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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

The Honourable ROBERT TASCHEREAU.

The Honourable CHARLES HOLLAND LOCKE.

The Honourable JOHN ROBERT CARTWRIGHT.

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

ATTORNEYS GENERAL OF CANADA

The Honourable EDMUND DAVIE FULTON, Q.C.

The Honourable DONALD M. FLEMING, Q.C.

SOLICITOR GENERAL OF CANADA

The Honourable WILLIAM J. BROWNE, Q.C.

MEMORANDA

On the 16th day of September, 1962, the Honourable Charles Holland Locke, Puisne Judge of the Supreme Court of Canada, upon attaining the age of seventy-five years, retired from the bench pursuant to s. 9(2) of the Supreme Court Act, R.S.C. 1952, c. 259.

On the 23rd day of November, 1962, the Honourable Emmett Matthew Hall, Chief Justice of Saskatchewan, was appointed a Puisne Judge of the Supreme Court of Canada.

53481-8—1½

ERRATA

in volume 1962

Page 120, line 11 from bottom. Read "formal" instead of "former".

Page 254, line 4 of Caption. Read "R.S.A. 1955".

in volume 1960

At the bottom of page 390, insert the following paragraph:

"Before parting with the matter, I wish to observe that Bridges J. suggests a doubt as to whether if he were untramelled by authority he would hold that, on the true construction of s. 64, to render void a preference in fact it is necessary that there be an intention on the part of the creditor to be preferred as well as an intention on the part of the debtor to prefer. In *Re Blenkarn Planer Ltd.* 14 D.L.R. (2nd) 719, Ruttan J. examines a number of decisions and expresses the opinion that the view of the debtor alone has to be considered. I mention this for the purpose of making it clear that in the case before us this point does not require decision and I express no opinion upon it."

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between November 1961 and December 1962, delivered the following judgments which will not be reported in this publication:

Aluminum Co. of Canada Ltd. v. H. W. Hullah Corpn. Ltd. (B.C.), appeal dismissed with costs, November 14, 1962.

Anderson and Houge v. Walkey and Mason, [1961] O.R. 289, appeal dismissed with costs in this Court, May 22, 1962.

Baldwin and McKinney v. Erin District High School Bd. et al., [1961] O.R. 687, 29 D.L.R. (2d) 290, appeal dismissed with costs, November 26, 1962.

Chartrand v. Thurso, [1960] Que. Q.B. 1, appeal dismissed with costs, April 24, 1962.

Chrysler Corporation of Canada Ltd. v. Robson, 32 D.L.R. (2d) 49, appeal dismissed with costs, November 29, 1962.

Crommie v. California Standard Co. (Alta.), appeal dismissed with costs, April 25, 1962.

Curlett v. Minister of National Revenue, [1961] Ex. C.R. 427, appeal dismissed with costs, October 10, 1962.

de Palma v. Lucciola, [1962] Que. Q.B. 373, appeal dismissed with costs, May 11, 1962.

Doiron v. The Queen (Exch.), appeal dismissed with costs, February 22, 1962.

Fortin v. Provincial Construction Co., [1961] Que. Q.B. 558, appeal dismissed with costs, June 11, 1962.

Gordon v. Ferguson, 46 M.P.R. 177, 30 D.L.R. (2d) 420, appeal dismissed with costs, May 2, 1962.

Hopital Voghel Inc. v. Cité de Montréal, [1962] Que. Q.B. 497, appeal dismissed with costs, November 8, 1962.

Iron Ore Transport v. The Queen, [1960] Ex. C.R. 448, appeal dismissed with costs, October 3, 1961.

Jacquays, Starke & Co. v. Hummel, [1961] Que. Q.B. 609, appeal dismissed with costs, February 23, 1962.

Konn v. Koss and Attorney General for British Columbia, 36 W.W.R. 100, 30 D.L.R. (2d) 242, appeal dismissed without costs, January 30, 1962.

Kulchycky et al. v. Kowalsky et al (Ont.), appeal dismissed with costs, March 8, 1962.

Labrador Realties Ltd. v. Legault, [1961] Que. Q.B. 633, appeal dismissed with costs, February 20, 1962.

Landry v. Larocque, [1960] Que. Q.B. 1147, appeal dismissed with costs, October 3, 1961.

McLean v. Minister of National Revenue, [1962] Ex. C.R. 81, appeal dismissed with costs, October 4, 1962.

Metalix Ltd. v. Clopay Corporation et al, 20 Fox Pat. C. 110, appeal dismissed with costs in the cause to the respondents in any event of the cause, December 15, 1961.

Minister of National Revenue v. John Colford Contracting Co., [1960] Ex. C.R. 433, appeal dismissed with costs, November 6, 1962.

North Peace Ratepayers Association et al. v. Travis et al. (B.C.), appeal dismissed with costs, January 24, 1962.

Paramount Fabrics Ltd. et al. v. Imperial Bank of Canada, [1961] Que. Q.B. 602, appeal dismissed with costs, October 17, 1962.

Queen, The v. Leforte, 31 C.R. 181, 131 C.C.C. 169, 31 D.L.R. (2d) 1, appeal allowed, conviction and sentence restored, October 12, 1961.

Rayonnier B.C. Ltd. v. City of New Westminster, 36 W.W.R. 433, 30 D.L.R. (2d) 446, appeal dismissed with costs, February 20, 1962.

Roy and Roy v. Hogan and Duguay, [1961] Que. Q.B. 450, appeal dismissed with costs, February 21, 1962.

Schwende v. Lacaille, [1961] Que. Q.B. 819, appeal dismissed with costs, November 8, 1962.

Shulman v. Minister of National Revenue, [1961] Ex. C.R. 410, appeal dismissed with costs, April 25, 1962.

Szymanski v. Unucka (Que.), appeal dismissed with costs, May 14, 1962.

Thorne v. Workmen's Compensation Board, 33 D.L.R. 167, appeal dismissed without costs, October 15, 1962.

Turpin v. The Queen (Ont.), appeal dismissed, November 20, 1962.

Vaillancourt v. Rousseau, [1962] Que. Q.B. 184, appeal dismissed with costs, October 26, 1962.

Valiquette v. St. Martin, [1961] Que. Q.B. 267, appeal dismissed with costs, December 15, 1961.

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Andrews v. The Queen (Ont.), leave to appeal refused, October 2, 1962.

Armstrong's Point v. Ladies of Sacred Heart, 29 D.L.R. (2d) 373, leave to appeal refused, January 23, 1962.

Bélanger v. The Queen, [1962] Que. Q.B. 781, leave to appeal refused, October 29, 1962.

Boland v. Labine (Ont.), leave to appeal refused with costs and motion to quash granted with costs, January 23, 1962.

Boland v. McTaggart et al. (Ont.), motion to quash granted with costs, June 11, 1962.

Brandon Packers v. National Trust Company (Man.), leave to appeal refused with costs, November 5, 1962.

Brandon Packers v. Rowe, 33 D.L.R. (2d) 503, leave to appeal refused with costs, November 5, 1962.

Brosseau v. The Queen, [1962] Que. Q.B. 456, leave to appeal refused, May 14, 1962.

Cadieux v. Delorme, [1962] Que. Q.B. 448, leave to appeal refused with costs, March 15, 1962.

Canada Permanent Trust v. Bowman et al., [1962] S.C.R. . . . motion to vary judgment granted, May 25, 1962.

Canadian Fishing Company v. Smith et al., 39 W.W.R. 277, leave to appeal refused with costs, October 2, 1962.

Dolbec v. U.S. Fire Insurance Company (Que.), leave to appeal refused, October 10, 1962.

Duguay v. The Queen, [1962] Que. Q.B. 779, leave to appeal refused, November 5, 1962.

Duval v. The Queen, 37 C.R. 305, leave to appeal refused, March 5, 1962.

Edwards et al. v. Edwards, 31 D.L.R. (2d) 308, leave to appeal refused with costs, February 26, 1962.

Ehret v. Anderst et al. (Alta.), judgment by consent granted, April 24, 1962.

Falconer v. Minister of Nat. Rev., [1962] S.C.R. 664, leave to vary judgment granted, October 29, 1962.

Farris v. Minister of National Revenue (Exch.), leave to appeal refused with costs, February 20, 1962.

Feeley v. Atty.-Gen. of Ontario (Ont.), leave to appeal refused with costs, September 18, 1962.

Gabourie v. The Queen (Ont.), leave to appeal refused, October 24, 1962.

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Labour Relations Bd. B.C. v. Rotary Pie Service Ltd. et al., 32 D.L.R. (2d) 576, leave to appeal refused with costs, May 7, 1962.

Lehnert v. Stein, 31 D.L.R. (2d) 673, motion to quash dismissed with costs, October 10, 1962.

Logan v. The Queen (Alta.), leave to appeal refused, March 5, 1962.

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Matte v. Matte, [1962] Que. Q.B. 521, leave to appeal refused with costs, May 28, 1962.

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Nadeau v. The Queen, [1962] Que. Q.B. 780, leave to appeal refused without costs, November 19, 1962.

Pickard v. Campbell, 30 D.L.R. (2d) 152, leave to appeal refused with costs, January 23, 1962.

Plotsky v. The Queen, 39 W.W.R. 129, leave to appeal refused, June 25, 1962.

Poulos v. Prahales et al, [1961] Que. Q.B. 811, leave to appeal refused without costs and motion to quash granted with costs, June 11, 1962.

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Simard v. Village de Normandin, [1962] Que. Q.B. 465, motion to quash granted, June 11, 1962.

Smith et al. v. The Queen (Ont.), leave to appeal refused, November 5, 1962.

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Sternlieb v. Cain et al., [1962] Que. Q.B. 440, leave to appeal refused, May 25, 1962.

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Taylor v. Williams et al. (Ont.), motion to quash granted with costs, March 5, 1962.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

53471-9—1

CANADIAN GENERAL ELECTRIC COMPANY .... APPELLANT;

1961 *June 7 Oct. 23

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Assessment—Income tax—Foreign exchange profits—Promissory notes payable in United States currency paid off at a saving—Proper method of computing profits—The Income Tax Act, 1948 (Can.), c. 52 [R.S.C. 1952, c. 148, ss. 3, 4]

The appellant borrowed funds from its parent United States company to purchase needed supplies from it and other suppliers in the United States, the indebtedness being evidenced by promissory notes payable in U.S. funds. During the currency of these notes the Canadian dollar rose from a discount to a premium over the U.S. dollar, and, as a result, the appellant was able to pay off all the notes at a saving of $512,847.12. Some of the notes aggregating $1,567,149.20 were paid off in 1951 at a saving of $81,774.44; the balance aggregating $9,225,326.87 were paid off in 1952 at a saving of $431,072.68. The latter amount, described as "foreign exchange profit on notes payable", was added by the Minister to the appellant's declared income for 1952. The appellant contended that the profit should be computed on an "accrual" basis, as in order to give a true picture of the company's position, it was necessary, from an accounting point of view, to revalue the amount of Canadian dollars necessary at each balance-sheet date to pay off the outstanding notes. On this basis it submitted that the total amount of $512,847.12 should be apportioned over three years as follows: $64,675.17 for 1950; $259,820.23 for 1951 and $188,351.72 for 1952. The Exchequer Court having ruled in favour of the Minister, the appellant appealed to this Court.

Held (Abbott J. dissenting): The appeal should be allowed.

Per Locke J.: For the years 1950 and 1951 the Minister had permitted the appellant to estimate its costs of production by treating the cost of its purchases, in respect of which the price was payable in American exchange, at the rate then current. In the result, however, except to the extent that some of the notes were paid prior to December 31, 1951, these liabilities were discharged at a time when American exchange was at a discount and, accordingly, the manufacturing profits of the company for 1950 and 1951 were understated for very considerable amounts in each year. The claim of the Crown in this matter really amounted to an attempt to recover *qua* profit on exchange substantially the amounts by which the appellant's costs were overstated and its income accordingly understated for these years by adding such amounts to its income for the year 1952. This could not be done.

Per Cartwright, Martland and Ritchie JJ.: It was proper for the appellant to compute its profits, in relation to the notes, in the manner which it adopted. There would be no "profit" at all in respect of the notes

*PRESENT: Locke, Cartwright, Abbott, Martland and Ritchie JJ.

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in the year 1952, save for the fact that their value had to be estimated, under the "accrual" method of accounting, in 1950 in order to determine the appellant's profit for that year. Being a matter of estimate, the valuation of the liability should continue to be revised in each year thereafter until the year of actual payment. If the "profit" for 1952 was to be the difference between an estimate and the amount of actual payment, such profit in that year should be determined on the basis of the estimate at the beginning of that financial year.

The decided authorities did not preclude the appellant from adopting the "accrual" method—a method which, in relation to trade liabilities payable in U.S. funds other than the notes, the Minister had never challenged, but in which, according to the uncontradicted evidence, the Minister had acquiesced, and which he had required. *Eli Lilly & Co. (Canada) Ltd. v. The Minister of National Revenue,* [1955] S.C.R. 745; *Tip Top Tailors Ltd. v. The Minister of National Revenue,* [1957] S.C.R. 703; *Davies v. The Shell Co. of China, Ltd.* (1951), 32 Tax. Cas. 133; *J. P. Hall & Co. Ltd. v. Commissioners of Inland Revenue,* [1921] 3 K.B. 152; *Whimster & Co. v. The Commissioners of Inland Revenue,* [1926] S.C. 20; *The Minister of National Revenue v. Consolidated Glass Ltd.,* [1957] S.C.R. 167; *Whiteworth Park Coal Co. Ltd. v. Inland Revenue Commissioners,* [1959] 3 All E.R. 703; *Gardner, Mountain & D'Ambrumenil, Ltd. v. Inland Revenue Commissioners,* [1947] 1 All E.R. 650, distinguished.

Per Abbott J., *dissenting:* In 1952 the appellant was able to purchase or otherwise acquire for $9,032,382.61 Canadian, the $9,225,326.87 U.S. required to discharge the liability of $9,461,455.29 Canadian, which it had claimed and been allowed as a deduction from gross income in arriving at its trading profits in the two previous years. It thus realized in that year a gain of $431,072.68 Canadian which on the principle laid down in *Eli Lilly & Co. (Canada) Ltd. v. The Minister of National Revenue, supra,* and *Tip Top Tailors Ltd. v. The Minister of National Revenue, supra,* must be taken into the computation of profit and loss for tax purposes. This exchange gain must be taken into account in 1952, the year in which it became a reality.

APPEAL from a judgment of the Exchequer Court of Canada[1], dismissing an appeal from an assessment under the *Income Tax Act,* 1948 (Can.), c. 52 and the *Income Tax Act,* R.S.C. 1952, c. 148. Appeal allowed, Abbott J. dissenting.

L. Phillips, Q.C., P. F. Vineberg, Q.C., and *A. D. McAlpine,* for the appellant.

D. S. Maxwell and *G. W. Ainslie,* for the respondent.

LOCKE J.:—That the difference between the amount in Canadian dollars required to satisfy the liability for the notes, as estimated in the company's accounts on December 31, 1951, and that expended for that purpose in 1952 was income within the meaning of the *Income Tax Act* is, in

[1] [1960] Ex. C.R. 24, 59 D.T.C. 1217.

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my opinion, settled by the decision of this Court in *Eli Lilly v. The Minister of National Revenue*[1]. That decision does not, however, touch the question as to whether the difference between the amount required to discharge these obligations at the time the notes were given and the amount which it would have been necessary to pay for that purpose on December 31, 1951, was also income.

I have read with care the evidence of the chartered accountants in this matter. It does not require expert evidence to demonstrate that, for the purpose of preparing a proper balance sheet and profit and loss statement for any manufacturing company, it is necessary to estimate throughout the year its costs of materials, raw or finished, purchased from other sources and used in manufacturing its products. A company such as the appellant is required annually to submit to its shareholders a statement as to its affairs at the end of its financial year. In a case such as the present, where the notes were payable in American exchange and the rate was fluctuating, it was necessary for the company to estimate its costs in accordance with the fluctuation of the rate from time to time during the year and to estimate the amount of the company's liability upon the notes at the rate current at the end of the fiscal year.

It is contended on behalf of the Minister that the fact that in the years 1950 and 1951 the amount necessary to discharge the notes given during these years was less at the end of the calendar year than that required to discharge them at the time they were given did not result in a taxable profit during those years. I agree with this contention and the contrary is not decided in *Lilly's* case. While the tax returns of the company for the years 1950 and 1951 showed these amounts as profit and treated them as capital gains and while the Crown contended as to the year 1950 that such so-called gains were part of the company's income, these circumstances do not affect the right of the Crown to take the stand that there was no such profit in these years.

However, accepting this as being correct, the position of the Crown is not assisted. Except to the extent that some of the notes were paid prior to December 31, 1951, the position was that though, of necessity, the liability in Canadian dollars for the purchases was estimated, neither profit nor gain was realized by reason of the variation of the exchange

[1] [1955] S.C.R. 745, 4 D.L.R. 561.

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rate. The Minister permitted the appellant to estimate its costs of production by treating the cost of its purchases, in respect of which the price was payable in American exchange, at the rate then current. In the result, however, these liabilities, with the exceptions noted, were discharged at a time when American exchange was at a discount and, accordingly, the manufacturing profits of the company for the years 1950 and 1951 were understated for very considerable amounts in each year.

In respect of this the Minister might, in my opinion, have made reassessments in respect of the years 1950 and 1951, when it was discovered that these amounts which might be described as exchange costs had not in fact been expended. There is no suggestion of any impropriety on the part of the taxpayer in this case but if, in the result, its costs were found to have been overstated in its returns for the years 1950 and 1951, the Minister might have made such a reassessment under the provisions of s. 42(4) of the *Income Tax Act*. The claim of the Crown in the present matter really amounts to an attempt to recover *qua* profit on exchange substantially the amounts by which the appellant's costs were overstated and its income accordingly understated for these years by adding such amounts to its income for the year 1952. This may not be done, in my opinion.

I have had the advantage of reading and I agree with the opinion of my brother Martland to be delivered in this case and with the disposition to be made of it which is proposed.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—The facts involved in this appeal, which are not in dispute, have been fully and completely stated in the judgment of the Exchequer Court[1] and are here restated.

By a re-assessment dated August 6, 1957, the respondent added to the declared income of the appellant for its taxation year ending December 31, 1952, the sum of $431,072.68, described as "foreign exchange profit on notes payable". In its original notice of appeal, to the Exchequer Court, the appellant took the position that, to the extent that any such profits were made in that year, they were profits on capital rather than on revenue account and, therefore, not

[1] [1960] Ex. C.R. 24, 59 D.T.C. 1217.

taxable. By amendments to the notice of appeal the appellant admitted that to the extent that it made "foreign exchange profits on notes payable" in 1952, such profits are of a revenue nature and are to be taken into consideration in computing its taxable income. The only dispute has to do with the quantum of such profits in 1952.

The appellant is a corporation, having its head office at Toronto, most of its shares being owned by the General Electric Company of Schenectady, New York. It is engaged in the business of manufacturing and selling electrical machinery and supplies of all sorts and purchases substantial quantities of needed supplies from General Electric, as well as from other suppliers in the United States. In 1950, the appellant had borrowed very substantial amounts from its Canadian bankers in the form of overdrafts. In August of that year, General Electric offered to make U.S. funds available to the appellant at a rate substantially lower than that paid to the appellant's Canadian bankers. The initial arrangement was that General Electric would defer payment of accounts for goods purchased from it by the appellant, carrying them on open account and at an interest rate of 2 per cent. Within a few weeks, however, General Electric required that any such indebtedness should be evidenced by promissory notes of the appellant payable to General Electric and all in U.S. currency.

These arrangements were duly carried out (the appellant, however, as before, continuing to pay cash for a portion of its purchases from General Electric) and some 25 notes were issued between August 20, 1950, and May 20, 1952. All of these notes were in respect of goods or services supplied by General Electric to the appellant except for one dated May 9, 1952, for $500,000 in U.S. funds supplied by General Electric to the appellant and used by the latter for the purchase of goods in the United States. Thirteen of these notes, issued in 1950, were payable on or before December 31, 1951. Five notes were issued in 1951, of which three were payable on or before June 30, 1952, and two were payable on or before December 31, 1952. Seven notes were issued in 1952, payable on or before June 30, 1953. All of the notes issued in 1950, which had not been paid in 1951, were replaced by a new note dated December 31, 1951, payable on or before June 30, 1953.

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During the currency of these notes the premium on U.S. funds over the Canadian dollar was sharply reduced, and, in 1952, the Canadian dollar was at a premium over such U.S. funds. The appellant was able to pay off all the notes at a saving, on a comparison between the cost of payment, in Canadian dollars, as between the dates of issuance and the dates of actual payment, of $512,847.12. Five of the notes issued in 1950, and aggregating $1,567,149.20, were paid off in 1951 at a saving of $81,774.44; the remaining notes, issued in 1950, 1951 and 1952 and aggregating $9,225,326.87, were paid off in 1952 at a saving of $431,072.68. It is the latter amount, which was added to the appellant's declared income, which is now in dispute.

It is submitted on behalf of the appellant that the total amount of $512,847.12 should be apportioned over three years as follows:

1950	$ 64,675.17
1951	259,820.23
1952	188,351.72

In order to understand this contention, it is necessary to state what the appellant did in relation to its liability on the notes in question. At the time that each note was given, there was set up in the appellant's books not only the liability for the face value of the note, but a further item under "foreign exchange" of an amount in Canadian funds which, together with the face amount of the indebtedness, would be necessary to pay the note in U.S. funds. That, of course, was based on the premium from time to time of the U.S. dollar over the Canadian dollar. It is not disputed that such entries were correct, the total of the two amounts truly representing the appellant's then liability for the goods purchased. As shown by the schedule attached to the notice of appeal, the amounts so set up for "foreign exchange" in 1950 totalled $300,573.15. The exchange rate in that year had varied from a high of 10½ per cent to a low of just less than 4 per cent. On December 31, 1950, the exchange rate was 6 per cent and the appellant on that date (which was the end of its fiscal year) revalued the amount of the "foreign exchange" premium which it would have had to provide if it had paid the existing notes in full at that date, namely, at the then rate of exchange of 6 per cent—a total of $235,897.98. The difference of $64,675.17 between the total amounts it had originally set up to meet the exchange

premium ($300,573.15) and that fixed for the year end ($235,897.98) was considered to be "profit" for that year, although no payments were made on the notes in that year. In its income tax return for the year 1950, this "profit" of $64,675.17 was disclosed, but as it was claimed by the appellant to be a gain on account of capital, it was not taken into income. The Minister added it to the declared income, but an appeal to the Income Tax Appeal Board was allowed. From that decision the Minister lodged an appeal which was later abandoned.

The second schedule to the notice of appeal sets forth the computation of the appellant in respect of the "profit" in question for 1951. The item of $235,897.98 set up by revaluation on December 31, 1950, as the amount necessary to pay the exchange on the outstanding notes on that date was carried forward to the beginning of 1951 and to it was added the amount of foreign exchange premium necessary to pay all the new notes issued in 1951 at the rate of exchange prevailing when each note was given, the total of both sums aggregating $404,793.26. From that aggregate, there was deducted (a) the actual exchange premiums paid on the notes which were redeemed in that year, and (b) the total of the revalued amounts of exchange necessary to pay the outstanding notes at December 31, 1951, at the then current rate of 1¼ per cent—a total of $144,973.03. The difference of $259,820.23 was considered to be "profit" for the taxation year 1951. In its return for that year, the appellant showed that amount as exchange profit on notes, but claimed it to be a gain on capital account.

Schedule 3 to the notice of appeal relates to the year 1952 in which further notes were issued, and these, together with all outstanding notes, were paid in full before December 31, 1952. The Canadian dollar throughout the year was at a premium. Accordingly, from the "credit" in exchange on the new notes issued in that year totalling $68,789.34, there was deducted the "debit" established by revaluation of the notes unpaid on December 31, 1951, namely, $62,196.80, leaving a balance of $6,592.54. That amount was deducted from $194,944.26, the amount of the actual benefits accruing to the appellant upon payment of its several notes in 1952, due to the premium on the Canadian dollar. It is contended that the difference of $188,351.72 is "profit" for 1952 relating to "exchange on the notes". In its income tax return for that

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year, the appellant attached Schedule 28 thereto with the same particulars as in Schedule 3 of the notice of appeal. In computing its taxable income, however, the full amount of $188,351.72 was deducted from net income, the appellant then being of the opinion that such "profit" was not on revenue account. It is now conceded, however, that whatever profit was made in 1952, upon payment of the notes, was a profit on revenue account.

It is admitted that the appellant, had it so desired, could at all relevant times have paid the notes (which admittedly were curernt liabilities) in full by having recourse to the line of credit which it had with its Canadian bankers.

The expert accountants, who gave evidence for the appellant, were all in agreement that the "accrual" system was the only suitable one for the appellant company and that, from an accounting point of view, it was proper and necessary, in order to give a true picture of the company's position, to revalue the amount of Canadian dollars necessary at each balance-sheet date to pay off the outstanding notes.

The Court below decided in favour of the respondent. Its decision may be briefly summarized in the following quotation from the reasons for judgment:

> It will be seen, therefore, that the issue is one of amount only, the appellant's main contention being that the profit on exchange in 1952 was $188,351.72 and not $431,072.68, the amount added by the Minister.
>
> In my view, the broad issue to be determined here is this—"When did this profit arise?" That question, as I have suggested, is one of law, to be answered by a consideration of the Act and the relevant decisions of the Courts. By s. 3 of the 1948 *Income Tax Act*, "The income of a taxpayer for a taxation year . . . is his income from all sources . . . (and) includes income for the year from all . . . businesses." Then, by s. 4, "Income for a taxation year from a business . . . is the profit therefrom for the year."
>
> The problem will, I think, be made clearer if a specific example is considered. Certain of the notes issued to General Electric in 1950 were wholly unpaid until 1952. Notwithstanding this fact, the appellant on December 31, 1950, and on December 31, 1951, in relation to these notes revalued downwards on its books the amount of Canadian dollars necessary on those dates to pay the premium then in effect on U.S. exchange. In 1951, nothing else was done in connection with these liabilities. The question, therefore, is whether in these circumstances a trader who in one year has incurred a debt in foreign currency and has left it wholly unpaid throughout the following year, is taxable under *The Income Tax Act* by reason of the single fact that its liability in terms of Canadian currency has decreased during that subsequent year as the result of the change downwards in exchange rates.
>
> After most careful consideration of the arguments of counsel and of the authorities cited in support of their submissions, I have come to the conclusion that the appeal on this point is not well founded and must be

dismissed. I do so for the reason that the profits in question, in my opinion, were neither made nor ascertained by the mere revaluation downwards on December 31, 1950 and December 31, 1951 on the books of the company, of the amount of the premium in Canadian dollars necessary to pay the outstanding notes, but that such profits were made only upon actual payment of the several notes.

From that judgment the appellant has appealed. Its position in the present appeal was stated by its counsel as follows:

The only difference between the parties and the subject of the present litigation is whether a "*calculated* profit" of $431,072.68 on a combination of the "cash" and "accrual" methods of computing income is attributable to 1952 as income of the appellant for that year, which is the only one of the three years now under assessment and appeal, or whether the appellant's attribution of "income" to 1950, 1951 and 1952 on the "accrual" method of computing income as reflected in the appellant's financial statements and income tax returns is correct.

The appellant's accrual treatment of all its current obligations in U.S. currency (including the accounts payable in question represented by notes) was accepted throughout as reported but the current liabilities evidenced by notes were singled out for different treatment only in the re-assessment made in 1957 for the appellant's 1952 taxation year. The appellant had treated all foreign currency payables and receivables, and foreign currency bank accounts in the same way and took into its profit and loss statement any income or loss resulting from a change in the rate of exchange from that which was originally recorded.

Under the belief, acknowledged later to be mistaken, that the issue of the notes changed the character of the liability, the appellant for the 1952 year excluded the "gain" on the notes. The mistaken belief has been subsequently corrected and the appellant concedes that the issue of the notes did not in any way change the liability from an ordinary trade account payable for goods purchased the same as other trade accounts payable, so that the exclusion of the "gain" from income for income tax purposes is no longer justified. It is the appellant's submission that the gain should be treated in exactly the same way as the gain on the other foreign currency payables, receivables, and bank accounts.

The respondent contends that a taxable profit is not realized and does not arise by the mere revaluation in a trader's account of the cost in Canadian dollars, at any given time, of paying off an indebtedness payable in a foreign currency. A profit arising in this way would be an unrealized profit. In the present case the profit was only realized on actual payment of the notes and that profit consisted of the difference in the amount of Canadian dollars which would have been required to pay the notes at the time of their issuance and the amount actually required when the notes were paid. No notes were paid off in 1950. Some were paid in 1951 and

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the balance were paid in 1952 and accordingly the respondent contends that the profit on exchange should be apportioned to the years in which the notes were actually paid, as follows:

1951	$ 81,774.44
1952	431,072.68

The relevant sections of the *Income Tax Act* are ss. 3 and 4, which provide as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

The problem to be determined is as to what was the appellant's profit from its business in the year 1952. The judgment appealed from has held that, in computing its profit for that year, the appellant must take into account the "profit" resulting from the fact that in that year it was able to discharge notes, payable in U.S. funds, for a lesser number of Canadian dollars than would have been required to pay them at the time of their issuance, on the ground that the "profit" was realized by such payment. The appellant was not, in law, for income tax purposes, entitled to compute its "profits", in respect of the notes, in the years 1950 to 1952 inclusive in the way in which, under its system of accounting, it had actually done.

In considering the validity of this conclusion, reference may first be made to some general principles which have been stated regarding the meaning of the word "profit" and the method of its determination.

Viscount Maugham, in *Lowry (Inspector of Taxes) v. Consolidated African Selection Trust, Limited*[1], said:

It is well settled that profits and gains must be ascertained on ordinary commercial principles, and this fact must not be forgotten.

In this Court, in *Dominion Taxicab Association v. The Minister of National Revenue*[2], Cartwright J. said:

The expression "profit" is not defined in the *Act*. It has not a technical meaning and whether or not the sum in question constitutes profit must be determined on ordinary commercial principles unless the provisions of the *Income Tax Act* require a departure from such principles.

[1] [1940] A.C. 648 at 661, 2 All E.R. 545.

[2] [1954] S.C.R. 82 at 85, 54 D.T.C. 1020.

I do not understand the judgment appealed from to hold, nor did the respondent contend, that the method adopted by the appellant in computing its profits in the year 1952 was in contravention of any of the provisions of the *Income Tax Act* itself. What was held was that, on the basis of the decided cases, the appellant had realized a taxable "profit" of $431,072.68 in that year.

This raises the question as to what was the nature of the "profit" which the appellant has thus realized. Clearly, it consists of the difference in amount as between an actual expenditure of Canadian dollars and an estimated valuation of the cost of payment in those funds. The sole issue is as to whether, in computing taxable income for the year 1952, that valuation must necessarily be the one which was first made, when the note was issued, or whether the revised valuation, as of the beginning of the year 1952, is the one which should be used.

Taking as an example a note issued by the appellant to its parent company in 1950 and paid in 1952, the legal position is that a debt, payable in U.S. dollars, incurred in 1950, was paid off in 1952 in U.S. dollars. Thus far there can be no question of a "profit" in 1952. Had the appellant operated on a "cash" system of accounting there would merely have been an expenditure taken into account in that year. The "profit" which the respondent says the appellant realized in 1952 can only be said to arise because of the fact that the appellant, under its "accrual" method of accounting, included the note as a liability in computing its profit for the year 1950. In setting up that liability in 1950 the appellant had to estimate the value of the note in terms of Canadian dollars. An estimate was made at the time the note was issued, but further estimates were made at the end of each month and also at the end of the financial year, December 31, 1950. The estimate for that date was made on the basis of the rate of exchange existing at that time. In my view, as it was a matter of estimation, that was the best date in 1950 on which to value the liability for the purpose of computing profit for that year. It seems to me that there is no special significance attaching to the rate of exchange existing on the date on which the note was issued, because there was no likelihood that the note would be paid on that date.

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In 1951, at the commencement of the year, the appellant's estimate of the liability as of the end of 1950 was carried forward. At the end of each subsequent month it was revised in accordance with the then existing exchange rate and again an estimate was made at the year end. During that year there had been a decline in the premium payable on the U.S. dollar, so that by the year end the cost to the company of paying off the U.S. obligation had declined. The liability which had been taken into account in computing profit for the year 1950 was now less than it had been in that year. In order properly to show the appellant's position in the year 1951 it was necessary for it to make this revision of estimate and thereby it disclosed a "profit", which was really a reduction of the liability, as previously taken into account in 1950. The appellant's position, under the "accrual" method of accounting, had improved. It was only because of the application of that method, in the first place, that the liability had been taken into account in terms of Canadian dollars in 1950.

In my opinion it was proper for the appellant to do this. Its profit or loss during the 1951 accounting period had to be ascertained by a comparison of its position at the beginning and at the end of that period, based upon estimates of value and the accrual of debits and credits. Furthermore it should be noted that all of the 1950 notes, not paid in 1951, were due and payable by December 31, 1951. So far as the notes issued in 1951 are concerned, for the reasons already stated, I feel that the proper date on which to estimate their value in that year was at the end of the financial year on December 31, 1951.

In 1952 the notes were paid off and our problem is as to the "profit" which accrued in that year. In my view, the "profit" from its business, in 1952, in relation to the notes, should be the amount by which, in terms of Canadian dollars, the cost of payment was reduced in that year. This represented the difference between the estimate of the cost of payment as of the beginning of the year 1952 and the actual cost of payment in that year.

To summarize my view it is that there would be no "profit" at all in respect of the notes in the year 1952, save for the fact that their value had to be estimated, under the "accrual" method of accounting, in 1950 in order to determine the appellant's profit for that year. Being a matter

of estimate, the valuation of the liability should continue to be revised in each year thereafter until the year of actual payment. If the "profit" for 1952 is to be the difference between an estimate and the amount of actual payment, such profit in that year should be determined on the basis of the estimate at the beginning of that financial year.

It is now necessary to consider whether this conclusion is contrary to the principles established by the decided cases. There does not appear to be any decision which actually deals with this point, but reliance was placed, in the Court below, on the views expressed in a number of decisions.

Some reliance was placed upon the decisions of this Court in *Eli Lilly & Co. (Canada) Limited v. The Minister of National Revenue*[1], and *Tip Top Tailors Limited v. The Minister of National Revenue*[2]. However, in both those cases, as the judgment below points out, the question before the Court was as to whether certain profits resulting to the taxpayer from fluctuations in the foreign exchange rate constituted capital gains or taxable income. The point in issue now was never considered and, because of that fact, I do not think that either case is of any real assistance in determining the issue in the present appeal. Similarly, I do not think that cases such as *Davies v. The Shell Company of China, Ltd.*[3], which involved like issues, can aid materially in the present case.

Reference was made to *J. P. Hall & Co. Ltd. v. Commissioners of Inland Revenue*[4]. In that case, the company had contracted, in March 1914, to supply electric motors with control gear between July 1, 1914, and September 30, 1915, payment to be made one month after delivery. In April 1914 it placed sub-contracts for the control gear, but, owing to the war, deliveries of control gear by the company to its purchaser were delayed and were, in fact, made between August 1914, and July 1916. Initially, the company, in its accounts, had credited the sale price of the control gear as and when it was delivered. Subsequently, however, it contended that, for the purposes of excess profits duty, the profit from the purchase and sale of control gear should be

[1] [1955] S.C.R. 745, 4 D.L.R. 561.
[2] [1957] S.C.R. 703, C.T.C. 309.
[3] (1951), 32 Tax Cas. 133.
[4] [1921] 3 K.B. 152, 90 L.J.K.B. 1229.

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treated as arising in the accounting period in which the contracts were made. It was held, contrary to the company's contention, that the receipts in question were receipts of the accounting period in which the deliveries of control gear were actually made.

In that case the accounts in question were not yet receivable in the year in which the taxpayer sought to take them into income. As Lord Sterndale said, at p. 155, in answer to the contention that the profit on the transaction was ascertained and made on the completion of the contract: "It seems to me the simple answer is it was neither ascertained nor made at that time."

In that case the debts which the taxpayer sought to take into account were not yet receivable. The issue was different from that which arises here, where the liability is, admittedly, a current liability, taken into account at an estimated figure, and where the question is as to the propriety of subsequent revisions of that estimate in determining profits.

The Court below found an analogy between the present case and two cases in which the taxpayer had sought to take into account future anticipated losses as actual losses in a taxation year.

In *Whimster & Co. v. The Commissioners of Inland Revenue*[1], a shipping company sought to include, as a loss in a particular year, an allowance in respect of losses which it anticipated in future years, by reason of a depression in the shipping business which had already set in. It was held in that case that this was not a proper deduction in the period in question, because the loss had not actually been incurred in that period.

In *The Minister of National Revenue v. Consolidated Glass Limited*[2], in this Court, the issue was as to whether a reduction in the value of shares owned by the company, which it still retained, could be taken into account in computing its undistributed income in accordance with s. 73A(1)(*a*) of the *Income Tax Act*, 1948, the company having elected to be assessed and to pay tax under s. 95A of that *Act* as enacted in 1950. This Court decided that it could not be taken into account.

[1] [1926] S.C. 20, 12 Tax Cas. 813.
[2] [1957] S.C.R. 167, C.T.C. 78.

With respect, in my opinion, these cases are distinguishable from the present case because the situation here is not one which involves a question of anticipated future profits or losses. In the year 1951, when the appellant revised the estimate of the cost of repaying its notes, it was not doing so with a view to making an allowance in respect of anticipated profits or losses of this kind in the future. It was revising its estimate of the amount of a liability which it had actually incurred and taken into account in 1950. That liability had, in fact, reduced by the end of the year 1951, with the result that, so far as that year's operations were concerned, its profit for the year had increased by that amount.

The respondent cited in argument, among other authorities, *Whitworth Park Coal Co. Ltd. v. Inland Revenue Commissioners*[1], and *Gardner, Mountain & D'Ambrumenil, Ltd. v. Inland Revenue Commissioners*[2].

The first of these dealt with the question of the years in which certain income payments, payable to the company, should be assessed. The payments arose by virtue of the statutory provisions relating to the transfer of assets from the company to the National Coal Board under the *Coal Industry Nationalisation Act, 1946*. The issue was as to whether they were assessable in the years in which they were actually paid, or whether they should be assessed in those years in respect of which the payments became due. The House of Lords held that they were assessable in the years in which the payments were actually made, but it is clear that the important element in that case was that the company had to be treated as a non-trader.

Viscount Simonds, at p. 713, says:

The word "income" appears to me to be the crucial word, and it is not easy to say what it means. The word is not defined in the *Act*, and I do not think that it can be defined. There are two different currents of authority. It appears to me to be quite settled that, in computing a trader's income, account must be taken of trading debts which have not yet been received by the trader. The price of goods sold or services rendered is included in the year's profit and loss account although that price has not yet been paid. One reason may be that the price has already been earned and that it would give a false picture to put the cost of producing the goods or rendering the services into his accounts as an outgoing but to put nothing against that until the price has been paid. Good accounting practice may require

[1] [1959] 3 All E.R. 703.
[2] [1947] 1 All E.R. 650, 29 Tax Cas. 69.

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some exceptions, I do not know, but the general principle has long been recognised. And if in the end the price is not paid it can be written off in a subsequent year as a bad debt.

But the position of an ordinary individual who has no trade or profession is quite different. He does not make up a profit and loss account. Sums paid to him are his income, perhaps subject to some deductions, and it would be a great hardship to require him to pay tax on sums owing to him but of which he cannot yet obtain payment.

He later goes on to say:

I certainly think that it would be wrong to hold now for the first time that a non-trader to whom money is owing but who has not yet received it must bring it into his income tax return and pay tax on it. And for this purpose I think that the company must be treated as a non-trader, because the *Butterley* case ((1956) 2 All E.R. 197) makes it clear that these payments are not trading receipts.

In *Gardner, Mountain & D'Ambrumenil, Ltd. v. Inland Revenue Commissioners* the House of Lords reaffirmed the doctrine of the relation back of trading receipts. The appellants were a firm of underwriting agents who, under their contract of service, were entitled to commission in respect of policies underwritten by them in any year, although the amount thereof could not be quantified or paid to them until two years after the close of the relevant year. It was held that the commission was earned in the year in which the policies were underwritten and must appear in the company's accounts as a trading receipt for such year; the assessment based on the original accounts for that year had accordingly to be re-opened so as to bring in the finally ascertained sum.

The present case involves liabilities on notes which were properly taken into account in the years in which they were made. Neither the amount of the liabilities in this case, nor the amount of the receipts in that case, could, at the time they arose, be finally determined. But there has been no suggestion by the respondent in the present case that the final determination of liability should be taken into account in the years in which the notes were issued. Had that been done in 1950 and 1951, the appellant's income in those years would have been increased, but its income in 1952 would have been even less than the appellant itself has admitted.

With respect, I do not reach the conclusion that the decided authorities precluded the appellant from computing its "profits", in relation to the notes, in the manner which it adopted—a method which, in relation to trade liabilities

payable in U.S. funds other than the notes, the respondent has never challenged, but in which, according to the uncontradicted evidence, the respondent had acquiesced, and which he had required.

In my opinion the appeal should be allowed and the respondent's assessment for the year 1952 should be adjusted to eliminate the respondent's inclusion in income of the amount of $431,072.68 and to include in income the amount of $188,351.72. The appellant should have the costs of this appeal and its costs in the Exchequer Court.

ABBOTT J. (*dissenting*):—The facts—which are not in dispute—are fully stated in the reasons of the learned trial judge and in those to be delivered by my brother Martland. I am in agreement with the reasons and conclusions of the learned trial judge and there is little I can usefully add to them.

During the period between August 25, 1950, and May 20, 1952, appellant issued to its parent company, notes as evidence of indebtedness, in the amount of 10,792,476.07 United States dollars. All these liabilities were incurred for stock in trade or services. During the taxation year 1951 appellant made payments on account of its U.S. dollar indebtedness amounting to $1,567,149.20 U.S., leaving a balance owing of $9,225,326.87 U.S. Since appellant maintains its accounts in Canadian dollars, a Canadian dollar equivalent of that amount, namely $9,461,455.29, had been taken into the trading accounts of appellant as a trading liability in the respective years in which the liabilities were incurred, and claimed and allowed a trading expense in determining taxable income for those years.

In 1952 appellant was able to purchase or otherwise acquire for $9,032,382.61 Canadian, the $9,225,326.87 U.S. required to discharge the liability of $9,461,455.29 Canadian, which it had claimed and been allowed as a deduction from gross income in arriving at its trading profits in the two previous years. It thus realized in that year a gain of $431,072.68 Canadian which on the principle laid down by this Court in the *Eli Lilly & Company* case and the *Tip Top Tailors* case must be taken into the computation of profit and loss for tax purposes. Put in another way, appellant had received goods and services worth $9,461,455.29 Canadian, which, by deferring payment until the exchange rate had moved substantially in its favour, it was able to acquire

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for $9,032,382.61 Canadian with a resulting profit of $431,072.68. I agree with the learned trial judge that this exchange gain must be taken into account in 1952, the year in which it became a reality.

