the knowledge of the managing director of the respondent, that the union activity for which she was dismissed did not conflict with her duty to her employer, and that although her duties were managerial in nature and she was therefore a person deemed not be an employee as defined by s. 1(3)(*b*) of the Act, nevertheless, she was a person entitled to the rights given under s. 65 of the Act. The Board ordered that she be reinstated in her employment. A motion to quash the order having been dismissed, the employer appealed. The Court of Appeal in allowing the appeal held that because the complainant exercised managerial functions, she was not a "person" within the protection of s. 65 of the Act and that in her case the Board had no jurisdiction.

Held (Abbott, Judson and Spence JJ., dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Cartwright, Fauteux, Martland, Ritchie and Hall JJ.:

The appeal could succeed only if the Act could be construed as giving the Board power, in appropriate circumstances, to compel the continuation of the employment not only of all persons who were "employees" within the meaning of that term as defined in the Act but also of all persons exercising managerial functions. Such a construction would be at variance with the purposes which appeared from reading the Act as a whole, and would involve giving a forced meaning to the words which the Legislature had employed.

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

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The Board having found that the appellant was not an "employee" within the meaning of the Act at any time material to the application, it followed that the rights accorded to "any employee" under s. 65(5) were denied to her, so that if this Court were to restore the order of the Board it would be restoring an order which could not be enforced by the appellant in the manner provided by s. 65(5) for the enforcement of such a determination. It was unreasonable to suppose the Legislature to have intended that the benefits conferred by s. 65(4) were to be enjoyed by a class of persons who were plainly excluded from the right to enforce those benefits in accordance with s. 65(5), and when s. 65 was read against the background of the Act as a whole, it was apparent that the provisions of subs. (4) did not clothe the Board with any authority or jurisdiction to reinstate a person such as the appellant, who the Board itself had found had been exercising "managerial functions" and who was thus not an "employee" within the meaning of s. 65(5) or any other section of the Act.

Section 80 of the Act did not prevent the quashing of the decision of the Board. The effect of this section, if it received the construction most favourable to the appellant, was to oust the jurisdiction of the superior Courts to interfere with any decision of the Board which was made in exercise of the powers conferred upon it by the Legislature; within the ambit of those powers it might err in fact or in law; but the section did not mean that if the Board purported to make an order which, on the true construction of the Act, it had no jurisdiction to make the person affected thereby was left without a remedy. The extent of the Board's jurisdiction was fixed by the statute which created it and could not be enlarged by a mistaken view entertained by the Board as to the meaning of that statute.

Per Abbott and Judson JJ., *dissenting*: There was error in the judgment of the Court of Appeal in its restriction of the rights conferred under the Act to those who were employees within the meaning of the Act. The term "person" as used in ss. 50 and 65 included one who exercised managerial functions. The appellant was a person within the meaning of s. 50(*a*) and was entitled to its protection. Likewise, the appellant was a person whom the Board could order to be reinstated in employment pursuant to the provisions of s. 65(4).

As to the matter of *certiorari*, the Board's right to entertain the application was unquestionable. It related to the subject-matter which was given to the Board for decision, and its decision was reasonably capable of reference to the power given to it. Section 80 prevented a decision of this kind from being quashed on *certiorari* because the reviewing tribunal may choose to call what it finds to be error a jurisdictional defect. If there was error (and there was a conflict of opinion here) it was in the exercise of the function exclusively assigned to the Board by the legislation, and within that area, even if mistakes were made, s. 80 prevented judicial review.

Per Spence J., *dissenting*: The appellant had a right to obtain a decision of the Board. The word "person" in s. 50 and s. 65(4) should not be limited to mean only "employees" as described in s. 1(3)(*b*). Those who were entitled to complain and obtain a hearing by the Board under s. 65(4) were of a broader class than those who could enforce the resultant determination by court order under s. 65(5). Other means of enforcement were available, such as commencement of action in the ordinary fashion.

However, as to the right of a Court to consider the application for *certiorari*, the Board was nowhere given exclusive jurisdiction to determine for itself the meaning to be attributed to s. 50 or to s. 65 and, of course, the Board could not by an erroneous interpretation of any section or sections of the Act confer upon itself a jurisdiction which it otherwise would not have. *Certiorari* still lay, despite s. 80, if the inferior tribunal gave itself jurisdiction by a wrong decision in law.

Also, the factum filed on behalf of the Board made no reference to the propriety of the respondents proceeding by way of *certiorari* and counsel for the Board in his argument made no submission in reference to *certiorari*. Moreover, the factum of the appellant did not refer at all to the provisions of s. 80 and although counsel for the appellant who submitted argument on the issue of the right to *certiorari* did cite the section he based his whole argument upon the proposition that *certiorari* only lay if there was error on the face of the record—not that *certiorari* proceedings, even if there were utter lack of jurisdiction in the inferior tribunal, were excluded. It would not, therefore, be appropriate for this Court to take such a position in this case.

[*In re Ontario Labour Relations Bd., Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*, [1953] 2 S.C.R. 18; *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Bd.*, [1953] 2 S.C.R. 140, applied; *Re Ontario Labour Relations Bd., Bradley et al. v. Canadian General Electric Co.*, [1957] O.R. 316; *Labour Relations Bd. et al. v. Traders' Service Ltd.*, [1958] S.C.R. 672; *Farrell et al. v. Workmen's Compensation Bd.*, [1962] S.C.R. 48; *Alcyon Shipping Co. v. O'Krane*, [1961] S.C.R. 299; *R. v. Ontario Labour Relations Bd., Ex. p. Taylor*, 41 D.L.R. (2d) 456; *The King v. Hickman, Ex. p. Fox and Clinton* (1945), 70 C.L.R. 598; *Tyrrell v. Consumers' Gas Co.*, [1964] 1 O.R. 68, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Parker J. and quashing a decision of the Ontario Labour Relations Board. Appeal dismissed, Abbott, Judson and Spence JJ. dissenting.

W. B. Williston, Q.C., and *John Sopinka*, for the appellant.

D. K. Laidlaw, for the respondent, Associated Medical Services, Incorporated.

H. L. Morphy, for the respondents, Ontario Labour Relations Board and A. M. Brunskill.

Taschereau C.J. and Martland and Hall JJ. concurred with the judgment delivered by

CARTWRIGHT J.:—The relevant facts and statutory provisions and the course of this litigation in the Courts below are set out in the reasons of my brothers Judson and Spence.

[1] *Sub nom. Associated Medical Services Incorporated v. Ontario Labour Relations Board et al.*, [1962] O.R. 1093, 35 D.L.R. (2d) 375.

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Cartwright J.

All parties argued the appeal on the assumption that the findings of fact made by the Board must be accepted.

The appellant was discharged on February 2, 1961, on the ground that she was engaging in union activities on company premises during working hours. The Board found that her dismissal was unjustified and ordered that she be reinstated forthwith in employment with the respondent. The Board made the following finding as to the appellant's status:

> There can be no question but that on and after February 28, 1960, Mrs. Jarvis exercised functions which viewed in their entirety were functions which the Board has uniformly characterized as managerial in nature. If the issue as to the status of Mrs. Jarvis had arisen in these proceedings for the first time, I would have no hesitation whatever in finding that in my opinion at the material times in so far as the present proceeding is concerned, Mrs. Jarvis was exercising managerial functions and that she was therefore a person deemed not to be an employee under the terms of sec. 1(3)(*b*) of the Act.

The question calling for determination is whether, under *The Labour Relations Act,* R.S.O. 1960, c. 202, hereinafter referred to as "the Act", the Board had jurisdiction to order the reinstatement of the appellant who at the time of her discharge had for almost a year ceased, for the purposes of the Act, to be an employee of the respondent.

It appears to me that the appeal can succeed only if we are able to construe the Act as giving the Board power, in appropriate circumstances, to compel the continuation of the employment not only of all persons who are "employees" within the meaning of that term as defined in the Act but also of all persons exercising managerial functions.

In my opinion such a construction would be at variance with the purposes which appear from reading the Act as a whole, and would involve giving a forced meaning to the words which the Legislature has employed.

I find myself so fully in accord with the unanimous reasons of the Court of Appeal[1], delivered by Aylesworth J.A., that I wish simply to adopt those reasons in their entirety. In particular, I find unanswerable the reasoning in the following passage where, after quoting the wording of ss. 50 and 65 of the Act, the learned Justice of Appeal continued:

> Upon the facts as found by the board, the complainant "for the purposes of this Act" was not an employee; hence if complainant comes within

[1] [1962] O.R. 1093, 35 D.L.R. (2d) 375.

the purview of sec. 50 she must be included in the term "person" as used therein. I do not think the term can be given so broad a meaning.

In clause (*a*) the pertinent prohibition is against refusal to employ or to continue to employ a "person" "because the person was or is a member of a trade union or was or is exercising any other rights under this Act." In clause (*b*) the prohibition is against imposing or seeking to impose certain conditions of employment against "an employee or a person seeking employment" and in clause (*c*) the prohibition is against compelling an "employee" to do or refrain from doing certain things. To employ or to continue to employ a person is for the purposes of the Act, to cause a person to become an employee or to continue a person as an employee. The section refers to two classes of individuals—a person who seeks employment i.e., who seeks to become an employee and a person who already is an employee. This meaning of the word is quite in keeping with the general object and purpose of the Act; on the other hand it is neither logical or necessary to construe "person" as it appears in this section as applying to anyone other than an individual seeking to become an employee or who already is an employee and we are told in plain terms by sec. 1(3)(*b*) of the Act that someone working in a managerial capacity is not, for the purposes of the Act to be considered an employee.

The same reasoning applies to the provisions of sec. 65; in clauses (1) and (4) thereof "person" is used in exactly the same connotation as in sec. 50; clause (1) envisions a complaint that a person has been refused employment, i.e. has been thwarted in an attempt to become an employee or has been discharged, i.e. denied continuation in the role of employee. Clause (4) contemplates that the board, where a complaint has not been settled "may inquire into the complaint" and if it is satisfied "that the person has been refused employment" (or) . . . "discharged . . . it shall determine the action . . . to be taken by the employer . . . with respect to the employment of such person which . . . may . . . include reinstatement in employment." Again the section is dealing with the same two classes of individuals—the person who is seeking to become an employee and the person who is an employee. In both instances it is "employment" which is spoken of and it is the refusal or termination of employment i.e. the withholding or termination for certain reasons of the role of "employee" which is the subject-matter of the board's inquiry. Since for the purposes of the Act, the complainant is not deemed to be an employee, it is difficult to appreciate how it can be held that under sec. 65 her duties in a managerial capacity are to be included in the term "employment". As in sec. 50, so in sec. 65 it is illogical and unrealistic that "employment" should be given any wider or other meaning than referring to work as an "employee" or that "person" should be construed as including anyone other than one seeking to become an employee; if any wider meaning is given either to person or to employment the language used is given a laboured and unnecessary meaning and one which does not further the general object and purposes of the legislation. Once the board determined, as it had the right to determine, that the complainant was a person deemed not to be an employee for the purposes of the Act it had *ipso facto,* demonstrated its lack of jurisdiction to proceed further with the complaint. The remedy, if any, of the complainant lies in another forum.

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My entire agreement with the reasons of Aylesworth J.A. includes, of course, the adoption of his statement:

> . . . it is trite to observe that the Board cannot by an erroneous interpretation of any section or sections of the Act confer upon itself a jurisdiction which it otherwise would not have.

However, in view of what is said by my brother Judson as to s. 80 of the Act, I wish to add a few words as to why, in my opinion, that section does not prevent the quashing of the decision of the Board in this case.

The effect of this section, if it receives the construction most favourable to the appellant, is to oust the jurisdiction of the superior Courts to interfere with any decision of the Board which is made in exercise of the powers conferred upon it by the Legislature; within the ambit of those powers it may err in fact or in law; but I cannot take the section to mean that if the Board purports to make an order which, on the true construction of the Act, it has no jurisdiction to make the person affected thereby is left without a remedy; indeed, in *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*[1], Rinfret C.J. explicitly rejected such a suggestion. The extent of the Board's jurisdiction is fixed by the statute which creates it and cannot be enlarged by a mistaken view entertained by the Board as to the meaning of that statute. The governing principle was succinctly stated by my brother Fauteux in *In re Ontario Labour Relations Board, Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*[2] at p. 41:

> The authorities are clear that jurisdiction cannot be obtained nor can it be declined as a result of a misinterpretation of the law, and that in both cases the controlling power of superior Courts obtains, notwithstanding the existence in the Act of a *no certiorari* clause.

This was the rule applied by the Court of Appeal in the case at bar. What is complained of by the respondent is not that the Board has been induced by errors of fact or law, or by both, to make an order in the exercise of its statutory jurisdiction, but rather that it has purported to make an order which the Act has not empowered it to make at all.

Since writing the above I have had the advantage of reading the reasons of my brother Ritchie and I agree with them.

[1] [1953] 2 S.C.R. 140 at 155. [2] [1953] 2 S.C.R. 18.

I would dismiss the appeal but would make no order as to costs.

Taschereau C.J. and Martland and Hall JJ. concurred with the judgment delivered by

RITCHIE J.:—The circumstances giving rise to this appeal have been fully set out by other members of the Court and it would be superfluous for me to reiterate them.

I agree with the reasons for judgment of my brother Cartwright and would dispose of this appeal in the manner proposed by him, but as there are other reasons which lead me to the same conclusion, I am prompted to make brief reference to them.

The appellant's argument rests upon the proposition that although, by reason of the provisions of s. 1 (3)(*b*), a "person" who "in the opinion of the Board exercises managerial functions" is not an "employee" within the meaning of that word as used in *The Labour Relations Act,* R.S.O. 1960, c. 202, such person is nevertheless to be included in the category of individuals with respect to whose employment by the employer the Board is authorized to make a determination under s. 65(4) of the said Act.

It was pointed out by counsel for the appellant that "the Court must have regard to the statute as a whole" and he contended that when this was done it became apparent that in the sections of the Act dealing with collective bargaining, the legal subjects and objects are employers, employees, employers' organizations and trade unions, whereas in the sections dealing with freedom to join and participate in the activities of trade unions and with unfair practices, the legal subjects and objects are employers, employees, trade unions, employers' organizations and "persons".

Dealing specifically with s. 65, the appellant's counsel submitted that "if the legislature intended the benefits of s. 65 of the Act to be restricted to employees it would have used the term 'employee' and not 'person'."

It is upon this foundation that the appellant seeks to obtain an order setting aside the judgment of the Court of Appeal and restoring the determination of the Ontario Labour Relations Board dated April 27, 1961. It occurs to me that this argument loses much of its force when s. 65 itself is read as a whole and consideration is given to

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the provisions for enforcement of the Board's determination which are contained in subs. 5 thereof. Section 65 (4) and (5) read as follows:

(4) Where the field officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint and, if it is satisfied that the person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act, it shall determine the action, if any, to be taken by the employer and the trade union or either of them with respect to the employment of such person, which, in its discretion, may, notwithstanding the provisions of a collective agreement, include reinstatement in employment with or without compensation by the employer and the trade union or either of them for loss of earnings and other employment benefits and the employer and the trade union shall do or abstain from doing anything required of them by the determination.

(5) Where the employer or the trade union has failed to comply with any of the terms of the determination, any employer, trade union or employee affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

The only mention of this latter subsection in the tribunals below is to be found in the opinion of the chairman of the Ontario Labour Relations Board who had occasion to say:

It may be that the complainant, having regard to my finding as to her status, may encounter difficulty in enforcing any determination that the Board might make concerning her employment if she should seek enforcement under subsection 5 of section 65. However, we are not called upon at this stage to deal with that problem. It may not be amiss to point out here that, prior to the coming into force of the 1960 amendments to The Labour Relations Act, the relief afforded to a complainant under the counterpart of section 65 of the Act was not enforceable as a judgment or order of the Supreme Court.

The effect of the chairman's "finding as to her status" (with which the majority of the Board agreed) is that the appellant exercised managerial functions at all times material to this complaint and that she was therefore expressly excluded from the status of an "employee" as that word is used in *The Labour Relations Act*.

These proceedings were initiated by a personal letter signed by Barbara Jarvis and addressed to the Ontario Labour Relations Board which bore the following heading:

REQUEST FOR REINSTATEMENT UNDER SECTION 65 OF THE LABOUR RELATIONS ACT FOR UNFAIR DISCHARGE FOR ALLEGED UNION ACTIVITY . . .

As I have indicated, I agree with the view that the "reinstatement in employment" which the Board, in its discretion is entitled to include in "the determination" made by it under the authority of s. 65(4) is a "reinstatement in employment" as an "employee". An "employee" who has been "dismissed by his employer contrary to the provisions of the Act or to any collective agreement" is not deemed to have ceased to be an "employee" by reason only of his ceasing to work for his employer on account of such dismissal (see s. 1(2)) and such "employee" is therefore entitled to apply for reinstatement under s. 65(4) and to proceed to the enforcement of the Board's determination in accordance with s. 65(5), but the same considerations do not, in my opinion, apply to one who was not an "employee" within the meaning of the Act at the time of her dismissal.

The Board having found that the appellant was not such an "employee" at any time material to this application it follows, in my view, that the rights accorded to "any employee" under s. 65(5) are denied to her, so that if this Court were to comply with the request made by counsel for the appellant and were to restore the order of the Ontario Labour Relations Board dated April 27, 1961, it would be restoring an order which could not be enforced by the appellant in the manner provided by s. 65(5) for the enforcement of such a determination.

It appears to me to be unreasonable to suppose the Legislature to have intended that the benefits conferred by subs. (4) of s. 65 were to be enjoyed by a class of persons who are plainly excluded from the right to enforce those benefits in accordance with subs. (5) of the same section, and when s. 65 is read against the background of *The Labour Relations Act* as a whole, I am satisfied, for the reasons stated by Cartwright J. and by Aylesworth J.A., speaking on behalf of the Court of Appeal, that the provisions of s. 65(4) do not clothe the Labour Relations Board with any authority or jurisdiction to reinstate a person such as Mrs. Jarvis, who the Board itself has found to have been exercising "managerial functions" and who was thus not an "employee" within the meaning of s. 65(5) or any other section of the Act.

As I have indicated, I would dispose of this appeal as proposed by my brother Cartwright.

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FAUTEUX J.: For the reasons given by my brothers Cartwright and Ritchie, I would dismiss the appeal but make no order as to costs.

ABBOTT J. (*dissenting*): I have had an opportunity of reading the reasons of my brother Judson, with which I am in respectful agreement. I desire to add only a brief comment with respect to s. 80 of *The Labour Relations Act*, R.S.O. 1960, c. 202.

The primary purpose of *The Labour Relations Act* is to promote harmonious industrial relations within the province. A board such as the Labour Relations Board, experienced in the field of labour management relations, representing both organized employers, organized labour, and the public, and presided over by a legally trained chairman, ought to be at least as competent and as well suited to determine questions arising in the course of the administration of the Act as a Superior Court judge.

In enacting s. 80, the Legislature has recognized that fact and has indicated in the clearest possible language that the workings of the Board are not to be unnecessarily impeded by legal technicalities. The duty of the Courts is to apply that section, not to attempt to circumvent it.

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

JUDSON J. (*dissenting*):—The judgment under appeal quashes a decision of the Ontario Labour Relations Board, which ordered the respondent, Associated Medical Services, Incorporated, to reinstate the appellant, Barbara Jarvis, in her employment. She had made a complaint to the Board that she had been discharged because she was a member of a labour union. The Board acted under s. 65 of *The Labour Relations Act*, R.S.O. 1960, c. 202, in ordering her reinstatement. The judgment of the Court of Appeal holds that because Mrs. Jarvis exercised managerial functions, she was not a "person" within the protection of s. 65 of the Act and that in her case the Board had no jurisdiction. With respect, I think that there was error in this conclusion.

Mrs. Jarvis was a member of the Office Employees International Union, Local 131. In December 1959, this union filed an application for certification as the bargaining agent of the employees of the respondent. At this time Mrs. Jarvis was employed as a clerk. In February 1960, she was

promoted to the position of railway claims supervisor. In October 1960, the Labour Relations Board certified the union. At this time Mrs. Jarvis, according to the subsequent opinion of the Board, was exercising managerial functions. She was discharged from her employment in February 1961 and applied promptly for reinstatement under s. 65 of the Act. The Board ordered her reinstatement in June 1961.

The Board found that she had been dismissed for union activity, that she was a member of the union, Local 131, to the knowledge of the managing director of the respondent, that the union activity for which she was dismissed did not conflict with her duty to her employer, and that although her duties were managerial in nature and she was therefore a person deemed not to be an employee as defined by s. 1(3)(*b*) of the Act, nevertheless, she was a person entitled to the rights given under s. 65 of the Act.

This is the decision that was quashed by the Court of Appeal on what was, in my respectful opinion, an unduly narrow and erroneous construction of the statute.

Section 1(3)(*b*) reads:

> 1. (3) For the purposes of this Act, no person shall be deemed to be an employee,
>
> (*b*) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

The result of this section is that in the sections of the Act which deal with bargaining rights and collective bargaining (the legal subjects and objects being employers, employees, employers' organizations and trade unions), a person exercising managerial functions cannot be included within the bargaining unit. On the other hand, in the sections of the Act which deal with freedom to join and participate in the activities of trade unions and with unfair practices, the legal subjects and objects are employers, employees, trade unions, employers' organizations and persons. For example, s. 3 of the Act provides that every person is free to join a trade union of his own choice and to participate in its lawful activities. This right is not limited to employees as defined by the Act, that is, to the exclusion of a person exercising managerial functions. Thus, a person who is not an employee as defined by the Act because of these managerial functions, is still a person and is amenable to the obligations of the Act and entitled to its protection.

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The term "person" as used in ss. 50 and 65 includes one who exercises managerial functions. Section 50(*a*) reads:

> 50. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> (*a*) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

Mrs. Jarvis is a person within the meaning of that section and is entitled to its protection. Likewise, Mrs. Jarvis is a person whom the Board can order to be reinstated in employment pursuant to the provisions of s. 65(4), which reads:

> 65. (4) Where the field officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint and, if it is satisfied that the person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act, it shall determine the action, if any, to be taken by the employer and the trade union or either of them with respect to the employment of such person, which, in its discretion, may, notwithstanding the provisions of a collective agreement, include reinstatement in employment with or without compensation by the employer and the trade union or either of them for loss of earnings and other employment benefits, and the employer and the trade union shall do or abstain from doing anything required of them by the determination.

The error in the judgment of the Court of Appeal is in its restriction of the rights conferred under this Act to those who are employees within the meaning of the Act. There is sound reason for the exclusion of employees exercising managerial functions from the bargaining unit but there is no such reason for the exclusion of these persons from the protection of the Act if they are members of a trade union and are discriminated against for union activity. There are many cases where a person exercising minor managerial functions retains union membership either by choice or compulsion.

Therefore, solely as a matter of statutory construction, I would hold that there was error in the judgment of the Court of Appeal and affirm the judgment of Parker J., who heard the original motion to quash and whose reasons for judgment are summarized in the following extract:

> A perusal of the Act indicates that in the sections dealing with bargaining rights the term used is employees, but in the sections dealing with freedom to join and participate in the activities of trade unions the term

used is persons. Section 65 refers to persons and, in my opinion, gives the Board power to consider an application such as this. The findings of fact made by the Board in this case were properly within its jurisdiction.

So far I have dealt with the matter as one of construction. Now that it appears that this order of the Board is going to be quashed on the ground of excess of jurisdiction, I wish to say something about the privative clause in the Act. The Board was authorized to embark upon an inquiry whether this person was discharged contrary to the provisions of the Act. This was the issue to be decided and the Board's decision, to the extent that it is based on evidence, cannot be questioned on *certiorari*. It is now said that this decision cannot apply to Mrs. Jarvis because of the question of interpretation which I have discussed above. The Board put one interpretation on the word "person" to include Mrs. Jarvis and the Court of Appeal another. Which one is right does not matter. If the Board made a mistake, it is not deprived of jurisdiction. It makes a mistake, as many tribunals do, in the course of doing what it is told to do. This kind of mistake is not reviewable on *certiorari*.

In enacting s. 80 of *The Labour Relations Act* the Legislature has recognized that decisions made by the Board may involve what are looked upon by a Court as jurisdictional errors. The Legislature has said that it prefers to have these errors stand rather than have the decisions quashed on *certiorari*.

The quashing of this decision amounts to a disregard of the provisions of s. 80 of the Act, which reads:

> 80. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

It seems to me that the Court of Appeal in this case ignored its own decision in *Re Ontario Labour Relations Board, Bradley et al. v. Canadian General Electric Co. Ltd.*[1], and the decisions of this Court in *Labour Relations Board et al. v. Traders' Service Ltd.*[2]; *Farrell, et al. v. Workmen's Compensation Board*[3], and *Alcyon Shipping Co. Ltd. v. O'Krane*[4]. What is taken to be an error in law

[1] [1957] O.R. 316, 8 D.L.R. (2d) 65.
[2] [1958] S.C.R. 672.
[3] [1962] S.C.R. 48.
[4] [1961] S.C.R. 299.

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becomes a jurisdictional defect and so within the scope of judicial review. In all these cases at least one Court had found error in law and founded a jurisdictional defect on that finding. It does not matter what the error in law was. It was called jurisdiction. In *Bradley and Traders' Service,* it was the composition of the bargaining unit. In *Farrell,* it was whether there was an accident arising out of and in the course of employment. In *Alcyon,* it was whether the case was one where the right to bring an action was taken away by the statute. These cases have this common feature, that in the first instance the Court found error in law and founded a jurisdictional defect on that conclusion. But if the Legislature takes away the remedy of *certiorari,* it must be dealing with this so-called jurisdictional error, for the correction of jurisdictional error is the only purpose of *certiorari.*

The Board is being told by the decision under appeal that it should have split its inquiry into two parts and that having found that Mrs. Jarvis was employed in a managerial capacity, it should have stopped at that point. But the Board had also found that Mrs. Jarvis was a person who was dismissed for union activity. I do not think that a decision ordering reinstatement does involve an excess of jurisdiction. The right to entertain the application is unquestionable. It relates to the subject-matter which is given to the Board for decision, and its decision is reasonably capable of reference to the power given to it. Section 80 prevents a decision of this kind from being quashed on *certiorari* because the reviewing tribunal may choose to call what it finds to be error a jurisdictional defect. If there is error (and there is a conflict of opinion here) it is within the exercise of the function exclusively assigned to the Board by the legislation, and within that area, even if mistakes are made, s. 80 prevents judicial review.

In stating the matter in this way I am doing no more than repeating what has often been said before and most recently by McRuer C.J.H.C., in *Regina v. Ontario Labour Relations Board, Ex p. Taylor*[1]. I do, however, wish to refer to and to adopt the statement of Dixon J. in *The King v. Hickman, Ex p. Fox and Clinton*[2], as summarizing the attitude of the High Court of Australia to this problem.

[1] (1964), 41 D.L.R. (2d) 456. [2] (1945), 70 C.L.R. 598 at 614.

The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary constitution, the interpretation of provisions of the general nature of reg. 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

I do not think that the decisions of this Court in *In re Labour Relations Board; Toronto Newspaper Guild, Local 87 v. Globe Printing Co.*[1] and *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*[2] touch the present case. In the *Globe* case the union filed a number of membership cards. Counsel for the employer was not permitted by the Board to see these cards or to cross-examine on whether persons who were said to be members had, in fact, resigned. Nevertheless, the Board certified the union and based its decision on the cards. This Court held that there was a refusal of admissible evidence and that this refusal was of such a serious nature that the Board had not undertaken any task that the Act assigned to it. Its duty was to hold a hearing to determine whether the applicant represented the necessary percentage of employees and not merely to count cards. It never conducted such a hearing and its decision was a nullity. I have deliberately avoided the use of the word "jurisdiction" but what the Board did may actually be called a refusal of jurisdiction because it never attempted to do what it was told to do.

L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board held that decertification without notice was bad as being a violation of natural justice even though s. 41 of the Act did not then require it. There was no clear expression of any legislative intention that the Board could act without the necessity of hearing the person affected. This case belongs to a long line of cases which hold that a violation of natural justice is a ground for quashing an administrative decision. *Ridge v. Baldwin et al.*[3] is perhaps the most recent example.

[1] [1953] 2 S.C.R. 18 at 41. [2] [1953] 2 S.C.R. 140 at 155.
[3] [1963] 2 W.L.R. 935.

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I would allow the appeal with costs throughout against the respondent, Associated Medical Services, Incorporated. There should be no order for costs against the Ontario Labour Relations Board.

SPENCE J. (*dissenting*): This is an appeal from the judgment of the Court of Appeal for Ontario[1] which allowed an appeal from Parker J. and quashed a decision of the Ontario Labour Relations Board. That Board had considered the complaint of the appellant made as to a breach by the respondents of the provisions of s. 50 of *The Labour Relations Act, R.S.O.* 1960, c. 202, and exercising jurisdiction which it believed it had under the provisions of s. 65 of that statute, had directed her re-employment by the respondent.

Mrs. Jarvis was a member of the Office Employees International Union, Local 131. In December 1959, this union filed an application for certification as the bargaining agent of the employees of the respondent. At this time Mrs. Jarvis was employed as a clerk. In February 1960, she was promoted to the position of railway claims supervisor. In October 1960, the Labour Relations Board certified the union. At this time Mrs. Jarvis, according to the subsequent opinion of the Board, was exercising managerial functions. She was discharged from her employment in February 1961 and applied promptly for reinstatement under s. 65 of the Act. The Board ordered her reinstatement in June 1961.

The Board found that she had been dismissed for union activity, that she was a member of the union, Local 131, to the knowledge of the managing director of the respondent, that the union activity for which she was dismissed did not conflict with her duty to her employer, and that although her duties were managerial in nature and she was therefore a person deemed not to be an employee as defined by s. 1(3)(*b*) of the Act, nevertheless, she was a person entitled to the rights given under s. 65 of the Act.

The Court of Appeal for Ontario quashed the decision of the Labour Relations Board being of the view that the appellant because she exercised managerial functions, as found by the Board, did not have available to her the

[1] [1962] O.R. 1093, 35 D.L.R. (2d) 375.

provisions of ss. 50 and 65 of *The Labour Relations Act*. These sections are as follows:

50. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to exercise any other rights under this Act.

* * *

65. (1) The Board may authorize a field officer to inquire into a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act.

(2) The field officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.

(3) The field officer shall report the results of his inquiry and endeavours to the Board.

(4) Where the field officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint and, if it is satisfied that the person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act, it shall determine the action, if any, to be taken by the employer and the trade union or either of them with respect to the employment of such person, which, in its discretion, may, notwithstanding the provisions of a collective agreement, include reinstatement in employment with or without compensation by the employer and the trade union or either of them for loss of earnings and other employment benefits and the employer and the trade union shall do or abstain from doing anything required of them by the determination.

(5) Where the employer or the trade union has failed to comply with any of the terms of the determination, any employer, trade union or employee affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

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It is to be noted that in s. 50(*a*) the employer is prohibited from refusing to employ or continue to employ or discriminate against *any person*. And in s. 65(4) the Board is empowered to direct that the employer shall rehire the person. Section 1(3), para. (*b*) of *The Labour Relations Act* provides:

> (3) For the purposes of this Act, no person shall be deemed to be an employee,
>
> (*b*) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

It is the submission of the respondent, however, and such a view was adopted by the Court of Appeal for Ontario, that it was the intent of the Legislature to grant the protection of s. 50 only to those who were "employees" or perhaps also to those who sought to be employees and those who had been employees prior to discharge. Therefore, it was submitted, when, by virtue of the provisions of s. 1 particularly subs. (3), para. (*b*), the appellant, having assumed managerial functions, ceased to be such an "employee" she no longer had available to her the protection of s. 50.

This construction of the statute entails the limitation of the word "person" in s. 50, and also s. 65, to a compass much narrower than the ordinary meaning of the word.

The Shorter Oxford Dictionary defines "person", *inter alia*, as "an individual human being; a man, woman, or child" and certainly that is the ordinary use of this most common English word.

Craies on Statute Law, 6th ed., p. 162, puts the cardinal rule on interpretation of words in a statute in this fashion "The first rule is that general statutes will, *prima facie*, be presumed to use words in their popular sense", quoting Lord Esher M.R., in *Clerical, Medical and General Life Assurance Society v. Carter*[1] at p. 448. Such a view was approved in Ontario in *Composers, Authors and Publishers Association of Canada, Ltd. v. Associated Broadcasting Co. Ltd. et al.*[2] at p. 111.

The word "person" is used in a very large number of sections in *The Labour Relations Act*, many of which I shall

[1] (1889), 22 Q.B.D. 444.

[2] [1951] O.R. 101.

deal with hereafter. In *Re National Savings Bank Association*[1], Turner L.J. said at pp. 549-50:

> I do not consider that it would be at all consistent with the law or with the course of this court to put a different construction upon the same word in different parts of an Act of Parliament without finding some very clear reason for doing so . . .

It is true that the learned Justice on Appeal was there dealing with a technical word "contributory" while here the respondent seeks to put a restricted meaning on a very ordinary word "person" but I am of the opinion the same principle applies. It would appear therefore we must turn to *The Labour Relations Act* to determine whether the word "person", in these two sections, may bear a meaning restricted to those who may be of a sort described as "employees", former "employees" or prospective "employees" as that word is itself limited by s. 1(3)(*b*).

Section 3 provides:

> 3. Every person is free to join an employers' organization of his own choice and to participate in its lawful activities.

And counsel for the appellant submits that "person" in this section must mean "anyone". This section illustrates the principle that any word in a statute must be interpreted in accordance with the context: *Colquhoun v. Brooks*[2]. Although in s. 3 the word "person" could not be considered to be limited to "employees", former "employees" or prospective "employees", neither could it, in the light of s. 10 and s. 48 include an "employer" or any "person acting on behalf of an employer or employers' organization". Section 3 is therefore an illustration of the use of the word "person" in a sense limited to exclude some of those who might fall within the word "anyone".

Similarly, the word "person" in s. 4 must be interpreted in the light of s. 49 to exclude a trade union or a "person acting on behalf of a trade union".

In s. 6(2), the word "person" may well be taken to mean "anyone" who falls within the descriptive words which follow the use of that word.

In s. 9 again, exactly the same interpretation must be given to "person".

[1] (1866), L.R. 1 Ch. 547.
[2] (1889), 14 App. Cas. 493.

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In s. 16(*a*), it is provided that the Minister may call upon each party to recommend a "person" to be a member of the conciliation board. I find it significant that in the sections prior to this dealing with certification of a bargaining agent and negotiation of a collective agreement, the word "person" had been used only with a descriptive addendum while in s. 16 the general word appears because, I believe, it was the intent of the section to permit the union to recommend someone who was not a member or an "employee" and to permit the employer to recommend someone not one of its officials. Indeed, it is the course which must be adopted—see s. 17—in itself an example of where the words "no person" would only mean "no one".

The word "person" in s. 19 bears the same limitation as in s. 16.

In s. 21, the word "person" is used in the general sense, *i.e.*, anyone authorized to administer oats. And again, in s. 28(*d*) and (*e*), and s. 34(9)(*d*) and (*e*) the word "person" could only mean "anyone".

In s. 38, the word "person" again must mean "anyone" and the limiting description following it "who was a member of the employees' organization . . ." illustrates that the word is used generally and indeed with the exact opposite meaning to that attributed to it by the respondent in considering ss. 50 and 65.

Section 47 would seem to use the word "person" to contrast with "trade union" so as to include within the meaning of the word both an employer and an "employee" but it is difficult to understand how the word could be used with a more general application than that.

Sections 48 and 49 both employ the word "person" followed by a limiting phrase and it would appear that the word so used in that section is of general meaning subject only to the limiting phrase which follows.

This partial survey of the various sections of the statute has demonstrated that the word "person" is used sometimes in the widest general sense, sometimes in a sense limited by a phrase which follows and sometimes limited by the provisions of other sections of the statute.

When we turn to s. 50, we see that the word "person" appears in the first line and I believe all would agree that there the word means "anyone" subject to the limiting

phrase which follows, *i.e.* "acting on behalf of an employer or employees' organization". It is the respondent's submission that the word "person" in s. 50(*a*) is limited to "employee" not because of any limiting phrase which follows nor because of the limiting effect of any provisions but because of the policy of the statute in dealing with two classes, *i.e.* employers and "employees", the members of those two classes being separated by the provisions of s. 1(3)(*b*). I am unable to agree that such a policy must be taken from the statute. I agree with counsel for the appellant that when dealing with collective bargaining and particularly the composition of the bargaining unit the legislator has been accurate in his use of the word "employee" while elsewhere he has used the word "person" either generally or limited in one of the two fashions I have described.

In s. 50(a) it would seem that no limitation of the general meaning of the word need be implied. It may be contrasted with such provisions as s. 37 which make the collective bargaining agreement bind only those named with exactness. Section 50, on the other hand, may well be designed to protect a broader group than "employees". In the present case, we are concerned with one who has ceased to be an "employee" because of the provisions of s. 1(3)(*b*). We might as easily be concerned with one excluded from that class by the provisions of s. 1(3)(*a*). Many large corporations employ professional engineers in considerable numbers. These men may well be, almost invariably are members of a professional association. Were such an organization capable of being a "trade union" as defined in s. 1(1)(j) then an engineer might well be discharged by an employer who disliked the activities of such an organization. There seems to be no reason why such engineer should not have the protection of s. 50.

It must be remembered that many servants of large corporations in the ordinary course of promotions attain positions which result in their exclusion from the class of "employees" under the provisions of s. 1(3)(*b*). It is quite proper that these servants, foremen, supervisors and the like should be excluded from the advantage of membership in the bargaining unit. It is much more difficult to understand why they should not be protected from unfair labour practices.

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Counsel for the respondent points out that the appellant acting in her capacity as railway claims supervisor might have "hired or fired" others and have involved the respondent in a proceeding under s. 50 by such action. Counsel argues that the appellant cannot be entitled to the protection of s. 50 when by her action she might involve her employer in a complaint under that very section. Again I am unable to understand how such a position is fatal to the appellant. There appears to be no sound reason why one should be deprived of the protection against unfair labour practices simply because, acting for her employer, she might on other occasions engage in those same unfair labour practices.

I have had the privilege of reading the reasons of my brother Ritchie and I therefore find it necessary to deal with the view expressed as to the effect of s. 65(5) of *The Labour Relations Act*. The subsection provides for the enforcement of the determination made by the Labour Relations Board under the powers conferred upon it in s. 65(4) of the statute, and it permits "any *employer, trade union* or *employee* affected by the determination" to cause the Board to file in the office of the Registrar of the Supreme Court a copy of the determination and provides that such determination shall be entered as a judgment or order of the Court and is enforceable as such. It is my brother Ritchie's view that when those who are given by this subsection the right to have the Board's determination enforced as a court order are limited to the three classes whose names I have italicized above, it is proper to interpret the word "person" in subs. (4) of s. 65 in the same limited fashion. An analysis of the legislative history of the section would appear appropriate. In the Revised Statutes of Ontario, 1950, c. 194, s. 57(1) provided:

> 57. (1) The Minister may appoint a conciliation officer to inquire into any complaint that any *person* has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act. (The italics are my own.)

Section 58(3) provided:

> 58. (3) The commissioner shall give the parties full opportunity to present evidence and to make submissions and if he finds that the complaint is supported by the evidence he shall recommend to the Minister the course that ought to be taken with respect to the complaint, which may include reinstatement with or without compensation for loss of earnings and other benefits.

And subs. (5) provided:

> (5) The Minister shall issue whatever order he deems necessary to carry the recommendations of the commissioner into effect and the order shall be final and shall be complied with in accordance with its terms.

The statute contained no provisions whatsoever for the enforcement of the order of the Minister as a court order. In 1960, *The Labour Relations Act* was very largely amended by the Statutes of Ontario 1960, c. 54, and by s. 30 of that statute ss. 57 and 58 as they existed in the Revised Statutes of Ontario 1950 as amended, were repealed and new sections substituted therefor. Section 57(4) and (5) are the exact verbatim counterpart of the present s. 64(4) and (5).

Section 1(3)(*b*) existed in exactly the same form and as the same numbered section in the Revised Statutes of Ontario 1950, c. 194.

It would appear therefore that in the predecessor section to s. 65(4) of the present statute, *i.e.*, s. 58(3) of R.S.O. 1950, c. 194, the Legislature used the word "parties" but in the section empowering the Minister to inquire into a complaint, *i.e.*, s. 57(1) of the 1950 statute, the Legislature used the same word "person" used in the present s. 65(4). When the Legislature then, in 1960, re-enacted in much more detailed terms those provisions, it chose in the then section 57(4) (now s. 65(4)) to repeat the use of the same word "person" but when it added in subs. (5) the power to obtain enforcement of the determination by court order it limited those who could take advantage of that right to those within the classes mentioned, *i.e.*, "employer, trade union or employee".

It is my view that if the Legislature, when enacting in much greater detail the provisions which had appeared as s. 57 and s. 58 in the 1950 statute, had intended to limit the right to make a complaint and obtain a hearing to employers, trade unions and employees, it would have used those words in subs. (4) as it did when it provided for the enforcement by registration as a court order in subs. (5), and its failure to use the three words chosen rather than the one general word indicates that those who were entitled to complain and obtain a hearing were a broader class than those who could enforce the resultant determination by court order. I do not think that this Court need speculate

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as to the reason for such limitation of those who could so enforce. There may well have been a decision of policy involved and such a view was expressed by counsel for the Ontario Labour Relations Board in argument in this Court as to the Board's view of the importance of retaining the broader interpretation of the word "person". Of course, other means of enforcement are available, such as commencement of action in the ordinary fashion. Those permitted to apply for registration as a court order are limited and in my view s. 64(5) does not provide a complete code of enforcement as was the view of Gale J. in *Tyrrell v. Consumers' Gas Company*[1], in reference to the provisions of s. 34(9) of the statute.

I am not ready to agree that the order which the Board might make under subs. (4) and which could "include reinstatement in employment with or without compensation by the employer" is limited to permitting an order for reinstatement as an "employee" in the sense limited by s. 1(3)(*b*) of the statute. That section limits the word "employee" but neither "employed" or "employment" are defined in the statute or limited in any way and I have already cited authority for the proposition that they should be given their ordinary grammatical meaning. In my view, therefore, it would be quite possible for the Board to make an order for the reinstatement of a servant of an employer in his or her work, whether that servant be "employee" in the limited sense or not. For these reasons, I cannot find that the provisions of s. 65(5) aid in the limiting interpretation of the word "person" appearing in s. 64(4) as urged by the respondent Associated Medical Services Inc.

I am therefore of the opinion that the word "person" in s. 50 and s. 65(4) should not be limited to mean only "employees" as described in s. 1(3)(*b*).

Since writing the above, I have had the privilege of reading the reasons of my brother Judson. As will be seen, I am in substantial agreement with his view of the applicant's right to obtain a decision of the Board. I must, however, express a different opinion as to the right of a court to consider the application for *certiorari* preferring to adopt

[1] [1964] 1 O.R. 68 at 73.

that of Aylesworth J.A. in the Court of Appeal when he said:

> The board, however, is nowhere given exclusive jurisdiction to determine for itself the meaning to be attributed to sec. 50 or to sec. 65 and, of course, it is trite to observe that the board cannot by an erroneous interpretation of any section or sections of the Act, confer upon itself a jurisdiction which it otherwise would not have.

My brother Judson cited, *inter alia*, the following decisions of the Court of Appeal for Ontario and of this Court: *Re Ontario Labour Relations Board, Bradley et al. v. Canadian General Electric Co. Ltd.*[1]; *Labour Relations Board et al. v. Traders' Service Ltd.*[2]; *Farrell et al. v. Workmen's Compensation Board*[3], and *Alcyon Shipping Co. Ltd. v. O'Krane*[4].

I have carefully considered each of those cases and am of the opinion that in each of them the Court refused the *certiorari* because it found there had been no exercise of function in excess of jurisdiction, or refusal to accept jurisdiction, by the lower Court rather than on any view that the Court was, even by a privative provision, as stringent as s. 80 of *The Labour Relations Act*, R.S.O. 1960, c. 202, prohibited from inquiry whether there had been any such excess of jurisdiction or refusal to accept the same even if such excess consisted only of an interpretation of the provisions granting such jurisdiction to cover a broader field than, in the opinion of the Court, it should cover.

In *Re Ontario Labour Relations Board, Bradley et al. v. Canadian General Electric Co. Ltd., supra*, Roach J.A. dealt with an application for *certiorari* in reference to a matter where exactly the same privative clause appeared in the statute as the then s. 69 of R.S.O. 1950, c. 194. The learned justice in appeal, at p. 325 O.R., quoted *Colonial Bank of Australasia v. Willan*[5] at p. 443, and the first two lines of the quotation are most significant:

> There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends.

After canvassing the whole question in considerable detail, Roach J.A. determined that, when the Board made findings that certain servants of the respondent exercised "manage-

[1] [1957] O.R. 316, 8 D.L.R. (2d) 65.
[2] [1958] S.C.R. 672.
[3] [1962] S.C.R. 48.
[4] [1961] S.C.R. 299.
[5] (1874), L.R. 5 P.C. 417.

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rial functions" or were "employed in a confidential capacity in matters relating to labour relations" and certain others were not of such class, the Board was acting exactly within the jurisdiction specifically and exclusively conferred upon it by the statute and not upon any collateral matter. Roach J.A., therefore, concluded at p. 336:

> In my opinion, the Board in the instant case acted within the limits of jurisdiction and its decision is not reviewable by the Court and the order of Mr. Justice Wells should be varied so to declare.

It should be noted that the action, superficially much similar to the present one, is in truth essentially different. In that case as in this the Board had determined that certain servants carried on managerial functions. In that case, however, it was sought to contest such a decision in the Court. In this case, such a decision was accepted but the applicant applied to the Court for *certiorari* on the basis of such a decision, then by interpretation of s. 50 and s. 65 of the present statue the Board has no jurisdiction to make the order subject to complaint in such proceeding.

The question in that case was as to the constitution of a bargaining unit. The statute provides that the bargaining unit shall be of "employees" (ss. 6 and 7 of R.S.O. 1950, c. 194) and no question of any alleged excess of jurisdiction by incorrect interpretation of any word of the statute arose. In my opinion, it is implicit in the reasons of Roach J.A. that if such excess of jurisdiction had been found he would have been of the opinion that *certiorari* lay despite the privative clause.

In *Re Labour Relations Board et al. v. Traders' Service Ltd., supra,* the Court held that the Board made a finding of fact within the exact power granted by the statute which provided that such finding was to be final and conclusive. At p. 678, Judson J. said:

> The matter therefore was solely within the Board's jurisdiction and is not open to judicial review.

Again, in *Alcyon Shipping Co. Ltd. v. O'Krane, supra,* this Court determined that the Board made a finding that the defendant company was not an employer in an industry within the scope of Part I of the *Workmen's Compensation Act* of British Columbia. That finding the Court determined

was one which the Board had power to make by the express provisions of the statute. Therefore, Judson J. said at p. 302:

> I would dismiss the appeal but on the grounds given by the learned trial judge and the minority opinion in the Court of Appeal, namely, that these two matters were conclusively determined by the Board and that the Board had exclusive jurisdiction in these matters whether before or after the institution of an action.

In *Farrell v. Workmen's Compensation Board, supra,* this Court held that the Board in determining that a workman's death occurred through natural causes had exercised a jurisdiction granted expressly to the Board in Part I of the statute. Therefore, Judson J. said at pp. 50-51:

> I agree with the majority reasons of the Court of Appeal that the Board's return, consisting of the application and its decision, was a proper one, that there was no error in law on the face of the record, and that there was error in compelling the Board to supplement its return in the absence of any question going to jurisdiction.
>
> The issue here is a very simple one—whether there was an accident arising out of and in the course of employment. This issue is unquestionably within the jurisdiction of the Board under Part I of the Act and even if there was error, whether in law or fact, it was made within the exercise of the jurisdiction and is not open to any judicial review, including *certiorari.* Section 76(1) of the Act, R.S.C. 1948, c. 370, provides:
>
> 76. (1) The Board shall have exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition, or other process or proceeding in any Court or be removable by certiorari or otherwise into any Court; and without restricting the generality of the foregoing the Board shall have exclusive jurisdiction to inquire into, hear, and determine:
>
> (*a*) The question whether an injury has arisen out of or in the course of an employment within the scope of this Part.

With some diffidence in view of the fact that the judgment of the Court in the last three decisions quoted above were written by my brother Judson, I express the view that it is implicit in each of them that had the Court found there had been excess of jurisdiction by the Board in question then even strict terms of such a provision as the present s. 80 of *The Labour Relations Act* would not have barred the Court's quashing the decision on a *certiorari* application. I am of the opinion that the problem of jurisdiction is a real problem. There is a valid distinction between the attempt of a superior Court to inquire into the manner in which the inferior tribunal has discharged its duty within its admitted

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jurisdiction, where the superior Court is barred despite its view that the inferior tribunal has committed errors in findings of fact or even of law, and the review by a superior Court to determine whether the inferior tribunal has acted beyond the jurisdiction granted to it by the statute and therefore without jurisdiction. In my view, this distinction is not touched by the judgment of Dixon J. in *The King v. Hickman*[1], as an action by the inferior tribunal whereby it had interpreted the powers granted to it in broader terms than the Court thought proper would not be "reasonably capable of reference to the power given to the body" (p. 615).

In *Regina v. Ontario Labour Relations Board, Ex. p. Taylor*[2], McRuer C.J. refused a *certiorari* application. That decision was later affirmed on appeal and leave to appeal to this Court was refused by this Court on February 3, 1964. McRuer C.J.H.C. said, at p. 179 of the Ontario Reports:

> My conclusion is that the sections of the *Labour Relations Act* in question are constitutional and I do not think it was beyond the powers of the Legislature to clothe the Labour Relations Board with jurisdiction to make decisions of law incidental to its administrative duties. Obviously the Board must decide many incidental questions of law in the performance of its administrative functions but in saying this I do not wish it to be taken that I think that the Board has power to make decisions in law with respect to collateral matters, which may not be reviewed on *certiorari*. In other words, it cannot give itself jurisdiction by wrong decisions in law.

expressing in the words last quoted my view that *certiorari* still lies if the inferior tribunal gave itself jurisdiction by a wrong decision in law.

I have read with interest the views of the learned author of the article appearing in The University of Queensland Law Journal, vol. 1, no. 2, p. 39, that any check of the purported exercise of jurisdiction by such inferior tribunals should be left to the legislative authority which created it. Until the relevant legislative enactment expressly prohibits the superior Court's investigation of whether the inferior tribunal has exceeded its jurisdiction and so acted beyond any power granted it by the Legislature, I conceive it the duty of the superior Court to the litigant to exercise such function. Any legislative correction, no matter how efficient its operation in the future, will not restore to the particular

[1] (1945), 70 C.L.R. 598.
[2] [1964] 1 O.R. 173, 41 D.L.R. (2d) 456.

litigant his right taken from him by the unauthorized and illegal action of the inferior tribunal.

There is a further matter which should be noted. Both the appellant Jarvis and the Ontario Labour Relations Board filed factums in this Court in which each sought to uphold the decision of the Board which granted relief to the appellant Jarvis. The factum filed on behalf of the Board made no reference to the propriety of the respondents proceeding by way of *certiorari* and counsel for the Board opened his oral submission by the unequivocal statement that he supported counsel for the appellant in his argument as to the interpretation of the statute but made *no* submission in reference to *certiorari*. If the Board in question does not wish to lay claims to such a drastic immunity from judicial review as is implicit in the reasons of my brother Judson, should this Court confer it unasked?

Moreover, the factum of the appellant does not refer at all to the provisions of s. 80 of *The Labour Relations Act* and although the counsel for the appellant who submitted argument on the issue of the right to *certiorari* did cite the section he based his whole argument upon the proposition that *certiorari* only lay if there was error on the face of the record—not that *certiorari* proceedings, even if there were utter lack of jurisdiction in the inferior tribunal, were excluded. Again, I do not think it would be appropriate therefore for this Court to take such a position in this case.

In the result, for the reasons outlined in the earlier part of this judgment, I would allow the appeal with costs against the respondent Associated Medical Services. There should be no costs for or against the respondent Labour Relations Board.

Appeal dismissed, ABBOTT, JUDSON *and* SPENCE JJ. *dissenting.*

Solicitors for the appellant: Fasken, Calvin, Mackenzie, Williston & Swackhamer, Toronto.

Solicitors for the respondent, Associated Medical Services, Incorporated: Miller, Thompson, Hicks, Sedgewick, Lewis & Healy, Toronto.

Solicitors for the respondents, The Ontario Labour Relations Board and A. M. Brunskill: Kimber & Dubin, Toronto.

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*Mar. 17, 18
May 11

THE CORPORATION OF THE CITY OF OTTAWA (*Respondent*) ..... APPELLANT;

AND

THE ROYAL TRUST COMPANY, CITY CENTRE DEVELOPMENT (OTTAWA) LIMITED, KENSON CONSTRUCTION LIMITED, FREEDMAN REALTY COMPANY LIMITED, PINECREST INVESTMENTS (OTTAWA) LIMITED, RIDEAU TERRACE APARTMENT LTD. and SHIRDEN INVESTMENTS LIMITED (*Applicants*)

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—City by-law imposing special charge upon owners of high-rise or other buildings—Validity of by-law—The City of Ottawa Act, 1960-61 (Ont.), c. 120, s. 4.

The City of Ottawa under s. 4 of *The City of Ottawa Act, 1960-61* enacted a by-law for the imposition of a special charge upon the owners of high-rise or other buildings to pay for part of the cost of providing additional sanitary and storm sewer and water capacity which would not otherwise have been required except for the heavy load such buildings impose or may impose on the city's sewer or water system or both. In the case of a residential building or the residential part of a combined residential and non-residential building, the charge, after crediting an exemption of two dwelling units, was $125 for each unit; in the case of a non-residential building or the non-residential part of a combined residential and non-residential building, the charge, after crediting an exemption of 1,500 square feet, was 17 cents for each square foot of floor space.

An application to quash the by-law having been dismissed in the first instance, the respondents appealed to the Court of Appeal where it was held that the by-law was invalid. The Court of Appeal concluded that s. 4 of *The City of Ottawa Act, 1960-61* authorized the enactment of a by-law only if an actual or estimated expenditure for a particular utility was dealt with and only if a charge for an actual or estimated expenditure capable of being revised by the Court of Revision was being dealt with. In addition, the Court of Appeal found that the by-law was bad for discrimination on four grounds, *viz.*, (1) the levy was imposed on owners of buildings which may be such as not to require any expenditure for additional utility capacity; (2) the levy was not upon the kind of buildings or classes thereof described in the enabling Act but was a levy made generally with respect to all new construction; (3) there was discrimination between buildings in the same class, and (4) the city classified buildings as residential and non-residential or combined residential and non-residential.

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

Held (Spence J., dissenting): The appeal should be allowed.

Per Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.: The Court of Appeal was in error in holding that s. 4 of *The City of Ottawa Act, 1960-61* did no more than authorize what may be described as a local improvement by-law for an actual work in construction or in contemplation. The appeal provisions in subs. (4) did not justify a finding that the by-law must be a by-law contemplated by *The Local Improvement Act*. Also, there was no ground for the application of any principle of strict construction whether arising from a private Act or a taxing Act to support any holding that this by-law was bad. The scheme and purpose of the legislation were clear. The carrying out of the scheme and purpose by means of the by-law was no more than was authorized by the legislation.

With respect to the findings that the by-law was bad for discrimination on four grounds the following rulings were made: (1) The first finding seemed to imply that it is the duty of the city to assess in some way before enacting the by-law the actual gallonage of water consumed or likely to be consumed and the gallonage and time factors of the run-off for storm and sanitary sewers before it can act at all. The city, instead, classified the buildings to be taxed as residential and non-residential and mixed, and made elaborate provision for a levy on that basis. (2) The levy was not on new construction but on new construction of the classes mentioned, *i.e.*, over 1,500 square feet and two dwelling units, because these classes might require additional capacity. (3) Adding to an existing building in such a way as to bring it within the terms of the legislation and by-law for the purpose of the exemption and a levy on the new construction on that basis was not discrimination. (4) The classification of buildings as residential and non-residential or combined residential and non-residential was well within the broad terms of the enabling statute and there was nothing arbitrary, unjust or partial in drawing such a distinction.

Per Spence J., *dissenting*: The principle of strict construction of a public Act and a taxing Act applied to *The City of Ottawa Act, 1960-61*. Section 4 of the Act contemplated not the general levy on all new construction, which was in fact the essence of the by-law under attack, but rather a by-law passed for any particular area with a specific problem which may be surveyed in view of present new construction or contemplated new construction. The by-law in question, therefore, was *ultra vires* as going beyond the power granted by the enabling statute.

As to the allegations of discrimination made by the respondents some of which were accepted and some rejected in the Court of Appeal, there was discrimination only in the provision in the last sentence of s. 3(2) of the by-law which removes the two-dwelling unit or 1,500 square feet of non-residential space from the exemption in the case of enlarged buildings. The last words of s. 3(2) form no part of the main structure of the by-law but contain only a provision as to a minor detail of the scheme. Were it possible to hold the by-law valid apart from the final words of s. 3(2), those words should be severed. However, as the whole scheme of the by-law goes beyond the power granted by s. 4 of *The City of Ottawa Act, 1960-61*, it is invalid *in toto*.

[*The King v. Crabbs*, [1934] S.C.R. 523; *Cartwright v. City of Toronto* (1914), 50 S.C.R. 215; *Altrincham Union Assessment Committee v. Cheshire Lines Committee* (1885), 15 Q.B.D. 597; *Partington v. Attorney-General* (1869), L.R. 4 H.L. 100; *Kruse v. Johnson*, [1898]

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CITY OF OTTAWA v. ROYAL TRUST CO.

2 Q.B. 91; *Village of Long Branch v. Hogle*, [1948] S.C.R. 557, referred to.]

APPEAL from an order of the Court of Appeal for Ontario[1], which allowed an appeal from an order of Aylen J. dismissing a motion to quash a taxing by-law of the City of Ottawa. Appeal allowed, Spence J. dissenting.

J. T. Weir, Q.C., D. V. Hambling, Q.C., and *B. H. Kellock*, for the appellant.

J. J. Robinette, Q.C., and *G. E. Beament, Q.C.*, for the respondents.

The judgment of Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall was delivered by

JUDSON J.:—The City of Ottawa appeals from an order of the Court of Appeal for Ontario[1] which quashed its by-law 449-62. Aylen J., in the first instance, had affirmed this by-law. The statutory basis for the by-law is *The City of Ottawa Act*, 1960-61 (Ont.), c. 120, s. 4, by which the City of Ottawa, subject to the prior approval of the Ontario Municipal Board, was granted jurisdiction to enact by-laws concerning buildings constructed or enlarged after May 2, 1960. The legislation authorizes by-laws for the imposition of a special charge or charges upon the owners of high-rise or other buildings as defined by the by-law or any class or classes of such buildings that impose or may impose a heavy load on the city's sewer or water system or both.

Pursuant to the legislation, the City of Ottawa submitted a draft by-law to the Ontario Municipal Board. After hearing interested parties, the Board, on December 17, 1962, gave a decision which authorized the enactment of a by-law in the form submitted but with a variation in the quantum of the charges. By-law 449-62 was then enacted on December 21, 1962. Subsequently, on January 7, 1963, by-law 3-63 was enacted setting forth methods for payment of the charges. This by-law had not received the prior approval of the Ontario Municipal Board. It was quashed by Aylen J. as being discriminatory and there was no appeal from that judgment to the Ontario Court of Appeal. We are, therefore, concerned only with by-law 449-62.

[1] [1963] 2 O.R. 573, 40 D.L.R. (2d) 513.

It is necessary to set out the authorizing legislation and the by-law in full:

City of Ottawa Act
Statutes of Ontario, 9-10 Elizabeth II
c. 120, s. 4

4. (1) Subject to the approval of the Ontario Municipal Board first being obtained, the council of the Corporation may pass by-laws for imposing upon the owners of high-rise or other buildings, as defined by the by-law, for the erection or enlargement of which a building permit was or is issued subsequent to the 2nd day of May, 1960, or of any class or classes of such buildings, that impose or may impose a heavy load on the sewer system or water system, or both, by reason of which expenditures are or may be required to provide additional sanitary or storm sewer or water supply capacity, which, in the opinion of the council, would not otherwise be required, a special charge or charges over and above all other rates and charges to pay for all or part of the cost of providing the additional capacity.

(2) The proceeds of the charge or charges authorized by subsection 1 shall be used for the purpose therein referred to and not otherwise.

(3) Any charge or charges imposed under subsection 1 are a lien upon the land on which the building is erected and may be collected in the same manner and with the same remedies as provided by *The Assessment Act* for the collection of real property taxes.

(4) There shall be an appeal to the court of revision of the City of Ottawa from any charge or charges authorized by subsection 1 and the provisions with respect to appeals to the court of revision and section 51 of *The Local Improvement Act* apply *mutatis mutandis*.

(5) This section does not apply to single-family, double or duplex buildings.

BY-LAW 449-62

A by-law of The Corporation of the City of Ottawa for the imposition of a special capital charge respecting sewerage and water supply.

WHEREAS all residential buildings in the City of Ottawa not being a single family building, a double building or a duplex building, all non-residential buildings in the City of Ottawa having more than 1,500 square feet of gross floor area and all combined residential and non-residential buildings having more than two dwelling units or more than 1,500 square feet of gross floor area erected or enlarged pursuant to a building permit issued subsequent to the 2nd day of May, 1960 may impose a heavy load on the sewer system or water system of the Corporation or both by reason of which expenditures may be required to provide additional sanitary or storm sewer or water supply capacity which in the opinion of the Council would not otherwise be required;

AND WHEREAS it is expedient to impose a special charge upon the owners of the above mentioned buildings subject to the exceptions hereinafter set forth, to pay for part of the cost of providing the additional capacity;

AND WHEREAS the Council is by section 4 of The City of Ottawa Act, 1960-61, with the approval of the Ontario Municipal Board, authorized to enact as hereinafter set forth;

AND WHEREAS the Ontario Municipal Board has by its order dated the 17th day of December, 1962 approved of this by-law;

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Therefore the Council of The Corporation of the City of Ottawa enacts as follows:

1. In this by-law,

(a) "combined residential and non-residential building" means a building containing

(i) a dwelling unit or dwelling units and

(ii) space devoted to other purposes which space is not accessory to a dwelling unit or dwelling units only;

(b) "dwelling unit" means one room or two or more rooms connected together or having access one to another intended for use as a separate unit in the same building and constituting an independent housekeeping unit for residential occupancy;

(c) "gross floor area" means the total floor area obtained by adding together the area contained within the perimeter of the exterior of the building at each floor level;

(d) "non-residential building" means a building containing no dwelling units;

(e) "residential building" means a building containing only

(i) a dwelling unit or dwelling units or

(ii) a dwelling unit or dwelling units and space accessory to such use only.

2. It is the opinion of the Council that all residential buildings in the City of Ottawa not being a single family building, a double building or a duplex building, all non-residential buildings in the City of Ottawa having more than 1,500 square feet of gross floor area and all combined residential and non-residential buildings having more than two dwelling units or more than 1,500 square feet of gross floor area erected or enlarged pursuant to a building permit issued subsequent to the 2nd day of May, 1960 may impose a heavy load on the sewer system or water system of the Corporation or both by reason of which expenditures may be required to provide additional sanitary or storm sewer or water supply capacity which would not otherwise be required.

3. (1) Subject to subsections 2 and 3 and to section 5 the following charges are hereby imposed upon the owner of every building in the City of Ottawa for the erection or enlargement of which a building permit was or is issued subsequent to the 2nd day of May, 1960:

(a) in the case of a residential building or the residential part of a combined residential and non-residential building, a charge of $125.00 for each dwelling unit the creation of which is authorized by the permit,

(b) in the case of a non-residential building or the non-residential part of a combined residential and non-residential building, a charge of 17 cents for each square foot of gross floor area the creation of which is authorized by the permit.

(2) In calculating the charge under subsection (1) each residential building or residential part of a combined residential and non-residential building shall be credited with an exemption of two dwelling units and each non-residential building or non-residential part of a combined residential and non-residential building shall be credited with an exemption of 1,500 square feet and in applying such exemption dwelling units and floor area created pursuant to a building permit issued on or before the 2nd day of May, 1960 shall be counted.

(3) In calculating the charge under subsection (1) in respect of a combined residential and non-residential building, that part of each floor used for dwelling units only shall be excluded from the gross floor area of the building.

4. (1) All charges imposed under this by-law shall be calculated by the Building Inspector of the Corporation at the time of issuance of the building permit or, in the case of building permits issued prior to the date of enactment of this by-law, forthwith after such date and the Building Inspector shall certify the amount of the charge to the Treasurer of the Corporation.

(2) The Treasurer shall

(*a*) prepare a special roll showing

(i) the name of the owner

(ii) a description of the land on which the building is erected or enlarged and

(iii) the amount of the charge imposed under section 3,

(*b*) send a notice to the owner at least fifteen days before the next sitting of the Court of Revision at which an appeal from the charge may be heard, setting out the information contained on the roll prepared under clause (*a*) and also the time and place of the said sitting of the Court of Revision.

(3) The charges imposed by this by-law are a lien upon the land on which the building is erected and shall be collected by the Treasurer in the same manner and with the same remedies as provided by The Assessment Act for the collection of real property taxes.

5. This by-law shall not apply to

(*a*) any building used for educational, religious or charitable purposes which is entitled to exemption from

(i) all kinds of municipal taxation, or

(ii) all kinds of municipal taxation other than school taxes or local improvement rates or both school taxes and local improvement rates,

(*b*) a building on a lot or block in respect of which lot or block a charge was imposed on or after the 21st day of June, 1961 as a condition of the approval of a plan of subdivision, pursuant to the resolution of the Council of the said date,

(*c*) any single family, double building or duplex building.

GIVEN under the corporate seal of the City of Ottawa this 21st day of December, 1962.

The Court of Appeal concluded that s. 4 of *The City of Ottawa Act, 1960-61* authorized the enactment of a by-law only if an actual or estimated expenditure for a particular utility was dealt with and only if a charge for an actual or estimated expenditure capable of being revised by the Court of Revision was being dealt with. The basis for this conclusion was subs. (4) of s. 4, which provides for appeals to the Court of Revision and makes the provisions of s. 51 of *The Local Improvement Act* apply *mutatis mutandis*.

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The ratio of the judgment of the Court of Appeal on this point is set out in the following extract from the reasons of Aylesworth J.A.:

> Subsection (4) of section 4 of the Act provides for an appeal to the Court of Revision from any charge authorized by subsection (1) and makes applicable to such appeal, *mutatis mutandis*, the provisions with respect to appeals to the Court of Revision and section 51 of the Local Improvement Act. Section 51(3) of the Local Improvement Act provides that the Judge on an appeal to him has the like jurisdiction and powers as are conferred on the Court of Revision by section 47. Section 47(1) provides *inter alia* that the Court of Revision has jurisdiction "to review the proposed special assessment and to correct the same . . . in all cases as to the actual cost of the work." Upon a consideration of subsections (1) and (4) of the City of Ottawa Act under review and of the provisions of the Local Improvement Act imported into the special act and made applicable *mutatis mutandis* to the disposition of the appeals provided for by subsection (4), I am impelled to the conclusion that the special Act in contemplating the levy of the special charge or charges authorizes such charges only with respect to some actual work in construction or contemplation to provide for an additional capacity in the utilities; that the money expended or to be expended in connection therewith has been calculated or at least estimated and that such additional capacity in the opinion of the council "would not otherwise be required". It seems to me clear that to hold otherwise would be to render abortive or very nearly so, the protection afforded the taxpayer under subsection (4); unless the charge is made with respect to the actual work in construction or contemplation, the cost of which has been ascertained or at least estimated, the taxpayer in prosecuting an appeal with respect to the charge would be precluded from any effectual complaint to the Judge on the ground that the same was excessive or oppressive or on any ground involving a consideration of "the cost of the work."

I think that there was error in holding that the new legislation did no more than authorize what may be described as a local improvement by-law for an actual work in construction or in contemplation. The appeal provisions in subs. (4) do not justify a finding that the by-law must be a by-law contemplated by *The Local Improvement Act*.

The Local Improvement Act, R.S.O. 1960, c. 223, provides legislation by which public works of all kinds may be undertaken. There are two methods of financing under *The Local Improvement Act*, a special rate per foot frontage provided for by s. 20, or an area charge provided for in s. 67(1). *The Local Improvement Act*, of course, contemplates the existence of a specific scheme with all its incidental details of cost for which a charge is to be made. Section 4 of *The City of Ottawa Act* does not authorize this kind of by-law at all and without the importation of the appeal provisions in subs. (4) of s. 4, the Court of Appeal could never have

reached the conclusion that it did. Section 4 is dealing with a situation where new construction imposes or may impose a heavy load on public utilities. It provides for charges that are or may be required. By-law 449-62 recognizes that in areas of the city not recently sub-divided, a sewer and water system of sufficient capacity to allow the use or erection and use of non-residential buildings with 1,500 square feet of gross floor area or residential buildings with two dwelling units should be provided for out of ordinary revenue. Expenditures to provide for this capacity and its maintenance are recognized as normal while the erection of large buildings may require expenditures to provide additional capacity which would not otherwise be required. The purpose of the levy is clearly set forth in subs. (2) of the legislation: "The proceeds of the charge or charges authorized by subsection (1) should be used for the purpose therein referred to and not otherwise." They are not to be applied in reduction of general rates or to provide for normal expenditures but to provide increased capacity in the system needed for new construction after May 2, 1960, which would not otherwise be required.

The interpretation placed upon *The City of Ottawa Act* by the Court of Appeal would render it ineffectual. The statute authorizes the imposition of charges against owners of buildings erected or enlarged after May 2, 1960 and only against such people. *The Local Improvement Act* cannot and was not meant to operate under such legislation and it is error to import into the new legislation the provisions of *The Local Improvement Act* because of the provisions for appeal contained in subs. (4) of the legislation. Subsection (4) of s. 4 of *The City of Ottawa Act,* having created the right of appeal, refers to the provisions of *The Local Improvement Act* as a shorthand method of providing the necessary procedural regulations and in order to provide for appeals to the County Judge and the Court of Appeal. Those provisions are to be applied *mutatis mutandis* and the section does not provide that these provisions are to be applied verbatim to a new Local Improvement Act. The question whether or not by-law 449-62 is *intra vires* depends upon a consideration of *The City of Ottawa Act* alone and the by-law, and it is error to hold that this kind of reference to appeal provisions colours the whole scheme of the legislation and contemplates the specific scheme and the specific

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modes of financing provided for in *The Local Improvement Act*.

The Court of Appeal also says that this legislation must be strictly construed against the city because it is a private Act and a taxing Act. The principles have often been stated. Those who promote a private Act ought to see that the powers they wish to obtain are plainly expressed. Those who seek to tax must point to clear, unambiguous words which impose the tax. If these are not to be found or where the meaning of the statute is in doubt, there is no tax. I am using my own words but I do not wish to be taken in any way as departing from the usual formulae.

The cases cited in support of these principles are many. Up to 1934 there is a representative collection of them relating to taxing Acts in a judgment of this Court in *The King v. Crabbs*[1], which was concerned with sales tax under the *Special War Revenue Act*.

On the other hand, in *Cartwright v. City of Toronto*[2], in dealing with tax sales and validating legislation, Duff J. said:

> On the merits of the case I think all the contentions advanced on behalf of the appellant are disposed of by the decision of the Privy Council in *City of Toronto v. Russell* ([1908] A.C. 493). I see no reason to doubt that the passages of the judgment at page 501 form a part of the *ratio decidendi*. The effect of these passages, in my judgment, is to explode the notion which appears to have been founded on some decisions of this court, that statutes of this character are subject to some special canon of construction based, apparently, upon the presumption that all such statutes are *prima facie* monstrous. The effect of the judgment of the Judicial Committee is that particular provision in such statutes must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole.

This principle was applied in *Palmolive Manufacturing Co. Ltd. v. The King*[3], also concerned with sales tax and the *Special War Revenue Act*, as was *Crabbs*, and in *Langdon v. Holtyrex Gold Mines Ltd.*[4], where the problem was the same as in *Cartwright v. Toronto* and *Toronto v. Russell*.

I do not think that these two lines of authority are saying exactly the same thing. The apparent diversity does suggest the need for emphasis on the problem before the legislature and the means adopted to solve it, and all the more so where the problem is new in municipal development.

[1] [1934] S.C.R. 523.
[2] (1914), 50 S.C.R. 215 at 219.
[3] [1933] S.C.R. 131 at 139.
[4] [1937] S.C.R. 334 at 340.

This legislation applies only to certain kinds of buildings for which a building permit is issued after May 2, 1960. The buildings may be of two classes: those that impose and those that may impose a heavy load on public utilities and which require or may require additional expenditures. This is not a situation apt to be dealt with by local improvement legislation. If it were, why would existing legislation not be adequate? The extensions are to be provided by those who make them necessary and not by the taxpayers at large as a bonus to a certain type of building operation.

The legislation itself exempts single family, double or duplex buildings. The by-law carries this out. Both are saying that the public utilities which the city has or which it would normally construct would be adequate for such buildings. Over and above this, whatever capacity is required or may be required is called for by a building in excess of these limits. The by-law provides for two classes of building to be subject to the special charges:

> (*a*) in the case of a residential building or the residential part of a combined residential and non-residential building, a charge of $125.00 for each dwelling unit the creation of which is authorized by the permit,
>
> (*b*) in the case of a non-residential building or the non-residential part of a combined residential and non-residential building, a charge of 17 cents for each square foot of gross floor area the creation of which is authorized by the permit.

Subsection (2) of s. 3 gives each of these classes of building a certain exemption which makes it clear that it is excess capacity that is being taxed. Broadly speaking, the classification is between residential and non-residential building. Residential building is taxed on a unit basis ($125 for each dwelling unit), non-residential building on floor space (17 cents per square foot). I agree with Aylen J. that the City Council had the right to draw this distinction between residential and non-residential building; that this distinction is valid and does not give rise to discrimination.

Subsection (3) of s. 3 is merely a mode of calculating the charge under subs. (1) in respect of combined residential and non-residential building. You deduct the floor space used for dwelling units only and the rest is non-residential floor area.

The by-law is, of necessity, a detailed document but it does not lack in clarity. I can see no ground for the applica-

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tion of any principle of strict construction whether arising from a private Act or a taxing Act to support any holding that this by-law is bad. To me the scheme and purpose of the legislation are clear. The carrying out of the scheme and purpose by means of the by-law is no more than is authorized by the legislation.

So far I have only dealt with the decision of the Court of Appeal in quashing the by-law because the levy was not imposed with respect to any planned expenditure for additional capacity with an ascertained or estimated cost. The Court of Appeal, however, went on to find that the by-law was bad for discrimination on four grounds.

The first of these grounds was that the levy is imposed on owners of buildings which may be such as not to require any expenditure for additional utility capacity. This is stated in the following extract from the reasons of the Court of Appeal:

> . . . Under this charging section therefore, a levy is made upon the owner of a building erected after the effective date which in fact may replace an existing building and be of such construction, extent and use as not only not to "impose a heavy load" upon the utilities but not to require any expenditures to provide any additional utility capacity whatsoever.

This conclusion is based upon a number of hypothetical cases put to the Court by counsel for the respondents. He quoted, for example, the possibility of the demolition of an old tenement building housing several families and its replacement by a warehouse building on one floor having only one or two employees. I doubt whether this kind of illustration is an aid to interpretation unless all the relevant facts are in evidence. There was no evidence called in this litigation. The evidence was entirely affidavit evidence which was merely put in to show that the respondents had an interest in attacking the by-law. Further, the probabilities do not stop with the hypothetical case. It ignores entirely the use of the word "may" in *The City of Ottawa Act*. There are all kinds of probabilities that this kind of building may be put to another use which may call for additional requirements.

This finding seems to imply that it is the duty of the city to assess in some way before enacting the by-law the actual gallonage of water consumed or likely to be consumed and the gallonage and time factors of the run-off for storm

and sanitary sewers before it can act at all. The city, instead, classified the buildings to be taxed as residential and non-residential and mixed, and made elaborate provision for a levy on that basis.

The second ground on which the Court of Appeal found discrimination is set out in the following extract:

> In pith and substance the levy is not upon the kind of buildings or classes thereof described in the enabling Act but is a levy made generally with respect to all new construction. Upon both these grounds, section 3 of the by-law is invalid.

The error here is that the levy is not on new construction but on new construction of the classes mentioned, *i.e.*, over 1,500 square feet and two dwelling units, because these classes may require additional capacity.

The third finding of the Court of Appeal was that there was discrimination between buildings in the same class. This is expressed in the following extract from the reasons dealing with s. 3(2) of the by-law:

> Again it is said that Section 3(2) of the by-law is discriminatory in that, although the special charge is levied upon owners of buildings erected or enlarged after the effective date, the owner of a building which is enlarged is discriminated against in comparison with the owner of a building which is newly erected in its entirety since the former is not granted an area or unit exemption in calculation of the tax which is received by the latter. I agree that the discrimination exists and if it exists it is a discrimination as between buildings in the same class, something not permitted by the enabling Act.

I take this to mean that when a building is extended, it is considered as a whole and the exemptions apply when the exemptions are determined. The exemptions may come out of the old construction and not necessarily out of the new construction. Take the case of an old residential building existing before the effective date. As it stands, it is not subject to this by-law. Any enlargement will have to be of such a character as to bring it within the legislation and the by-law but once this happens, there is no reason to restrict the operation of the exemption only to the enlargement. Enlargement brings a building within the scope of the by-law just as much as new erection.

There is a rational basis for the enactment of the by-law in its form as it stands. Adding to an existing building in such a way as to bring it within the terms of the legislation and by-law for the purpose of the exemption and a levy on the new construction on that basis is not discrimination.

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Section 3(2) of the by-law recognizes that if a lot is now vacant a new building thereon should not pay the special charge except in excess of occupation space for either two families or 1,500 square feet of commercial space. In enlargements of old buildings the by-law recognizes the same basic exemption but if the land is already consuming municipal services to the extent of 1,500 square feet of commercial space or two families, it recognizes that any additional construction will require expenditures on the sewer or water system.

Finally, discrimination is found in the fact that the city classified buildings as residential and non-residential or combined residential and non-residential. I agree with Aylen J. on this point that the distinction was a natural and sensible one and well within the broad terms of the enabling statute and that there was nothing arbitrary, unjust or partial in drawing such a distinction.

I would allow the appeal with costs both here and in the Court of Appeal and restore the order of Aylen J. which dismissed the motion to quash by-law 449-62.

SPENCE J. (*dissenting*):—This is an appeal by the City of Ottawa from the order of the Court of Appeal for Ontario[1] dated July 2, 1963. In that judgment, the Court of Appeal for Ontario allowed an appeal by the respondents from the order of the late Mr. Justice Aylen dated March 19, 1963. In the latter judgment, Mr. Justice Aylen had dismissed an application by the respondents herein to quash by-law 449-62 of the City of Ottawa. *The City of Ottawa Act, 1960-61,* being chapter 120 of the Statutes of that year provided in s. 4:

> 4. (1) Subject to the approval of the Ontario Municipal Board first being obtained, the council of the Corporation may pass by-laws for imposing upon the owners of high-rise or other buildings, as defined by the by-law, for the erection or enlargement of which a building permit was or is issued subsequent to the 2nd day of May, 1960, or of any class or classes of such buildings, that impose or may impose a heavy load on the sewer system or water system, or both, by reason of which expenditures are or may be required to provide additional sanitary or storm sewer or water supply capacity, which, in the opinion of the council, would not otherwise be required, a special charge or charges over and above all other rates and charges to pay for all or part of the cost of providing the additional capacity.

[1] [1963] 2 O.R. 573, 40 D.L.R. (2d) 513.

(2) The proceeds of the charge or charges authorized by subsection 1 shall be used for the purpose therein referred to and not otherwise.

(3) Any charge or charges imposed under subsection 1 are a lien upon the land on which the building is erected and may be collected in the same manner and with the same remedies as provided by *The Assessment Act* for the collection of real property taxes.

(4) There shall be an appeal to the court of revision of the City of Ottawa from any charge or charges authorized by subsection 1 and the provisions with respect to appeals to the court of revision and section 51 of *The Local Improvement Act* apply *mutatis mutandis*.

(5) This section does not apply to single-family, double or duplex buildings.

A draft by-law of the Corporation of the City of Ottawa, numbered 449-62, was submitted to the Municipal Board in accordance with the provisions of the said s. 4 of *The City of Ottawa Act* and after a hearing on December 17, 1962, the Municipal Board gave reasons for authorizing the enactment of the by-law in the form submitted but with a variation in the quantum of the charges. Subsequently, on December 21, 1962, by-law 449-62 was enacted by the Corporation of the City of Ottawa. Before this Court, there were two main attacks levelled at the validity of the by-law. Firstly, that the whole scheme of the by-law was not in accordance with the provisions of the enabling statute as that enabling statute contemplated a building which had been or was about to be built and which would or might add a heavy load on the water or sewage system by reason of which expenditures were or may be required to provide the additional capacity, and that additional expenditure would, in the opinion of council, not otherwise be required, while it is submitted that what was enacted as by-law 449-62 was, in fact, with narrow exemptions, a general levy on all new construction irrespective of whether it will add a heavy load to the water or sewage facilities and irrespective of whether such heavy load will require expenditures not otherwise necessary. Secondly, that even if the scheme of the by-law were within the enabling legislation, it is bad as discriminatory in five different instances, and that the by-law being the embodiment of a scheme and that scheme having been approved by the Municipal Board, it is not possible to sever the alleged discriminatory portions of the by-law and to declare in favour of the validity of the truncated remainder.

To deal first with the allegation that the by-law is *ultra vires* in that it goes beyond the legislation permitted by the enabling statute, one must determine what general canons of

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construction are to be applied to the by-law and to the statute. Firstly, it is noted that c. 120 of the Statutes of Ontario, 1960-61, is in fact a private Act. It is so listed in the table of contents at p. viii of the index and the statute itself shows that it was enacted after a petition by the Corporation of the City of Ottawa. Lord Esher said in *Altrincham Union Assessment Committee v. Cheshire Lines Committee*[1], at p. 602:

> Now it is quite true that there is some difference between a private Act of Parliament and a public one, but the only difference which I am aware of is as to the strictness of the construction to be given to it, when there is any doubt as to the meaning. In the case of a public Act you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who obtain a private Act ought to take care, that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But, when the construction is perfectly clear there is no difference between the modes of construing a private Act and a public Act . . .

It is true that in *North London Ry. Co. v. Metropolitan Board of Works*[2], Sir W. Page Wood V.C., said at p. 413:

> . . . and they point to the acts which regulate the taking of land by private companies to show that it is not in the course of the Legislature to give such powers without providing protection for the land owners. To this argument it is competent for the Defendants to reply, that the policy of Acts for the regulation of private companies is not necessarily applicable to an Act like this, the purpose of which is a great public benefit to the whole community.

That statement was made in reference to a statute which permitted the Metropolitan Board of Works to execute public works without first acquiring title to the land. I am of the opinion that it is not applicable to the situation in the present action. In *Quinton v. Corporation of Bristol*[3], at p. 532, Sir R. Malins, V.C., expressed a similar view as to a statute which permitted the City of Bristol to expropriate property in order to widen streets and held that it permitted the taking of a whole property and not the half or less which was actually required within the limits of the proposed street. So far as the present case is concerned, I am of the opinion that Lord Esher's statement sets a proper standard for the construction of the statute and indeed of the by-law passed by virtue of the statute.

[1] (1885), 15 Q.B.D. 597. [2] (1859), John. 405.
[3] (1874), L.R. 77 Eq. 524.

Again, the statute and the by-law is a taxing statute. The statute in fact only authorized the tax while the by-law purports to assess such tax but the principle of construction, it is suggested, applies to the enabling statute to determine whether or not it authorizes the tax as set out in the by-law. If there is any ambiguity then the interpretation must be the one more favourable to the taxpayer: *Partington v. Attorney-General*[1] at p. 122, per Lord Cairns:

> . . . because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there is admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

In *City of Ottawa v. Egan*[2], Idington J., at p. 308, quoted Lord Cairns in *Cox v. Rabbits*[3], at p. 478, to the same effect. And in *Montreal Light Heat and Power Consolidated v. City of Westmount*[4], Anglin C. J., at p. 519, adopted the citation I have made from the *Partington* case, as did Hughes J. in *The King v. Crabbs*[5], at p. 525. Counsel for the appellant cited *Langdon v. Holtyrex Gold Mines Ltd.*[6], *Palmolive Manufacturing Co. v. The King*[7], and *Northern Broadcasting Co. v. District of Mountjoy*[8]. I have considered these cases and they do not cut down the validity of the principle enunciated by Lord Cairns in the *Partington* case which, in my opinion, still applies to s. 4 of *The City of Ottawa Act, 1960-61*.

It is appropriate at this time to consider the problem which the statute and the by-law passed in virtue thereof attempt to deal with. The City of Ottawa was faced with a problem of urban core renewal. Land in an area no longer attractive to single-family residences was being developed for high-rise office and apartment buildings. In addition, the 50 to 60-year old water mains and sewers were wearing out. This is a problem common to every city in North America and particularly to the older cities in Ontario. If what Ottawa seeks to do by the by-law as distinguished

[1] (1869), L.R. 4 H.L. 100.
[2] [1923] S.C.R. 304.
[3] (1878), 3 App. Cas. 473.
[4] [1926] S.C.R. 515.
[5] [1934] S.C.R. 523.
[6] [1937] S.C.R. 334.
[7] [1933] S.C.R. 131.
[8] [1950] S.C.R. 502.

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from what, in my opinion, it was empowered to do by the statute were a solution accepted by the legislature, then one would have expected it to have been the subject of a general amendment to *The Local Improvement Act* and other provincial statutes, whereby such a capital levy on new construction would have been permitted in all cases. Surely, therefore, the legislature acted on the City of Ottawa's petition only to permit the municipality to lay a special rate or rates when it would not otherwise be required.

The submission by counsel for the appellant that such a type of by-law would only apply on the first building erected thereunder cannot be supported. Were certain areas in the City of Ottawa surveyed by the proper authorities and it was determined that in the next "x" years the erection of high-rise buildings would require larger mains at a certain cost, larger sanitary sewers at a certain additional cost, and larger pumping stations and increased treatment plants at a further cost, and that of the total cost a certain per cent would be attributable not to replacement but to the additions caused by such new construction, this cost would then be distributed over new building in the area as it would occur during those years in an acceptable formula. The last words of subs. (1) of s. 4 of the statute, "to pay *for all or part* of the cost of providing the additional capacity" are the key (the italics are my own). Such a scheme would contemplate a calculation or estimation of the actual or potential increased load even if such calculations were an approximation only. On the other hand, the present by-law assesses a building built in 1962 despite the fact that it might be right over a large new trunk sewer and alongside a new water main, both constructed in 1958 and at that time prudently constructed of a size much larger than required, so that in fact the 1962 construction of the building entailed no additional load on either water or sewer facilities which would require additional expenditure. The additional expenditure had already been made and I can find no implication in the statute that the City of Ottawa is entitled to recoup itself for past expenditures in renewal or extension of services. It is true that in such a scheme there may be examples of such accidental discrimination as has been pointed out by counsel for the appellants in reference to the present by-law. In my opinion, such discrimination would have to be considered necessary and reasonable when the

statute contemplates and permits a rate assessed on a building which is merely proposed.

A consideration of s. 4 of *The City of Ottawa Act, 1960-61*, in my opinion, demonstrates that it has in view a by-law applicable to specific areas and schemes rather than a charge on all new construction subject to the slight exemptions.