The $9,461,455.21 Canadian, claimed as an expense in the respective years in which the U.S. dollar liabilities were incurred, could not be claimed as an expense in any other year, and the fallacy inherent in appellant's submission is clearly pointed out by the learned trial judge in the following terms:

> Let it be assumed that goods were purchased in the United States at a time when U.S. funds were at a premium of only 3 per cent, that notes similar to those above-mentioned were given in payment and that such notes were still outstanding at the end of the following year, by which date the premium on U.S. funds had risen to 10 per cent. In my view, the taxpayer in such circumstances could not then successfully claim a deduction of an additional 7 per cent as a further cost of goods purchased for the reason that such an expense had not actually been incurred and was a mere estimate of anticipated losses.

Particularly in the absence of a fixed exchange rate, a liability incurred by a Canadian debtor in terms of a foreign currency must always contain a contingent element and what the appellant did, in reality, in revaluing its U.S. dollar liability at the end of each fiscal period, was merely (1) to state from time to time in its balance sheet, a revised estimate of the Canadian dollar equivalent of what it owed to its parent company in U.S. dollars and (2) to write down the amount of that indebtedness as originally entered in its books and treat the resulting "gain" as a capital profit, apportioned over three years. The fact that appellant used the accrual system of accounting in calculating its trading profits for each year had no relevance to this purely bookkeeping operation. No doubt the entries made by appellant in its books were proper from an accounting standpoint in order to present from time to time, as accurate a balance sheet as possible, but in my opinion they had no bearing upon the appellant's liability for income tax.

I would dismiss the appeal with costs.

Appeal allowed with costs, ABBOTT J. *dissenting.*

Solicitors for the appellant: Borden, Elliot, Kelley & Palmer, Toronto.

Solicitor for the respondent: A. A. McGrory, Ottawa.

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LOUIS BLUMBERG AND CONSOLIDATED MOULTON TRIMMINGS LIMITED (*Assignees—Executants*) .. } APPELLANTS;

AND

WAWANESA MUTUAL INSURANCE COMPANY (*Garnishee*) .... } RESPONDENT.

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

Subrogation—Joint and several liability—Judgment in principal action not fixing apportionment of liability—Payment by one defendant—Whether right of execution against co-defendant without judgment fixing amount—Absence of res judicata—Civil Code, arts. 1106, 1117, 1118.

Following a collision between two cars, a pedestrian, who was injured when a post hit by one of the cars fell on his foot, sued the two drivers and the two owners of the cars. The four defendants were held jointly and severally liable but the judgment did not assess their respective liability. The present appellants paid the judgment in full, obtained a subrogation from the pedestrian and then, by means of a seizure by garnishment, the insurer being the tiers-saisi, claimed from their co-defendants 50 per cent. of what they had paid. The co-defendants did not put in a defence, but the insurer pleaded that the status of subrogated creditor did not give the joint creditors the right to execution by the simple method of seizure by garnishment, and subsidiarily, that the degree of liability could not be considered as being equal. The trial judge dismissed the seizure and this judgment was affirmed by the Court of Queen's Bench.

Held: The appeal should be dismissed.

The judgment obtained by the victim did not decide the respective fault of the co-defendants, it merely decided the liability as between the victim and the co-defendants and not as between the co-defendants. The victim had sued them jointly and severally and had no interest in the extent each would be held liable. Where the liability arises from a quasi-delict, the Courts in the province of Quebec do not fix the relative liability of the co-defendants in the action instituted by the victim. As between the co-defendants, the joint obligation found by the trial judge must be divided. The payment and the subrogation did not modify this conclusion as to the absence of *res judicata* upon the issue. Joint tortfeasers were not deemed to be equally liable as between themselves and their respective faults must be established, even though all were liable to the victim for the whole amount of the judgment. Assuming, however, that it must be presumed that the liability must be divided equally, such presumption could be rebutted, but only in an action where the question could be adjudicated.

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

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BLUMBERG et al. v. WAWANESA MUTUAL INS. CO.

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

N. A. Tansey, Q.C., and *A. Monet*, for the appellants.

W. A. Grant, for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Le 28 janvier 1948, une automobile de la Consolidated Moulton Trimmings Limited, conduite par son employé, Louis Blumberg, vint en collision, à l'intersection des rues Notre-Dame et Atwater, en la cité de Montréal, avec un taxi, propriété de Marcel Giguère et conduit par son employé, François St-Cyr. Le taxi fut projeté sur un poteau de la zone de sécurité. Ce poteau tomba sur le pied d'un piéton, Paul-Emile Desjardins, alors engagé dans l'intersection. Desjardins en fut grièvement blessé.

Action en dommages fut intentée de la part de la victime contre les propriétaires et conducteurs de ces voitures. Giguère et St-Cyr produisirent une défense conjointe, et Consolidated Moulton Trimmings Limited et Blumberg, une défense séparée. Aucun défendeur n'imputa faute à la victime. Propriétaire et conducteur de chaque voiture se rejetèrent mutuellement le blâme.

Par décision du 9 mars 1951, la Cour supérieure jugea les quatre défendeurs responsables et les condamna conjointement et solidairement à payer à la victime, la somme de $7,941.26, avec intérêts et dépens. Etrangère à ce litige, la question de la proportion de responsabilité de chacun des défendeurs ne fut pas considérée. Aucun appel ne fut interjeté de ce jugement qui emporta chose jugée entre les parties sur les questions pertinentes à l'instance.

Par la suite, et après avoir vainement cherché à s'entendre avec leurs codéfendeurs pour décider de la part contributive de chacun au paiement de la dette établie par jugement, les présents appelants, Blumberg et Consolidated Moulton Trimmings Limited, y satisfirent intégralement en capital, intérêts et frais et obtinrent, au même temps, de la victime une subrogation dans les droits lui résultant de ce jugement.

Les subrogés firent alors émettre un bref de saisie-arrêt contre Giguère et St-Cyr et contre l'assureur de ces derniers, la présente intimée, Wawanesa Mutual Insurance Company.

[1] [1960] Que. Q.B. 1165.

Par ce procédé, ils ont recherché le remboursement de 50 pour cent du montant payé par eux en satisfaction totale du jugement.

Sur cette instance d'exécution de jugement, Giguère et St-Cyr ne produisirent aucune défense. L'assureur, de son côté, plaida que les subrogés ne pouvaient, par ce procédé, validement exercer les droits leur résultant du paiement de la dette et de la subrogation, et subsidiairement que la proportion de responsabilité des assurés ne pouvait être considérée comme étant de 50 pour cent. La Cour supérieure, étant d'avis que la première soumission de l'assureur était bien fondée et décisive du litige, annula la saisie.

Porté en appel, ce jugement fut maintenu par une décision majoritaire de la Cour du banc de la reine[1]. Les Juges de la majorité furent d'opinion qu'en raison de l'inexistence de solidarité entre coauteurs de quasi-délit, de la possibilité d'une mesure inégale dans la proportion de leur faute et, partant, de l'inégalité de la part contributive de chacun, en somme, de l'absence de chose jugée sur la question, le créancier subrogé n'avait aucun jugement définitif lui permettant de recourir à la saisie-arrêt. De là le pourvoi à cette Cour.

La question qui se présente est plus qu'une simple question de procédure. Il apparaît bien, en effet, que le procédé adopté par les appelants équivaut à une saisie avant jugement en satisfaction d'une créance non judiciairement et définitivement liquidée mais par eux arbitrairement fixée à 50 pour cent de la somme qu'ils ont payée avec subrogation.

Les appelants, ainsi qu'il appert au fiat et au bref de saisie, invoquent ce jugement du 9 mars 1951 et leur qualité de créanciers subrogés.

Le jugement du 9 mars 1951 a déterminé un litige mu entre, d'une part, la victime du quasi-délit et, d'autre part, les codéfendeurs poursuivis, et non un litige entre les codéfendeurs condamnés conjointement et solidairement qui aurait eu pour objet la détermination de la gravité de la faute de chacun pour établir, entre eux, leur part contributive. La détermination de la proportion de responsabilité de chacun des défendeurs n'est d'aucune pertinence dans

[1] [1960] Que. Q.B. 1165.

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cette action où Desjardins a recherché contre eux une condamnation conjointe et solidaire. C'est là un débat auquel ce dernier est étranger et à la poursuite duquel il n'avait pas d'ailleurs l'intérêt requis pour former une demande en justice, l'art. 1106 C.C. décrétant déjà la solidarité d'une obligation résultant d'un quasi-délit. Comme l'a signalé notre collègue, M. le Juge Taschereau, dans *City of Montreal v. The King*[1], dans la province de Québec, contrairement à ce qui existe dans ces provinces de droit commun où un texte l'autorise, le Juge, adjugeant sur la réclamation d'une victime contre les coauteurs d'un quasi-délit, ne détermine pas la proportion de responsabilité des défendeurs. En somme, le jugement du 9 mars 1951 a affirmé l'obligation solidaire des codéfendeurs à payer à la victime le montant des dommages lui résultant du quasi-délit. Rien de plus. Entre codéfendeurs, cette obligation se divise de plein droit et, entre eux, ils n'en sont tenus que chacun pour sa part. (Article 1117 C.C.). Il reste que cette part, qui s'apprécie suivant la gravité respective des fautes causales de chacun, n'a pas été, et ne pouvait, dans cette instance entre la victime et les défendeurs par elle poursuivis, être judiciairement déterminée.

Le paiement et la subrogation n'ont pas modifié cette conclusion sur l'absence de chose jugée sur la question. En donnant à la victime intégralement satisfaction au jugement du 9 mars 1951, les appelants ont acquitté une dette au paiement intégral de laquelle ils étaient personnellement tenus à son endroit. Codébiteurs de cette dette solidaire, par eux payée en entier, ils ne peuvent répéter contre les saisis que les parts et portions de chacun d'eux, encore même qu'en payant, ils furent spécialement subrogés aux droits de la victime. (Article 1118 C.C.)

Au soutien de leur prétention qu'il y a eu chose jugée, les appelants argumentent comme suit:—La solidarité légale décrétée par l'art. 1106 C.C. relativement à l'obligation résultant d'un quasi-délit est, tout comme la solidarité conventionnelle, une solidarité parfaite et non, comme l'affirme Migneault, une solidarité imparfaite. Dans le cas de solidarité parfaite, la dette se divise de plein droit entre codébiteurs par parts viriles, c'est-à-dire par parts égales,

[1] [1949] S.C.R. 670 at 673, 4 D.L.R. 1.

à moins que la Cour n'assigne différents degrés de responsabilité. C'est que la loi présume entre ces codébiteurs l'égalité des parts de responsabilité. Le jugement du 9 mars 1951 n'ayant pas écarté cette présomption par l'assignation de parts différentes, emporte chose jugée sur la question et, partant, la saisie a été validement pratiquée en exécution de ce jugement.

La jurisprudence a toujours reconnu que, lorsque plusieurs personnes ont contribué à un quasi-délit, bien que toutes soient responsables pour le tout envers la victime, entre elles la responsabilité doit être déterminée selon l'étendue et la gravité de leur faute respective. Dans le cas de solidarité conventionnelle, effet sera donné à l'intention de ceux qui se sont obligés conjointement et solidairement envers le créancier, en ce qui concerne le partage de la responsabilité entre eux. Cette intention pourra être exprimée ou être présumée en raison des termes ou de la nature de la convention ou des rapports existant entre les codébiteurs. Mais dans le cas de l'obligation à réparer le dommage causé accidentellement par plusieurs personnes, il n'est pas concevable que ces personnes, n'ayant pas eu l'intention de causer de dommage, aient eu celle d'établir des proportions entre elles pour le réparer. Assumant, cependant, qu'il faille, en ce cas, présumer qu'entre elles la proportion de responsabilité et la part contributive à la réparation doivent se diviser par parts égales, le moins qu'on puisse dire c'est qu'il s'agit là d'une présomption qui peut être repoussée et ce dans une instance où la question se présente et peut être judiciairement déterminée. Tel n'est pas, en l'espèce, le caractère de l'instance donnant lieu au jugement du 9 mars 1951 lequel, comme en a jugé la Cour du banc de la reine, ne saurait constituer, sur la question, un jugement définitif en faveur des appelants leur permettant de recourir à la saisie-arrêt.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Attorneys for the appellants: Tansey, de Grandpré, de Grandpré, Bergeron & Monet, Montreal.

Attorneys for the respondent: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

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*Jun. 6
Oct. 23

RUNNYMEDE IRON & STEEL LIMITED (*Plaintiff*) .... APPELLANT;

AND

ROSSEN ENGINEERING AND CONSTRUCTION COMPANY (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of goods—Part of shipment of "relaying rails" not qualifying as such—Entire shipment rejected on ground goods not in accordance with contract—Rights of parties—The Sale of Goods Act, R.S.O. 1950, c. 345, s. 29(3).

By a contract in writing the defendant agreed to sell to the plaintiff all the "relaying rail" in a railway siding included in a plant which the defendant had purchased for salvage purposes. The plaintiff had not seen the goods which it was purchasing and it was clearly a sale by description. After much delay on the part of the plaintiff the defendant shipped the "relaying rail" to the plaintiff, but the latter rejected the entire shipment on the ground that the goods were not in accordance with the contract. Of the contents of the first of the cars in which the rails were shipped, 80 per cent consisted of "relaying rail" and 20 per cent of material which did not qualify as "relaying rail". In the second and third cars the corresponding percentages were 75 per cent and 25 per cent. The rejected goods were later resold by the defendant. The plaintiff claimed the return of its deposit and damages; the defendant disputed the claim in its entirety and counter-claimed for the sum of $569.45.

The trial judge allowed the defendant the contract price of $50 a ton on the 80 per cent in the first car and the 75 per cent in the second and third cars, together with 80 per cent and 75 per cent of the freight and demurrage charges of the respective cars; furthermore the defendant was allowed the market price of $37.50 per ton for the balance of the contents of the three cars, together with its loss on the sale of 12 tons of spikes not shipped, and for incidental charges, amounting in all to $11,535.16. Against this he allowed the plaintiff its $6,000 deposit and the proceeds of the resale, amounting to $8,190, leaving a balance in favour of the plaintiff of $4,654.84, for which sum judgment was given. The counter-claim was dismissed. The plaintiff at the trial had abandoned its claim for damages and sought only the return of its deposit. The trial judgment was affirmed by a judgment of the Court of Appeal. From that decision the plaintiff appealed by special permission of this Court.

Held (Kerwin C.J. and Judson J. dissenting): The appeal should be allowed.

Per Locke, Cartwright and Ritchie JJ.: The case fell within the terms of s. 29(3) of *The Sale of Goods Act*, R.S.O. 1950, c. 345. The seller delivered to the buyer the relaying rail he contracted to sell mixed with

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

goods of a different description (i.e. "scrap"). The buyer in rejecting the whole shipment had the right so to do. In view of the finding that between 20 and 25 per cent of the total shipment consisted of scrap it was impossible to apply the rule *de minimis non curat lex. Rapalli v. K. L. Take, Ltd.*, [1958] 2 Lloyd's Rep. 469, referred to.

Aitken, Campbell & Co. Ltd. v. Boullen & Gatenby, [1908] S.C. 490; *Easterbrook and Others v. Gibb & Co.* (1887), 3 T.L.R. 401, considered; *Alkins Brothers v. G. A. Grier & Sons Ltd.* (1924), 55 O.L.R. 667, distinguished; *Arcos Ltd. v. E. A. Ronaasen & Son*, [1933] A.C. 470, followed.

Per Kerwin C.J. and Judson J., *dissenting:* The term "relaying rail" is not a term of precise classification—the nearest one can get to it is that it is rail that can be relaid on any track. All of the rails shipped to the plaintiff had in fact been laid in track and were there when sold. The balance of the goods which had been damaged during the process of lifting and removal were goods of the same description but inferior in quality. It was apparent from the evidence that with a little cropping and drilling at a very minor cost the goods contained in the cars could all have been classified as relaying rails. *Aitken, Campbell & Co. Ltd. v. Boulden and Gatenby, supra*, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Schroeder J. Appeal allowed, Kerwin C.J. and Judson J. dissenting.

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

J. D. Arnup, Q.C., and *A. M. Austin*, for the defendant, respondent.

The judgment of the Chief Justice and of Judson J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This is an appeal by Runnymede Iron & Steel Limited, from a judgment of the Court of Appeal for Ontario[1] affirming the judgment at the trial of Schroeder J. The genesis of the dispute between the parties is an agreement of October 1951. While there may be reasons for the fact that it was nearly ten years later when the matter came before this Court, it should be made clear that the delay does not rest with the tribunals. The writ was issued October 21, 1952. The trial took place in June 1953, and judgment was delivered June 19, 1953. The appeal was heard by the Court of Appeal in December 1953, and judgment delivered by that Court on February 11, 1954. It does not appear from the case or factums when notice of appeal to this Court was given, but, because of certain documents appearing in the Court's files, the parties were required to appear before me to explain if the appeal had

[1] [1954] O.R. 153.

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been settled, or the reason for the delay in bringing it on for argument. On the return of the motion, and after hearing the agents for the solicitors, special permission was given to set down the appeal for hearing at the April Term, 1961.

In its statement of claim the plaintiff-appellant claimed the return of a deposit of $6,000 paid on account of the purchase price of certain steel rails, agreed to be sold by the respondent to the appellant by the agrement of October 1951, and $6,375 for loss of profits on 255 tons at $25 per ton. The defendant disputed the claim in its entirety and counter-claimed for the sum of $569.45.

The trial judge allowed the respondent the contract price of $50 a ton on 80 per cent of the rails shipped by it in the first railway car and 75 per cent of the rails shipped in the second and third cars, together with 80 per cent and 75 per cent of the freight and demurrage charges of the respective cars; furthermore, the respondent was allowed the market price of $37.50 per ton for the rest of the shipments, together with its loss on the sale of twelve tons of spikes not shipped to Toronto, and for incidental telephone, telegraph and bank charges, amounting in all to $11,535.16. Against this he allowed the appellant its $6,000 deposit and the proceeds of the sale of the entire contents of the three cars to a company controlled by one Merrilees, amounting to $8,190, leaving a balance in favour of the appellant of $2,654.84, for which sum judgment was given the appellant, together with one-half of its costs of the action. The counterclaim was dismissed with costs. At the trial the appellant had abandoned its claim for damages for loss of profits and the respondent did not contend that the appellant should pay for a fourth car and the trial judge therefore did not deal with these matters. It was this judgment which was affirmed by the Court of Appeal.

The appellant claims that the contract was for the sale of goods by description within the meaning of subs. (3) of s. 29 of *The Ontario Sale of Goods Act*, R.S.O. 1950, c. 345:

29. (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

The appellant also claims that the respondent delivered some goods of a different description. I agree with the trial judge and the Court of Appeal that these submissions are not entitled to prevail.

Early in 1951 the respondent had purchased for salvage purposes the plant of Grenville Crushed Rock Company at Hawk Lake, Ontario. This plant included a railway siding and the subject-matter of the contract between the parties was the material included in this railway siding. The contract is contained in a letter, dated October 18, 1951, from the respondent to the appellant of which the following are the pertinent parts:

> Have received your cheque as a deposit on the rail and am changing the specifications as follows to reconcile your purchase with our last telephone conversation. The rail will be as follows:
>
> 1100 lineal ft., more or less, of 60 lbs. per yd. ~~used-rail~~
> 8200 lineal ft., more or less, of 80 lbs. per yd. ~~used-rail~~
> 5700 lineal ft., more or less, of 85 lbs. per yd. ~~used-rail~~
> } re-laying rail "J.T."
>
> with a maximum of twelve switches although I think we only have eight and with six 85 lb. wise and five 80 lb. wise. The average length of this rail to be around 30 ft. This order to include all Spacing Bars and all Splice Bars, Nuts and Bolts, and up to ten tons of Spikes which are to include all the new Spikes on the job whatever the weight is. The price for this used rail is to be $50.00 per ton on car Hawk Lake, Ontario. Seventy-five per cent of this order is to be available for shipment before January 1st 1952, the balance by the end of April 1952 or sooner.
>
> We may have fifty or hundred ton more rail or fifty ton less rail but the intent is that we will hold for you all of the used rail on the job for your disposition and that we are selling you all this used rail and that we have no authority to dispose of any rail other than to you on the job at Hawk Lake.

In July 1952, after a long delay which was attributable to the appellant's unwillingness to give shipping instructions, the respondent shipped two cars f.o.b. Hawk Lake to the appellant at Toronto, which it rejected. A third car was already en route but since the respondent considered that the appellant's rejection of the first two cars was unjustified, it did not release the third car except on acceptance of a sight draft. A fourth car was also shipped and the appellant refused to accept this. All four cars were eventually purchased by Mr. Merrilees' company, which is the biggest

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dealer in rails in Canada, at $50 per ton for the first three cars and $37.50 per ton for the fourth. The trial judge's finding of fact is based upon an acceptance of the evidence of Mr. Merrilees and is contained in the following extract:

> I accept this classification of the contents of the first three cars as containing 80%, 75% and 75% of siding quality relaying rails. The balance consisted of "potential relaying rails" which could be converted into relaying rails, as already indicated, but, according to the evidence of Mr. Merrilees, rails having only reclamation possibilities do not comply with the quality called for by the contract, whereas the former rails do measure up to the necessary standard.

The Court of Appeal held:

> There is no doubt that the appellant received all the relay rails available from the Hawk Lake siding, and that is what the respondent had undertaken to supply. There was nothing in the agreement as to an inventory and although the appellant on various occasions asked for an inventory it was known at the time that the agreement was entered into that the quantity and quality of the relay rails were uncertain.

It is important to bear in mind that the subject-matter of this contract was rails in position on a siding and in use at the time of the contract. The contract contemplated the lifting and movement of these rails. The term "relaying rail" is not a term of precise classification and the nearest that one can get to it is that it is rail that can be relaid on any track. Obviously this rail, which was siding rail, could not be moved into a higher category.

All of the rails shipped to the appellant had in fact been laid in track and were there when sold. During the process of lifting and removal, some of it suffered minor damage. In the circumstances of this case, therefore, the trial judge was clearly right in his finding that the balance of the rails which had been damaged did not constitute goods of a different description and I cannot read the reasons in the Court of Appeal as indicating anything to the contrary or any inconsistency between their reasons and those of the trial judge. The balance of the goods were goods of the same description but inferior in quality. It is apparent from the evidence that with a little cropping and drilling at a very minor cost the goods contained in the cars in question could all have been classified as relaying rails.

Most of the decisions referred to on the argument and in the Courts below are really of very little assistance. In considering the cases in Scotland it must be borne in mind that the Scottish law differs from the English in view of

subs. (2) of s. 11 and s. 62 of the Imperial *Sale of Goods Act, 1893,* but the first few sentences of the judgment of Lord Low in *Aitken, Campbell & Co. Ltd. v. Boullen and Gatenby*[1] may be taken to be a correct statement applicable to the present case so far as concerns the point to be determined:

> I am of opinion that this is not a case to which sec. 30(3) of the Sale of Goods Act, 1893, applies. That enactment deals with the case of a seller delivering to a buyer "the goods he contracted to sell mixed with goods of a different description not included in the contract." I think that the word "description" is there plainly used to denote the kind of goods contracted for, and that the right of partial rejection conferred upon the buyer applies only to cases where goods of the kind contracted for are mixed with goods of a different kind, and not to cases where all the goods are of the kind contracted for, but part of them is not of such good quality as the seller was bound to supply.

The appeal should be dismissed with costs.

The judgment of Locke, Cartwright and Ritchie JJ. was delivered by

CARTWRIGHT J.:—The facts out of which this litigation arises are stated in the reasons of the Chief Justice and are set out in great detail in the reasons delivered in the courts below. In none of the reasons delivered does there appear to me to be any difference of opinion as to what actually occurred. I propose to summarize briefly the facts upon which the rights of the parties depend.

The contract between the parties was in writing and was for the sale by the respondent to the appellant of all the "relaying rail" in the siding of Grenville Crushed Rock Company at Hawk Lake, at the price of $50 per ton on car at Hawk Lake. The appellant had not seen the goods which it was purchasing and it was clearly a sale by description.

When, after great delay, the appellant finally gave shipping instructions the respondent shipped all this "relaying rail" to the appellant at Toronto in four railway cars all of which were rejected by the appellant on the ground that the goods shipped were not in accordance with the contract. By reason of an arrangement between the parties we are concerned with only three of these cars. Of the contents of one of these cars 80 per cent consisted of "relaying rail" and 20 per cent of material which did not qualify as "relaying rail". In the other two cars the corresponding percentages were 75 per cent and 25 per cent.

[1] [1908] S.C. 490 at 494-5.

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The evidence of the witness Merrilees who purchased the rejected goods from the respondent was accepted by the learned trial judge. This witness was explicit in his statement that used rail which can be re-laid in any track, even of the lowest category, falls within the description "relaying rail" but that used rail on which it is necessary that any work be done before it can be re-laid does not comply with that description. The learned trial judge said in part:

> I attach the utmost significance to the testimony of Mr. Merrilees, supported as it is by his subsequent experience in disposing of the rails. His evidence, standing alone, is, to my mind, more worthy of credit and entitled to greater weight than the evidence of all the plaintiff's expert witnesses combined. I accept this classification of the contents of the first three cars as containing 80%, 75% and 75% of siding quality relaying rails. The balance consisted of "potential relaying rails" which could be converted into relaying rails, as already indicated, but, according to the evidence of Mr. Merrilees, rails having only reclamation possibilities do not comply with the quality called for by the contract, whereas the former rails do measure up to the necessary standard.

The learned trial judge held that the appellant was bound to pay for the 80 per cent in car number 1 and for the 75 per cent in cars numbers 2 and 3 at the contract price of $50 per ton and to pay for the balance of the contents of the three cars at the price of $37.50 per ton. He also held that the appellant was chargeable with only 80 per cent of the cost of transportation of the first car and 75 per cent of the cost of transportation of the other two cars. The words used by the learned trial judge in this regard are as follows:

> Counsel for the defendant concedes that his clients are bound by the evidence of Andrew Merrilees, even if they think that the percentages of goods not complying with the contract as stated by him are somewhat high. He admits the plaintiff's right to recover its deposit of $6,000, subject to deductions, for the price of the material shipped to Toronto and the freight charges and certain other smaller items hereinafter mentioned, after crediting to the plaintiff the sum of $8,190 realized on the sale of the same to Andrew Merrilees Limited. In computing these deductions the defendant has charged $50 a ton in respect of the rails which were in conformity with the description contained in the contract, and $37.50 per ton in respect of the rails which were not. This I consider reasonable and proper. They also seek to charge against the plaintiff the full cost of the freight charges incurred by them on Runnymede's instructions. I think that it would be unfair to permit the defendant to charge more than 80% of the cost of transportation on the first car and 75% of the cost of transportation of the other two cars for the reason that it was wasteful and uneconomical to send to Toronto by freight rails which could only qualify as scrap material. Having failed to satisfy the requirements of the contract in that respect, the defendants ought to bear that portion of the freight charges attributable to the non-conforming part of the shipment.

It should be pointed out that the learned trial judge found that the cost of transportation of the goods from Hawk Lake to Toronto was approximately $30 a ton so that on the disposition of the case made by him the total cost at Toronto to the appellant of goods conforming to the contract would be $80 per ton and that of the percentages which did not conform to the contract would be $37.50 per ton; or, to express the matter differently, the cost to the buyer of the goods not conforming to the contract was fixed by the learned trial judge at $7.50 per ton f.o.b. Hawk Lake.

The reasoning which led the learned trial judge and the Court of Appeal to decide that on these findings of fact the appellant did not have the right to reject the whole shipment is summarized in the following passage in the reasons of the Court of Appeal delivered by Gibson J.A.:

> The contract was by no means definite as to the quantity of relay rails to be sold, but it was clearly understood that the appellant was to receive all the relay rails available on the Hawk Lake siding. All the rails which the respondent considered to be of relay quality were shipped to Toronto and of these, after hearing expert evidence from both parties, the learned trial judge found as a fact that 80 per cent of the first carload and 75 per cent of the second and third carloads were relay rails.
>
> Because some of the rails for one reason or another failed to come up to the standard required for relay rails and were therefore classified as scrap they do not become "goods of a different description". They are goods of the same description but inferior in quality: *Aitken, Campbell & Company, Limited v. Boullen & Gatenby* (1908) S.C. 490; *Easterbrook et al. v. Gibb and Co.* (1887), 3 T.L.R. 401.
>
> Therefore, s. 29(3) of The Sale of Goods Act, R.S.O. 1950, c. 345, has no application and the buyer is not entitled to reject the whole shipment because some only of the goods are inferior in quality.

With respect the second paragraph of this passage appears to me to be contrary to the evidence expressly accepted by the learned trial judge and inconsistent with the findings of fact made by both the courts below.

The goods sold were described in the contract as "relaying rail" not as used rail with a representation or warranty that they would be of the quality of "relaying rail" or of any particular quality. The appellant purchased "relaying rail"; he did not purchase "potential relaying rail" or scrap that might be transformed into "relaying rail".

It appears to me to be a contradiction in terms to say that some of the rails shipped "failed to come up to the standard required for relay rails and were therefore classified as scrap" and at the same time to say that they do not

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thereby become "goods of a different description". This amounts to saying that the description "scrap" is the same as the description "relaying rail".

In my opinion, the case falls within the terms of s. 29(3) of *The Sale of Goods Act*, R.S.O. 1950, c. 345:

> (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

The seller delivered to the buyer the relaying rail he contracted to sell mixed with goods of a different description (*i.e.* "scrap"). It is common ground that the buyer rejected the whole shipment. In my opinion he had the right to do this. In view of the finding that between 20 per cent and 25 per cent of the total shipment consisted of scrap it is impossible to apply the rule *de minimis non curat lex*. The principle applicable to the facts found in the case at bar is succinctly stated by Jenkins L.J., with whom the other members of the Court of Appeal agreed, in *Rapalli v. K. L. Take, Ltd.*[1]:

> The purchaser is entitled to have delivered to him goods complying with the contractual description, and, failing that, he is entitled to reject unless the rule of *de minimis* in its strict sense applies. Clearly, in my view, 6 to 7 per cent, is a proportion which cannot be disregarded as *de minimis*.

In addition to the two cases referred to in the passage from the reasons of Gibson J.A., quoted above, the learned trial judge referred to the case of *Alkins Brothers v. G. A. Grier and Sons Limited*[2], and it is necessary to examine these three decisions.

In *Aitken, Campbell and Company Limited v. Boullen and Gatenby*[3], the contract was for the sale of 133 pieces of maroon twills by sample. It was found that 64 of the pieces delivered while answering the description "maroon twills" were of a quality inferior to that of the sample. It was held that the purchasers could not retain the pieces which were in accordance with the contract and reject the 64 pieces which were not; but the judgments make it plain that the

[1] [1958] 2 Lloyd's Rep. 469 at p. 480.
[2] (1924), 55 O.L.R. 667.
[3] [1908] S.C. 490.

purchasers had the right to reject the whole shipment. It is sufficient to quote the following passage from the judgment of Lord Low at page 496:

> Suppose that when the defenders refused to take back the 64 pieces, the pursuers had at once also returned the remaining 69 pieces, and intimated that they repudiated the contract and rejected the whole goods, I cannot imagine any ground upon which it could have been held that they were not entitled to follow that course.

In applying this case it must, of course, be remembered that s. 11 of the *Sale of Goods Act* of the United Kingdom which otherwise corresponds to section 12 of the Ontario Act contained subsection (2) reading as follows:

> (2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

However, so far as it is applicable this decision would appear to support the position of the appellant in the case at bar rather than that of the respondent.

In *Easterbrook and Others v. Gibb and Co.*[1], the contract was for the sale of 1,500 Bauer's patent pipe-vices. The goods delivered were Bauer's patent pipe-vices but a number of them were found to be defective. The grounds of the decision appear in the following passage in the reasons of the Master of the Rolls at page 401:

> The contract here was not a contract for successive deliveries, though, as a fact, successive deliveries were made, and must be considered as one contract for one whole lot. Accordingly the purchaser could only reject if that which was offered as the whole lot was so different from the whole lot ordered as to make the lot offered not in accordance with the description in the contract. Mr. Justice Grantham did not think that the goods delivered so far differed as a lot from the description in the contract as not to correspond with the lot ordered and so as to entitle the defendants to reject. The referee found 206 defective out of 1,417 examined, and though this number was rather high, yet, considering that the defects were trivial and could be put right in a very short time and at a very small cost, his Lordship could not differ from the learned Judge at the trial.

There is nothing in the report to suggest that the buyers were allowed any reduction from the full contract price and the decision appears to turn on a finding of fact that the goods delivered were in accordance with the contract, the defects which were present in some of them being regarded

[1] (1887), 3 T.L.R. 401.

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as so trifling as to fall within the *de minimis* principle. I do not regard this judgment as establishing any general principle which assists the respondent in the case at bar.

In *Alkins Brothers v. G. A. Grier and Sons, Ltd.*[1], the contract was for the purchase of the whole product of the seller's mill during the sawing season of 1920, "dead culls out", the wood to be sawn in accordance with instructions given by the buyers. The whole product of the mill was delivered but included some "dead culls" and some of the lumber was not sawn in conformity with the instructions. The referee to whom a reference had been directed "to ascertain and state what sum, if any, is due from the defendant company to the plaintiffs" reported that the defendant had accepted the goods after inspection, or after full opportunity to inspect, and had thereby lost its right to reject; he allowed substantial deductions from the contract price in respect of the "dead culls" and "miscuts". This view was affirmed by Rose J. and by the Court of Appeal. The question whether the defendants could have rejected the whole had they not lost the right to do so by acceptance is left open. This case is distinguishable on the facts from the case at bar in which there is no suggestion that the appellant accepted the goods delivered by the respondent.

In my view, the case at bar is governed by the principles stated by the House of Lords in *Arcos, Ltd. v. E. A. Ronaasen and Son*[2]. The agreement in that case was for the sale of a quantity of staves required by the buyers as the sellers knew for making cement barrels; the contract specified that the staves were to be of one-half an inch in thickness. 75.3 per cent of the staves delivered were more than one-half an inch but not more than nine-sixteenths of an inch in thickness and 18.3 per cent were more than nine-sixteenths of an inch but not more than five-eighths of an inch in thickness. It was found as a fact by the umpire that all the staves delivered were fit for the purpose of making cement barrels and "were commercially within and merchantable under the contract". It was held by Wright J. whose judgment was affirmed unanimously by the Court of Appeal and the House of Lords that the buyers were entitled to reject all the staves.

[1] (1924), 55 O.L.R. 667.
[2] [1933] A.C. 470, 102 L.J.K.B. 346.

At page 474, Lord Buckmaster, with whom Lord Blanesburgh and Lord Macmillan agreed said:

The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description, and I think the phrase "commercially" itself shows that while the goods did not in fact answer the description, they could, as a matter of commerce, be so dealt with. But the rights of the buyers under the contract are not so limited. If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

At page 479, Lord Atkin said:

It was contended that in all commercial contracts the question was whether there was a "substantial" compliance with the contract: there always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does ½ inch mean about ½ inch. If the seller wants a margin he must and in my experience does stipulate for it. Of course by recognized trade usage particular figures may be given a different meaning, as in a baker's dozen; or there may be even incorporated a definite margin more or less: but there is no evidence or finding of such a usage in the present case.

No doubt there may be microscopic deviations which business men and therefore lawyers will ignore.

It appears to me that on the findings of fact made in the courts below in the case at bar the variation between the contract description and the goods delivered was wider than in the *Arcos* case.

For the above reasons I am of opinion that the appeal succeeds. The appellant at the trial abandoned its claim for damages and sought only the return of the deposit of $6,000. The learned trial judge dismissed the respondent's counter-claim without costs and no appeal was taken from that dismissal.

I would allow the appeal, set aside the judgment of the Court of Appeal and that of the learned trial judge, except in so far as it dismissed the counter-claim without costs, and direct that judgment be entered in favour of the appellant for $6,000 with costs throughout.

Appeal allowed with costs, KERWIN C.J. *and* JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Catzman and Wahl, Toronto.

Solicitors for the defendant, respondent: Mason, Foulds, Arnup, Walter and Weir, Toronto.

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*Sept. 18, 26, 27
Sept. 27

IN RE MORRIS C. SHUMIATCHER

Criminal law—Habeas corpus—Counselling to commit perjury before Registrar of Saskatchewan Securities Commission—Whether examination by Registrar a judicial proceeding—Registrar's power to examine on oath—Solemn declaration—Perjury—Powers of Court on habeas corpus—The Securities Act, 1954 (Sask.), c. 89, s. 13—The Saskatchewan Evidence Act, R.S.S. 1953, c. 73, s. 41—Criminal Code, 1953-54 (Can.), c. 51, ss. 22, 112, 114.

The petitioner, a barrister and solicitor, was committed for trial in Saskatchewan on an indictment of ten charges. Seven charges were that the petitioner counselled seven named individuals to commit perjury in their examination before the Registrar of the Saskatchewan Securities Commission held pursuant to s. 13 of *The Securities Act,* 1954 (Sask.), and thereby became a party to the said perjury by reason of s. 22(1) of the *Criminal Code.* The other charges were that he counselled and procured one L to make a false declaration on oath before an authorized person and thereby became a party to an offence under s. 114 of the *Criminal Code.* The plaintiff applied to the Supreme Court of Canada for a writ of *habeas corpus* on two grounds: (1) that there was no offence at law shown in the first seven charges because the examination of the individuals before the Registrar was not a judicial proceeding within the meaning of s. 112 of the *Criminal Code*; and (2) that L was not a person permitted, authorized or required by law to make the said declaration within the meaning of s. 114 of the *Criminal Code,* and that there existed no authorization at law for the taking or receiving of these solemn declarations.

Held: The application was dismissed.

Under s. 13 of *The Securities Act,* 1954, the Registrar had by law authority to examine under oath. He also had the power to administer the oath if not under that section then under s. 41 of *The Saskatchewan Evidence Act.* Consequently, counts one to seven disclosed offences known *to the law and for which the accused was properly committed for trial.*

The jurisdiction of this Court in a writ of *habeas corpus* was limited to a consideration of the warrant of committal and other germane order, and if they were regular on their face, that was the end of the matter. The Court in such a writ has no more power to look at the solemn declarations alleged to have been made than it has to look at the evidence given on a preliminary hearing. No distinction can be drawn between a warrant of committal before and one after conviction.

APPLICATION before Judson J. in chambers for a writ of *habeas corpus.* Application dismissed.

A. W. Embury, Q.C., and *P. H. Gordon, Q.C.,* for the petitioner.

N. L. Mathews, Q.C., and *J. P. Nelligan,* contra.

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*PRESENT: Judson J. in Chambers.

The following judgment was delivered

JUDSON J. (orally):—This is an application for habeas corpus. Before I can deal intelligibly with the issues raised on the application, I think I should set out in chronological order the steps that have been taken in this prosecution before the application was launched.

The accused came before the magistrate on a summons containing eleven charges on which the magistrate conducted a preliminary hearing lasting seven days. He committed the accused for trial on all charges except number nine, in which he made an amendment to reduce it to "counselling, procuring or inciting the commission of an offence" which was not committed, under s. 407(*a*) of the *Criminal Code.*

I should say at this point that the magistrate on that date, that is, the 30th November 1960, signed no warrant of committal. He admitted the accused to bail immediately on his own recognizance.

On January 23, 1961, an indictment containing eleven counts was preferred against the accused in the Court of Queen's Bench presided over by Mr. Justice Disbery. Without analyzing the counts in the indictment in detail, it is accurate, I think, to say that they are substantially in the same form as the charges contained in the summons before the magistrate, as amended.

I can make this rough classification at this point, that the first seven counts in the indictment have to do with counselling seven named individuals to commit perjury before the Registrar under *The Securities Act* of Saskatchewan and an allegation that that offence of perjury was afterwards committed. The charge, therefore, on the first seven counts was that of perjury.

Count number eight charged an attempt to obstruct and defeat the course of justice by attempting to induce the seven named individuals in the first seven counts to give false evidence in a judicial proceeding, namely, an examination before the Registrar under *The Securities Act.*

Counts nine, ten and eleven have to do with procuring or inciting two named individuals to make a solemn declaration.

I will deal with all these counts in more detail later.

Counsel for the accused moved to quash all counts in the indictment. The application was dismissed by the trial judge, with the exception of count number eight on which the accused had elected a non-jury trial and on which the Crown had no right of election before a judge and jury. Count number eight, therefore, requires no further consideration here.

The remaining counts were then severed and the accused was arraigned on counts nine, ten and eleven. He pleaded not guilty.

At the conclusion of the evidence there was a motion for a directed verdict, which was rejected by the trial judge. The jury found the accused not guilty on count eleven and disagreed on counts nine and ten.

The trial judge then adjourned the trial on counts nine and ten and the remaining seven counts, counts one to seven, to the next sittings of the Court to be held in May 1961; and continued the bail.

The next step was a motion by the accused before the Saskatchewan Court of Appeal for a Writ of Certiorari to quash the committal for trial on counts one to seven and counts nine and ten and to quash the indictments corresponding to those counts. Judgment was given dismissing this application on August 16, 1961, and on September 15, 1961, the accused launched this application for habeas corpus.

On September 15, 1961, the accused was still at liberty on bail, but on Monday, September 18, he appeared before Judge Hogarth and, according to the order made by Judge Hogarth on that day, surrendered himself into the custody of the judge for the purpose of satisfying the conditions of the recognizance; and applied to be relieved of his obligations under the terms of the recognizance and no longer acknowledged himself to be bound by its terms.

The order recites that the accused was so relieved of his obligations and then commands W. H. Williams, Sheriff of the Judicial Centre of Regina, to take the accused into custody and convey him to Regina Gaol.

On the same day, an order was made by a Judge of this Court directing the issue of a Writ of Habeas Corpus to W. H. Williams, the Sheriff, and to the Keeper of the Regina

Gaol, to have the body of the accused before the judge making the order on September 25, 1961. At that time the accused was admitted to bail. The writ was served but no formal return to the writ has been made.

I have before me, first of all, the recognizance entered into by the accused on November 30, 1960; a copy of the order of Judge Hogarth; and a certified copy of a warrant of committal dated November 30, 1960. I have already mentioned that this warrant was not signed on that day because the accused was immediately admitted to bail.

There is evidence before me that this warrant was not signed until September 21, or possibly September 22. In any event, I am not in any doubt how the accused came to be in custody and I assume that if any formal return had been made it would recite the facts that I have recited.