Firstly, it should be noted that the opinion of council in the statute is confined to one element only, and that is whether the expenditures required for the additional capacity would or would not be otherwise required. Therefore, the other elements set out in the statute, (1) whether the buildings impose or may impose a heavy load, and (2) whether by reason of the heavy load additional capacity is required, are not by the statute left to the opinion of council and there must be some adjudication thereon. Such adjudication may be by the Municipal Board or by the Court of Revision, more probably by the former. This by-law has already been approved by the Municipal Board but it could not have considered those two elements, for the determination of the first element implies that the Board had to know the buildings which were or were to be built before it could determine if those buildings imposed or might impose a heavy load. By-law 449-62 in paragraph (2) purports to transfer the opinion to cover all of the elements and so, in my view, exceeds the statutory power granted.

Secondly, s. 4(2) of the statute provides that the proceeds shall be used for the purpose set out in subs. (1) and not otherwise. Yet by-law 449-62 makes no provision for segregation of the fund nor for its disbursement in accordance with the provisions of s. 4(1), that is to pay all or part of the cost of providing the additional capacity. In fact, apart from the declaration in para. (2), no mention is made of cost. One asks oneself how, under this by-law, can it be determined what amount is to be paid out of the proceeds of the fund for the new sewer on any particular street.

Thirdly, s. 4(4) of the statute provides:

> (4) There shall be an appeal to the court of revision of the City of Ottawa from any charge or charges authorized by subsection 1 and the provisions with respect to appeals to the court of revision and section 51 of the Local Improvement Act apply *mutatis mutandis*.

Counsel for the appellants argue that one must look at s. 4 and determine how it shall be interpreted and only then

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look at *The Local Improvement Act* to determine how the statute must be applied in so far as procedure is concerned. I cannot accept that method of construction; subs. (4) is part of the special Act and any light its provisions cast on the meaning of subs. (1) is available to aid in its interpretation and it should be so utilized. Counsel for the appellant submits that subs. (4) is only "a shorthand method of providing the necessary procedural regulations in order to provide for appeals to the County Judge and the Court of Appeal", but a consideration of subs. (4) demonstrates that it discharges a much more important task. It provides an appeal to the Court of Revision and then sets out the provisions with respect to appeals thereto and further appeals and includes s. 51 of *The Local Improvement Act*, with the direction that the provisions of the latter statute shall apply only *mutatis mutandis*. One of the provisions with respect to the Court of Revision is s. 47 of *The Local Improvement Act*, R.S.O. 1960, c. 223. That section is as follows:

> 47. (1) The court of revision has jurisdiction and power to review the proposed special assessment and to correct the same as to all or any of the following matters:
>
> (*a*) where the owners' portion of the cost is to be specially assessed against the land abutting directly on the work,
>
> (i) the names of the owners of the lots,
>
> (ii) the frontage or other measurements of the lots,
>
> (iii) the amount of the reduction to be made under section 28 in respect of any lot,
>
> (iv) the lots which, but for section 62, would be exempt from special assessment,
>
> (v) the lifetime of the work,
>
> (vi) the rate per foot with which any lot is to be specially assessed, and
>
> (vii) the exemption or amount of reduction to be made under section 30 in respect of any lot;
>
> (*b*) where part of the owners' portion of the cost is to be specially assessed on land not abutting directly on the work, in addition to the matters mentioned in clause a, as to the lots other than those abutting directly on the work which are or will be immediately benefited by it, and as to the special assessment which such lots should respectively bear;
>
> (*c*) in all cases as to the actual cost of the work.
>
> (2) The court of revision does not have jurisdiction or authority to review or to alter the proportions of the cost of the work that the lands to be specially assessed and the corporations are respectively to bear according to the provisions of the by-law for undertaking the work.

It will be seen that in both clauses (*a*) and (*c*) of the said section the Court of Revision is permitted to make

adjustments having in view a specific work and after ascertaining the exact nature and cost of the work. Counsel for the appellant argues that this type of provision is obviously inapplicable to the present case and insists the provisions of *The Local Improvement Act* are to apply only *mutatis mutandis* and that therefore this section cannot be used to restrictively interpret s. 4(1) of *The City of Ottawa Act*. But surely *mutatis mutandis* means "with necessary changes in matters of detail" and the proper interpretation is not to ignore the provisions of s. 47 of *The Local Improvement Act* such as found in clause (*c*) of subs. (1) "in all cases as to the actual cost of the work" but to interpret the *mutatis mutandis* direction of s. 4(4) as providing that the Court of Revision may consider the *estimated* cost of all the work required in addition to that which would otherwise be required. In my view, to confine s. 4(4) to limit the provisions as to appeal to the Court of Revision and further appeals therefrom to merely the formal and mechanical matters such as the name of the owners or the size of the lots would be to improperly limit the application of the subsection. I have, therefore, concluded that s. 4 of *The City of Ottawa Act, 1960-61*, contemplates not the general levy on all new construction, which is in fact the essence of the by-law under attack, but rather a by-law passed for any particular area with a specific problem which may be surveyed in view of present new construction or contemplated new construction, and that therefore by-law 449-62 is *ultra vires* as going beyond the power granted by the enabling statute.

Counsel for the respondents also submits that by-law 449-62 is invalid in that it is in many instances discriminatory. Firstly, counsel for the respondents had made no attempt to attack by-law 449-62 on the basis that it is unreasonable as distinguished from discriminatory despite the fact that s. 242(2) of *The Municipal Act*, R.S.O. 1960, c. 249, which provides that a by-law passed by the council in the exercise of any of its powers conferred by that Act could not be found to be unreasonable applies by its very terms only to by-laws passed by virtue of *The Municipal Act* while this by-law was passed by virtue of the powers conferred by *The City of Ottawa Act*.

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Lord Russell C. J., when purporting to define "unreasonableness" in a by-law in *Kruse v. Johnson*[1], at p. 99, defined, in my view, "discrimination" when he said:

> But unreasonable in what sense? If for instance they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires".

Again, in *City of Montreal v. Beauvais*[2], Duff J., as he then was, at p. 216 described such a by-law as "so unreasonable, unfair or oppressive as to be on any fair construction an abuse of the power". The invalidity of discriminatory by-laws has frequently been declared in this Court and in the Province of Ontario: *City of Hamilton v. Hamilton Distillery Co.*[3]; *Carleton Woollen Co. v. Town of Woodstock*[4]; *Forst v. City of Toronto*[5], and *Re S. S. Kresge Co. Ltd. v. City of Windsor et al.*[6]

It is, however, well settled law that a court, when considering the validity of subordinate legislation such as a by-law and finding two possible interpretations, one of which would result in the invalidity of the by-law as discriminatory and one of which would result in its being found valid, should choose the latter: *Kruse v. Johnson, supra; City of Toronto et al. v. Outdoor Neon Displays Ltd.*[7], per Cartwright J. at p. 313. Applying those statements of the relevant principles I proceed to consider the allegations of discrimination made by the respondents some of which were accepted and some rejected in the Court of Appeal.

(1) *In fixing rates differently based for residential and non-residential buildings, and in fixing one rate for all sizes of residential buildings:*

Section 4(1) of the statute authorized the council to pass by-laws for imposing on the owners of high-rise or other buildings, or of any class or classes of such buildings, a special charge or charges. The statute therefore gives the council power to set up classes of buildings and to apply appropriate rates to such classes. The council set up, so far

[1] [1898] 2 Q.B. 91.
[2] (1909), 42 S.C.R. 211.
[3] (1907), 38 S.C.R. 239.
[4] (1907), 38 S.C.R. 411.
[5] (1923), 54 O.L.R. 256.
[6] [1957] O.W.N. 154, 7 D.L.R. (2d) 708.
[7] [1960] S.C.R. 307.

as this allegation of discrimination is concerned, three classes, residential, non-residential and combined residential and non-residential, and defined them in s. 1 of the by-law. The council also set different rates for the classes of residential and non-residential accommodation. It may well be that the result is that the owner of a residential building pays exactly the same rate per square foot as the owner of a non-residential building only when each dwelling unit contains exactly 735.3 square feet but it would appear, nevertheless, that council honestly exercised their judgment in determining that the amount of $150 (varied by the Municipal Board to $125) represented a fair approximation of some undetermined, or at any rate unstated, part of the cost of the required additional capacity of sewers and water supply, and that the council similarly exercised its judgment as to the non-residential rate. To quote again Lord Russell C. J. in *Kruse v. Johnson, supra,* at p. 100:

> Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

I realize, of course, that the oft-quoted statement was said in relation to a by-law prohibiting playing music or singing in the streets. However, as was said by counsel for the appellant during the argument in this Court, any by-law is bound to be "mildly discriminatory". The test of discrimination, if any, is whether it were reasonably necessary. Again, to apply the test of Duff J. in *Montreal v. Beauvais, supra:*

> The by-law in fixing the two general rates was not, in my opinion, so unreasonable, unfair or oppressive as to be on any fair construction an abuse of the powers of council.

(2) *The alleged discrimination against the enlargement of buildings contained in the final words of subs. (2) of s. 3 of the by-law "and in applying such exemption dwelling units and floor area created pursuant to a building permit issued on or before the 2nd day of May, 1960, shall be counted":*

It would appear that if one owner builds a new building containing twelve units then he is required to pay, allowing the exemption of two-dwelling units, ten times $125 or $1,250, while another owner who builds a new wing to an

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existing building containing twelve units exactly similar would be required to pay twelve times $125 or $1,450. Counsel for the appellant submits that this provision is rational and in fact that its omission would be discriminatory, for the owner of a newly-built building had not before utilized the municipal services beyond the basic extent of two-dwelling units or thirteen hundred feet commercial space, and so would be entitled to that exemption while the owner of the enlarged building had already the use of the services to at least the extent of that basic exemption. This argument presupposes that in the case of the new building as distinguished from the enlarged one it was built on land utilized prior to its construction to an extent less than the basic exemption and that no additional lands are used in the enlargement, that is, that the enlargement consists of adding additional storeys, a most unusual situation. In my opinion, the reasonable and necessary discrimination would be more properly attained if the provision had been omitted from the by-law. The provision as it stands would appear to be so unreasonable, unfair and oppressive as to be an abuse of the power although, in my opinion, it is not an important one.

(3) *The alleged discrimination in s. 3(3) of the by-law by the requirement that in combined residential and non-residential buildings that part of each floor "used for dwelling purposes only" shall be excluded from the gross floor area of the building:*

It is true that if this provision were interpreted so that corridors, elevator shafts, laundries, garage space, etc., were to be held to be space not "used for dwelling units" then the owner of a combined building would pay a much larger sum than the owner of a residential building of comparable size. Counsel for the appellant, however, does not seek to have the provision so interpreted. It must be noted that the words in the subsection are "used for dwelling units only" and not such words as "contained within the walls of dwelling units", and one may well say a corridor, for instance, is "used for dwelling units". In view of the authorities I have cited above, it would appear that this is a case where the Court should so interpret the provisions of the by-law as to remove any invalidity resulting from discrimination, and I do so.

(4) *Re alleged discrimination by exemption of subdivision charge areas:*

Section 5 of by-law 449-62 exempts certain properties from the operation of the by-law. Subsection (*c*) thereof exempts single-family and double or duplex buildings, and therefore simply repeats the exemption in s. 4(5) of the statute. Section (*a*) provides exemption for charitable educational institutions, and is again a repetition of other provincial legislation. Subsection (*b*), however, exempts:

> (*b*) a building on a lot or block in respect of which lot or block a charge was imposed on or after the 21st day of June, 1961, as a condition of the approval of a plan of subdivision, pursuant to the resolution of the Council of the said date

By a resolution of Council passed on June 21, 1961, a series of charges on subdivisions recommended for approval after January 16, 1961, were set. The charges include $1,200 per acre plus $100 per unit to an amount of not less than $1,500 for multiple dwellings and $1,200 per acre for non-residential buildings. Under this schedule, a 10-apartment building built on an acre of ground subdivided after January 1, 1961, would pay a subdivison charge of $1,200 plus ten times $100 or $2,200. A 10-unit apartment building under by-law 449-62 apart from the exemption set out as not within the exemption of subdivision charge areas, would pay eight times $125 or $1,000, and a building on one acre of land under the by-law would have to have at least sixty dwelling units before the special rates set out in by-law 449-62 would exceed the subdivision charges. However commercial or non-residential buildings, to use the terminology of the subdivision resolution and the by-law, respectively, do exhibit what might well be regarded as discrimination. An acre of land for commercial purposes is subject to a charge under the subdivison resolution of $1,200 whether it were occupied by a parking lot or a multi-storey office building, while the same one acre of land under the by-law, if completely covered by a one-floor non-residential building containing say 40,000 square feet after allowing for walls, would pay a charge under by-law 449-62 of $6,800 and each floor would add a like amount to the charge. Aylesworth J. A., in the Court of Appeal, considered this allegation of discrimination and pointed out that under the statute the council were empowered to set up classes and affix rates. In my view, that power does permit council

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to reasonably differentiate between various buildings and so long as it does so reasonably the different rates assigned to the different classes cannot be found to be discrimination. What s. 5(*d*) has done in effect is to divide each class into two sub-classes, dependent on whether the land on which the building was erected was or was not subject to the subdivision charge. It may well be that the result is favourable to the owner who has erected on land subject to the subdivision charge a large non-residential building, if any such example exists, unless that owner in the subdivision agreement also was required to instal services such as sewers and water mains at a very considerable cost.

I have come to the conclusion that the differentiation, having regard to the existence of the subdivision charges, is a reasonable one and the fact that there may occur examples of inequality is merely an example of the approximate equality which must result in order to avoid discrimination.

It will be seen, therefore, that I have found discrimination only in the provision in the last sentence of s. 3(2) of the by-law which removes the two-dwelling unit or 1,500 square feet of non-residential space from the exemption in the case of enlarged buildings. The problem therefore arises whether such a provision may be severed from the by-law. By the provision of s. 4(1) of the statute, the by-law must be approved by the Municipal Board and it has been so approved. That approval, of course, does not in any way validate a by-law which is *ultra vires* or discriminatory: *Re Casa Loma*[1]; *R. ex rel. St. Jean v. Knott*[2], per Rose C.J.H.C. at pp. 434 and 435.

It has been said that where a by-law must be approved by the Municipal Board then it is approved as a whole and the Court could not declare in favour of the validity of a by-law so approved unless it was ready to find it valid *in toto*: *City of Chatham v. Sisters of St. Joseph et al.*[3], per Robertson C.J.O. at p. 554; *Re Wilmot et al. and City of Kingston*[4]. Both of these decisions were in reference to s. 406 subs. (4) of *The Municipal Act* which then read:

> No part of any by-law passed under this section and approved by the Municipal Board shall be repealed or amended without approval of the Municipal Board.

[1] 61 O.L.R. 187, [1927] 4 D.L.R. 645 (App. Div.).
[2] [1944] O.W.N. 432.
[3] [1940] O.W.N. 548 (C.A.).
[4] [1946] O.R. 437, 3 D.L.R. 790.

Robertson C.J.O. observed that the council cannot amend it without the Board's approval, yet in effect that is what the Court would do if it should hold part of the by-law to be invalid and other parts of it to be valid and in force.

Section 4 of *The City of Ottawa Act, 1960-61*, the enabling legislation here, simply provides:

> Subject to the approval of the Municipal Board first being obtained, the council of the Corporation may pass by-laws . . .

and no counterpart of the subsection of *The Municipal Act*, then in effect, quoted above appears in the statute, nor so far as I have been able to ascertain, in any other statutory provision applicable to this case. Moreover, as Kerwin J., as he then was, pointed out in *Village of Long Branch v. Hogle*[1], at pp. 559-60, the statement by Robertson C.J.O. in *Chatham v. Sisters of St. Joseph* was *obiter* with which he did not agree and its approval by Laidlaw J.A. in *Wilmot v. City of Kingston, supra*, at p. 448, was also *obiter*, and that Robertson C.J.O. continued:

> These by-laws for imposing building restrictions usually set up a scheme which is designed and adopted as a whole and, quite apart from the question of the approval of the Municipal Board, it is from the very nature of the by-law a delicate operation for the court to sever one part of such a by-law from the rest with any assurance that what is left of it sets forth any scheme that the council had put in operation.

Kerwin J. adopted those remarks and found that the invalid part of the by-law in *Long Branch v. Hogle* was merely an additional penalty and so severable and with that view Rand J. concurred. Kellock J. found that the penalty section did not require approval by the Municipal Board and so that body's approval of the by-law did not prevent the penalty section being severed therefrom. Applying this principle, in my view, the Court should hold that even if the statute contained such a provision as to the approval of the Board as that quoted from *The Municipal Act* which it does not, it may in proper circumstances sever the invalid provision in the by-law. In the present case, the last words of s. 3(2) of by-law 449-62 form no part of the main structure of the by-law but contain only a provision as to a minor detail of the scheme. Were it possible to hold by-law 449-62 valid apart from the final words of s. 3(2) thereof, I would have no hesitation in severing them.

[1] [1948] S.C.R. 557.

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However, in view of my opinion that the whole scheme of the said by-law goes beyond the power granted by s. 4 of *The City of Ottawa Act, 1960-61*, I am of the opinion that it is invalid *in toto*.

I would dismiss the appeal with costs.

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

Solicitor for the appellant: D. V. Hambling, Ottawa.

Solicitors for the respondents: Beament, Fyfe, Ault, Hutton & Wilson, Ottawa.

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*May 30, 31

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April 28

LA CITE DE SILLERY (*Defendant*) .....APPELLANT;

AND

SUN OIL COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT;

AND

THE ROYAL TRUST COMPANY (*Intervenant*) ..... RESPONDENT;

AND

LE CONSEIL DES PORTS NATIONAUX and BEN BUSHENBAUM .. MIS-EN-CAUSE.

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

Municipal corporations—Zoning by-law—Lands formerly used for industrial purposes classified as residential—Whether by-law discriminatory and an abuse of power—Code of Civil Procedure, art. 50.

The plaintiff oil company brought an action based on art. 50 of the *Code of Civil Procedure* against the defendant municipality to have a general zoning by-law declared null and void in so far as it concerned a lot in which the plaintiff claimed an interest. By way of an aggressive intervention, the Royal Trust also asked for the nullity of the by-law in respect of certain other lots in the same zone and, subsidiarily, that it be declared that it had an acquired right in the commercial and industrial use of such lots and that the said by-law could not affect

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

that use. The only industrial activity which had been carried on in recent years within that zone was a modest lumber business on part of the property in which the Royal Trust was interested. This had ceased three years prior to the adoption of the by-law. No complaint was made against the adoption of the by-law until some ten years after it had been in affect. The trial judge quashed the by-law in so far as the properties in question were concerned on the ground that it constituted a discriminatory, unjust and abusive exercise of the discretion conferred by the statute. That judgment was affirmed by the Court of Appeal. The municipality appealed to this Court.

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

It is well established that the supervisory powers of the Superior Court under art. 50 of the *Cole of Civil Procedure* over the acts of municipal councils are only to be exercised under exceptional circumstances. The Court could not merely substitute its opinion for that of the municipal authority. In order to declare null the by-law, the Court must find that, as to the lots in question, there had been discrimination and an abuse of power equivalent to fraud which had caused a flagrant injustice. Admittedly any zoning by-law is discriminatory. The burden of proving fraud or abuse of power was upon the plaintiff, and no such fraud or abuse of power by the municipality has been established.

As to the subsidiary argument that the intervenant had an acquired right in the commercial and industrial use of lots held by it and that the by-law could not affect such use, it could not succeed. The by-law provided for the protection of non-conforming use of land at the time it came into force, but if that use was discontinued it could not be resumed at a later date. Consequently, since acquired rights of the intervenant to the commercial or industrial use of these lots, if such existed at the time the by-law came into force, were protected, it was not necessary to intervene in the present action in order to protect them.

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

Jean Turgeon, Q.C., and *Jacques Drouin, Q.C.*, for the defendant, appellant.

François de B. Gravel, for the plaintiff, respondent, Sun Oil Co.

Maurice Gagné, Q.C., for the intervenant, respondent, Royal Trust Co.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench[1] affirming a judgment of the Superior Court which maintained (1) an action by the

[1] [1962] Que. Q.B. 914.

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respondent Sun Oil Company Limited against appellant declaring illegal, null and void a general zoning by-law of appellant municipality in so far as it concerns beach lot No. 286-1 of the Parish of St. Colomban de Sillery, in which respondent Sun Oil claimed an interest and (2) the intervention of the respondent The Royal Trust Company es qualité, asking similar conclusions in respect of certain other beach lots in the same area.

The relevant facts are not now in dispute. They are fully set out in the judgments below and for the purpose of this appeal can be summarized as follows.

In 1949, under the terms of its charter, and in particular the provisions of s. 20 of 11 Geo. VI, c. 90, the appellant adopted a comprehensive zoning by-law No. 267, dividing the whole of the municipality into twenty-four zones. The municipality is situated on the North Shore of the St. Lawrence River immediately to the west of the city of Quebec and is largely residential in character, most of the residential area being north of a cliff which borders the river. At the bottom of this cliff is a strip of land running the full extent of the frontage of the municipality, varying in depth from about 100 feet to 500 feet, with the tracks of the Canadian National Railway running quite close to the shore. Beyond these river-front properties there are beach lots extending to low-water mark which are in large part covered twice daily by the tide.

Prior to the enactment of by-law No. 267, industrial operations had been carried on at various points along these river-front lots and in the alleged interest of preserving the residential character of the city, the by-law classified those sections as industrial where such activities were then being carried on, but the other portions were classified as generally residential allowing various accessory service activities such as grocery stores, service stations, and the like. This resulted in the establishment along the river front of six separate zones, three of which were industrial and three, including the area under consideration, residential.

The zone which contains the properties in which the respondents are interested—designated Zone CX—is classed as residential and is some 2800 feet long. The zones to the east and west of Zone CX are classed as industrial and contain a number of oil storage tanks. There are no oil

storage tanks in Zone CX and, apart from the railway tracks; the only industrial activity which had been carried on in recent years within that zone, was a modest lumber business on part of the property in which the respondent The Royal Trust Company is interested. This had ceased in 1946 prior to the adoption of the zoning by-law. While these beach lots appear at one time to have been commercially exploited they had not been put to any use for some time prior to the enactment of the zoning by-law. As Montgomery J. has pointed out, if the by-law was valid when enacted, it cannot be rendered invalid by changes in the economic situation that subsequently occurred.

No complaint was made by the respondents or the owners of other properties concerned against the adoption of by-law No. 267 until some ten years after it had been in effect. No proceedings were taken by any ratepayer under arts. 411 *et seq.* of *The Cities and Towns Act*, R.S.Q. 1941, c. 233, within the delay provided by the statute, to quash the zoning by-law either in whole or in part.

The present proceedings arose out of a desire by the respondent, Sun Oil Company Limited, to construct an oil storage plant and marine terminal on the westerly of the two beach lots in Zone CX, namely lot No. 286-1, having a superficial area of 1,075,000 square feet. It had entered into an undertaking, on September 13, 1958, to purchase the said lot from the then owner, the mise-en-cause Bushenbaum, for the sum of $50,000 provided it could obtain the necessary permits and licenses to construct such a plant. Bushenbaum had purchased the property for $15,000 in 1953, over three years after the enactment of the zoning by-law.

On March 31, 1958, the Sun Oil Company Limited also made an offer to the other respondent, The Royal Trust Company, to purchase the other half of the beach lot area, lot No. 270-2 having an approximate superficial area of 900,000 square feet—and three other lots to the north of the railroad, namely Nos. 270-1, 271 and 273, as well as three deep-water lots, for the sum of $150,000, under a similar condition that they could build thereon an oil storage plant.

Applications for permits were made to the appellant municipality and refused by reason of the provisions of its

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by-law No. 267. The Sun Oil's offer to The Royal Trust Company expired, but its interest in Lot No. 286-1, owned by Bushenbaum, persists, and on January 9, 1959, Sun Oil took the present action to have the by-law declared null and void in so far as Lot No. 286-1 was concerned.

The respondent, The Royal Trust Company, as the testamentary executor of the Estate of the late Dame Margaret Alleyn, widow of the late Hon. John Sharples, the owner of lots 270-1, 270-2, 271, 272 and 273, by its aggressive intervention also asked that the zoning by-law be declared null and void in so far as the said five lots were concerned and, subsidiarily, that it be declared that it had an acquired right in the commercial and industrial use of such lots, and that the said by-law could not affect that use.

The learned trial judge maintained both the main action and the intervention, held that the zoning by-law constituted, in respect of the beach lots 286-1, 270-1, 270-2 and 273, a discriminatory, unjust and abusive exercise of the discretion conferred by the statute, and he quashed the by-law in so far as those properties are concerned. That judgment was confirmed by the Court of Queen's Bench, Hyde and Montgomery JJ. dissenting.

The action and the intervention are based on art. 50 of the *Code of Civil Procedure* which reads:

> Art. 50. Excepting the Court of King's Bench, the Courts within the jurisdiction of the Legislature of Quebec, and bodies politic and corporate within the Province are subject to the supervision and reforming power of the Superior Court, in such manner and form as by law provided, save in matters declared by law to be of the exclusive competency of such courts, or of anyone of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law.

It is well established that the supervisory powers of the Superior Court under that article over the acts of municipal councils and other like bodies, are only to be exercised under exceptional circumstances. The Court cannot merely substitute its opinion for that of the municipal authority. The relevant principles were succinctly stated by Pratte J. in *La Corporation de St. Joseph de Beauce v. Lessard*[1]:

> Le champ d'application de l'art. 50 C.P. a été si souvent exploré qu'il serait fastidieux de passer en revue les nombreux arrêts auxquels il a donné lieu et qui en ont fixé les limites. Rappelons seulement que, suivant une jurisprudence constante, il y a lieu à l'action de l'art. 50 C.P., à l'encontre

[1] [1954] Que. Q.B. 475 at 478.

des procédés municipaux, dans le cas d'excès de pouvoirs, dans le cas de fraude, et aussi lorsqu'une violation de la loi ou un abus de pouvoir équivalant à fraude a pour effet une injustice flagrante.

Applying these principles to the present case, in order to declare null the decision taken by the appellant as expressed in its by-law No. 267, the court must find that, as to the lots in which the respondents are concerned, there had been discrimination and an abuse of power equivalent to fraud which had caused a flagrant injustice.

Admittedly any zoning by-law is discriminatory in the sense that it forbids the construction of certain types of buildings, or the carrying on of certain activities in a zoned area, and permits others. That result flows from the exercise of the statutory authority to enact zoning by-laws in the public interest. As my brother Judson stated in *Township of Scarborough v. Bondi*[1]:

> The mere delimitation of the boundaries of the area affected by such a by-law involves an element of discrimination. On one side of an arbitrary line, an owner may be prevented from doing something with his property which another owner, on the other side of the line, with a property which corresponds in all respects except location, is free to do.

Similarly in *Canadian Petrofina Limited v. Martin* and *City of St. Lambert*[2], my brother Fauteux after discussing the decision of the Privy Council in *City of Toronto v. Trustees of the Roman Catholic Separate Schools of Toronto*[3], said at p. 458:

> What was then said by Lord Cave may be stated concisely as follows, for the purpose of this case. The whole object and purpose of a zoning statutory power is to empower the municipal authority to put restrictions, in the general public interest, upon the right which a land owner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the status of land owner cannot *per se* affect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a land owner are then insecure in the sense that they are exposed to any restrictions which the city acting within its statutory power may impose.

The burden of proving fraud or abuse of power was upon the respondents, and for the reasons which they have given I share the view expressed by Hyde and Montgomery JJ. that no such fraud or abuse of power by the municipal council of appellant municipality has been established.

[1] [1959] S.C.R. 444 at 451, 18 D.L.R. (2d) 161.
[2] [1959] S.C.R. 453 at 458, 18 D.L.R. (2d) 761.
[3] [1926] A.C. 81, [1925] 3 D.L.R. 880.

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As a subsidiary argument counsel for the respondent, The Royal Trust Company, submitted that it had an acquired right in the commercial and industrial use of the lots held by it and that the zoning by-law could not affect such use. This argument was based primarily upon a text of by-law No. 267 containing in s. 73 a definition of "use", which in the French version reads:

> USAGE.—L'objet pour lequel *un terrain*, un bâtiment, une structure ou ses dépendances sont employés, occupés ou destinés à être employés ou occupés.

In referring to this definition Hyde J. cited a text which did not include the words "un terrain", and this difference was pointed out by my brother Fauteux at the hearing before us. It is now conceded that the official text of the by-law does not contain the words "un terrain" in s. 73.

The words "destinés à être employés ou occupés", in s. 73, clearly refer to a building in course of construction but not yet completed. This interpretation is consistent with the terms of s. 351 of the by-law. That section provides that a building, which at the coming into force of the by-law, is used or destined to be used for a purpose prohibited under the by-law, shall not be enlarged, rebuilt or structurally altered unless thereafter it is used for a permitted purpose.

Non-conforming use of land at the time the zoning by-law came into force is protected under s. 352, but if that use is discontinued it may not be resumed at a later date. Acquired rights of The Royal Trust Company to the commercial or industrial use of the beach lots, if such existed at the time the by-law came into force, are protected under s. 352. It was not necessary to intervene in the present action in order to protect them.

For the foregoing reasons, as well as for those of Hyde and Montgomery JJ., with which I am in respectful agreement I would allow the appeal and dismiss the action and the intervention. The appellant is entitled to its costs throughout.

Appeal allowed with costs.

Attorney for the defendant, appellant: J. Drouin, Quebec.

Attorneys for the plaintiff, Sun Oil Co.: Gravel, Thomson & Gravel, Quebec.

Attorneys for the intervenant, Royal Trust Co.: Prevost, Gagné, Flynn, Chouinard & Jacques, Quebec.

GEORGES MARCOTTE ..... APPELANT;

ET

SA MAJESTÉ LA REINE ..... INTIMÉE.

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*Avril 29, 30
Mai 11

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Droit criminel—Meurtre qualifié—Vol de banque—Meurtrier déguisé en Père Noël—Témoignage d'un complice—Corroboration—Défense d'alibi rejetée par le jury—Justification du verdict—Code criminel, 1963-64 (Can.), arts. 202, 202A.

L'appelant fut trouvé coupable de meurtre qualifié pour avoir intentionnellement causé la mort d'un constable à l'occasion et aux fins de la perpétration d'un vol qualifié. Deux de ceux qui ont pris part à ce vol étaient masqués, et le troisième était déguisé en Père Noël. Un nommé Fournel, qui admit avoir été un des deux hommes masqués, fut un des témoins de la Couronne et identifia l'accusé comme étant celui qui portait l'habit de Père Noël. L'accusé a soumis une preuve d'alibi. Le verdict a été unanimement confirmé par la Cour du banc de la reine. D'où le pourvoi de l'accusé devant cette Cour.

Arrêt: L'appel doit être rejeté.

La lecture de la charge du juge et de l'adresse de l'avocat de la Couronne ne supporte pas les reproches qu'on a faits à l'une et à l'autre. Également dépourvu de substance est le grief relatif à l'introduction dans la preuve de certains faits, y compris ce qu'on a appelé «l'incident Constantin».

Outre les aveux extra-judiciaires faits par l'accusé quelques heures après l'assassinat, la preuve consistait principalement dans le témoignage du complice Fournel, témoignage corroboré par des témoins indépendants. Les jurés, comme ils en avaient le droit, ont accepté le témoignage du complice et rejeté la défense d'alibi. Au regard de toute la preuve placée devant eux ils étaient justifiés de rapporter contre l'accusé un verdict de culpabilité.

Criminal law—Capital murder—Bank robbery—Killer disguised as Santa Claus—Testimony of accomplice—Corroborating evidence—Defence of alibi rejected by jury—Whether conviction justified—Criminal Code, 1963-64 (Can.), c. 51, ss. 202, 202A.

The appellant was convicted on a charge of capital murder for having caused the death of a policeman while committing a robbery. Of the three men involved in the robbery, two wore masks and one was disguised in a Santa Claus suit. One of the masked men was, by his own admission, one Fournel, who testified on behalf of the Crown and who identified the appellant as the man dressed as Santa Claus. The accused submitted a defence of alibi. The conviction was unanimously affirmed by the Court of Appeal. The accused appealed to this Court.

Held: The appeal should be dismissed.

The objections to the trial judge's charge and to the address of the Crown prosecutor had no substance, as was the objection relating to the

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*CORAM: Les Juges Fauteux, Abbott, Martland, Judson, Ritchie, Hall et Spence.

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evidence of certain facts, including what was called the "Constantin incident".

In addition to the extra-judicial admissions made by the accused a few hours after the killing, the evidence consisted mainly of the testimony of the accomplice Fournel which was corroborated by independant witnesses. The jury, as they were entitled, accepted the testimony of the accomplice and rejected the defence of alibi. Taking all the evidence into account, the jury were justified in finding the accused guilty.

APPEL d'un jugement de la Cour du banc de la reine, Province de Québec[1], confirmant un verdict de culpabilité pour meurtre qualifié. Appel rejeté.

Dollard Dansereau, C.R. et *Yves Mayrand,* pour l'appelant,

Jacques Ducros et *Jean-Guy Boilard,* pour l'intimé.

Le jugement de la Cour fut rendu par

Le Juge FAUTEUX:—L'appelant a été accusé et trouvé coupable d'avoir, le 14 décembre 1962, en la cité de St-Laurent, district de Montréal, intentionnellement causé la mort du constable Claude Marineau, et ce à l'occasion et aux fins de la perpétration d'un vol qualifié, commettant ainsi un meurtre qualifié.

Ce verdict fut par la suite confirmé par une décision unanime de la Cour du banc de la reine[1], alors composée de M. le Juge en chef Tremblay et de MM. les Juges Casey, Montgomery, Badeaux et Montpetit (ad hoc). Le présent appel est de ce jugement.

Les griefs soulevés en cette Cour de la part de l'appelant portent sur la charge du Juge principalement, et, en partie, sur l'adresse de l'avocat de la Couronne aux jurés, et sur l'introduction en preuve de certains faits. La plupart, sinon tous ces griefs ont été soumis à la Cour du banc de la reine et aucun n'y fut retenu pour modifier le verdict. La lecture de la charge du Juge et de l'adresse de l'avocat de la Couronne ne supporte pas les reproches qu'on a faits à l'un et à l'autre. Egalement dépourvu de substance est le grief relatif à l'introduction dans la preuve de certains faits, y compris ce qu'on a appelé «l'incident Constantin».

La preuve apportée au soutien de l'accusation est substantielle. Outre les aveux extra-judiciaires faits par l'accusé

[1] [1964] B.R. 155.

le 14 décembre 1962, quelques heures après l'assassinat, qu'il avait fait feu sur deux policiers lors d'un vol à main armée, cette preuve consiste principalement dans le témoignage de Jean-Paul Fournel, l'un des complices. Ce témoignage est corroboré par un ensemble de faits divers rapportés par des témoins indépendants. Témoignant en défense, l'accusé a cherché à écarter cette preuve incriminante et a, de plus, soumis une défense d'alibi. La faiblesse de la preuve relative à la défense d'alibi a été reconnue par l'avocat de l'accusé au cours de son adresse aux jurés.

Les jurés, comme ils en avaient le droit, ont, d'une part, accepté le témoignage de Fournel et rejeté, d'autre part, la défense d'alibi. Au regard de toute la preuve placée devant eux, ils étaient justifiés de rapporter contre l'accusé un verdict de culpabilité.

Ajoutons qu'à la fin de l'audition de cet appel, nous étions unanimement d'avis qu'il ne pouvait être accueilli et ces vues n'ont pas été modifiées à la suite d'une considération ultérieure.

L'appel doit être rejeté.

Appel rejeté.

Procureurs de l'appelant: D. Dansereau et Y. Mayrand, Montréal.

Procureur de l'intimée: J. Ducros, Montréal.

KARAFIL BLETA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Non-capital murder—Expert evidence—Defence of automation following brain injury—Psychiatrist expressing opinion based on evidence of other witnesses—Whether evidence of psychiatrist admissible.

The appellant was acquitted on a charge of non-capital murder. In the course of a fight with the victim, the appellant was knocked down or fell down and his head struck the pavement. The victim had started to walk away when the appellant, having regained his feet, followed

*PRESENT: Cartwright, Fauteux, Martland, Judson, Ritchie, Hall and Spence JJ.

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him and stabbed him fatally with a knife. Some of the witnesses observed that when the appellant got up he staggered and appeared to be dazed. The appellant advanced the defence of automation. This defence was supported by a psychiatrist who had not examined the appellant until more than three months after the incident but who had attended his trial and listened to all the evidence as to the appellant's head injury and his behaviour immediately after receiving it. The expert was not asked hypothetical questions but on the contrary was invited to express his opinion based on the evidence which he had heard. The Court of Appeal ordered a new trial on the ground that this evidence was inadmissible and should not have been accepted by the trial judge even though no objections were taken by the Crown at the trial. The accused appealed to this Court.

Held: The appeal should be allowed and the verdict of acquittal restored.

Provided that the questions are so phrased as to make clear what the evidence is on which an expert is being asked to found his conclusion, the failure to put such questions in hypothetical form does not of itself make the answers inadmissible. It is within the competence of the trial judge in any case to insist upon the foundation for the expert's opinion being laid by way of hypothetical question if he feels this to be the best way in which he can be assured of the matter being fully understood by the jury, but this does not mean that the judge is necessarily precluded from permitting the expert's answer to go before the jury if the nature and foundation of his opinion have been clearly indicated by other means. In the present case there was no difficulty in concluding that the psychiatrist was proceeding on the hypothesis that the appellant's blow on the head and his conduct after receiving it were as described by the uncontradicted evidence of the Crown witnesses, and that his condition as to amnesia, headaches and other symptoms was the condition which the appellant himself described. Where the evidence is open to the construction that the premises upon which the expert's opinion is based were clearly presented to the jury, a Court of Appeal should be hesitant to interfere with the ruling made by the trial judge as to the admissibility of that opinion. All those concerned with the conduct of this trial were satisfied that a proper basis had been laid for the admission of the doctor's opinion. Under these circumstances a Court of Appeal should, before excluding an expert's opinion, be able to make a clear finding that there was no material before the jury to enable it to determine whether his conclusions were properly founded or not. Such a finding was not justified in the present case. The trial judge was justified in proceeding on the assumption that the hypothesis on which the psychiatrist based his opinion had been made clear to the jury and he was accordingly justified in admitting the evidence of that opinion and commenting on it as he did.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside a verdict of acquittal on a charge of non-capital murder and ordering a new trial. Appeal allowed.

A. Maloney, Q.C., for the appellant,

W. C. Bowman, Q.C., for the respondent.

[1] [1964] 1 O.R. 485, 41 C.R. 377, 2 C.C.C. 190.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought pursuant to s. 597 (2) of the *Criminal Code* from a judgment of the Court of Appeal for Ontario[1] setting aside the verdict of a jury which had acquitted the present appellant of the non-capital murder of one Hairedin Gafi and directing that there be a new trial on the ground that certain evidence given by a psychiatrist who was called by the defence was inadmissible and that the trial judge was in error in accepting it and dealing with it as he did.

At the trial a number of Crown witnesses testified that they were present on Dundas Street in the City of Toronto on the afternoon of June 6, 1963, and there watched the course of a fight between Gafi and the appellant which culminated in the appellant stabbing Gafi fatally in the neck. Although the stories of the eye witnesses differ as to the details of the affray, it is clear that blows were exchanged between the two men, that the appellant was knocked down or fell down striking his head forcibly on the pavement and that Gafi had started to walk away when the appellant, having regained his feet, followed him and pulled out a knife with which he delivered the fatal blow. Two of the onlookers observed that when the appellant got up he staggered and appeared to be dazed, and one police officer also commented on his apparently dazed condition, but the other witnesses to the fight made no observation in this regard.

The defence advanced at the trial on behalf of the appellant was that the blows to his head sustained when it struck the sidewalk had the effect of depriving him of all voluntary control over his actions so that he acted as an automaton for a period which included the time when he stabbed Gafi, and that he was therefore not legally responsible for his actions at that time. This defence was supported by the evidence of Dr. Ronald Stokes, a psychiatrist and an Assistant to the Director of the Forensic Clinic at the Toronto Psychiatric Hospital, who had not examined the appellant until more than three months after the incident but who had attended his trial and listened to all the evidence as to the appellant's head injury and his behaviour immediately after receiving it.

The reasons for the Court of Appeal rejecting this evidence as inadmissible are well summarized in the decision

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rendered on behalf of that Court by Porter C.J.O. in which he said:

> Counsel for the accused did not follow the established practice of putting to the expert witness a hypothetical question upon which he could properly base an expert opinion, but asked the expert questions concerning his view of evidence given by witnesses. Dr. Stokes, in fact was improperly permitted to express an opinion based on his own assessment of the evidence. No objections were taken by counsel for the Crown to this evidence, and the trial judge raised no objections, and admitted the evidence without question or argument. In his charge the trial judge discussed this evidence and treated it as if it had been properly admitted, and suggested that the jury should give it a good deal of consideration. Indeed, the evidence of Dr. Stokes was the only evidence that in any way touched upon the subject of automation.

and he continued:

> . . . I am of the opinion that the evidence as presented by Dr. Stokes was inadmissible and the learned trial judge was in error in accepting it and dealing with it in his charge in the way that he did.

The question of whether or not an accused person was in a state of automatism so as not to be legally responsible at the time when he committed the acts with which he is charged, is a question of fact, and indeed may be the most vital question of fact in a criminal case, and it is because the opinion of an expert witness on such a question can serve only to confuse the issue unless the proven facts upon which it is based have been clearly indicated to the jury that the practice has grown up of requiring counsel, when seeking such an opinion, to state those facts in the form of a hypothetical question. In cases where the expert has been present throughout the trial and there is conflict between the witnesses, it is obviously unsatisfactory to ask him to express an opinion based upon the evidence which he has heard because the answer to such a question involves the expert in having to resolve the conflict in accordance with his own view of the credibility of the witnesses and the jury has no way of knowing upon what evidence he based his opinion. Where, however, there is no conflict in the evidence, the same difficulty does not necessarily arise and different considerations may therefore apply.

In *M'Naghten's Case*[1], certain questions were put by the House of Lords to the judges of England and amongst these was the following:

> Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the

[1] (1843), 10 Cl. & F. 200, 8 E.R. 718.

whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to the law, or whether he was labouring under any and what delusion at the time?

This question, which appears to me to be singularly apt to the present circumstances, was answered by Tindal C.J., as follows:

> In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

In answer to the same question, Mr. Justice Maule, who expressed a separate opinion, indicated what in my view is the true reason for excluding such a question when he said:

> Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence; it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry.

In *Regina v. Francis*[1], the very question which had been asked of the judges in the *M'Naghten Case* was considered by Baron Alderson and Cresswell J. Baron Alderson was of opinion that the question should not be put at all and that the decision in *M'Naghton's Case* was wrong; but Cresswell J., although apparently concurring in the result, is reported to have observed that the answer in *M'Naghten's Case* went no further than deciding "that the question could not be put as a matter of right". This latter view appears to be shared by leading text writers. (See Phipson on Evidence, 10th ed., para. 1298, and Glanville Williams, Criminal Law, 2nd ed., para. 149, Note 3 at page 452.

The case of *R. v. Holmes*,[2] is illustrative of the fact that the opinion of experts on the very question at issue can be elicited without the aid of a hypothetical question if the

[1] (1849), 4 Cox C.C. 57, 14 J.P. 24.
[2] [1953] 2 All E.R. 324, 37 Cr. App. R. 61.

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basis for the opinion is made apparent to the jury. In that case the expert who had examined the accused before the trial was questioned as to his opinion based on his behaviour after the alleged murder had been committed. The manner in which the evidence was introduced and the opinion of the Court of Criminal Appeal in England are well described in the reasons for judgment of Lord Goddard C.J., at page 324 where he said:

> In the present case the appellant, after a savage attack on the murdered person, went to a police station, gave himself up, said he was giving himself up for murder, and gave a detailed account of what he had done and how he had done it. A medical witness who was called for the defence, was asked in cross-examination:
>
> > You remember that I asked you the question whether the accused's conduct immediately after this incident would indicate to you that he knew the nature of the act that he was committing and your reply was 'Yes'. That is so, is it not? A.—Yes. Q.—Would his conduct immediately after indicate equally that he knew his conduct was contrary to the law of the land. A.—Yes.
>
> Counsel for the appellant has submitted that those questions were inadmissible. Whatever fine distinctions may have been drawn in days before or soon after *M'Naghten's Case*, we can only say that no member of the court has ever heard an objection being taken to such questions as those. Moreover, if the objection prevailed, it would, as it seems to us, put an insuperable difficulty in the way of the defence whenever they were trying to establish insanity. For instance, if a medical witness could not be asked whether the defendant's conduct immediately after the act in respect of which he was charged indicated that he knew his conduct was contrary to the law of the land, the doctor being prepared to answer "No", it would be a great hardship on the defendant who was setting up a plea of insanity if the doctor was not to be allowed to answer that question. It seems to the court that that is essentially a question that may be asked and answered.