The application for habeas corpus is made on two grounds—the first ground having reference to the first seven counts and the second ground having reference to counts nine and ten. The first seven counts have been referred to throughout these proceedings as the "registrar charges" and counts nine and then have been referred to as "Leier charges".

I will set out now count number one, the first of the registrar charges. The others are in exactly the same terms but with a different name. I am quoting not from the indictment but from the summons.

The first charge is that the accused, during the month of January 1958, at the City of Regina, did counsel another person, to wit, one Edward Joseph Leier to commit the offence of perjury, which offence was afterwards committed by the said Edward Joseph Leier at the examination before the Registrar of the Saskatchewan Securities Commission held pursuant to s. 13 of *The Securities Act,* 1954, on the 23rd day of January, A.D. 1958, by swearing falsely to the following effect:

(a) that he did not make certain representations to prospective purchasers of shares in Columbia Metals Exploration Co. Ltd., including statements regarding the listing of the shares, the resultant increase in the price of the shares, the financial position of the said Company, and its association with other companies, including the Ford Motor Company, and

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(b) that the information contained in the said representations was not given to him by Walter Luboff, and

(c) that he could not remember certain facts which he did actually remember,

while knowing the same to be false and with intent to mislead the said Registrar contrary to the *Criminal Code*, and did thereby become a party to the said perjury by virtue of 22(1) of the *Criminal Code*.

When the Registrar charges became the first seven counts in the indictment the application to quash was based on the same argument that has been addressed to me on this motion for habeas corpus. Its outlines are set out in the Notice of the application.

The argument is that there is no offence at law shown in these counts, because the examination before the Registrar of the Saskatchewan Securities Commission which he is said to have held under s. 13 of *The Securities Act*, 1954, is not a judicial proceeding within s. 112 of the *Criminal Code*. Section 112 of the *Criminal Code* reads:

> Every one commits perjury who, being a witness in a judicial proceeding, with intent to mislead gives false evidence, knowing that the evidence is false.

"Judicial proceeding" is defined in s. 99 of the Code. I think the only subsection that I am concerned with is para. (iv) of subs. (*c*), which reads:

> (*c*) "judicial proceeding" means a proceeding
>
> * * *
>
> (iv) before an arbitrator or umpire, or a person or body of persons authorized by law to make an inquiry and take evidence therein under oath,
>
> * * *

I next set out s. 13 of *The Saskatchewan Securities Act*, which reads:

> 13. The registrar may and shall when so directed by the commission require any further information or material to be submitted by any applicant or any registered person or company within a specified time and may require verification by affidavit or otherwise of any information or material then or previously submitted or may require the applicant or the registered person or any partner, officer, director or employee of the registered person or company to submit to examination under oath.

Counsel for the applicant submits that this section does not authorize the registrar to make an inquiry or examination. His argument is that if it did so authorize the registrar the concluding words of the section would be, not "to submit to examination under oath" but "to submit to examination under oath before him".

That is reducing the argument to its simplest elements. The answer that is made by the Crown to it is that the plain meaning of the section is that the registrar has this power to require the named person, in this case, to submit to examination under oath and that the section cannot mean anything else but submit to examination under oath before him.

Two other parts of the Act are referred to in support of that argument. The first is s. 2(5)(*f*), which defines "fraud", in part, as

the making of a material false statement in any application, information, material or evidence submitted or given to the commission or the registrar under the provisions of this Act or the regulations, or in any prospectus or return filed with the commission;

The subsection that I have just read, it is argued, contemplates the giving of information, material or evidence to the registrar.

Section 65(1)(*c*) is also relevant. It provides:

65.(1) Every person, including any officer, director, official or employee of a company, who is knowingly responsible for

* * *

(*c*) the making of any material false statement in any application, information, statement, material or evidence submitted or given under this Act or the regulations to the commission, its representative, the registrar or any person appointed to make an investigation or audit under this Act;

I have no doubt, after listening to the two arguments and the reading of the sections that I have already mentioned, that the registrar has the power under s. 13 to take evidence and to take evidence under oath.

That was Mr. Justice Disbery's opinion when he dismissed the motion to quash, and it is also my opinion.

I think it is the plain meaning of s. 13 that the registrar may require this particular person to give this information under oath, to submit to examination under oath and before the registrar. To what other possible place or person could he send the man for examination?

If the person to conduct the examination is the registrar, I think it is implicit in the terms of the section too that the registrar can administer the oath. In any event, there is s. 41 of *The Saskatchewan Evidence Act* which I had better set out in full:

41. Every court, judge, police magistrate, justice of the peace, arbitrator or other person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence may administer an oath to any witness who is legally called before such court, judge, police magistrate, justice of the peace, arbitrator or other person respectively.

In my opinion the registrar, under s. 13, has by law authority to examine under oath. I think he has, by s. 13, also the power to administer the oath, but if he has not got that power by s. 13 of *The Securities Act,* I think he has it by s. 41 of the *Evidence Act.*

I am therefore holding that counts one to seven do disclose offences known to the law and that the accused was properly committed for trial on those charges and that to that extent the motion to quash the committal on those charges fails.

I turn now to counts nine and ten, referred to as the Leier charges. I set out count nine in full:

9. And further, that you during the month of August A.D. 1958 at the said City of Regina unlawfully did counsel or procure one Edward Joseph Leier who, not being a witness in a judicial proceeding but being permitted or authorized by law to make a statement by solemn declaration, to make in such statement before a person who is authorized by law to permit it to be made before her, assertions with respect to matters of fact, opinion, belief or knowledge knowing the said assertions to be false, and thereby to be a party to an offence against the Criminal Code section 114, which offence was afterwards committed by the said Edward Joseph Leier by solemn declaration declared at the said City of Regina on the 14th day of August A.D. 1958, and you did thereby become a party to the said offence against section 114 of the Criminal Code by virtue of section 22(1) of the Criminal Code.

Count number ten is in the same terms, with this exception, that the solemn declaration referred to was simply dated "in the month of August 1958". Section 114 of the *Criminal Code* reads:

114. Every one who, not being a witness in a judicial proceeding but being permitted, authorized or required by law to make a statement by affidavit, by solemn declaration or orally under oath, makes in such a statement, before a person who is authorized by law to permit it to be made before him, an assertion with respect to a matter of fact, opinion, belief or knowledge, knowing that the assertion is false, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

The attack on these two counts is made on these grounds—that Leier was not a person permitted, authorized or required by law to make the solemn declarations referred to in counts nine and ten and that there exists no authorization at law for the taking or receiving of these solemn declarations.

The argument is that the phrase "permitted, authorized or required by law" to make a statement, means permitted, authorized or required by some substantive law; that the Crown must point to some statute which permits, authorizes or requires Leier to make these solemn declarations, and that there is no such statutory authorization.

The Crown's submission in answer to that is that Leier is permitted by s. 37 of the *Canada Evidence Act* to make this declaration if Part I of the *Canada Evidence Act* is applicable and, if it is not so applicable, he is permitted under provincial law to make the declaration; and that the purpose of the declaration may very well determine which law is applicable and the determination of the purpose is a matter of evidence for the jury.

All that I have before me is the declaration itself. The declaration does refer to a statement of claim in an action brought by a plaintiff, whose name I cannot read, against Columbia Metals Exploration Co. Ltd., Western Bond and Share Corporation Limited, William Luboff, John J. Abbott, Edward Leier and Laurence Tetrault.

This brings me to the question of what use may be made of this material on a motion for habeas corpus before a judge of this Court.

The Crown's submission is that I am limited to looking at the warrant of committal and that I cannot look at these declarations and the statement of claim any more than I can look at the evidence—seven or eight volumes of it—given on the preliminary hearing.

The basis for that submission is to be found in a number of cases decided in this Court going back to *In re Trepanier*[1]. This and the other cases to which I propose to refer in a moment have to do with motions for habeas corpus after a conviction. The present application is brought in a case

[1] (1885), 12 S.C.R. 111.

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where there has been no conviction but only a committal for trial and a bill of indictment preferred. It is suggested that that makes a difference and I will deal with that later.

In *Re Trepanier* an application was made to a judge of this Court on behalf of a person arrested on a warrant issued on a conviction, for a writ of habeas corpus with certiorari in aid. The application was dismissed. Chief Justice Ritchie said, at p. 113:

> The jurisdiction of the magistrate being unquestionable over the subject-matter of complaint and the person of the prisoner, and there being no ground for alleging that the magistrate acted irregularly or beyond his jurisdiction, and the conviction and warrant being admitted to be regular, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion as to the guilt of the prisoner arrived at by the magistrate, I have not the slightest hesitation in saying that we cannot go behind the conviction and inquire into the merits of the case by the use of the writ of habeas corpus.

It was also pointed out that there is no jurisdiction in this Court to issue a writ of certiorari in aid of habeas corpus. The certiorari provisions in the *Supreme Court Act* have to do with appellate jurisdiction and not with jurisdiction in matters of habeas corpus which is concurrent with that of jurisdiction of the judges of the Superior Courts of the provinces.

The next case I refer to is *Ex parte Macdonald*[1]. That was also an application for habeas corpus after there had been a conviction. At p. 687, the judgment reads:

> I believe therefore that the jurisdiction of a judge of the Supreme Court in matters of habeas corpus in any criminal case, is limited to an inquiry into the cause of commitment, that is, as disclosed by the warrant of commitment, under any Act of the Parliament of Canada.

Finally on that point, in the case of *In re Goldhar*[2], the principle to be found in the previous cases reported in the court is reaffirmed in the plainest terms. For example, Chief Justice Kerwin, at p. 435, says:

> The Calendar is a certificate regular on its face that the appellant was convicted by a court of competent criminal jurisdiction and therefore it is impossible to go behind it on an application for habeas corpus; *Re Trepanier* (1885) 12 S.C.R. 111; *Re Sproule* (1886) 12 S.C.R. 140; *In re Henderson* (1930) S.C.R. 45, 1 D.L.R. 420. 52 C.C.C. 95.

[1] (1896), 27 S.C.R. 683.
[2] [1960] S.C R. 431, 33 C.R. 71, 126 C.C.C. 337, 25 D.L.R. (2d) 401.

And to the same effect in the judgment of Mr. Justice Fauteux, at p. 439:

The question, which counsel for the appellant admittedly sought to be determined by way of habeas corpus proceedings, is stated in the reasons for judgment of other members of the Court. In my view, it is one which would require the consideration of the evidence at trial and which, in this particular case, extends beyond the scope of matters to be inquired under a similar process. To hold otherwise would be tantamount to convert the writ of habeas corpus into a writ of error or an appeal and to confer, upon every one having authority to issue the writ of habeas corpus, an appellate jurisdiction over the orders and judgments of even the highest Courts. It is well settled that the functions of such a writ do not extend beyond an inquiry into the jurisdiction of the Court by which process the subject is held in custody and into the validity of the process upon its face.

In my opinion the jurisdiction of this Court is similarly limited in an inquiry into a committal for trial. In the absence of power to issue a writ of certiorari in aid of habeas corpus, a judge of this Court has no power to look at the evidence at the preliminary hearing or to receive affidavit evidence relating to it.

My jurisdiction is limited to a consideration of the warrant of committal and the other material that I have referred to—the recognizances and the order of Judge Hogarth. I cannot look at evidence, whether a transcript of the evidence at the preliminary hearing or evidence sought to be introduced by way of affidavit identifying a portion of such evidence.

I am founding my reasons on this branch of the case entirely on that principle and I am expressing no opinion on the point on which I heard full argument—whether there does exist, by virtue of provincial legislation, permission to take a declaration of this kind.

It was suggested that that power is to be found in 1835 legislation enacted in the United Kingdom and that that legislation is still in force in some way in the Province of Saskatchewan. The applicant, on the other hand, says that that legislation cannot have been in force after the year 1907 when *The Saskatchewan Evidence Act* was enacted. If that is so, any statutory declaration made in Saskatchewan before the 1959 amendment to the *Evidence Act* is invalid unless it comes within Part I of the *Canada Evidence Act*. I am expressing no opinion on that point, but founding my judgment on the lack of jurisdiction in this Court to do more

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than examine the warrant of committal, and to find that, if it is regular on its face, that is the end of the matter. I am drawing no distinction between a warrant of committal after conviction. I see no distinction in principle between the two.

The application will therefore be dismissed.

The judgment will issue on the 10th October, 1961, to afford the applicant an opportunity to apply to the full Court on that date for bail and, in the meantime, I continue the bail.

Application dismissed.

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*Oct. 11, 12
Dec. 15

MARY FARRELL ET AL. (*Applicant*) ...APPELLANT;

AND

WORKMEN'S COMPENSATION BOARD .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Workmen's compensation—Whether accident arose out of and was in the course of employment—Issue within exclusive jurisdiction of Workmen's Compensation Board and not open to judicial review.

Constitutional law—Constitutionality of Board's powers—Workmen's Compensation Act, R.S.B.C. 1948, c. 370, s. 76(1)—British North America Act, 1867, s. 96.

The appellant, whose husband, a hospital workman, was found dead after having engaged in some physical exertion which his work required, applied to the respondent Board for compensation on behalf of herself and four children. The Board decided that the workman died from natural causes and that his death was not the result of an accident arising out of and in the course of his employment. Following this decision, the appellant moved in the Supreme Court of British Columbia for *mandamus* with *certiorari* in aid. The judge who heard the motion held that the death was the result of an accident arising out of and in the course of employment, and directed the assessment and payment of compensation to the widow and dependents. This decision was set aside by a majority of the Court of Appeal. The widow then appealed to this Court.

Held: The appeal should be dismissed.

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

The Board's return on the motion, consisting of simply the application for compensation and the decision, was a proper one and there was no error on the face of the record. There was error in compelling the Board to supplement its return in the absence of any question going to jurisdiction.

The issue—whether there was an accident arising out of and in the course of employment—was unquestionably within the jurisdiction of the Board under Part I of the *Workmen's Compensation Act,* R.S.B.C. 1948, c. 370, s. 76(1), and even if there was error, whether in law or fact, it was made within the exercise of the jurisdiction and was not open to any judicial review, including *certiorari*. *Dominion Canners Ltd. v. Costanza,* [1923] S.C.R. 46; *O'Krane v. Alcyon Shipping Co. Ltd.,* [1961] S.C.R. 299, followed; *Acme Home Improvement Ltd. v. Workmen's Compensation Board* (1957), 23 W.W.R. 545, approved.

The submission that s. 76(1) of the Act was *ultra vires* of the Provincial Legislature on the ground that it infringed s. 96 of the *British North America Act* was abandoned in this Court. If an argument based on that ground was untenable (*Workmen's Compensation Bd. v. C.P.R.,* [1920] A.C. 184; *Kowanko v. J. H. Tremblay Co.* [1920] 1 W.W.R. 787; *Attorney-General of Quebec v. Stenec and Grimstead* (1933), 54 Que. K.B. 230; *Reference re The Adoption Act,* [1938] S.C.R. 398; *Labour Relations Bd. of Saskatchewan v. John East Iron Works Ltd.* [1949] A.C. 134, referred to), the appellant's other argument based upon right of access to the courts fell with it. Its rejection as far as this Board was concerned was implicit in the judgments in the *Dominion Canners* case and in the *Alcyon* case. The restrictions on the legislative powers of the province to confer jurisdiction on boards must be derived by implication from the provisions of s. 96 of the *B.N.A. Act.* Short of an infringement of this section, if the legislation is otherwise within the provincial power, there is no constitutional rule against the enactment of s. 76(1).

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Manson J. which had set aside a decision of the Workmen's Compensation Board and ordered the Board to assess compensation to the applicant. Appeal dismissed.

T. R. Berger, for the applicant, appellant.

C. C. Locke, Q.C., for the respondent.

M. M. McFarlane, Q.C., for the Attorney-General of British Columbia.

F. Mercier, Q.C., for the Attorney-General of Quebec.

E. Pepper, for the Attorney-General of Ontario.

J. Holgate, for the Attorney-General of Saskatchewan.

R. W. Cleary, for the Attorney-General of Alberta.

[1] (1960-61), 33 W.W.R. 433, 26 D.L.R. (2d) 185

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FARRELL et al. v. WORKMEN'S COMPENSATION BOARD

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia[1] allowing an appeal from a judgment of Manson J. which had set aside a decision of the Workmen's Compensation Board and issued an order of *mandamus* directing the Board to assess and pay the compensation payable to the appellant. The appellant is the widow of the late John Farrell, who died in February 1959 while working at the North Vancouver General Hospital. She applied for compensation on behalf of herself and four children.

The Board decided that the workman died from natural causes and that his death was not the result of an accident arising out of and in the course of his employment. Following this decision, the appellant moved in the Supreme Court of British Columbia for *mandamus* with *certiorari* in aid. The material filed by the Board on the return of the motion was simply the application for compensation and the decision. As a result of further proceedings, the Court ordered the Board to file all the material that it had before it at the time it considered the appellant's claim, including a transcript of the evidence given at the inquest on the deceased workman. The material showed that the workman, unknown to himself or to anyone else, suffered from a serious heart disease and that he was found dead after having engaged in some physical exertion which his work at the hospital required.

The learned judge who heard the motion examined the material before him and came to a conclusion contrary to that of the Board. He held that the death was the result of an accident arising out of and in the course of employment, and directed the assessment and payment of compensation to the widow and dependents. It is, I think, plain that the learned judge really conducted a rehearing of the whole application by way of appeal, which is a procedure not provided by the Act and beyond the competence of a judge sitting on a motion for *certiorari*. His decision was properly set aside by the Court of Appeal.

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

[1] (1960-61), 33 W.W.R. 433, 26 D.L.R. (2d) 185.

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.B.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.

Two decisions of this Court have held that no Court has the power to decide in an action whether the case is one for compensation under the Act and whether the right of action is taken away under Part I. These decisions are: *Dominion Canners Limited v. Costanza*[1], and *Alcyon Shipping Co. Ltd. v. O'Krane*[2]. They are not confined in their application to the precise point under Part I of the Act which fell to be decided in them. They are of general application to all questions which arise for decision under Part I of the Act and which, by the very terms of s. 76(1), are within the exclusive jurisdiction of the Board and on which the decision of the Board is final and conclusive and not open to judicial review. This is the essential basis of the judgment under appeal and of the judgment of the same Court in *Acme Home Improvement Limited v. Workmen's Compensation Board*[3], and I am in complete agreement.

[1] [1923] S.C.R. 46, 1 D.L.R. 551.
[2] [1961] S.C.R. 299, 27 D.L.R. (2d) 775.
[3] (1957), 23 W.W.R. 545, 11 D.L.R. (2d) 461.

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A constitutional issue was raised on the hearing. The learned judge who heard the motion held that s. 76(1) was *ultra vires* of the Provincial Legislature on two grounds:

(1) That the Legislature has no jurisdiction to prevent a review by the Courts of a decision of the Board upon questions of law since that deprives the subject of his right of access to the Courts.

(2) That by such legislation the Board is constituted a superior District or County Court or a tribunal analogous thereto and the members thereof, not having been appointed by the Governor-General in Council pursuant to s. 96 of the B.N.A. Act, have no power or authority to exercise judicial functions.

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.*[1], *Kowanko v. J. H. Tremblay Co.*[2], *Attorney-General of Quebec v. Slanec and Grimstead*[3], *Reference re The Adoption Act*[4], and *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*[5]

If an argument based upon s. 96 of the *British North America Act* is untenable, the other argument based upon right of access to the courts falls with it. Its rejection as far as this Board is concerned is implicit in the judgments in the *Dominion Canners* case and in the *Alcyon* case. The restrictions on the legislative power of the province to confer jurisdiction on boards must be derived by implication from the provisions of s. 96 of the *British North America Act*. Short of an infringement of this section, if the legislation is otherwise within the provincial power, there is no constitutional rule against the enactment of s. 76(1).

I would dismiss the appeal without costs.

Appeal dismissed without costs.

Solicitors for the applicant, appellant: Shulman, Tupper, Worrall & Berger, Vancouver.

Solicitors for the respondent: Ladner, Downs, Ladner, Locke, Clark and Lenox, Vancouver.

[1] [1920] A.C. 184, 88 L.J.P.C. 169.
[2] [1920] 1 W.W.R. 787, 51 D.L.R. 174, 30 Man. R. 198.
[3] (1933), 54 Que. K.B. 230, 2 D.L.R. 289.
[4] [1938] S.C.R. 398, 71 C.C.C. 110, 3 D.L.R. 497.
[5] [1949] A.C. 134, [1949] L.J.R. 66.

BANQUE CANADIENNE NATIONALE (*Defendant*) .... APPELLANT; 1961 *May 18, 19 Oct. 3

AND

DONATO MASTRACCHIO (*Plaintiff*) ...RESPONDENT.

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

Contracts—Disappearance of money from safe deposit box—Bank's contractual liability—Whether failure to take ordinary precautions—Master key used by unauthorized person—Burden of proof—Evidence—Civil Code, arts. 1018, 1242—Code of Civil Procedure, art. 312.

For a number of years the plaintiff, through a prête-nom, had a safety deposit box in one of the defendant's branches in Montreal. Clause 7 of the agreement provided that the bank's liability was limited to taking ordinary precautions to prevent the opening of the box save by the plaintiff or his agent; and that the total or partial loss of the contents of the box did not constitute a presumption that the box had been opened by a person other than the plaintiff or his agent. The master key in the possession of the bank and one of the duplicate keys in the possession of the plaintiff were required to open the box.

In January 1956, the plaintiff placed in the box a total of $12,750 in Canadian and American currency. When he opened the box again some two weeks later, this amount was missing. The plaintiff claimed that the bank's employees had not taken sufficient care or precaution. The bank pleaded that it was only obliged to take ordinary precautions to prevent the box from being opened by a person other than the plaintiff or his agent. The trial judge maintained the action, and this judgment was affirmed by a majority in the Court of Appeal. The bank appealed to this Court.

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

Per Kerwin C.J.: The plaintiff's evidence that he had put the money in the box and that it had disappeared was believed by the trial judge and the majority in the Court of Appeal. There was no reason to disturb their findings in view of the evidence of carelessness on the part of the bank.

Per Fauteux, Abbott and Martland JJ.: The evidence went beyond the mere proof of the disappearance or loss of the contents of the safety deposit box. It established not only the occurrence of that loss, but also the fact that the plaintiff had not, nor any person authorized by him, removed those contents and thus that the money had been removed by an unauthorized person. The evidence also established that there had been specific instances of failure by the defendant to exercise ordinary precautions to prevent the opening of the box by an unauthorized person and that one of these failures might have contributed to the opening of the box by an unauthorized person. Clause 7 did not go so far as to require the plaintiff to prove by other evidence that an unauthorized person had gained access to the box. The plaintiff

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

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had made out a *prima facie* case. The defendant had failed to discharge the burden of showing that on the balance of probabilities none of these breaches of its duty had caused the loss.

Per Taschereau J., *dissenting*: This was not a contract of deposit, but one of ordinary lease. There was no presumption against the defendant, either under the civil law or the contract. The burden was on the plaintiff to establish that the defendant had not taken the ordinary precautions to prevent the opening of the box by an unauthorized person and that the consequence of that negligence, if it existed, was the loss for which he was claiming. The plaintiff had failed to establish by a balance of probabilities that the defendant was responsible.

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

C. A. Geoffrion, Q.C., A. Gerin-Lajoie, Q.C., and *Hazen Hansard, Q.C.,* for the defendant, appellant.

M. G. Robitaille, Q.C., for the plaintiff, respondent.

THE CHIEF JUSTICE:—I agree that it is necessary first to construe the "bail de coffret de sureté" and that the important clause is no. 7. The first sentence limits the responsibility of the bank to take the ordinary precautions to prevent the opening of the safety deposit box by a person other than the respondent or his "fondé de pouvoir". The second sentence reads as follows:

> La disparition ou la perte totale ou partielle des objects et valeurs déposés dans la coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le sous-signé ou son fondé de pouvoir.

It is quite true that the box cannot be opened without one of the two keys given by the bank to Miss Sawka as "prête-nom" of the respondent and which, according to his testimony, had been in his possession continuously. However, on the other hand, the box could not be opened without the master key retained by the bank.

The evidence shows that the bank throughout was very careless. Although at the conclusion of the period for which one rents the box the lock is supposed to be changed before renting it to another, that was not done in the case of the respondent with respect to the box in question. The previous rentor testified that he had kept the keys while he had rented the box and returned the keys to the bank upon giving it up, but in not one instance with relation to the

[1] [1961] Que. Q.B. 1.

particular box was the respondent required to sign the list of "authorized signatures" when he used the box, and we were told by counsel for the appellant that this occurred with reference to about five per cent of all the boxes. Again the rules and instructions to the bank employees provide that the "locataire" of a box or his representative is never to have access alone in the vault; someone should accompany each such person. Contrary to these instructions, to quote the appellant's factum, "it was also shown that visitors to the safety deposit boxes at the branch in question were occasionally left alone in the vault".

The respondent testified that he had put the money in the box on January 5, 1956, and that when he returned and opened the box on January 17, 1956, the money was gone. The trial judge believed the respondent and I am unable to read his reasons as indicating that he merely did so because he felt that otherwise he would be in effect declaring that the respondent was a perjurer. The trial judge referred to the peculiar circumstances but I can read his reasons in no other way than that, notwithstanding these circumstances and in view of all the evidence, he believed the testimony of the respondent. The majority of the Court of Appeal agreed with him and I can see no reason to disturb their findings in view of all the circumstances set out above.

The appeal should be dismissed with costs.

TASCHEREAU J. (*dissenting*):—Depuis de nombreuses années, le demandeur-intimé est un client de la Banque Canadienne Nationale, où il a gardé un dépôt d'épargnes substantiel à la succursale rue Ste-Catherine 334 est, Montréal. En octobre 1949, mademoiselle Anna Sawka loua de la Banque un coffret de sûreté, et signa le bail habituel qu'on lui présenta. Il n'est pas contesté que la Banque-appelante savait que cette demoiselle représentait bien l'intimé dans la présente cause, et qu'elle agissait en son nom. Il est arrivé qu'au début de l'année 1956 une somme de $12,750 disparut de ce coffret, et l'intimé, alléguant la négligence de la Banque, l'a poursuivie devant les tribunaux. L'honorable Juge Prévost de la Cour Supérieure a

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maintenu cette action, et la Cour du Banc de la Reine[1], MM. les Juges Pratte et Choquette dissidents, a confirmé ce jugement.

Mon collègue M. le Juge Martland a récité tous les faits essentiels de cette cause et il me semble inutile d'y revenir. Je veux cependant insister sur les faits suivants qui me semblent être les points déterminants de cette cause.

Il ne s'agit sûrement pas entre l'appelante et l'intimé d'un contrat de dépôt et l'on ne peut, en conséquence, trouver dans l'entente intervenue les caractéristiques des obligations du dépositaire, qui sont essentiellement *de conserver la chose*, et de la rendre à première réquisition. Il s'agit plutôt, à mon sens, d'un louage ordinaire où la Banque, moyennant un prix stipulé, a mis un coffret à la disposition de l'intimé. Ce dernier en avait la clé et la Banque conservait la clé maîtresse, de sorte qu'il fallait le concours des deux pour en pratiquer l'ouverture. Mais il est clair que ce n'est seulement qu'à la réquisition du locataire que le coffret pouvait être ouvert. Lui seul en contrôlait l'accès. Seul il pouvait exiger que la Banque participât à l'ouverture, et la Banque ne pouvait exercer une pareille autorité.

Dans le bail intervenu, on y lit la clause suivante:

> 7°. La responsabilité de la banque en vertu du présent bail est limitée à l'obligation pour celle-ci de prendre les précautions ordinaires pour empêcher l'ouverture de ce coffret par une personne autre que le sousigné ou son fondé de pouvoir. La disparition ou la perte totale ou partielle des objets ou valeurs déposés dans le coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le soussigné ou son fondé de pouvoir.

Que l'on invoque la loi civile de la province, ou le contrat qui est la loi des parties, aucune présomption n'existe contre la Banque. C'est au demandeur-intimé à prouver que la Banque n'a pas pris des précautions ordinaires pour empêcher l'ouverture du coffret, et à établir que comme conséquence de cette négligence, si elle existe, il a subi la perte pour laquelle il réclame.

La preuve révèle que le 5 janvier 1956, Fortin employé de la Banque qui connaissait bien l'intimé, et en possession de la clé maîtresse, a ouvert le coffret à la demande de Mastracchio, qui avait aussi sa propre clé. Il est établi qu'il y avait dans le coffret $12,750 qui furent en partie comptés par Fortin à la réquisition de l'intimé. Pendant quelques

[1] [1961] Que. Q.B. 1.

minutes, Fortin n'a pas observé tous les mouvements de l'intimé, mais a constaté qu'il a «joué» dans son coffret. Celui-ci a été ensuite fermé à clé par l'intimé et par Fortin. Il est aussi en preuve que le 17 janvier, soit douze jours plus tard, quand l'intimé est revenu à la Banque et a ouvert son coffret, l'argent était disparu. Personne ne sait où il est allé. Mais l'on sait également que dans l'intervalle, soit entre le 5 janvier et le 17 du même mois, l'intimé, qui seul avait en sa possession la clé qui permettait l'ouverture de ce coffret, n'est pas venu à la Banque, et que les préposés de l'appelante qui contrôlaient la clé maîtresse n'ont pas participé à son ouverture. A part cette clé maîtresse, toujours en possession de la Banque, il n'en existe que deux et c'est l'intimé qui les gardait toujours dans sa poche, et il jure qu'il ne s'en est pas départi.

La détermination de cette cause va donc dépendre de l'interprétation de la preuve, et il est impossible de se baser sur des hypothèses pour prouver où résulte la responsabilité. Il faut exclure les conjectures et les possibilités, car la loi interdit de pareilles spéculations pour faire reposer une conclusion juridique. Les droits des parties à un litige, en matière civile, doivent être jugés suivant la balance des probabilités, et il faut également examiner si le demandeur-intimé qui avait évidemment le fardeau de prouver la négligence de l'appelante, a démontré la responsabilité de celle-ci.

Je crois que l'intimé n'a pas réussi à établir sa cause. Pour conclure que l'appelante a manqué à ses obligations, il faudrait supposer qu'un employé de la Banque avait une clé semblable à celle de l'intimé, que la serrure a été forcée avec la connivence de la Banque, qu'une nouvelle clé a été fabriquée avec un modèle en cire, ou enfin qu'un tiers a volé la clé de l'intimé et a trompé la vigilance des employés négligents de la Banque. Mais aucune réalité ne correspond à ces hypothèses, à ces possibilités qui ne sont appuyées sur aucun élément de preuve. Au contraire, l'intimé se charge de nous dire qu'il a toujours eu ses deux clés en sa possession, et il est établi hors de tout doute qu'il n'en existe que deux. Les employés de la Banque jurent également que l'on ne s'est pas servi de la clé maîtresse pour ouvrir ce coffret.

Non seulement je crois que la demandeur-intimé n'a pas prouvé les allégations de sa demande, mais je trouve étrange certains aspects de sa conduite, qui sans être conclusifs,

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n'aident pas à faire pencher en sa faveur la balance des probabilités, et qui font planer dans mon esprit des doutes très sérieux. Je m'explique difficilement, en effet, que cet homme qui est un parieur reconnu aux courses et aux jeux de hasard de Las Vegas, prenne la peine, malgré que cela soit déjà arrivé, de faire compter par l'employé Fortin le 5 janvier en question le montant d'argent qu'il avait dans son coffret, et particulièrement la somme qu'il avait en devises américaines et dont il avait sans doute besoin pour son voyage projeté dans le Nevada. Je trouve également suspect qu'il ait été le dernier à "jouer" dans son coffret alors que l'attention de Fortin était attirée ailleurs momentanément, et qu'une fois le coffret fermé il ait gardé les clés en sa possession durant quinze jours. Il a été le dernier à avoir accès à ce coffret, et rien ne peut justifier de penser, à moins d'entrer dans la sphère des conjectures, qu'il ait été ouvert par qui que ce soit. Je m'obstine à croire que l'on ne peut pas dire que les probabilités nous entraînent à conclure à la négligence de l'appelante.

La négligence que l'on reproche à la Banque c'est que presque toujours l'intimé ne signait pas le livre constatant ses visites à son coffret. Ceci est exigé par les règlements de la Banque et, apparemment, il est arrivé qu'ils n'ont pas été suivis, et la raison donnée, c'est que l'intimé était bien connu des employés de la Banque. On savait qu'il était locataire du coffret et qu'il était seul porteur des clés qui y donnaient accès. L'obligation d'exiger la signature du client est une question de régie interne destinée à la protection de la Banque qui a intérêt à surveiller qui a accès aux coffrets. Souvent, les corporations ou les sociétés imposent à leurs employés des règlements de régie interne qui ne peuvent augmenter ou diminuer les droits des tiers. Ces droits ne se créent pas plus qu'ils ne se perdent comme résultat de conventions intervenues *inter alios*. Un employeur peut sûrement exiger de son employé un standard de prudence beaucoup plus élevé que ne l'exigent les règles normales de la responsabilité. Mais la violation de ces règles imposées ne peut bénéficier aux tiers.

A tout événement, dans le cas qui nous occupe, que l'absence de signature dans les registres soit ou non une négligence, il n'existe aucune relation entre cette faute alléguée et la disparition des argents du coffret. Il n'y a pas

là de cause à effet. En effet, du 5 au 17 janvier, l'intimé ne pouvait pas signer car il jure qu'il n'est pas allé à la Banque. Sans doute, la situation eut été différente si un tiers, inconnu des employés, en possession des clés de l'intimé, et sans être porteur d'un procuration, eut voulu avoir accès au coffret en question. On lui aurait évidemment refusé l'accès. Mais ici, cette situation ne se présente pas. Il a été établi que personne n'est venu à la Banque pour obtenir l'ouverture du coffret, et l'absence de signature me paraît immatérielle, car la vigilance de la Banque a été autrement prouvée. Aucun des employés durant la période en question n'a été requis de se servir de la clé maîtresse, et aucun preuve ne démontre ce fait essentiel.

D'accord avec MM. les Juges Pratte et Choquette de la Cour du Banc de la Reine, je suis d'opinion que le demandeur-intimé qui avait le fardeau de la preuve, n'a pas prouvé sa réclamation et qu'il n'a pas démontré la responsabilité de la Banque.

Je maintiendrais l'appel et rejetterais l'action avec dépens de toutes les Cours.

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

MARTLAND J.:—By agreement entitled "Bail de Coffret de Sûreté" dated October 28, 1949, one Miss Anne Sawka, acting, to the knowledge of the appellant, as *prête-nom* of the respondent, leased from the appellant safety deposit box no. 544 in the vaults of the appellant's branch situated at 334 Ste. Catherine Street East, Montreal. Clause 7 of that agreement provided as follows:

> 7. La responsabilité de la banque en vertu du présent bail est limitée à l'obligation pour celle-ci de prendre les précautions ordinaires pour empêcher l'ouverture de ce coffret par une autre personne que le soussigné ou son fondé de pouvoir. La disparition ou la perte totale ou partielle des objets et valeurs déposés dans le coffret ne constitue pas une présomption que le coffret a été ouvert par une autre personne que le soussigné ou son fondé de pouvoir.

The respondent was well known at this branch of the appellant. He had kept an account there for many years and had had, for over two years, to his credit in his savings account, the sum of $50,000, from which there had been no withdrawals. To the knowledge of the appellant, he used to keep substantial sums of money in this safety deposit

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box. It was of the usual type, the evidence showing that it had a double lock, the first part of which could only be opened by a master key, which remained in the possession of the bank, and the second by a key which was delivered in duplicate to the respondent at the time of execution of the agreement and of which no copy remained in the possession of the bank. In order to gain access to the box, the master key had first to be inserted in the lock and the first portion thereof unlocked, then the respondent would insert one of his keys, turn it in the lock and open the box.

The evidence shows that on January 5, 1956, the respondent came to the bank and requested an employee of the appellant, one Donat Fortin, with whom he had become friendly and who had already performed similar services for the respondent in the past, to change into new bills a sum of $3,000 in old bills which the respondent had with him.

After having done this, Fortin, after securing the master key, accompanied the respondent to his safety deposit box and with him opened the box. Upon opening the box, the respondent removed therefrom some American currency which he requested Fortin to count. Fortin counted the currency which amounted to $5,500 and returned it to the respondent.

Thereupon the respondent busied himself with the box for some three or four minutes while Fortin remained close at hand.

The respondent testified that when he visited his box on January 5, 1956, he had in it $9,750 in U.S. and Canadian currency and that he deposited therein the $3,000 in new bills which he had obtained from Fortin in exchange for his old bills and then closed the box. The explanation given as to why the respondent asked Fortin to count the U.S. currency in his box is that he wished to know how much he had for travelling; this was not the first time that Fortin had counted money at the request of the respondent.

The respondent did not visit the bank again until January 17, 1956, on which date, accompanied by Fortin, he opened the safety deposit box when, except for some stock certificates and a ring, it was found to be empty. Fortin stated that he had been much surprised that the money was no longer there. There was no indication that anyone had forced open the box or made any attempt to this end.

The respondent alleged and proved various particulars of failure by the appellant to exercise ordinary precautions to prevent the opening of the safety deposit box by an unauthorized person. The appellant itself had given certain instructions to its employees and had established standards of practice for safeguarding the safety deposit boxes, which were not observed. The following are examples of this:

It was shown that the employees of the appellant's branch, in certain cases, did not require a person to sign the register, showing the date and time of his visit, if he was well known to them. As a matter of fact, the respondent himself never signed with respect to his safety deposit box no. 544.

Although the appellant purported to find "des locataires désirables", no particular investigation was made prior to leasing a safety deposit box to any person.

Visitors to the safety deposit boxes at the branch in question were occasionally left alone and unsupervised in the vault.

The lock on the respondent's safety deposit box no. 544 was not changed in 1949 when it was first leased to him. The reason given by the appellant was that the previous lessee had terminated his lease only three days before and there had not been time to change the lock. The former lessee said that when he gave up his lease he had to return both keys to the box, in his possession, to the bank. During the time he had held the box, these keys had not left his possession nor had duplicates thereof been made.

The master key of the appellant was not kept securely in safe custody, but was left in an unlocked desk drawer. Some ten to twelve employees of the appellant had access to it.

The appellant relies upon clause 7 of the agreement as an answer to the respondent's claim. By the terms of that clause the appellant's liability, under its agreement with the respondent, is limited to taking ordinary precautions to prevent the opening of the safety deposit box save by the respondent or his agent. The second portion of the clause provides that the total or partial loss of the contents of the box shall not constitute a presumption that the box was opened by a person other than the respondent or his agent.

I will deal with the latter portion of this clause first.

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The respondent has testified as to having left a certain sum of money in the box on January 5, 1956; that he did not return to the bank again until January 17; and that during that interval he had kept his safety deposit box keys in his own possession at all times. He stated, without contradiction, that he had not authorized anyone else to open the box on his behalf and that on the latter date, when he opened the box, the money had disappeared. By virtue of clause 7, the disappearance of the money, without other evidence, did not create a presumption that the box had been opened by someone other than the respondent or his agent. But the fact of the disappearance does create an inference that the box had been opened by someone. It is, then, established, by affirmative evidence, not only that the loss occurred from the box, but also that the box could not have been opened by the respondent or by any agent of his at the time the money was removed from it. Furthermore, in view of the absence of evidence to show that the box had been forced open, it is clear that the appellant's master key must have been used by some unauthorized person. In the light of that evidence, apart from any presumption, there is no other conclusion but that the box must have been opened by an unauthorized person.

The appellant sought to cast doubt upon the respondent's evidence, and to suggest that he had, himself, removed the money from the safety deposit box, by alleging that the respondent was a gambler, that his action in having some of the money counted by Fortin was a suspicious circumstance and that the respondent alone had been handling the contents of the box on January 5 after Fortin had counted the money and before the box was closed. As to the respondent being a gambler, the evidence was that the respondent had told Fortin on January 5 that he was going to Las Vegas "pour jouer". Fortin's evidence was that this was not the first occasion when he had been asked by the respondent to count money which the respondent had in his safety deposit box. It is not disputed that the respondent was handling the contents of the box after Fortin had counted the money and before the box was closed.

As against this evidence, which, in my opinion, falls very far short of establishing that the respondent was not, as every one is presumed to be, an honest person, is the evidence, previously mentioned, of the respondent's long

association with the appellant's branch and of the fact that he had kept a large sum of money on deposit in his savings account. The respondent's evidence was accepted by the learned trial judge and by the majority of the Court of Queen's Bench[1] and I see no reason for disturbing their conclusion.

The appellant contends that by virtue of clause 7 no inference of any kind whatever can be drawn from the loss of contents of the box. In other words, the respondent must prove by other evidence that an unauthorized person has gained access to his safety deposit box. In my opinion, the wording of the clause does not go that far. Furthermore, so to construe this portion of the clause would be to render the obligation of the appellant, defined in the first portion of the clause, virtually nugatory. Both portions of the clause must be considered together (Art. 1018 of the *Civil Code*). The second portion of the clause should not, if there is any doubt as to its meaning, be construed so as to have such an effect.

I now turn to the first part of the clause, which defines the appellant's liability. It has been established in evidence that the appellant did fail in various respects to take ordinary precautions to prevent an unauthorized person from opening the box. The appellant contends, however, that this is not sufficient in itself. It is argued that the respondent must go further and establish affirmatively that some one or more of the alleged defaults actually resulted in the opening of the box by an unauthorized person.

If this is so, obviously an almost impossible burden is placed on the respondent. But is this contention justified? The respondent has proved that his safety deposit box was opened by an unauthorized person. He has proved loss as a consequence and he has proved specific instances of failure on the part of the appellant to exercise ordinary care, one of which, at least, might have contributed to the opening of the box by an unauthorized person. In my view, a *prima facie* case has been made which the appellant had to meet. The appellant had to show that, on the balance of probabilities, none of these breaches of its duty would have caused the actual loss. In my opinion that burden has not been discharged. It is only necessary to consider one instance of the

[1] [1961] Que. Q.B. 1.

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appellant's breach of its obligation. The evidence shows that the box was not opened by force. Consequently it must have been unlocked. It could not have been unlocked without the improper use, by someone, of the appellant's master key, either to open the box, or in order to have a duplicate made for that purpose. If that key had been properly safeguarded, it is unlikely that it could have been used for such a purpose. The evidence, however, is clear that the master key was not properly safeguarded. No adequate system was provided to prevent its improper use. This being so, I do not see how it can be contended, successfully, that this breach of its duty could not have been a cause contributing to the respondent's loss.