In commenting on what he described as "the orthodox and accepted theory of the hypothetical question in our law", the learned editor of Wigmore on Evidence, 3rd ed., summarized the matter in para. 672 at page 793 in the following language:

> The key to the situation, in short, is that there may be two distinct subjects of testimony,—premises, and inferences or conclusions; that the latter involves necessarily a consideration of the former; and that the tribunal must be furnished with the means of rejecting the latter if upon consultation they determine to reject the former, i.e. of distinguishing conclusions properly founded from conclusions improperly founded.

Provided that the questions are so phrased as to make clear what the evidence is on which an expert is being asked to found his conclusion, the failure of counsel to put such

questions in hypothetical form does not of itself make the answers inadmissible. It is within the competence of the trial judge in any case to insist upon the foundation for the expert opinion being laid by way of hypothetical question if he feels this to be the best way in which he can be assured of the matter being fully understood by the jury, but this does not, in my opinion, mean that the judge is necessarily precluded in the exercise of his discretion in the conduct of the trial from permitting the expert's answer to go before the jury if the nature and foundation of his opinion has been clearly indicated by other means.

In the present case there does not appear to me to be any difficulty in concluding that in giving his opinion Dr. Stokes was proceeding on the hypothesis that the appellant's blow on the head and his conduct after receiving it were as described by the uncontradicted evidence of Crown witnesses, and that his condition as to amnesia, headaches and other symptoms was the condition which he himself described.

As he was required to do, the learned trial judge made it clear to the jury that they were not bound to accept the evidence upon which the doctor based his opinion or the opinion itself when he said: "You may accept or reject the evidence of any witness in whole or in part and that applies to the experts—in this case the doctor—as it does to all other evidence".

If the jury disbelieved Bleta's story of amnesia and headaches, it would undoubtedly affect the weight which they attached to Dr. Stokes' evidence, but the possibility of this happening does not, in my view, in any way affect the admissibility of that evidence.

In the same way the evidence of Dr. Golab, who saw the appellant some five and a half hours after the fight and pronounced him to be then quite normal and well-oriented, might well have been viewed as substantially weakening the force of Dr. Stokes' opinion, based as it was in such a large degree upon hypotheses rather than personal examination, but this would reflect on the reliability rather than the admissibility of the Stokes evidence.

As has been indicated, the decision as to whether a sufficient basis has been laid for the admission of an expert opinion rests in each case in the discretion of the trial judge, the exercise of which is dependant upon many factors, all

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of which may not be fully appreciated by a court of appeal which is confined to the printed record of the proceedings in its reconstruction of the atmosphere existing at the trial. For this reason, in cases where the evidence is open to the construction that the premises upon which the expert opinion is based were clearly presented to the jury, a court of appeal should, in my opinion, be hesitant to interfere with the ruling made by the trial judge as to the admissibility of that opinion. It is particularly noteworthy that in the present case Crown counsel not only took no objection to the admissibility of the evidence, but without framing a hypothetical question of any kind himself, elicited a much more detailed opinion from the doctor than had theretofore been given as to the nature of the appellant's injury. This appears to me to be clear confirmation of the fact that all those concerned with the conduct of the trial who saw and heard the witnesses were satisfied that a proper basis had been laid for the admission of the doctor's opinion. Under these circumstances it seems to me that, before excluding an expert's opinion, a court of appeal should be able to make a clear finding that there was no material before the jury to enable it to determine whether his conclusions were properly founded or not. I do not, with respect, consider that such a finding is justified in the present case.

In instructing the jury the learned trial judge, as I have pointed out, told them that they were free to reject the evidence of the doctor in whole or in part, he indicated to them that the doctor's opinion was based on the evidence of the appellant's amnesia and the blow to his head, he reviewed the evidence as to his staggering and dazed condition and concluded by saying:

> On the issue of automatism I come now to the important evidence of Dr. Ronald Stokes. He is an experienced psychologist, he examined the accused and heard all of the important evidence at this trial. His evidence is not contradicted and while you may still refuse to accept it you should most certainly give it a good deal of consideration. The considered opinion of Dr. Stokes in this case is that the accused was so affected by the blow on the head that he suffered a brain injury temporary in nature but which caused amnesia, which is a loss of memory, and which in turn makes it impossible for him to give anyone an accurate account of what happened although he may attempt to do so, as he did.

Later in his charge, the learned trial judge continued:

> . . . the doctor says that the actions of the accused when he stabbed the deceased were purely automatic and without any volition on the part

of the accused. He was, in fact, in the condition of a sleep walker or an epileptic. During this seizure, and since he had been in a fight, he automatically continued it. If you accept that evidence, then as I have told you, the law is that the accused is not guilty of anything.

Dr. Stokes considered all of the circumstances and the actions of the accused both before and after his arrest and gives as his opinion, and without doubt on his part, that this is a true case of automatism. It is for you to decide whether the evidence of Dr. Stokes should be accepted or rejected . . .

With the greatest respect for the views expressed by The Court of Appeal for Ontario, I am of the opinion that the learned trial judge was justified in proceeding on the assumption that the hypothesis on which Dr. Stokes based his opinion had been made clear to the jury and that he was accordingly also justified in admitting the evidence of that opinion and commenting on it as he did.

In view of this conclusion, it is unnecessary for me to consider the other points raised in support of this appeal.

I would allow the appeal and restore the verdict of the jury acquitting the accused and the order of the learned trial judge made pursuant thereto.

Appeal allowed and verdict of acquittal restored.

Solicitors for the appellant: Maloney & Hees, Toronto.

Solicitor for the respondent: W. C. Bowman, Toronto.

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC UNION SEPARATE SCHOOL FOR THE UNITED SECTIONS NUMBER 11 IN THE TOWNSHIP OF SENECA AND THE VILLAGE OF CAYUGA (*Applicant*) .....APPELLANT;

AND

THE CORPORATION OF THE TOWNSHIP OF SENECA (*Respondent*) ... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Lands and building owned by school board ceasing to be used as a school—School remaining closed and property not used for any purpose—Whether liable to taxation—The Assessment Act, R.S.O. 1960, c. 23, s. 4, as amended, 1960-61 (Ont.), c. 4, s. 1; 1961-62 (Ont.), c. 6, s. 1.

*PRESENT: Cartwright, Abbott, Judson, Hall and Spence JJ.

1964

BOARD OF TRUSTEES OF SEPARATE SCHOOL IN TOWNSHIP OF SENECA AND VILLAGE OF CAYUGA v. TOWNSHIP OF SENECA

The appellant school board acquired a school site in March of 1959 and built on it a one-room school which came into use in December 1959. In December 1961 the board ceased to use the building as a school. From that date the building remained vacant and was not used for any purpose. On July 31, 1962, the respondent township entered the lands and building on the collector's roll as having ceased to be exempt from taxation for the balance of the year 1962, and further, assessed the lands and building for the year 1963 as taxable property.

An application was made by the board to the Supreme Court of Ontario for an order declaring that the lands in question were exempt from taxation pursuant to the provisions of *The Assessment Act*. The Chief Justice of the High Court made this declaration. His judgment was reversed by a majority decision of the Court of Appeal. An appeal was then brought to this Court pursuant to leave granted by the Court of Appeal.

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

Per Cartwright, Abbott, Hall and Spence JJ.: The appellant's lands, although unoccupied, were exempted from taxation by the plain words of clause 9 of s. 4 of *The Assessment Act*, it not having been shown that it was "otherwise provided in this or any other Act". The circumstance that, because the condition prescribed as to use had not been fulfilled, the wording of clause 4 was not apt to entitle the appellant to exemption under that clause fell short of providing that it shall not be entitled to exemption under the plain words of clause 9, the application of which depends on ownership and not upon use.

Per Judson J., *dissenting:* Paragraph 9 of s. 4 of *The Assessment Act* was amended in 1962 by the addition of the words "and except as otherwise provided in this or any other Act". Exemption was thus given to the property of a school board except as otherwise provided in this or any other Act. This put the two assessments with which this appeal was concerned under para. 4 of s. 4, as that was the only possible reference to anything otherwise provided in this Act.

The result was that para. 9 does not operate to confer exemption in two cases: (*a*) Where public utility commissions and municipal parking authorities are concerned. These are subject to s. 43 of the Act; (*b*) Where the case falls within para. 4 of s. 4 for there it is otherwise provided. Therefore, under para. 4 of s. 4, if buildings and grounds cease to be used and occupied as a school, they lose their exemption.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of McRuer C.J.H.C. Appeal allowed, Judson J. dissenting.

D. F. McDonald, Q.C., and *J. W. Morden*, for the appellant.

H. Turkstra, for the respondent.

The judgment of Cartwright, Abbott, Hall and Spence JJ. was delivered by

[1] [1963] 2 O.R. 439, 40 D.L.R. (2d) 17.

CARTWRIGHT J.:—There is no dispute as to the facts out of which this appeal arises.

In March 1959, the appellant purchased the lands which the respondent seeks to tax and later in that year erected thereon a one-room school for the teaching of all eight grades of elementary education. Until December 1961, the lands and building were used and occupied by the appellant as a school. On the last-mentioned date the teacher employed at the school left the appellant's employment and the students of the school were transferred elsewhere. Since then the school has remained closed and the lands and building have not been used for any purpose. They are not leased to anyone but continue in the appellant's ownership.

The respondent has taken the necessary steps to assess and tax these lands if, on the true construction of *The Assessment Act*, they are liable to taxation.

The appellant applied by originating notice to the Supreme Court of Ontario for an order declaring that the lands in question were exempt from taxation. The motion was heard by McRuer C.J.H.C. who made the order asked for without recorded reasons.

The Court of Appeal[1], by a majority, reversed this order and directed that the originating motion be dismissed with costs throughout. Kelly J.A., dissenting, would have dismissed the appeal with costs.

The appellant appeals to this Court pursuant to leave granted by the Court of Appeal. The operative part of the order granting leave reads as follows:

> 1. THIS COURT DOTH ORDER that leave to appeal to the Supreme Court of Canada from the Order of this Court made on June 5th, 1963, be and the same is hereby given on condition that, regardless of the outcome of the said appeal, no costs of the said appeal shall be awarded against the Respondent, The Corporation of the Township of Seneca.

In this Court, for the first time, counsel for the respondent sought to raise the objection that the proceedings were not properly commenced by way of originating notice. The Court over-ruled this objection at the hearing, being of opinion that the case falls within the terms of R. 612(1)(*b*) reading as follows:

> 612(1) Where the rights of the parties depend, . . .
> (*b*) upon undisputed facts and the proper inference from such facts, such rights may be determined upon originating notice.

[1] [1963] 2 O.R. 439, 40 D.L.R. (2d) 17.

1964

BOARD OF TRUSTEES OF SEPARATE SCHOOL IN TOWNSHIP OF SENECA AND VILLAGE OF CAYUGA v. TOWNSHIP OF SENECA

Cartwright J.

The relevant provisions of *The Assessment Act*, R.S.O. 1960, c. 23, as amended, in force at the time at which the rights of the parties are to be determined, are as follows:

4. All real property in Ontario is liable to assessment and taxation, subject to the following exemptions from taxation: . . .

4. The buildings and grounds of and attached to or otherwise *bona fide* used in connection with and for the purposes of a university, high school, public or separate school, whether vested in a trustee or otherwise, so long as such buildings and grounds are actually used and occupied by such institution, but not if otherwise occupied.

(*a*) The exemption from taxation under this paragraph does not apply to lands rented or leased to an educational institution mentioned in this paragraph by any person other than another such institution.

* * *

9. Subject to section 43 and except as otherwise provided in this or any other Act, the property belonging to any county or municipality or vested in or controlled by any public commission or local board as defined by *The Department of Municipal Affairs Act*, including a municipal parking authority, wherever situate and whether occupied for the purposes thereof or unoccupied but not when occupied by a tenant or lessee.

The wording of clause 4 of the exemptions has remained unaltered for some years but clause 9 has recently been twice amended.

In R.S.O. 1960, c. 23, it read as follows:

9. Subject to section 43, the property belonging to any county or municipality or vested in or controlled by any public commission, including a municipal parking authority, wherever situate and whether occupied for the purposes thereof or unoccupied but not when occupied by a tenant or lessee.

By s. 1(2) of c. 4 of the 1960-61 Statutes, the words "or local board as defined by *The Department of Municipal Affairs Act*" were inserted after the word "commission"; and by s. 1 of c. 6 of the 1961-62 Statutes the words "and except as otherwise provided in this or any other Act" were inserted after "43".

It is common ground that the appellant is a "local board as defined by *The Department of Municipal Affairs Act*"; the lands sought to be taxed are vested in and controlled by it and therefore, although unoccupied, are exempted from taxation by the plain words of clause 9 unless it can be shewn that it is "otherwise provided in this or any other Act". Counsel for the respondent submits that it is otherwise provided by clause 4 of the exemptions; this submission found favour with the majority in the Court of Appeal but I am unable to agree with it.

The words of clause 4 of the exemptions do not impose taxation on anything, they prescribe an exemption from taxation of buildings and grounds conditional upon their being used and occupied for certain educational purposes; their application depends primarily on use rather than ownership. The words which impose taxation are the opening words of s. 4 which have already been quoted: "All real property in Ontario is liable to assessment and taxation subject to the following exemptions from taxation:" When the section is read as a whole it is clear that these opening words impose taxation only upon such real property in Ontario as does not fall within any of the eighteen exempting clauses; they do not impose it on the appellant's lands because those lands are exempt by the words of clause 9. The circumstance that, because the condition prescribed as to use has not been fulfilled, the wording of clause 4 is not apt to entitle the appellant to exemption under that clause appears to me to fall short of providing that it shall not be entitled to exemption under the plain words of clause 9, the application of which depends on ownership and not upon use.

For these reasons I have reached the conclusion that clause 9 of the exemptions governs this case as it has not been shewn that it is otherwise provided in *The Assessment Act* or in any other Act.

I would allow the appeal, restore the order of McRuer C.J.H.C. and direct that the appellant recover its costs in the Court of Appeal from the respondent; in view of the terms of the order granting leave to appeal I would make no order as to costs in this Court.

JUDSON J.(*dissenting*):—The appellant trustees acquired a school site in March of 1959 and built on it a one-room school which came into use in December 1959. In December 1961 they ceased to use the building as a school. From that date the building remained vacant and was not used for any purpose. On July 31, 1962, the respondent township entered the lands and building on the collector's roll as having ceased to be exempt from taxation for the balance of the year 1962, and further, assessed the lands and building for the year 1963 as taxable property. In these proceedings the trustees are claiming a declaration that the land and premises are not liable to assessment and taxation. The

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BOARD OF TRUSTEES OF SEPARATE SCHOOL IN TOWNSHIP OF SENECA AND VILLAGE OF CAYUGA v. TOWNSHIP OF SENECA

Judson J.

Chief Justice of the High Court made this declaration. His judgment was reversed on appeal, Kelly J.A. dissenting. The appeal comes to this Court pursuant to leave granted by the Ontario Court of Appeal.

Section 4 of *The Assessment Act*, R.S.O. 1960, c. 23, provides as follows: "All real property in Ontario is liable to assessment and taxation, subject to the following exemptions from taxation:" Then follow 18 paragraphs setting out the exemptions. The first one that requires consideration is para. 4, which reads:

> 4. The buildings and grounds of and attached to or otherwise *bona fide* used in connection with and for the purposes of a university, high school, public or separate school, whether vested in a trustee or otherwise, so long as such buildings and grounds are actually used and occupied by such institution, but not if otherwise occupied.

It is common ground that but for an amendment made to a subsequent paragraph in 1961, the case would fall to be decided under this paragraph and that the taxes for the year 1962, based upon the additional assessment of July 31, 1962, would be payable, and also for the year 1963.

However, the trustees contend that an amendment to para. 9 of s. 4 enacted in the year 1961 produces a different result. Subsection 9, as amended by 1960-61 (Ont.), c. 4, s. 1, reads:

> 9. Subject to section 43, the property belonging to any county or municipality or vested in or controlled by any public commission or local board as defined by *The Department of Municipal Affairs Act*, including a municipal parking authority, wherever situate and whether occupied for the purposes thereof or unoccupied but not when occupied by a tenant or lessee.

The amendment enacted by this legislation was the addition of the underlined words "or local board as defined by *The Department of Municipal Affairs Act*". *The Department of Municipal Affairs Act*, R.S.O. 1960, c. 98, s. 1(*d*) includes a school board in the definition of "local board". Therefore, immediately following this amendment we have one paragraph of the exemptions saying that this school is not exempt from assessment and taxation because it is no longer used as a school, and another section saying that property belonging to a school board is exempt from taxation. The

following year para. 9 was further amended by 1961-62 (Ont.), c. 6, s. 1. It now reads:

> 9. Subject to section 43 and except as otherwise provided in this or any other Act, the property belonging to any county or municipality or vested in or controlled by any public commission or local board as defined by *The Department of Municipal Affairs Act*, including a municipal parking authority, wherever situate and whether occupied for the purposes thereof or unoccupied but not when occupied by a tenant or lessee.

The amendment was in the addition of the words "and except as otherwise provided in this or any other Act". The 1962 amendment came into force on April 18, 1962, a date prior to either of the two assessments with which we are concerned in this appeal.

The question for determination is, what did the Legislature do when it gave exemption to the property of a school board except as otherwise provided in this or any other Act? I agree with the majority opinion in the Court of Appeal that this puts these assessments under para. 4 of s. 4. That is the only possible reference to anything otherwise provided in the Act. The result is that

Paragraph 9 does not operate to confer exemption in two cases:

(*a*) Where public ultility commissions and municipal parking authorities are concerned. These are subject to s. 43 of the Act;

(*b*) Where the case falls within para. 4 of s. 4 for there it is otherwise provided.

Therefore if buildings and grounds cease to be used and occupied as a school, they lose their exemption.

I would dismiss the appeal for the reasons given by Aylesworth J.A. There should be no order as to costs.

Appeal allowed, JUDSON J. *dissenting.*

Solicitors for the appellant: McKenna & Whelan, Hamilton.

Solicitor for the respondent: Herman Turkstra, Hamilton.

1964
*May 19
June 10

RONALD MAZE (*Plaintiff*) .....APPELLANT;

AND

JAMES EMPSON (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Trials—Evidence—Plaintiff's evidence diametrically opposed to that of defendant—Trial judge's findings of fact not followed by appeal Court—Duty of appellate Court to defer to trial judge's findings of fact unless plainly wrong.

An action was brought against the defendant for damages which the plaintiff claimed he had sustained as a result of a collision between two motor vehicles, one being driven by the plaintiff and the other by the defendant. The accounts of the accident that the two parties gave at the trial were diametrically opposed to one another. The trial judge accepted the plaintiff's evidence and rejected that of the defendant. On appeal, the Court of Appeal allowed the appeal and ordered a new trial; the Court refused to follow the findings of fact made by the trial judge and it was held that he was wrong in rejecting the evidence of an independent witness. The plaintiff appealed to this Court.

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

There was evidence to support the trial judge's findings that the defendant was on the wrong side of the road just prior to the impact and that the effective cause of the accident was the negligence of the defendant. An examination of the evidence of the independent witness showed that the trial judge was correct in placing little reliance on it.

If the judges of an appellate Court cannot be satisfied that the trial judge, with the advantage of having heard and tried the case, was plainly wrong in his findings of fact, then it is their duty to defer to his judgment. In the present case it could not be said that the trial judge was plainly wrong in his findings of fact. *Clarke v. Edinburgh and District Tramways Co.*, [1919] S.C. (H.L.) 35, applied.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from Greschuk J. Appeal allowed.

John Bassie, for the plaintiff, appellant.

W. G. Morrow, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] allow-

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

[1] (1964), 47 W.W.R. 684.

ing an appeal with costs and directing a new trial in respect of a judgment by Greschuk J. in which he had awarded the appellant damages in the sum of $32,967.40 for injuries received and damages sustained as a result of a collision of two motor vehicles, one being driven by the appellant and the other by the respondent.

The collision occurred at about 3:45 a.m. on September 3, 1961. Prior to the impact the appellant had been driving in an easterly direction on Highway 16 some 30 miles west of Edmonton in the Province of Alberta. The respondent was driving in a westerly direction on the same highway and they met on a stretch of road just after the appellant's motor vehicle had come out of a slight curve. Highway 16 at this point was 46 feet in width. There were two driving lanes each 13 feet 6 inches in width and on the outside of each of the driving lanes there were parking lanes marked by continuous orange lines.

The evidence of the appellant was that he was driving at about 45-50 miles an hour on his own side of the road (the south side) and as he emerged from the curve he became aware that the respondent's vehicle, whose headlights he had previously seen, was coming towards him on the south side. He said it continued on this course until it was directly in front of him, and, in order to avoid a head-on collision, he swung to his left across to the north side of the road. He continued that at this same moment the respondent swung his vehicle to the right and onto the north side of the road and this brought the two vehicles into collision at an angle on the north side of the centre line.

The respondent's evidence was that he was driving at about 50 miles an hour on his own side of the road (the north side) and that the appellant emerged from the curve on the north side of the centre line and that the appellant maintained his course on the north side. The respondent further testified that at the time of the impact which he says was virtually head-on, his vehicle was straddling the orange line which was the dividing line between the north lane proper and the parking lane on the north side of the road. He continued that he was endeavouring to get on the north shoulder to avoid the collision which he knew was imminent when he saw that the appellant was maintaining his course in the north lane.

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MAZE v. EMPSON

Hall J.

These two stories were diametrically opposed to one another. Both could not be true. The learned trial judge had the responsibility of determining which story should be accepted. He believed the appellant. He was impressed with the manner in which the appellant gave his evidence and he found that the appellant's evidence was in harmony and in accordance with the balance of probabilities in the case. He did not accept the evidence of the respondent and found that the respondent was in the south lane a second or so and for some time before the impact occurred. He stated that the evidence of the respondent did not impress him while, on the other hand, he found that the appellant gave his evidence in a truthful and straightforward manner.

The Court of Appeal refused to follow the findings of fact made by Greschuk J., and after an analysis of the evidence, concluded that the respondent's version of the collision was the more likely one. Johnson J.A., with whom Porter J.A. concurred, held that the learned trial judge should not have rejected the evidence of one Royce who had testified that the appellant had overtaken him about two minutes prior to the collision, and that at that time the appellant was going in excess of 60 miles an hour. An examination of Royce's evidence leaves me with the view that the learned trial judge was correct in placing little reliance on Royce's evidence. The man told two different stories, first, that he was travelling well within the speed limit which was 50 miles an hour when overtaken by the appellant, and then that he was travelling over the speed limit when overtaken. The learned trial judge had this witness before him and the opportunity to weigh at first hand the effect of Royce's contradictory testimony. It cannot be said that the learned trial judge could not reasonably have come to the conclusion that he did in respect of Royce. There was evidence upon which the learned trial judge could find, as he did find, that the respondent was on the south side of the road just prior to the impact; that the appellant went over to the north side at the last moment and in an attempt to avoid a head-on collision and that the effective cause of the collision was the negligence of the respondent in maintaining his position on the south side of the road until so close to the oncoming vehicle of the appellant that a collision became inevitable. This is a case

where the statement of Lord Shaw of Dunfermline in *Clarke v. Edinburgh and District Tramways Co., Ltd.*[1], at p. 37:

> In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

is particularly apt.

I do not think it can be said here that Greschuk J. was plainly wrong in his findings of fact. There was no cross-appeal as to damages. Counsel for the respondent did not ask that the amount awarded be disturbed. I would accordingly allow the appeal with costs and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Bassie, Kempo, Hochachka & Shewchuk, Edmonton.

Solicitors for the defendant, respondent: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

[1] [1919] S.C. (H.L.) 35.

1964

*May 14
June 15

CAMILLE MARIE PALSKY, an infant by her next friend EDWARD MAX PALSKY, and EDWARD MAX PALSKY and WALLACE D. LEISHMAN, Administrator of the Estate of ATTENA KATE LEISHMAN, deceased (*Plaintiffs*) .....APPELLANTS;

AND

ARCHIBALD ASHTON HUMPHREY and FRANK BYRNE, Administrator Ad Litem of the Estate of PETER WILLIAM HARVIE, deceased (*Defendants*)

RESPONDENTS.

GLEN SILLITO, DONALD WAYNE SILLITO, PATRICIA FAYE SILLITO STREIBEL, by her next friend GLEN SILLITO, BRYCE LAMONT SILLITO, by his next friend GLEN SILLITO, DOROTHY ANN SILLITO, by her next friend GLEN SILLITO, GLEN SILLITO as Administrator of the Estate of RUTH ANN SILLITO, deceased, and GLEN SILLITO as Administrator of the Estate of TERRY MARIE SILLITO, deceased (*Plaintiffs*) .....*Appellants*;

AND

ARCHIBALD ASHTON HUMPHREY and FRANK T. BYRNE, Administrator Ad Litem of the Estate of PETER WILLIAM HARVIE, deceased (*Defendants*)

RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Motor vehicles—Collision—Owner's liability for driver's negligence—Whether possession of vehicle obtained by driver with implied consent of owner—The Vehicles and Highway Traffic Act, R.S.A. 1955, c. 356, s. 130.

An action arose as a result of a collision between two motor vehicles, one of which was owned by the defendant and at the time of the accident was being driven by H, a close friend of the defendant. In the Court of first instance judgment was given in favour of the various plaintiffs; an appeal from that judgment was allowed by the Appellate Division of the Supreme Court, one member of the Court dissenting.

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

The only point at issue on the appeal to the Appellate Division and on the subsequent appeal to this Court was whether possession of the defendant's vehicle had been acquired by the driver H with the implied consent of the defendant so as to make him liable for H's negligence pursuant to s. 130 of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356. The trial judge was of the opinion that the question of implied consent must be approached from the point of view of the driver, that is whether the driver under all the circumstances would be justified in deeming that he had an implied consent to drive. The Appellate Division criticized this test; the test to be applied was whether the driver had in fact acquired possession of the vehicle with the implied consent of the owner, irrespective of what the driver deemed to have been the situation.

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

A consideration of all the evidence led to the conclusion that the trial judge did not clearly draw the wrong inferences or act upon an erroneous principle of law. Accordingly, the trial judge's finding that the driver H had the implied consent of the owner to drive the vehicle in question should not be reversed.

The Appellate Division placed too narrow an interpretation on the trial judge's test of implied consent. What the trial judge did was put to himself the question whether all the circumstances were such as would show that the person who was driving had the implied consent of the owner and therefore whether he would have been justified in deeming that he had such consent.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], allowing an appeal from a judgment of Milvain J. holding the owner of a motor vehicle liable for the negligence of the driver. Appeal allowed.

B. W. Stringam and *S. Denecky*, for the plaintiffs, appellants.

H. S. Prowse, for the defendant, respondent, Humphrey.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] dated August 27, 1963. By that judgment, the majority of the Court (Porter J.A. dissenting) allowed an appeal from the judgment of the Honourable Mr. Justice Milvain dated January 29, 1963, by which judgment the learned trial judge had given awards in favour of the various plaintiffs in sums totalling $59,686.28. The judgment, however, in favour of the plaintiff Glen Sillito alone exceeded the sum of $10,000.

[1] (1963), 43 W.W.R. 625, 41 D.L.R. (2d) 156.

1964

PALSKY *et al.* v. HUMPHREY *et al.*

SILLITO *et al.* v. HUMPHREY *et al.*

Spence J.

An application for leave to appeal to this Court was made on behalf of all the appellants and by the order of the Chief Justice of this Court of December 5, 1963, such application was directed to come on before the Court immediately preceding the hearing of the appeal of Glen Sillito. Upon the said appeal being called for hearing in this Court, leave to appeal was granted to all the applicants. The only appeal to the Appellate Division of the Supreme Court of Alberta was by the defendant Archibald Ashton Humphrey, and the only point at issue upon that appeal or in this Court was whether possession of the appellant's vehicle had been acquired by the driver Harvie, who was killed in the accident which gave rise to the action, with the implied consent of the appellant Humphrey so as to make him liable for Harvie's negligence pursuant to s. 130 of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356.

In his reasons for judgment, the learned trial judge had said:

> It is my conception of the meaning of that statute that in dealing with the implied consent it means that one must approach the problem in a somewhat subjective fashion from the point of view of the person who was driving. That is to say whether under all of the circumstances the person, who was driving, would have been justified in deeming that he had an implied consent to drive.

Both the judgment of the majority of the Court given by the Chief Justice of Alberta and the dissenting judgment of Porter J.A. criticize this test, adopting the language of McBride J.A. in *Stene and Lakeman Construction v. Evans and Thibault*[1], at p. 600:

> The test is not the knowledge or belief of the driver for the time being as to who is the true owner [in that case] but lies in the facts and circumstances under which possession was handed over to the true owner, in this case Evans.

I am of the view that the learned Justices of Appeal interpreted too narrowly the words of the learned trial judge and when he said:

> That is to say whether under all of the circumstances the person who is driving would have been justified in deeming that he had an implied consent to drive.

What the learned trial judge was doing was putting to himself the question whether all the circumstances were such

[1] (1958), 24 W.W.R. 592.

as would show that the person who was driving had the implied consent of the owner and therefore, of course, whether he would have been justified in deeming that he had such consent. In fact, the learned trial judge did examine with very considerable detail all of the circumstances which go to show whether the driver Harvie had the implied consent of the owner Humphrey to drive the vehicle in question. He had the great additional advantage that he watched the witnesses as they were giving evidence and was able to appreciate the fine nuances of their testimony which cannot be reflected in any printed record. I accept the propositions put by counsel for the appellants in this Court that his finding should not be reversed unless the inferences which he drew were clearly wrong or that he acted on some incorrect principle of law. After having carefully considered all of the evidence, I find that I am in agreement with the view of Porter J.A. that the learned trial judge did not clearly draw the wrong inferences or act upon an erroneous principle of law.

The learned trial judge found, as a fact, in these terms:

> Now, the evidence makes it clear that there was a very close and friendly relationship between Humphrey and the deceased Harvie. Harvie was a young man who visited Humphrey on many occasions, and had done so over a number of years. In fact the knowledge one of the other went back into the days of Harvie being but a child, and therefore extended over something in the neighbourhood of 20 years. The evidence makes it clear that on many occasions in the past Harvie had driven Humphrey's car on occasions when Humphrey was with him and on occasions when Harvie was driving it by himself, and in the absence of Humphrey. That comes clear from the evidence of so many people, Cpl. Gingara had seen him driving on at least a couple of occasions, and the O'Hara's, the Darragh's, Netty Harvie, Pete Harvie's father, had all seen Pete Harvie on different occasions driving the car.

I am of the opinion that the learned trial judge was justified in making that finding of fact from the evidence.

The evidence reveals that Harvie, on the day preceding the accident, had come from the home of one Darragh for whom he was working about 200 yards away, to Humphrey's place and had learned that Humphrey's vehicle, which was later involved in the accident, was in bad mechanical condition and that he had worked on Humphrey's car substantially the whole of that day, Friday. This entailed driving into Milk River, a distance of some 25 miles, in his own, Harvie's, car. That Friday evening, Harvie then took Humphrey's car without letting Humphrey know that he

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was doing so and drove into the village of Coutts, a distance of 20 miles. He returned to Humphrey's farm with his sister, Nettie M. Harvie, and another girl with him, and at that time in the presence of these two young ladies there was no reference by Humphrey to the taking of the car. On the other hand, the conversation seemed to be a pleasant one and Humphrey loaned to Harvie for Harvie's automobile so that his sister could return to the village, not only gasoline but a spare tire.

On Humphrey's evidence, after Miss Harvie had left with her friend, he said to the late Peter Harvie:

> I just told him that he shouldn't have taken my car like that, without letting me know.

The learned trial judge comments:

> Now that is a very different thing to saying "You know very well that you have no right to take my car. You were wrong in taking my car. I forbid you from taking my car." "But you were wrong in taking it without telling me." Those are words which carry a natural implication when one views a friendly relationship between these two people that "had you asked me I would have let you have it".

That the remonstrance was mild indeed seems to be demonstrated by the fact that the late Peter Harvie stayed that night in the home of the defendant Humphrey rather than returning the 200 yards to the residence of his employer Darragh, where, of course, all his belongings were. And further, that in the morning when the late Harvie and the defendant Humphrey discovered that two of the tires on Humphrey's automobile were deflated, he, Harvie, walked to Darragh's, borrowed Darragh's car then drove a mile and a half to another friend's to obtain a tire pump, returned, pumped up both tires and then took the pump back to the lender. Thereafter he and the defendant Humphrey drove into the village of Coutts, from there to Milk River and back to the farm. During the time that the two were away, they also stopped to pick up the mail at the post office, pick up a spare tire, go to the bank and to a beverage room. During the whole of this trip, it would appear that the late Harvie drove the automobile and Humphrey rode with him. According to Humphrey's evidence, they returned to his home at about a quarter to one o'clock in the afternoon. Porter J.A., when giving judgment in the Appellate Division, was of the opinion that it must have been some time later than this, an opinion which

seems to have considerable weight under the circumstances. While the two were returning from the village in Humphrey's car, a conversation took place and I quote from the evidence:

Q. Was there any discussion between you and Harvie on the way out from town?
A. Well, Pete wanted to go to Lethbridge to a dance that night.
Q. And why did he tell you about it?
A. Well, the car was in, his car was in Coutts, and it wasn't running, and he wanted me to go with him to the dance in Lethbridge.
Q. He wanted you to go with him?
A. Yes.
Q. To a dance in Lethbridge?
A. Yes.
Q. And you had been to a dance before with him?
A. Yes, a week or two before.
Q. And what did you have to say about going to a dance in Lethbridge on September, on September 16th, 1961?
A. I said I didn't dance anyway, and the car has gone far enough for one day, and I told him I definitely wasn't going out with the car any more that day.

Upon their return to the defendant Humphrey's home, Humphrey went in to get dinner, the late Harvie came in and sat in a chair and said nothing. Humphrey proceeded to get dinner about half ready and at that time the late Harvie stood up and walked out and shut the door. When Humphrey had dinner ready, he went outside to see where the late Harvie was and both Harvie and the car had disappeared.

As I have said, the defendant Humphrey swore this was about 1:00 p.m.

James Dunlop Harvie, the father of the late Peter Harvie, appears to have been the next witness to see the late Peter Harvie and swore that he met him on the road to Coutts between 2:30 and 3:00 o'clock in the afternoon of that day, and at a point of about 5 or 6 miles outside of Coutts. Coutts is 20 miles from the defendant Humphrey's farm and it is 10 miles from Coutts to Milk River.

William Oswold, a garageman in Milk River, swore that the late Peter Harvie brought the Humphrey car into his garage around 4:00 o'clock in the afternoon and there had three tires repaired. There were nails in two of the three

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tires. The late Peter Harvie charged the repair bill to the defendant Humphrey, although Oswold had not, up to the date of the trial, rendered any account.

John Darragh, the then employer of the late Peter Harvie and the neighbour of the defendant Humphrey, saw the late Peter Harvie at 5:00 o'clock in Milk River at the garage where the tires were repaired, and had certain conversation with him. He later saw Harvie leave Milk River headed toward Coutts at 6:35 p.m.

Both the learned trial judge and Porter J.A. in the Court of Appeal considered that the conversation between Darragh and the late Peter Harvie was not evidence against Humphrey. Much of the argument in this Court was devoted to considering that question. I find it unnecessary to decide the question and it is my intention to ignore that conversation in coming to my conclusion.

The accident which gave rise to this action occurred a very few moments after the witness Darragh had seen the late Peter Harvie depart from Milk River. It occurred on the northerly limits of the village of Coutts some 10 miles south of Milk River. Cpl. Gingara of the R.C.M.P. investigated the accident and gave evidence that he arrived at the scene at a few minutes after 6:45 p.m. when the cars were still on the highway and the occupants of the plaintiff Sillito's vehicle were still in it. On those facts, the learned trial judge found in these words:

> This is a fair assumption. Harvie may well have looked out and seen these tires were going flat again, got in the car and drove off. Now at the moment that he did so I am sure that Harvie would quite properly feel that Mr. Humphrey, regardless of what he may have said in the reprimand, would not object to the car being taken by him, Harvie, so that Harvie, in my view, at the moment that he took the car was entitled to assume that he was doing so with the implied consent of Humphrey. I find that was taken under those circumstances, and that therefore Mr. Humphrey as owner of the motor car is rendered liable.

The Chief Justice of Alberta in giving the majority judgment for the Appellate Division said:

> If the owner of a vehicle who has theretofore impliedly consented to a friend acquiring possession of the vehicle revokes the implied consent by reprimanding the friend for having taken the car without his permission and giving what I consider to be a direction to the friend that the car is not to be used by the friend again on a specific day, the owner in my view cannot be taken to have impliedly consented because he did not remove the keys from the car. That he did by his statements on Friday evening

and Saturday morning revoke any implied consent theretofore granted, at least to use the car on the day just referred to, is in my view clear.

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On the other hand, Porter J.A., in his dissenting judgment, said:

> It is clear from the quoted evidence of Humphrey that Harvie did not contemplate going to the dance in Humphrey's car unless Humphrey went along because Humphrey's refusal was: "I told him I definitely wasn't going out with the car any more that day".

With all respect, I am of the opinion that Porter J.A. made a more accurate appraisal of the exact words used by the defendant Humphrey in giving his evidence and of the import thereof. It would appear that the late Harvie did not request leave to take from Humphrey the latter's car to go to the dance that Saturday night but rather requested Humphrey to go to the dance with him, Harvie, in Humphrey's car, and that it was not contemplated by either party that Harvie could take the vehicle to go to the dance without Humphrey. It should be noted that the dance was to take place in Lethbridge some 85 miles away from Humphrey's farm. Had Humphrey believed that Harvie had taken the vehicle to go to that dance then Humphrey would not have expected Harvie to return until very late at night. Yet Humphrey swore on examination, and repeated in cross-examination, that he expected Harvie to return to the farm at any time. In cross-examination, Humphrey swore "I thought sure that he would be back. I didn't know just where he went." There may well be significance in the fact that the defendant Humphrey, when he visited the Darragh place, always removed the keys from his car before entering Darragh's home but on arriving back at his own home on the Saturday morning after the conversation in the automobile with the late Harvie in reference to the dance in Lethbridge, he left the keys in the car neither removing them himself nor asking the late Harvie to do so for him.

Upon this evidence, Porter J. A. concluded:

> It seems clear that the sole purpose of Harvie's trip to town that afternoon was to have these tires repaired for Humphrey . . .
>
> It seems clear to me that the course of conduct between these two men was such that there was an implied consent by Humphrey to the use by Harvie of his car. This implied consent, of course, could be terminated or denied in specific instances. The appellant relies on the two instances as having revoked any consent express or implied, namely, the mild

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reprimand for having taken the car on Friday night without asking for it, and the evidence about Humphrey's refusal to go with Harvie to the dance in Lethbridge in Humphrey's car. The latter incident cannot be taken as having anything to do with consent or lack of consent to the use by Harvie of Humphrey's car because Harvie did not then ask for the car, nor, indeed, did Humphrey refuse it to him. Harvie was not using the car on Saturday to go to the dance in Lethbridge, some 80 miles in the opposite direction from that in which he was travelling at the time of the accident. Was the reprimand on the Friday night sufficient to terminate a consent which, in my judgment, had prevailed to that time?

Contemplate the scene at Humphrey's place on Saturday morning—flat tires, no pump, Humphrey's feet preventing him from walking any distance, Harvie's car gone from the farm, Harvie under a duty to return to work at Darragh's. Looking at the state of Humphrey's mind, the only possible solution to his helpless isolation was to send Harvie to town to get the tires fixed. It seems to me that consent can be implied because it is clear that had it been sought it would have been granted as a matter of course. In my opinion the facts and circumstances surrounding the use by Harvie of Humphrey's car on this and other occasions imply consent by Humphrey.

I am of the opinion that Porter J.A. drew the proper inferences from the evidence and proceeded upon the proper principles of law. I am therefore of the opinion that the appeal should be allowed and the judgment of the learned trial judge be restored with costs to the appellants throughout.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Virtue, Russell, Morgan, Virtue & Morrison, Lethbridge; and Stringam, Steele & Denecky, Lethbridge.

Solicitors for the defendant, respondent, Humphrey: Rice, Paterson, Prowse, MacLean, Yanosik & Jacobson, Lethbridge.

SHORE & HORWITZ CONSTRUCTION CO. LIMITED (*Plaintiff*) .. APPELLANT;

AND

FRANKI OF CANADA LIMITED (*Defendant*) ..... RESPONDENT.

1964
*May 5
June 10

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Delay in completion of main contract resulting from performance by subcontractor—Claim for damages against subcontractor—Assessment of damages.

The plaintiff took a contract from the Government of Canada to construct a building and employed the defendant to drive the piles. The work done by the defendant was rejected and had to be done again, with the result that there was 4¾ months' delay in the completion of the main contract. The plaintiff sued the defendant for damages. Liability having been established, the trial judge referred the assessment of damages to the local master. The latter assessed the damages at $99,598.13 and itemized them under 13 heads. A judge of the Supreme Court of Ontario confirmed the report; the defendant appealed two items, namely overhead and plant. The Court of Appeal reduced the amount allowed for overhead from $16,909.33 to $3,692.10 and that for plant from $7,539.91 to $1,256.66. The plaintiff appealed to this Court.

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

Per Curiam: The plaintiff's contention that it should be compensated on a commercial rental basis for the plant and equipment during the period of tie-up was rejected. In the absence of evidence to the contrary, the Court of Appeal was correct in treating the plaintiff's plant as a non-profit-earning asset during this period.

Per Cartwright, Fauteux, Hall and Spence JJ.: The Court of Appeal seemed to have cut out $2,802 per month for 4¾ months allowed in the overhead and allowed 4.99 per cent on the amount of additional out-of-pocket costs incurred by the plaintiff. In essence, therefore, the Court of Appeal had disallowed any compensation in overhead for the 4¾ months' delay. This was not a proper deduction. During the 4¾ months the overhead costs were continuing to run but the plaintiff was obtaining no revenue from which to defray the overhead costs. The allowance of 4.99 per cent on the direct cost was not a compensation for this delay but was an allowance of the same percentage rate on an item which would not normally have been in the year's operation. Therefore, the Court of Appeal erred in taking this amount ($13,309.50) from the master's assessment.

Per Judson J. *dissenting:* Although delay resulting from the performance by a subcontractor may well cause loss to the main contractor, such loss of profit arising from inability to accept or to move on to another contract, nothing of that kind was alleged or proved here. Further, there was no suggestion that the plaintiff stayed in business solely for the business of completing this delayed job or with existing overhead

*PRESENT: Cartwright, Fauteux, Judson, Hall and Spence JJ.

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made necessary during the period of delay. In the absence of any evidence to support such a claim, the Court of Appeal was right in disallowing the sum of $13,309.50 in the overhead.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from an order of Aylen J. which confirmed a report of the Local Master at Ottawa. Appeal allowed, Judson J. dissenting.

I. Goldsmith and *Miss Rose-Marie Perry,* for the plaintiff, appellant.

K. E. Eaton and *J. H. Konst,* for the defendant, respondent.

The judgment of Cartwright, Fauteux, Hall and Spence JJ. was delivered by

SPENCE J.:—I have had the privilege of reading the reasons for judgment of my brother Judson and I shall refrain from repeating the statement of facts except insofar as it is concerned with the question of overhead. I am in agreement with my brother Judson's view as to plant, but I feel that I have come to another conclusion in reference to overhead.

The Master assessed the plaintiff's damages at a total of $99,598.13 which total included the amount of $16,909.33 for overhead and $7,539.91 for plant. The Master in his reasons for judgment stated:

> 7. The method of calculating overhead as advanced by the plaintiff was a proper basis for so doing.
>
> The plaintiff contended that overhead was a continuing expense and that as long as one was working on the job overhead was being incurred. He took the figures for the two years over which this job ran, on a percentage basis for the year's operation of the business and averaged them, arriving at a figure of 4.99%. No definition of overhead was supplied to me. The defendant contended that overhead was part of the contract and once you put in a figure for overhead it never changed, no matter how long you were engaged on the job. It follows that the longer the job takes the more overhead that is incurred. Accordingly I found the plaintiff's method of calculating overhead a proper one.
>
> The amount for plant was arrived at by taking the value of the equipment and buildings tied up on the job for the delay period, at the rate of 5% per month. Counsel for the defendant cited a number of cases on this type of thing, but in my opinion these all referred to the rate to be charged for materials and labour actually expended on a job and not for equipment and buildings tied up on the job.

The defendant (here appellant) appealed to a single judge of the Supreme Court of Ontario from the assessment of the Master and that appeal was dismissed by Aylen J. on February 22, 1963. The defendant (here respondent) further appealed to the Court of Appeal and the Court of Appeal by its judgment dated September 10, 1963, allowed the appeal and substituted a judgment reducing the amount allowed for overhead from $16,909.33 to $3,692.10 and reducing the amount allowed for plant from $7,539.91 to $1,256.66. Neither Aylen J. nor the Court of Appeal gave any reasons in writing for their decision and the lack of these reasons has considerably increased the difficulty of the task facing this Court.

OVERHEAD

It would appear, however, and counsel are agreed, that the judgment of the Master for overhead is composed of two items, firstly, 4.99 per cent of the sum of $72,171.06, being the additional out-of-pocket costs incurred by the appellant (plaintiff), equals $3,601.33, plus $2,802 per month for $4\frac{3}{4}$ months equals $13,309.50, totalling $16,909.33 (the $1.50 error is unexplained). The 4.99 per cent used as the factor for the overhead was the average of the actual overhead taken as a percentage of direct cost for the fiscal year ending April 3, 1960 (3.35 per cent), and for the fiscal year ending April 3, 1961 (6.64 per cent). The period of $4\frac{3}{4}$ months was the additional time required for the completion of the contract due to the failure of the subcontractors (the defendants, respondents) to perform their part thereof.

The Court of Appeal seemed to have cut out the $2,802 per month for $4\frac{3}{4}$ months allowed in the overhead and allowed 4.99 per cent figuring it on $73,990.56 as the Court increased the direct cost by addition of $1,819.50 "miscellaneous".

In essence, therefore, the Court of Appeal has disallowed any compensation in overhead for the $4\frac{3}{4}$ months' delay. I have considered the argument made by counsel and I have read the cases cited and I am of the opinion that this is not a proper deduction. The overhead in a year is figured as a percentage of the direct cost and then that percentage is assigned to the direct cost of each individual job. When the job here in question occupied $4\frac{3}{4}$ months more of the plain-

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tiff's (appellant's) time then during that $4\frac{3}{4}$ months the overhead costs were continuing to run but it was obtaining no revenue from which to defray the overhead costs. The allowance of 4.99 per cent on the extra direct cost is not a compensation for this delay but is an allowance of the same percentage rate on an item which would not normally have been in the year's operations, and I am therefore of the opinion that the Court of Appeal erred in taking this amount from the Master's assessment.

Counsel for the respondent during the argument mentioned a series of calculations which did not appear in the factum. Counsel were permitted additional time to put those calculations in writing and additional time to reply thereto.

I have perused both the additional figures supplied by the respondent and the appellant's reply, and I am convinced that the appellant has properly explained the examples submitted by the respondent. Indeed, I agree with the counsel for the appellant that the figures submitted by the respondent have confirmed the respondent's argument that the $4\frac{3}{4}$ month's delay when, of course, the plaintiff company could not devote its enterprise to other undertakings but when its fixed costs kept running, is largely responsible for the unproductive fiscal year ending on April 3, 1961, and for the very large increase in the percentage of its overhead to direct costs in that year as compared to the previous year.

I would therefore allow this appeal and increase the amount of the award by $13,309.50. The appellant is entitled to its costs in this Court and of the order of Stewart J. There will be no costs of the appeal to Aylen J. or in the Court of Appeal. There is, of course, no variation in the judgment of McRuer C.J.H.C.

JUDSON J. (*dissenting*):—Shore & Horwitz Construction Co. Limited took a contract from the Government of Canada to construct a building in the City of Ottawa for a total contract price of $724,300, the contract to be completed within one year. They employed Franki of Canada Limited to do the pile driving at a price of $57,500, to be completed within 22 days. The piles driven by Franki were totally rejected by inspectors appointed by the Government of Canada. The result of this was that the piles had to be

driven again, the whole structure had to be shifted by five feet and there was $4\frac{3}{4}$ months' delay in the completion of the main contract. Shore & Horwitz sued Franki for damages. They established liability and the trial judge referred the assessment of damages to the Local Master at Ottawa. The two relevant paragraphs in the order of reference are:

> THIS COURT DOTH FURTHER ORDER that the said Local Master shall assess the loss that the Plaintiff has suffered by reason of the failure of the Defendant to perform the contract referred to in the Statement of Claim and by reason of the failure of the Defendant to complete the work referred to in the letter from the Defendant to the Plaintiff, dated September 15, 1959 (filed as exhibit 1), within twenty-two days.
>
> AND THIS COURT DOTH FURTHER ORDER that the said Local Master shall not assess any amount for profit, but shall assess overhead on a proper basis.

The Local Master assessed the damages at $99,598.13 and itemized them under 13 heads. Aylen J. confirmed the report and Franki appealed on two items:

(a) *OVERHEAD, $16,909.33*

The Local Master allowed the sum of $16,909.33 for overhead. Without giving reasons, the Court of Appeal reduced this item to $3,692.10. In spite of the lack of reasons, it is not difficult to trace the principles on which the Court acted. The sum of $3,692.10 was an allowance of 4.99 per cent on $73,990, which was the actual cost of certain additional construction which Shore & Horwitz did and for which Franki was to pay.

The disallowed sum of $13,309.50 is claimed by Shore & Horwitz for the delay. They say that when they took the contract, their overhead was established at $2,802 per month for a twelve month period of performance and that because Franki delayed the performance of the contract for a period of $4\frac{3}{4}$ months, Franki must pay for that period of delay at the rate originally established of $2,802 per month. This is the sole basis of the claim. Delay resulting from the performance by a subcontractor may well cause loss to the main contractor, such loss of profit arising from inability to accept or to move on to another contract. Nothing of that kind is alleged or proved here. Further, there is no suggestion that Shore & Horwitz stayed in business solely for the purpose of completing this delayed

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job or with existing overhead made necessary during the period of delay. In the absence of any evidence to support such a claim, the Court of Appeal was right in disallowing the sum of $13,309.50.

(b) *PLANT*

The Court of Appeal, also without giving reasons, reduced this item from $7,539.91 to $1,256.66. However, there is no dispute that the sum of $1,256.66 was arrived at by giving an allowance at the rate of 10 per cent per annum for a period of $4\frac{3}{4}$ months on the value of the plant tied up during this period. This plant consisted of

Temporary buildings	$ 3,000
Construction equipment	26,250
Tools	2,497
	$ 31,747

Shore & Horwitz contend that they should be compensated on a commercial rental basis for this plant and equipment which was tied up too long. The Local Master accepted this and allowed them 5 per cent per month for the period of $4\frac{3}{4}$ months on the above valuation. It should be made clear that this was an idle plant, not in use on the job and, of course, not capable of profitable use until moved to another job. If Shore & Horwitz thought that they should have compensation on the basis that this was a profit-making asset during the period of the tie-up, they should have given evidence that there was profitable work for this asset to do elsewhere. I think that the Court of Appeal was right in treating this as a non-profit-earning asset during the period of $4\frac{3}{4}$ months. The allowance of 10 per cent per annum on the valuation was generous.

There is a well established distinction between compensation for loss of use when the property is profit-earning and non-profit-earning: Mayne & McGregor on Damages, 12th ed., pp. 578-590; Street, Principles of the Law of Damages, pp. 203-210. I adopt the statement of Street at p. 207 as a compendious summary:

> Where the court is not satisfied that a profit would ensue, the plaintiff is reverted to the method for compensating loss of non-profit-earning vessels, *i.e.*, interest, depreciation and maintenance. This rule (and presumably the rest) applies to other forms of property such as contractors' road-excavating plant [*Sunley & Co. Ltd. v. Cunard White Star Ltd.*, [1940]

1 K.B. 740] and (in Scotland, at least) lorries [*Galbraith's Stores, Ltd. v. Glasgow Corporation*, 1958 S.L.T. (Sh. Ct.) 47].

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I would dismiss the appeal with costs.

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

Solicitors for the plaintiff, appellant: Horwitz, Kertzer & Perry, Ottawa.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

CYCLORAMA DE JÉRUSALEM INC. (*Défenderesse*) ..... APPELANTE;

1963
*Juin 11
1964
Juin 29

ET

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR (*Demanderesse*) ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Louage de chose—Avis de résiliation—Insuffisance de l'avis.

La défenderesse occupait un terrain appartenant à la Congrégation demanderesse en vertu d'un bail se terminant le 9 mars 1958 et qui, à partir de cette date, devait se continuer d'année en année aux mêmes termes et conditions jusqu'à ce qu'il soit terminé par un avis écrit. Le 30 novembre 1959, la défenderesse recevait un avis des procureurs de la demanderesse l'avisant que le bail ne serait pas renouvelé à son expiration le 9 mars 1960. Cet avis ayant été ignoré, la demanderesse intenta des procédures en expulsion. L'action fut rejetée par le juge au procès, mais son jugement fut infirmé par la Cour d'Appel. La défenderesse en appelle devant cette Cour.

Arrêt: L'appel doit être maintenu et l'action rejetée.

La lettre des procureurs de la demanderesse n'était pas un avis suffisant pour mettre fin au bail. L'avis n'était pas signé par les parties au bail, et de plus la preuve révèle que ce n'est pas la demanderesse qui avait autorisé l'envoi de cet avis mais bien deux membres de son conseil d'administration ne formant pas quorum.

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*CORAM: Le Juge en Chef Taschereau et les Juges Fauteux, Abbott, Ritchie et Hall.

1964

CYCLORAMA DE JÉRUSALEM INC. v. LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement de la Cour supérieure. Appel maintenu.

Jean Turgeon, C.R., et *Louis Rémillard*, pour la défenderesse, appelante.

André Trotier et *Guy Letarte*, pour la demanderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE EN CHEF:—Depuis de nombreuses années, il existe à Ste-Anne de Beaupré, près de Québec, un édifice connu sous le nom de Cyclorama, situé non loin de la Cathédrale de Ste-Anne.

Le commerce était exercé sous la raison sociale de la Cie du Cyclorama de Jérusalem par madame Albina Laurendeau-Plourde et, par bail sous seing privé en date du 23 avril 1953, la Compagnie de Chemins de Fer Nationaux louait à cette dernière, à raison de $38 par année, une partie du terrain décrit à la pièce P-1 et voisine de l'endroit où est situé le Cyclorama.

Ce bail faisait suite à un autre au même effet intervenu le 16 décembre 1949 entre ladite Dame Plourde et The Quebec Railway Light and Power Company pour une période de cinq ans, soit à compter du 9 mars 1953 jusqu'au 9 mars 1958.

Le juge au procès a reconnu que la défenderesse dans la présente cause et ses auteurs ont exploité depuis 1895 un Cyclorama à Ste-Anne de Beaupré. Toute près de ce Cyclorama se trouve un magasin également exploité depuis 1895, mais plus spécialement exploité depuis 1925 dans l'état où il est actuellement. Une partie de ce magasin se trouve sur un terrain qui n'appartient pas à la défenderesse, mais il a fait l'objet d'une convention entre The Quebec Railway Light and Power Company et Dame Albina Laurendeau-Plourde le 16 décembre 1949.

En 1957 est intervenu l'acte de vente invoqué par la demanderesse-intimée en vertu duquel cette dernière a acheté de Canadian National Railway Company une bande de terrain d'une largeur de 50 pieds, le long de la voie ferrée. Tel qu'il appert au plan annexé à la pièce P-2, le magasin de l'appelante empiète sur cette bande de terrain d'une largeur de 15 pieds à l'arrière par 10 pieds à l'avant.

[1] [1962] B.R. 684.

Tel que l'explique l'appelante dans son factum, cette bande de terrain incluse dans l'immeuble vendu à l'intimée était cette partie de terrain loué à Dame Albina Laurendeau-Plourde, auteur de l'appelante, par le bail expirant le 8 mars 1958, et il appert à l'acte de vente ci-dessus que ce bail déjà consenti à Dame Plourde devait, à compter du 9 mars 1958, se continuer d'année en année aux termes et conditions exprimés dans l'écrit intitulé «Convention spéciale de renouvellement du dit bail».

La partie essentielle de ce bail qu'il est important de retenir pour les fins de la présente cause est la suivante:

A partir du 9 mars 1958, le dit bail se continuera d'année en année, aux mêmes termes et conditions en faveur du présent locataire, dame Vve Albina Laurendeau-Plourde, faisant affaires sous les nom et raison sociale de «La Cie du Cyclorama de Jérusalem» ainsi qu'en faveur de ses héritiers ou ayants droit ou représentants, quelqu'ils puissent être, jusqu'à ce que le dit bail soit annulé par un avis écrit du locataire au locateur, trois mois avant le 9 mars de toute année à venir après le 9 mars 1958; cependant la continuation de ce bail d'année en année n'aura lieu qu'en autant que le Cyclorama continuera d'exister à cet endroit et que le magasin érigé sur l'une des ces parcelles de terrain sera utilisé comme présentement, *c'est-à-dire pour vendre des objets de piété et des souvenirs dont l'achat sert de droit d'admission à visiter le Cyclorama.* Mais cette convention spéciale du renouvellement du dit bail, à partir du 9 mars 1958 ne s'appliquera pas à la parcelle de terrain où se trouve la guérite du veilleur de nuit du côté sud-ouest de la rue Régina, tel qu'indiqué par la lettre «B» sur le plan préparé par l'ingénieur divisionnaire, J. W. Clarke, en date du 29 juin 1956.

Le 24 septembre 1959, la Congrégation du Très Saint Rédempteur, intimée dans la présente cause, écrivait au Cyclorama de Jérusalem Inc., maintenant aux droits de Dame Laurendeau-Plourde, la lettre suivante:

24 septembre 1959.

La Cie du Cyclorama de Jérusalem
Ste-Anne-de-Beaupré

Messieurs,

Le R. P. Léopold St-Amand vous expédiait un extrait du contrat qui contenait la convention spéciale de renouvellement du bail vous permettant d'occuper par un magasin, une parcelle des terrains que la Corporation du T. S. Rédempteur tient du C.N.R. Par le respect des clauses qu'il vous rappelait, ce Père ne voulait pas vous créer d'ennuis ni d'embarras mais tout juste sauvegarder les intérêts de sa Congrégation et ne pas placer les administrations suivantes devant des situations de fait qui les obligeraient à des recours pénibles, à des mesures qui mettraient les choses à point et chacun chez soi.

Nous éprouvons pour vous, de la Cie du Cyclorama de Jérusalem, une non moindre sympathie et nous admirons votre toile panoramique que votre sollicitude a rendue même plus belle qu'à ses débuts, mais nous

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partageons les vues de notre devancier et ses justes appréhensions à sacrifier les intérêts des nôtres et de Ste-Anne.

Il nous répugne d'en appeler à la rigueur, nous optons de loin pour les moyens pacifiques. Au cas où vous auriez perdu cet extrait et pour vous éviter des recherches, nous vous en envoyons une autre copie. Certes vous daignerez la lire avec soin.

Veuillez nous avertir de vos intentions avant le premier jour de décembre 1959 afin qu'en cas de refus à vous conformer aux conditions relatives surtout à la vente des objets de piété et des souvenirs dont l'achat sert de droit d'admission à visiter le Cyclorama, nous puissions vous signifier officiellement avant le 9 décembre 1959 que nous ne renouvellerons plus le bail vous permettant d'occuper le dit terrain en question par un bout de votre magasin.

Veuillez nous croire bien vôtre en J M J A

L'administration locale des
Rédemptoristes de Ste-Anne-de-Beaupré.

Par C.E.M.
(Note à l'encre):
Une copie fut envoyée à la dite Cie
le 25 sept. 1959 par lettre enregistrée.

L'appelante n'a pas donné suite à cette lettre, et le 30 novembre 1959, elle recevait un avis des procureurs de l'intimée l'avisant que le bail ne serait pas renouvelé à son expiration le 9 mars 1960. Cet avis adressé par les procureurs de l'intimée ayant aussi été ignoré, la demanderesse-intimée intenta des procédures en expulsion.

Les conclusions de son action sont à l'effet de confirmer l'expiration et le non-renouvellement du bail intervenu le 23 avril 1953 entre Canadian National Railway Company et Dame Albina Laurendeau-Plourde, renouvelé dans le contrat de vente intervenu le 25 mars 1957 entre la demanderesse et la Compagnie de Chemins de Fer Nationaux du Canada, et cédé postérieurement à la défenderesse. L'action demande de plus que par jugement à intervenir, il soit ordonné à la défenderesse de quitter les lieux loués et de démolir les immeubles qu'elle y a érigés. Il est aussi demandé qu'à défaut par la défenderesse de se conformer au jugement à intervenir dans un délai de trente jours, la demanderesse soit déclarée seule et unique propriétaire des immeubles construits sur les terrains loués.

La Cour supérieure, présidée par M. le Juge Miquelon, a rejeté cette action avec dépens, mais son jugement a été infirmé par la Cour d'Appel[1] qui a maintenu l'action de la demanderesse, M. le Juge en chef Tremblay et M. le Juge Choquette ayant enregistré leurs dissidences.

[1] [1962] B.R. 684.

Je partage entièrement les vues de M. le Juge en chef et de M. le Juge Choquette. Je crois en effet que la question du bail à perpétuité a été définitivement déterminée par cette Cour dans la cause de *Consumers Cordage Co. Ltd. v. St-Gabriel Land & Hydraulic Co. Ltd.*[1]. Je suis également d'avis que M. le Juge Choquette a raison quand il dit:

> Notons que la défenderesse nie l'allégué 9 de la déclaration et qu'elle plaide spécialement ce qui suit:
>
> 16. La demanderesse n'a jamais fait signifier, ni donné à la défenderesse un avis de résiliation et d'ailleurs la demanderesse n'a pas droit à la résiliation du bail existant entre les parties;
>
> 17. Le prétendu avis de non-renouvellement du bail en date du 30 novembre 1959 et signé par les avocats Laplante, Gagné, Trotier, Letarte et Brown est illégal, informe, non autorisé, nul et sans effet;
>
> 18. Ce prétendu avis est invalide et nul et ne saurait mettre fin au bail sus-mentionné.
>
> La clause 7 stipule que l'avis prévu doit indiquer «the intention of the Lessor so to resume possession of the said premises and to terminate this lease . . .» et qu'il doit être au moins signé comme suit: «and that every notice to be given by the Lessor . . . shall be sufficient if signed by the Vice-President or General Manager of the Lessor, without the seal of the Lessor . . .»
>
> La lettre P-4 ne fait qu'aviser la défenderesse que son bail «ne sera pas renouvelé à son expiration le 9 mars 1960». Ni la lettre ni l'action ne font valoir l'intention de la demanderesse de reprendre possession des lieux et de terminer le bail; selon tous les allégués de la demande, l'avis de non-renouvellement s'identifie avec le prétendu refus de la défenderesse de se conformer à la condition relative à l'usage des lieux loués. De plus, cet avis n'est signé ni par le Président ni par le Gérant général de la Corporation demanderesse (ou par celui ou ceux qui en remplissent aujourd'hui les fonctions). Bien plus, ce n'est pas la demanderesse qui a autorisé l'envoi de cet avis, mais deux membres de son Conseil d'administration ne formant pas quorum. Voici ce que dit à ce sujet le Rév. Père Rondeau:
>
> pp. 123-124:
>
> R. Voici, le trente novembre au soir, n'est-ce pas, nous avons reçu un téléphone de M[e] Letarte et comme il n'y avait que deux directeurs à la maison ne formant pas quorum, et qu'il fallait prendre une décision rapide, alors, le Révérend Père Blanchet et moi-même sommes deux directeurs de la Corporation . . .
>
> .....
>
> R. . . . alors, nous avons autorisé monsieur Letarte à prendre toutes les directives et toutes les procédures nécessaires.
>
> Le témoin venait de dire ce qui suit:
>
> pp. 122-123:
>
> Q. Voulez-vous regarder, mon Père, au livre des minutes et nous dire si antérieurement au trente (30) novembre mil neuf cent cinquante-neuf (1959), la Corporation demanderesse que vous représentez a

[1] [1945] R.C.S. 158, 2 D.L.R. 481.

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passé une résolution pour faire donner un avis de résiliation à la Corporation défenderesse?

R. Non.

Q. Il n'y en a pas?

R. Non.

Enfin, je ne puis comprendre, comme d'ailleurs M. le Juge en chef Tremblay l'a dit dans son jugement, que l'acte du 25 mars 1957 stipule que «ledit bail se continuera d'année en année . . . jusqu'à ce qu'il soit annulé par un avis écrit du locataire au locateur», et que les parties aient également convenu que le bail puisse aussi se terminer par un avis du locateur.

Pour terminer, je crois que les mots que l'on trouve dans le contrat «dont l'achat sert de droit d'admission à visiter le Cyclorama» n'ont pas l'effet de poser une condition à la continuation du bail.

Je suis d'avis de maintenir le présent appel et de rejeter l'action avec dépens de toutes les Cours.

Appel maintenu avec dépens.

Procureur de la défenderesse, appelante: L. Remillard, Québec.

Procureurs de la demanderesse, intimée: Gagné, Trotier, Letarte, Brown et Larue, Québec.

HERMÉNÉGILDE TREMBLAY (*Demandeur*) ..... APPELANT;

1964
*Juin 3, 4
Juin 29

ET

SA MAJESTÉ LA REINE (*Défenderesse*) ....INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Automobile—Collision—Commettant et préposé—Exécution des fonctions—Utilisation du véhicule pour aller prendre un repas—Code civil, art. 1054.

Un camion, propriété du Ministère des Terres et Forêts et conduit par un employé du ministère, vint en collision avec une automobile appartenant au demandeur. L'employé se dirigeait alors vers un hôtel pour y prendre son repas du soir. La preuve révèle que cet employé cumulait les fonctions de camionneur, garde-chasse, garde-pêche et garde-feu. Il logeait dans un établissement du gouvernement situé à l'entrée du Parc National. Il lui était loisible de prendre et il prenait habituellement ses repas, qui étaient payés par le ministère, à l'hôtel en question situé à un mille de son établissement. Il pouvait utiliser le camion pour s'y rendre plutôt que d'y aller à pied comme cela lui était arrivé. Il était en disponibilité vingt-quatre heures par jour pour répondre aux appels de son supérieur, advenant un incendie ou la nécessité d'une patrouille en forêt. Le soir de l'accident il venait de terminer son travail. L'action fut maintenue par le juge au procès. La Cour d'Appel jugea que l'employé n'était pas dans l'exécution des fonctions auxquelles il était employé et rejeta l'action. De là le pourvoi devant cette Cour.

Arrêt: L'appel doit être rejeté.

La question de savoir si, au moment où un préposé cause un fait dommageable, il est dans l'exécution des fonctions auxquelles il est employé en est une dont la détermination dépend des circonstances particulières à chaque cas. Rien dans la preuve n'indique que c'était pour revenir plus tôt à son poste que l'employé se servait du camion pour aller prendre ses repas. L'usage qu'il en avait était de l'accommodation. De plus il n'avait pas reçu d'ordre d'aller souper à l'hôtel, ni de prendre le camion pour s'y rendre, ni de faire ce trajet rapidement, ni d'être de retour à la barrière à une heure déterminée. Le fait qu'il devait être en disponibilité vingt-quatre heures par jour n'implique pas qu'il était vingt-quatre heures par jour dans l'exécution des fonctions auxquelles il était employé et qu'il ne lui était pas loisible de vaquer à des activités personnelles, telles que la nécessité d'aller prendre ses repas. Au moment de l'accident, il n'était donc pas dans l'exécution de ses fonctions.

*CORAM: Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux, Abbott et Hall.

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TREMBLAY v. LA REINE

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement de la Cour supérieure. Appel rejeté.

Pierre Côté et *Charles Tremblay,* pour le demandeur, appelant.

Pierre de Grandpré et *Pierre Marseille,* pour la défenderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Le 21 juin 1958, un samedi soir, vers 7:45 heures, une automobile appartenant à l'appelant et par lui conduite sur le boulevard Talbot, en direction sud-nord, soit vers Chicoutimi, vint en collision avec un camion, propriété du ministère des Terres et Forêts et alors conduit en direction nord-sud, par un employé du ministère, Marcellin Lachance. Cette collision se produisit à peu près en face de l'hôtel Trahan, sis à l'est du boulevard, où Lachance se dirigeait pour y prendre son repas du soir. Dans le résultat, l'appelant et son épouse qui l'accompagnait furent grièvement blessés et leur automobile virtuellement détruite.

Tremblay, tant personnellement qu'en sa qualité de chef de la communauté, s'adressa à Sa Majesté la reine aux droits de la province de Québec pour obtenir le paiement de tous les dommages encourus. Au soutien de sa demande, il allégua particulièrement que cet accident était exclusivement imputable à Lachance et que celui-ci était alors dans l'exercice de ses fonctions. Niées par l'intimé, ces prétentions furent accueillies par le Juge de la Cour supérieure qui fit droit à la demande de Tremblay.

Ce jugement fut porté en appel et infirmé par une décision unanime. La Cour du banc de la reine[1] jugea qu'en allant prendre son repas du soir, Lachance faisait exclusivement son affaire et qu'il n'était pas dans l'exécution des fonctions auxquelles il était employé. Ceci étant décisif du litige, la Cour n'eut pas à considérer si Lachance avait commis une faute causant, ou contribuant à causer, l'accident. De là le pourvoi à cette Cour.

[1] [1963] B.R. 650.

Dans ses raisons de jugement, le Juge en chef de la Cour du banc de la reine dispose de certains points préliminaires soulevés en appel par Tremblay et subséquemment abandonnés par celui-ci à l'audition devant nous. Sur le motif principal de la décision, M. le Juge en chef ainsi que M. le Juge Hyde concourent dans l'opinion exprimée par M. le Juge Rivard.

La question de savoir si, au moment où un préposé cause un fait dommageable, il est dans l'exécution des fonctions auxquelles il est employé, au sens que cette expression doit recevoir suivant le Droit civil du Québec, en est une dont la détermination dépend évidemment des circonstances particulières à chaque cause où la question se présente. Dans des notes très élaborées, M. le Juge Rivard fait une revue complète des faits et du droit. Je résume:— Lachance, employé du ministère, cumulait les fonctions de camionneur, garde-chasse, garde-pêche et garde-feu. Il logeait dans un établissement du gouvernement de la province, situé à la barrière de Stoneham, à l'entrée du Parc National. Il lui était loisible de prendre et il prenait habituellement ses repas, qui étaient payés par le ministère, à l'hôtel Trahan sis à un mille de cet établissement. Il pouvait utiliser le camion pour se rendre à l'hôtel Trahan plutôt que d'y aller à pied comme cela lui était arrivé. Aux termes de son engagement, il était en disponibilité vingt-quatre heures par jour pour répondre aux appels que Genest, son supérieur, pouvait lui adresser au poste de Stoneham, advenant un incendie ou la nécessité d'une patrouille en forêt. Ceci ne veut pas dire, cependant, comme l'a prétendu le procureur de l'appelant en invoquant un extrait du témoignage de Lachance, que ce dernier devait se tenir vingt-quatre heures par jour à la barrière de Stoneham. En témoignent le fait même qu'il devait s'en absenter pour aller prendre ses repas et l'emploi qu'il fit de tout son temps le jour même de l'accident. Presque toute la journée, ce jour-là, il avait été absent du poste où, en principe, on pouvait le rejoindre. Il avait utilisé le camion dans l'avant-midi pour transporter du gravier et, dans l'après-midi, pour ravitailler différents postes de garde-feu dans le Parc National. Vers les six heures et demie, il est sorti du bois et est revenu à la barrière. Son

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travail était terminé. Voici d'ailleurs comment lui-même s'en exprime:

Q. Vous avez expliqué que vous êtes sorti du bois, si vous voulez, je présume que ce chemin-là est dans le bois, quand vous allez porter aux postes de garde-feu, vous êtes sorti vers les sept heures moins le quart, six heures et demie?

R. Oui, monsieur.

Q. Vous avez expliqué que vous vous étiez en venu à la barrière de Stoneham et que vous vous étiez rapporté là, c'est là que vous aviez un poste où vous deviez vous rapporter?

R. Oui, monsieur.

Q. Et là à cet endroit-là, à la barrière de Stoneham, je comprends que votre travail était fini, là, vous n'aviez pas d'autre travail à faire le soir?

R. Non, on était juste disponible.

Q. Mais est-ce que l'on vous a dit: «Vous allez faire ci et ça?»

R. Non, monsieur.

Q. Vous n'aviez rien à faire?

R. Rien.

Q. Vous êtes donc allé souper, n'est-ce pas?

R. Oui, monsieur.

L'appelant a soumis qu'en utilisant le camion pour aller prendre son repas, Lachance pouvait revenir plus tôt à son poste et qu'il agissait ainsi plus adéquatement dans l'intérêt de son patron; il en déduit qu'il était alors dans l'exécution des fonctions auxquelles il était employé. Au regard des circonstances révélées par la preuve, cette prétention ne peut être retenue. Rien n'indique, en effet, que c'est pour revenir plus tôt au poste de Stoneham que Lachance se servait du camion pour aller prendre ses repas. L'usage qu'il en avait était de l'accommodation. De plus, comme le signale M. le Juge Rivard, Lachance n'avait pas reçu d'ordre d'aller souper à l'hôtel Trahan, ni de prendre le camion pour s'y rendre, ni faire se trajet rapidement, ni être de retour à la barrière à une heure déterminée. Le fait qu'il devait être en disponibilité vingt-quatre heures par jour pour répondre aux appels que pouvait lui faire Genest, advenant la déclaration d'un incendie ou la nécessité d'une patrouille en forêt, n'implique pas qu'il était vingt-quatre heures par jour dans l'exécution des fonctions auxquelles il était employé et qu'il ne lui était pas loisible de vaquer à des

activités personnelles—telle la nécessité d'aller prendre ses repas—n'entrant pas dans la sphère des fonctions à l'exécution desquelles il était employé.

En droit et sur la portée de l'art. 1054, M. le Juge Rivard réfère particulièrement aux arrêts de *Curley v. Latreille*[1], *The Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*[2], *Moreau v. Labelle*[3], *Eaton v. Moore*[4] et *Zambon Company Limited v. Schrivershof et al.*[5], et il note qu'en cette dernière cause on a reconnu que l'employé qui va prendre son repas agit pour lui-même, dans son intérêt, et que le fait qu'il utilise le véhicule de son employeur pour ce faire ne suffit pas *per se* pour conclure qu'il était alors dans l'exécution de ses fonctions. Le savant Juge fait de plus les distinctions qui s'imposent entre les circonstances propres à cette dernière cause et celles que nous trouvons en la présente.

Aussi bien, partageant les vues exprimées par M. le Juge Rivard, avec le concours de ses collègues, je dirais, comme la Cour du banc de la reine, qu'au moment de l'accident Lachance n'était pas dans l'exécution de ses fonctions.

Je rejetterais l'appel, avec dépens si réclamés.

Appel rejeté avec dépens si réclamés.

Procureurs du demandeur, appelant: Pratte, Côté & Tremblay, Québec.

Procureurs de la défenderesse, intimée: Létourneau, Stein, Johnston, Leahy, Marseille & Price, Québec.

1 (1920) 60 R.C.S. 131, 35 D.L.R. 461.
2 [1923] R.C.S. 414.
3 [1933] R.C.S. 201, [1934] 1 D.L.R. 137.
4 [1951] R.C.S. 470, 2 D.L.R. 529.
5 [1961] R.C.S. 291, 27 D.L.R. (2d) 336.

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*Feb. 27, 28
June 29

DAME THERESE RATTE (*Plaintiff*) ....APPELLANT;

AND

THEODORE PROVENCHER (*Defendant*) ..... RESPONDENT.

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

Motor vehicle—Collision—Credibility of witnesses—Expert evidence—Burden of proof—Preponderance of evidence—Finding of trial judge reversed by Court of Appeal.

As a result of the death of her husband in an accident involving his automobile and a truck driven by the defendant, the plaintiff was awarded damages by the trial judge. The only eyewitness to the accident was the defendant, and his account of what happened was vague and confused. Having refused to accept the defendant's evidence, the trial judge relied upon inferences drawn from the circumstances and upon theories advanced by two expert witnesses. The Court of Appeal held that the plaintiff had not satisfied the burden of proof which was hers and consequently set aside the judgment. The plaintiff appealed to this Court.

Held (Fauteux and Abbott JJ. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Taschereau C.J. and Cartwright and Spence JJ.: The duty of the Appeal Court was to consider whether the trial judge, who had the advantage of hearing and seeing the witnesses, had come to a conclusion which could not have been reached by a reasonable man. In civil proceedings, the party who has the burden of proof is not called upon to establish his allegations so rigorously as to leave no room for doubt. It is sufficient if he has produced such a preponderance of evidence as to show that the conclusion he sought to establish was the most probable of the possible views of the facts. In this case, the trial judge who had the advantage of hearing and seeing the witnesses and who carefully considered all the evidence, including the direct evidence of the defendant, the evidence as to the circumstances, and the opinion of the experts, had weighed the probabilities and had come to a conclusion which was a reasonable one.

Per Fauteux and Abbott JJ., *dissenting:* 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 was erroneous. This the appellant has failed to do.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judg-

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Spence JJ.

[1] [1961] Que. Q.B. 180.

ment of Lizotte J. Appeal allowed, Fauteux and Abbott JJ, dissenting.

Perrault Casgrain, Q.C., for the plaintiff, appellant.

Jacques de Billy, Q.C., for the defendant, respondent.

The judgment of Taschereau C.J. and Cartwright and Spence JJ. was delivered by

SPENCE J.:—In this case two actions were tried together; the action of *Provencher v. Lavoie* and the present action. Lizotte J. gave reasons in very considerable detail in the Provencher v. Lavoie action. In that action, Provencher as plaintiff had the onus and Lizotte J. said in the course of his judgment:

> D'ailleurs, dans la présente cause, le poids de la preuve était à la charge du demandeur, qui n'a certainement pas supporté son fardeau.

Lizotte J. then then turned to give judgment in the action of *Ratte v. Provencher,* the subject of this appeal. The largest part of his brief reasons therein are concerned with the quantum of damages but the learned trial judge did say:

> Pour les raisons données et les motifs exprimés par le jugement dans la cause 18,503 C.S.R. Théodore Provencher vs Les Héritiers collectivement de feu Blaise Lavoie, la Cour en vient à la conclusion que le défendeur est responsable des dommages éprouvés par la demanderesse.

Then, lest it be thought that the learned trial judge had failed to note that the onus had shifted in this action to the present appellant, he continued:

> Il est vrai qu'ici le poids de la preuve est déplacé, mais la Cour est convaincue que la preuve faite est amplement suffisante pour tenir le défendeur responsable.

Thereby demonstrating that in the paragraph first quoted the learned trial judge had relied on Provencher's failure to discharge the onus in the action in which he was plaintiff as only one of the reasons for dismissing the action and that he was of the opinion that the appellant, here Ratté, in her action, had discharged this burden.

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There had been only one eye-witness to the accident which caused the death of the late Lavoie, the defendant Provencher. The learned trial judge, after carefully reviewing the latter's evidence and quoting from it extensively, came to the conclusion that he could accept it only in so far as it established Provencher's nervousness, vagueness of memory and inability to explain. The learned trial judge was of the opinion that at a critical time in the accident,

> A ce moment, il avait perdu le contrôle de sa voiture et même semble-t-il le contrôle de son esprit.

a definite finding of an act of negligence on Provencher's part. In so proceeding, the learned trial judge was taking advantage of the opportunity to hear and consider the witnesses and decide on the credibility of their evidence.

The learned trial judge then turned to the two remaining parts of the evidence, i.e., the testimony of witnesses as to their investigations on the scene and the area surrounding it as well as the vehicles, and secondly, evidence given by the experts, Dr. Gravel and Mr. Royer, for the plaintiff and the defendant, respectively.

The judgment of the Court of Queen's Bench (Appeal Side)[1] appears to proceed on the basis that neither of these witnesses having given evidence from their own observation but merely from what they had learned, and their evidence concerning inferences from such facts and the theories they developed from them, the Court in Appeal was as well qualified to decide whether it would accept such theories as was the learned trial judge. The effect of the two written judgments in the Court of Queen's Bench (Appeal Side) would seem to be summarized in the statement of Montgomery J.:

> The burden of proof was upon Respondent, and while it may well be that the learned trial judge was correct in dismissing Appellant's action, where the burden of proof was upon him, I am of the opinion that Respondent's action should have been dismissed for lack of sufficient proof that some fault of Appellant caused Lavoie's automobile to strike the guard rail.

I have come to the conclusion that the judgment of the Court of Appeal of Queen's Bench is in error for these reasons:

Firstly, the learned trial judge heard much evidence of the facts in addition to the expert testimony, weighed it

[1] [1961] Que. Q.B. 180.

and assessed both its credibility and its probative value. Some of the facts, the learned trial judge regarded as most important; for example, the evidence of the various witnesses as to Provencher's speed when passing through the Village of Ste. Angele. It should be noted they not only gave evidence as to Provencher's speed but also that they noticed no automobile resembling that driven by the late Lavoie following Provencher shortly behind him. Therefore, in all probability, and that is sufficient at any rate in a civil action, Lavoie's vehicle was in front of Provencher's and could not have been attempting to pass Provencher's at the time of the accident. Again, the learned trial judge was called upon to consider the evidence of Constable Levesque as given at the trial in reference to the tire marks crossing the centre line of the road, south of the scene of the impact, and to contrast it with the constable's different evidence at the coroner's inquest. Indeed, the evidence of the defendant Provencher given at trial also differed from his evidence at the coroner's inquest. Much of the evidence at trial as to circumstances was such that it could only be appreciated and assessed properly by the trial judge who heard it and his finding thereon should not be interfered with.

It is most significant to me that the learned trial judge first cited and analyzed this evidence as to circumstances in his reasons, only then turned to the consideration of the evidence given by the expert witnesses and concluded that the theory of Dr. Gravel coincided exactly with his own view as to what occurred. I am of the opinion that the learned trial judge would have arrived at the same conclusion if he had not had the advantage of Dr. Gravel's evidence.

Secondly, one of the expert witnesses, Dr. Gravel, whose theories were accepted by the learned trial judge, had made five different inspections of the scene of the accident. The first of these was on the 14th or 15th of October 1955, only about two weeks after the accident, when he had the opportunity to personally observe many of the signs of the accident at the site and to inspect both vehicles at a nearby garage. Dr. Gravel was therefore in a position to give evidence upon what he actually had seen himself and to use

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his accurate first-hand knowledge of these observations to evolve his theory. Mr. Royer, the expert witness called by the defendant, on the other hand, went to the bridge site but he could not say when and the learned trial judge found:

> Sur ce pont, on lui a dit qu'il était arrivé un accident, mais il n'a vérifié aucun vestige, aucune trace, n'a pas préparé de plan, ni pris de mesures, contrairement à ce qu'a fait le docteur Gravel.

It would appear that Mr. Royer never inspected the vehicles. Under these circumstances, it is not surprising that the learned trial judge preferred to accept the evidence of Dr. Gravel whose testimony he described in these words:

> La cour doit admettre qu'elle a été vivement impressionnée par le témoignage de cet expert qui n'affirme que ce qu'il peut jurer, qui est bien prudent dans ses réponses, qui semble ne montrer aucun zèle, qui possède certainement une belle intelligence et exprime son opinion que sur ce qu'il a pu constater lui-même en examinant les traces, les vestiges, etc.

As an illustration of the much more convincing character of the evidence of Dr. Gravel, there may be considered the critical issue of whether Provencher overtook the late Lavoie from the rear and in a delayed attempt to avoid his vehicle by turning out and passing it to the left struck the left rear corner of that vehicle or, whether on the other hand, the late Lavoie overtook and passed Provencher's truck, and in passing him or turning in to the right thereby clipped the left front corner of the Provencher truck with the right rear fender or bumper of his own vehicle. Upon that issue, Dr. Gravel gave evidence after inspecting both vehicles and determining in his opinion that the impact on the left rear corner of the Plymouth, the late Lavoie's automobile, was a heavy one. On either the theory advanced by Dr. Gravel or that advanced by Mr. Royer there had been no other heavy impact directly on the rear left corner of the Lavoie vehicle. Mr. Royer, on the other hand, merely from an inspection of the photograph, exhibit D-2, gave as his opinion that the impact on the left rear corner of the Lavoie automobile was too light to have driven it into the bridge pillar. Again, Mr. Royer refused to accept Dr. Gravel's theory that the impression of the front of the Provencher truck on the right side of the Lavoie automobile

was made when the latter swung in an arc to the left after its right front corner had been driven into the pillar by the impact of the truck upon its left rear corner. Mr. Royer was of the opinion that if the impact had been in that fashion the Provencher truck would have continued past the Lavoie automobile on its left and never had an opportunity to mark the right side of the vehicle. It would seem highly unlikely that the Provencher truck could possibly have squeezed past the left side of the Lavoie car on that bridge in the fraction of a second available after the car was driven forward into the pillar and before it pivoted to the left in the direct path of the truck.

These illustrations I have cited, and they may be multiplied, to demonstrate that the learned trial judge had a perfectly sound basis for accepting the explanation of Dr. Gravel. Indeed when, as he stated, the learned trial judge had, apart from Dr. Gravel's opinion, come to the same conclusion such considerations must have influenced him.

It is true that the evidence adduced by the appellant was far from complete and irrefutable. As I have noted above, Montgomery J. in the Court of Queen's Bench (Appeal Side) found it did not discharge the onus on the plaintiff.

Hyde J., in the same court, said:

> Much in the reconstruction by Dr. Gravel may be sound but it does not satisfy me on the vital question in this case. I feel in no way bound to accept it because the Court below did.

In my view, with respect, the learned judges of the Court of Queen's Bench (Appeal Side) applied to the proof a standard beyond that required in a civil action. That standard would seem to be exactly the same in civil actions in Quebec as it is in common law jurisdictions and was put simply and clearly by Duff J., as he then was, in *Clark v. The King*[1]:

> Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to shew that the conclusion

[1] (1921), 61 S.C.R. 608 at 616, 35 C.C.C. 261, 59 D.L.R. 121.

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he seeks to establish is substantially the most probable of the possible views of the facts.

In *Rousseau v. Bennett*[1], the present Chief Justice of this Court, said at p. 92:

Mais la preuve peut établir des présomptions de faits et l'article 1242 du *Code Civil* nous dit comment elles doivent être appréciées. Cet article se lit ainsi:—

«Les présomptions qui ne sont pas établies par la loi sont abandonnées à la discrétion et au jugement du tribunal.»

Ce que la loi a voulu c'est que ces présomptions soient laissées à la discrétion du juge qui voit et entend les témoins, et pour qu'une Cour d'Appel intervienne dans l'exercice de cette discrétion, il faut nécessairement trouver une erreur de la part du juge au procès, erreur qu'on ne trouve pas dans le cas présent.