In summary, therefore, my conclusion is that the evidence in this case went beyond the mere proof of the disappearance or loss of the contents of the safety deposit box. It established, not only the occurrence of that loss, but also the fact that the respondent had not, nor had any person authorized by him, removed those contents and thus that the money had been removed by an unauthorized person. The evidence also established that there had been a failure by the appellant to exercise ordinary precautions to prevent the opening of the box by an unauthorized person and that such failure could have caused the loss which was sustained by the respondent. That being so, my opinion is that the decision of the learned trial judge and that of the Court of Queen's Bench was correct and, consequently, this appeal should be dismissed with costs.

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

Attorneys for the defendant, appellant: Gerin-Lajoie & Laprade, Montreal.

Attorneys for the plaintiff, respondent: Robitaille, Fabien & Dansereau, Montreal.

FRANK SURA .... APPELLANT; 1961

*Nov. 7, 8
Dec. 15

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Quebec domicile—Legal community of property—Wife having no separate property (propres)—Whether only one-half of taxable income in husband's hands—Whether husband liable for only one-half of income tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 9—Income Tax Act, 1948 (Can.), c. 52, ss. 2, 3 (Income Tax Act, R.S.C. 1952, c. 148, ss. 2, 3).—Civil Code, arts. 406, 1260, 1269, 1272, 1292, 1298.

The taxpayer and his wife were resident and domiciled in the Province of Quebec at the time of their marriage. As they did not enter into a pre-nuptial contract stipulating separation as to property, they were therefore, under the provisions of the *Civil Code,* married under the regime of the community of property. The income in question was made up of the husband's salary and rentals, and it was not disputed that this income constituted an asset of the community. The taxpayer claimed that under the provisions of the Code, the income was the income of himself and his wife in equal parts and that each should be assessed for one-half of the total income. The Minister contended that the husband alone was liable for the income tax. The taxpayer was successful before the Income Tax Appeal Board, but lost before the Exchequer Court. The taxpayer appealed to this Court.

Held: The appeal should be dismissed; the appellant was liable for tax on all of the income of the community of property.

Under the *Income Tax Act,* the tax is imposed on the person and not on the property, and the person who must pay the tax is the one whose enjoyment of the income is absolute, unfettered by any restriction on his freedom to dispose of the income as he sees fit. The amount of the tax is determined by the benefits that person receives.

Under the regime of community of property, all income—with the exception of the proceeds of the personal work of the wife—received by either consort and those derived from the assets of the community, fall into the community. The consorts are the co-owners of the property of the community. Although the wife is a co-owner she does not have all the rights which ownership normally confers. Her right is stagnant, nearly sterile, because it is unproductive during the existence of the community. It is only at the dissolution of the community that the wife will be vested with her full rights of ownership. The husband is the sole administrator of the community and has very broad powers. He collects the income from the community property. He alone can dispose of this income, he alone has the unrestricted enjoyment of it, and nothing can leave the common fund unless it results from the expression of his wish. He receives the income on his own account and

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Judson JJ.

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not as agent or fiduciary for the benefit of his wife. Since the wife withdraws no benefit derived from the community property, no income tax can be claimed from her.

APPEAL from a judgment of Fournier J. of the Exchequer Court of Canada[1], reversing a decision of the Income Tax Appeal Board. Appeal dismissed.

P. F. Vineberg, Q.C., and *P. Meyer,* for the appellant.

R. Bédard, Q.C., and *M. Paquin, Q.C.,* for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Il s'agit dans la présente cause d'un appel d'un jugement rendu par M. le Juge Alphonse Fournier[1], le 3 novembre 1959, renversant un jugement de la Commission d'Appel de l'Impôt sur le Revenu. Les faits dans cette cause ne sont pas contestés, et les parties ont en effet signé une admission. Pour la parfaite intelligence de la cause, cependant, ces faits peuvent se résumer ainsi:

L'appelant Sura qui était domicilié dans la province de Québec au moment de son mariage, s'est marié sans passer par les formalités d'un contrat. Comme conséquence de l'art. 1260 du *Code Civil,* les époux se sont soumis aux lois et coutumes générales du pays, et la communauté légale de biens a donc existé entre eux. Evidemment, les parties ne contestent pas que le revenu des biens communs est un actif de la communauté, tel que défini à l'art. 1272 du *Code Civil* de la province de Québec.

La question qui se pose est de savoir si ce revenu de la communauté est le revenu seul du mari, ou si le revenu de cette communauté est pour moitié le revenu du mari, et pour l'autre moitié le revenu de la femme. Si le revenu de la communauté doit être considéré comme le revenu seul du mari, la cotisation faite par le Ministre est valide, mais si ce revenu doit être divisé, tel que le prétend l'appelant, la cotisation faite par le Ministre doit être mise de côté.

Le Ministre a décidé, le 20 février 1956, que pour les années 1947 à 1954, un seul rapport devait être fait, et que l'appelant devait en conséquence payer l'impôt sur cet unique rapport. De cette décision l'appelant s'est pourvu en appel devant la Commission d'Appel de l'Impôt sur le

[1] [1960] Ex C.R. 83, [1959] C.T.C. 460, 59 D.T.C. 1280.

Revenu, qui a décidé que les revenus devaient être divisés, que deux rapports distincts pour chaque année devaient être faits, un pour le mari et un pour la femme, ce qui réduisait substantiellement la taxe imposable, et que le dossier devait en conséquence être retourné pour nouvelle cotisation. En Cour d'Echiquier, devant qui s'est pourvu le Ministre du Revenu National, l'honorable Juge Fournier a renversé la décision de la Commission d'Appel de l'Impôt sur le Revenu, et en est arrivé à la conclusion que les cotisations du revenu de l'appelant pour fins d'impôt, pour les années d'imposition de 1947 à 1954, devaient être confirmées et qu'un seul et même rapport devait être fait par l'appelant. C'est de ce jugement qu'appelle maintenant Sura.

Comme il s'agit de cotisations pour les années 1947 à 1954, il est essentiel de voir quelle était la loi fédérale d'impôt en vigueur à ces dates respectives.

En 1947, c'était la loi que l'on retrouve dans les Statuts Revisés du Canada de 1927, c. 97. L'article 3 est à l'effet que pour les objets de la loi, le mot "Revenu" signifie:

la gratification ou le profit ou gain annuel net, soit déterminé et susceptible de computation en tant que gages, salaires, ou autre montant fixe, ou non déterminé en tant qu'honoraires ou émoluments, ou comme étant des profits tirés d'une profession, ou d'une occupation ou vocation industrielle ou commerciale, financière ou autre, directement ou indirectement reçus par une personne de tout office ou emploi, ou de toute profession ou vocation, ou de tout commerce, industrie ou affaire, suivant qu'il y a lieu, que sa provenance soit du Canada ou d'ailleurs; et doit comprendre l'intérêt, les dividendes ou profits directement ou indirectement reçus de fonds placés à intérêt sur toutes valeurs ou sans garantie, ou d'actions, ou de tout autre placement, et, que ces gains ou profits soient partagés ou distribués ou non, aussi les profits ou gains annuels dérivés de toute autre source, y compris etc.

En 1948, lors de la révision de la Loi concernant les impôts sur le revenu (11 et 12 Geo. VI, c. 52), la loi a été refondue, et l'art. 2 (1) était ainsi rédigé:

2. (1) Un impôt sur le revenu est payé, ainsi qu'il est prévu ci-après, sur le revenu imposable pour chaque année d'imposition, de toute personne résidant au Canada à une époque quelconque de l'année.

3. Le revenu d'un contribuable pour une année d'imposition, aux fins de la présente partie, est son revenu pour l'année de toutes provenances à l'intérieur ou à l'extérieur du Canada, et, sans restreindre la généralité de ce qui précède, comprend le revenu pour l'année provenant

(*a*) d'entreprises,
(*b*) de biens,
(*c*) de charges et d'emplois.

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4. Sous réserve des autres dispositions de la présente partie, le revenu provenant, pour une année d'imposition, d'une entreprise ou de biens, est le bénéfice en découlant pour l'année.

5. (1) Le revenu provenant, pour une année d'imposition, d'une charge ou d'un emploi, est le traitement, salaire, et autre rémunération, y compris les gratifications que le contribuable a touchées dans l'année.

Rien dans les amendements subséquents apportés à la loi, ne change le principe que ce n'est pas la propriété d'un bien qui est taxable, mais que la taxe est imposée sur un contribuable, et est déterminée par le revenu que l'emploi, les entreprises, les biens, ou la propriété procurent à celui qui en est le bénéficiaire légal. Comme l'a dit M. le Juge Mignault dans la cause de *McLeod v. Minister of Customs and Excise*[1]:

> All of this is in accord with the general policy of the Act which imposes the Income Tax on the person and not on the property.

On ne peut pas plus mettre en doute cette proposition, qu'on peut entretenir la moindre hésitation pour admettre, sans réserve, que seul doit payer l'impôt sur le revenu, celui qui en a la jouissance absolue, entachée d'aucune restriction concernant la libre disposition qu'il juge à propos d'en faire. (Vide *Robertson Ltd. v. M.N.R.*[2]).

Dans le cas présent, les époux, comme nous l'avons vu, sont mariés sous le régime de la communauté légale de biens. Ce régime est caractérisé par l'union étroite d'intérêts qu'il établit entre les époux. Il est fondé sur la nature même du mariage, et fait présumer entre les époux la convention de mettre en commun leur mobilier, leurs revenus, les fruits de leurs épargnes et de leur commune collaboration. La communauté est une sorte de société de biens répartis en trois masses. La première est formée de ce que l'on appelle les «biens communs», spécialement affectée aux intérêts du ménage, et c'est le principe fondamental sur lequel repose ce système matrimonial.

La seconde est formée des immeubles propres au mari dont il était propriétaire avant le mariage, ou dont il a hérité de ses ascendants pendant sa durée. C'est sur ces biens personnels au mari que porte le douaire coutumier de la femme et des enfants. (1434 C.C.). La troisième masse

[1] [1926] S.C.R. 457 at 464, 1 D.T.C. 85, (1917-27) C.T.C. 290.
[2] [1944] Ex. C.R. 170 at 180, 2 D.T.C. 655, [1944] C.T.C. 75.

de cette communauté comprend les «biens immobiliers» propres de la femme, dont elle est propriétaire, comme d'ailleurs le mari avant le mariage, ou qu'elle acquiert comme héritage lors de l'existence de la communauté.

Le revenue de ces trois masses sert à augmenter les «biens communs» qui sont la *copropriété* des époux, et qui doivent normalement se partager à la dissolution du mariage, par la mort ou le divorce, ou comme conséquence d'un jugement prononçant la séparation de biens. (Vide Mignault, vol. 6, p. 148 et suivantes).

Ce régime de communauté assure la prépondérance du mari dans l'administration des biens. Comme conséquence de la volonté du législateur (art. 1292), le mari seul administre les biens de la communauté. Il peut les vendre, aliéner et hypothéquer, sans le concours de sa femme. Il ne peut cependant, sans ce concours, disposer entre vifs à titre gratuit des immeubles de la communauté, ni de l'universalité ou d'une quotité du mobilier, si ce n'est pour l'établissement des enfants communs. Il peut néanmoins disposer des effets mobiliers à titre gratuit et particulier pourvu qu'il ne s'en réserve pas l'usufruit et que ce soit sans fraude.

Ce fut aussi la volonté du législateur (1298 C.C.) que le mari seul ait l'administration de tous les biens personnels de la femme, c'est-à-dire de ses «propres», et lui seul peut exercer toutes les actions mobilières et possessoires qui appartiennent à sa femme. Il lui est interdit cependant d'aliéner ses immeubles sans le consentement de son épouse.

On voit donc que, sans être comme l'ont dit jadis les anciens auteurs, «le maître et seigneur de la communauté», le mari en est le seul administrateur, avec des pouvoirs très étendus. Le mari administre les trois masses et en perçoit les revenus qui servent à augmenter l'actif commun. Lui seul peut disposer de ces revenus, lui seul en a la jouissance sans restrictions, et rien ne peut sortir du fonds commun à moins que ce ne soit comme résultat de l'expression de sa volonté. Il reçoit pour lui, et nullement comme mandataire ou fiduciaire pour le bénéfice de son épouse. Cette dernière ne retire aucun revenu, et son bénéfice consiste dans l'augmentation des biens communs dont elle est copropriétaire et dans lesquels elle a un droit éventuel au partage futur.

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Une seule exception, apportée par la Législature en 1931, permet à la femme mariée sous le régime de la communauté légale, d'administrer sans restrictions les biens qui sont le produit de son travail personnel. (C.C. 1425a et suivants). Mais cependant, au décès de l'un des époux, ces biens accumulés et non dépensés constituent un actif de la communauté. Ce n'est pas le cas qui nous occupe, mais je tiens à le souligner pour indiquer l'exception qu'a voulu faire le législateur à la règle générale, reconnue par le droit civil de la province de Québec.

Ce régime de la communauté contraste avec le régime de la séparation de biens, que les futurs conjoints ont la liberté de choisir, et où chacun des époux contribue aux charges du ménage, dans la proportion de leurs moyens respectifs. (C.C. 1423).

Que le mari et la femme soient *copropriétaires* des biens de la communauté, ne peut faire, il me semble, aucun doute dans l'esprit des juristes. Malgré les hésitations qu'ont pu entretenir certains auteurs, je crois qu'il est maintenant universellement admis que c'est bien là la règle qui doit nous régir.

Baudry-Lacantinerie, Traité théorique et pratique de droit civil, Du Contrat de Mariage, vol. 1, 3e éd., à la page 581, dit:

> 637. Le mari et la femme sont *copropriétaires* des biens de la communauté. La communauté ou société de biens entre époux n'est représentée que par un fonds commun, destiné à subvenir aux charges du ménage et à s'enrichir des économies momentanément confondues et finalement soumises au principe du partage égal. Ainsi se trouve bien consolidée, semble-t-il, l'idée d'une copropriété basée sur l'égalité, du moins théorique, des droits des deux conjoints.

Aubry-Rau, 6e éd., Cours de Droit Civil, tome 8, p. 10:

> Mais, dans les rapports des époux entre eux, la maxime précitée n'avait pas une portée aussi absolue; et la femme n'en était pas moins, en réalité, même pendant le mariage, copropriétaire des biens de la communauté.

Laurent, Principes de Droit Civil Français, (Paris 1887), vol. 22, n° 1, p. 7:

> C'est que la femme est réellement copropriétaire. Les anciens auteurs le disent en toutes lettres.

Dans *Pesant v. Robin*[1], citant Baudry-Lacantinerie, M. le Juge Anglin approuve le passage suivant:

> En somme, la véritable notion de la communauté nous paraît être qu'elle constitue une copropriété entre époux, soumise à des règles particulières.

Mignault partage les mêmes vues, et il s'exprime ainsi, Droit Civil, vol. 6, p. 337:

> La femme qui renonce perd toute espèce de droit sur les biens de la communauté. Perd: car elle avait pendant le mariage des droits sur les biens de la communauté. Elle était copropriétaire avec le mari, non pas sous la condition suspensive de son acceptation, mais sous la condition résolutoire de sa renonciation. Si elle accepte, le droit résoluble qu'elle avait devient irrévocable; si elle renonce, il est révolu *rétroactivement,* et le mari est réputé avoir toujours été seul propriétaire des biens qui composaient le communauté.

Mignault rejette comme inadmissible la théorie de Toullier qui a enseigné que pendant le mariage, le mari est seul propriétaire; que le femme n'a que l'expectative de devenir un jour commune. En un mot, la théorie de Toullier serait qu'il n'y a pas de communauté pendant le mariage, et c'est donc une erreur que commet Toullier quand il fait commencer la communauté alors que nous la faisons finir, c'est-à-dire au moment de la dissolution du mariage, de la séparation de corps ou de biens. Comme le signale encore Mignault, la loi dit positivement que la communauté commence avec le mariage (art. 1269), et qu'elle finit avec lui.

S'il en était autrement, et si la femme n'était pas copropriétaire des biens communs, elle aurait à payer, lors de la dissolution de la communauté, des droits de succession, car il s'agirait alors d'une transmission de biens lui venant de son mari. Mais, il n'en est pas ainsi, car il n'y a pas de *transmission* mais un partage, où elle prend la part qui lui revient et qui lui appartient depuis le mariage. Ce qu'elle reçoit ne provient pas du patrimoine de son époux. Vide également les autorités suivantes qui sont au même effet: —LAURENT, Principes de Droit Civil, vol. 21, pp. 224-225; PLANIOL et RIPERT, (Boulanger) Traité Pratique de Droit Civil, 1957, vol. 8, pp. 328, 331, 704; JOSSERAND, Cours de Droit Civil, 1933, vol. 3, n° 14; HUC, Code Civil, 1896, vol. 9, n° 72; MARCADE, Droit Civil, 7e éd., vol. 5, p. 444; DURANTON, Cours de Droit Français, vol. 14, p. 105.

[1] (1918), 58 S.C.R. 96 at 105, 46 D.L.R. 369.

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Je n'entretiens aucun doute sur la vérité de cette proposition, mais pour la détermination de la présente cause, d'autres facteurs doivent être considérés. Ainsi, s'il est vrai, comme je le crois, que la femme est copropriétaire des biens communs, il est également vrai qu'elle n'a pas l'exercice de la plénitude des droits que confère normalement la propriété. (C.C. 406). Son droit est informe, démembré, inférieur même à celui de quelqu'un qui a la nue propriété d'un bien et dont un autre a l'usufruit. Il est stagnant, presque stérile, parce qu'improductif durant la vie du conjoint. Ce n'est qu'à la dissolution de la communauté que la femme sera investie de la plénitude de son droit de propriété, qui comporte le *jus utendi, fruendi et abutendi,* dont sa condition maritale l'avait temporairement dépouillée.

C'est ainsi qu'elle ne retire aucun revenu des biens de la communauté, dont le mari est le seul administrateur (C.C. 1292), sans qu'il ait besoin, d'une façon générale, d'obtenir le concours de son épouse. Tous les revenus sont les siens dont il peut disposer, qu'il peut aliéner, même à titre gratuit, sauf les restrictions imposées par la loi. (C.C. 1292). Il résulte que la femme ne touche aucun revenu des biens communs, qu'elle n'a «aucun traitement, salaire ou rémunération», que rien ne lui «provient d'entreprises, de biens, de charges ou d'emplois». Or, c'est précisément ce qui est taxable.

Le loi, comme je l'ai signalé antérieurement, ne recherche pas le capital ou la propriété d'un bien. Elle s'adresse à la personne, et le montant de l'impôt est déterminé par les bénéfices qu'elle recueille. Comme la femme n'en retire aucun, dérivant des biens communs, il s'ensuit que le fisc ne peut rien lui réclamer.

Ces principes que je viens d'exposer et qui doivent, à mon sens, déterminer le sort de la présente cause, doivent évidemment régir les biens communs lorsqu'il s'agit de communauté légale. Dans le cas qui nous est soumis, il n'y a qu'une seule masse de biens, car il est admis que les conjoints n'avaient pas de «biens propres». De plus, quand il s'agit de communauté conventionnelle, il est certain que la situation peut être différente, car les conjoints peuvent toujours par contrat, tout en stipulant la communauté qui

doit déterminer le régime marital financier, faire toutes sortes d'autres conventions qui, évidemment, ne doivent pas être contraires aux bonnes mœurs ni à l'ordre public. (C.C. 1257, 1262, 1268). Pour les fins de la présente cause, il serait superflu de les discuter.

Je dois dire que je suis d'accord avec M. Fisher de la Commission d'Appel de l'Impôt sur le Revenu, quand il dit qu'il y a copropriété des biens communs, mais je ne puis accepter sa conclusion que l'impôt doit être divisé. Admettre cette opinion, ce serait dire que la femme a un «gain annuel», personnel au sens de la loi de l'impôt, ce qui n'existe certainement pas; ce serait dire également qu'elle a un «revenu imposable» pour chaque année et que, évidemment, elle ne pourrait pas payer. Seul le mari peut payer à même les biens de la communauté, et il est interdit à la femme de le faire. La communauté n'est pas taxée, et d'ailleurs elle ne peut l'être, car elle n'est pas une *personne juridique*. *Pesant v. Robin*[1].

D'autre part, je refuse d'admettre la théorie de M. le Juge Fournier de la Cour d'Echiquier, qui ne voit dans la communauté que les biens personnels du mari. Dans son jugement très élaboré il s'exprime de la façon suivante:

> Pour toutes ces raisons, je suis d'opinion que pendant la durée de la communauté, le mari est seul propriétaire des biens qui composent l'actif de la communauté et seul responsable des charges qui en constituent le passif.

Il conclut qu'étant seul propriétaire des biens communs, le mari doit seul payer l'impôt. J'arrive à la même conclusion que M. le Juge Fournier, que seul le revenu du mari est imposable, mais pour des raisons différentes que j'ai expliquées précédemment.

On a cité au cours de l'audition une nombreuse jurisprudence américaine, d'où il semble ressortir qu'aux États-Unis, dans les huit États où est établie la communauté légale, la copropriété des biens existe entre les conjoints et que deux rapports d'impôt doivent être faits. Je dois

[1] (1918), 58 S.C.R. 96, 46 D.L.R. 369.

signaler, cependant, que j'ai trouvé des différences dans les lois qui régissent ces États et que de plus, une influence, qui n'est pas d'origine française, a substantiellement changé certains principes fondamentaux.

Au début du volume de Saunders (Lectures on the Civil Code of Louisiana), Juge de l'État de la Louisiane, un éminent avocat, H. P. Dart, a écrit un remarquable article sur les sources du Droit Civil de la Louisiane. Il est obligé lui aussi de reconnaître que Saunders admet l'infiltration de la Common Law dans le Droit Civil Français de la Louisiane. Voici ce qu'il dit:

> It is his belief (Saunders) that judicial construction has had a tendency to import Common Law into our jurisprudence, perhaps unintentionally or because so much of our system is not dependent upon the Civil Law of France and Rome. He lays the blame upon court and legislature, and he warns us that we will soon lose touch altogether with the law of our origin, unless a higher standard of legal education is required by the Legislature or by the Supreme Court.

Quelle que soit la valeur des autorités étrangères qui nous ont été citées, je crois qu'elles ne peuvent pas lier cette Cour. Elles reflètent une économie du droit civil qui ne correspond nullement à la nôtre.

Pour les raisons ci-dessus, je suis d'opinion que l'appel droit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the appellant: Meyerovitch & Levy, Montreal.

Attorney for the respondent: A. A. McGrory, Ottawa.

1961 *Nov. 22, 23 Dec. 15

ANDRE VANDEKERCKHOVE and YVONNE VANDEKERCKHOVE, on behalf of themselves and all other Roman Catholic Ratepayers desiring to be assessed as Separate School Supporters residing within three miles in a direct line of the site of the schoolhouse known as Roman Catholic School Section Union 6, Middleton, and THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC UNION SEPARATE SCHOOL FOR THE UNITED SECTIONS NUMBERS 6 IN THE TOWNSHIP OF MIDDLETON AND 22 IN THE TOWNSHIP OF NORTH WALSINGHAM (*Plaintiffs*) ....APPELLANTS;

AND

THE CORPORATION OF THE TOWNSHIP OF MIDDLETON (*Defendant*) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Schools—One of two schoolhouses operated by union separate school board closed in interests of efficiency—Pupils transported to remaining schoolhouse—Whether pupils' parents residing beyond three mile radius of remaining schoolhouse entitled to be assessed as Roman Catholic separate school supporters—The Separate Schools Act, R.S.O. 1950, c. 356, ss. 33(1), 57.

The plaintiff board of trustees of the union separate school, formed in 1944, for the United Sections numbers 6 in the Township of Middleton and 22 in the Township of North Walsingham operated a school in each section until 1959, but in that year, for reasons of more efficient operation, closed the school in Middleton and provided transportation for the pupils who had been attending that school to the school in North Walsingham. The individual plaintiffs were all Roman Catholics who resided within three miles of the school in Middleton but at a greater distance than three miles from the school in North Walsingham. They were all assessed by the defendant township as Roman Catholic separate school supporters until 1959, when they were assessed as public school supporters on the basis of s. 57 of *The Separate Schools Act*, R.S.O. 1950, c. 356, which provides that "subject to the other provisions of this Part, no person shall be deemed a supporter of a separate school unless he resides within three miles in a direct line of the site of the schoolhouse". An appeal to the township Court of Revision against this assessment was dismissed. The plaintiffs appealed to this Court, pursuant to leave granted by the Court of Appeal for Ontario, from a judgment of that Court whereby an appeal from a judgment of the trial judge was allowed and it was declared that the plaintiffs were not entitled to be assessed as Roman Catholic separate school supporters.

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Judson and Ritchie JJ.

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Held: The appeal should be allowed.

Following the union which took place in 1944, the schools in Middleton and in North Walsingham became in the eyes of the law one school, not merely for purposes of administration, but in the words of subs. (1) of s. 33 of the Act "for *all* Roman Catholic separate school purposes". Once that happened, the board was free to decide in the interests of efficiency to transport the pupils who were in attendance at one of the schoolhouses forming part of the one school resulting from the union to the other schoolhouse. It would be a startling result if on doing this they must suffer the loss of revenue from the assessment of the parents of the children so transported. Such a construction would fail to give effect to the word "all" in s. 33(1) of the Act. This result should be avoided by limiting the effect of s. 57 to disabling from being a separate school supporter a person whose residence is not within three miles of the site of either of the two schoolhouses which on the union became parts of one school, regardless of whether both or one only of the schoolhouses continued to be used.

When the language used by the legislature admits of two constructions one of which would lead to obvious injustice or absurdity the courts act on the view that such a result could not have been intended.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Landreville J. Appeal allowed.

Hon. Arthur M. Lebel, Q.C., and *F. G. Carter*, for the plaintiffs, appellants.

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

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal brought by the individual appellants, pursuant to leave granted by the Court of Appeal for Ontario, from a judgment of that Court[1] whereby an appeal from a judgment of Landreville J. was allowed and it was declared that the appellants are not entitled to be assessed as Roman Catholic separate school supporters.

The plaintiff board is the Board of Trustees of the Roman Catholic Union Separate School for the United Sections number 6 in the Township of Middleton and number 22 in the Township of North Walsingham. The union was formed in 1944. Until 1959 the board operated a school in each section but in that year closed the school in Middleton and

[1] [1961] O.R. 449, 28 D.L.R. (2d) 162.

provided transportation for the pupils who had been attending that school to the school in North Walsingham. The only question of fact in dispute is whether the school in Middleton was closed permanently or temporarily.

The individual plaintiffs and the other ratepayers on whose behalf the action is brought are all Roman Catholics who reside within three miles of the schoolhouse in Middleton but at a greater distance than three miles from the schoolhouse in North Walsingham. They were all assessed by the defendant township as Roman Catholic separate school supporters until 1959 when they were assessed as public school supporters. They appealed to the Court of Revision against this assessment. The appeal of Andre Vandekerckhove, one of the present appellants, was dismissed and decisions upon the appeals of the other ratepayers were reserved to await the final outcome of the present action.

The reason for closing the schoolhouse in Middleton and transporting the pupils who had been attending there to the school in North Walsingham was explained by Mr. Causyn, the chairman of the board. At the Middleton school there were about 23 pupils in attendance; there was only one class-room and one teacher who had the task of teaching eight grades. At the North Walsingham school there were four class-rooms with two grades to a room. Mr. Causyn testified that it was the view of the board that better education could be given with one teacher for every two grades than with one teacher for eight grades. In contemplation of the new arrangement the schoolhouse in North Walsingham was somewhat enlarged.

The question to be decided depends primarily on the true construction of ss. 33 and 57 of *The Separate Schools Act*, R.S.O. 1950, c. 356. These read as follows:

> 33.(1) The majority of the supporters of each of the separate schools situate in two or more public school sections, whether in the same or in adjoining municipalities, at a public meeting duly called by the board of each separate school may form a union separate school of which union the trustees shall give notice within 15 days to the clerk or clerks of the municipality or municipalities and to the Minister, and every union separate school thus formed shall be deemed one school for all Roman Catholic separate school purposes, and shall every year thereafter be represented by three trustees to be elected by the supporters of the union separate school as provided by section 26.

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(2) The trustees shall be a body corporate under the name of 'The Board of Trustees of the Roman Catholic Union Separate School for the United Sections numbers.......in the......'.

57. Subject to the other provisions of this Part, no person shall be deemed a supporter of a separate school unless he resides within three miles in a direct line of the site of the schoolhouse.

It is not questioned that the appellants have all the qualifications and have taken all the steps necessary to entitle them to be assessed as Roman Catholic separate school supporters, unless they are prevented from being so dealt with by the terms of s. 57. The prohibition in that section is expressly made subject to the other provisions of the Part in which it is found. If therefore, as counsel for the appellants contends, the terms of s. 33 are effective to give the appellants the right to be assessed as separate school supporters that right will not be destroyed by the terms of s. 57.

Following the union which took place in 1944, the schools in Middleton and in North Walsingham became in the eyes of the law one school, not merely, as was suggested in argument, for purposes of administration, but in the words of subs. (1) of s. 33, "for *all* Roman Catholic separte school purposes". Once that happened, if the board in the interests of efficiency decided to transport the pupils who were in attendance at one of the schoolhouses forming part of the one school resulting from the union to the other schoolhouse they were in our opinion free to do so. It would be a startling result if on doing this they must suffer the loss of the revenue from the assessment of the parents of the children so transported. Such a construction would fail to give effect to the word "all" which is italicized above. This result can, and, in our opinion, should be avoided by limiting the effect of s. 57 to disabling from being a separate school supporter a person whose residence is not within three miles of the site of either of the two schoolhouses which on the union became component parts of one school, regardless of whether both or one only of the schoolhouses continues to be used.

There is ample authority for the proposition that when the language used by the legislature admits of two constructions one of which would lead to obvious injustice or

absurdity the courts act on the view that such a result could not have been intended. A number of cases on this point are collected in Maxwell on Interpretation of Statutes, 10th ed., at page 201.

That the construction adopted by the Court of Appeal results in grave hardship was fully recognized by that Court and by counsel for the respondent, who argued however that the words used by the legislature did not permit of any other construction.

We have reached the conclusion that the words of subs. (1) of s. 33 should be construed as we have indicated above and that the wording of s. 57 is not effective to prevent this construction.

In view of our conclusion as to the true construction of the sections mentioned it becomes unnecessary to decide the question of fact, on which the Court of Appeal differed from the learned trial judge, as to whether the schoolhouse in Middleton was closed temporarily or permanently.

The appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment at trial restored including the order therein as to costs. The appellants are entitled to their costs in this Court and in the Court of Appeal.

Appeal allowed, judgment at trial restored, with costs.

Solicitors for the plaintiffs, appellants: Nelligan & Carter, London.

Solicitors for the defendant, respondent: Mackay & Innes, Simcoe.

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FOREST INDUSTRIAL RELATIONS LIMITED and INTERNATIONAL WOODWORKERS OF AMERICA and the LABOUR RELATIONS BOARD OF THE PROVINCE OF BRITISH COLUMBIA (*Defendants*) APPELLANTS;

AND

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 882 (*Prosecutor*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Administrative law—Oral hearing by Labour Relations Board on union's application for certification—Further representations by union in writing and replies thereto—No opportunity for union to answer replies—Propriety of Board's procedure—Labour Relations Act, 1954 (B.C.), c. 17, s. 62(8).

The respondent union sought from the Labour Relations Board of British Columbia and was refused certification as representative of the engineers and firemen in ten plants of the lumber industry. Its application was opposed by the appellant company as representative of the industry, and by the appellant union, International Woodworkers of America, the certified bargaining agent for the whole industry. Following an oral hearing at which all parties had full opportunity to call evidence, to cross-examine witnesses and submit argument, the Board visited two representative plants. Shortly before the view was held, the respondent suggested that the hearing be reopened for the purpose of making further representations. The Board decided against this but advised the interested parties that it would consider further representations in writing. The respondent made its submissions by letter. The Board sent copies of this letter to the appellant company and the appellant union, and informed the respondent by telephone that it had done so. The company and the I.W.A. replied in writing, but these letters were not sent to the respondent union, which consequently did not have an opportunity of answering the replies. Following the Board's rejection of the application for certification, the respondent brought an application for *certiorari* to quash the decision. This application was dismissed by the trial judge but granted on appeal to the Court of Appeal. The appellants appealed to this Court.

Held: The appeal should be allowed.

Both parties had been given a full opportunity to be heard. After a full oral hearing and a view of two representative plants, the Board merely gave the interested parties an opportunity to make any further submissions they chose. After hearing from one side and hearing from the other side in reply, it was not a departure from the rules of natural

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

justice for the Board to hold that the debate had gone on long enough and that it was time to stop. Furthermore, the Board had fully complied with s. 62(8) of the *Labour Relations Act,* which provides that "The Board shall determine its own procedure but shall in every case give an opportunity to all interested parties to present evidence and make representations."

The Board had every right to afford the company and the I.W.A. a reasonable time to reply to the further submissions of the respondent even if, as in the event, it meant an extension of the time set by the Board.

The record disclosed no basis for the finding below that the company and the I.W.A. had added substantially to the representations made by them at the oral hearing in their replies to the further submissions of the respondent.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Verchere J. dismissing an application to quash a decision of the Labour Relations Board. Appeal allowed.

D. A. S. Lanskail, for defendant, appellant, Forest Industrial Relations Ltd.

A. B. Macdonald, for defendant, appellant, International Woodworkers of America.

A. W. Mercer, for defendant, appellant, Labour Relations Board of B.C.

T. R. Berger, for prosecutor, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This appeal is from the judgment of the British Columbia Court of Appeal[1] which quashed a decision of the Labour Relations Board. The respondent, International Union of Operating Engineers Local 882, had sought from the Board and had been refused certification as representative of the engineers and firemen in ten plants of the lumber industry. Its application was opposed by the appellant, Forest Industrial Relations Limited, as representative of the industry, and by the appellant union, International Woodworkers of America, which wished to retain its position as bargaining agent for the whole industry. Following the Board's rejection of the application, the respondent brought an application for *certiorari* to quash the decision. This application was dismissed by Verchere J. but granted on appeal to the Court of Appeal.

[1] (1961), 34 W.W.R. 659, 28 D.L.R. (2d) 249.

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The respondent's application, which was dated April 26, 1960, was made on behalf of what constituted but a small group of a large body of employees in each of the plants. The appellant union, the I.W.A., is the certified bargaining agent for the whole industry. On receipt of the application, the Board sent the usual notices to all interested parties, namely, to Forest Industrial Relations Limited, as representing the employers, to the appellant union, the I.W.A., and to the employees affected by the applications.

The Board, pursuant to the provisions of s. 12(2) of the *Labour Relations Act,* first made its own inquiries by an examination of the records, and on May 25, 1960, sent a notice of hearing to all interested parties for June 8, 1960. An oral hearing was held on that date in the presence of the appellant union, the appellant employer and the respondent union, at which time all parties had a full opportunity to be heard, to call evidence, to cross-examine witnesses and make their submissions. During the hearing the appellant employer invited the Board to visit representative plants. The Board agreed to do so and notified all parties that it would visit two plants on June 20, 1960.

Shortly before the view was held, the respondent union suggested that the hearing be reopened for the purpose of making further representations. The Board decided against this but advised the interested parties that it would consider further submissions in writing to be made not later than July 12, 1960. Forest Industrial Relations Limited replied that it had completed its submissions but requested an opportunity to reply if representations were made by others. The I.W.A. replied that its case was complete but that it wished to be informed if the hearings were to be reopened. The respondent union made its submissions by letter dated July 7, 1960. The Board sent copies of this letter to Forest Industrial Relations Limited and the I.W.A. by letter dated July 12, 1960, and informed the respondent union by telephone that it had done so. Forest Industrial Relations Limited replied in writing to the submissions of the respondent union by letter dated July 20, 1960, and the I.W.A. by letter dated July 22, 1960. These replies were not sent to the respondent union.

On July 28, 1960, the Board notified the respondent union that its application was rejected on the ground that its units of employees were not appropriate for collective bargaining. On September 26, 1960, the respondent union moved for an *order nisi* to show cause why a *writ of certiorari* should not issue to quash the decision of the Board. It was this application which was rejected by Verchere J. and granted by the Court of Appeal.

I have set out this outline of the course taken by these proceedings because, in my respectful opinion, on these facts the issues of jurisdiction and departure from the rules of natural justice, upon which the judgment of the Court of Appeal was founded, do not arise. The respondent's real complaint is that it should have been afforded an opportunity of replying to the submissions made by Forest Industrial Relations Limited and the I.W.A. in their letters of July 20 and July 22, 1960. Both parties in this case on these facts had been given a full opportunity to be heard. After a full oral hearing and a view of two representative plants, the Board merely gave the interested parties an opportunity to make any further submissions they chose. After hearing from one side and hearing from the other side in reply, it is not a departure from the rules of natural justice for the Board to hold that the debate had gone on long enough and that it was time to stop. Further, the Board fully complied with its own Act (s. 62(8)), which states that "The Board shall determine its own procedure but shall in every case give an opportunity to all interested parties to present evidence and make representations."

It is also urged against the decision that the Board received the representations of the two appellants after the deadline that it had set for July 12, 1960. I cannot see that the mere departure from the date can have any bearing upon the decision in this case. The respondent did not send its written submissions until July 7 and these were not sent on to the two appellants until July 12. The Board had every right to afford these two interested parties a reasonable time to reply to the further submissions of the respondent even if it meant an extension of time.

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It was also said in the reasons of the Court of Appeal that Forest Industrial Relations Limited and the I.W.A. in their letters of July 20 and July 22 had added substantially to the representations made by them at the hearing of June 8. An examination of the record discloses no basis for such a finding. There is nothing in the record about the representations made and the evidence given on June 8. No stenographic record was made of this hearing and the material does not attempt to state what went on beyond the fact that there was an oral hearing with all interested parties present and with a full opportunity to adduce evidence, examine and cross-examine and submit argument. The two last mentioned letters of the appellants did no more than reply point by point to the representations made by the respondent in its letter of July 7. Counsel for the respondent was invited to compare his client's letter with the replies received to it and to point to any new material in the replies. He stated that there was no new material but that nevertheless his client had a right of reply and had been deprived of it. I do not think that his client had any such right as he asserted.

I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Verchere J. The respondent, International Union of Operating Engineers Local 882, should pay to the appellants, Forest Industrial Relations Limited and International Woodworkers of America, their costs throughout. There should be no order for costs for the Labour Relations Board.

Appeal allowed with costs to the appellants, Forest Industrial Relations Limited and International Woodworkers of America.

Solicitor for Forest Industrial Relations Limited: D. A. S. Lanskail, Vancouver.

Solicitor for International Woodworkers of America: Alex B. Macdonald, Vancouver.

Solicitors for Labour Relations Board of the Province of British Columbia: Paine, Edmonds, Mercer & Williams, Vancouver.

Solicitors for the respondent: Shulman, Tupper, Gray, Worrall & Berger, Vancouver.

WORKMEN'S COMPENSATION BOARD .... APPELLANT;

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AND

VERA FAY RAMMELL .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Administrative law—Workmen's compensation—Claim rejected—Whether Board failed to disclose evidence upon which decision based—Whether breach of fundamental requirement of procedure depriving decision of its authority as one made within jurisdiction.

The respondent's husband, an employee on a logging operation at Homfray Creek, British Columbia, was drowned while crossing by boat from the job site to Campbell River. The Workmen's Compensation Board decided that he did not die as a result of an accident arising out of and in the course of his employment and rejected the widow's claim to compensation. The respondent continued to ask for further consideration of the case, and following an oral hearing the Board reaffirmed its previous decision. The respondent had submitted that the deceased's reason for the trip was to pick up certain equipment for his employer; that he also intended to visit his family was said to be incidental. An appeal to the Court of Appeal from dismissal of a motion for *certiorari* to quash the decision of the Board was allowed. The Board then appealed to this Court; the issue being whether there was a breach of a fundamental requirement of procedure which deprived the decision of the Board of its authority as one made within the jurisdiction. The fundamental breach was said to be the Board's failure to disclose to the applicant evidential facts upon which it based its decision.

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

On the facts of the case there was no refusal of disclosure and no non-disclosure amounting to refusal. This made it unnecessary to determine the duty of the Board, if any, to disclose information on its files. On the hearing the issues to be determined were plain to the applicant. There was no indication that counsel intended to question the statement which he knew the Board had that the employee was making the trip to see his family. With knowledge of this statement but not of its source, his argument was directed not to showing that it had never been made or that it was otherwise unreliable but that it was outweighed by the other evidence indicating that the workman was in the course of his employment. No issue going to jurisdiction was raised in this case.

Per Cartwright J., *dissenting*: The respondent had made a strong *prima facie* case in her attempt to establish that the deceased's death was caused by an accident arising out of and in the course of his employment. It could not lightly be assumed that the Board made a ruling contrary to the evidence and the law, and the most reasonable explanation of

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

its decision appeared to be that it had in its possession some evidence other than that disclosed in the record which in its view outweighed the strong *prima facie* case made out by the respondent. In the circumstances, it was the duty of the Board to make full disclosure to the respondent of every item of evidence on which it proposed to base its decision including the contents of all statements made to its inspector and the names of the persons from whom those statements had been obtained, and, having done so, to give the respondent a fair opportunity to correct or contradict that evidence. The material indicated that it failed to perform this duty.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Whittaker J. dismissing an application for *certiorari*. Appeal allowed, Cartwright J. dissenting.

C. C. Locke, Q.C., for the appellant.

Miss M. F. Southin, for the respondent.

The judgment of the Chief Justice and of Taschereau, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—Eric Rammell, the husband of the respondent, was drowned on October 9, 1954, while crossing by boat from Homfray Creek to Campbell River in British Columbia. At the time of his death he was employed by Power Saw Sales & Service Limited as superintendent of a logging operation at Homfray Creek. The Workmen's Compensation Board decided that he did not die as a result of an accident arising out of and in the course of his employment and rejected the respondent's claim to compensation. A motion to quash the decision of the Board was dismissed by Whittaker J. but the Court of Appeal[1] did quash the decision and directed the issue of a writ of *mandamus* requiring the Board to hear and determine according to law the respondent's claim to compensation. The Board now appeals. The issue is whether there was a breach of a fundamental requirement of procedure which deprived the decision of the Board of its authority as one made within the jurisdiction. The fundamental breach is said to be the Board's failure to disclose to the applicant for compensation evidential facts upon which it based its decision.

An issue of this kind makes necessary a review of the Board's procedure in this case. The employer reported the death by letter dated October 29, 1954, and stated that the

[1] (1961), 35 W.W.R. 145, 28 D.L.R. (2d) 138.

employee had been drowned in the course of his employment. The Board asked the employer to complete its regular form for the report of an accident. It obtained a death certificate and a copy of the report of the Coroner's inquest. On November 23, 1954, it sent a form of application for compensation to the widow, which was returned completed on November 29, 1954. In November it also received from its own inspector a report covering his investigation of the death made at Homfray Creek on October 23, 1954.

On December 1, 1954, the Board wrote to the employer to question its statement that the employee had been drowned during and in the course of his employment. The Board stated that other information on its file indicated that the deceased left the camp to see his family at Campbell River and was warned not to go and that in spite of this, the employee stated that he was going as he wanted to see his family. On December 8, the Board received a reply to this letter. The reply is not in the material filed on the motion but it appears from the printed case that it was this letter from the employer which was read to the Board by counsel for the applicant on the oral hearing in 1958.

On December 21, 1954, the Board asked the employer to call at its office to discuss the case. On January 10, 1955, Robert A. Challenger, the secretary of the employer, called on the Board and gave it information about the duties of the deceased and also about a piece of paper which had been found on the body. A few days later, on January 13, Challenger telephoned the Board to add to the information given at the interview on January 10. The Board gave its decision on March 7, 1955, rejecting the claim.

On March 10, 1955, the Board, in answer to a letter from the father of the deceased workman, stated that the evidence did not establish that the purpose of Mr. Rammell's trip was for the employer's business. The letter informs the father that the reason given by his son for making the trip was to see his family. The letter also refers to the piece of paper that was found on the body. The suggestion was evidently being made that this was an order form. The Board stated that the evidence from the employer indicated

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that Mr. Rammell had some packing slips in his pocket at the time of his death but they referred to previous trips which had been made.

On March 23, 1955, the Board wrote to Messrs. Anderson and Anderson, solicitors of Vancouver, who had written on behalf of the widow. The solicitors evidently had the Board's letter to Mr. Rammell Sr. and had questioned its accuracy. The Board informed the solicitors that Mr. Robert A. Challenger, secretary of the employer, had given it part of the information contained in its letter when he came in to see the Board on January 10. The letter also referred to the list of parts for equipment found on the body and stated that no such list had been received by the Board.

Mr. Rammell Sr. then made inquiries from the Royal Canadian Mounted Police at Campbell River concerning the slip of paper. The officer in charge reported on April 19, 1955, that two constables had seen the slip of paper on which the writing was badly faded and blurred because of water, that it had been difficult to establish whether it was a receipt or an order form but that the opinion of the constables was that it was an order form. He also reported that the paper had been lost and that it was assumed at the time that it had no importance except as a means of identification. On May 26, 1955, the two constables swore affidavits to the same effect. On June 3, 1955, P. E. Hornby, branch manager of the employer at Campbell River, also swore an affidavit that he had examined what appeared to be an order form which Constable McPherson had handed to him on October 9, 1954, and that this order form itemized parts for a power saw and nothing else.

Mr. Rammell Sr. had sent to the Board the letter of April 19, 1955, from the officer in charge at Campbell River. This letter contained a summary of the information which was shortly afterwards sworn to by the two officers and Hornby. The Board, however, in its reply dated April 26, 1955, stated that as the letter from the father and the enclosure with it contained no new information, its decision would not be changed.

In November 1955, Mr. A. E. Branca, Q.C., of Vancouver, asked for further discussion of the claim. The secretary wrote agreeing to this but Mr. Branca did not pursue

the matter. He had, however, on July 11, 1955, obtained a letter from both P. E. Hornby and A. J. Hornby containing information to the same effect as that contained in the affidavit of A. J. Hornby sworn on June 3, 1955, and referred to above.

On April 9, 1956, Mrs. Rammell asked for further consideration of the case. On May 16, 1956, she sent in three affidavits which I take to be those of the two constables and A. J. Hornby. On May 31, 1956, the Board asked whether she had any additional evidence. She notified the Board on September 26, 1956, that she had nothing further to submit and on October 12, 1956, the Board confirmed its previous decision and notified her of its confirmation.

In April 1957 the Board received an inquiry from the Department of Veterans Affairs and explained to the department why the claim had been disallowed. Its letter is not in the material filed.

On February 19, 1958, Graham B. Ladner, the present solicitor for the applicant, telephoned the Board to say that he was acting for the widow, and on the following day the Board received a letter from him asking for the recognition of the claim. He referred to the lost slip of paper found on the body and made the submission that if the slip was an order, it would be conclusive evidence. He also enclosed a copy of the letter from A. J. Hornby and P. E. Hornby addressed to Mr. Branca, dated July 11, 1955.

In his reply to Mr. Ladner dated February 25, 1958, the secretary of the Board said that he did not know whether the slip would have any effect on the Board's decision. Mr. Ladner had been inquiring whether he should make an effort to locate the slip. The police had stated three years before that it had been lost. The secretary told Mr. Ladner by letter, as he had told him by telephone, that the workman himself made the statement that although it was a rough day he could make it as he wanted to see his family. Mr. Ladner then asked for an oral hearing and this was held on March 25, 1958. Mr. Ladner appeared on that date but no one appeared to represent the employer although notified of the hearing.

At the hearing, counsel for the applicant did not call any witnesses. He did, however, file the two Hornby letters, the first to Branca, dated July 11, 1955, and referred to

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above, and the second to himself, dated February 23, 1958. These letters are, of course, some evidence from which an inference could be drawn that in going to Campbell River, Rammell was in the course of his employment. Counsel made this submission that the reason for the trip was to pick up this equipment from the Hornbys and that a visit to the family was incidental. The order form was also referred to. Then counsel read a letter, dated December 7, 1954, from D. M. Challenger to the Board. D. M. Challenger was the manager of the employer. It was this letter which the Board received on December 8 and which asserted that the accident happened in the course of the employment. It was this letter that caused the Board to ask Challenger why he made this assertion and this reply, together with the subsequent invitation, led to the visit of Mr. R. M. Challenger to the Board on January 10, 1955, and Challenger's subsequent telephone conversation. In discussing Challenger, the chairman of the Board said:

> Mr. Eades: Not much new. Mr. Challenger was in here and gave a statement and said it was Rammell's own boat.
>
> Mr. Ladner: I believe that was correct. I have interviewed Challenger—there are two of them and I have spoken to them both and no question in their minds that he was going over there primarily in the course of his duties.

It is quite evident from this that counsel knew that Challenger had given information about the boat and that counsel, after his interview with them, knew that they were still asserting that the employee was in the course of his employment.

We have therefore in this case both the manager and secretary of the employer, the Hornbys, who ran the repair shop, and the Royal Canadian Mounted Police, through their finding of what they referred to as order slips, all giving evidence tending to show that the employee was in the course of his employment. The Board, however, was emphasizing the employee's own statement that he was going to see his family in spite of the rough weather and the fact that he was using his own boat on a Saturday morning. The issues were fully apparent and disclosed at the hearing. Counsel knew that the question was the employee's own statement about his intentions and the fact that he was using his own boat. What other issues

could there be apart from the assertions that I have mentioned tending to show that the man was in the course of his employment?

If counsel had thought that Challenger could give material evidence, he could have called him as a witness or presented evidence from him in some other form. He had interviewed both the Challengers. He knew what they would say, and he read a letter from one of them to the Board which was presumably favourable to his position. At no time either before or during the oral hearing did he state that he was working in the dark, that he wanted further information that the Board might have and which he lacked, or that anything was being held back from him. Specifically, he did not say that he questioned the report made by someone that the employee had said that he was making the trip to see his family. If he had had any doubt on this point, he had every opportunity to raise it and to demand any information which he lacked and which he thought he needed and should have.

The judgment of the Court of Appeal has no common ratio. The learned Chief Justice held that there had been no finding or determination that the death did not arise out of and in the course of the employment and that consequently the right to compensation still remained to be determined. Counsel for the respondent declined to argue this ground in support of the judgment. O'Halloran J.A. held that the inquiry and decision of the Board had not met the requirement of substantial justice because of failure to give the applicant for compensation a fair opportunity to know what was alleged against her and to contradict any relevant statement which might be prejudicial to her claim and that this principle was not affected by the prohibition in the Act against the divulging of information.

Davey J.A. (dissenting) held on the facts of the case there was no refusal of disclosure and no non-disclosure amounting to refusal. This, in my respectful opinion, is the correct and obvious finding to be made on the facts of the case and made it unnecessary for him to determine the duty of the Board, if any, to disclose information on its files. On the hearing held in this case, the issues were plain to the applicant. There was no indication that counsel

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Judson J.

intended to question the statement which he knew the Board had that the employee was making the trip to see his family. With knowledge of this statement but not of its source, his argument was directed not to showing that it had never been made or that it was otherwise unreliable but that it was outweighed by the other evidence indicating that the workman was in the course of his employment. I agree with Davey J.A. and also with Whittaker J. that no issue going to jurisdiction is raised here. Consequently, the Court of Appeal should not have quashed the decision of the Board and issued the mandatory order.

I would allow the appeal and set aside the judgment of the Court of Appeal and restore the judgment of Whittaker J. dismissing the application. The Board does not ask for costs and there will consequently be no order for costs in any court.

CARTWRIGHT J. (*dissenting*):—The relevant facts are stated in the reasons of my brother Judson and in those of O'Halloran J.A. in the Court of Appeal.

I do not understand that there is any disagreement in this Court or in the courts below as to the principle of law under which this case falls to be decided.

The appellant Board was under a duty to hear and determine the respondent's application for compensation. It was not bound to conduct its hearings in accordance with the procedure followed in the trial of an action but it was under a duty to give a fair opportunity to the respondent to correct or contradict any relevant statement prejudicial to her claim. If it failed in this duty its order would be the subject of *certiorari* and the Board itself would be the subject of *mandamus*. If authority is required for this fundamental proposition it is to be found in the words of Lord Loreburn L.C. in *Board of Education v. Rice*[1], which were adopted by Viscount Haldane L.C. in *Local Government Board v. Arlidge*[2].

It appears that the Board had received a report from one of its inspectors and founded its decision, in part at least, upon a statement or statements said to have been

[1] [1911] A.C. 179 at 182, 80 L.J.K.B. 796.
[2] [1915] A.C. 120 at 133, 84 L.J.K.B. 72.

made to him. I do not think it can be determined with any certainty from the material before us who made these statements or what they contained.

The material indicates that the respondent had made a strong *prima facie* case to show that when her late husband met his death he was crossing by boat from Homfray Creek to Campbell River to obtain parts, listed in an order slip which he had with him, which were required in his employer's business. As is pointed out in the reasons of my brother Judson, the evidence of the manager and secretary of the deceased's employer, of the Hornbys who ran the repair shop at Campbell River, and of the officers of the Royal Canadian Mounted Police who investigated the fatality all tended to support this view. If these were the facts, it would follow that the death of the deceased was caused by an accident arising out of and in the course of his employment, and the circumstances that he was using his own boat and that he wanted to see his family at Campbell River would not alter this result.

We cannot lightly assume that the Board has made a ruling contrary to the evidence and the law and the most reasonable explanation of its decision would appear to be that it had in its possession some evidence other than that disclosed in the record which in its view outweighed the strong *prima facie* case made out by the respondent. The material, as pointed out above, does establish that the Board had before it some evidence which was not fully disclosed.

No doubt, as my brother Judson points out, the issue to be determined was plain to the applicant; admittedly her husband met his death by accident and the sole question was whether that accident arose out of and in the course of his employment. What the applicant complains of is that the Board did not fully and fairly inform her as to what was the evidence which moved it to find against her on that issue.

In the particular circumstances of this case it was, in my opinion, the duty of the Board to make full disclosure to the respondent of every item of evidence on which it proposed to base its decision including the contents of all statements made to its inspector and the names of the persons from whom those statements had been obtained,

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Cartwright J.

and, having done so, to give the respondent a fair opportunity to correct or contradict that evidence. The material indicates that it failed to perform this duty.

I would dismiss the appeal.

Appeal allowed, Cartwright J. dissenting.

Solicitors for the appellant: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.

Solicitors for the respondent: Ladner & Southin, Vancouver.

1961
*May 16, 17
Oct. 3

DAME IRENE JALBERT (*Plaintiff*) ......APPELLANT;

AND

LA CITE DE SHERBROOKE (*Defendant*) RESPONDENT.

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

Damages—Liability—Gas from distribution system owned by city escaping into basement of house—Use of cigarette lighter to trace source of odour—Explosion—Liability of city—Whether plaintiff also at fault—Civil Code, art. 1054.

While inspecting their house to try and discover the source of a peculiar odour, the appellant's husband and their two sons went down into the basement where they spent some fifteen minutes seeking for a possible source of the odour. One of the sons used a cigarette lighter in the process. The father and one of the sons started back upstairs leaving the other son (who died prior to the trial) still investigating, when an explosion of gas occurred. In the action for damages to the house, the father and the surviving son both testified that at no time did they suspect the presence of gas, and their evidence was accepted by the trial judge. It was conceded during the trial that gas had penetrated into the building from a break in a gas pipe outside the building, which was part of a propane gas distribution system owned and operated by the City and under its control. The action was maintained by the trial judge. This judgment was unanimously affirmed both as to the amount and the liability of the City, but a majority found that the father had also been at fault. The father having died, his wife, as universal legatee, appealed to this Court.

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

The only fault which could be attributed to the appellant's husband would be a fault of omission in failing to prevent his son from using or continuing to use a lighter when he knew or should have known that such use was dangerous. The explosion was due primarily to the

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

presence of explosive gas for which the City was clearly responsible under art. 1054 of the *Civil Code*. A reasonably prudent layman could not be expected to know that propane gas is heavier than air and apparently would lie along the floor of the basement.

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

Maurice Delorme, Q.C., for the plaintiff, appellant.

Albert Rivard, Q.C., for the defendant, respondent.

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] which allowed, in part, an appeal from a judgment of the Superior Court condemning respondent to pay to appellant's late husband, Rodolphe L. Vallée, a sum of $5,890.36 as the amount of damage caused by fire to a house owned and occupied by the said Rodolphe L. Vallée.

The fire in question resulted from a gas explosion which took place in the basement of the said premises, and at the trial it was conceded that gas had penetrated into the building from a break in a gas pipe outside the said building which was part of a propane gas distribution system then owned and operated by respondent and under its control. The cause of the break was not established.

The Court of Queen's Bench unanimously confirmed the judgment of the Superior Court as to the amount of the damage caused to the premises and as to the liability of respondent under art. 1054 of the *Civil Code*. The majority held however, that appellant's late husband was also at fault and reduced by one-half the damages fixed by the learned trial judge. Bissonnette and Hyde JJ. dissenting, would have dismissed the appeal.

From that judgment, appellant as the universal legatee of her late husband (who died pending the appeal to the Court below) has appealed to this Court.

The facts are fully set out in the judgments below and are not now really in dispute. On the evening of the accident, the late Rodolphe Vallée, his wife and their two sons, with some friends, were celebrating a family anniversary in the premises. Appellant had complained to her husband

[1] [1960] Que. Q.B. 934, *sub nom. Cité de Sherbrooke v. Vallée.*

for some time previously of a peculiar odor in the house, which he said he himself could not detect. On the evening in question, the guests also noticed the odor which they were unable to identify, and Vallée and his two sons (one of whom was a professional engineer) set out to inspect the house and see if they could discover it. Finding nothing in the kitchen, Vallée and the sons went down to the cellar where they spent some fifteen minutes seeking for a possible source of the odor. One of the sons used his cigarette lighter in the process. They tried the gas meter without incident and then began to suspect the sewer. One of the sons started back upstairs followed by the father, leaving the other son (who died prior to the trial) still carrying on the investigation, when an explosion occurred —presumably from the ignition by the flame of the cigarette lighter—of gas which had seeped into the cellar from outside. Vallée and the surviving son both testified that at no time did they suspect the presence of gas. Their evidence on this point was not shaken on cross-examination and it was accepted by the learned trial judge.

As Bissonnette J. pointed out in the Court below the fault, if any, of appellant's late husband could only have been a fault of omission, in that he failed to prevent his son from using or continuing to use a cigarette lighter when he knew or was bound to know that such use was dangerous.

The search in the basement for the source of the objectionable odor was carried on without mishap for some fifteen minutes in the immediate vicinity of the pipes and gas meter with the aid of a cigarette lighter, but precisely what happened after this inspection as the father and one son were leaving the basement, is not established.

The explosion was due primarily to the presence of explosive gas for which respondent was clearly responsible under art. 1054 of the *Civil Code*. This propane gas is heavier than air and apparently lay along the floor of the basement. In the circumstances this was not a condition which, in my opinion, a reasonably prudent layman could be expected to know about.

With great respect, I am unable to agree with the conclusion reached by the majority in the Court below that appellant's late husband was at fault, and in part responsible for the accident.

I would allow the appeal and restore the judment of the learned trial judge, with costs here and in the Court below.

Appeal allowed with costs.

Attorneys for the plaintiff, appellant: Leblanc, Delorme, Barnard & Leblanc, Sherbrooke.

Attorney for the defendant, respondent: A. Rivard, Sherbrooke.

DAME REJANE BASTIEN ET VIR (*Defendant*) .... APPELLANT;

1961
*Jun. 5, 6
Oct. 3

AND

J. M. DESSUREAULT INC. (*Plaintiff*) ....RESPONDENT.

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

Contract—Assignment of debt with notice—Whether absolute transfer or merely a pledge—Civil Code, art. 1174, 1571.

In December 1955, A Co. owed the plaintiff $6,906.68 for materials furnished and assigned to the plaintiff a debt of $6,841.42 it claimed was owed to it by the defendant. The transfer, a copy of which was duly served on the defendant as required by art. 1571 of the *Civil Code*, purported to assign and transfer the debt (cède et transporte) and concluded by these words: "The present security is granted subject to the other securities which [the grantee] presently holds or may hold". In the action, following the refusal of the defendant to pay the amount under the assignment, the defendant pleaded that the assignment was not an absolute transfer but was one by way of pledge only. The trial judge dismissed the action on that ground, but his judgment was reversed by the Court of Appeal.

Held: The appeal should be dismissed.

The words "cède et transporte", in the absence of some qualifying term, meant a transfer of the ownership of the debt. No such qualification could be found in the agreement. The whole tenor of the document was in the opposite sense and the concluding words of the transfer could not have the effect of constituting the contract merely one of pledge. The amount owing to the plaintiff was somewhat greater than

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

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v.
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INC.

the amount of the debt transferred, and the transfer of a debt with or without the acceptance of the debtor does not effect novation. The fact that the plaintiff was entitled to retain any other security it may have held until its debt was paid in full did not affect the absolute character of the assignment it had taken.

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

Hon. Mark Drouin, Q.C., and *J. P. Bernier*, for the defendant, appellant.

René Fournier, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The sole matter at issue in this appeal is whether the transfer to respondent of a debt owing by appellant to a company known as Agel Construction Limitée was an absolute transfer or merely a pledge of the said debt.

The facts which are not in dispute are these: Agel Construction Limitée had built a house for appellant at a contract price of $25,800 on which it claimed a balance owing of $6,841.42. On December 21, 1955, the said Agel Construction Limitée was indebted to respondent in an amount of $6,906.68 for materials furnished and on that date executed the following instrument—a copy of which was duly served on appellant as required by art. 1571 of the *Civil Code*—which reads as follows:

TRANSPORT DE CRÉANCE

Pour bonne et valable considération, Agel Construction Limitée, ici représentée par monsieur Roger Gélinas, son Président, dûment autorisé par résolution des Directeurs et des Actionnaires de la Compagnie, adoptée le 22 novembre 1954, et dont copie est demeurée annexée à l'original des présentes, cède et transporte à J. M. Dessureault Inc., acceptant, représentée par monsieur J. Aug. Lapointe trés., Martin Garneau sec., de la dite Compagnie, se déclarant dûment autorisés, les sommes d'argent actuellement dues ou qui pourront lui être dues par Dame J. Antoine Mercier, née Bastien, domiciliée au numéro 1,342 de la rue Duquet, cité de Sillery, en vertu d'un contrat de construction dont le solde est actuellement de six mille huit cent quarante-et-un dollars et quarante-deux cents ($6,841.42).

J. M. Dessureault Inc. pourra toucher en totalité ou en partie toutes les sommes d'argent qui sont ou seront ainsi dues au soussigné, donner pour et en son nom, sur paiement, bonne et valable quittance, et imputer

[1] [1960] Que. Q.B. 1052.

à son gré les sommes qu'elle recevra, aux dettes et responsabilités du soussigné, échues ou non échues, qu'elle choisira à sa discrétion, sans égard à leur date d'ancienneté, et sans être tenue d'en établir l'existence.

Si le paiement de toute somme d'argent ainsi due au soussigné se faisait au moyen d'un chèque, ordre de paiement, mandat, billet ou autre effet à l'ordre du soussigné ou à son ordre conjoint avec d'autres, J. M. Dessureault Inc., sous la réserve de tous droits et recours pourra signer le nom du soussigné pour tenir lieu d'endossement ou de reçu et afin d'opérer l'encaissement du dit effect; et le soussigné donne à cette fin, irrévocablement à J. M. Dessureault Inc. et à chacun de ses officiers, tout pouvoir et mandat requis.

J. M. Dessureault Inc., sans y être tenue, est autorisée:—

1. A procéder même judiciairement, au nom et aux frais et dépens du soussigné à la perception de toute somme due;

2. A enregistrer tout privilège autorisé par la loi;

3. A faire tout concordat et règlement qu'elle jugera à propos;

4. A terminer au nom du soussigné et comme son agent, le contrat ou tous travaux en cours et se procurer tous matériaux jugés par elle utiles ou nécessaires et à en ajouter le coût à sa créance.

La présente garantie est ainsi consentie sous la réserve des autres garanties que J. M. Dessureault Inc. peut actuellement ou pourra détenir.

Appellant having refused to comply with a demand for payment, respondent instituted the present action. In its plea appellant, without prejudice, acknowledged liability to the extent of $3,946.32, and the action was proceeded with for the balance of $2,895.10. By its amended plea appellant alleged that the transfer in question was not an absolute transfer but was one by way of pledge only. At the trial it was conceded that if the transfer was an absolute one respondent was entitled to judgment in the amount claimed in its action. The sole issue before all courts therefore has been the interpretation and effect to be given to the document of transfer dated December 21, 1955.

The interpretation of the said transfer urged by appellant found favour with the learned trial judge, but his judgment was unanimously reversed by the Court of Queen's Bench[1] and I am in respectful agreement with that view.

The words "cède et transporte" used in the transfer, in the absence of some qualifying term, mean a transfer of the ownership of the debt—*Laliberté v. Larue et Les Appartements Lafontaine*[2]. I find no such qualification in

[1] [1960] Que. Q.B. 1052.

[2] [1931] S.C.R. 7, 2 D.L.R. 12, 12 B.C.R. 495.

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Abbott J.

the agreement. Indeed the whole tenor of the document is in the opposite sense and the concluding words of the transfer cannot, in my view, have the effect of constituting the contract merely one of pledge. The amount owing to respondent was somewhat greater than the amount of the debt transferred, and the transfer of a debt with or without the acceptance of the debtor does not effect novation (C.C. 1174). In taking a transfer of the debt in question, respondent was entitled to retain any other security it may have held until its debt was paid in full without affecting the absolute character of the assignment it had taken.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorney for the defendant, appellant: Hon. Mark Drouin, Quebec.

Attorneys for the plaintiff, respondent: Fournier, Monast & Walters, Quebec.

1961

*May 31
Oct. 3

DAME JEANNE PAQUIN ET VIR (*Plaintiff*) .... APPELLANT;

AND

LA CITE DE VERDUN (*Defendant*) ....RESPONDENT.

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

Damages—Negligence—Fall by pedestrian on icy sidewalk—Liability—Standard of care required of municipality—Imprudence of pedestrian.

The plaintiff was injured in a fall on an icy sidewalk in the city of Verdun. The trial judge held the City liable, but this judgment was reversed by the Court of Queen's Bench. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

There was no doubt that the sidewalks were slippery on that day. This was normal in this country, where sudden changes in the weather often occur. On that day it had rained and the temperature was slightly above the freezing point.

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

The plaintiff had to prove negligence on the part of the City, and the question was whether at the relevant time the City had taken the necessary precautions to ensure the safety of the citizens. The mere fact that a person falls on the sidewalk does not necessarily give rise to a claim for damages. The standard of care required of municipalities is not one of perfection. Municipalities are not an insurer of pedestrians and could not reasonably be required to foresee the uncertainty of the elements. So long as the municipalities proved that they had taken reasonable care within a reasonable time, such as a prudent man would take under similar circumstances, the municipalities could not be held liable. *Garberi v. La Cité de Montreal,* [1961] S.C.R. 408, applied. In this case the municipality was not negligent.

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

Maurice Bourassa, for the plaintiff, appellant.

Maurice Fauteux, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le 26 janvier 1954, la demanderesse-appelante, avec une de ses compagnes, retournait chez-elle après sa journée de travail. Vers 5:45 heures p.m., à l'angle des rues Gertrude et Strathmore, dans les limites de la cité de Verdun, elle fit une chute sur le trottoir et s'est infligé des blessures que l'honorable juge de première instances a estimées à $2,582.30. Il a conclu à la responsabilité de la Cité. La Cour du banc de la reine[1] a unanimement renversé cette décision et a rejeté l'action.

Il n'y a pas de doute que ce jour-là, les trottoirs étaient évidemment glissants. C'est ce qui arrive normalement dans notre pays, où il nous faut subir les intempéries climatériques et les changements rapides des conditions atmosphériques. La preuve révèle qu'il pleuvait, et la température a varié de 33°F. à 37°F. et s'est tenue toujours en haut du point de congélation.

Il est clair qu'aucune présomption de faute ne repose sur la municipalité lorsqu'un piéton est victime d'un accident résultant d'une chute sur un trottoir. Le réclamant doit alléguer et prouver la faute de la Cité, et celle-ci ne peut résulter que d'une négligence. La question qui se pose toujours dans les causes de ce genre est de savoir si la municipalité a pris, dans le temps voulu, les précautions nécessaires pour protéger la sécurité des citoyens.

[1] [1960] Que. Q.B. 1230.

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PAQUIN
v.
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VERDUN
—
Taschereau J.
—

Comme il a été dit souvent, et c'est aujourd'hui la jurisprudence dans la province, le fait de faire une chute sur un trottoir ne donne pas nécessairement ouverture à une réclamation pour les dommages subis. Ce que l'on exige des municipalités, ce n'est pas un standard de perfection. Elles ne sont nullement les assureurs des piétons, et on ne peut pas raisonnablement leur demander de prévoir l'incertitude des éléments. Comme cette Cour a eu l'occasion de le dire dans *Garberi v. La Cité de Montréal*[1], la vigilance simultanée de tous les moments, dans tous les endroits de leur territoire, serait imposer aux municipalités une obligation déraisonnable. Il peut arriver, et il arrive malheureusement des accidents, où s'exerce très bien la surveillance municipale qui résultent d'aucune négligence et pour lesquels il n'y a pas de compensation sanctionnée par la loi civile. Et cette Cour a ajouté, dans le même arrêt, que lorsque la municipalité fera preuve de soin et de diligence raisonnables, lorsqu'elle prend les précautions que prendraient des personnes prudentes dans des circonstances identiques, elle ne peut être recherchée devant les tribunaux civils.

Je suis d'opinion que dans le cas qui nous occupe, aucune négligence ne peut être imputée à l'intimée. Des équipes d'hommes étaient employées à sabler les rues dans tous les endroits de la municipalité, et s'il est arrivé que sous la force de la pluie le sable a été enlevé. la défenderesse ne peut en être tenue responsable. De plus, l'appelante savait que la rue était glissante, et s'y est aventurée quand même, avec des chaussures dont les semelles de cuir n'offraient aucune sécurité, et augmentaient au contraire les risques d'accident qui existaient déjà.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: M. Bourassa, Verdun.

Attorneys for the defendant, respondent: Fauteux, Bélanger, Fauteux, Craig & Mailloux, Montreal.

[1] [1961] S.C.R. 408.

1961
*Oct. 17
Dec. 15

RICHARD SHELDON STONEHOUSE (*Plaintiff*) .... APPELLANT;

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Real property—Joint tenancy—Transfer of half-interest to stranger—Joint tenancy severed—Registration of deed after death of grantor—Duty of Registrar—Claim against assurance fund fails—Land Registry Act, R.S.B.C. 1948, c. 171, s. 35(1).

The plaintiff and his wife were the registered owners of certain land as joint tenants. The wife, without telling her husband what she was doing, conveyed "all her interest in and to" this property to her daughter by a former marriage. From the time of its execution until after his wife's death, three years later, the plaintiff was unaware of the existence of the deed which remained unregistered until the day following the death of the wife, when the latter's daughter made application for its registration. The Registrar of Titles, before registering this three-year old deed, omitted to make inquiry as to whether the grantor was dead or alive. The husband brought an action for recovery from the assurance fund under s. 223(1) of the *Land Registry Act*, R.S.B.C. 1948, c. 171. The trial judge ruled in favour of the plaintiff but the Court of Appeal held that his action should be dismissed. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The opening words of s. 35(1) of the Act "except as against the person making the same" expressly make operative an unregistered instrument against the party making the same. *Davidson v. Davidson,* [1946] S.C.R. 115, applied; *Wright v. Gibbons* (1948-1949), 78 C.L.R. 313, distinguished. It was, therefore, apparent that the deed in question operated as an alienation of the wife's interest, and the very fact of her interest being transferred to a stranger of itself destroyed the unity of title without which a joint tenancy cannot exist at common law. The effect of the deed was to change the character of the husband's interest from that a joint tenancy to that of a tenancy in common and thus to extinguish his right to claim title by survivorship.

Having regard to the state of the register and to the fact that the unregistered deed was operative to sever the joint tenancy at common law, the Registrar was under no obligation to inquire as to whether the grantor was dead or alive at the time of application for the registration of the deed. There being no suggestion of any other omission, mistake or misfeasance on the part of the Registrar, the plaintiff's claim necessarily failed.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Ritchie JJ.

1961

STONEHOUSE *v.* ATTY.-GEN. FOR BRITISH COLUMBIA

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Manson J. for the plaintiff in an action to recover from the assurance fund under the *Land Registry Act*. Appeal dismissed.

D. M. Norby, for the plaintiff, appellant.

M. M. McFarlane, 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 Court of Appeal of British Columbia[1], reversing and setting aside the judgment of the trial judge by which the appellant had been awarded damages against the Attorney-General of British Columbia under the provisions of s. 223(1) of the *Land Registry Act*, R.S.B.C. 1948, c. 171, which read as follows:

> 223. (1) . . . any person sustaining loss or damages caused solely as a result of any omission, mistake, or misfeasance of the Registrar, or any of his officers or clerks, in the execution of their respective duties under this Act, may bring and maintain an action in the Supreme Court against the Attorney-General as nominal defendant for the purpose of recovering the amount of the loss or damages and costs from the Assurance Fund.

On March 23, 1956, at which time the appellant and his wife were the registered owners of 3384 Southeast Drive in Vancouver as joint tenants, Mrs. Stonehouse, without telling her husband what she was doing, conveyed "all her interest in and to" this property to Mrs. Shirley Munk, her daughter by a former marriage. From the time of its execution until after his wife's death on March 1, 1959, the appellant was unaware of the existence of this deed which remained unregistered until March 2, 1959, when Mrs. Munk made application for its registration at the office of the Registrar of Titles at Vancouver.

It is contended on behalf of the appellant that by reason of the provisions of s. 35(1) of the *Land Registry Act* the unregistered deed from Mrs. Stonehouse to her daughter had no effect on the appellant's interest as a joint tenant and that when this three-year old deed was presented for registration the Registrar should have been alerted to the possibility of the grantor having died since its execution and the whole title having thus become vested in the appellant as the surviving joint tenant. It is the failure of the Registrar to make inquiry before he

[1] (1960-61), 33 W.W.R. 625, 26 D.L.R. (2d) 391.

registered this deed as to whether the grantor was dead or alive that is now claimed to constitute "an omission or mistake" which was the sole cause of the appellant sustaining damage and which accordingly entitled him to bring and maintain the present action against the Attorney-General in accordance with the provisions of s. 223(1).

When, as in this case, application is made for registration of a transfer of land, the title to which is registered, the Registrar is placed under the duty described in s. 156 of the *Land Registry Act* as follows:

> 156. . . . the Registrar, upon being satisfied that the conveyance or transfer produced has transferred to and vested in the applicant a good safe-holding and marketable title, shall, upon production of the former certificate or duplicate certificate of title, register the title claimed by the applicant in the register.

When Mrs. Munk applied for registration there was in force and uncancelled a certificate of indefeasible title which certified that the appellant and his wife were absolutely entitled to the property in question as "joint tenants" subject only to an outstanding judgment which Mrs. Stonehouse had registered against her husband's one-half interest and by virtue of the provisions of s. 38(1) such a certificate is

> . . . conclusive evidence . . . as against Her Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in fee-simple in the land therein described . . . .

Sheppard J.A. has said of this section in the course of his decision in the Court of Appeal that,

> As the certificate is conclusive of the owner being seised as against all persons, . . . it would be conclusive against the Registrar.

Counsel for the appellant, however, contends that this section must be read in conjunction with s. 156, and that once it is accepted that the unregistered deed did not sever the joint tenancy, it follows that the Registrar could not be satisfied that a three-year old deed from one joint tenant had "transferred to and vested in the applicant a good safe-holding and marketable title" to an undivided one-half interest in the property until he had also satisfied himself, by inquiry if necessary, that the grantor of that deed was still alive. I do not, however, find it necessary to decide this question because I have formed the opinion that the joint tenancy in question was severed at the time of the execution and delivery of the deed to Mrs. Munk.

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As has been indicated, the contention advanced on behalf of the appellant in this latter regard is based on the provisions of s. 35(1) of the *Land Registry Act,* the relevant portions of which read as follows:

> 35. *Except as against the person making the same, no instrument* . . . executed and taking effect after the thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein, *shall become operative to pass any estate or interest, either at law or in equity, in the land* . . . *until the instrument is registered in compliance with the provisions of this Act;* . . . . (The italics are mine.)

In finding that the joint tenancy had not been severed by the execution of the unregistered deed and that the *jus accrescendi* operated in favour of the appellant immediately on his wife's death so as to vest the whole title in him to the exclusion of Mrs. Munk, the learned trial judge relied, in great measure, as did the appellant's counsel before this Court, on the case of *Wright v. Gibbons*[1]. This is a decision of the High Court of Australia which held that under the *Real Property Act* of Tasmania the registration of a document evidencing mutual transfers of their interests *inter se* between two out of three registered joint tenants had the effect of severing the joint tenancy. This case is cited as authority for the proposition that a registered estate as joint tenants can only be severed by some dealing which results in an alteration of the register book, but the decision is of necessity based on the provisions of the *Real Property Act* of Tasmania of which Riche J. says at 78 C.L.R. 326: "The scheme of transfer and registration is the only method by which any alienation or disposition of a share or interest in land may be made." This observation clearly indicates that the statute under consideration in that case did not include the exception which is made a part of the British Columbia scheme of transfer and registration by the opening words of s. 35(1) and in the absence of some evidence that those words were considered by the High Court of Australia, the case of *Wright v. Gibbons, supra,* cannot be considered as an authority bearing in any way directly on the present case.

[1] (1948-1949), 78 C.L.R. 313.

In *Davidson v. Davidson*[1], Estey J. had occasion to consider the opening words of s. 35(1), and speaking on behalf of this Court at p. 119 he said:

> These words, "except as against the person making the same", expressly make operative an unregistered instrument against the party making the same. Therefore, the transfer executed by the respondent was operative to transfer to the Minto Trading and Development Company Limited whatever estate, either at law or in equity, he was in possession of.

It is, therefore, apparent that the deed here in question operated as an alienation of the interest of Mrs. Stonehouse, and the very fact of her interest being transferred to a stranger of itself destroyed the unity of title without which a joint tenancy cannot exist at common law.

The effect at common law of a conveyance by one joint tenant to a stranger in title is accurately stated in Cheshire's Modern Real Property, 8th ed., at p. 308, in the following terms:

> . . . it has long been the law that one joint tenant can alienate his share to a stranger. The effect of such alienation is to convert the joint tenancy into a tenancy in common, since the alienee and the remaining tenant or tenants hold by virtue of different titles and not under that one common title which is essential to the existence of a joint tenancy.

The following passage from the decision of Vice-Chancellor Sir Page Wood in *Williams v. Hensman*[2], is to the same effect. He there says:

> A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi.*

There is nothing in the *Land Registry Act* which changes the effect of the common law in this regard as between the two joint tenants in the present case, and it follows that because the unregistered deed was operative against the share of Mrs. Stonehouse it had the effect of severing the joint tenancy. As Davey J.A. has said in the course of his decision in the Court of Appeal: "It is the binding effect upon himself of an owner's dealings with his own property that effects a severance of the joint tenancy."

[1] [1946] S.C.R. 115, 2 D.L.R. 289.
[2] (1861), 1 John & H. 546, 30 L.J. Ch. 878.

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Under the provisions of s. 35 an unregistered deed could not be operative "to pass any estate or interest either at law or in equity" other than that of the grantor, but the effect of Mrs. Munk's deed was not *"to pass"* any such estate or interest of Mr. Stonehouse but rather to change its character from that of a joint tenancy to that of a tenancy in common and thus to extinguish his right to claim title by survivorship which is an incident of the former but not of the latter type of interest. The right of survivorship under a joint tenancy is that, on the death of one joint tenant, his interest in the land passes to the other joint tenant or tenants (Megarry and Wade, The Law of Real Property, 2nd ed., p. 390). But, on the execution and delivery of the transfer by Mrs. Stonehouse, she divested herself of her entire interest in the land in question. At the time of her death, therefore, there was no interest in the land remaining in her which could pass to her husband by right of survivorship.

The "omission or mistake" within the meaning of s. 223 attributed to the Registrar by the learned trial judge was that he "omitted to make inquiry as to whether the deed was delivered in the lifetime of the grantor and as to whether she was dead or alive". The learned trial judge's finding that there was no delivery of the deed during the lifetime of the grantor was properly set aside by the Court of Appeal and was not relied on by the appellant's counsel in this Court, and in my opinion, having regard to the state of the register and to the fact that the unregistered deed was operative to sever the joint tenancy at common law the Registrar was under no obligation to inquire as to whether Mrs. Stonehouse was dead or alive at the time of the application for the registration of Mrs. Munk's deed. As there is no suggestion of any other omission, mistake or misfeasance on the part of the Registrar, the appellant's claim must fail.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Jestley, Morrison, Eckardt, Ainsworth & Henson, Vancouver.

Solicitors for the defendant, respondent: Lawrence, Shaw, McFarlane & Stewart, Vancouver.

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

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AND

HADDON HALL REALTY INC. ....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Taxpayer in business of renting apartments—Replacement of refrigerators, stoves and blinds in apartments—Whether expenditure a deductible expense or capital outlay—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(a) and (b).

The taxpayer, a real estate holding company, owned and operated a high-class apartment building containing 210 suites. As part of a program for the gradual replacement of worn-out and defective equipment, the taxpayer spent some $11,000 in 1955 for the replacement of refrigerators, stoves and venetian blinds. This expenditure was claimed as a deduction from income under s. 12(1)(*a*) of the *Income Tax Act.* The Minister contended that it was made for the replacement of capital within the meaning of s. 12(1)(*b*) of the Act. It was conceded that the expenditure was incurred for the purpose of gaining or producing income. The question was whether it was an income expense incurred to earn the income and allowable as a deduction from gross income, or a capital outlay to be amortized or written off over a period of years under the capital cost allowance regulations made under s. 11(1)(*b*). Both the Income Tax Appeal Board and the Exchequer Court allowed the deduction. The Minister appealed to this Court.

Held: The taxpayer was not entitled to the deduction.

Among the tests which may be used in order to determine whether an expenditure is an income expense or a capital outlay, it has been held that an expenditure made once and for all with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade is of a capital nature. Expenditures to replace assets which have become worn out or obsolete are something quite different from those ordinary annual expenditures for repairs which fall naturally into the category of income disbursements. Applying that test, the expenditures in question were clearly capital outlays within the provisions of s. 12(1)(*b*) of the Act.

APPEAL from a judgment of Fournier J. of the Exchequer Court of Canada[1], affirming a decision of the Income Tax Appeal Board. Appeal allowed.

P. Ollivier, for the appellant.

P. F. Vineberg, Q.C., for the respondent.

The judgment of the Court was delivered by

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

[1] [1959] Ex. C.R. 345, [1959] C.T.C. 291, 59 D.T.C. 1145.

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MINISTER OF NATIONAL REVENUE v. HADDON HALL REALTY INC.

ABBOTT J.:—This is an appeal by the Minister of National Revenue from a judgment of the Exchequer Court[1] confirming a decision of the Income Tax Appeal Board which had allowed respondent's appeal against its income tax assessment for 1955.

The facts are not in dispute. The respondent owns and operates a large apartment house property in Montreal which it acquired in 1948. The buildings had been constructed in 1924. Each year during the period 1950 to 1955, respondent incurred expenses for the replacement of stoves, refrigerators and window blinds which had become worn out, obsolete or unsatisfactory to its tenants.

Expenditures under this head in the year 1955 amounted to $11,675.95. In its Income Tax Return for 1955, respondent treated this amount as an operating expense and as such deductible from its gross income for that year. That deduction was disallowed by the Minister on the ground that it was a capital outlay within the meaning of s. 12(1)(*b*) of the *Income Tax Act*, 1948.

Section 12(1)(*a*) and (*b*) reads:

12. (1) In computing income, no deduction shall be made in respect of

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.

It is conceded by appellant that the expenditures in question were incurred by respondent for the purpose of gaining or producing income. The sole matter in issue here is whether such expenditures were an income expense incurred to earn the income of the year 1955 and allowable as a deduction from gross income in that year under s. 12(1)(*a*) of the *Income Tax Act*, or a capital outlay to be amortized or written off over a period of years under the capital cost allowance regulations made under s. 11(1)(*b*) of the said Act.

The general principles to be applied in determining whether a given expenditure is of a capital nature are fairly well established: *Montreal Light Heat and Power*

[1] [1959] Ex. C.R. 345, [1959] C.T.C. 291, 59 D.T.C. 1145.

Consolidated v. Minister of National Revenue[1]; *British Columbia Electric Railway Company Limited v. Minister of National Revenue*[2]. Among the tests which may be used in order to determine whether an expenditure is an income expense or a capital outlay, it has been held that an expenditure made once and for all with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade is of a capital nature.

Expenditures to replace capital assets which have become worn out or obsolete are something quite different from those ordinary annual expenditures for repairs which fall naturally into the category of income disbursements. Applying the test to which I have referred to the facts of the present case, the expenditures totalling $11,675.95, made by respondent in the year 1955 for replacing refrigerators, stoves and blinds in its apartment building were, in my opinion, clearly capital outlays within the provisions of s. 12(1)(*b*) of the Act.

The appeal should be allowed, the judgments of the Exchequer Court and the Income Tax Appeal Board set aside and the assessment restored. It was agreed at the hearing that in this event there would be no costs to the appellant in this Court. The appellant is entitled to his costs in the Exchequer Court.