L'honorable Juge de première instance a jugé suivant la balance des probabilités, ce qui est la preuve requise en matière civile, et je crois que le jugement de la Cour d'Appel est erroné en droit quand cette dernière conclut qu'il n'y a pas de présomption *tellement forte qu'elle exclut toute autre possibilité*. Ce n'est pas ce que la loi requiert. Il y a une distinction fondamentale qu'il faut faire entre le droit criminel et le droit civil. En matière criminelle, la Couronne doit toujours prouver la culpabilité de l'accusé *au delà d'un doute raisonnable*. En matière civile, *la balance des probabilités est le facteur* décisif.

* * *

Les tribunaux doivent souvent agir en pesant les probabilités. Pratiquement rien ne peut être mathématiquement prouvé. (*Jérôme v. Prudential Insurance Co. of America* ((1939) 6 Ins. L.R. 59 at 60), *Richard Evans & Co. Ltd. v. Astley* ((1911) A.C. 674 at 678), *New York Life Insurance Co. v. Schlitt* ((1945) S.C.R. 289 at 300), *Doe D. Devine v. Wilson* (10 Moore P.C. 502 at 532)).

In *Champagne v. Labrie*[2], Rivard J. said at p. 487:

Les présomptions qui résultent des faits sont laissées à l'appréciation du tribunal, à sa discrétion et à son jugement (*C.C., art. 1238, 1242*).

Il n'est pas besoin de rappeler que notre Code civil n'impose pas au tribunal les directives que prescrit le Code Napoléon dans l'exercice de la discrétion que la loi lui laisse en cette matière (*Code Napoléon, art. 1353*).

* * *

Je crois que le premier juge en appréciant cette preuve de circonstances a décidé suivant la prépondérance des probabilités et qu'il n'y a pas lieu pour cette Cour d'intervenir sur ce point.

To balance these probabilities, the trial judge may draw inferences: *Simpson v. London, Midland and Scottish Rlwy. Co.*[3], *per* Viscount Dunedin at p. 357.

[1] [1956] S.C.R. 89.

[2] [1961] Que. Q.B. 481.

[3] [1931] A.C. 351.

The duty of the appellate court was put by Davis J. in *Danley v. C.P.R.*[1], quoting Lord Shaw in *Kerr v. Ayr Steam Shipping Co. Ltd.*[2]:

> is a very different, a strikingly different, one. It is to consider whether the arbitrator appointed to be the judge of the facts and having the advantage of hearing and seeing the witnesses, has come to a conclusion, which conclusion could not have been reached by a reasonable man.

For the reasons which I have outlined, I am of the opinion that the learned trial judge who had the advantage of hearing and seeing the witnesses and who carefully considered all the evidence, including the direct evidence of the respondent, the evidence as to the circumstances, and the opinion of the experts, has weighed the probabilities and has come to a conclusion which is a reasonable one. I would, therefore, allow the appeal with costs and restore the judgment of Lizotte J.

The judgment of Fauteux and Abbott JJ. was delivered by

ABBOTT J. (*dissenting*):—This action arose out of a collision between two automobiles which occurred on September 30, 1955, in which the driver of one of the vehicles, the husband of the appellant, was killed. The facts are fully set out in the judgments below and in the reasons of my brother Spence, which I have had the advantage of considering.

The only surviving witness of the accident was the respondent Provencher, the driver of one of the cars involved. The learned trial judge found his evidence vague and confusing as to what happened at the time of the collision and refused to accept it. In maintaining the appellant's action therefore, he relied upon inferences drawn from the circumstances surrounding the accident and upon theories as to how it happened, advanced by two expert witnesses. That judgment was unanimously reversed by the Court of Queen's Bench.[3]

The burden of proving negligence was upon the appellant, and the learned judges in the Court below refused to

[1] [1940] S.C.R. 290 at 297, 51 C.R.T.C. 41, 2 D.L.R. 145.
[2] [1915] A.C. 217 at 232.
[3] [1961] Que. Q.B. 180.

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accept the inferences made by the learned trial judge as to the manner in which the accident occurred.

It is well settled, of course, 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. *Demers v. Montreal Steam Laundry Company*[1]; *Pelletier v. Shykofsky*[2].

The appellant has failed to satisfy me that the judgment of the Court below is erroneous and I would therefore dismiss the appeal with costs.

Appeal allowed with costs, FAUTEUX *and* ABBOTT JJ. *dissenting.*

Attorneys for the plaintiff, appellant: Casgrain & Casgrain, Rimouski.

Attorneys for the defendant, respondent: Gagnon, de Billy, Cantin & Dionne, Quebec.

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*June 1
June 29

SAINT JOHN TUG BOAT CO. LTD. (*Plaintiff*) ..... APPELLANT;

AND

IRVING REFINING LTD. (*Defendant*) ...RESPONDENT.

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

Contracts—Acceptance—Letter proposing terms for rental of tug—Verbal arrangements made for services and at rates set out in letter—Continuation of services beyond expressed period—Whether agreement implied from defendant's acquiescence.

The defendant operated an oil refinery at Saint John, New Brunswick, and required tugs to guide incoming tankers into the harbour. The plaintiff company claimed that a letter sent by it to Kent Lines Ltd., a shipping firm which was owned or controlled by the same interests as the

*PRESENT: Cartwright, Abbott, Ritchie, Hall and Spence JJ.

[1] (1897), 27 S.C.R. 537, 5 Que. Q.B. 191.
[2] [1957] S.C.R. 635.

defendant, contained the terms under which the plaintiff's tug *Ocean Rockswift* was made available for use by the defendant. There was no written acceptance of this offer, but it was not disputed that the defendant made verbal arrangements for the rental of the tug for a period of one month commencing June 13, 1961, for the services and at the rates set out in the letter, nor was it disputed that this arrangement was expressly extended twice, each time for a period of two weeks. Although no formal authorization was made for any further extension, the services of the tug continued to be employed by the defendant, and, apart from a complaint about handling charges, the defendant gave no indication to the plaintiff as to any change in the arrangements for the tug's employment or the *per diem* charges being made for its services until late in February 1962. The plaintiff's monthly invoices since July 1961 remained unpaid and the defendant denied liability for all charges after the middle of August in that year.

The plaintiff sued for services rendered and was successful at trial. The Court of Appeal allowed an appeal and varied the trial judge's assessment of the plaintiff's damages by reducing considerably the amount thereof on the ground that the liability of the defendant for the rental of the plaintiff's tug on a stand-by basis was limited to the period extending from June 12 to December 15, 1961 (the end of the port summer season) instead of continuing on the same basis until February 28, 1962, as found by the trial judge. The plaintiff appealed and the defendant cross-appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored; the cross-appeal should be dismissed.

The defendant must be taken to have known that the tug was being kept standing by for its use until the end of February 1962, and that the plaintiff expected to be paid for this special service at the *per diem* rate specified in the monthly invoices. The matter drifted from day to day without any move being made on the defendant's behalf to either dispense with the services or complain about the charge. It was not unreasonable to draw the conclusion from this course of conduct that the defendant was accepting the continuing special services on the proposed terms. The contract was concluded by the defendant's own acquiescence.

The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfilment of the contract is an objective and not a subjective one; the intention to be attributed to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind. However, mere failure to disown responsibility to pay compensation for services rendered is not of itself always enough to bind the person who has the benefit of those services. The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied. *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, applied; *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, referred to.

APPEAL and cross-appeal from a judgment of the Supreme Court of New Brunswick, Appeal Division, allowing an appeal from a judgment of Anglin J. Appeal allowed and cross-appeal dismissed.

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Paul Barry, Q.C., for the plaintiff, appellant.

A. B. Gilbert, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick whereby that Court allowed an appeal from the judgment of Anglin J., rendered at trial, and varied his assessment of the appellant's damages by reducing the amount thereof from $79,639 to $49,944, on the ground that the liability of the respondent for the rental of the appellant's tug on a "stand-by" basis was limited to a period extending from June 12 to December 15, 1961, instead of continuing on the same basis until February 28, 1962, as found by the learned trial judge.

Since early in 1960, the respondent has operated an oil refinery bordering on the harbour of Saint John, New Brunswick, at Courtenay Bay, and as a necessary incident of this operation it is supplied with crude oil brought by large tankers which are owned or chartered by the California Shipping Company, a corporation with its head office in the United States of America, which was, at all times material hereto, represented at Saint John by Kent Lines Limited, a shipping firm which was owned or controlled by the same interests as the respondent company.

It was important to the respondent that tugs should be available when required to guide the incoming tankers into the harbour as any delay whilst they waited in the harbour approaches involved demurrage charges and to meet this situation, Mr. K. C. Irving, the chairman of the board of directors of the respondent company and president of Kent Lines Limited, had one of the other companies in which he was interested purchase tugs to do this work. Unfortunately, however, from the time when the large tankers first started servicing the refinery in April 1960, up to and including the date of the trial, difficulty was encountered in having these tugs used by the Saint John Harbour pilots and it accordingly became necessary to employ the services of the appellant's tug boats which were the only other such boats available in the harbour.

On March 24, 1961, no firm arrangements having been made as to the employment of these tugs by the respondent during the forthcoming months, the Saint John Tug Boat Company Limited wrote to Kent Lines Limited in the following terms:

Dear Sirs:

This is to advise you that unless some special arrangement is made, on and after early in April when the winter port season closes here, we will only have two tug boats available for assisting in docking and undocking ships in St. John Harbour.

If we do not hear from you we will assume that you are making arrangements elsewhere for any additional tugs that you may require.

On the same day, C. N. Wilson, the president of the appellant company, wrote to Mr. Irving, in part, as follows:

My dear Kenneth:

I am enclosing herewith copy of letter which we are sending to Kent Line Ltd. concerning tug services in St. John Harbour this coming summer.

* * *

We do appreciate the work we have received from Kent Line Ltd. and thought it was only fair to advise both them and you of our plans for this coming summer. If more than two tugs are required from us during the coming season, we feel that we could arrange to provide them if we are advised to this effect now. However special rates will need to be agreed upon as it would be absolutely impossible for us to provide them at the present tariff rates.

This was followed by a letter of March 27 addressed to Kent Lines Limited which was also brought to the attention of K. C. Irving and which is now claimed as containing the terms under which the appellant's tug *Ocean Rockswift* was made available to the respondent during the period covered by the statement of claim. That letter reads:

Gentlemen:

With further reference to our letter of the 24th inst. and our telephone conversation of this morning, we would say that as it looks now, we will probably be keeping available for assisting in docking and undocking ships in St. John Harbour this coming summer, the tugs "OCEAN HAWK 11", 900 h.p. Diesel; and the "OCEAN WEKA", 400 h.p. Diesel.

We could make either the tug "OCEAN ROCKSWIFT", Steam, 1,000 h.p. and/or the tug "OCEAN OSPREY", Steam, 1,000 h.p. available for your large tankers at a cost per day each of $450.00. This of course would take in Sundays and holidays as well as the ordinary working day and would be for all days during the month regardless of whether the tug was working or not.

If at any time, more than two tugs were required and the "ROCKSWIFT" and/or the "OSPREY" were used on work other than large

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tankers, we would give you credit at the tariff rate on the earnings of this tug, less 10% for handling.

As we have other enquiries concerning the "OCEAN OSPREY" and the "OCEAN ROCKSWIFT", we would appreciate your early decision as to whether or not the above is of interest to you.

There was no written acceptance of this offer, but it is not disputed that the respondent made verbal arrangements for the rental of the *Ocean Rockswift* for a period of one month commencing June 13, 1961, for the services and at the rates set out in the letter of March 27, nor is it disputed that this arrangement was expressly extended twice, each time for a period of two weeks, and it appears to be agreed also that these extensions were intended to cover the time until the arrival of an Irving tug which was expected to be available sometime in the month of August. There is evidence also that Mr. L. L. Henning, the president of the respondent company, was succeeded in this position by a Mr. W. R. Forsythe in August 1961, and that before leaving Saint John he had told the president of the appellant company "that he should for any further extensions contact Mr. Forsythe". Neither Mr. Forsythe nor any other officer of the respondent formally authorized any further extension of the agreement, but the services of the *Ocean Rockswift* continued to be employed by the respondent until late in February 1962, and accounts for these services were rendered by the appellant to the respondent each month, up to and including February 28, 1962. Each of these accounts carried the heading: "To Rental *'Ocean Rockswift'* As Per our letter of March 27th, 1961" and disclosed that the rental was $450 per day "Less Credit Note Attached".

The effect of this method of billing was that the respondent company was charged $450 per day for the privilege of having this tug "standing by" and that the normal tariff rate paid by other companies for the tug's services was deducted from the $450, but this deduction was reduced by 10 per cent to defray the appellant's "handling charges". The way this worked out in respect of the larger tankers which were escorted to the refinery was that the normal tariff rate for each such tanker was paid by Kent Lines Limited, and this amount was duly deducted from the $450 daily "stand-by" charge which was billed to the respondent. When the respondent found that the appellant was deduct-

ing the 10 per cent for handling charges in respect of these tankers, it protested and in giving judgment at the trial the learned trial judge, in my opinion quite rightly, excluded this charge in respect of such tankers from the total bill.

There does not appear to have been any difference in the use which the respondent made of the *Ocean Rockswift* after July 31, 1961, nor, apart from its complaint about the 10 per cent handling charge, did the respondent give any indication to the appellant as to any change in the arrangements for the tug's employment or the *per diem* charges being made for its services until late in February 1962, but all the appellant's invoices for the services of the tug since July 1961, remain unpaid, and the respondent now denies liability for all charges after the middle of August in that year.

In finding the respondent liable for payment of these invoices up to and including February 28 (less the 10 per cent adjustment above referred to) the learned trial judge stated:

> Although the plaintiff over the period in question was pressing Mr. Forsythe for payment, there was no written or verbal notification to it that the defendant refused to accept liability as invoiced for the rental of the *Rockswift*. Even in the latter part of February, 1962, when Mr. Forsythe was invited by Mr. Keith Wilson "to take her off charter", Mr. Forsythe said he would have to talk to Mr. Irving first.
>
> I find that the defendant knew that the *Ocean Rockswift* continued after August 1, 1961, in commission on call to assist and did assist the large tankers during the period in question, and that the plaintiff expected payment on a rental basis for its being kept in commission. The defendant had ample opportunity to notify the plaintiff that it did not accept any liability on that basis, but did not do so. The defendant acquiesced in the tug being so employed. It had and took the benefit of such stand-by service and the probable avoidance of demurrage charges.

In the course of his reasons for judgment rendered on behalf of the Appeal Division, Chief Justice McNair, after quoting at length from the letter of March 24, 1961, went on to say:

> It is abundantly clear, that, throughout their negotiations the parties contemplated the special arrangements for the services of the *Ocean Rockswift* on a stand-by footing was to meet conditions at the port during its summer season when tugs available in the harbour would be at a minimum. Such arrangement had no relation to the port's winter season when quite different conditions as to tug availability would prevail.
>
> It follows that the plaintiff is entitled to recover under the special contract for the period from June 12 to December 15, 1961, both dates inclusive.

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It was contended by way of cross-appeal that the contract for hire of the tug came to an end on August 15, this being the expiry date of the second extension of the 30-day period for which it had originally been hired on June 12. In the alternative, respondent's counsel based the cross-appeal on the contention that the hiring was for the "summer" as a season of the year and therefore came to an end on September 21, 1961. In the further alternative, it was contended that as found by the Appeal Division, the arrangement contemplated by the parties could not be construed as extending the period of hire after the end of the "port summer season" (*i.e.* December 15, 1961).

These submissions are based in large degree on the wording of the third paragraph of the statement of claim and the particulars thereof which were furnished pursuant to demand. Paragraph 3 of the statement of claim reads as follows:

> The Plaintiff Company offered to provide tug services on certain terms and conditions which terms and conditions were accepted by the Defendant Company.

The particulars of this paragraph contain the following statements:

> The "terms and conditions" referred to in the Statement of Claim herein are set forth in a letter to Kent Lines Limited dated March 27, 1961, from the Plaintiff, which letter was the result of a telephone conversation with Kent Lines Limited following letters of March 24, 1961 to K. C. Irving and Kent Lines Limited. On April 1, 1961, K. C. Irving acknowledged receipt of these various letters.
>
> The acceptance of the offer of March 27, 1961, by the Defendant was made by Mr. Henning, an officer of the Defendant Company, on or about June 12, 1961, in a telephone conversation with Keith M. Wilson, a senior managing officer of the Plaintiff. "The terms of the said offer were told to Henning and were accepted by Henning".

The conclusion which is advanced on behalf of the respondent in reliance on these particulars, is summarized in the following paragraphs taken from the factum filed on its behalf:

> It is clear from the above that the Appellant's claim was upon an express contract based upon the letters which refer to "this coming summer" and not upon an implied contract as held by the trial judge.
>
> It is respectfully submitted that the judgment of the learned trial judge cannot be supported because he purports to imply a contract to February 28, 1962 notwithstanding the use of the word "summer" as a limitation (by the appellant) to the hiring. There was an express contract only and no contract existed beyond the summer.

The contract accepted by Mr. Henning on June 12, 1961, which is recited in the particulars was not a contract for "this coming summer" but one for a period of thirty days on the "terms and conditions" as to the nature and costs of services which are set forth in the letter of March 27, and in my view the reference in the particulars to the "terms and conditions" set forth in that letter is to be similarly construed not as incorporating in the pleadings a contract for rental during "this coming summer", but rather as alleging that the appellant offered to provide the tug's services during the months specified in the statement of claim for the same purpose and at the same *per diem* rate as it had been theretofore employed.

If it were assumed, as respondent's counsel contends, that it was the intention and understanding of both parties that the offer of hire should come to an end on August 15, 1961, or that its life was in any event limited to September 21 of that year, then it would appear to follow that in making the "stand-by" services of the tug available after that date the appellant was making a new offer and the invoices make it clear that it was an offer for the same services at the same rate. The same considerations would apply with equal force to the services rendered after December 15 if it were assumed, as the Appeal Division found, that the original offer did not extend beyond that date.

The question to be determined on this appeal is whether or not the respondent's course of conduct during the months in question constituted a continuing acceptance of these offers so as to give rise to a binding contract to pay for the "stand-by" services of the tug at the rate specified in the invoices furnished by the appellant.

The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfilment of the contract, is made the subject of comment in Anson on Contracts, 21st ed., p. 28, where it is said:

> The test of such a contract is an objective and not a subjective one, that is to say, the intention which the law will attribute to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind. So if A allows B to work for him under such circumstances that no reasonable man would suppose that B meant to do the work for nothing, A will be liable to pay for it. The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance.

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Ritchie J.

In this connection reference is frequently made to the following statement contained in the judgment of Lord Blackburn in *Smith v. Hughes*[1], which I adopt as a proper test under the present circumstances:

> If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

The American authorities on the same subject are well summarized in Williston on Contracts, 3rd ed., vol. I, para. 91A where it is said:

> Silence may be so deceptive that it may become necessary for one who receives beneficial services to speak in order to escape the inference of a promise to pay for them. It is immaterial in this connection whether the services are requested and the silence relates merely to an undertaking to pay for them, or whether the services are rendered without a preliminary request but with knowledge on the part of the person receiving them that they are rendered with the expectation of payment. In either case, the ordinary implication is that the services are to be paid for at their fair value, or at the offered price, if that is known to the offeree before he accepts them.

It must be appreciated that mere failure to disown responsibilty to pay compensation for services rendered is not of itself always enough to bind the person who has had the benefit of those services. The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied.

As was observed by Bowen L.J., in *Falcke v. Scottish Imperial Insurance Company*[2]:

> Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.

Like the learned trial judge, however, I would adopt the following excerpt from Smith's Leading Cases, 13th ed. at p. 156 where it is said:

> But if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done: and that will import a promise to pay for it.

[1] (1871), L.R. 6 Q.B. 597 at 607. [2] (1886), 34 Ch. D. 234 at 248.

In the present case the ordinary tariff rates for the tug's normal services were being paid by Kent Lines Limited, a company closely associated with the respondent, and it is perhaps for this reason that, in the absence of any formal agreement fixing any additional rate, the respondent took no steps to either pay for or dispense with the "stand-by" services which continued to be rendered for its benefit until February 1962.

The matter was put clearly and frankly by Mr. K. C. Irving himself when he was asked:

> If there was a misunderstanding, it could have been cleared right up in September, couldn't it?

and he replied:

> Well it seemed so obvious to me, yes, that there was no arrangement . . . Mr. Forsythe it came to his attention, and he just thought there was no agreement . . . He had no record of anything and he just—I don't know how it drifted or what happened.

Neither the absence of an express agreement nor the fact that the respondent did not consider itself liable to pay for the "stand-by" services after July 31 can, however, be treated as determining the issue raised by this appeal. The question is not whether the appellant is entitled to recover from the respondent under the terms of an express or recorded agreement, but rather whether an agreement is to be implied from the respondent's acquiescence in the tug's services being supplied for its benefit during the period for which the claim is now made.

In my view the respondent must be taken to have known that the *Ocean Rockswift* was being kept "standing by" for its use until the end of February 1962, and to have known also that the appellant expected to be paid for this special service at the *per diem* rate specified in the monthly invoices which were furnished to it, but the matter drifted from day to day without any move being made on the respondent's behalf to either dispense with the service or complain about the charge. I do not think it was unreasonable to draw the conclusion from this course of conduct that the respondent was accepting the continuing special services on the terms proposed in the March letters and the appellant is accordingly entitled to recover the sums charged in the invoices up to and including the month of February 1962 (subject to the adjustment as to handling

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SAINT JOHN TUG BOAT CO. LTD. v. IRVING REFINING LTD.

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charges) as being money due pursuant to a contract which was concluded by the respondent's own acquiescence.

For these reasons I would allow this appeal, set aside the judgment of the Appeal Division of the Supreme Court of New Brunswick and restore the judgment of the learned trial judge. The appellant will have its costs of the appeal in this Court and in the Appeal Division. The cross-appeal is dismissed without costs.

Appeal allowed and judgment at trial restored with costs; cross-appeal dismissed without costs.

Solicitor for the plaintiff, appellant: J. Paul Barry, Saint John.

Solicitors for the defendant, respondent: Gilbert, McGloan & Gillis, Saint John.

FREDERICK WILMER FAWCETT .....APPELLANT;

1964

*May 6
June 10

AND

THE ATTORNEY-GENERAL FOR ONTARIO ..... } RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA ..... } INTERVENER.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Habeas corpus—Constitutional law—Appellant committed to mental hospital for examination—Certification—Whether relevant sections of The Mental Hospitals Act authorized appellant's confinement—Whether ultra vires of the Legislature—The Mental Hospitals Act, R.S.O. 1960, c. 236—Criminal Code, 1953-54 (Can.), c. 51, s. 524(1a) [*enacted 1960-61, c. 43, s. 22*].

On October 18, 1961, the appellant, as an accused person, was remanded by a magistrate to a mental hospital for a period not exceeding thirty days for examination, pursuant to s. 524(1*a*) of the *Criminal Code*. On November 16, 1961, two medical practitioners certified that the appellant was mentally ill and a proper person to be confined in an Ontario Hospital; he was confined continuously thereafter as a certificated patient pursuant to the provisions of *The Mental Hospitals Act*, R.S.O. 1960, c. 236. The appellant applied for a writ of *habeas corpus*, and following the trial of an issue, he was found to be mentally ill and dangerous to be at large. The trial judge having decided that his confinement was according to law dismissed his application. An appeal from the trial judgment was dismissed by the Court of Appeal and the appellant then appealed to this Court.

Held: The appeal should be dismissed.

The magistrate derived the power to make the order requiring the superintendent of the hospital to admit and detain the appellant from s. 524(1*a*) of the *Criminal Code*; the terms of s. 38 of *The Mental Hospitals Act* obligated the superintendent to admit the appellant. The appellant "was admitted under section 38" within the meaning of that expression as used in s. 27 of the Act, the section under which the respondent sought to support the confinement of the appellant.

The Mental Hospitals Act was legislation in relation to the subject-matter described in head 7 of s. 92 of the *British North America Act* and not in relation to criminal procedure. The relevant provisions of the Code and those of the Act were complementary to, and not in conflict with, each other. Accordingly, the relevant sections of *The Mental Hospitals Act* were *intra vires* of the Legislature.

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*PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.

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FAWCETT v. ATTORNEY-GENERAL FOR ONTARIO

APPEAL from an order of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Spence J. Appeal dismissed.

W. B. Williston, Q.C., and *John Sopinka*, for the appellant.

R. A. Cormack, Q.C., and *E. G. Hachborn*, for the respondent.

T. D. MacDonald, Q.C., for the Attorney General of Canada.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from an order of the Court of Appeal for Ontario[1], made on September 16, 1963, dismissing an appeal from a judgment of Spence J. pronounced on December 17, 1962, following the trial of an issue, finding the appellant mentally ill and dangerous to be at large, dismissing his application for a writ of *habeas corpus* and deciding that his confinement was according to law.

The appellant is a farmer; prior to his confinement he resided on a farm in the Township of Euphrasia in the County of Grey. On October 18, 1961, the appellant appeared before His Worship Magistrate Stewart at Meaford. The appellant at that time was in custody charged with the following offences: (i) that on August 28, 1961, he did without lawful excuse point a firearm at George Seabrook contrary to s. 86 of the *Criminal Code*; (ii) that on August 28, 1961, he did wilfully and without legal justification commit damage to certain personal property under the value of $50 belonging to Stuart Howey, to wit: an automobile tire contrary to s. 373(1) of the *Criminal Code*; (iii) that on August 28, 1961, he did strike George Seabrook with his arm and thereby commit a common assault contrary to s. 231(1) of the *Criminal Code*; (iv) that on September 18, 1961, he did unlawfully assault W. J. E. Ferguson a peace officer engaged in the execution of his duty, contrary to s. 232(2)(*a*) of the *Criminal Code*; (v) that on September 18, 1961, he did unlawfully and wilfully obstruct W. J. E. Ferguson, a peace officer in the

[1] [1964] 1 C.C.C. 164.

execution of his duty, contrary to s. 110(*a*) of the *Criminal Code*; and (vi) that on September 10, 1961, he did unlawfully drive a motor vehicle upon a highway carelessly contrary to s. 60 of *The Highway Traffic Act* of Ontario. All of these offences were charged as having been committed in the Township of Euphrasia.

On each of the informations relating to the first five of the charges set out in the preceding paragraph there appears the following endorsement:

October 18, 1961.

After hearing medical evidence of Dr. M. D. Tuchtie, Dr. Ronald E. Stokes, Dr. J. Moldofsky, and Dr. Alex. S. Szatmari, and at the request of the Crown Attorney, I remand Fred Fawcett for 30 days to The Ontario Hospital at Penetanguishene, Ontario, for observation and treatment, under the authority vested in me under Section 451-c(al) C.C.C., until Nov. 17/61 at 10 a.m.

(Sgd.) Alan S. Stewart
P.M.

Section 451(*c*) of the *Criminal Code* deals with the powers of a justice holding a preliminary inquiry, and was not the appropriate section as the appellant was before Magistrate Stewart not for preliminary inquiry but for trial. On October 18, 1961, the learned magistrate signed a warrant of remand in accordance with section 524(1*a*) of the *Criminal Code,* which so far as relevant provides:

(1*a*) A court, judge or magistrate may, at any time before verdict or sentence, when of the opinion, supported by the evidence of at least one duly qualified medical practitioner, that there is reason to believe that

(*a*) an accused is mentally ill, . . .

remand the accused, by order in writing, to such custody as the court, judge or magistrate directs for observation for a period not exceeding thirty days.

This warrant of remand was in respect of the charge of obstructing a peace officer which is numbered (v) above.

On October 31, 1961, an application made on behalf of the appellant for a writ of *habeas corpus* came before Donnelly J. and was dismissed. The recitals in the order read as follows:

Upon the application of Counsel on behalf of Frederick Fawcett, upon hearing read the affidavit of Frederick Fawcett and the transcript of evidence herein, and the material filed in the presence of Counsel for the said Frederick Fawcett and the Attorney General for Ontario, and upon hearing what was alleged by Counsel aforesaid, it appearing that there was ample evidence before the Learned Magistrate to justify a finding that the said Frederick Fawcett was mentally ill; and it appearing that the Learned Magistrate has now substituted a warrant of committal pursuant to Sec-

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Cartwright J.

tion 524(1a) of the Criminal Code for the original warrant of committal pursuant to Section 451(c) of the Criminal Code;

On November 16, 1961, two medical practitioners certified that the appellant was mentally ill and a proper person to be confined in an Ontario Hospital. The appellant was never returned before Magistrate Stewart and has ever since November 16, 1961, been confined in an Ontario Hospital as a certificated patient pursuant to the provisions of *The Mental Hospitals Act*, R.S.O. 1960, c. 236, hereinafter referred to as "the Act". He is at present confined in the Ontario Hospital at 999 Queen Street, West, in the City of Toronto.

On September 25, 1962, pursuant to an order of Ferguson J. a writ of *habeas corpus* was issued directed to the superintendent of the Ontario Hospital at 999 Queen Street, West, Toronto. The return to this writ came on before Landreville J. and on October 9, 1962, he directed the trial of an issue as to the appellant's sanity and as to whether he was dangerous to be at large and adjourned the motion to be disposed of by the judge presiding at the trial of the issue. The issue so directed was tried and the matter disposed of by Spence J. as set out in the opening paragraph of these reasons.

The Court of Appeal agreed with the findings made by Spence J. that the appellant was mentally ill and dangerous to be at large. Before this Court counsel for the appellant did not seek to have us interfere with these concurrent findings of fact; he attacked the judgments below on the ground that the confinement of the appellant in the Ontario Hospital at Penetanguishene was not according to law.

It is submitted for the appellant that on their true construction the relevant sections of the Act do not authorize the confinement of the appellant in the circumstances of this case and, alternatively, that if they purport to do so they are *ultra vires* of the Legislature of the province.

Section 27 of the Act is as follows:

27(1) Notwithstanding anything in subsection 2 of section 21, any mentally ill person who has been admitted as a voluntary patient or a habituate patient, or any person admitted under section 22 or 38, or any person detained under section 57, may be continued as a certificated patient upon the certificates of two medical practitioners with the accompanying history record in the prescribed form.

(2) At least one of the certificates required by subsection 1 shall be issued by a medical practitioner who is not an officer of the Department,

and a certificate upon which any patient was admitted to an examination unit is not a certificate for the purpose of this section.

(3) Upon a person being certificated under this section, he is thereafter during the time he is a patient a certificated patient within the meaning of this Act and is subject to the provisions of this Act and the regulations respecting certificated patients.

It is under this section that the respondent seeks to support the confinement of the appellant. It is clear that the appellant was certified in accordance with the terms of this section if at the time he was certified he should properly be described as "a person admitted under section 38".

Section 38 is as follows:

38(1) Any person may be admitted to an institution upon the order of a judge or magistrate if the person has been apprehended either with or without warrant and charged with any offence, if the order is accompanied by the prescribed history form and if the order is for a period of not more than sixty days, and any order made under this section shall direct that the person shall be conveyed to the institution most conveniently situated to the place where the order is made.

(2) Before the expiration of the time mentioned in such order, the superintendent shall report in writing as to the mental condition of the person to the judge or magistrate.

(3) Where in the opinion of the superintendent the person is mentally ill or mentally defective, he shall direct the examination of the person as provided for by section 27, and if the examining medical practitioners certify the person to be mentally ill or mentally defective, he shall be detained as a certificated patient and is subject to all the provisions of this Act and of the regulations respecting certificated patients.

(4) Where in the opinion of the superintendent the person is neither mentally ill nor mentally defective and where the superintendent has failed to obtain certificates in the prescribed form, he shall discharge the person to the custody of the court by which he was ordered to the institution.

From the recital of facts given above it appears that the appellant was admitted to the Ontario Hospital at Penentanguishene upon the order of Magistrate Stewart, that the appellant had been apprehended and charged with an offence and that the order was for a period of not more than sixty days. The record is silent as to whether the order was "accompanied by the prescribed history form" referred to in s. 38(1); but no point seems to have been made of this in the Courts below and I did not understand any argument to be founded on the fact, if it be the fact, that the history form did not accompany the order of the magistrate.

Under these circumstances I agree with the view expressed by Schroeder J.A. that the magistrate derived the power to make the order requiring the superintendent of the Ontario

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Cartwright J.

Hospital at Penetanguishene to admit and detain the appellant from s. 524(1*a*) of the *Criminal Code*; and that the terms of s. 38 of the Act obligated the superintendent to admit the appellant. It may well be that even if s. 38 had not been enacted the provisions of the *Criminal Code* would have been sufficient to impose the obligation on the superintendent but, be that as it may, when the Act is read as a whole it is my opinion that the appellant was "admitted under section 38" within the meaning of that expression as used in s. 27 of the Act.

On the constitutional question also I am in agreement with the view of Schroeder J.A. that the Act is legislation in relation to the subject-matter described in head 7 of s. 92 of the *British North America Act* and not in relation to criminal procedure, that the relevant provisions of the *Criminal Code* and those of the Act are complementary to, and not in conflict with, each other. It follows that the sections of the Act impugned by the appellant are *intra vires* of the Legislature.

I agree with the submission of counsel for the Attorney General of Canada that if a particular case should arise in which the circumstances were such that the provisions of the *Criminal Code* would bring about one result and those of the Act would bring about a different result then the provisions of the *Criminal Code* would prevail; but there are no such circumstances in the case at bar.

The case of *Trenholm v. Attorney-General of Ontario*[1] does not assist the appellant. In that case it was sought to justify the detention of the appellant by the production of a warrant signed by the Lieutenant-Governor, which, under the relevant statutory provisions, he had the power to issue only if the person ordered to be detained were imprisoned for an offence or "imprisoned in safe custody charged with an offence". At the time the Lieutenant-Governor's warrant was signed the appellant was not so imprisoned and this Court held that for that reason the warrant was not legally issued.

I would dismiss the appeal but would make no order as to costs.

Appeal dismissed.

Solicitor for the appellant: Sol. Gebirtig, Toronto.

Solicitor for the respondent: R. A. Cormack, Toronto.

[1] [1940] S.C.R. 301, 1 D.L.R. 497.

CHRISTOPHER HENRY FLINTOFT, as Trustee in Bankruptcy of CANADIAN WESTERN MILLWORK LTD. APPELLANT;

1964
*May 22
Oct. 6

AND

THE ROYAL BANK OF CANADA .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Banks and banking—Debts arising from sale by bank's customer of goods covered by security under s. 88 of Bank Act—Claim by customer's trustee in bankruptcy—Whether bank entitled to debts notwithstanding failure of assignment of books debts due to lack of timely registration—Bank Act, R.S.C. 1952, c. 12, substituted 1953-54, c. 48—Bankruptcy Act, R.S.C. 1952, c. 14.

A dispute occurred between the respondent bank holding security under s. 88(1)(*b*) of the *Bank Act* and the appellant, the trustee in bankruptcy of the bank's customer, concerning the ownership of certain uncollected debts owing to the customer at the date of bankruptcy. These debts arose from the sale by the customer of goods covered by the bank's security. The trustee claimed that he was entitled to collect these debts for administration under the *Bankruptcy Act* because an assignment of book debts held by the bank was void for lack of timely registration. The bank claimed that the fact that these debts arose from the sale of the goods covered by the bank's security gave them to the bank notwithstanding the failure of the assignment of book debts. The judge of first instance declared that the trustee in bankruptcy was entitled to all book debts of the bankrupt unpaid at the date of bankruptcy. The Court of Appeal, in a majority judgment, held that to the extent that the book debts of the customer outstanding at the time of the bankruptcy represented debts owing to the customer for goods sold and covered by the bank's s. 88 security, these accounts went to the bank.

Held: The appeal should be dismissed.

By agreement in writing between bank and customer an express trust of the accounts in question was created in favour of the bank. In addition, the agreement rejected in advance any suggestion that the bank's right to these accounts would depend upon a valid assignment of book debts. The agreement did no more than set out the terms upon which a bank as holder of s. 88 security permits a customer to sell the property of the bank in the ordinary course of business.

The property rights of the bank are defined by ss. 88(2) and 86(2) of the *Bank Act*. Under s. 88(2) the bank gets the same rights and powers as if it had acquired a warehouse receipt or bill of lading in which the property was described. Under s. 86(2) it acquires all the right and title of the customer.

Section 88 permits certain classes of persons not of a custodier character, in this case a manufacturer, to give security on their own goods with the consequences as defined. Notwithstanding this, with the consent of

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.

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FLINTOFT v. ROYAL BANK OF CANADA

the bank, the one who gives the security sells in the ordinary course of business and gives a good title to purchasers from him. But this did not mean that he owns the book debts when he has sold the goods. Here, the Court was not concerned with the rights of a purchaser for value without notice of the proceeds of the sale of the bank's security. It was true that s. 63 of the *Bankruptcy Act* avoided in favour of the trustee the assignment of book debts held by the bank because of defective registration. Subject to this, the trustee had no higher rights than the bankrupt and he took the property of the bankrupt merely as a successor in interest and not as an innocent purchaser for value without notice. He took the property of the bankrupt subject to the express trust created by the written agreement, which could not be characterized as an assignment of book debts in another form. When these debts, the proceeds of the sale of s. 88 security, came into existence they were subject to the agreement between bank and customer. As between these two the customer had nothing to assign to the bank. The actual assignment of book debts which was signed did no more than facilitate collection. Any other assignment, whether general or specific, of these debts by the customer to a third party would fail unless the third party was an innocent purchaser for value without notice.

Union Bank of Halifax v. Spinney and Churchill (1907), 38 S.C.R. 187; *Re Goodfallow, Trader's Bank v. Goodfallow* (1890), 19 O.R. 299; *Banque Canadienne Nationale v. Lefaivre et al.*, [1951] B.R. 83, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from an order of Bastin J. Appeal dismissed.

V. Simonsen, for the appellant.

W. P. Fillmore, Q.C., and *A. R. Philp,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The contest in this litigation is between a bank holding security under s. 88(1)(*b*) of the *Bank Act,* R.S.C. 1952, c. 12, substituted 1953-54, c. 48, and a trustee in bankruptcy of the bank's customer concerning the ownership of certain uncollected debts owing to the customer at the date of bankruptcy. These debts arose from the sale by the customer of goods covered by the bank's security. The trustee says that he is entitled to collect these debts for administration under the *Bankruptcy Act,* R.S.C. 1952, c. 14, because an assignment of book debts held by the bank was void for lack of timely registration. The bank says that the fact that these debts arose from the sale of the goods covered by the bank's security

[1] (1963), 47 W.W.R. 65, 44 D.L.R. (2d) 47.

gives them to the bank notwithstanding the failure of the assignment of book debts. There is no dispute about the facts. It is admitted that the bank's security under s. 88 (1)(*b*) was a valid security and that the assignment of book debts held by the bank is void for want of timely registration.

The judge of first instance declared that the trustee in bankruptcy was entitled to all book debts of the bankrupt unpaid at the date of bankruptcy. The Manitoba Court of Appeal[1] held that to the extent that the book debts of the customer outstanding at the time of the bankruptcy represented debts owing to the customer for goods sold and covered by the bank's s. 88 security, these accounts went to the bank. Freedman J. A. dissented and would have held that the proceeds of these sales must come under the assignment of book debts, that the bank could only claim in its capacity as holder of this assignment and that, therefore, its claim failed.

My opinion is that the majority judgment is correct. By agreement in writing between bank and customer an express trust of these accounts was created in favour of the bank in the following terms:

> The proceeds of all sales by the Customer of the property or any part thereof, including, without limiting the generality of the foregoing, cash debts arising from such sales or otherwise, evidences of title, instruments, documents and securities, which the Customer may receive or be entitled to receive in respect thereof, are hereby assigned to the Bank and shall be paid or transferred to the Bank forthwith, and until so paid or transferred shall be held by the Customer in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts or any additional assignment of any of such proceeds shall be deemed to be in furtherance hereof and not an acknowledgment by the Bank of any right or title on the part of the Customer to such book debts or proceeds.

In addition to the creation of the trust, the agreement rejects in advance any suggestion that the bank's right to these accounts will depend upon a valid assignment of book debts. This agreement does no more than set out the terms upon which a bank as holder of s. 88 security permits a customer to sell the property of the bank in the ordinary course of business.

The property rights of the bank are defined by ss. 88(2) and 86(2) of the *Bank Act*. Under s. 88(2) the bank gets

[1] (1963), 47 W.W.R. 65, 44 D.L.R. (2d) 47.

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Judson J.

the same rights and powers as if it had acquired a warehouse receipt or bill of lading in which the property was described. Under s. 86(2) it acquires all the right and title of the customer.

86. (2) Any warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof,

(*a*) all the right and title to such warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof, or

(*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods, wares and merchandise.

Section 88 is a unique form of security. I know of no other jurisdiction where it exists. It permits certain classes of persons not of a custodier character, in this case a manufacturer, to give security on their own goods with the consequences above defined. Notwithstanding this, with the consent of the bank, the one who gives the security sells in the ordinary course of business and gives a good title to purchasers from him. But this does not mean that he owns the book debts when he has sold the goods. To me the fallacy in the dissenting reasons is the assumption that there is ownership of the book debts in the bank's customer once the goods have been sold and that the bank can only recover these book debts if it is the assignee of them.

We are not concerned here with the rights of a purchaser for value without notice of the proceeds of the sale of the bank's security. It is true that s. 63 of the *Bankruptcy Act* avoids in favour of the trustee the assignment of book debts held by the bank because of defective registration. Subject to this, the trustee has no higher rights than the bankrupt and he takes the property of the bankrupt merely as a successor in interest and not as an innocent purchaser for value without notice. He takes the property of the bankrupt subject to the express trust created by the agreement noted above, which, in my opinion, cannot be characterized as an assignment of book debts in another form. When these debts, the proceeds of the sale of the s. 88 security, come into existence they are subject to the

agreement between bank and customer. As between these two the customer has nothing to assign to the bank. The actual assignment of book debts which was signed does no more than facilitate collection. Any other assignment, whether general or specific, of these debts by the customer to a third party would fail unless the third party was an innocent purchaser for value without notice.

In *Union Bank of Halifax v. Spinney and Churchill*[1], the proceeds of the sale of the bank's security came into the hands of Spinney, a third party, who was a guarantor of the customer's account with the bank. The proceeds were in the form of drafts drawn in favour of the guarantor instead of the bank, as they should have been. Spinney took with knowledge that the drafts were in payment for meal, ground from corn, on which the bank held security and he was held liable to account. I can find in the report no mention of any written agreement similar to the one in existence in the present case but it is clear that the oral understanding between bank and customer was to the same effect. Any other understanding would be inconceivable in commercial dealings. Why would any lender who lends for the purpose of enabling another to acquire and manufacture goods, permit the sale of goods on which he holds security except on terms that the borrower must bring in the proceeds of the sale of those goods?

Re Goodfallow, Traders' Bank v. Goodfallow[2] is a similar case. The contest there was between the bank and the administrator of the deceased customer. The customer was a miller who had given a warehouse receipt to the bank. At the date of his death there was found to be a shortage of wheat which had commenced shortly after the warehouse receipt had been given. During the period of shortage some of the wheat had been converted into flour and sold. The proceeds were paid to the administrator, who was compelled to pay the money to the bank. The ratio of the judgment of Boyd C. is contained in the following short extract from his reasons: "As long as the 'product' of this wheat can be traced, whether it be in flour or in money, it is recoverable by the bank as against the deceased and his administrator."

[1] (1907), 38 S.C.R. 187.

[2] (1890), 19 O.R. 299.

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Judson J.

Again, I can find in the report no mention of any agreement in writing, but even in its absence the principle is plainly to be spelled out that if you sell my goods with my consent, it is on terms that you bring me the money in place of the goods. Although the bank's customer does not sell as agent for the bank, he does not sell free of the bank's claim to the proceeds. There is an analogy with the case where goods are consigned to a factor to be sold by him and reduced to money. There has never been any doubt of the right of the owner to trace the money or any other form of property into which the money has been converted. (Underhill's Law of Trusts and Trustees, 11th ed., p. 561.)