Appeal allowed.

Solicitor for the appellant: A. A. McGrory, Ottawa.

Solicitors for the respondent: Philipps, Bloomfield, Vineberg & Goodman, Montreal.

[1] [1942] S.C.R. 89, 1 D.L.R. 593.
[2] [1958] S.C.R. 133, [1958] C.T.C. 21, 77 C.R.T.C. 29, 58 D.T.C. 1022, 12 D.L.R. (2d) 369.

1961
*Oct. 10
Dec. 15

FRED HANDLEY (*Defendant*) ....APPELLANT;

AND

STANLEY LIONEL GEORGE ALLARDYCE (*Plaintiff*) .... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Motor vehicles—Owner injured while riding as passenger—Driver negligent—Whether driver liable for injuries in absence of wilful and wanton misconduct on his part—The Vehicles Act, 1957 (Sask.), c. 93, s. 157.

The defendant was the driver of an automobile, owned by the plaintiff, in which the latter was riding as a passenger. Contrary to regulations, the defendant failed to stop before crossing a highway and a collision occurred, as a result of which the plaintiff suffered personal injuries. The trial judge held that the defendant had been negligent; it was also held that he had not been guilty of wilful and wanton misconduct. The question at issue in the appeal was whether, in view of the provisions of s. 157 of *The Vehicles Act, 1957* (Sask.), c. 93, the defendant could be held liable to the plaintiff in the absence of wilful and wanton misconduct on his part. The trial judge and the majority of the Court of Appeal having held that he could, the defendant appealed to this Court.

Held: The appeal should be allowed.

The restriction on liability in relation to passengers created by subs. (2) of s. 157 of *The Vehicles Act, 1957*, and also by subs. (2) of s. 41a of the Ontario *Highway Traffic Act* applied in respect of "any person being carried in . . . such motor vehicle". In the light of those words, neither subsection could be construed as preserving to an owner-passenger the same rights as against the driver of a vehicle, in case of the latter's negligence, which would have existed at common law. Here the defendant could only incur liability for the personal injuries to the plaintiff if he had been found guilty of wilful and wanton misconduct in the driving of the automobile.

This was not a proper case in which to hold that the Legislature, in re-enacting the predecessor of s. 157, had in mind the principle which had been laid down in *Koos v. McVey*, [1937] O.R. 369, to the effect that the words "any person being carried" etc. in s. 41a (2) of the Ontario *Highway Traffic Act* meant any person other than the owner or driver of the motor vehicle. The *Koos* case must be regarded as overruled. *Studer v. Cowper*, [1951] S.C.R. 450; *Canadian Acceptance Corporation Ltd. v. Fisher*, [1958] S.C.R. 546, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Hall, C.J.Q.B. Appeal allowed.

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

[1] (1961), 35 W.W.R. 97, 29 D.L.R. (2d) 550.

A. W. Embury, for the defendant, appellant.

D. G. McLeod, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This action arose as a result of an automobile collision which occurred about 4 p.m. on July 19, 1959. The appellant was the driver of an automobile, owned by the respondent, in which the latter was, at the time, riding as a passenger. The appellant was proceeding in an easterly direction on a road known as the Golf Club Road, which intersects with Saskatchewan Highway No. 1, which runs in a northeast to southwest direction. Vehicles travelling along the Golf Club Road are required to stop before crossing Highway No. 1. A collision occurred with a vehicle, travelling in a southeasterly direction, along Highway No. 1, and the respondent suffered injuries.

The learned trial judge found that the appellant had not stopped before crossing Highway No. 1 and held that he had been negligent. It was also held that the appellant had not been guilty of wilful and wanton misconduct.

There is no issue raised in this appeal regarding the finding of negligence. With respect to the second finding, McNiven J.A., who delivered the majority judgment of himself and Culliton J.A., said:

> In the record there is evidence to support the conclusion reached by the learned trial judge and nothing to indicate that he had either misdirected himself or taken any irrelevant matter into consideration.

Procter J.A., who delivered a dissenting judgment, agreed with the finding of the learned trial judge with respect to this point.

After considering the evidence in the case, I would not be prepared to disturb this finding.

The main issue in the appeal is one of law, the question being whether, in view of the provisions of s. 157 of *The Vehicles Act, 1957* (Sask.), c. 93, the appellant can be held liable to the respondent, in the absence of wilful and wanton misconduct on his part. The learned trial judge and the majority of the Court of Appeal[1] have held that he could.

[1] (1961), 35 W.W.R. 97, 29 D.L.R. (2d) 550.

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Martland J.

Section 157 provides as follows:

157. (1) Subject to subsection (2), when any loss, damage or injury is caused to any person by a motor vehicle, the person driving it at the time is liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof is also liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof.

(2) The owner or driver of a motor vehicle, other than a vehicle ordinarily used for carrying passengers for hire or gain, is not liable for loss or damage resulting from bodily injury to or the death of any person being carried in or upon or entering, or getting on to, or alighting from such motor vehicle, unless there has been wilful and wanton misconduct on the part of the driver of the vehicle and unless such wilful and wanton misconduct contributed to the injury.

In holding that the appellant was not entitled to the protection afforded by subs. (2) of this section, the Courts below have followed the reasoning of Macdonnell J.A., who delivered the judgment of the Court of Appeal of Ontario in *Koos v. McVey*[1]. The relevant sections of the Ontario statute there under consideration were subss. (1) and (2) of s. 41a of *The Highway Traffic Act*, R.S.O. 1927, c. 251, as amended by 1930 (Ont.), c. 48 and 1935 (Ont.), c. 26. The section, as amended, read as follows:

(1) The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway unless such motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner shall be liable to the same extent as such owner.

(2) Notwithstanding the provisions of subsection 1 the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from such motor vehicle.

It was decided in that case that the words "any person being carried" etc. meant any person other than the owner or driver of the motor vehicle. Macdonnell J.A., at p. 372, said:

The subject matter of secs. 41 and 41a is the liability of owners or drivers for violations of the Act and for loss resulting from negligence. But liability to whom? Liability as between themselves, or liability towards others? The answer seems clear from an examination of the sections. First, certain liabilities are imposed upon an owner; then the driver is made liable to the same extent; on the other hand, in certain circumstances, both

[1] [1937] O.R. 369, 2 D.L.R. 496.

owner and driver are declared not to be liable. So far as is possible, owner and driver are fixed with identical responsibility. This would not be so if the intention were to deal with their rights and liabilities as between each other. The conclusion is irresistible that what is dealt with is the rights and liabilities of owner and driver, regarded as one, towards other persons. In short, the words "any person being carried in, or upon" etc., mean any person other than the owner or driver.

The provisions of the Ontario *Highway Traffic Act,* which were under consideration in that case, are not identical with those of *The Vehicles Act, 1957,* under consideration here. In particular, subs. (2) of s. 41a of the Ontario Act eliminated the liability of the owner or driver of a motor vehicle (other than one engaged in the business of carrying passengers for compensation) to passengers in the vehicle. Section 157(2) of the Saskatchewan Act restricted the liability to that class of persons to cases in which the driver of the motor vehicle had been guilty of wilful and wanton misconduct. However, the reasoning in *Koos v. McVey,* if sound, would, I think, apply to the Saskatchewan statute as well as to the Ontario Act, but, with respect, I do not agree with it.

The purpose of s. 41a(1) of the Ontario Act and s. 157(1) of the Saskatchewan Act (each of which was enacted earlier in point of time than the provisions which later became subs. (2) of each of those sections) was to extend the vicarious liability of the owner of a motor vehicle beyond what it had been at common law. In each case the owner was to be responsible for the negligence of any driver of his motor vehicle, unless such driver was wrongfully in possession of it.

After the vicarious liability of the owner had been expanded by subs. (1), subs. (2) of s. 41a of the Ontario Act was enacted to eliminate any liability which had previously existed toward passengers being carried in a motor vehicle, either on the part of the owner or the driver, save in those cases in which the vehicle was engaged in carrying passengers for hire. Similarly, subs. (2) of s. 157 of the Saskatchewan Act was later enacted to restrict the liability which might arise with respect to a passenger to cases in which the driver had been guilty of wilful and wanton misconduct.

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I do not understand the purpose of either s. 41a of the Ontario Act or s. 157 of the Saskatchewan Act as being to create an identity of responsibility between the owner and the driver, which would be applicable to all other persons, and not to deal with their responsibility as between themselves. The restriction on liability in relation to passengers created by subs. (2) of each of these sections is applicable in respect of "any person being carried in . . . such motor vehicle". In the light of those words, I cannot construe either subsection as preserving to an owner-passenger the same rights as against the driver of the vehicle, in case of the latter's negligence, which would have existed at common law.

It was contended by the respondent that, as the predecessor of s. 157 of the Saskatchewan *Vehicles Act* had been re-enacted from time to time subsequent to the judgment in *Koos v. McVey,* the Saskatchewan Legislature should be understood thereby to be adopting the legal interpretation which had been placed on the similar section of the Ontario Act by the Court of Appeal of that Province in that case. The respondent acknowledged that the common law presumption to that effect was removed by subs. (4) of s. 24 of *The Interpretation Act,* R.S.S. 1953, c. 1, which reads as follows:

> (4) The Legislature shall not, by re-enacting an Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise been placed upon the language used in such Act or enactment or upon similar language.

It may be observed that *The Interpretation Act* of Ontario has for many years contained a similar provision, which is now s. 19 of c. 191 of the R.S.O. 1960.

The respondent relied, however, on the statement as to the effect of this provision made in this Court by Kerwin J., as he then was, in *Studer v. Cowper*[1], approved by the judgment of this Court in *Canadian Acceptance Corporation Limited v. Fisher*[2]. That statement is as follows:

> In view of these decisions, it must now be taken that subsection 4 of s. 24 of the Saskatchewan Interpretation Act, 1943, c. 2, which is the same as the ones referred to in the two cases mentioned, merely removes the

[1] [1951] S.C.R. 450 at 454, 2 D.L.R. 81.
[2] [1958] S.C.R. 546 at 554, 14 D.L.R. (2d) 225.

presumption that existed at common law and, in a proper case, it will be held that a legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it.

In my opinion, this is not a proper case in which to hold that the Legislature, in re-enacting the predecessor of s. 157, had in mind the principle which had been laid down in *Koos v. McVey.*

With the greatest respect for the learned Justices of Appeal who took part in that decision, I am of opinion that it must be regarded as overruled.

In my opinion, the appellant could only incur liability for the personal injuries to the respondent, in the circumstances of the present case, if he had been found to have been guilty of wilful and wanton misconduct in the driving of the vehicle.

There is included in the respondent's claim the sum of $200 in respect of damage to his automobile, which amount was admitted by the appellant. It is clear that s. 157 does not protect the appellant in respect of this kind of claim and that his negligence makes him liable for it.

In my view, the appeal should be allowed and the action of the respondent should be dismissed, save as to the sum of $200. The appellant should be entitled to the costs of this appeal and his costs in the Courts below.

Appeal allowed with costs throughout.

Solicitors for the defendant, appellant: Noonan, Embury, Heald & Molisky, Regina.

Solicitors for the plaintiff, respondent: Pedersen, Norman, McLeod & Pearce, Regina.

GREAT EASTERN OIL AND IMPORT COMPANY LIMITED AND ANGUS OAKLEY (*Defendants*) .... APPELLANTS;

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*Oct. 30, 31
Dec. 15

AND

FREDERICK E. BEST MOTOR ACCESSORIES COMPANY LIMITED (*Plaintiff*) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND (ON APPEAL)

Negligence—Plaintiff's premises destroyed by fire—Standard procedure and employer's instructions not followed by operator of gasoline delivery truck—Vapour from spilled gasoline ignited by heating-stove—No contributory negligence on part of plaintiff—Co-defendant's negligence subsequent to and severable from act or omission of plaintiff—The Contributory Negligence Act, R.S.N. 1952, c. 159.

Courts—Authority of Superior Court to determine own jurisdiction and hear appeal—The Judicature Act, R.S.N. 1952, c. 114.

The defendant company, a supplier of gasoline, through its servant and agent O, the co-defendant, delivered gasoline to the premises of the plaintiff by means of a hose from the company's delivery truck inserted in the fill pipe of the plaintiff's storage tank. Contrary to standard procedure and his employer's instructions, O failed to remain at the nozzle of the hose while the gasoline was being discharged from the truck and as a consequence a quantity of gasoline was sprayed on the floor of the plaintiff's shop. Vapour from the gasoline was immediately ignited due to the close proximity of a heating-stove which was in operation at the time, and in the resulting fire the premises and a large quantity of stock-in-trade and equipment were destroyed or greatly damaged. In an action for damages it was ordered that the plaintiff recover against the defendants 20 per cent of its damages to be assessed and 20 per cent of its costs and that the defendants recover from the plaintiff 80 per cent of their costs. The trial judgment was affirmed by the Supreme Court (On Appeal). In that Court the Chief Justice disqualified himself as, before his appointment to the Bench, he had been engaged professionally in another matter which concerned the same circumstances as the present case. One of the two remaining judges adhered to the views he had already expressed in his capacity as the trial judge, while the other would have dismissed the plaintiff's claim, allowed the defendants' appeal and dismissed the action. The defendants appealed and the plaintiff cross-appealed to this Court.

Held: The appeal should be dismissed and the cross-appeal allowed.

The Supreme Court of Newfoundland (On Appeal) had authority to determine its own jurisdiction and hear the appeal. *Walker v. R.*, [1939] S.C.R. 214; *Re Padstow* (1882), 20 Ch. D. 137, referred to.

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*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Martland and Ritchie JJ.

O had been negligent; his actions were fool-hardy and were the direct cause of the occurrence. It was not negligent, on the part of the plaintiff, to maintain the premises in the condition in which they were at the time of the fire. Even if the premises were in a dangerous condition, the defendants knew and must be taken to have accepted the situation. To constitute contributory negligence it does not suffice that there be some fault on the part of a plaintiff without which the damage would not have been suffered; the negligence charged must be proximate in the sense of an effective cause of the damages. *McLaughlin v. Long,* [1927] S.C.R. 303; *Bechthold and Others v. Osbaldeston and Others,* [1953] 2 S.C.R. 177, followed; *Ellerman Lines, Ltd. v. H. & G. Grayson, Ltd.,* [1920] A.C. 466, referred to.

The negligence of O was clearly subsequent to and severable from the act or omission of the plaintiff even if such act or omission could be considered a fault, and therefore, under the provisions of s. 6 of the *Contributory Negligence Act,* R.S.N. 1952, c. 159, the question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof could not be taken into consideration.

APPEAL and cross-appeal from a judgment of the Supreme Court (On Appeal) of Newfoundland[1], affirming a judgment of Sir Brian Dunfield J. Appeal dismissed and cross-appeal allowed.

W. G. Burke-Robertson, Q.C., for the defendants, appellants.

J. H. Amys, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by Great Eastern Oil and Import Company Limited and Angus Oakley, the defendants in an action in the Supreme Court of Newfoundland, and a cross-appeal by the plaintiff, Frederick E. Best Motor Accessories Company Limited, against the judgment of the Supreme Court of Newfoundland (on Appeal), affirming the judgment at the trial whereby it was ordered that the plaintiff recover against the defendants twenty per cent of its damages to be assessed and twenty per cent of its costs and that the defendants recover from the plaintiff eighty per cent of their costs.

No point as to the jurisdiction of this Court was raised by either party but, because of a question put from the Bench, it should be noted that by s. 6 of *The Judicature Act,* R.S.N. 1952, c. 114, the Supreme Court of Newfoundland is composed of a Chief Justice and two other Judges.

[1] (1961), 45 M.P.R. 207.

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By s. 3 of c. 33 of the Statutes of 1957, this s. 6 was repealed and it was enacted that the Supreme Court should consist of a Chief Justice and three other Judges. However, it was provided by s. 13 that s. 3 was to come into force on a date to be fixed by proclamation of the Lieutenant-Governor in Council and no such proclamation has been issued. So far as relevant s. 9 of *The Judicature Act,* R.S.N. 1952, c. 114, provides that the Supreme Court may be held by one judge who may hear and determine all causes and matters except (inter alia) appeals. Sections 27 and 30 read as follows:

> 27. Every judgment finding or order of a Judge in Court or chambers may be reviewed, varied or set aside by the Court constituted by any two or by the three Judges, subject, in cases in which two only sitting shall differ in opinion, to re-hearing and determination before the three Judges.
>
> ....
>
> 30. Where two Judges sit together in the first place and join in any judgment or order, the decision shall be final and absolute, unless by their leave; but if they differ in opinion application may be made to the three Judges to review, vary or set aside such judgment or order.

In this action the trial judge was Sir Brian Dunfield. The appeal was heard by the Chief Justice, Winter J. and the trial judge. When reasons were delivered the Chief Justice filed a statement disqualifying himself as, before his appointment to the Bench, he had been consulted professionally in connection with other proceedings by a third party against the parties to this litigation arising out of the events complained of in this action. The trial judge adhered to the views he had already expressed while Winter J. would have dismissed the plaintiff's claim, allowed the defendants' appeal and dismissed the action. The former order affirmed the judgment at the trial and dismissed the appeal and cross-appeal.

The Supreme Court of Newfoundland (on Appeal) is a Superior Court. In *Walker v. The King*[1], Chief Justice Sir Lyman Duff stated at 216:

> It is clear that, the learned trial judge having intended to pronounce, and having considered he was pronouncing a valid judgment of acquittal, what he did cannot be treated as a nullity. Presiding in a court of general jurisdiction, having authority to pronounce on its own jurisdiction, and his judgment being one which under appropriate conditions could competently be given, it was in its nature susceptible of being the subject of

[1] [1939] S.C.R. 214, 2 D.L.R. 353, 71 C.C.C. 305.

appeal (*re Padstow* (1882) 20 Ch. Div. 137); and the Court of Appeal rightly dealt with it upon the footing that it constituted a judgment or verdict of acquittal.

In the *Padstow* case the following appears in the judgment of Sir George Jessel, Master of the Rolls, at p. 142:

> The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper mode of getting rid of that order. I think that it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous.

Lord Justice Brett at p. 145 put it thus:

> In this case an order has been made to wind up an association or company as such. That order was the order of a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal.

Lord Justice Lindley commenced his judgment by stating: "I am of the same opinion". In the present case the Supreme Court of Newfoundland (on Appeal) had authority to determine its own jurisdiction and hear the appeal.

On March 4, 1959, the defendant company, a supplier of gasoline, was, through its servant and agent, the co-defendant Oakley, delivering gasoline to the premises of the plaintiff by means of a hose from the company's delivery truck inserted in the fill pipe of the plaintiff's storage tank. A fire occurred as a result of which the plaintiff's premises, and a large quantity of its stock-in-trade and equipment, were destroyed or greatly damaged, for which the plaintiff asked damages in the following amounts:

Damage to buildings	$ 29,420.38
Equipment damaged or destroyed	4,304.90
Stock-in-trade damaged or destroyed	41,987.57

The plaintiff claimed that the fire and resulting damage occurred by reason of the negligence of Oakley in failing to follow the standard procedure and his employer's instructions to stay close to the delivery nozzle while the gasoline

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was being discharged from the truck. The defendants denied negligence and alleged that if there had been any such negligence it was not the cause of the damage complained of but that the damage was caused by the negligence of the plaintiff, its servants or agents, in that it had a knowledge that gasoline did, from time to time, spill over the floor of the premises when being pumped into the gasoline storage tank; but, notwithstanding such knowledge, the plaintiff allowed a fire to be maintained at all material times in a stove in close proximity to the fill pipe of its gasoline storage tank through which gasoline deliveries were made and that that fire was the direct cause of the damage complained of in that it ignited vapour from gasoline which had escaped from the fill pipe and had been allowed to flow over the floor of the said premises because of the defective manner in which the fill pipe was installed and maintained in the said building.

The evidence shows that the defendant company had been supplying gasoline to the plaintiff for a great number of years during many of which the premises were in the same condition as on the day of the fire and both defendants knew of this condition. The trial judge found that Oakley had been negligent and with that I agree. Oakley's actions were foolhardy and were the direct cause of the occurrence. Contrary to what was shown to be the usual practice and contrary to the instructions from his employer, he failed to remain at the nozzle and as a result a quantity of gasoline was sprayed on the floor of the premises which immediately caught fire from a a stove which had been installed and which was being used to heat them. In answer to a question by counsel for the defendants, at p. 179 of the Case, Oakley admitted that ordinarily he would hold the nozzle in the fill pipe himself, and at p. 184, in answer to another question by counsel for the defendants, he admitted that, if he had remained at his proper place when he was filling the plaintiff's tank, he could have reached in to turn off the nozzle, although he said "it was a cumbersome spot" and that on one occasion he had strained his wrist in so doing. On the same page he admitted that his instructions were to stay by the nozzle or in a position where he could turn off the nozzle. He further stated that he had asked Delaney, an employee of the plaintiff, to keep an eye on the nozzle and that he had seen Delaney hold

it, but, at p. 208, Delaney denied both statements and gave a circumstantial account of his movements at the relevant time. While noting this discrepancy the trial judge made no finding, but consideration of the evidence satisfies me that Delaney was telling the truth.

The trial judge considered that it was negligent for the plaintiff to maintain the premises in the condition in which they were at the time of the fire but with respect I am unable to agree. There is no doubt that several years prior to the occurrence with which we are concerned gasoline had been spilled but the plaintiff thereupon altered his premises. While the building had been built out over the underground storage tank and while the intake pipe was in the wall of the building, the area of the pipe inside the building was enclosed by an asbestos-lined box to propel gasoline vapours outside the building through the opened outside door of the box.

Even if the premises were in a dangerous condition, the defendants knew and must be taken to have accepted the situation. Oakley by his negligence permitted the hose and nozzle to remain unattended and as a result of the movement of the nozzle gasoline was sprayed on the floor of the premises causing the damage. It was held by this Court in *McLaughlin v. Long*[1], in considering the *Contributory Negligence Act* of New Brunswick, that to constitute contributory negligence it does not suffice that there be some fault on the part of a plaintiff without which the damage would not have been suffered and that the negligence charged must be proximate in the sense of an effective cause of the damages. From time to time there have been discussions in the Courts and otherwise as to proximate cause, *causa causans* and the last clear chance. In *Ellerman Lines, Limited v. H.&G. Grayson, Limited*[2], affirmed by the House of Lords[3], the headnote in the latter report sets forth the circumstances and the decision of the House:

A firm of ship repairers were riveting cleats to the weather deck of a steamer which, under the authority of the Admiralty, they were fitting with apparatus for protection against mines. The rivets were heated in a furnace on the weather deck, and lowered in a bucket through an open hatchway to the 'tween decks, where a riveter drove them into holes bored into the under side of the weather deck to receive them. The steamer was

[1] [1927] S.C.R. 303, 2 D.L.R. 186.
[2] [1919] 2 K.B. 514.
[3] [1920] A.C. 466, 89 L.J.K.B. 924.

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discharging from a hold below the 'tween decks, and a 'tween deck hatchway was open directly below the open hatchway on the weather deck, so that a cargo of jute in the lower hold lay exposed. A boy carrying a red-hot rivet in a pair of tongs to the bucket close by the weather deck hatchway slipped on the deck, and the rivet shot over the coamings and through both the open hatchways on to the cargo of jute and set it on fire.

In an action by the owners of the steamer against the ship repairers for damage to the ship and cargo:

Held, that the damage was caused by the negligence of the ship repairers in doing the work as they did while the jute was exposed, and that the shipowners were not guilty of any negligence.

At p. 475 Lord Birkenhead put it that he should have been content to state his own conclusion in the language used by Atkin L.J. and he assented particularly to the illustration which Atkin L.J. gave in the latter part of his judgment in which he pointed out that the appellants, under circumstances in which they received remuneration, brought upon the respondent's ship that which was in fact dangerous. In the Court of Appeal Lord Justice Atkin had stated at pp. 535 and 536:

If a workman is sent to my house containing inflammable material to work with fire, am I to remove the source of danger, or is he to take precautions which will avoid danger? If a man comes to my premises containing an oil tank is he to abstain from smoking in its vicinity or am I to remove the oil tank? And if he chooses to smoke there am I precluded from recovering because I did not remove the oil tank but allowed him to continue at his peril? The doctrine of contributory negligence cannot, I think, be based upon a breach of duty to the negligent defendant. It is difficult to suppose that a person owes a duty to anyone to preserve his own property.

The law applicable in this case is that set forth in the judgment of this Court in *Bechthold and Others v. Osbaldeston and Others*[1] at p. 178:

The position in this appeal on the question of liability is that put by Lord Shaw in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* [1924] A.C. 406 at 419:

And I take the principle to be that, although there might be—which for the purpose of this point I am reckoning there was—fault in being in a position which makes an accident possible yet, if the position is recognized by the other prior to operations which result in an accident occurring, the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part, could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encounter of danger was contributed to by the fact that there was a danger to be encountered.

[1] [1953] 2 S.C.R. 177, 4 D.L.R. 783.

In addition to providing for cases where two parties are negligent, The Newfoundland *Contributory Negligence Act,* R.S.N. 1952, c. 159, provides:

6. Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

Here I am satisfied that the negligence of Oakley was clearly subsequent to and severable from the act or omission of the plaintiff even if such act or omission could be considered a fault.

I would dismiss the appeal, allow the cross-appeal, set aside the judgment of the Supreme Court of Newfoundland (on Appeal) and the judgment at the trial and direct that judgment be entered in favour of the plaintiff against the defendants for the full amount of its damages to be assessed. The plaintiff is entitled to its costs throughout.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for the defendants, appellants: Curtis, Dawe & Fagan, St. John's.

Solicitor for the plaintiff, respondent: P. Derek Lewis, St. John's.

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA .... APPELLANT;

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*Oct. 19
Dec. 15

AND

WESTCOAST TRANSMISSION COMPANY LIMITED (CANADIAN BECHTEL LIMITED AGENT) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxes—Steel pipe purchased abroad brought into Province—Terminal charges assessed as part of delivered price—Assessments not authorized—Social Services Tax Act, R.S.B.C. 1948, c. 333, s. 3(3), as amended.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

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The respondent company purchased a quantity of steel pipe from an English manufacturer for delivery in Vancouver. Each shipload was paid for by the respondent and the bill of lading relating thereto was delivered to the respondent, or its agents, while such shipment was at sea en route to Vancouver. Terminal or harbour charges were paid by the respondent in the course of taking delivery of each shipment. The Commissioner, Social Services Tax, assessed a tax of 5 per centum on these charges on the basis that the money paid therefor was part of the delivered price of the steel. The respondent appealed the assessments and, when subsequently the assessments were affirmed by the Minister of Finance, the respondent appealed to a Judge of the Supreme Court of British Columbia. The appeal was successful and the assessments were set aside. This decision was affirmed unanimously by the Court of Appeal. The Crown then appealed to this Court.

Held: The appeal should be dismissed.

The words "the same tax" in subs. (3) of s. 3 of the *Social Services Tax Act,* R.S.B.C. 1948, c. 333, as amended, do not mean "the same amount of tax" as would have had to be paid in respect of a notional retail purchase of the steel pipe in British Columbia. They mean that, in the circumstances outlined in subs. (3), the tax which applies on retail purchases in the Province also applies on the consumption or use of property brought into the Province. That tax is a tax of 5 per centum of its purchase price. The goods, which in view of the nature of the contract for the purchase of the steel pipe became the property of the respondent while they were on the high seas, became subject to tax as soon as they entered the Province.

The terminal charges were not a part of the purchase price, either within the general meaning of that term or within the definition contained in the Act. They were charges paid, not by the vendor, but by the purchaser, after property in the goods had passed to it, after the goods had been brought into the Province and after the tax attached and became payable.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Ruttan J. Appeal dismissed.

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

J. G. Alley, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This case has been argued on an agreed set of facts, which are as follows:

The respondent purchased 96,000 tons of three-inch steel pipe from South Durham Steel & Iron Co. Ltd., Stockton-on-Tees, County Durham, England, for delivery to the respondent in Vancouver. The agreement to purchase is contained in a letter from the respondent to the vendor dated October 12, 1955, as amended by a letter from the

[1] (1961), 35 W.W.R. 70, 28 D.L.R. (2d) 518.

respondent to the vendor dated May 21, 1956. By endorsement dated May 24, 1956, the purchase terms were accepted by the vendor.

The contract price of the said steel pipe is described in the said letter of May 21, 1956, as:

> The contract price delivered C.I.F. Vancouver, B.C., but not including any dues, Import Duty, Sales Tax, Landing or other charges, but including ocean insurance as outlined herein, is $160.14 U.S. dollars per ton of 2,000 lbs., for 90,000 tons.
>
> The contract price delivered C.I.F. Vancouver, B.C., but not including any dues, Import Duty, Sales Tax, Landing or other charges, but including ocean insurance as outlined herein, is $161.75 U.S. dollars per ton of 2,000 lbs., for 6,000 tons.

Each shipload of pipe was paid for by the respondent and the bill of lading relating thereto was delivered to the respondent, or its agents, while such shipment was at sea en route to Vancouver.

Between March 4, 1956, and December 31, 1956, 27 separate shipments of steel pipe (hereinafter referred to as "Group A") were delivered by the vendor to the purchaser, by deep sea ships, at Vancouver, B.C. Nineteen additional shipments of steel pipe (hereinafter referred to as "Group B") were delivered, by deep sea ships, by the seller to the buyer in Vancouver, between January 4, 1957, and July 25, 1957. The said shipments were delivered at the Canadian Pacific Railway Company's dock, or at the National Harbours Board dock, in Vancouver.

In respect to each of the shipments of Groups A and B, the following procedure was carried out by the dock owner:

(1) The dock owner, upon receipt of the ship's manifest, prepared an expense bill. This bill was then sent to the respondent and contained a statement of all harbour or terminal charges.

(2) Prior to the delivery of the first shipment, the respondent had posted security with the dock owner and was, therefore, entitled to and did have a credit account.

(3) The dock owner charged or debited the respondent, in its weekly ledger account, for the terminal or harbour charges.

(4) The dock owner sent an advice note to the respondent, advising of the arrival of each shipment.

(5) The respondent presented the bill of lading (after payment) to the dock owner and took delivery of the steel shipment. The steel was unloaded from the ship to railway cars at the dockside.

"Terminal or harbour charges" is the expression used by dock owners in reference to an overseas delivery in the Port of Vancouver and consists of:

(a) Cargo Rates—9 cents per ton payable to National Harbours Board for harbour maintenance.

(b) Wharfage —60 cents per ton payable to dock owner for use of the dock.

(c) Handling —$1.80 per ton payable for stevedoring wages for unloading of the ship.

In respect to the shipments in Group A, terminal charges were debited by the dock owner to the respondent's account and were paid by the respondent and amounted, in all, to $84,090.34.

In respect to the shipments in Group B, terminal charges were debited by the dock owner to the respondent's account and were paid by the respondent and amounted to $57,492.49.

The Commissioner, Social Services Tax, assessed a tax of five per centum on the terminal charges of $84,090.34 for the Group A shipments, on the basis that this amount of money was part of the delivered price of the steel. The tax amounts to $4,204.52, to which there is added interest at six per centum from February 20, 1957. Similarly, a tax of $2,874.61 was assessed against the Group B shipments, plus interest at six per centum to May 20, 1958.

The respondent appealed the assessments and, when subsequently the assessments were affirmed by the Minister of Finance, the respondent then appealed, pursuant to s. 15 of the *Social Services Tax Act,* R.S.B.C. 1948, c. 333, as amended, to a Judge of the Supreme Court of British Columbia.

The appeal was successful and the assessments were set aside. This decision was affirmed unanimously by the Court of Appeal[1].

[1] (1961), 35 W.W.R. 70, 28 D.L.R. (2d) 518.

The provision of the *Social Services Tax Act,* under which the tax was sought to be imposed, is contained in s. 3, the relevant subsections of which provide as follows:

3. (1) Every purchaser shall pay to Her Majesty in right of the Province at the time of making the purchase a tax at the rate of five per centum of the purchase price of the property purchased.

* * *

(3) Every person residing or ordinarily resident or carrying on business in the Province who brings into the Province or who receives delivery in the Province of tangible personal property acquired by him for value for his own consumption or use, or for the consumption or use of other persons at his expense, or on behalf of, or as the agent for, a principal who desires to acquire such property for the consumption or use by such principal or other persons at his expense, shall immediately report the matter in writing to the Commissioner and supply to him the invoice and all other pertinent information as required by him in respect of the consumption or use of such property, and furthermore, at the same time, shall pay to Her Majesty in right of the Province the same tax in respect of the consumption or use of such property as would have been payable if the property had been purchased at a retail sale in the Province.

The words "purchaser", "retail sale" and "purchase price" are defined in s. 2 of the Act as follows:

"purchaser" means any person who acquires tangible personal property at a sale in the Province for his own consumption or use, or for the consumption or use by other persons at his expense, or on behalf of, or as the agent for, a principal who desires to acquire such property for consumption or use by such principle or other persons at his expense;

"retail sale" means a sale to a purchaser for purposes of consumption or use and not for resale;

"sale price" or "purchase price" means a price in money, and also the value of services rendered, the actual value of the thing exchanged, and other considerations accepted by the seller or person from whom the property passes as price or on account of the price of the thing covered by the contract, sale, or exchange, and includes the charges for installation of the thing sold, for interest, for finance, for service, for customs, for excise, and for transportation, whether or not such are shown separately on the invoice or in the vendors' books;

The appellant's contention is that the concluding words of subs. (3) of s. 3, i.e., "the same tax in respect of the consumption or use of such property as would have been payable if the property had been purchased at a retail sale in the Province", mean that the respondent is required to pay, not a tax of five per centum of the actual purchase price of the property purchased, but five per centum of what would have been the retail price of the property purchased, assuming that the steel pipe had been purchased at a retail sale in British Columbia. The argument is that the words "the

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Martland J.

same tax" do not mean the same kind of tax on purchase price as is payable under subs. (1) in respect of property purchased in British Columbia, but the same amount of tax as would have been paid had the property actually been purchased at a retail sale in British Columbia.

I do not construe the words "the same tax" in subs. (3) as meaning "the same amount of tax" as would have had to be paid in respect of a notional retail purchase of the steel pipe in British Columbia. I construe them as meaning that, in the circumstances outlined in subs. (3), the tax which applies on retail purchases in the Province also applies on the consumption or use of property brought into the Province. That tax is a tax of five per centum of its purchase price. This is my interpretation of the concluding words of this subsection and it is reinforced by the portion of the subsection which precedes them.

A person who brings into British Columbia, or receives delivery of property in that Province, is required immediately to report the matter to the Commissioner. He must also supply the Commissioner with the invoice and all pertinent information required by the Commissioner in respect of the consumption or use of the property. The invoice will give to the Commissioner the purchase price of the property. The pertinent information, which relates only to consumption and use, will enable him to decide whether or not the tax applies. The recipient is further required, at the same time, to pay the tax imposed by the subsection. This means, therefore, that if tax is payable it attaches immediately upon the property being brought into British Columbia, or on receipt of it in that Province.

In view of the nature of the contract for the purchase of the steel pipe in question, those goods became the property of the respondent while they were on the high seas. Accordingly, they became subject to tax as soon as they entered the Province.

The terminal charges paid by the respondent were not a part of the purchase price, either within the general meaning of that term or within the definition contained in the Act. Matters such as installation charges, interest, finance

charges, customs, excise or transportation, referred to in that definition, all relate to expenditures made by the vendor, whether or not they are separately shown on the invoice or in the vendor's books. The terminal charges in question here were charges paid, not by the vendor, but by the purchaser, after property in the goods had passed to it, after the goods had been brought into the Province and after the tax attached and became payable.

I do not find in subs. (3) or in s. 25, to which we were referred by counsel for the appellant, any obligation or authority upon or in the taxpayer or the Commissioner to estimate the retail price of the steel pipe on a notional sale of it in British Columbia. I think subs. (3), by requiring payment of the tax as soon as the goods entered British Columbia, contemplated that such tax would be determined on the purchase price as disclosed in the invoice, which the recipient was required to deliver to the Commissioner.

In my opinion, the assessments under appeal were not authorized by the statute and, accordingly, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Paine, Edmonds, Mercer & Williams, Vancouver.

Solicitors for the respondent: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

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*Oct. 17, 18
Dec. 15

THE ROYAL TRUST COMPANY, surviving Executor and Trustee of the Will of Stephen Jones, deceased (*Plaintiff*) .... APPELLANT;

AND

ELIZA MARGARET JONES, STEPHEN JONES (JR.), STEPHEN RANDAL JONES, FRANCES ELIZABETH BUCKLE, FRANCES GAIL BUCKLE (an infant), HARRY BUCKLE III (an infant), MILDRED VICTORIA GILLESPIE, MARGARET THOMPSON BRIGGS, MARLENE ANNE MILLER (an infant) (*Defendants*) .... RESPONDENTS.

VIRGINIA JEAN WALLACE, VIRGINIA LORRAINE JONES, HOWARD STEPHEN JONES (an infant), ELSIE MARGARET LANGMAID and CAROL ANNE JONES (*Defendants*)

VIRGINIA LORRAINE JONES and HOWARD STEPHEN JONES (an infant) (*Defendants*) .. APPELLANTS;

AND

ELIZA MARGARET JONES, STEPHEN JONES (JR.), STEPHEN RANDAL JONES, FRANCES ELIZABETH BUCKLE, FRANCES GAIL BUCKLE (an infant), HARRY BUCKLE III (an infant), MILDRED THOMPSON BRIGGS, MARLENE ANNE MILLER (an infant) (*Defendants*) .... RESPONDENTS.

AND

VIRGINIA JEAN WALLACE, ELSIE MARGARET LANGMAID and CAROL ANNE JONES (*Defendants*)

AND

THE ROYAL TRUST COMPANY, surviving Executor and Trustee of the Will of Stephen Jones, deceased (*Plaintiff*)

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Courts—Judgment affirmed by Court of Appeal—Action to set aside the judgment—Jurisdiction of trial judge.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott, Martland, Judson and Ritchie JJ.

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ROYAL TRUST CO. v. E. M. JONES *et al.*

V. L. JONES *et al.* v. E. M. JONES *et al.*

The Court of Appeal for British Columbia in 1933 dismissed an appeal from a judgment which had upheld the validity of a codicil of a testator's will. The codicil disinherited the testator's son H unless he complied with certain conditions, which he did not so do. In an action by H, his first wife and their two infant daughters, a judge of the Supreme Court of British Columbia, on June 26, 1945, held that the relevant portion of the codicil was invalid, void and of no effect, and that the judgment of the Court of Appeal in 1933 and the judgment which it affirmed should be set aside. Following the death of H in 1958, the plaintiff trust company, as sole surviving executor of the testator, commenced proceedings by originating summons for the determination of certain questions. The judge who gave judgment in those proceedings proceeded on the assumption that the judgment of June 26, 1945, was operative. The children of H by his first wife appealed to the Court of Appeal, asking that the judgment appealed from be varied. They sought a declaration that they alone (to the exclusion of H's second wife and his child by that wife) were entitled to share in that part of the testator's estate bequeathed to the widow and the children of H after his death. The Court of Appeal held that in pronouncing the judgment of June 26, 1945, the judge had acted without jurisdiction, that his judgment was a nullity and that the acts done by the trustees in pursuance thereof were without validity. The judgment appealed from and the originating summons upon which it was based were set aside, and a trial was directed to determine what ought to have been done by the trustees of the testator's will if the judgment of June 26, 1945, had never been pronounced. Pursuant to leave granted by this Court appeals were brought from this judgment (i) by the surviving executor and trustee of the testator and (ii) by H's second wife and his child by that wife.

Held: The appeal should be allowed.

The judgment below was founded upon the erroneous view that because the judgment which had upheld the validity of the codicil had been affirmed by the Court of Appeal, a judge of the Supreme Court of British Columbia was without jurisdiction to entertain an action to set it aside. That this is not the law was shewn by the authorities. *Falcke v. The Scottish Imperial Insurance Co.* (1887), 57 L.T. 39; *Flower v. Lloyd* (1887), 6 Ch. D. 297; *Jonesco v. Beard* [1930] A.C. 298; *Boswell v. Coaks* (1894), 6 R. 167, referred to.

It has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal. The law and practice on this point in British Columbia and in England are the same.

APPEALS from a judgment of the Court of Appeal for British Columbia[1], setting aside a judgment of Maclean J. and containing other provisions. Appeal allowed.

D. M. Gordon, Q.C., and *K. E. Eaton,* for the plaintiff, appellant.

[1] (1961), 34 W.W.R. 540, 28 D.L.R. (2d) 767.

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T. P. O'Grady, for the defendants, appellants.

W. H. M. Haldane, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—These appeals are from a judgment of the Court of Appeal for British Columbia[1] setting aside a judgment of Maclean J. and containing other provisions. In order to make clear the questions which arise it is necessary to set out the relevant facts in some detail.

The late Stephen Jones Sr., hereinafter referred to as "the testator", died on October 2, 1933. His domicile was in British Columbia. He left a will dated December 18, 1928, a first codicil dated December 18, 1928, and a second codicil dated June 5, 1933. He was survived by his widow, Eliza Margaret Jones, and by five children whose names and dates of birth are: Stephen Jones, Junior, December 11, 1910; Howard Jones, May 1, 1912; Frances Elizabeth Buckle, November 1, 1913; Mildred Victoria Gillespie, December 22, 1916; and Margaret Thompson Briggs (formerly Miller), April 23, 1918. The widow and all of the children except Howard Jones are still living. Howard Jones died on March 18, 1958.

The following grandchildren of the testator are now living: Stephen Randal Jones, son of Stephen Jones Junior; Elsie Margaret Langmaid and Carol Anne Jones, children of Howard Jones by his first marriage; Howard Stephen Jones, son of Howard Jones by his second marriage; Frances Gail Buckle and Harry Buckle III, children of Frances Elizabeth Buckle; and Marlene Anne Miller, daughter of Margaret Thompson Briggs.

The terms of the testator's will with which we are concerned gave an annuity to his widow for her life, made certain provisions for the maintenance and support of his children, directed $100,000 to be paid to each son on his attaining 35 years of age, directed that on each of his daughters attaining 35 years of age the sum of $100,000 should be set aside for her, the daughter to receive the income during her lifetime with a power of appointment as to the corpus.

Paragraph 12 of the will read:

(12) When my youngest child shall have attained the full age of thirty-five (35) years and each child or the issue of any child having died before that age has received in the case of sons the said capital sum of

[1] (1961), 34 W.W.R. 540, 28 D.L.R. (2d) 767.

One hundred thousand ($100,000) dollars and in the case of daughters the said capital sum of One hundred thousand ($100,000) dollars for each one having been ear-marked and set aside as by this my Will provided then and thereafter to pay the annual income of the balance of the said trust fund then left in the hands of my Trustee equally amongst my children and in the event of the death of any child of mine leaving issue then such issue shall take and share and share alike the portion of income which the parent of such issue would have taken if living and at the expiration of the period of twenty (20) years from the death of my last surviving child that now lives then as to as well the capital as the income of the said trust fund UPON TRUST for all of my grandchildren then living in equal shares that is to say share and share alike.

Paragraph 14 of the will provided, *inter alia,* that the payments of income to the widow should be free of income tax.

The first codicil read, in part, as follows:

In the event of any son of mine marrying and departing this life leaving him surviving a widow and child or children I WILL AND DIRECT that such widow take an equal share per capita with her child or children in all moneys coming to her child or children under and by virtue of the provisions of my said Last Will and Testament and in the event of there being left a widow and no issue then I WILL AND DIRECT that such widow be paid by my said Trustee an annuity of two thousand four hundred dollars payable and to be paid by my said Trustee in equal monthly payments computed from the first day of the calendar month next following my decease until and up to the day of her death or remarriage with full power to my said Trustee to take and apply so much of the incomes and profits of the said Trust Fund under my said last Will and Testament as may be necessary for the purposes of this annuity.

The income from the residue of the estate after providing the $100,000 for each of the testator's children has proved sufficient to pay the income directed to be paid to the widow (plus an additional allowance awarded to her by order of D. A. McDonald J. made on September 28, 1934, under the *Testator's Family Maintenance Act*) and to leave a surplus of income each year to be divided among the testator's children.

The second codicil appointed additional executors and continued:

As regards and with reference to my second son Howard Jones who has contracted an ill-advised marriage and has become entangled in disputes and troubles with his wife I revoke all gifts and provisions made to or for him in my said last Will and Testament and in lieu thereof I give devise and bequeath as follows that is to say: All moneys in and by my said Last Will and Testament bequeathed to or provided for or directed to be paid to or for the benefit of my said son Howard Jones shall fall back into and be accumulated with and form part of "the said Trust

Fund" directed by my said last Will and Testament to be created and accumulated and I will and direct that except as hereinafter in this Codicil provided the Executors and Trustees of my said last Will and Testament shall deal with and distribute all my estate and also the said Trust Fund as though my said son Howard Jones had never been born subject however to the two following provisions namely first that my said trustees and Executors shall pay to the said Howard Jones the sum of seventy dollars per month so long as he shall live computed from the first day of the month next following my decease and second that if in the event of the said Howard Jones on the day of his attaining the full age of thirty-five years being free of disputes and troubles with his present wife and being under no liability to contribute and pay either directly or contingently to her any money received by him from my estate then the said Howard Jones shall be reinstated so as to receive as on and from that day as a new gift and without any right to claim back for intervening time all and singular such money, share of my said estate and provisions for his benefit as on attaining the said age he would have been entitled to under my said last Will and Testament if this Codicil had not been made.

Howard Jones married Virginia Jean Jones (now Virginia Jean Wallace) on March 6, 1933.

Shortly after the testator's death (the exact date does not appear in the material before us) proceedings were commenced by originating summons in the Supreme Court of British Columbia to determine whether Howard Jones was entitled to receive the gifts and bequests provided for him under the testator's will unaffected by the provisions of the second codicil quoted above. The question raised was whether the codicil was void as being against public policy. The matter came before Murphy J. and on May 28, 1934, that learned judge gave judgment upholding the validity of the codicil. Howard Jones appealed to the Court of Appeal for British Columbia and his appeal was dismissed, McPhillips and McQuarrie JJ.A. dissenting. The reasons of the Court of Appeal are reported *sub nom. In Re Estate of Stephen Jones, Deceased. The Royal Trust Company et al. v. Jones et al. (No. 2)*[1].

At a date not stated in the material an action was commenced in the Supreme Court of British Columbia in which Howard Jones, his wife Virginia Jean Jones and his two infant daughters were plaintiffs and the executors of the testator and all the other persons then living entitled to share in the estate were defendants. The pleadings in that action are not before us but it appears from the judgment of Manson J., before whom it was tried, and from his reasons that the plaintiffs asked that the judgment of

[1] (1934), 49 B.C.R. 204.

Murphy J., affirmed by the Court of Appeal as set out above, be set aside upon the grounds: (i) that all the interested parties were not before the Court; (ii) that the plaintiff Howard Jones had, under duress, failed to produce certain material evidence before Murphy J.; and (iii) that other material evidence had just recently come to the knowledge of Howard Jones which had not been produced before Murphy J.

On June 26, 1945, Manson J. gave judgment.

In paragraph 1 of his formal judgment, that portion of the second codicil to the testator's will quoted above is declared to be invalid, void and of no effect.

Paragraph 2 reads as follows:

2. That the Judgments of the Honourable Mr. Justice Murphy and of the Court of Appeal in the pleadings herein mentioned and dated the 28th day of May, 1933, and the 9th day of October, 1933, respectively, be and the same are hereby set aside.

Paragraph 3 commences with the words:

3. That the Defendants The Royal Trust Company and Samuel McClure, as the Executors and Trustees of the will of the said Stephen Jones, deceased, shall and may from and after the date hereof administer and distribute the estate of the said Stephen Jones, deceased, as if the said codicil bearing date the 5th day of June, 1933, being the second codicil to his will bearing the date the 18th day of December, 1928, had never included the words and terms quoted in paragraph No. 1 hereof, but subject to the following conditions, namely:

There follow a number of provisions, consented to by Howard Jones, dealing with the manner in which the accounts between him and the executors were to be adjusted.

No appeal was taken from the judgment of Manson J. and the executors have ever since administered the estate and made payments of capital and income in reliance on that judgment.

On September 25, 1945, Howard Jones left his wife, Virginia Jean Jones in British Columbia and went to California, U.S.A. Later Virginia Jean Jones went to Reno, Nevada, and commenced an action for divorce on October 15, 1945. Howard Jones entered a general appearance in that action and both parties were present in Nevada at the time of the hearing. A decree of divorce was granted by the Nevada court on December 7, 1945. Thereafter Virginia Jean Jones returned to British Columbia, and on February 23, 1946, was married there to Hugh Holdsworth Wallace.

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Howard Jones married Virginia Lorraine Hurst in Nevada on December 7, 1945, and then returned with her to California. As already stated, there was born of this marriage one child, Howard Stephen Jones.

Following the death of Howard Jones, on March 18, 1958, the executors were in doubt as to the validity of the divorce granted in Nevada and as to what persons were entitled to the share of the testator's estate to which Howard Jones had been entitled in his lifetime.

On May 29, 1958, the Royal Trust Company, which was then the sole surviving executor of the testator, commenced proceedings by originating summons for the determination of the following questions:

1. From what source shall the Trustee make the monthly payments of $500 to the widow of the said Testator required by Clause 4 of the Will and the monthly payments of $200 to said widow required by the order of the Honourable Mr. Justice McDonald dated the 28th day of September, 1934?

2. From what source should the Trustee pay the income tax of said widow as directed by said Will and said order?

3. If any part of said monthly payments or income tax should be paid out of capital, in what order should capital and income be resorted to?

4. Is the widow of said Testator entitled to have all her income taxes paid out of the estate of said Testator regardless of the source of income, or only so far as her income comes from the estate of said Testator?

5. To what extent can and should the Trustee exercise the power given by the following language in Clause 3 of the Will of said Testator, viz:

> *UPON TRUST* out of the incomes and profits of the said trust fund, with right and full power to my Trustee to have resort to principal in the event of any deficiency in incomes and profits?

6. Was the Nevada divorce dated 7th December 1945 between the Defendant Virginia Jean Wallace and said Howard Jones a valid divorce?

7. Did said Howard Jones die "leaving him surviving a widow" within the meaning of the said Testator's second codicil?

8. If so, who was such widow?

9. Is the defendant Virginia Jean Wallace estopped from claiming to be such widow by having obtained the said Nevada divorce or by having later purported to re-marry?

10. Was said Howard Jones' purported marriage to the defendant Virginia Lorraine Jones a valid marriage?

11. What children did said Howard Jones leave "him surviving" within the meaning of said first codicil and what issue within the meaning of Clause 12 in said testator's will?

12. How should the Trustee divide the income of the Testator's estate that Howard Jones would have taken if living between the lawful widow and the children of Howard Jones?

13. If neither the defendant Virginia Jean Wallace nor the defendant Virginia Lorraine Jones can claim as the lawful widow of said Howard Jones, who is entitled to the portion of the income of the estate of said Testator that Howard Jones would take if living?

14. If the said Howard Jones left a lawful widow, will she take any interest, and if so what interest, in the capital of the estate of said Testator?

15. If such widow takes an interest in such capital will this be contingent on (a) her surviving the last surviving child of said Testator by twenty years, (b) her having children who survive the last surviving child of said Testator by twenty years?

A preliminary inquiry as to the domicile of Howard Jones, directed by order of McInnis J., came on for hearing before Macfarlane J. and on October 26, 1959, that learned judge made an order declaring that Howard Jones was domiciled in the State of California both:

(1) at the date when the defendant Virginia Jean Wallace obtained against said Howard Jones a divorce decree or alleged divorce decree dated the 7th day of December, 1945 in the Second Judicial District Court of the State of Nevada in and for the County of Washoe; and

(2) at the date when the defendant Virginia Jean Wallace presented her petition on which said decree was granted.

This order further provided that the matter should be brought on again before the presiding judge in Chambers and that evidence of the relevant law of California might be given by affidavit subject to any order in that regard which the presiding judge might make.

The matter later came on for hearing before Maclean J. and on June 17, 1960, that learned judge gave judgment making the following answers to the questions quoted above:

Question 1.

Answer: All the monthly payments should be made in priority to payments of any other income under said will out of the income from the estate of the said Testator coming to the hands of the plaintiff, so far as the same suffices, other than income of the special trust funds set aside for the three daughters of Testator, with resort to residuary capital in any case of insufficiency of said general income.

Question 2.

Answer: From the same sources as the widow's monthly payments of income, as directed in the last Answer.

Question 3.

Answer: Payments should be made to the widow of said Testator out of income so far as this extends, with resort to capital from time to time so far as income proves deficient.

Question 4.

Answer: In paying the income taxes of said widow the plaintiff shall follow the provisions of para. 6(*c*) and (*d*) of the agreement dated the 15th day of December, 1945, forming Exhibit "A" to said affidavit of William Booth McFadden, which provisions the Court finds to be in accordance with the will of the said Testator.

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Question 5.

Answer: At the present state of administration the power extends only to the monthly payments referred to in the Answer to Question 1.

Question 6.

Answer: No answer needed.

Question 7.

Answer: Yes.

Question 8.

Answer: The defendant Virginia Lorraine Jones.

Question 9.

Answer: Yes, she is estopped.

Question 10.

Answer: The validity of this marriage depends on the validity of the said divorce of Howard Jones; the validity of the said divorce and marriage for the purposes of this summons is governed by the law of California, and the marriage must be considered valid because by that law no party interested in contesting the said divorce has any locus standi to contest it.

Question 11.

Answer: The children and issue in each case are the defendants Elsie Margaret Langmaid, Carol Anne Jones and Howard Stephen Jones.

Question 12.

Answer: The trustee should pay the said income (one-fifth of all income of the residuary estate after monthly payments of income to the widow of the said Testator) as follows:

One-third of said one-fifth to the defendant Elsie Margaret Langmaid;

One-third of said one-fifth to the defendant Carol Anne Jones;

One-sixth of said one-fifth to the defendant Howard Stephen Jones (through his guardian during his infancy);

One-sixth of said one-fifth to the defendant Virginia Lorraine Jones.

Question 13.

Answer: No answer needed.

Question 14.

Answer: If the defendant Virginia Lorraine Jones survives the expiration of the period of 20 years from the death of said Testator's last surviving child, and the defendant Howard Stephen Jones survives the same period, then said Virginia Lorraine Jones will share equally with said Howard Stephen Jones the portion of said Testator's capital that said Howard Stephen Jones would have taken in his sole right if she had not survived said period.

Question 15.

Answer: Virginia Lorraine Jones' taking capital will depend on both her and Howard Stephen Jones surviving the last surviving child of said Testator by 20 years.

From this judgment Elsie Margaret Langmaid and Carol Anne Jones appealed to the Court of Appeal asking that the judgment be varied. While their notice of appeal did not specify the terms of the judgment for which they asked, it

is clear from the grounds set forth in the notice that the answers to the first five questions were not attacked and that what the appellants sought was a declaration that they alone (to the exclusion of Virginia Lorraine Jones and Howard Stephen Jones) were entitled to share in that part of the testator's estate bequeathed to the widow and children of Howard Jones after his death. This was the only question raised for the decision of the Court of Appeal. No appeal was taken by any other party.

The material filed before Maclean J. included an affidavit exhibiting a copy of the judgment of the Court of Appeal dated October 9, 1934, and a copy of the judgment of Manson J. dated June 26, 1945. It was, of course, necessary that the last mentioned judgment should be before Maclean J. and presumably it was thought desirable to include the judgment of the Court of Appeal in the material so as to complete the history of the matter.

The argument of the appeal commenced on February 22, 1961, continued on February 23 and concluded on February 24. The appeal case filed in this Court includes a transcript of what was said in argument on the final day of the hearing in the Court of Appeal. From this it appears that it was only at the conclusion of the argument on February 23 that counsel for the Royal Trust Company called the attention of the Court to a passage in his factum which, as quoted in the reasons of the Court of Appeal, read as follows:

The plaintiff (that is the Trustee) has the embarrassing role of bringing before the court what *prima facie* appears to be a conflict between a judgment of this court dated the 9th of October, 1933 (A.B. pp. 66-68) and a judgment of Manson J. dated the 26th June, 1945. The judgment of this Court upheld the validity of the testator's second codicil, which disinherited Howard Jones unless he complied with certain conditions, which he did not. This Court's reasons are reported at (1934) 49 B.C.R. 207. The judgment of Manson J. held the codicil void and of no effect, as being contrary to public policy.

Bringing this conflict forward is not at all in the plaintiff's interest, since the plaintiff has acted upon the judgment of Manson J. But the plaintiff feels that it cannot avoid doing so, since it is asking for the advice and direction of the courts, and must disclose the material facts. As has already been said, without Manson J.'s judgment none of the persons claiming as wife or children of Howard Jones can have any claim at all under the Will, since the second codicil said that unless its conditions were complied with, the estate should be distributed as though Howard Jones had never been born:

Maclean J., without discussing the point at all, proceeded on the assumption that Manson J.'s judgment was operative. The judgments of this Court and of Manson J. alone are before the Court; the record of the

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case before Manson J. is of some size and the plaintiff did not feel justified in going to the expense of having copies made unless and until the Court required them.

As has been said, the plaintiff has no interest in disturbing or any wish to disturb the judgment of Manson J. Its interest is all the other way.

With respect, this passage appears to me to have been unfortunately worded; the suggestion that there was a conflict between the judgments mentioned presupposed that both were in force whereas the earlier one had been set aside by the later.

In giving the reasons of the Court of Appeal O'Halloran J.A. made it clear that, on the assumption that the part of the second codicil quoted above purporting to disinherit Howard Jones was invalid, the Court would have dismissed the appeal. The learned Justice of Appeal then referred to the passage in the factum of counsel for the Royal Trust Company quoted above and went on to hold that in pronouncing the judgment of June 26, 1945, Manson J. had acted without jurisdiction, that his judgment was a nullity and that the acts done by the trustees in pursuance thereof were without validity.

By the formal judgment of the Court of Appeal it was declared ordered and adjudged:

(a) That the judgment of Mr. Justice Maclean now under appeal, and the originating summons upon which it was based, be and the same are hereby set aside.

(b) That the said judgment of Mr. Justice Manson in so far as it purports to set aside and overrule the judgment of the Court of Appeal as reported in 1934—49 B.C.R. 207, is on its face without jurisdiction and should be quashed as a nullity and is hereby set aside and quashed accordingly.

(c) That a trial be directed to determine upon all admissible evidence . . . .

There follow a number of paragraphs providing in effect that at the trial so directed it shall be determined what ought to have been done by the trustees of the testator's will if the judgment of Manson J. had never been pronounced.

Pursuant to leave granted by this Court, appeals were brought from this judgment (i) by the Royal Trust Company as surviving executor and trustee of the testator and (ii) by Virginia Lorraine Jones and Howard Stephen Jones. In both of these appeals it was asked that the judgment of the Court of Appeal be set aside *in toto,* that the judgment of Maclean J. be restored and that the costs of all parties in this Court and in the Court of Appeal should be paid out of the Estate.

On the argument before us, counsel for the respondents other than Stephen Jones Jr. (who was not represented by counsel) supported the submission of counsel for the appellants except on the question of the order which should be made as to costs.

I have reached the conclusion that the judgment of the Court of Appeal must be set aside. It is founded upon the view, which, in my respectful opinion, is erroneous, that because the judgment of Murphy J. had been affirmed by the Court of Appeal, a judge of the Supreme Court of British Columbia was without jurisdiction to entertain an action to set it aside. Counsel for the appellants referred us to a wealth of authority to shew that this is not the law. It will be sufficient to refer to a few of the cases which were cited.

In *Falcke v. The Scottish Imperial Insurance Company*[1], a judgment of Bacon V.C. had been reversed by the Court of Appeal in 1886 (vide 34 Ch. D. 234) and judgment had been entered rejecting the claim of one Emanuel and directing the whole of the proceeds of an insurance policy to be paid to Mrs. Falcke. On December 22, 1886, Emanuel appealed to the House of Lords. On February 14, 1887, the parties came to a compromise and the appeal was withdrawn. In April 1887 Emanuel obtained a letter dated the — day of May, 1878, which he contended was newly discovered evidence which would have been decisive in his favour if it had been available in the earlier proceedings. Emanuel applied for leave to commence an action in the nature of a bill of review grounded upon new matter discovered after the making of the said orders. The application came before Kay J., as he then was, on August 3, 1887, and that learned Judge raised the question whether an action could be brought to review a judgment of the Court of Appeal; he thereupon directed that the matter should stand over until the following Monday so that he might be furnished with authority. After the matter had been fully argued Kay J. gave judgment holding that the old jurisdiction to entertain an action in the nature of a bill of review was unaffected by the Judicature Acts; he said in part at page 40:

> In this case leave to bring an action in the nature of a bill of review is sought because since the decision of the Court of Appeal material evidence is alleged to have been found; but such leave is not given unless,

[1] (1887), 57 L.T. 39.

first, the evidence is material; secondly, that it has been discovered since the decision; and, thirdly, could not with reasonable diligence have been discovered before. I am stating from memory what I believe to be the settled practice of the Court of Chancery in such a matter. I had doubts whether, as the decision was made since the Judicature Acts, the application should not have been made to the Court of Appeal. No authority could be found, and on consideration I came to the conclusion that it was not the practice to make the application to the Court of Appeal. The decision of the Court of Appeal is enrolled as a decision of the High Court, and the application to institute an action in the nature of a bill of review is part of the original jurisdiction of the High Court. The Court of Appeal has no original jurisdiction of that kind. The proper court to apply to is the High Court; the right application is to the High Court to exercise its original jurisdiction; there is no reason why the application should be to the Appeal Court.

Kay J. then dealt with the merits of the application and dismissed it.

Flower v. Lloyd[1], was a decision of the Court of Appeal the effect of which is accurately summarized in the headnote which reads as follows:

The Plaintiffs commenced an action to restrain the Defendants from infringing their patent, and obtained a judgment which was reversed by the Court of Appeal, who dismissed the action on the ground that the Defendants' process was no infringement of the Plaintiffs' patent. After the order on appeal was passed and entered, the Plaintiffs applied to have the appeal reheard with fresh evidence, on the ground that when an expert sent down by the Court, and whose evidence was in fact the only material evidence before the Court as to the nature of the Defendants' process, examined the Defendants' works, the Defendants had fraudulently concealed from him parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the Plaintiffs:

Held, that the Court of Appeal had no jurisdiction to rehear the appeal, and that the remedy of the Plaintiffs was by original action analogous to a suit under the old practice to set aside a decree as obtained by fraud.

The decision of the Court of Appeal in *Flower v. Lloyd* was approved in the unanimous judgment of the House of Lords, delivered by Lord Buckmaster, in *Jonesco v. Beard*[2] particularly at pages 300 and 301.

In Mitford's Chancery Pleading, 5th ed., 1847, among the bills in the nature of original bills are listed "Bills impeaching decrees upon the ground of fraud" and "Bills to avoid decrees on the ground of matter subsequent" (page 97), and at page 105 the learned author says:

A bill of review upon new matter discovered has been permitted even after an affirmance of the decree in Parliament.

[1] (1877), 6 Ch. D. 297.

[2] [1930] A.C. 298, 99 L.J. Ch. 228.

Boswell v. Coaks[1] is a decision of the House of Lords. In 1883, Fry J. gave judgment dismissing with costs an action in which it was sought to set aside a sale. In the following year the Court of Appeal reversed this decision. In 1886 the House of Lords allowed an appeal from the judgment of the Court of Appeal and restored that of Fry J. These judgments are reported at 23 Ch. D. 302; 27 Ch. D. 424; and 11 App. Cas. 232. Some years later an action was brought to have it declared that the judgment given by the House of Lords, restoring that of Fry J., was obtained by the fraudulent suppression of evidence. A motion to dismiss this action on the ground that it was frivolous and vexatious and an abuse of the process of the Court was granted by North J. whose decision was affirmed by the Court of Appeal and by the House of Lords. The unanimous judgment of the House of Lords was delivered by the Earl of Selborne. There is nothing in his speech to suggest that the bringing of an action in the High Court to impeach the earlier judgments was not the proper practice, indeed he assumes that it was the right way in which to proceed. He points out that the old practice of the Court of Chancery which required a preliminary application to the Court for leave to take proceedings in the nature of a bill of review is no longer in use and that the safeguard against an action to set aside a judgment being proceeded with on insufficient grounds is now found in the power of the Court to stay such an action. Earl Selborne then went fully into the merits and held that the action was properly dismissed on the ground that the matter which was alleged to have been newly discovered was not material.

An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal. Section 9 of the *Supreme Court*

[1] (1894), 6 R. 167.

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Act, R.S.B.C. 1936, c. 56, which was in force at the time when Manson J. dealt with the matter (and which is now section 9 of the R.S.B.C. 1960, c. 374) reads as follows:

> 9. The Court is and shall continue to be a Court of original jurisdiction, and shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the Province.

There appears to be nothing in the statutes constituting and continuing the courts in British Columbia or in the Rules of Court of that Province to suggest that there is any difference between the law and practice on this point in British Columbia and in England; in my opinion they are the same.

It follows that Manson J. had jurisdiction to entertain the action which was brought before him and his judgment in that action, not having been appealed from or otherwise impeached, is a valid judgment of the Court binding upon all those who were parties to it.

The conclusion that Manson J. had jurisdiction to pronounce the judgment of June 26, 1945, renders it unnecessary to examine the other grounds upon which counsel argued that the judgment of the Court of Appeal should be set aside.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of Maclean J. In the somewhat unusual circumstances of this case I would direct that the costs of all parties in this Court and in the Court of Appeal should be paid out of the capital of the Estate, those of the surviving trustee as between solicitor and client.

Appeal allowed, judgment at trial restored.

Solicitors for the plaintiff, appellant: Crease and Co., Victoria.

Solicitor for the defendants, respondents: W. H. M. Haldane, Victoria.

Solicitor for the defendants, appellants: T. P. O'Grady, Victoria.

Solicitor for Elsie Margaret Langmaid and Carol Anne Jones: John McConnell, Victoria.

Solicitor for Virginia Jean Wallace: P. J. Sinnott, Victoria.

KATHLEEN M. NORDSTROM (*Defendant*) .... APPELLANT;

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AND

JEAN BAUMANN (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Devolution of estates—Intestacy—Originating summons to determine right of wife to share in husband's estate—Husband killed in fire set by wife—Whether wife insane.

Courts—Procedure—Propriety of making findings of fact in civil proceedings which if proven in criminal proceedings would be held criminal.

N came to his death as a result of a fire caused by the act of his wife. The plaintiff, in her capacity as administratrix of the deceased's estate, issued an originating summons to determine the right of the widow to share in the estate of her late husband. The trial judge held that the defendant wife, when she set the fire, "did not appreciate the nature and quality of her act or know that it was wrong" and accordingly was entitled to inherit. In directing that the judgment of the trial judge and the proceedings before him, including the originating summons itself, should be "wholly set aside", the majority of the Court of Appeal did not find it necessary to review the finding as to the defendant's insanity, but disposed of the matter on the ground that the trial Court was without jurisdiction to determine by way of originating summons, or other civil proceeding, whether or not a person had committed a crime. The defendant appealed to this Court, asking that the trial judgment be restored, and the plaintiff cross-appealed, contending that the judgment of the Court of Appeal should be varied so as to direct that judgment be entered for her, and that the questions proposed by the originating summons should be answered so as to exclude the defendant from sharing in her husband's estate.

Held: The appeal should be allowed and the cross-appeal dismissed.

Per Taschereau, Locke, Martland and Judson JJ.: The judge before whom the application for directions came and the judge who heard the case were both apparently of the opinion that the questions to be determined could properly be disposed of by way of originating summons as prescribed by M.R. 765 (B.C.). This conclusion was correct. The Court had jurisdiction to determine the questions in a civil action commenced by an ordinary writ of summons, and there was no sound ground upon which to interfere with the discretion exercised by the two judges. *In Re Turcan* (1888), 58 L.J. Ch. 101; *Eggli v. Stewart* (1952), 5 W.W.R. (N.S.) 164, referred to. The question was one of procedure and not of jurisdiction and, if there were non-compliance with any of the rules or rules of practice, the matter could be dealt with under M.R. 1037.

If it were not permissible in civil actions to make findings of fact which if proven in criminal proceedings would be held criminal, the due administration of justice would be gravely impeded. Civil Courts constantly have to make such findings for the purpose of determining civil rights.

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

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Per Taschereau, Martland, Judson and Ritchie JJ.: An originating summons was a permissible, though not desirable, method of initiating these proceedings. The parties concerned consented to the case being tried in this way, and the trial judge who, in the exercise of his discretion, heard and determined the matter was clothed with jurisdiction so to do.

The rule of public policy precluding a person from benefiting from his or her own crime, which is an integral part of our law, applies also to cases where the distribution of the estate of an intestate is concerned. In re *Pitts, Cox v. Kilsby,* [1931] 1 Ch. 546; *Whitelaw v. Wilson* (1934), 62 C.C.C. 172; *Re Estate of Maud Mason,* [1917] 1 W.W.R. 329, referred to. The right to determine the question of whether or not the conduct of an individual amounts to a crime for the purpose of invoking this rule is a necessary concomitant of the jurisdiction which civil courts have long exercised in such cases.

Per Curiam: As to the cross-appeal, the plaintiff's arguments that the defendant failed to discharge the onus of proof necessary to rebut the presumption of sanity, and that the trial judge misdirected himself in the manner in which he applied the test of insanity contained in s. 16(2) of the *Criminal Code* were rejected. The trial judge's finding that the defendant was insane at the relevant time was a finding of fact based on a careful assessment of the relative value of the testimony of expert witnesses and should not be reversed on appeal. *Prudential Trust Co. Ltd. v. Forseth,* [1960] S.C.R. 210, referred to.

APPEAL and cross-appeal from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Wilson J. Appeal allowed and cross-appeal dismissed.

W. G. Burke-Robertson, Q.C., for the defendant, appellant.

David A. Freeman, for the plaintiff, respondent.

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

LOCKE J.:—The judgment of O'Halloran J.A. in this matter proceeds upon two grounds: the first being that a person's sanity or criminality should not be adjudicated upon in a hearing in a matter instituted by an originating summons; the second, that "a provincially constituted court is without jurisdiction to determine in civil proceedings whether or not a person has committed a crime."

Bird J. A. in his oral judgment said nothing as to the first point but said that, if there was to be a finding that the appellant was guilty of a crime it should be made "in a properly constituted criminal proceeding and not in a civil proceeding such as this."

[1] (1961), 34 W.W.R. 556, 27 D.L.R. (2d) 634.

Davey J.A. who dissented, considered as to the first point that the manner in which the issues had been raised and tried was a matter of discretion and said that he would not interfere with the exercise of that discretion in the circumstances of this case.

The manner in which the issue came to be tried by Wilson J. is not referred to in the judgments of the Court of Appeal[1] and, since the objection is really that the procedure followed in raising and determining the issue as to whether the appellant was entitled to share in the estate of her deceased husband, it is of importance that this should be described.

The originating summons was issued on November 1, 1957, at the instance of the respondent, in her capacity as administratrix of the estate of John Alfred Nordstrom, for the determination of three questions and, by it, the appellant was directed to cause an appearance to be entered.

The proceedings thus initiated constituted an action as that term is defined in s. 2 of the *Supreme Court Act*, R.S.B.C. 1960, c. 374. The summons was issued by the plaintiff in the proceedings relying upon Marginal Rule 765 of the Supreme Court, which permits an executor or administrator to apply by originating notice returnable in chambers for the determination, *inter alia*, of:

> (*a*) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin or heir-at-law or *cestui que* trust.

Mrs. Nordstrom, at the time of the issue of the summons, was an inmate of the Provincial Hospital for the insane and the Official Committee for British Columbia entered an unconditional appearance on her behalf.

The plaintiff then applied for directions under the provisions of Order 30 as to the manner in which the questions should be determined and such application came before Brown J. on August 17, 1958. By an order bearing that date that learned judge directed that the case be set down for hearing on the trial list without further pleadings, leave was given to the parties to call evidence at the hearing and to cross-examine on any affidavits which might be filed. It is clear that this order was made with the consent and approval of the committee acting on behalf of the defendant.

[1] (1961), 34 W.W.R. 556, 27 D.L.R. (2d) 634.

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Locke J.

In this manner the case came on for hearing before Wilson J. Counsel for the parties informed that learned judge that the date of the death and the manner in which it had been caused were admitted and that it had been agreed that the transcript of the evidence taken at the inquest, which had been held to enquire into the death of Nordstrom, should be admitted as part of the evidence at the trial and that the matter to be determined was whether at the time the defendant had set fire to the house she was insane, within the meaning of s. 16 of the *Criminal Code*. The defendant by her committee conceded that the onus was on her to establish such insanity, if it existed.

As stated in the reasons delivered, it was further admitted that if the defendant was guilty of either the crime of murder or arson she could not inherit and that the estate should be dealt with as if there had been an intestacy, but that if she was insane in the sense mentioned at the relevant time she was entitled to inherit.

Both parties called evidence and the trial was conducted in the same manner as if the action had been commenced by an ordinary summons, save that there were no pleadings. The question of the propriety of deciding the issues in this way was clearly not raised either on the application for directions or before the learned trial judge, the parties consenting to the matter being heard and disposed of by Wilson J. The propriety of proceeding in this manner was not questioned by either party in the Court of Appeal and was raised for the first time in the oral judgments given in that court. The practical aspect of the matter is that there was a trial at which both parties had full opportunity to be heard and the procedure adopted resulted in a considerable saving of expense to the litigants, since no pleadings were delivered or examinations for discovery held.

Marginal Rule 765 of the Supreme Court of British Columbia reproduces Order 55, Rule 3 of the Supreme Court of Judicature in England. The same rule is Rule 600 of the Supreme Court of Ontario. In its present form it appeared as Marginal Rule 765 of the Supreme Court Rules of 1906 and has been in force since that time.

Read literally, the portion of the rule that I have quoted above appears to authorize an application by originating summons in a case of this kind, since the question affects the rights of a person claiming to be an heir-at-law of the

deceased person. There are, however, decisions in England such as *Re Powers*[1], where it was said that the English Rule in similar terms does not authorize a summons at the instance of alleged creditors of an estate for its administration when there was a dispute as to the debt. Where, however, a summons had been issued under Order 55, Rule 3, to decide questions between executors and adverse claimants and those named as defendants had entered appearances without objection and the matter being decided adversely to them appealed to the Court of Appeal objecting that the procedure was not authorized, Cotton L.J., delivering the judgment of the Court of Appeal, said that the objection could not be given effect to in these circumstances in the Court of Appeal (*In Re Turcan*[2]). That learned judge, whose opinion was concurred in by Bowen and Fry L. JJ., said in part:

> Order LV is not an order conferring jurisdiction, but merely regulating the mode in which questions are to be brought before the Court. If a person who is served with an originating summons in a matter not falling within a, b, c, d, e, f, and g in the 3rd rule of Order LV objected to the jurisdiction, and did not appear, the Court would not go on; but when the party has appeared and has taken the decision of the Court, it would be wrong to let him take the objection when the matter comes before the Court of Appeal.

In *Eggli v. Stewart*[3], where an originating summons had been issued to determine the validity of an alleged creditor's claim against the estate of a deceased person, Bird J.A., with whom O'Halloran J.A. agreed, said in part (p. 169):

> In my view the Rule is broad enough to permit determination thereunder of the validity of a debt, even where there is a dispute on fact; but it lies in the discretion of the presiding judge to decide whether the question can conveniently and economically be disposed of by the summary procedure prescribed by the Rule, or can be determined more satisfactorily in an action commenced by writ of summons.

In the present matter, Brown J. and Wilson J. were apparently of the opinion that the questions could properly be disposed of in this manner, a conclusion with which I respectfully agree. Considering as I do that the Court had jurisdiction to determine the questions in a civil action commenced by an ordinary writ of summons, I am unable to perceive any sound ground upon which to interfere with the discretion exercised by these two learned judges. The question is one of procedure and not of jurisdiction and, if

[1] (1885), 30 Ch. D. 291, 53 L.T. 647.
[2] (1888), 58 L.J. Ch. 101, 40 Ch. D. 5. [3] (1952), 5 W.W.R. (N.S.) 164.

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there were non-compliance with any of the rules or rules of practice, the matter might be dealt with under Marginal Rule 1037.

As to the second question, if it were not permissible in civil actions to make findings of fact which if proven in criminal proceedings would be held criminal, the due administration of justice would be gravely impeded. If this was the law, this Court would not have considered the issue as to whether the assured was a suicide in *London Life Insurance Co. v. Trustees of Lang Shirt Co. Ltd. et al.*[1], since, as found by Mignault J., where there is a successful attempt at suicide a crime is committed. Civil courts constantly have to make such findings, as in actions upon fire insurance policies where the defence may be that the assured has made false statements in a proof of loss, thus committing the offence of attempting to obtain money by false pretences. It is also unfortunately the fact that trial judges at times must find that witnesses have knowingly, with intent to mislead, sworn to what is false in the course of a trial, conduct punishable in criminal proceeding as perjury. The right to make findings such as these for the purpose of determining civil rights have, so far as I am aware, not been previously questioned.

If the court was without jurisdiction to determine the first question in a civil action, then since it is clear that both parties consented to submit their rights to be determined by Wilson J. it would be necessary to consider whether the proceedings were in the nature of an arbitration from which there would be no appeal (*Overn v. Strand*[2]; *Wong Soon v. Gareb*[3]). However, in the view I take of the matter this question does not arise.

I would allow the appeal and restore the judgment at the trial.

I have had the advantage of reading the reasons for judgment to be delivered by my brother Ritchie regarding the cross-appeal, with which I agree and with the proposed order as to costs.

[1] [1929] S.C.R. 117, 1 D.L.R. 328.
[2] (1930), 44 B.C.R. 47.
[3] (1935), 49 B.C.R. 456, 2 D.L.R. 415.

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

RITCHIE J.:—These proceedings were initiated by way of an originating summons issued by the respondent in her capacity as administratrix of the estate of John Alfred Nordstrom pursuant to the provisions of Marginal Rule 765 of the 1943 Rules of the Supreme Court of British Columbia for the determination of the following questions:

1. Is the above-named Defendant, Kathleen M. Nordstrom, widow of the late John Alfred Nordstrom, entitled to the distributive share of the estate of the said John Alfred Nordstrom, deceased, as provided for in the Administration Act, R.S.B.C. 1948, Chapter 6, as amended by S.B.C. 1955, in view of the circumstances that the said John Alfred Nordstrom came to his death as a result of a fire caused by the act of the said Defendant?
2. If the answer to Question 1 is in the affirmative, to whom should the share of the said Defendant be paid in view of her confinement as a patient in the Provincial Mental Hospital, Essondale, B.C.?
3. If the answer to Question 1 is in the negative, to whom should the share which would otherwise have been payable to the Defendant be paid?

The appellant, being a patient in the Provincial Mental Hospital, was represented by counsel acting on instructions from the Official Committee appointed under the *Lunacy Act*, R.S.B.C. 1948, c. 194, whose position before the Court was governed *inter alia* by the provisions of Marginal Rule 143 of the said Rules which contains the following provision:

In all causes or matters to which any . . . person of unsound mind . . . is a party, any consent as to the mode of taking evidence or as to any other procedure shall, if given with the consent of the Court or a Judge by the . . . committee, or other person acting on behalf of the person under disability, have the same force and effect as if such party were under no disability and had given such consent: . . . .

At the opening of the proceedings and with the apparent consent of the trial judge, it was admitted by counsel for the Official Committee that Mr. Nordstrom died on May 30, 1956, by reason of asphyxiation suffered in a fire which had been set by the appellant, and it was further agreed by counsel for both parties that the transcript of the proceedings at the coroner's inquest on the body of John Alfred Nordstrom, except for the findings of the coroner's jury, should be treated as evidence in these proceedings.

The only evidence as to the origin of the fire was contained in an account given by Dr. J. M. Coles of a statement made by the appellant on the morning after the event in which she said that she was feeling unwell on the evening in question and that she had got out of bed on two occasions to get herself some food and soft drink, and that when her husband told her that she had eaten enough and to come to bed she tried to call the doctor but her husband knocked the telephone out of her hand. Dr. Coles' report of her statement then continues:

> . . . she said, "I then lay down and waited until I heard him snoring good and loud," and when I asked her what she did next she stated that she got up and went out to the kitchen and set the curtains on fire. She was then asked "How did you set the curtains on fire", and she replied that she had taken some matches and lit the curtains.

On being further questioned at the trial, Dr. Coles stated:

> Then, as I recall it, she stated that she had taken the oil can and used it—the oil thereof—to soak the curtains, so that they would fire up.

Even if counsel had made no admission, it seems to me that this uncontradicted statement, taken together with the medical evidence that Mr. Nordstrom's death was caused by asphyxiation and the police evidence that his badly burned body was found in the bedroom after the fire would have afforded ample justification for the finding of the learned trial judge "that the widow set fire to the house and this act caused Nordstrom's death."

The real issue before the trial judge was whether or not, when she set this fire, the appellant was insane to such an extent as to relieve her of the taint of criminality which both counsel agreed would otherwise have precluded her from sharing in her husband's estate under the rule of public policy exemplified in such cases as *Lundy v. Lundy*[1], *The London Life Insurance Company v. Trustees of Lang Shirt Company Limited et al.*[2], *In the Estate of Crippen*[3] and *Cleaver v. Mutual Reserve Fund Life Association*[4].

The learned trial judge analyzed the evidence with great care, including the previous record of happy relations between the Nordstroms, the deranged and contradictory behaviour of the appellant after the fire and her long history of mental disease, epilepsy and diabetes, and having then weighed the opinions of four doctors, he concluded, based in large measure on the evidence of the Assistant Clinical

[1] (1895), 24 S.C.R. 650.
[2] [1929] S.C.R. 117, 1 D.L.R. 328.
[3] [1911] P. 108, 80 L.J.P. 47.
[4] [1892] 1 Q.B. 147, 61 L.J.Q.B. 128.

Director of the Provincial Mental Hospital, that the appellant, when she set fire to the house, "did not then appreciate the nature and quality of her act or know that it was wrong."

In conformity with this finding as to the appellant's mental condition, the trial judge ordered that the first question raised by the originating summons be answered in the affirmative and that the appellant's share of her husband's estate should be paid to the Official Committee.

In directing that the judgment of the trial judge and the proceedings before him, including the originating summons itself, should be "wholly set aside", the majority of the Court of Appeal did not find it necessary to review the finding as to the appellant's insanity, but rather disposed of the matter on a ground which had been raised by neither party, namely, that the trial court was without jurisdiction to determine by way of originating summons or other civil proceeding whether or not a person had committed a crime.

From this judgment the appellant now appeals, asking that the decision of the trial judge be restored and the respondent, by way of cross-appeal, contends that the judgment of the Court of Appeal should be varied so as to direct that judgment be entered for her, and that the questions propounded by the originating summons should be answered so as to exclude the appellant from sharing in her husband's estate.

In the course of rendering his decision in the Court of Appeal, O'Halloran J.A. said in part:

> What I am saying from now on, I am speaking only for myself. In my judgment a person's sanity or insanity or criminality should not be adjudicated upon in a hearing by way of Originating Summons. It is my judgment also that in view of the divisional heads in Secs. 91 and 92 of the *British North America Act* that a provincially constituted Court is without jurisdiction to determine in civil proceedings whether or not a person has committed a crime.

Bird J.A. expressed his concurrence in this view in the following brief paragraph:

> I would allow the appeal substantially on the ground that the Order made below has for its foundation a finding that the appellant was guilty of a crime. It is my view that if there is to be any such finding it should be made in a properly constituted criminal proceeding and not in a civil proceeding such as this.

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Ritchie J.

I do not think that the procedure provided by Rule 765 of the said Rules of Court was primarily designed for the purpose of having seriously contested questions of fact determined by originating summons, but the terms of that Rule provide that the administrator of a deceased person may take out as of course an originating summons for the determination of "any question arising in the administration of the estate or trust" and of "any question affecting the rights of a person claiming to be . . . next of kin or heir-at-law . . . ." and it cannot be said that the trial judge was without jurisdiction to determine such a contested question of fact when so raised. In the present case it is plain that the parties concerned consented to the case being presented in this way, and as the trial judge, in the exercise of his discretion, heard and determined the matter, I agree with the dissenting opinion of Davey J.A. in the Court of Appeal and "would not be prepared to interfere with the use of an originating summons under the circumstances of this case."

The rule of public policy which precludes a person from benefiting from his or her own crime is an integral part of our system of law, and although some doubts have been raised as to whether this rule overrides the statute law as to the distribution of the estate of an intestate (see *In re Houghton, Houghton v. Houghton*[1]), the better view appears to me to be that it applies to such cases (see *In re Pitts, Cox v. Kilsby*[2], *Whitelaw v. Wilson*[3], and *Re Estate of Maud Mason*[4]). As Fry L.J. in *Cleaver v. Mutual Reserve Fund Life Association, supra,* at p. 156 said:

> It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.