The only other case to which I wish to refer is *Banque Canadienne Nationale v. Lefaivre et al.*[1], where the Quebec Court of Appeal, on facts which cannot be distinguished from those of the present case, anticipated the judgment of the Manitoba Court of Appeal. In the Quebec case the bank and customer had executed an agreement in the following terms:

> Art. 5: dans le cas de vente par le client des effets, en tout ou en partie, le produit de cette vente y compris les espèces, les effets de commerce, les billets à ordre, titres et valeurs qui en seront la considération de même que les créances contre les acheteurs, appartiendront à la banque à qui ils devront être immédiatement versés ou remis, et jusqu'à ce versement ou cette remise le client ne les détiendra qu'en fidéicommis pour la banque. L'exécution par le client et l'acceptation par la banque des transports de dettes de livres seront censés résulter de la présente convention et ne constitueront pas une reconnaissance de la part de la banque que le client a des droits ou un titre quelconque à ces dettes de livres.

The contest was between the bank and the trustee in bankruptcy of the customer. The trustee contended that the accounts of the customer representing the proceeds of the sale of the s. 88 security were part of the assets of the bankrupt estate because they had not been validly transferred to the bank in acordance with Art. 1571 of the *Civil Code*. It was held that the use of the words "en fidéicommis" was merely an attempt to translate the English expression "in trust". The majority judgment is founded squarely on the ground that the claims against the buyers of the goods became the property of the bank by virtue of its s. 88

[1] [1951] Que. K.B. 83, 32 C.B.R. 1.

security and never were the property of the customer so as to be affected by the assignment in bankruptcy.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Scarth, Honeyman, Scarth & Simonsen, Winnipeg.

Solicitors for the respondent: Fillmore, Riley & Company, Winnipeg.

1964
*May 25
Oct. 6

MARIE LEDA LAFONTAINE (*Defendant*) ..... APPELLANT;

AND

RURAL MUNICIPALITY OF MONTCALM (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Welfare payments to indigent resident of municipality—Whether payments recoverable by action for debt—The Municipal Act, R.S.M. 1954, c. 173, s. 947(2) to (5).

The respondent municipality brought action against the appellant, an indigent resident of the municipality, claiming the sum of $2,594.92 being moneys expended by the municipality on behalf of the appellant by way of maintenance and welfare. The appellant admitted liability for the sum of $151.45 for hospital premiums and expenses paid on her behalf under the Manitoba *Hospital Services Insurance Act*, but as to the balance she took the position that any amounts expended on her behalf by way of maintenance and welfare did not constitute a *debt* recoverable by action. Judgment at trial was given against the appellant for $2,000. This amount was fixed by counsel and was made up of $151.45 for hospital expenses and premiums and $1,848.55 for welfare payments. An appeal, restricted to the amount awarded in respect of welfare, was dismissed by the Court of Appeal, one member of the Court dissenting. With leave, the appellant further appealed to this Court.

Held: The appeal should be allowed.

Section 453(1)(*c*) of *The Municipal Act*, R.S.M. 1954, c. 173, empowers a municipal corporation, by resolution or by-law, to regulate and prescribe the conditions under which relief is to be given. This would enable such a corporation, if it so desired, to stipulate that any moneys

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*PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

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which it paid out in the form of relief payments should constitute a loan and create a debt owing by the recipient to the corporation.

In the present case, however, no resolution or by-law of the respondent was pleaded. The question in issue was, therefore, whether the expenditure of moneys by way of maintenance and welfare, *per se*, gives to the municipal corporation the right to claim for the same in debt as against the person on whose behalf such payments were made. In the absence of a provision by resolution or by-law of the kind above mentioned, the respondent must establish that a right of recovery is conferred upon it by the statute.

In the absence of an express stipulation by resolution or by by-law that relief payments are in the form of a loan creating a debt owed by the beneficiary to the municipal corporation, the rights of such corporation to recover the same are limited to those prescribed in subss. (2) to (5) of s. 947 of *The Municipal Act*.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from a decision of Bastin J. Appeal allowed.

J. F. O'Sullivan and *S. I. Schwartz*, for the defendant, appellant.

K. G. Houston, for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—The respondent municipality brought action against the appellant, claiming the sum of $2,594.92 being moneys expended by the municipality on behalf of the appellant, who was an indigent resident of the municipality, by way of maintenance and welfare from the month of March 1942 until the month of July 1961.

The appellant admitted liability for the sum of $151.45 for hospital premiums and expenses paid on her behalf under *The Hospital Services Insurance Act*, 1962 (Man.), c. 30, s. 17(7), but as to the balance she took the position that any amounts expended on her behalf by way of maintenance and welfare did not constitute a *debt* recoverable by action.

The relevant provisions of *The Municipal Act*, R.S.M. 1954, c. 173, are to be found in ss. 453 and 947 which read as follows:

453. (1) Any municipal corporation may provide, by resolution or by by-law,

(*a*) for aiding in maintaining any indigent person who is a resident of, or found within the limits of, the corporation, at any workhouse,

[1] (1963), 43 W.W.R. 219.

hospital, or institution for the insane, deaf and dumb, blind, or poor, or other public institution of a like character; or

(*b*) for granting outdoor relief to the resident poor or those found within the limits of the corporation, and to such persons as are afflicted with any contagious or infectious disease who are unable, through poverty or other causes, to care for themselves; or

(*c*) for regulating and prescribing the conditions under which such relief is to be given.

(2) A municipal corporation, by by-law, may enter into an agreement with another municipal corporation providing that all or any portion of the liability for any indebtedness by reason of a person being a resident of the corporation or having a residence therein shall be assumed and paid by one or more municipal corporations in the proportions fixed by the agreement.

* * *

947. (1) Every municipal corporation, including the cities of Winnipeg and St. Boniface, shall, in addition to, or concurrently with, any other remedies, have the following remedies for the recovery of any debt, statutory or otherwise, within the jurisdiction of the County Court from any person indebted to it, other than another municipal corporation, that is to say:

(*a*) It shall not be necessary for the corporation to issue a summons, but it may serve by registered mail upon the person indebted to it a certificate signed by the head of its council or, if directed by resolution of the council, by the treasurer of the corporation, and under its corporate seal, setting out the name of the person so indebted and the amount of the indebtedness and endorsed with a notice to the debtor that if he disputes the amount claimed he must file his statement of defence in the County Court, specifying it, within twenty days from the mailing of the certificate, otherwise judgment will be entered against him.

(*b*) It shall, upon serving the certificate, file with the clerk of the County Court a duplicate thereof together with an affidavit proving that the certificate has been so served upon the debtor.

(*c*) The serving and filing of such a certificate shall take effect, and judgment may be entered and all subsequent proceedings in the court be had thereon in the same manner, as if a special summons had issued out of the court.

(2) Where any moneys are paid out or expended by a municipal corporation in connection with the maintenance, relief, support, hospital account, or burial, of a person or his or her husband or wife, or his or her child under twenty-one years of age, a statement over the signature of the head of the corporation or, if directed by a resolution of the council, by the treasurer of the corporation, and certifying what moneys have been so paid out or expended, may be recorded in any land titles office in the province.

(3) From the time of the recording thereof the statement shall bind, and form a lien and charge for the amount so certified on, all the lands owned by that person or his or her husband or wife, or his or her executors or administrators, in favour of the corporation; and the lien or charge may be realized in the same manner as if it were a mortgage on the land executed by the owner thereof.

(4) The certificate shall be recorded on its mere production without any affidavit of execution.

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(5) The statement, when recorded, shall from the time of its being so recorded be held to cover all moneys paid out or expended by the corporation in connection with the maintenance, relief, support, hospital account, or burial of the person, or his or her husband or wife, or his or her child under twenty-one years of age, after the date of recording thereof as well as before; and the statement and the lien or charge created thereby shall remain in force without renewal until discharged.

(6) The lien or charge created by the statement may be discharged by the registration in the same office or a discharge executed by the head of the corporation or, if directed by resolution of the council, by the treasurer of the corporation.

The action was tried by Bastin J. who gave judgment against the appellant for the sum of $2,000. This amount was fixed by consent of counsel and was made up as follows:

Premiums and hospital expenses paid under The Hospital Insurance Act	$ 151.45
Welfare payments	1,848.55

The appellant appealed to the Court of Appeal restricting the appeal to the amount awarded in respect of welfare, $1,848.55. The Court of Appeal[1], Freedman J.A. dissenting, dismissed her appeal with costs. Leave to appeal to this Court *in forma pauperis* was granted on October 16, 1963.

Section 453(1)(*c*) of *The Municipal Act* previously quoted empowers a municipal corporation, by resolution or by-law, to regulate and prescribe the conditions under which relief is to be given. This would enable such a corporation, if it so desired, to stipulate that any moneys which it paid out in the form of relief payments should constitute a loan and create a debt owing by the recipient to the corporation.

In the present case, however, no resolution or by-law of the respondent was pleaded. The statement of claim claims for moneys "expended on behalf of the defendant by way of maintenance and welfare." The question in issue in this case is, therefore, whether the expenditure of moneys by way of maintenance and welfare, *per se*, gives to the municipal corporation the right to claim for the same in debt as against the person on whose behalf such payments were made. In the absence of a provision by resolution or by-law of the kind above mentioned, the respondent must establish that a right of recovery is conferred upon it by the statute.

[1] (1963), 43 W.W.R. 219.

Freedman J.A. in his dissenting judgment dealt with the question in issue as follows:

> The common-law position supports the defendant. *Pontypridd (Guardians) Union v. Drew*, [1927] 1 K.B. 214, 95 L.J.K.B. 1030, makes it plain that at common law there was no obligation upon a poor person, who has received relief, to repay what he had received. Unless, therefore, some statutory provision confers upon a municipality the right to recover by action moneys paid by way of relief, no such right can be taken to exist. It is the contention of the plaintiff—and one that was upheld by the learned trial judge—that such statutory authority is to be found, if not expressly at least by implication, in sec. 947 of *The Municipal Act*, R.S.M. 1954, ch. 173. It is accordingly necessary to examine this section and that contention.
>
> Under sec. 947 (1) every municipal corporation is declared to have, in addition to, or concurrently with, any other remedies, the remedies hereafter set forth in the section for the recovery of any debt, statutory or otherwise. I pause here to say that before this section can be of assistance to the plaintiff it must first be shown that moneys paid out by way of relief constitute "a debt". Nowhere, however, does the statute so provide.
>
> It is largely upon the provisions of subsec. (2) and (3) of sec. 947 of *The Municipal Act* that the plaintiff relies. Subsec. (2) specifically permits a municipal corporation to record in any land titles office in the province a statement certifying as to the moneys which have been paid out or expended by the municipal corporation for maintenance, relief or support of any person. Subsec. (3) then goes on to say that from the time of the recording thereof, the statement shall bind and form a lien or charge for the amount so certified on all the lands owned by that person, or his or her husband or wife, in favour of the corporation, and that the lien or charge may be realized in the same manner, as if it were a mortgage on the land executed by the owner thereof.
>
> In short, the legislature has specifically provided that a municipality may charge a person's land or real property with the amount received by him or her by way of relief. This is a specific remedy which the legislature saw fit to provide. The defendant says that this remedy is exhaustive of the rights of a municipality, and that no right of suit for a debt is permitted.

Freedman J.A. accepted this submission and, in my opinion, correctly. In the absence of an express stipulation by resolution or by by-law that relief payments are in the form of a loan creating a debt owed by the beneficiary to the municipal corporation, the rights of such corporation to recover the same are limited to those prescribed in subss. (2) to (5) of s. 947 of *The Municipal Act*.

The appeal should, therefore, be allowed. The judgment of the learned trial judge will be varied by reducing the amount awarded to the sum of $151.45. As this amount was never in dispute, the appellant should have her costs

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throughout, but as the appeal was *in forma pauperis* her costs in this Court will be as provided in R. 142(4).

Appeal allowed with costs as provided in R. 142(4).

Solicitors for the defendant, appellant: Walsh, Micay and Company, Winnipeg.

Solicitors for the plaintiff, respondent: Arpin, Rich, Houston & Karlicki, Winnipeg.

1964

*May 20, 21, 22 Oct. 6

MICHAEL SIKYEA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Criminal law—Constitutional law—Indians—Game laws—Shooting duck out of season in Northwest Territories—Migratory Birds Convention Act, R.S.C. 1952, c. 179, s. 12(1).

The appellant, a treaty Indian, was found guilty by a magistrate at Yellowknife in the Northwest Territories of killing a migratory bird during the closed season in violation of Reg. 5(1)(*a*) of the Migratory Bird Regulations, contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. The appellant admitted that he shot the bird for food. His defence was that under Treaty No. 11 made in 1921 he was entitled to hunt and shoot ducks for food regardless of any regulations or legislation, whether in season or not. The bird was identified as a female mallard duck. The conviction was set aside by the Territorial Court, which also expressed a doubt as to whether the duck was wild or domestic. On appeal to the Court of Appeal, the conviction was restored on the grounds that the Act was valid legislation and abrogated any rights given to Indians by treaty. Leave was granted to appeal to this Court.

Held: The appeal should be dismissed.

The doubt expressed by the trial judge as to whether the duck in question was a wild duck was a question of law alone, since the validity of this conclusion was dependant upon the true meaning to be attached to the words "wild duck" as used in the statute and regulations. There was no room for doubt that a mallard is a species of wild duck within the meaning of the Act, and under the circumstances the doubts expressed by the trial judge were only consistent with his erroneous opinion that a wild duck which once has been tamed or confined and is later found at large is not then a wild duck within the meaning of

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie and Hall JJ.

the statute. *Hamps v. Darby*, [1948] 2 K.B. 311, referred to. Accordingly the Court of Appeal and this Court had jurisdiction to entertain the appeal. On the merits of the appeal, the reasons and conclusions of the Court of Appeal should be upheld.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories[1], restoring the conviction of the appellant. Appeal dismissed.

W. G. Morrow, Q.C., and *Mrs. E. R. Hagel*, for the appellant.

D. H. Christie, Q.C., and *J. M. Bentley*, for the respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal, pursuant to leave, by Michael Sikyea from the judgment of the Court of Appeal for the Northwest Territories[1] allowing an appeal by the respondent from the judgment of Mr. Justice Sissons of the Territorial Court of the Northwest Territories who had allowed an appeal by the appellant by way of trial *de novo* from his conviction at Yellowknife, Northwest Territories, on May 7, 1962, by W. V. England, a Justice of the Peace in and for the Northwest Territories for an offence contrary to subs. (1) of s. 12 of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. The charge on which the appellant was convicted was that he—

> on the 7th day of May AD 1962 at or near the Municipal District of Yellowknife in the Northwest Territories did unlawfully kill a migratory bird in an area described in Schedule A of the Migratory Bird Regulations at a time not during an open season for that bird in the area in the aforementioned schedule, in violation of Section 5(1)(*a*) of the Migratory Bird Regulations, thereby committing an offence contrary to Section 12(1) of the *Migratory Birds Convention Act*, Chapter 179, R.S.C. 1952.

The regulation mentioned provides that:

> Unless otherwise permitted under these Regulations to do so, no person shall
>
> (*a*) in any area described in Schedule A, kill, hunt, capture, injure, take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A,

Section 12(1) of the Act provides that every person who violates any regulation is, for each offence, liable upon summary conviction to a fine of not more than three hundred

[1] [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65.

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dollars and not less than ten dollars, or to imprisonment for a term not exceeding six months, or to both fine and imprisonment.

Part XI of Schedule A to the Regulations defines the open season for ducks in the Northwest Territories as being from September 1 to October 15 inclusive.

Under s. 3(*b*)(i) "migratory game birds" include "wild ducks".

The appellant testified at the trial *de novo* before Sissons J. and in his evidence admitted having shot the duck which was in evidence as part of the Crown's case as testified to by Constable Robin. The appellant also said that he had shot the duck for his own use as food when he saw it swimming on a pond. This pond, according to Constable Robin, was in the open country in the Northwest Territories six miles out of Yellowknife.

The appellant's defence was in effect that he was a Treaty Indian, a member of the Yellowknife Band and that under Treaty No. 11 made in 1921 he was entitled to hunt and shoot ducks for food regardless of any regulations or legislation, whether in season or not.

Sissons J. made the following findings:

(1) THAT the appellant was a Treaty Indian and one of the Band included under Treaty No. 11;

(2) THAT on May 7, 1962 the appellant shot the duck for which he was being prosecuted;

(3) THAT the duck was a female mallard.

Sissons J. then dealt at length with the contention that the appellant as a Treaty Indian was lawfully entitled to shoot ducks for food at any time of the year. He concluded his judgment by saying:

I find that the Migratory Birds Convention Act has no application to Indians hunting for food, and does not curtail their hunting rights.

He had, however, preceded that finding with this statment:

It is clear that the evidence does not establish beyond a reasonable doubt that the female Mallard which was shot was a wild duck. In spite of the argument of the Crown, I cannot draw from the circumstantial evidence the inference that it was a wild duck. The Rule in Hodge's case is in the way. The accused therefore cannot be found Guilty of the offence with which he is charged.

but having said that, he immediately added:

The real defence and the important issue in this case is that the Migratory Birds Convention Act has no application to Indians engaged in the

pursuit of their ancient right to hunt, trap and fish game and fish for food at all seasons of the year, on all unoccupied Crown lands.

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The substantial question argued on the hearing of this appeal was whether the provisions of the *Migratory Birds Convention Act, supra,* and the Regulations made thereunder apply to Treaty Indians in the Northwest Territories hunting and killing ducks for food at any time of the year.

But the point is validly made that an appeal to this Court in a case of this kind can be on a question of law alone and that if the statement of Sissons J. above quoted is a finding of mixed fact and law, no appeal lay to the Court of Appeal or lies to this Court. What the learned judge was deciding in the passage above quoted was that there was some doubt on the evidence as to whether the duck in question was a "wild duck" within the meaning of the *Migratory Birds Convention Act.* The validity of his conclusion is dependent upon the true meaning to be attached to the words "wild duck" as used in the statute and regulations, and this is, in my view, "a question of law alone". See *Vail v. The Queen*[1]. A mallard duck is defined in the Shorter Oxford Dictionary as a "wild duck". It is also referred to in Canadian Water Birds, Game Birds: Birds of Prey, by P. A. Taverner as "perhaps the choice duck of the wild-fowler" and in the Catalogue of Canadian Birds by J. Macoun and J. M. Macoun, published by the Geological Survey of Canada as "the most abundant duck in the Northwest Territories and British Columbia, breeding near ponds and lakes from lat. 49° to the borders of the Barren Lands." Mallards are also referred to as wild birds in the publication Canadian Bird Names, published by the Canadian Wild Life Service, 1962.

The facts are not in dispute; the duck in question was a mallard which was shot on a pond some six miles from Yellowknife in the Northwest Territories in the month of May at which time such a bird found in this region would be in the nesting grounds area and would probably be starting to nest.

There is evidence that if such a bird were tamed it would be very difficult to distinguish it from one which was wild, and in fact an expert called on behalf of the Crown was unable to say whether the dead duck, which was an exhibit

[1] [1960] S.C.R. 913 at 920, 129 C.C.C. 145, 33 W.W.R. 325.

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in this case, had been tamed during its lifetime, and it is this evidence which seems to have caused Sissons J. the doubts he expressed.

There appears to me to be no room for doubt that a mallard is a species of wild duck within the meaning of the *Migratory Birds Convention Act* and under the circumstances the doubts expressed by Sissons J. are only consistent with his having erroneously formed the opinion that a wild duck which has once been tamed or confined and is later found at large in the nesting area at a time when it would be likely to nest is not then a "wild duck" within the meaning of the statute. The contrary is the case. A wild duck which has once been tamed or confined reverts, on escaping, to being a wild duck in the eyes of the law. See *Hamps v. Darby*[1]. Accordingly, the Court of Appeal had jurisdiction and this Court has jurisdiction to entertain the appeal.

On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal[2]. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

The appeal must, therefore, be dismissed. There will be no order as to costs, counsel having stated that costs were not being asked for by either party, regardless of the result.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitor for the respondent: D. H. Christie, Ottawa.

[1] [1948] 2 K.B. 311 at 321, 2 All E.R. 474.
[2] [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65.

MONTREAL TRUST COMPANY, DAME ORIAN HAYS HICKSON AND RALPH DOUGAL YUILE .. APPELLANTS;

1964
*June 11
Oct. 6

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Succession duty—Will—Substitution—Lapse of substitution—Residuary interest in estate of mother of deceased left by mother to children of deceased, if any, or if none, to testamentary or legal heir of deceased—Death of deceased childless—Whether deceased "competent to dispose" of residue of mother's estate—Whether deceased exercised "general power" in respect of same—Estate Tax Act, 1958 (Can.), c. 29, ss. 2(1), 3(1)(a), 3(2)(a), 58(1)(i)—Civil Code, arts. 597, 873, 962.

The mother of the deceased left a share of the residue of her estate in trust for the children of the deceased. The will provided that if he should die childless, this share was to be paid to the testamentary or legal heir of the deceased. At his death, the deceased left no children, and by his will appointed his widow his universal legatee. The Minister sought to tax this share of the residue as forming part of the estate of the deceased, on the ground that the deceased had had a general power to dispose of it within the meaning of ss. 3 and 58(1)(i) of the *Estate Tax Act*. The Exchequer Court affirmed the assessment. The appellant appealed to this Court.

Held: The appeal should be allowed.

The substitution created by the will of the deceased's mother did not lapse upon the death of the deceased leaving no children. The will provided for the possibility of the institute dying without children and in that event, which happened, named as substitute his legal or testamentary heir.

When the substitution opened, the deceased's widow as substitute took the fund directly from the mother of the deceased and not from the institute, her husband.

The alternative argument that the deceased had such a general power to dispose of the fund as to bring the case within s. 3 of the Act, could not be upheld. Since the deceased could not dispose of the property to anyone but his testamentary heir, he did not have the power to dispose of it "as he saw fit" within the meaning of s. 58(1)(i). His widow took the fund not through the exercise of any power given to the deceased but because the deceased's mother had designated as substitute his testamentary heir.

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Spence JJ.

1964

MONTREAL TRUST CO. *et al.* v. MINISTER OF NATIONAL REVENUE

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming an assessment of estate tax made by the respondent. Appeal allowed.

John de M. Marler, Q.C., and *Terence O'Connor*, for the appellant.

Paul A. Boivin, Q.C., and *Paul Ollivier, Q.C.*, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Dumoulin J. pronounced on August 6, 1963, dismissing the appellants' appeal from the confirmation of an assessment of Estate Tax made by the respondent in respect of the death of the late Robert Newmarch Hickson.

There is no dispute as to the facts.

Robert Newmarch Hickson died on June 19, 1960, domiciled in the Province of Quebec. He was survived by his widow, the appellant Dame Orian Hays Hickson; no children were born of his marriage; he left a will executed in notarial form on October 27, 1959. By this will he appointed the appellants his executors and after making a number of particular legacies gave the residue of his estate to his widow in the following words:

> And all the rest residue and remainder of the property real and personal moveable and immoveable of every sort nature and description of which I may die possessed or in which I may have any interest or over which I may have the power of appointment or disposal (including any lapsed legacies) I give and bequeath to my wife the said Dame Orian Hays Hickson as her absolute property.

Lady Hickson, the mother of Robert Newmarch Hickson, had predeceased him by many years, leaving a will executed in notarial form on April 22, 1931. After making a number of particular legacies she bequeathed the residue of her estate to be divided in equal shares amongst her five children but provided that the share of her son Robert Newmarch Hickson should be subject to the condition expressed as follows in Article IX of the will:

> I direct that one-half of the share of my son Robert Newmarch Hickson in the residue of my Estate, less the sum of Forty Thousand Dollars which I have given him some years ago, shall belong to him in absolute ownership, and the other half of his share I give and bequeath the usufruct

[1] [1964] Ex. C.R. 293, [1963] C.T.C. 405, 63 D.T.C. 1255.

thereof during his lifetime to my said son Robert Newmarch Hickson and the ownership to the children of my said son, and if he leaves no children to his heirs, legal or testamentary.

At the date of the death of Robert Newmarch Hickson, the executors of Lady Hickson held the last mentioned half of his share in his mother's residuary estate which had a value of $363,702.19. The question to be determined on this appeal is whether this fund forms part of the aggregate taxable value of the property passing on the death of Robert Newmarch Hickson.

The learned trial judge held that Article IX of Lady Hickson's will created a substitution of the fund in question of which Robert Newmarch Hickson was the institute and his children the substitutes, that since he left no children the substitution lapsed thereby vesting the full ownership of the fund in him and giving him "a general power to appoint, appropriate or dispose of this property as he sees fit by will". If I have understood the reasons of the learned trial judge correctly, it would follow from the finding that at the time of his death Robert Newmarch Hickson was the full owner of the fund, that it formed part of his estate and estate tax would be payable upon it under s. 2(1) of the *Estates Tax Act* (1958), 7 Eliz. II, c. 29, hereinafter referred to as "the Act". In this view it would be unnecessary to consider the effect of ss. 3 and 58 of the Act.

Counsel for the respondent supports the reasons as well as the judgment of the learned trial judge but also argues, in the alternative, that the judgment should be upheld on the ground that Robert Newmarch Hickson had such a general power to dispose of the fund as to bring the case within s. 3 of the Act.

Counsel for the appellant, while not so admitting, was content to argue the appeal on the assumption that Article IX of Lady Hickson's will did create a substitution and I propose to deal with the matter on that basis.

It is clear that Robert Newmarch Hickson was the institute of the substitution, that its opening took place at his death, and that had he left children him surviving they would have been the substitutes. With respect, I am unable to agree with the learned trial judge that the substitution lapsed. The will of Lady Hickson provided for the possibility of the institute dying without children and in that

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MONTREAL TRUST CO. *et al.* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

event, which happened, named as substitutes "his heirs, legal or testamentary".

By the residuary clause of his will, quoted above, his widow was constituted the testamentary heir of Robert Newmarch Hickson; the character of the gift to her in this clause is that of a universal legacy; this character is not altered by the circumstance that a number of particular legacies had been made to others; this clearly appears from the provisions of art. 873 of the *Civil Code*.

The effect of the concluding words of Article IX of Lady Hickson's will, "and if he leaves no children to his heirs, legal or testamentary" is to give the fund on the death of Robert Newmarch Hickson to his testamentary heir. These words envisage two possible events, one that Robert Newmarch Hickson should die intestate and the other, which happened, that he should die testate. By article 597 of the *Civil Code* it is provided that the person to whom either abintestate succession or testamentary succession devolves is called heir and that abintestate succession takes place only in default of testamentary succession.

When the substitution opened, at the death of Robert Newmarch Hickson, his widow as substitute took the fund directly from the grantor, Lady Hickson, and not from the institute her husband. It is so provided by art. 962 of the *Civil Code*.

In the simple case of a substitution created by X, of which Y is the institute and Z the substitute and the substitution opens on the death of Y, it is clear that the property would form no part of the estate of Y. The difficulty in the present case arises from the fact that the substitute is not named as an individual in the instrument creating the substitution but is designated, in the events that have happened, as the testamentary heir of the institute.

The alternative argument of counsel for the respondent is that, in these circumstances, by the combined effect of ss. 3(1)(*a*), 3(2) and 58 of the Act the fund in question is required to be included in the aggregate net value of the property passing on the death of Robert Newmarch Hickson. There is no doubt of the power of Parliament to enact that, by a statutory fiction of law, property shall, for purposes of federal taxation, be deemed to form part of the estate of a deceased person although it would not have done so under either the civil law or the common law. The ques-

tion is whether the words used by Parliament have that effect having regard to the facts of the case at bar.

The sections referred to read as follows:

Sec. 3(1)(*a*)

(1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

(*a*) all property of which the deceased was, immediately prior to his death, competent to dispose;

Sec. 3(2)

(2) For the purposes of this section,

(*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein or such general power as would, if he were sui juris, have enabled him to dispose of that property;

Sec. 58

(1) In this Act,

(i) GENERAL POWER—general power includes any power or authority enabling the donee or other holder thereof to appoint, appropriate or dispose of property as he sees fit, whether exercisable by instrument inter vivos or by will, or both, but does not include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee;

The provision which imposes tax, if it is imposed, is s. 3(1)(*a*) and the question is whether Robert Newmarch Hickson immediately prior to his death was competent to dispose of the fund. Section 3(2) and s. 58 give extended meanings to the phrases "competent to dispose" and "general power".

Subject to an argument made by Mr. Marler with which, for reasons that will appear, I do not find it necessary to deal, the words of these sections appear to provide that property is to be deemed to form part of the estate of a deceased person if he had power to dispose of it by will "as he sees fit". In my opinion, it is clear that Robert Newmarch Hickson had no such power over the fund in question. Article IX of Lady Hickson's will does not in terms confer any power upon him; regardless of the terms of her will he had the power, which every man has, to dispose of his own property by will or, by refraining from making a will, to die intestate and leave the distribution of his estate to the operation of law. In fact he chose the former course and, by that portion of his will quoted above, constituted his widow his universal legatee and therefore his testamen-

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tary heir. His widow takes the fund not through the exercise of any power given to Robert Newmarch Hickson but because Lady Hickson has designated as substitute his testamentary heir. It is true that Robert Newmarch Hickson was free to name anyone he pleased to be his testamentary heir and that the person so named would become as substitute entitled to the fund; but he could not dispose of the fund to anyone else. A simple example may be given. Suppose Robert Newmarch Hickson having made his widow his testamentary heir went on in the next clause of his will to provide that "the half-share held by the executors of the late Lady Hickson pursuant to Article IX of her will shall be paid to my cousin X". It is obvious that this clause would be without effect. A person who can name anyone he pleases to be the recipient of a fund but only on condition that he makes that person his testamentary heir cannot be said to be free to dispose of the fund "as he sees fit".

I have reached the conclusion that Robert Newmarch Hickson did not have power to dispose of the fund by will as he saw fit and as it is clear that apart from the provisions of the Act the fund formed no part of his estate the appeal must succeed. This makes it unnecessary to consider the interesting question, raised by Mr. Marler, whether a person who has a power, however general, which is exercisable only by will and only in the event of his leaving no children can be held to be competent to dispose of the subject matter of the power "immediately prior to his death" and I express no opinion upon it.

I would allow the appeal with costs throughout, set aside the judgment of the Exchequer Court and direct that the assessment be referred back to the Minister in order that an assessment may be made excluding the fund of $363,702.19 from the aggregate taxable value of the estate of the late Robert Newmarch Hickson.

Appeal allowed with costs.

Solicitors for the appellants: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

GUNTHER FRIEDRICH HUGO MARX (*Defendant*) ..... APPELLANT;

AND

MARGARETA GERTRUD MARX (*Plaintiff*) ..... RESPONDENT.

1964
*May 12, 13
Oct. 7

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Partnership—Husband and wife—Whether partners in a bakery business—The Partnership Act, R.S.A. 1955, c. 230.

An action in which the plaintiff wife asked for a declaration that she was an equal partner with her husband in a bakery business was dismissed by the trial judge. The Appellate Division reversed this judgment and made the declaration; it held that all the elements necessary to establish a partnership were present and that if the relationship between the parties had not been that of husband and wife, "there probably would have been no argument that the appellant (now respondent) was not a partner." The husband appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Cartwright, Abbott, Martland and Spence JJ.: There was evidence from which the Appellate Division could conclude that the parties were carrying on a business in common with a view to profit. This inference was drawn by the Court from the facts in this particular case, which were of an unusual character, but which were not in dispute, in view of the findings of the trial judge, which were not disturbed by the Appellate Division. The Court had not erred in drawing that inference.

Per Judson J., *dissenting*: The Appellate Division was wrong in holding that all the elements necessary to establish a partnership were present in this case; significant facts indicated otherwise, and above all there was no evidence of any agreement that a partnership should subsist between this husband and wife. Also, it was error to draw any inference of partnership from the usual conversations about a business and its conduct that one would expect between husband and wife who were living and working together.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, allowing an appeal from a judgment of Farthing J. Appeal dismissed, Judson J. dissenting.

W. J. Anderson, for the defendant, appellant.

M. E. Shannon, for the plaintiff, respondent.

Abbott J. concurred with the judgment delivered by

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

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CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Martland, but in view of the differences of opinion in the Courts below and in this Court I wish to add a few words.

It appears to me that the disagreement between the Appellate Division and the learned trial judge is solely on the question of fact, whether the existence of a contract of partnership should be implied from the findings of the learned trial judge as to the primary facts all of which were accepted by the Appellate Division. I do not have to decide whether, in a first Appellate Court, I would have been satisfied that the decision of the learned trial judge on this question ought to be reversed. I agree with my brother Martland that there was evidence from which the Appellate Division could decide as it did and, in my opinion, on the facts of this particular case we ought not to interfere with the unanimous decision of that Court.

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

Abbott and Spence JJ. concurred with the judgment delivered by

MARTLAND J.:—The question in issue in this appeal is as to whether the appellant and the respondent, who are husband and wife, are partners in the bakery business carried on under the name of "Bowness Bakery Co." at Bowness, Alberta. The definition of "partnership" in s. 2(*c*) of *The Partnership Act*, R.S.A. 1955, c. 230, is as follows:

> "partnership" means the relationship that subsists between persons carrying on a business in common with a view to profit.

The Appellate Division of the Supreme Court of Alberta, by unanimous judgment, held that "all of the elements necessary to establish a partnership are present in this case and, if the relationship between the parties were not husband and wife, there probably would have been no argument that the appellant (now respondent) was not a partner."

In my opinion there was evidence from which that Court could conclude that the parties were carrying on a business in common with a view to profit. This inference was drawn by the Court from the facts in this particular case, which are of an unusual character, but which were not in dispute, in view of the findings of the learned trial judge, which were

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not disturbed by the Appellate Division. I am not prepared to say that the Court erred in drawing that inference.

In my opinion, therefore, the appeal should be dismissed with costs.

JUDSON J. (*dissenting*):—In this action a wife is suing her husband for a declaration that she is an equal partner with him in a bakery business in Bowness, Alberta. The trial judge dismissed the action. The Appellate Division reversed this judgment and made the declaration.

The trial judge's reasons are founded upon a thorough review of the evidence. There is no doubt that the wife throughout her married life has helped her husband in the establishment and operation of several businesses, first in Germany before, during and after the war, and then in Alberta. The husband is the baker. The wife for many years worked almost as long hours as the husband and did everything she could to help in the business. Her efforts were fully recognized by the learned trial judge but he concluded that the explanation was not to be found in the existence of a partnership but because the parties were husband and wife.

The Appellate Division held that all the elements necessary to establish a partnership were present and that if the relationship between the parties had not been that of husband and wife, "there probably would have been no argument that the appellant was not a partner." With respect, it seems to me that in so expressing themselves, they were considering a situation which would never have arisen between these two parties had they not been married and living together. It is the marriage and not business partnership that explains the relationship. It is inconceivable that any woman not a wife would have worked as this woman did without some business arrangement.

I do not agree that all the elements necessary to establish a partnership were present in this case. I do not propose to repeat the examination of the evidence which the learned trial judge made, but the following significant facts emerge. The husband made the financial arrangements to start the business and he registered it in his name. There is some suggestion that he deceived his wife when he talked about the registration with her. The bank account was in his name. He made all the banking arrangements. The money for the support of the matrimonial home came out of this bank

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account on the husband's cheque. There is not the slightest suggestion anywhere that the wife was the agent of the husband to do anything in the way of binding the business. Above all, there is no evidence of any agreement that a partnership should subsist between this husband and wife.

> Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing. It is not sufficient there should be community of interest; there must be contract. (*Porter v. Armstrong*, [1926] S.C.R. 328 at 329, *per* Duff J.)

The dealings with real property and the income tax returns have some significance. One property was bought and put in the joint names of the husband and wife. Another property was bought and put in the wife's name but the husband refused to keep up the payments. The premises on which the bakery business is conducted are in in the husband's name. No income tax return was filed by the wife as a partner or in any other capacity. The husband made his income tax returns as sole owner and paid tax on the total income.

It is error, in my opinion, to draw any inference of partnership from the usual conversations about a business and its conduct that one would expect between husband and wife who were living and working together.

I would allow the appeal and restore the judgment at trial. There should be no order as to costs in this Court or in the Appellate Division.

Appeal dismissed with costs, JUDSON J. *dissenting.*

Solicitors for the defendant, appellant: Anderson & Cooper, Calgary.

Solicitors for the plaintiff, respondent: Shannon, Rowbotham & Cook, Calgary.

RONALD K. FRASER .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1964
*June 23
Oct. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Purchase of land for shopping centre and apartment house project—Transfer of land to private companies for shares—Sale of shares—Whether profit realized capital gain or income from business—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

In 1952, the appellant and an associate, both of whom were experienced operators in the field of real estate, jointly acquired four contiguous parcels of land, intending to build a shopping centre and apartment houses for investment purposes. The two associates then formed two corporations, and sold the land intended for the shopping centre to one and the land intended for the apartment houses to the other. The associates received all the issued shares of both corporations in equal proportions. Construction of a store was started on the shopping centre site, but before it was finished, the associates sold all their shares in the corporation holding that land, and shortly afterwards all their shares in the other corporation. The Minister assessed the appellant's profit as income. The assessment was confirmed by the Exchequer Court. An appeal was launched to this Court.

Held: The appeal should be dismissed.

The associates were carrying on a business; they intended to make a profit, and if they could not make it one way, then they made it another way. The fact that they incorporated companies to hold the real estate made no difference. The sale of shares, rather than the sale of land, was merely an alternative method they chose to adopt in putting through their real estate transactions. The profit was therefore taxable as income.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], confirming an assessment made by the Minister for income tax purposes. Appeal dismissed.

P. N. Thorsteinsson and *James A. Grant,* for the appellant.

D. S. Maxwell, Q.C., for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant, together with an associate, both of whom were experienced operators in the field of

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

[1] [1963] Ex. C.R. 334, [1963] C.T.C. 130, 63 D.T.C. 1083.

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real estate, bought vacant land in 1952, incorporated two companies to hold the land in two parcels, built on one parcel a store in the year 1953 and sold the store shortly before completion to Dominion Stores. The other parcel they sold at about the same time to a single purchaser. The mode of sale in each case was by way of shares, the appellant and his associate being equal shareholders in the two companies. The appellant claims that he made a capital gain. The Minister of National Revenue assessed the profit as income. The judgment of the Exchequer Court was that the profit was income. This is a bald outline of the problem involved in complicated dealings. But notwithstanding the complexity of the dealings, I think that both the issue and the result are plain and I would affirm the judgment of the Exchequer Court on the ground that the appellant made a business profit.

The appellant between 1937 and 1950 worked in the mortgage department of a large insurance company and there acquired some experience in real estate development and financing. He became associated with one Grisenthwaite and at the time of the trial was secretary of Grisenthwaite Investments Limited, which had been incorporated in 1950 with the appellant owning 49 per cent of the issued shares and Grisenthwaite owning 51 per cent. That company was in the business of construction and sale of commercial and industrial buildings. It had constructed and sold buildings to International Business Machines Limited and Singer Sewing Machines Limited. At the date of the trial it owned six buildings and one shopping centre. It also owned a number of subsidiary companies, one of them in the business of building houses and apartment buildings, three in the business of dealing in real estate, two limited dividend housing companies, one in the heavy construction business and lastly, one which owned a shopping centre.

In 1952, an official of Dominion Stores in charge of real estate, one Foster, approached the appellant to seek his assistance in locating and developing a Dominion Store in the Aldershot area near the City of Hamilton. Originally it was intended that this official, together with the appellant and one other person, would be members of a syndicate of three to be formed for the purpose, but before any lands were purchased, this third person dropped out. The appellant, who was dissatisfied with his minority position in the

Grisenthwaite companies, then made a deal with Grisenthwaite that his project would, as between the two of them, be done on a 50-50 basis and not within Grisenthwaite Investments Limited. The appellant, on behalf of Foster, Grisenthwaite and himself, then acquired through a nominee four contiguous parcels of land totalling 132 acres for a total purchase price of $205,000. Upon the completion of the purchase of the land, Foster held a 50 per cent interest and Grisenthwaite and the appellant each had a 25 per cent interest. The land purchase was completed in the year 1952, but in the spring of 1953, Foster withdrew as a participant. His investment at that point was $60,000. He left this in as an interest-free loan to the appellant and Grisenthwaite.

Before the acquisition of these lands, a town planning expert had given an opinion that a shopping centre would not be economically feasible without an adjoining apartment dwelling project. For this reason, the lands which had been acquired were divided between two companies. 36.17 acres were transferred to Aldershot Investments Limited in June of 1953. The remaining lands were transferred to Aldershot Realty Limited in March of 1954. It was on the 36.17 acres held by Aldershot Investments that the Dominion Store was built. The appellant and Grisenthwaite were equal shareholders in each of these companies. In March of 1953 Aldershot Investments Limited sought a building permit for the erection of a supermarket. The Township of East Flamboro refused this building permit. There were mandamus proceedings which were settled in June of 1953 by the issue of a building permit for a supermarket but it was apparent by this time that zoning regulations would prevent apartment building on the lands which had been conveyed to Aldershot Realty Limited.

Barclay Construction Company Limited, a subsidiary of Grisenthwaite Investments Limited, undertook the construction of the supermarket. In the fall of 1953 a competitor of Dominion Stores approached the appellant with a view to acquiring a site on the lands owned by Aldershot Investments Limited. Dominion Stores objected and offered to buy out Aldershot Investments Limited either by purchase of assets or shares. The transaction was completed by a sale of the shares of Aldershot Investments Limited on

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April 14, 1954. The appellant realized a profit of $140,198.38. This is one of the items in dispute.

The appellant in his evidence stated that it was his intention in acquiring the lands and that it was also the intention of Aldershot Investments Limited, to develop the lands acquired by that company as a shopping centre and to hold them as a long-term investment. However, it should be noted that the town planning expert had told them that a shopping centre would not be economically feasible without the nearby apartment development. This advice had been given in 1952 and the dispute with the township knocked out any possibility of any such development. The adjoining lands were zoned for single residence dwellings.

In August of 1952 the appellant, in a letter to Dominion Stores, had mentioned two possibilities, rental of the proposed store to Dominion Stores Limited or, in the alternative, an outright sale. In October of 1952, in correspondence with Dominion Stores, the appellant was saying that he and his associate would like to build the building on their own account and lease it to Dominion Stores for a 25 or 30 year lease.

The fact is, however, that this one store was built by the two associates operating through a construction company, which was a subsidiary of Grisenthwaite Investments, and sold to Dominion Stores. This is all that happened. The agreement of sale was made in April of 1954 when the store was about 80 per cent completed. Dominion Stores agreed to buy all the shares of the appellant and Grisenthwaite for $360,000 cash, subject to the condition that the liabilities of Aldershot Investments should not exceed $350,000, which sum included $297,000 payable to the contractor, Barclay Construction Company, which up to that date had been paid nothing. The agreement was carried out and the purchase price divided equally between the appellant and Grisenthwaite. The appellant's profit on the sale of these shares was $140,198.38, which the Minister, in making his re-assessment, added to the appellant's reported income.

Cameron J., accepted the evidence of the appellant that when the two associates acquired the property, they did intend to attempt to develop the property for rental purposes. He calls this their dominant intention and he says that he is far from satisfied that it was their sole intention

at any time. He also finds that they intended to sell at least part of the property if they were unsuccessful in developing it as they planned. His conclusion is contained in the following extract from his reasons:

> In my view, the whole scheme was of a speculative nature in which the promoters envisaged the possibility that if they could not complete their plans to build and retain as investments a shopping centre and apartments, a profitable sale would be made as soon as it could be arranged.

In spite of the Judge's emphasis on primary and secondary intention, when applied to the facts of this case it amounts to no more than this. He was saying that two active and skilled real estate promoters made a profit in the ordinary course of their business, and this they obviously did. They were carrying on a business; they intended to make a profit, and if they could not make it one way, then they made it another way.

The same observations apply to the sale of the shares of Aldershot Realty Limited. The contract for the sale of these shares was made in April of 1954 and completed in 1955. On this transaction the appellant made a profit of $23,498.88. This was added by the Minister to his 1954 income. The profit on this sale, however, was realized in 1955 and should have been assessed in that year. This is the only change made by Cameron J. in the re-assessment and there is no cross-appeal on this point.

Some point was made of the fact that the appellant did not in one case sell a store and in the other case vacant land but shares in two companies. I agree with Cameron J. that this was merely an alternative method that they chose to adopt in putting through their real estate transactions. The fact that they incorporated companies to hold the real estate makes no difference. *Associated London Properties, Ltd. v. Henriksen (H. M. Inspector of Taxes)*[1].

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman, Elliott, Tamaki, Mercier & Turner, Montreal.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

[1] (1944), 26 Tax Cas. 46.

1964
*May 13, 14
Oct. 6

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

JOSEPH S. IRWIN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Profit from sale of oil interests by petroleum engineer—Whether business income—Computation of profit—Valuation of inventory—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 14(1), 14(2), 139(1)(e), 139(1)(w).

Over a number of years, the respondent, a petroleum engineer, acquired interests in prospective oil lands and in 1952, 1953 and 1955 disposed of some of them for cash payments and reservations of a royalty. The payments received were in excess of the cost to him of such rights. The Minister added to his reported income for 1952, 1953 and 1955 the profits realized on the sale of these rights on the ground that he was a trader in oil interests. The Income Tax Appeal Board confirmed the assessments. The Exchequer Court held that the respondent was a trader in oil interests, but ruled that under the combined effect of s. 14(2) of the Act and reg. 1800 of the Regulations, he was entitled to bring such interests into computation of profit as property described in an inventory and valued at fair market value, although such market value was considerably higher than the cost. This method would place the profits in earlier transaction years, rather than in those under appeal. The appeal was therefore allowed. The Minister appealed this latter ruling to this Court and the respondent cross-appealed the finding that he was trading in oil interests.

Held: The Minister's appeal should be allowed and the cross-appeal dismissed.

The law was clear that for income tax purposes gross profits, in the case of a business which consists of acquiring property and reselling it, is the excess of sale price over cost, subject only to any modification effected by the "cost or market, whichever is lower" rule. That rule is based upon the ordinary principles of commercial accounting, and s. 14(2) of the Act gave it statutory recognition. *M.N.R. v. Anaconda American Brass Ltd.*, [1956] A.C. 85, referred to. It was doubtful whether the combined effect of s. 14(2) and reg. 1800 made a change in that settled concept of profit. However it was not necessary to express an opinion on this point. The respondent did not in fact adopt the inventory method of computing income and, under the provisions of s. 14(1) of the Act, could not have done so without the permission of the Minister. Such permission was not granted. The respondent's profits were taxable and he was not entitled to adopt the fair value market method of inventory valuation.

APPEAL by the Crown and cross-appeal by the respondent from a judgment of Noël J. of the Exchequer Court of

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

Canada[1], allowing an appeal from a decision of the Income Tax Appeal Board. Appeal allowed and cross-appeal dismissed.

G. W. Ainslie and *G. F. Jones*, for the appellant.

J. H. Laycraft, Q.C., for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The material facts in this appeal and cross-appeal are not in dispute. Over a number of years commencing in 1942, respondent a petroleum engineer acquired interests in prospective oil lands and in the years 1952, 1953 and 1955 disposed of some of these interests for cash payments and reservations of a royalty. The payments received were in excess of the cost to him of such rights.

The appellant re-assessed the respondent for his 1952, 1953 and 1955 taxation years as having carried on business as a trader in oil interests, and included in his income for those years the net profit arising from the sale and partial disposition of the rights referred to. These assessments were confirmed by the Income Tax Appeal Board.

On appeal to the Exchequer Court[1], Noël J. held that respondent was a trader in oil interests but he accepted respondent's contention, that if he was a trader in such interests—which of course respondent had denied—they should be brought into computation of profit as property described in an inventory and valued at market value (although such market value was considerably higher than the cost) and allowed the appeal.

A few weeks before the trial in March 1962, respondent had a statement prepared by an accountant, the witness Morton, showing what purported to be the fair market value of oil interests held by him at the end of the 1951, 1952, 1953, 1954, 1955, and 1956 taxation years. Opinion evidence as to the fair market value of these interests in those years was adduced by respondent through a petroleum engineer, the witness Sproule. On the basis of that evidence the witness Morton also prepared profit and loss statements purporting to show that respondent had incurred a loss during the years in question.

On cross-examination Morton acknowledged that as an accountant he would not be prepared to certify the profit

[1] [1963] Ex. C.R. 51, [1962] C.T.C. 572, 62 D.T.C. 1356.

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and loss statements prepared by him as accurately reflecting either the loss or profit of respondent from dealing in oil leases; that the statements were simply an exercise in arithmetic based on valuations furnished by Dr. Sproule; and that an accountant in preparing financial statements would not value inventory at market value if the market value was in excess of cost.

The Crown appealed the finding of the Exchequer Court that in computing profits respondent was entitled to value oil rights as though described in an inventory at their fair market value. The respondent cross-appealed the finding that he was trading in oil rights.

At the hearing before this Court, counsel for appellant was informed that we did not need to hear him in reply on the cross-appeal which would therefore be dismissed.

Section 2 of the *Income Tax Act*, the charging section, imposes tax upon the taxable income of every person resident in Canada. Section 3 provides that such income includes income from a business, and s. 4 that income from a business is the profit therefrom for the year.

The basic concept of "profit" for income tax purposes has long been settled. A recent statement of the principle is that of Viscount Simonds in *Minister of National Revenue v. Anaconda American Brass Ltd.*[1]:

> The income tax law of Canada, as of the United Kingdom, is built upon the foundations described by Lord Clyde in *Whimster & Co. v. Inland Revenue Commissioners*, (1925) 12 T.C. 813, 823, in a passage cited by the Chief Justice which may be repeated. "In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business *during such year or accounting period* and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of *ascertaining that difference* must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes."

The law is clear therefore that for income tax purposes gross profit, in the case of a business which consists of acquiring property and reselling it, is the excess of sale

[1] [1956] A.C. 85 at 100, [1955] C.T.C. 311, 55 D.T.C. 1220.

price over cost, subject only to any modification effected by the "cost or market, whichever is lower" rule. That rule as Lord Clyde indicated in the passage which I have quoted is based upon what he described as the ordinary principles of commercial accounting and s. 14(2) of the Act gave it statutory recognition.

This appeal has raised the question whether the inventory provisions of the Act and the Regulations have effected a change in that settled concept of profit. I doubt whether the combined effect of s. 14 of the Act and reg. 1800 of the Income Tax Regulations, to which I shall refer in a moment, has made any such change, and I am also doubtful whether, in any event, the inventory provisions referred to, are applicable in the circumstances of a case such as this where the actual cost and sale price of each particular piece of property are well established. However since I have reached the conclusion that the appeal succeeds on other grounds I find it unnecessary to express any opinion on these two points, and I therefore refrain from doing so.

The following provisions of the *Income Tax Act,* relevant to inventory, are applicable to the three years in issue here, 1952, 1953 and 1955:

14. (1) When a taxpayer has adopted a method for computing income from a business or property for a taxation year and that method has been accepted for the purposes of this Part, income from the business or property for a subsequent year shall, subject to the other provisions of this Part, be computed according to that method unless the taxpayer has, with the concurrence of the Minister, adopted a different method.

(2) For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

139, (1)(*w*) "inventory" means a description of property the value of which is relevant in computing a taxpayer's income from a business for a taxation year.

This definition was repealed effective July 28, 1955 and the following was substituted:

(*w*) "inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year.

Regulation 1800 of the Income Tax Regulations reads as follows:

1800. For the purpose of computing the income of a taxpayer from a business

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(a) All the properties described in all the inventories of the business may be valued at the cost to him; or

(b) all the property described in all the inventories of the business may be valued at the fair market value.

Respondent acknowledged on cross-examination that at no time had he kept any document of inventory or valuation of the petroleum oil and natural gas reservations or oil leases acquired by him, and in particular that he had kept no inventory record or account as required by the Act. During the period in issue here, the Respondent was required to report any profit from his business, and if he had used the inventory method he would have been obliged to calculate such profit on the basis of cost or market whichever was the lesser. This was so prior to the enactment of s. 14 of the Act and of reg. 1800 because that was the law as stated in the *Anaconda* case.

As I have said, the Respondent did not in fact adopt the inventory method of computing income either prior to, upon, or after the enactment of reg. 1800, and under the provisions of s. 14(1) of the Act he could not have adopted that method without the permission of the Minister. That no such permission was granted is obvious from the fact that the respondent first put forward his market values at the trial before the Exchequer Court. Moreover if he had been keeping inventories on the "market value basis", he should have reported income in respect of his transactions in earlier years, which he failed to do. The repeal of s. 14(1) in 1958 could not have the retroactive effect of permitting him to change the method of computing income after 1958 without the permission of the Minister in respect of years that were past when the sub-section was repealed.

I would allow the appeal, dismiss the cross-appeal, and restore the assessments made by the Minister for the respondent's 1952, 1953 and 1955 taxation years. The appellant is entitled to his costs here and in the Exchequer Court.

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

Solicitor for the appellant: E. S. MacLatchy, Ottawa.

Solicitors for the respondent: Chambers, Saucier, Jones, Peacock, Black, Gain & Stratton, Calgary.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ADRIENNE LAROCHE .....RESPONDENT.

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*Mar. 12, 13
May 21

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Theft by conversion—Municipal treasurer giving municipal moneys to mayor on latter's instructions—Deficiencies concealed in accounts by treasurer—Defence of honest belief that accused was justified in following mayor's order—Court of Appeal ordering new trial—Whether trial unsatisfactory in regard to instructions to jury on defence's theory—Whether appeal to Supreme Court raises question of law—Whether conversion of moneys to accused's own use as charged—Criminal Code, 1953-54 (Can.), c. 51, ss. 269(1), 598(1)(b).

The respondent was convicted of unlawfully converting to her own use a sum of money, the property of a municipal corporation of which she was the treasurer and tax collector, and thereby stealing the same. The respondent admitted taking cash from the parking meter collections and depositing cheques due to the municipality from third persons in the parking meter bank account in order to balance that account and finally destroying the records of the transactions with these third persons. Her defence was that she gave the money to the mayor of the municipality in the honest belief that he had authority to receive the same and that she took no money for herself. The mayor gave evidence for the defence and testified that he had been authorized by council to receive up to $2,600 per year in addition to his salary for charitable purposes. Nine cheques were used in this way. The accused admitted that all of these cheques, with the exception of the Beaudry cheque and the Noël cheque, were *bona fide* cheques payable to the municipality and should have been credited to other accounts and that these other accounts were falsified. As to the Beaudry cheque, the respondent denied having any knowledge of this transaction. Beaudry himself said that this cheque was for the purchase of a lot and that he had received a conveyance. As to the Noël cheque which was certified, the mayor said that Noël cashed this cheque with the municipality to meet a payroll; the accused said that she understood from the mayor that Noël was cashing the cheque to raise money in a hurry for a holiday in Florida; and Noël said that it was paid to the municipality as a deposit for services to be rendered to his company by the municipality. The Court of Appeal found non-direction as to these last mentioned cheques and ordered a new trial. The Crown was granted leave to appeal to this Court on the question as to whether the Court of Appeal erred in law in holding that the trial judge misdirected the jury as to the theory of the defence.

Held (Cartwright, Hall and Spence JJ. *dissenting*): The appeal should be allowed and the conviction restored.

Per Taschereau C.J. and Fauteux, Abbott, Martland, Judson and Ritchie JJ.: As to the Beaudry cheque, the jury had the accused's explanation that she knew nothing about this particular item. They did not believe her. This aspect of the charge was adequate.

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

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As to the Noël cheque, the jury were entitled to consider all the circumstances—the concealment, the falsification of books, the whole operation of the parking meter account for improper purposes and the fact that this was a certified cheque. There could be no possibility of confusion or lack of understanding on the part of the jury. The brevity of the judge's reference to this cheque had not and could not have had the slightest effect in bringing about any lack of appreciation of the issues or the evidence in the minds of the jury. They could come to no conclusion other than the one that they did, namely, that there could be no honesty or honest opinion of right in these transactions.

This appeal raised a question of law.

The accused did convert the money to her own use and the judge's instruction on this point was correct.

Per Cartwright and Hall JJ., *dissenting:* The Court had jurisdiction to entertain the appeal. The question on which leave to appeal was granted was one of law and all of the grounds on which the Court of Appeal held that the conviction should be quashed were grounds the validity of which depended upon the answers given by that Court to questions of law.

The charge of the trial judge in regard to the evidence relating to the Beaudry cheque and that relating to the Noël cheque was insufficient. Since the trial judge instructed the jury that they should convict if satisfied that she had stolen the money represented by any one of the nine cheques, an Appellate Court could not know that the verdict was not based solely on the view that the guilt had been established as to the moneys represented by one or part of these two cheques.

There was also misdirection when the trial judge directed the jury that they could convict if they found that the accused converted the money in question to the use of the mayor since such a conversion would not be within the scope of the charge as laid. Parliament has seen fit to treat conversion to an accused's own use and conversion by an accused to the use of another person as two alternative modes of committing the offence of theft by conversion. Subject to the making of an amendment, the prosecution was bound by the description of the offence contained in the indictment. On the charge of the trial judge read in the light of the evidence, it was open to the jury to find that she handed to the mayor some or all of the moneys covered by the nine cheques, that she made use of none of these moneys for herself, but that she had no belief that the mayor had any colour of right to the moneys so taken. On these findings, it would not have been open to them to convict her of converting the moneys to her own use.

Per Spence J., *dissenting:* The Court of Appeal found that the trial judge failed to give to the jury the evidence as to the defence in a sufficient character to permit them to consider that defence. It has been held in this Court as a matter of law that the trial judge must review the substantial parts of the evidence and give to the jury the theory of the defence. There was therefore an appeal to this Court under the provisions of s. 598(1)(*b*) of the Code.

The ground relied upon by the Court of Appeal, namely, that the trial judge erred in directing the jury that they could only acquit the accused if they found that she believed she was under a legal compulsion to obey the mayor's orders, whereas it was sufficient if she honestly believed she was justified in following his orders even though she was not bound to do so, was not well taken. The trial judge pre-

sented to the jury the defence as it was made and then added that even if on the facts what was shown was a position weaker than belief in obligation and merely was belief in justification, it would, if established, have been a sound defence.

But the ground relied upon by the Court of Appeal that the trial judge while he put the theory of the defence to the jury did not discuss the evidence relating to that theory in a sufficiently comprehensive way, particularly in relation to the Beaudry and Noël transactions, was well taken. In the light of the circumstances, it would seem that the trial judge was required to outline the evidence adduced by the defence upon these two transactions in some particularity. Failure to do so would, in essence, be failure to put to the jury the defence of the accused. Yet the reference to these two transactions was regrettably brief. This constituted non-direction amounting to misdirection and a new trial should be had.

The instruction by the trial judge on the form of the indictment that the accused could have been convicted had it been proved that she converted to her own use any sum was a proper instruction. When the accused took the funds she converted them to her use despite the fact that her use of them was to deliver them to the mayor.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside the conviction of the respondent and directing a new trial on the ground of non-direction. Appeal allowed, Cartwright, Hall and Spence JJ. dissenting.

R. P. Milligan, Q.C., for the appellant.

G. A. Martin, Q.C., and *B. Carter*, for the respondent.

The judgment of the Chief Justice and Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The Crown appeals with leave of the Court from a judgment of the Court of Appeal for Ontario[1] which set aside the conviction of the accused and directed a new trial on the ground of non-direction. The Crown contends on this appeal that the verdict of the jury should be restored and that the judge's charge was adequate.

The accused was convicted on the following indictment:

That Adrienne Laroche did, between the 17th day of September, 1956 and the 17th day of May, 1960, at the Town of Eastview, in the County of Carleton, unlawfully convert to her own use money to the amount of $10,790.52, the property of the Municipal Corporation of the Town of Eastview and did thereby steal the same, contrary to the Criminal Code of Canada.

In spite of the fact that the trial lasted two weeks, the issues in the case were simple. The accused was charged

[1] [1963] 3 C.C.C. 5, 40 C.R. 144.

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with taking money from the parking meter collections of the Town of Eastview. Periodically, the meters were emptied, the small coins counted and taken to the bank. Instead of being deposited in the proper account, the coins were converted into paper currency and brought back to the Treasurer's Department of the Town of Eastview and kept there. From time to time the Treasurer took money from this account and the total alleged to be missing is the amount mentioned in the indictment, $10,790.52.

This shortage had to be concealed in some way if the auditors were not to become aware of what was going on. The method adopted was to take a bona fide cheque payable to the Town of Eastview and put it in the parking meter collection account and deposit it in the bank. The parking meter account, therefore, showed no shortage. The account in the books of the town to which the bona fide cheque should have been credited was falsified or destroyed. Nine cheques were used in this way. They are as follows:

(1) Millcraft (Ontario) Limited	$ 906.81	Nov. 26/56
(2) Millcraft (Ontario) Limited	923.81	Jan. 28/57
(3) A. Beaudry	1,000.00	Apr. 25/58
(4) Ottawa Gas Company	347.99	Dec. 5/58
(5) Ottawa Gas Company	1,231.05	July 28/58
(6) L. W. Noël Limited	2,000.00	Oct. 28/57
(7) C. L. Laroche	977.00	Oct. 4/58
(8) C. L. Laroche	1,000.00	Sept. 4/58
(9) C. L. Laroche	2,404.65	May 19/59
	$ 10,790.52	

The accused admitted that all of these cheques, with the exception of item No. (3), the Beaudry cheque, and item No. (6), the Noël cheque, were bona fide cheques payable to the Town of Eastview and should have been credited to other accounts and that these other accounts were falsified. There was some question about the Beaudry and Noël cheques and I will deal with the evidence on this later.

The accused commenced her employment with the Town of Eastview in the year 1947 as a clerk in the Treasurer's Department. In 1951, she was appointed Treasurer and Tax Collector and held this office until December 29, 1960. The accused admitted that she took cash from the parking meter collections and deposited cheques due to the municipality from third persons in the municipal bank account in order to balance the accounts, and she admitted that she destroyed the records of the transactions with the third persons. Her

excuse was that she gave the money to the Mayor of the municipality in the honest belief that he had authority to receive the money and that she took no money for herself.

Lavergne, the Mayor of the municipality, gave evidence for the defence. He was also a member of the Legislature of the Province of Ontario. He said that in 1955 and 1956 the municipal council wished to raise his salary to $5,000 from $2,400 but that he declined the increase because of the extra income tax that he would have to pay. He said that he made an informal arrangement with the council that he could draw in cash up to $2,600 a year to give to the poor and needy. He said that he did not exceed in any one year the total of $2,600 so authorized to be paid to him and that he used the money for the purposes stated. He did not keep any records of the amounts he received and Mrs. Laroche did not keep any records of the amounts that she gave to him.

This outrageous defence, coming as it did from two public officials of long experience, was put to the jury by counsel for the accused and by the judge. It was put to the jury by the judge with gravity and respect, without criticism and without commendation. This is the way counsel for the accused put it to the jury:

> If Mrs. Laroche had an honest belief that what Lavergne told her to do was all right, that she could do it, and that he had power and authority to order it, and she believed that he had such power and authority to order it, then what she did in allowing him to take money and what she did in not entering up these records as they should have been entered up, in a proper accounting system, in my respectful submission, is not a crime . . . whether Lavergne takes the money out of the box, or whether he tells her to take it out and give it to him, is immaterial in my respectful submission. If she honestly believed that Lavergne had the right, Council had said it is all right, charge it to whatever Department has the money.

This is the way the judge put it to the jury by way of summary after full discussion:

> Now here the theory of the defence as I understand it is that the accused honestly thought she was obliged to take this money as Lavergne had asked or ordered her to, because he was the Mayor, and had told her the Council had authorized him to have the money. Now if you believe her, or if you have a reasonable doubt in the matter, then you must acquit her, because she had not the fraudulent intent to steal.

I now turn to the two items on which the Court of Appeal found non-direction. The first is item No. (3) on the above list—the Beaudry cheque. Beaudry said that he gave his cheque payable to the town for the purchase of a lot and

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that he received a conveyance. The respondent denied having any knowledge of this transaction but the fact is that the Beaudry cheque, a bona fide cheque payable to the town, got into the parking meter collection account under her charge and was used at some date after April 25, 1958, to cover up the taking of the sum of $1,000. This was plain to the jury. They had her explanation that she knew nothing about this particular item. They did not believe her. This is what the judge said about the Beaudry cheque:

> The same with the Beaudry cheque for $1,000. The accused said she does not know how that got into the Treasurer's drawer and gave no explanation for it at all, and as Crown counsel has suggested, it is a peculiar situation where a cheque for $1,000 would be kicking around with the Treasurer not being curious enough to make some enquiry to find out where it came from, or why it was there and what it was for, but this again appears to have been used for covering up the taking of monies.

I think that aspect of the charge was adequate.

The second of the two disputed items is No. (6) on the above list, the cheque of L. W. Noël Limited. This company was in the construction business. The cheque was a certified cheque for $2,000 payable to the Town of Eastview and Noël said that it was paid to the town as a deposit for services to be rendered to his company by the town for the installation of sewer pipes and water mains. Lavergne said that Noël cashed this cheque with the town to meet a pay-roll. Mrs. Laroche said that she understood from Lavergne that Noël was cashing the cheque to raise money for a holiday in Florida and that he wanted the money in a hurry. These are the three explanations of the use of the Noël cheque referred to in the judge's charge, and they could not fail to be clear in the minds of the jury.

This is what the judge said:

> The next one is in April and July of 1958 when we are told about the Noël cheque for $2,000, and we are given three explanations of how that cheque came to be in the Municipal coffers, and you will have to decide which, if any, of these stories you accept. I do not know that you have to accept any of them. The fact is it was put in there and apparently improperly used and not credited.

Noël was called as the last witness in reply by the Crown. He had by this time, of course, heard the explanations that he was cashing a cheque for a pay-roll or for a trip to Florida. He denied that he had ever cashed a cheque with the municipality and was again cross-examined at length, much of it repetition of what he had gone through before.

The next day the case went to the jury. The $2,000 cheque was fully dealt with by counsel for the accused and he put it to them that the cheque was cashed. Counsel for the Crown put it to them that it was for a building permit and that whatever the purpose was, it was payable to the Town of Eastview and had nothing to do with the parking meter account and that the only purpose of getting it into that account was to cover up a defalcation of $2,000. The jury heard all this evidence, argument and instruction from the judge. They were entitled to consider all the circumstances—the concealment, the falsification of books, the whole operation of the parking meter account for improper purposes, and finally, the fact that this was a certified cheque that all the discussion was about. Why have a cheque certified in the afternoon if you are going to need cash? Why not get the cash instead of having the cheque certified?

I cannot see any possibility of confusion or lack of understanding on the part of the jury. I have already said that in my opinion, the issues were plain. The jury knew what these issues were and were in a position to form an opinion on the credibility of the two witnesses I have mentioned. The brevity of the judge's reference to the $2,000 cheque had not and could not have had the slightest effect in bringing about any lack of appreciation of the issues or the evidence in the minds of the jury. In my opinion they could come to no conclusion other than the one that they did, namely, that there could be no honesty or honest opinion of right in these transactions.

I would allow the appeal and restore the verdict of the jury and the sentence of the Court.

I agree with the reasons of Spence J.

(a) that this appeal raises a question of law,

(b) that the accused did convert the monies to her own use and that the judge's instruction on this point was correct.

The judgment of Cartwright and Hall JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The course of the trial and the questions raised on this appeal are stated in the reasons of other members of the Court.

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I agree with what I understand to be the opinion of all the other members of the Court that the question on which leave to appeal was granted is one of law, that all of the grounds on which the Court of Appeal[1] held that the conviction should be quashed were grounds the validity of which depended upon the answers given by that Court to questions of law and that, consequently, this Court has jurisdiction to entertain the appeal.

For the reasons given by my brother Spence and those given by McLennan J.A. I agree with their conclusion that the charge of the learned trial judge in regard to the evidence relating to the Beaudry cheque and that relating to the Noël cheque was insufficient. This defect assumes added importance by reason of the fact that the learned trial judge had, in effect, instructed the jury that they should convict the respondent if satisfied beyond a reasonable doubt that she had stolen the money represented by any one of the nine cheques listed in the reasons of my brother Spence. An appellate Court cannot know that the verdict of the jury was not based solely on the view that the guilt of the accused had been established as to the moneys represented by one or both of these two cheques.

My agreement on this point renders it unnecessary for me to examine the other grounds of law which were raised in the Court of Appeal and on which counsel for the respondent relies. I wish, however, to deal with the one which was stated as follows in the notice of appeal to the Court of Appeal:

> That the learned trial judge erred in law in directing the jury that they could convict the appellant if they found that she improperly converted the money in question to the use of Lavergne since such a conversion would not be within the scope of the charge as laid.

The charge on which the accused was indicted and tried was as follows:

> Adrienne Laroche did, between the 17th day of September, 1956, and the 17th day of May, 1960, at the Town of Eastview, in the County of Carleton, unlawfully convert to her own use money to the amount of $10,790.52, the property of the Municipal Corporation of the Town of Eastview and did thereby steal the same, contrary to the Criminal Code of Canada.

[1] [1963] 3 C.C.C. 5, 40 C.R. 144.

The relevant words of s. 269(1) of the *Criminal Code* defining the offence with which the respondent was charged are as follows:

> Everyone commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything . . . with intent . . . .

The corresponding words of the *Criminal Code* prior to the coming into force of the present code were the following, in s. 347:

> Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person anything . . . with intent . . . .

In the present code Parliament has seen fit to treat (i) conversion to an accused's own use, and (ii) conversion by an accused to the use of another person, as two alternative modes of committing the offence of theft by conversion. The prosecution could, if so minded, have charged the respondent in the words of s. 269; in which case the defence might well have moved for particulars. However, when the prosecution sees fit to particularize in the indictment itself it is, subject to the making of an amendment in a proper case, bound by the description of the offence contained in the indictment.

On the charge of the learned trial judge read in the light of the evidence it was open to the jury to find, (i) that the respondent handed to Lavergne some or all of the moneys covered by the nine cheques, (ii) that she made use of none of these moneys for herself, but (iii) that she had no belief that Lavergne had any colour of right to the moneys so taken. If, as may be the case, these were the conclusions arrived at by the jury, it would have been their duty to convict the respondent, had she been so charged, with converting the moneys to the use of Lavergne; but it would not, in my opinion, have been open to them to convict her of converting the moneys to her own use. It may be observed that at no stage of the proceedings did the Crown apply for any amendment.

In the course of his charge to the jury the learned trial judge said:

> Now the accused further says she took or retained none of the money for herself, but she turned over every cent she received to the Mayor, and I must tell you it is immaterial to this charge whether she kept some, all or none of the money. In fact in the first instance when she took it, it was

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for use to do as she wished with, and the use she made of it was to give it or some of it surreptitiously I suggest to Lavergne. If she took it for his use entirely it still falls in the definition of theft as I gave it to you, which definition is imported into the charge by the definitions I read.

For the reasons I have given above on this branch of the matter, I am of opinion that this was misdirection fatal to the validity of the conviction; and on this ground also I would have upheld the order made by the Court of Appeal.

I would dismiss the appeal.

SPENCE J. (*dissenting*):—This is an appeal by the Crown from the judgment of the Court of Appeal for the Province of Ontario[1] directing a new trial of the accused. The appeal is taken by leave of this Court granted on May 6, 1963, and the appeal was permitted upon the following question:

> Whether the Court of Appeal erred in law in holding that the learned trial judge misdirected the jury as to the theory of the defence?

Counsel for the accused took the preliminary objection that the Court of Appeal had allowed the appeal and directed a new trial upon two separate and independent grounds: (1) that the trial was unsatisfactory because the trial judge, while he put the theory of the defence to the jury, did not discuss the evidence relating to that theory in a sufficiently comprehensive way, and (2) that the trial judge erred in directing the jury that they ought to acquit the accused if the accused, honestly thought that she was obliged to give the money to the mayor and thereby conveyed to the jury the impression that they should acquit only if the accused believed she was under a legal compulsion to obey the mayor's orders, whereas it was sufficient, if she honestly believed that she was justified in following the mayor's orders even though she was not bound to do so. Counsel for the accused submitted that the first of those grounds was a ground of fact and that no appeal lay to this Court upon such ground. Where the provincial court of appeal has allowed an appeal on two grounds and no appeal lies to the Supreme Court of Canada on one of those grounds, no appeal will be considered with respect to the other of such grounds because the appeal would be devoid of practical results: *Ouvrard v. Quebec Paper Box Co. Ltd.*[2] and *The Queen v. Warner*[3]. It is true that in *R. v. Cohen*

[1] [1963] 3 C.C.C. 5, 40 C.R. 144.
[2] [1945] S.C.R. 1, 83 C.C.C. 16, 1 D.L.R. 522.
[3] [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

and Bateman[1], the Court of Criminal Appeals held that a mistake of the judge as to the fact or omission to refer to some point in favour of the prisoner is not a wrong decision on any point of law but merely comes within the words "on any grounds" as those words appear in s. 592(1)(*a*)(iii) of the *Criminal Code,* so that the appeal should not be carried beyond the Court of Appeal of Ontario, those words not appearing in s. 598(1)(*b*) of our Code.

I am of the opinion that it has been held in this Court as a matter of law that the trial judge must review the substantial parts of the evidence and give to the jury the theory of the defence.

The present Chief Justice of this Court, in *Azoulay v. The Queen*[2], said at p. 497:

> The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

In the result, the appeal was allowed, the judgment of the Court of King's Bench (Appeal Side) reversed, and a new trial directed.

In *Rex. v. Krawchuk*[3], this Court considered an appeal by the Crown from the Court of Appeal of British Columbia quashing a conviction for murder and directing a new trial. In giving judgment dismissing the appeal, Kerwin J., as he then was, said at p. 223:

> A trial Judge need not refer to every piece of evidence but to omit to mention the only evidence upon one branch of the defence is an omission to place that defence before the tribunal of fact.

There is no word in the judgment as to any lack of jurisdiction to consider such a ground in the Supreme Court of Canada.

In *Brooks v. The King*[4], this Court allowed an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario which had dismissed an appeal by the

[1] (1909), 2 Cr. App. R. 197.
[2] [1952] 2 S.C.R. 495, 15 C.R. 181, 104 C.C.C. 97.
[3] (1941), 75 C.C.C. 219, 2 D.L.R. 353.
[4] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.

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accused from his conviction at trial. At p. 636 of the judgment, it is said:

> Misdirection in a material matter having been shown, the onus was upon the Crown to satisfy the Court that the jury, charged as it should have been charged, could not, as reasonable men, have done otherwise than find the appellant guilty . . . That burden the Crown, in the view of the majority of the Court, has not discharged. There was non-direction by the learned trial judge in a vital matter, tantamount in the circumstances of this case to misdirection, and constituting a miscarriage of justice within subs. (1)(*c*) of s. 1014 of the *Criminal Code*.

That section is now s. 592(1)(*a*) and yet the Court considered it.

In *Kelsey v. The Queen*[1], leave to appeal was granted the accused upon two questions. Question (a) being, did the learned trial judge err in failing to instruct the jury adequately as to the theory of the defence? Fauteux J. at p. 225 said:

> It is suggested that the trial Judge should have commented on:—
> (*h*) The lack of any evidence of blood or signs of a struggle in the victim's taxi which serves strongly to contradict the appellant's statement to the police.

And at p. 226, commenting on this suggestion (*h*), said:

> In law, the general rule as again stated recently in *Azoulay v. The Queen*, [1952] 2 S.C.R. 495, is that the trial Judge in the course of his charge should review the *substantial* part of the evidence and give the jury the theory of the defence so that they may appreciate the value and effect of that evidence and how the law is to be applied to the facts as they find them.

Again, there was no reference to any lack of jurisdiction in this Court.

Despite the sentence in the judgment of McLennan J.A. in the Court of Appeal, "I have come to the conclusion that while the trial judge told the jury what the theory of the defence was, he did not discuss the evidence relating to that theory in a sufficiently comprehensive way and that the trial was unsatisfactory.", I have come to the conclusion that what the learned justice in appeal found was the failure of the trial judge to give to the jury the evidence as to the defence in a sufficient character to permit them to consider that defence and that that complaint was a matter of law and that, therefore, there is an appeal to this Court under the provisions of s. 598(1)(*b*). The Court of Appeal of Ontario considered that such a failure to submit the defence

[1] [1953] 1 S.C.R. 220, 16 C.R. 119, 105 C.C.C. 97.

of the accused to the jury had been established. I shall deal with that question hereafter.

At the present time I turn to the second ground of appeal relied upon in the judgment of the Court of Appeal, namely, that the trial judge erred in directing the jury that they could only acquit the accused if they found that she believed she was under a legal compulsion to obey the mayor's orders, whereas it was sufficient if she honestly believed she was justified in following the mayor's orders even though she was not bound to do so. If the evidence given by the accused and her counsel's address to the jury are carefully perused, it will be demonstrated that her defence was, in fact, that she was told by Lavergne that he was authorized to take these moneys, that she believed he was so authorized (she regarded him as the mayor, or as her "boss") and therefore that she was obliged to obey not merely that she was justified in obeying.

Since that was the defence which the accused submitted in her evidence and which her counsel emphasized in his address to the jury, it was that defence which the trial judge should have submitted to the jury. The trial judge did so even prefacing this statement with the words, "Now here the theory of the defence is as I understand it . . ." It may well be that the accused could have advanced a sound defence by merely establishing that she honestly believed she was justified in following the mayor's orders even though not bound to do so, and even when that belief was without foundation: *Regina v. Bernhard*[1]. The distinction, in my view, is academic as there could be no belief in justification which the accused could imagine except her obligation as a municipal servant to obey the mayor's orders. The trial judge, however, went farther having informed the jury of the defence of her belief in her obligation to obey the mayor's order, he charged them toward the close of his summing up in these words:

> If you take the other view that she was honestly under the dómination of Lavergne, and I pointed out to you the position in which he was there, as Mayor, with the power and prestige that he held, and that she thought she was acting honestly, and what she was doing was alright, or if you have any reasonable doubt about that, then you must acquit the accused.

Therein, the trial judge stressed that the accused's honest belief that her actions were honest "and what she was doing was alright" was a complete defence. What counsel for the

[1] (1938), 26 Cr. App. R. 137.

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accused sought to do in the Court of Appeal and here was to submit that the trial judge should have presented the accused's defence not as it was made but as it could have been made. The trial judge presented to the jury the defence as it was made and then added that even if on the facts what was shown was a position weaker than belief in obligation and merely was belief in justification, it would, if established, have been a sound defence. I am therefore of the opinion that this ground of appeal was not well taken and should not have been accepted by the Court of Appeal.

The Court of Appeal also allowed the appeal of the accused on the ground that the trial judge while he put the theory of the defence to the jury did not discuss the evidence relating to that theory in a sufficiently comprehensive way, particularly in relation to the Noël and Beaudry transactions. These transactions were two of the nine as to which evidence was adduced by the Crown to prove the total conversion of $10,790.52. It would seem an accurate summary of the learned trial judge's charge to say that he regarded these two transactions as merely two of the nine and, in fact, he charged the jury very explicitly that even if the accused had not been proved to have converted the $3,000 represented in those two transactions but had been proved to have converted the sums involved in the other transactions, she should be found guilty. This shall be referred to hereafter but at this point we are only concerned with the importance of these two transactions. It must be remembered that the accused swore that she had not used the Beaudry cheque for $1,000 to replace any sum taken from the municipal coffers in order to give it to the mayor, Lavergne, and that she also swore that she merely cashed the $2,000 Noël cheque as a matter of courtesy when requested by the mayor to do so and gave the proceeds to the mayor to deliver them to Noël. Now there was the strongest evidence to throw doubt on the *bona fides* of the defence story as to either of these transactions and that evidence was referred to forcefully and properly by the trial judge in his charge, but the fact remains that if the defence evidence were true, then neither the amount of $1,000 in the case of Beaudry nor of $2,000 in the case of Noël was filched by the accused from the municipal treasury although both appeared in the deposits to make up the balance in the various accounts. Lavergne, when called as a defence witness, made no estimate at all of the amount received from

the accused, and which he swore he used for various philanthropic gifts to citizens of the town, and persisted in this answer despite a very careful cross-examination. About the closest he came to such an estimate was to say that it was over $5,000 and not more than $2,600 per annum, i.e., $10,400.

The accused finally, in cross-examination, gave an estimated total of $6,300 as the amount which she had removed from the treasury upon the mayor's instructions and delivered to the mayor, but this was a most tentative estimate subject to qualification as to her ability to remember. The $6,300 in this estimate seems to be made up as follows: two Millcraft cheques for $906.81 and $923.81; a $1,200 Ottawa Gas cheque which was actually $1,231.05; another cheque which she described as a $900 cheque, i.e., the C. L. Laroche cheque for $977; and another cheque which she described as a $2,400 cheque, i.e., the Laroche cheque for $2,404.65. Those amounts total $6,443.32.

McLennan J.A., giving judgment for the Court of Appeal, set out the nine different cheques which were involved in the charge. Those cheques are as follows:

(1) Millcraft (Ontario) Limited	$ 906.81	Nov.	26/56
(2) Millcraft (Ontario) Limited	923.81	Jan.	28/57
(3) A. Beaudry	1,000.00	Apr.	25/58
(4) Ottawa Gas Company	347.99	Dec.	5/58
(5) Ottawa Gas Company	1,231.05	July	28/58
(6) L. W. Noël Limited	2,000.00	Oct.	28/57
(7) C. L. Laroche	977.00	Oct.	4/58
(8) C. L. Laroche	1,000.00	Sept.	4/58
(9) C. L. Laroche	2,404.65	May	19/59

It will be seen, therefore, that the accused acknowledges the delivery to Lavergne of funds represented by cheques Nos. 1, 2, 5, 7 and 9 in that list. The Beaudry and Noël cheques are Nos. 3 and 6, so this leaves unaccounted for only cheques Nos. 4 and 8, 4 being an Ottawa Gas Company cheque for $347.99, and 8 being a C. L. Laroche cheque for $1,000. It is possible that the accused, in her most inaccurate memory of those cheques which she had used to cover deliveries of cash to Lavergne, forgot those two items. If the accused's story had been believed that neither the Beaudry nor the Noël cheques represented any deduction from the assets of the town, it might have gone far towards supporting, in the minds of the jury, her defence that in all other cases she had acted on the orders of Lavergne and honestly

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believed she was justified in so doing, or at least it might have raised in the minds of the jury a reasonable doubt.

If, on the other hand, she was not believed on these two, the jury might well have felt that she had taken the $3,000 represented in those two cheques for herself personally and not to pass on to Lavergne, and so would have disbelieved her defence that she honestly believed she was under obligation to obey the orders of Lavergne. In the light of this situation, it would seem that the trial judge was required to outline the evidence adduced by the defence upon these two transactions in some particularity. Failure to do so would, in essence, be failure to put to the jury the defence of the accused. Yet the reference of the trial judge to these two transactions is regrettably brief. As to the Beaudry cheque, there is failure to point out the important fact that many persons had access to the drawer in which the cheque was kept and to the receptacles where the money in the various accounts reposed before such money was deposited in the bank, so that others beside the accused could have removed from these receptacles the amount equal to that represented by the cheque and cause the cheque to be placed amongst those to be deposited in the place of the cash. As to the Noël cheque, the brief reference thereto fails to mention the evidence of the accused that it was cashed from funds on hand merely as a courtesty, i.e., that it had been simply the delivery of money to the face value of a certified cheque after bank hours.

It is true, as has been pointed out above, that the evidence of the accused is contrary to much of the evidence proved on behalf of the Crown, and the jury might well have disbelieved the accused but since it was the gist of the defence the jury should have had called to their attention the evidence of the accused upon that theory of the defence, and, of course, quite properly, the evidence contra, so that they could have come to their decision whether the Crown had proved the charge beyond reasonable doubt. I, therefore, am in agreement with the judgment of the Court of Appeal that the trial judge's failure to do so constituted non-direction amounting to mis-direction and that a new trial must be had. That, of course, is sufficient to dispose of the appeal. However, some other grounds argued by counsel for the accused before the Court of Appeal and either not accepted by that Court or not dealt with in the Court of Appeal should be referred to, although briefly.

McLennan J.A., in giving judgment of the Court of Appeal, said:

> Counsel for the appellant argued that each of the nine transactions should have been made the subject of a separate count and since they were not the conviction is void for uncertainty because a general verdict on the indictment as it stands now does not reveal what amount the jury found that the appellant had stolen. This charge is, however, that the appellant between certain dates stole varying sums, in amounts and at times unknown, to a total sum of $10,790.52. In such a case it is proper to charge a general deficiency: *Minchin v. The King,* (1914) 23 C.C.C. 414. The proof of the nine transactions was necessary to show the general deficiency and apart from the first Millcraft cheque and the Noël cheque, if that was a substitution for cash previously taken, there was no relation in time between the takings and the substitutions of the cheques. If the charge had been that of falsifying records under section 340 it would of course have been necessary to set out in a separate count each of the transactions referred to, but that is not this case. The appellant did not apply for particulars before or during the trial under section 497 or to amend or divide the count under section 500. I would not be disposed to quash the conviction on these grounds because in substance the charge is of one continuous act of theft. In any event it is not a rule of law but one of practice that in cases like this the charge should be divided into as many counts as possible: *Regina v. Tomlin,* (1954) 38 C.A.C. 82. However, if there is a new trial it will be desirable and of assistance in directing the attention of the jury to the issues to be determined by them if either particulars are given under section 497 of the means by which the offence was committed by referring to each transaction or if that count be divided into separate counts so as to separate, at least, the first Millcraft transaction and the Noël and Beaudry transactions from the others.

I am in agreement with the view of McLennan J.A. and have nothing to add thereto.

If McLennan J.A.'s suggestion is complied with at the new trial, there will be no need to consider any question of the accused being found guilty as charged, when in fact some amount smaller than the total of $10,790.52 was proved beyond reasonable doubt. I must, however, express dissent from the submission made by counsel during the argument of this appeal that on the indictment if the evidence disclosed that only a lesser amount of money had been stolen the jury could have returned a verdict of guilty of that lesser amount but not guilty as charged. In my view, the instruction on the form of the indictment presented at the former trial that the accused could have been convicted had it been proved that she converted to her own use any sum was a proper instruction.

The submission that the accused could not have been convicted on the indictment as laid, in that it alleged that she had converted the funds to her own use while the evidence

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at trial showed that at any rate as to some indeterminate amount, perhaps $6,300, the accused had converted the funds of the town so that they could be used by the mayor, Lavergne, raises a rather difficult and important issue. To accede to the submission of the respondent's counsel herein, would enable an accused person to establish a sound defence by merely proving that the funds converted were handed over to the third party, be he a creditor or an ailing parent or an informal philanthropist such as Lavergne alleged he was. The trial judge charged the jury on the basis of the definition of theft in s. 269(1) of the Code that it mattered not whether the accused had converted the funds to her own use or that of another. Counsel for the accused, however, takes the position that the Crown had not charged theft generally, which would have permitted such an instruction to the jury, but had specifically charged the accused with conversion to her own use. It must be remembered that until the accused gave evidence in her own defence the allegation of conversion to the use of Lavergne had never been advanced. The answer to this contention, in my opinion, is that given by the learned trial judge when he said in his charge:

> In fact the first instance when she took it it was for use to do as she wished with. And the use she made of it was to give it or some of it, surreptitiously, I suggest, to Lavergne.

In short, when the accused took the funds she converted the funds to her use despite the fact that her use of them was to deliver them to Lavergne. I distinguish cases such as *R. v. Haurany*[1] and *R. v. Lurie*[2], on the ground that there the charge was obtaining by false pretences while the evidence showed that what the accused did was to obtain the delivery of property to another by a false pretence and never had possession himself. In the latter case, Goddard L.C.J., at p. 118, said:

> In this case, the cheques have been made out to the company, there is no doubt that the company was the owner of those cheques; it was always intended to be the owner. The only banking account into which those cheques could have gone was the banking account of the company.

In the result, I would dismiss the appeal.

Appeal allowed, conviction restored, CARTWRIGHT, HALL *and* SPENCE JJ. *dissenting.*

Solicitor for the appellant: W. C. Bowman, Toronto.

Solicitor for the respondent: G. Arthur Martin, Toronto.

[1] (1962), 132 C.C.C. 372.

[2] (1951), 35 Cr. App. R. 113.

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