As has been indicated the civil courts of this country have repeatedly determined the question of whether or not the conduct of an individual amounts to a crime for the purpose of invoking this rule. Such a determination does not constitute a conviction or acquittal of the individual concerned nor is it in any way binding on a criminal court which may later be concerned with the same circumstances, but the

[1] [1915] 2 Ch. 173 at 176.
[2] [1931] 1 Ch. 546 at 550.
[3] (1934), 62 C.C.C. 172 at 177.
[4] [1917] 1 W.W.R. 329, 31 D.L.R. 305.

right to determine such an issue is a necessary concomitant of the jurisdiction which civil courts have long exercised in such cases.

It is true that if such an issue is raised in a civil court at a time when proceedings are pending for the determination of the same question in a criminal court, application may be made in the civil court for a stay of proceedings until the criminal prosecution has been concluded, but no such application was made in the present case, and in any event the view has been authoritatively expressed that such a discretion should only be exercised in exceptional circumstances (see *Canada Starch Company v. St. Lawrence Starch Company*[1], and *MacKenzie v. Palmer*[2]).

In view of the above, I am of opinion that an originating summons was a permissible, though not desirable, method of initiating these proceedings and that the learned trial judge was clothed with jurisdiction to determine the issue of whether or not the appellant was sane when she lit the fire that caused her husband's death, and I would, accordingly, allow this appeal.

The cross-appeal is directed to attacking the learned trial judge's finding as to the insanity of the appellant and is based on the contention that the appellant failed to discharge the onus of proof necessary to rebut the presumption of sanity, and that the learned trial judge misdirected himself in the manner in which he applied the following test of insanity contained in s. 16(2) of the Canadian *Criminal Code*:

> 16. (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

It is contended on behalf of the respondent (cross-appellant) based on what was said in the cases of *Rex v. Codere*[3], and *Rex v. Windle*[4], that the words "nature and quality" as employed in this section must be construed as referable to the physical character of the act and not as being intended to distinguish between its physical and moral

[1] [1936] 2 D.L.R. 142, per Riddel J.A. at 148-9.
[2] (1922), 62 S.C.R. 517 at 520, 63 D.L.R. 362.
[3] (1916), 12 Cr. App. Rep. 21.
[4] [1952] 2 All E.R. 1, 2 Q.B. 826.

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aspects, and that the words "knowing that an act or omission was wrong" must be treated as meaning "wrong in law" as opposed to meaning "morally wrong".

It does not seem to me to be necessary in the present case to express any opinion concerning the adequacy of the tests of insanity adopted in the *Codere* and *Windle* cases, *suprà.* Although the trial judge considered these cases in the course of his decision, it is to be remembered that he had medical evidence before him to the effect that the appellant, when she lit the fire, was in such a state of unawareness as to be unable to appreciate that what she was doing was wrong *in any sense,* and, as the learned trial judge found this evidence to be consistent with all the circumstances, he had no occasion to concern himself with distinctions between the moral, physical or legal aspects of the appellant's understanding.

In my view, the success of this cross-appeal must depend on it being shown that the learned trial judge was clearly wrong in his assessment and interpretation of the evidence and that the appellant failed to discharge the burden of proving insanity.

The onus of proof lying upon the appellant was that of showing that

> . . . balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant . . . reasonable men in concluding that it had been established that the accused when "she" committed the act was mentally incapable of knowing its nature and quality, or if "she" did know it, did not know that "she" was doing what was wrong. . . .

(See *Clark v. The King*[1], per Anglin J. (as he then was)).

Counsel for the respondent (cross-appellant) stressed the evidence of the medical experts who expressed a different view of the appellant's condition from that expressed by Dr. Halliday, the Assistant Clinical Director of the Provincial Mental Hospital, and on this ground it is contended that the appellant has not and cannot meet this onus.

In this regard the learned trial judge said:

> I think I must conclude that Dr. Gould and Dr. Coles, with the proper caution one expects of experts, probably think that Mrs. Nordstrom was not insane within the meaning of the M'Naghten rules, that Dr. Fister thinks she may or may not have been insane within the meaning of those rules, and that Dr. Halliday has a clear opinion that she

[1] (1921), 61 S.C.R. 608 at 626, 59 D.L.R. 121.

was insane. Consideration of the circumstances of the case as revealed by the witnesses impels me to the conclusion that Dr. Halliday's opinion is most consistent with those circumstances and ought to be accepted.

The language of Lord Alness, speaking for the Privy Council in *Caldeira v. Gray*[1], appears to me to be pertinent in the circumstances. He there said at p. 542:

> The learned trial judge accepted the view of the medical men adduced as witnesses for the respondent, and rejected the view of the medical men adduced as witnesses for the appellant. Their Lordships see no reason to doubt that, in assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial judge—e.g., whether, . . . they confined themselves to giving evidence, or acted as advocates—may powerfully and properly influence the mind of the judge who sees and hears them in deciding between them. These advantages, which were available to the trial judge, are manifestly denied to their Lordships sitting as a Court of Appeal.

As the trial judge's finding that the appellant was insane at the relevant time is a finding of fact based on a careful assessment of the relative value of the testimony of expert witnesses, I do not think it should be reversed on appeal (see *Prudential Trust Company Limited v. Forseth*[2]).

In the result, I would allow this appeal, dismiss the cross-appeal and restore the judgment of the learned trial judge.

At the outset of the proceedings, counsel for the respondent made the following statement:

> The administratrix, although nominally acting as administratrix,—she is, of course, opposing any interest of her stepmother—was the daughter of the deceased, but not the daughter of the Defendant, Mrs. Nordstrom, ...

In view of this situation, I would direct that the costs of the appeal and cross-appeal to this Court and of the appeal to the Court of Appeal should be paid by the respondent personally, although I would not disturb the disposition of costs of the trial made by the trial judge.

Appeal allowed, cross-appeal dismissed and judgment at trial restored.

Solicitors for the defendant, appellant: Douglas, Symes & Brissenden, Vancouver.

Solicitors for the plaintiff, respondent: Freeman, Freeman, Silvers & Koffman, Vancouver.

[1] [1936] 1 All E.R. 540, 80 Sol. Jo. 243.
[2] [1960] S.C.R. 210, 21 D.L.R. (2d) 587.

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THE ATTORNEY GENERAL OF CANADA (*Plaintiff*);

AND

LAMINATED STRUCTURES & HOLDINGS LIMITED (*Defendant*) .... APPELLANT;

AND

EASTERN WOODWORKERS LIMITED (*Defendant*) .... RESPONDENT;

AND

TIMBER STRUCTURES OF CANADA LIMITED (*Defendant*).

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Contracts—Contract for supply of materials—Disclosure of purpose for which materials required—Reliance of purchaser on skill and judgment of supplier—Implied condition as to fitness of materials—Liability of supplier.

The defendant E Ltd. entered into a contract with a Crown agency for the construction of a maintenance and storage garage for the Department of National Defence. The original specifications contemplated the use of steel framework, but shortly after they were issued an alternative of laminated wood frame was authorized. L Ltd. offered to supply E Ltd. with laminated wood trusses for the project. The latter company, as the result of instructions from a second Crown agency specifying T Ltd. as the supplier, gave permission to L Ltd. to place an order for structural wood frame components with that firm, for whom L Ltd. were distributors. A few days after the building was completed and accepted by the Crown engineers, a partial collapse of the roof occurred. In an action brought by the Attorney General of Canada, the trial judge held that E Ltd. was liable for damages to government vehicles caused by the collapse, and held further that E Ltd. could recover the cost of these damages and the cost to it of re-erecting the collapsed structure from L Ltd. The latter's appeal to the Supreme Court of Nova Scotia in banco was dismissed, and an appeal was then brought to this Court.

Held: The appeal should be dismissed.

The question of the reliance of E Ltd. on the skill and judgment of the appellant was a question of fact which had been decided by the judges below, who were of the unanimous opinion that E Ltd. had placed such reliance on the appellant and that there were no circumstances such as to exclude the condition as to fitness of the materials which was implied

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Ritchie JJ.

by law. There was a clear preponderance of evidence to support the finding that E Ltd. disclosed to L Ltd. the purpose for which the wooden frame and component parts were required; that it effectively disclosed to L Ltd. the reliance placed upon it; and that the cause of the collapse was within the area of that reliance. Neither the requirement of conformity to the plans and specifications nor the part played by T Ltd. operated to exclude such reliance or furnish proof that the reliance was placed on the latter company and not upon L Ltd. *Hayes, Trustee of Preload Co. of Canada Ltd. v. City of Regina*, [1959] S.C.R. 801, applied; *Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] 2 A.C. 74; *Medway Oil & Storage Co. v. Silica Gel Corporation* (1928), 33 Com. Cas. 195; *Mash and Murrell, Ltd. v. Joseph I. Emanuel, Ltd.*, [1961] 1 All E.R. 485, referred to.

APPEAL from a judgment of the Supreme Court of Nova Scotia in banco[1], dismissing an appeal from a judgment of Ilsley C.J. Appeal dismissed.

Donald McInnes, Q.C., J. H. Dickey, Q.C., and *A. J. Campbell, Q.C.,* for the defendant, appellant.

J. W. E. Mingo and *D. R. Chipman,* for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia en banc[1] dismissing the appeal of the present appellant from a judgment of Ilsley C.J. which ordered that the Attorney General of Canada recover the sum of $7,539.21 from the respondent in respect of damage to Government vehicles caused by the partial collapse of the roof of a building constructed by the respondent as general contractor, and which ordered further that the respondent have judgment against the appellant, as the supplier of the defective material which caused the collapse of the said roof, for the said sum, and also for the sum of $66,973.02 being the cost to the respondent of re-erecting the collapsed structure under the terms of its contract with the Crown.

Neither the Attorney General of Canada nor Timber Structures of Canada Limited is a party to this appeal, and the issue is confined to the question of whether or not the appellant is liable to the respondent either in contract or in tort for the damage sustained by the respondent as a result of the collapse of this roof which has been found to have been occasioned by the incorporation in its structure of a

[1] (1961), 28 D.L.R. (2d) 92.

defective laminated wood truss negligently constructed by Timber Structures of Canada Limited and, therefore, not reasonably fit for the purpose for which it was used or required to be used.

The essence of the dispute insofar as constractual liability is concerned is that the respondent contends, as the courts below have found, that it was entitled to rely and did rely on the skill and judgment of the appellant from whom it ordered the laminated wood trusses and that the appellant was accordingly in breach of an implied condition that these materials would be reasonably fit for the purpose for which they were required.

It is contended on behalf of the appellant on the other hand that the circumstances are such as to exclude the existence of any such condition and that as it was ordered by the respondent to obtain and incorporate in the structure the very trusses which proved to be defective, it was merely carrying out instructions under conditions which gave rise to no warranty or condition except that it would order and obtain the laminated wood products from the makers designated by the respondent and indeed by the Government, namely, Timber Structures of Canada Limited.

On December 4, 1951, Defence Construction Limited, a Crown agency, called for tenders for the construction of a maintenance and storage garage at Shearwater, Nova Scotia, for the Department of National Defence. The original specifications contemplated the use of steel framework, but shortly after they were issued an alternative of laminated wood frame was authorized, and on December 13, before any tender had been made by the respondent, it received a telegram from the appellant which was then called "Laminated Structures Limited" and of which the respondent had never previously heard which read as follows:

RE COMBINED MAINTENANCE AND STORAGE GARAGE HMCS SHEARWATER *OUR* GLUED LAMINATED WOOD TRUSSES HAVE BEEN APPROVED AS ALTERNATE B IN THE SPECIFICATIONS PLEASE ADVISE IF YOU ARE INTERESTED IN QUOTING USING LAMINATED TRUSSES WE WILL LET YOU HAVE PRICE AND OTHER NECESSARY DETAILS (The italics are mine.)

On the following day the appellant wrote to the respondent, enclosing a brochure which bore on it the name of "Timber Structures of Canada Limited", and saying:

> Enclosed herewith, please find *our* illustrated brochure entitled: "ENGINEERED TIMBERS" and *the truss that we propose to supply for the Combined Maintenance and Storage Building* for HMCS Shearwater at Dartmouth, N.S., is shown on the last page of the brochure.
>
> I have also outlined in blue pencil, the arrangement of the trusses where the two buildings are joined together.
>
> We will quote on the supply of suitable Timber Columns Timber Side Wall Girts, *the necessary Glued Laminated Timflat Trusses* and the *necessary* purlins.
>
> For your information we have been in touch with the Navy Engineers at Ottawa, and for their purposes, 2" T & G roofing is classified as a mill roof.
>
> I regret that our quotation is not yet finalized, but I will have the necessary information for you Monday, December 17, and will be in touch with you by telephone.
>
> I will, at that time, also give you an approximate estimate of the number of men hours required to assemble and erect the trusses for your guidance. (The italics are mine.)

On December 19 the appellant forwarded its tender to the respondent quoting a price and containing the assurance that "all materials are precut and prefabricated ready for assembly and erection with the exception of the roof sheeting." On the following day sketch plans showing the design of a *bow string truss* were forwarded by the appellant to the respondent, and it is of some importance to note that these plans also bore the name of "Timber Structures of Canada Limited".

On February 14, 1952, at the request of one of the Crown agencies, Mr. E. C. Mingo of the respondent company came to Ottawa for a discussion with the Engineer-in-Charge of the Navy Defence Research Board concerning various aspects of the contract, but Mr. Mingo was not qualified to talk about the truss himself and he agreed to bring a representative of the subtrade to Ottawa. He tried to get in touch with Mr. Millar of the appellant company who was not available, and he was, accordingly, referred to Mr. DeGrace of Timber Structures of Canada Limited who eventually came to Ottawa to discuss the laminated wood features of the contract and in fact offered to redesign the truss to conform with a suggestion made by the Navy, and when he had done this forwarded his preliminary drawings of the redesigned truss direct to the Government representative.

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It was not until March 18 that the respondent's tender was accepted, and almost immediately thereafter the respondent wrote to the appellant in part as follows:

> As there has been a redesign of the type of truss to be used on the above building and we had started negotiations with yourself on prices, etc. on the building, and along the line Timber Structures of Canada have entered the picture submitting a design on a truss for approval by the Navy, would you kindly advise what relation, if any, is there between the above mentioned Companies; namely, Laminated Structures Limited and Timber Structures of Canada Ltd.

to which the appellant replied:

> You ask in your letter what is the connection between Timber Structures and ourselves, and I would like to point out that we are the distributors in Eastern Canada for Timber Structures of Canada Limited.

Within a few days of writing this letter, Mr. Millar of the appellant company telephoned to the Engineer-in-Charge of the Navy Defence Research Board and it is apparent that as a result of this call the Engineer-in-Charge despatched the following telegram to Central Mortgage and Housing Corporation at Halifax:

> RE GARAGE SHEARWATER JOB 1700 PLEASE REQUEST EASTERN WOODWORKERS TO PLACE ORDER WITH TIMBER STRUCTURES FOR STRUCTURAL WOOD FRAME COMPONENTS STOP ORDER TO BE CONTINGENT ON APPROVAL OF SHOP DRAWINGS BY DND STOP TIMBER STRUCTURES PREPARED TO PROCEED ON THIS BASIS

Instead of placing the order direct with Timber Structures of Canada Limited, the respondent telegraphed to the appellant as follows:

> INSTRUCTIONS RECEIVED TODAY FROM CM & HC HALIFAX RE MAINTENANCE AND STORAGE GARAGE SHEARWATER N.S. STOP THIS IS YOUR PERMISSION TO PLACE ORDER WITH TIMBER STRUCTURES FOR STRUCTURAL WOOD FRAME COMPONENTS ORDER TO BE CONTINGENT ON APPROVAL OF SHOP DRAWING BY DND STOP OUR FIRM ORDER FOLLOWING.

The firm order followed on March 29 and it was acknowledged by the appellant on March 31. The Timber Structures of Canada Limited plans for the frame building were finally approved by the Navy in December 1952, but the building was not completed and accepted by the Crown engineers until January 20, 1954, and eleven days later the collapse occurred.

As Doull J. has said in the course of his reasons for judgment in this case:

> There is ample authority for the proposition that the liability of a contractor for the supplying of material and the erection of a structure is no less than that of a vendor under the Sale of Goods Act.

The relevant provision of the Nova Scotia *Sale of Goods Act,* R.S.N.S. 1954, c. 256, s. 16(*a*) reads as follows:

> 16. Subject to this Act, and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:
>
> (*a*) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose; . . . .

The leading sale of goods cases dealing with the topic of reliance by buyers upon the skill and judgment of the sellers have recently been the subject of a comprehensive review by Martland J., speaking on behalf of this Court in *Hayes, Trustee of Preload Co. of Canada Ltd. v. City of Regina*[1], where the decisions in *Manchester Liners, Ltd. v. Rea, Ltd.*[2], *Medway Oil & Storage Co. v. Silica Gel Corporation*[3], and *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.*[4] are all fully discussed.

In *Medway Oil & Storage Co. v. Silica Gel Corporation, supra,* Lord Sumner pointed out at p. 196 that although the warranty of fitness is an implied one, it is still contractual, and he went on to say:

> . . . just as a seller may refuse to contract except on the terms of an express exclusion of it, so he cannot be supposed to assent to the liability, which it involves, unless the buyer's reliance on him, on which it rests, is shewn and shewn to him. The Tribunal must decide whether the circumstances brought to his knowledge shewed this to him as a reasonable man or not, but there must be evidence to bring it home to his mind, before the case for the warranty can be launched against him.

It is, however, now established that if the special purpose for which the goods are required is disclosed to the seller, this circumstance alone may raise the presumption that the

[1] [1959] S.C.R. 801 at 820 *et seq.*, 20 D.L.R. (2d) 586.
[2] [1922] 2 A.C. 74, 91 L.J.K.B. 504.
[3] (1928), 33 Com. Cas. 195.
[4] [1934] A.C. 402, 103 L.J.K.B. 289.

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buyer is relying on the skill and judgment of the seller. As was said by Martland J. in the *Preload Co. of Canada Ltd.* case, *supra*, at p. 820:

> *Manchester Liners Ltd. v. Rea Ltd.* . . . held that, if goods are ordered for a special purpose and that purpose is disclosed to the vendor so that, in accepting the contract, he undertakes to supply goods which are suitable for the object required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment. The mere disclosure of the purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller.

The same proposition was recently restated by Diplock J. in *Mash and Murrell, Ltd. v. Joseph I. Emanuel, Ltd.*[1], where he said:

> Counsel for the plaintiffs, in those circumstances, relied on the well-known case of Manchester Liners, Ltd. v. Rea, Ltd. which he says, I think rightly, establishes the proposition that if the particular purpose is made known by the buyer to the seller, then, unless there is something in effect to rebut the presumption, that in itself is sufficient to raise the presumption that the buyer relies on the skill and judgment of the seller;

Mr. McInnes, in the course of his most forceful argument on behalf of the appellant, contended that the appellant's role in supplying the laminated wood trusses was simply that of a selling agent for Timber Structures of Canada Limited and that the evidence in support of this contention was such as to rebut any presumption of reliance which might otherwise arise out of the knowledge on the appellant's part that the laminated wood frame was being ordered for the purpose of the erection of the structure required by the Crown. Going back to the beginning of the matter, Mr. McInnes pointed out, *inter alia,* that there was a strong probability that the change in the original specifications so as to include laminated wood frame as an alternative to steel was expressly made for the benefit of Timber Structures of Canada Limited, that the changed design of the trusses was discussed and determined by the Crown authorities directly with the representative of Timber Structures of Canada Limited, that on the eve of the granting of the respondent's order to the appellant there was a firm request from a Crown agency specifying Timber Structures of Canada Limited as the supplier, and that on March 27, 1952, the respondent disclosed its understanding of the matter

[1] [1961] 1 All E.R. 485 at 489.

when it said in the concluding paragraph of its letter to the Regional Construction Engineer of Central Mortgage and Housing Corporation:

> We placed an order for the structural frame on the above building with Timber Structures of Canada, today, (through the Montreal Office—Laminated Structures Ltd.) as per your wire of this date.

In support of this argument, great reliance was placed on the last sentence of the following paragraph which appears in Halsbury's Laws of England, 3rd ed., vol. 3 at p. 435:

> A person who contracts to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them unless the circumstances of the contract are such as to exclude any such warranty. The contractor, however, cannot be held responsible for the quality of materials or work chosen or directed by the employer or his architect, or in any case where the employer does not rely on the contractor's skill and judgment, as when the employer chooses to supersede the contractor's judgment by using his own.

In applying this statement to the present circumstances, Mr. McInnes contended that laminated wood trusses as constructed by Timber Structures of Canada Limited were the materials chosen by the Crown authorities and, therefore, by the respondent for incorporation in the roof structure of the building in question and that the appellant was in effect directed to obtain these materials.

By way of illustrating the proposition stated in Halsbury's Laws of England, *supra,* reference was made to the judgment of Mr. Justice DuParcq in *Myers & Co. v. Brent Cross Service Co.*[1], where he said at p. 55:

> I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.
>
> There may be circumstances which would clearly exclude it. A man goes to a repairer and says: "Repair my car; get the parts from the makers of the car and fit them". In such a case, it is made plain that the person ordering the repairs is not relying upon any warranty except that the parts used will be parts ordered and obtained from the makers.
>
> On the other hand, Mr. Wynn Werninck says that it has been, or it can be established, that expressly or impliedly the Defendants were instructed to get parts from the makers, or their recognized agents, and to use those parts, not using their own skill and judgment in the matter at all. If that be so, then I think those facts did afford a Defence, because they did negative any warranty.

In assessing the degree to which these statements of the law can be said to govern the facts in the present case, it is to be remembered that the existence of the warranty of

[1] [1934] 1 K.B. 46, 103 L.J.K.B. 123.

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fitness is not dependent upon exclusive reliance being placed in the seller's skill and judgment, but that it is sufficient if the reliance be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity.

Although there are many factors indicating that the Crown authorities depended on the advice of representatives of Timber Structures of Canada Limited, it nevertheless seems to me that the position adopted by the appellant at the very inception of its association with the respondent invited reliance upon its skill and judgment, and that the subsequent events disclosed by the evidence did not have the effect of materially changing this position. It is to be remembered that when tenders were called for this contract the respondent was totally unfamiliar with glued laminated wood trusses and had never heard of the respondent or of Timber Structures of Canada Limited. On December 13, before it tendered on the contract, it received the appellant's telegram introducing itself as one whose "glued laminated wood trusses had been approved as Alternate B in the specifications" and that the very next day the appellant wrote to the respondent, saying in part: "We will quote on the suply of . . . the *necessary* Glued Laminated Timflat Trusses and the *necessary* purlins." (The italics are mine.) To me the inference is inescapable that the appellant was holding itself out to the respondent as the possessor of the skill and judgment required to determine what was *necessary* in this regard for the purposes of the contract in question, and it is noteworthy that more than a year later, in March 1952, after the respondent had been requested by Central Mortgage and Housing Corporation to place the order with Timber Structures of Canada Limited it still was only prepared to pass this request on to the appellant in the form of the granting of "permission to place order with Timber Structures".

Although it may well be that the sequence of events which includes the bankruptcy of Timber Structures of Canada Limited has placed the appellant in a position which it had never intended to assume, I am nevertheless unable to find sufficient evidence to rebut the presumption of reliance on its skill and judgment arising from the circumstances.

The unanimous opinion of all the judges in both courts below is that the respondent relied on the skill and judgment of the appellant and that there were no circumstances such as to exclude the condition as to fitness which is implied by law. There was abundant evidence to support the finding that there was a breach of such condition. This, therefore, seems to me to be a case to which the following language employed by Martland J. in the *Preload Co. of Canada Ltd.* case, *supra,* can well be adapted. He there said at p. 822:

> The question of the buyer's reliance on the seller's skill or judgment, . . . is, as stated by Lord Sumner in the *Medway* case, a question of fact. That question of fact has been decided by the Courts below in favour of the City. In my view there was ample evidence on which to base such a finding and I think that a preponderance of evidence justifies the conclusion which has been reached.

I do not base my conclusion solely on any implication of reliance which may arise from the contract itself, but, like Mr. Justice MacDonald in the Court below, I prefer to base it on a wider ground, and I am content to adopt the language employed by him in the penultimate paragraph of his reasons for judgment where he says:

> I should prefer, however, to base my conclusion on the wider ground that having regard to the circumstances affecting the parties and the course of the negotiations leading to the contract, there is a clear preponderance of evidence to support the finding of the trial judge that Eastern disclosed to Laminated the purpose for which the wooden frame and component parts were required (namely, to support the roof of the garage and maintenance shed at Shearwater under such ordinary conditions as those which obtained when it collapsed); that it effectively disclosed to Laminated such reliance upon it; and that the cause of the collapse was within the area of that reliance. It is equally clear to me that neither the requirement of conformity to the plans and specifications nor the presence of Timber Structures "in the picture" as the probable, and, as it turned out, actual maker of the materials, operated to exclude such reliance or furnish proof that the reliance was placed on the latter Company and not upon Laminated.

In view of the above conclusions, I do not find it necessary to deal with the argument presented on behalf of the respondent in support of the contention that the appellant was liable in tort.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Donald McInnes, Halifax.

Solicitor for the defendant, respondent: H. P. MacKeen, Halifax.

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1962 Jan. 23

FRED KAUP and JOHN KAUP (*Plaintiffs*) .... APPELLANTS;

AND

IMPERIAL OIL LIMITED, MARIE ANNE EDWARDS, (formerly Marie Anne LaFleur), JULES ALBERT LAFLEUR, ROSE ANNA LANDRY, (formerly Rose Anna LaFleur), YVONNE AMANDA NOYES, (formerly Yvonne Amanda LaFleur), ALICE CLARA ST. LOUIS, (formerly Alice Clara LaFleur), THE REGISTRAR OF THE NORTH ALBERTA LAND REGISTRATION DISTRICT and JULES ALBERT LAFLEUR, (Representative of the Estate of Alexander LaFleur) (deceased). (*Defendants*). RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Transfer of land with reservation of mines and minerals—Reservation omitted from transferee's title by reason of registrar's error—Subsequent transfer to volunteer with similar omission in both transfer and new certificate of title—Corrections subsequently made to certificates of title—Issue as to title to the mines and minerals—The Land Titles Act, 1906 (Alta.), c. 24, ss. 23, 41, 42, 44, 46, 104, 106, 114(2) and (3), 135; R.S.A. 1922, c. 133, ss. 50, 51, 56, 58, 148, 150, 160, 175—Inapplicability of The Limitation of Actions Act, 1935 (Alta.), c. 8.

In 1919, JL, as executor of the estate of AL, became the registered owner of certain land. A transfer was registered from JL to UK of this land "reserving therefrom all mines and minerals". By an error of the registrar, the certificate of title issued to UK omitted the reservation of mines and minerals and contained only a reservation of coal in favour of the Canadian Pacific Railway Co. In 1924, UK executed a transfer, without consideration, to herself and her husband FK. Both the transfer and the new certificate of title contained a reservation as to coal but no reservation in respect of other mines and minerals. Corrections were subsequently made to the three certificates of title. That of JL, which had been stamped as "cancelled" following the transfer to UK, had the cancellation stamp crossed out and the notation on the certificate stating that it had been cancelled in full was later altered to read "in full EX M & M". The remaining certificates were altered to include the reservation of mines and minerals. The issue in the appeal was as to the title to the mines and minerals, other than coal, in the land. The trial judge and the majority of the Appellate Division of the Supreme Court of Alberta held that they were the property of the estate of AL. The respondent company was the lessee of petroleum and natural gas and related hydro-carbons in the land, by virtue of leases made in its favour by the successors in title of AL.

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

Held: The appeal should be dismissed.

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The submission that ss. 23, 41 and 46 of *The Land Titles Act,* 1906 (Alta.), c. 8, and the equivalent sections of R.S.A. 1922, c. 133, have the mandatory effect that, upon the registration of any transfer there is automatically created the estate or interest, defined in such transfer, in favour of the transferee, irrespective of whether or not the transferor had any legal estate or interest which he was entitled to transfer, was rejected. The power and duty of a Court to rectify the register where a wrongdoer has become registered as owner of land also apply to a case in which registration of title has been obtained by a volunteer, who registers a transfer from a transferor who had no legal right to give it, provided that the rights of third parties are not implicated. Here the AL estate was the registered owner of the mines and minerals in question and had never, by transfer or otherwise, divested itself of those mines and minerals. *Assets Company, Ltd. v. Mere Roihi,* [1905] A.C. 176, distinguished; *Loke Yew v. Port Swettenham Rubber Co., Ltd.,* [1913] A.C. 491; *Imperial Bank of Canada v. Esakin,* [1924] 2 W.W.R. 33, approved.

Sections 42, 44 and 104 of the 1906 Act are not to be construed as meaning that, once a certificate of title has issued, the title of the registered owner is thereafter to be deemed as conclusive and to be subject to attack only in case of fraud, misdescription or the existence of a prior certificate of title. The conclusiveness of a certificate of title, referred to in s. 44 (s. 58 of the 1922 Act), must be considered in the context of the scheme of the Act as a whole and in particular in relation to ss. 106, 114(2) and (3) and 135 (equivalent ss. 150, 160 and 175 of the 1922 Act). In the light of these sections the conclusiveness referred to in s. 44 is for the benefit of the *bona fide* purchaser for valuable consideration only. Here it was conceded that no consideration was given for the transfer which was made by UK to herself and her husband. *Sutherland v. Rural Municipality of Spruce Grove No. 519,* [1919] 1 W.W.R. 274; *Minchau v. Busse,* [1940] 2 D.L.R. 282, referred to; *C.P.R. and Imperial Oil Ltd. v. Turta,* [1954] S.C.R. 427, distinguished. *The Land Titles Act* altered the common law rule that no man can convey a better title than he possesses only to the extent that it established certain special rights for the benefit of the *bona fide* purchaser for value. Accordingly, the registration of a transfer from UK, who had no title to any minerals, to herself and her husband, made without consideration, did not confer any title to mines and minerals in the transferees.

It could not be successfully contended that the rights of the AL Estate to mines and minerals had been extinguished under the provisions of *The Limitation of Actions Act,* 1935 (Alta.), c. 8. If the appellants acquired no interest in the mines and minerals, as a result of the erroneous registration of the two transfers, as against the AL Estate, then there could be no basis for contending that the appellants ever had possession of them. *C.P.R. and Imperial Oil Ltd. v. Turta, supra,* applied.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], affirming, by a majority, a judgment of Primrose J. Appeal dismissed.

[1] (1961), 35 W.W.R. 433, 29 D.L.R. (2d) 38.

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W. G. Morrow, Q.C., for the plaintiffs, appellants.

J. H. Laycraft, for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—On July 15, 1919, John Lafleur, of St. Albert, Alberta, the executor of the estate of Alexander Lafleur, deceased, became registered, in the North Alberta Land Registration District, as the owner of the North half of Section 9, Township 55, Range 25, West of the 4th Meridian, containing 320 acres more or less, excepting thereout 6 2/100 acres more or less for the right-of-way of the Edmonton and Slave Lake Railway, the land thereby described containing 313.98/100 acres more or less, reserving unto the Canadian Pacific Railway Company all coal on or under the said land.

On the same day a transfer was registered from John Lafleur to Urbanie Kaup, of Morinville, Alberta, of this half section, "reserving therefrom all mines and minerals".

Notwithstanding this reservation of all mines and minerals in the transfer, a certificate of title was issued in the name of Urbanie Kaup in exactly the same terms as the certificate of title of John Lafleur, containing only a reservation of coal in favour of the Canadian Pacific Railway Company.

The land, the subject-matter of the transfer, had been purchased from John Lafleur by Fred Kaup, the husband of Urbanie Kaup, and by her, but the former had elected to have the title registered in his wife's name, he already being the registered owner of another quarter section of land. The purchase price of the land was $11,000, of which $8,000 was secured by a mortgage from Urbanie Kaup to John Lafleur, in which the description of the mortgaged land contained the reservation of "all mines and minerals".

In December 1924, after Kaup and his wife had decided that the title to the land should be registered in both names, Urbanie Kaup transferred the land to Fred Kaup and Urbanie Kaup for $1 and in consideration of natural love and affection. A new certificate of title was issued on December 20, 1924, in the names of both of them. Both the transfer and the new certificate of title, following the description of the land as it had appeared in Urbanie Kaup's certificate of title, contained a reservation of all coal to the

Canadian Pacific Railway Company, but no reservation in respect of other mines and minerals. It is conceded by the appellants that the transfer leading to this title was made without consideration.

Fred Kaup farmed the land until about 1938 or 1940, when he retired to Vancouver, after which the land was farmed by his son John. Urbanie Kaup died in 1953 and John Kaup is a beneficiary of her estate.

Corrections were subsequently made to the three certificates of title, previously mentioned, by officials of the North Alberta Land Registration District. That of John Lafleur, which had been stamped as "cancelled" following the transfer to Urbanie Kaup, had the cancellation stamp crossed out. The notation on the certificate, stating that it had been cancelled in full, was altered so as to read "in full Ex M & M", so as to indicate that the title to the mines and minerals was not cancelled. According to the evidence, this latter change appears to have occurred some 20 or 25 years after the initial notation on the certificate of title had been made.

The reservations which had appeared on the certificate of title of Urbanie Kaup and on that of Fred Kaup and Urbanie Kaup were altered so as to reserve, in addition to coal, all other mines and minerals. The correction on Urbanie Kaup's certificate of title appears to have been made on February 18, 1948, and that on the certificate of title of Fred Kaup and Urbanie Kaup on June 3, 1943.

The issue in this appeal is as to the title to the mines and minerals, other than coal, in this land. The learned trial judge and the majority of the Appellate Division of the Supreme Court of Alberta have held that they were the property of the Lafleur Estate. The respondent Imperial Oil Limited is a lessee of petroleum and natural gas and related hydro-carbons in this land, by virtue of five leases made in its favour by the successors in title of Alexander Lafleur, executed in the year 1957.

The appellants concede that Urbanie Kaup acquired no title to mines and minerals by virtue of the registration of the transfer from John Lafleur to her. Notwithstanding this, they do contend that the subsequent transfer by her to Fred Kaup and herself, which purported to transfer mines and minerals other than coal, did result, upon its registration, in the acquisition of a title to such mines and minerals

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in their names. It is further contended that, even if such title was not an absolute one, but was defeasible at the instance of the Lafleur Estate, yet any right of that estate to mines and minerals was extinguished by virtue of the provisions of *The Limitation of Actions Act*, 1935 (Alta.), c. 8.

The respondents, in addition to disputing these contentions, submitted that the corrections to the three certificates of title were properly authorized under the provisions of *The Land Titles Act*, were effective, and that once corrected the effect was as if the error on the title had not been made.

The appellants' argument that the registration of the transfer from Urbanie Kaup to Fred Kaup and herself conveyed mines and minerals, other than coal, to the transferees, is based upon certain sections of *The Land Titles Act*, 1906 (Alta.), c. 24. That Act was in force at the time of the transfer from John Lafleur to Urbanie Kaup, although it had been repealed and replaced by c. 133, R.S.A. 1922, at the time of the registration of the transfer from Urbanie Kaup to Fred Kaup and herself. The provisions of the latter statute are substantially similar in effect. As the sections cited in argument and in the judgment in the Court below are from the 1906 Act, it is convenient to refer to those provisions here. The sections in question are as follows:

> 23. Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution; and the registrar, upon registration thereof, shall retain the same in his office, and so soon as registered, every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.
>
> * * *
>
> 41. After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money; but upon the registration of any instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.
>
> * * *
>
> 46. After the certificate of title for any land has been granted no instrument shall be effectual to pass any interest therein or to render the land liable as security for the payment of money as against any *bona fide* transferee of the land under this Act unless such instrument is executed

in accordance with the provisions of this Act and is duly registered thereunder; and the registrar shall have power to decide whether any instrument which is presented to him for registration is substantially in conformity with the proper form in the schedule to this Act or not and to reject any instrument which he may decide to be unfit for registration.

The relevant equivalent sections of *The Land Titles Act*, R.S.A. 1922, c. 133, are ss. 50 and 51, which provide as follows:

50. After a certificate of title has been granted for any land, no instrument shall be effectual to pass any estate or interest in such land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money, unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.

51. So soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.

The proposition submitted by the appellants is that these sections have the mandatory effect that, upon the registration of any transfer, there is automatically created the estate or interest, defined in such transfer, in favour of the transferee, irrespective of whether or not the transferor had any legal estate or interest which he was entitled to transfer. This result flows, it is said, irrespective of whether the transferee was a *bona fide* purchaser for value or not.

It is then argued that, the transferee having acquired the legal title, ss. 42, 44 and subss. (*d*), (*e*) and (*f*) of s. 104 of the 1906 Act come into play to protect his interest and that, in consequence, Fred and Urbanie Kaup could only be deprived of title to the mines and minerals, if at all, on one of the grounds defined in those provisions. Those sections read as follows:

42. The owner of land for which a certificate of title has been granted shall hold the same subject (in addition to the incidents implied by virtue of this Act) to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other encumbrances, liens, estates or interests whatsoever, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act or granted under any law heretofore in force relating to title to real property.

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(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title has held such possession.

* * *

44. Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the next preceding section, except so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land; and for the purpose of this section that person shall be deemed to claim under a prior certificate of title who is holder of or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate of title granted, notwithstanding that such certificate of title has been surrendered and a new certificate of title has been granted upon any transfer or other instrument.

* * *

104. No action of ejectment or other action for the recovery of any land for which a certificate of title has been granted shall lie or be sustained against the owner, under this Act in respect thereof, except in any of the following cases, that is to say:

* * *

(*d*) The case of a person deprived of any land by fraud as against the owner of such land through fraud, or as against a person deriving title otherwise than as a transferee *bona fide* for value, from or through such owner through fraud;

(*e*) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the owner of such other land;

(*f*) The case of an owner claiming under an instrument of title prior in date of registration under this Act, or under the provisions of any law heretofore in force in any case in which two or more grants, or two or more certificates of title, or a grant and certificate of title, are registered under this Act or under any such law in respect to the same land.

The section of the 1922 Act which is the equivalent of s. 42 of the 1906 Act is s. 56, which provides as follows:

56. (1) The owner of land in whose name a certificate of title has been granted shall, except in case of fraud wherein he has participated or colluded, hold the same subject (in addition to the incidents implied by virtue of this Act) to such incumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other incumbrances, liens, estates or interests whatsoever except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act or granted under any law heretofore in force relating to title to real property.

(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title has held such possession.

Section 58 of the 1922 Act uses the same wording as s. 44 of the 1906 Act and s. 148 of the 1922 Act uses the same wording as s. 104 of the 1906 Act.

The appellants cite the decision of this Court in *C.P.R. and Imperial Oil Ltd. v. Turta*[1], as authority for the proposition that there has been no fraud, no misdescription and no prior certificate of title on the facts of the present case.

The whole of the argument rests on the primary proposition that registration of a transfer, in itself, vests in the transferee a title which is indefeasible, save on those grounds specifically stated in ss. 42, 44 and 104 of the 1906 Act. I do not accept the appellants' interpretation of the meaning of ss. 23, 41 and 46 of the 1906 Act. I do not construe those provisions as doing more than to state what is a basic principle of *The Land Titles Act* system that it is only the registration of an instrument under that Act, and not its execution and delivery, which can be effective to convey a legal interest under the statute. I do not consider that the wording of these sections is sufficient to alter the common law rule that no man can convey a better title than he possesses. That this rule was altered by the provisions of *The Land Titles Act* is undoubted, but, in my opinion, that result was achieved, not by the effect of the sections presently under consideration, but because of the special position which was given to the *bona fide* purchaser for value under other sections of the Act, to which I will refer later.

Reference was made, in argument, to the decision of the Privy Council in *Assets Company, Limited v. Mere Roihi*[2]. This decision dealt with three appeals from New Zealand, each involving the same appellant, which was the registered owner in possession of three parcels of land, the ownership of which was claimed by the various respondents in the three cases. The history of the circumstances leading up to the registration of the three titles is very complicated and differed in each case. The appellant's titles were attacked by the respondents on the grounds of fraud and also on

[1] [1954] S.C.R. 427, 3 D.L.R. 1. [2] [1905] A.C. 176, 92 L.T. 397.

the ground that such registration was invalid by reason of the invalidity of certain orders of the Native Land Court, a tribunal established by New Zealand legislation, on which warrants of the Governor, having the effect of Crown grants, were issued. In two of the cases the appellant was the registered purchaser, in good faith, of an improperly registered title. The third case differed from the other two in that the appellant, in that case, was the first owner to obtain registration on the permanent register. In all three cases the appellant had given consideration and the Privy Council negatived any fraud on the part of the appellant in relation to any of the three transactions.

The Privy Council decided in favour of the appellant. The decision is summarized in the headnote, as follows:

> By the Land Transfer Acts of 1870 and 1885 the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Acts, is actual, not constructive fraud, brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.

It was further held that

> as the registration had been obtained in each case *bona fide* the effect thereof was conclusive to confer on the appellants a title unimpeachable by the respondents.

While there are dicta in the reasons given which might appear to support the position now taken in the present appeal by the appellants, notably the statement at p. 191, referring to the provisions of the New Zealand Act regarding the Assurance Fund:

> This provision, taken in connection with those already referred to, went far to shew that except in the excepted cases the registered certificate was to be conclusive, and that the remedy of persons wrongfully deprived of their property was to obtain damages from the wrong-doer,

the case itself does not, in my view, support the appellants' proposition. I do not think that it goes further than what is said of it by Baalman, in his "Commentary on the Torrens System in New South Wales", at p. 133:

> It was settled by the Privy Council in *Assets Co. v. Mere Roihi,* that the quality known as indefeasibility attaches to a title immediately upon the entry, in the register-book, of the name of an innocent purchaser. That case dealt both with an original applicant and with a derivative purchaser, and it applied equally to both.

The case certainly does not support the proposition that a registered owner of land, whose title has wrongfully been affected through an error of the Registrar, cannot obtain rectification of that error as against the person who became registered owner as a result of the error, or as against one who acquires title from him as a volunteer.

I find support for my view in the later decision of the Privy Council in *Loke Yew v. Port Swettenham Rubber Company, Limited*[1]. That case involved the issue of the title to land which had been registered in the name of the respondent company pursuant to a transfer to it from the prior registered owner. Prior to the making of such transfer, the company had knowledge of an unregistered interest, as to a portion of the land, in the appellant Loke Yew. In order to induce the prior registered owner to transfer the whole of the land to it, the company had, in writing stated: "As regards Loke Yew's interest I shall have to make my own arrangements."

The respondent company relied on a statutory provision, similar in effect to s. 44 of the 1906 Act, whereby the duplicate certificate of title was made conclusive evidence of absolute and indefeasible ownership, subject only to certain exceptions, including fraud.

The Privy Council did find that there had been fraud in this case, so as to come within the exception in that section, but it went on to add further reasons in the following statement, at p. 504:

> The conclusion to which their Lordships have come as to the transfer having been obtained by fraud brings the case within the exception of s. 7 and is therefore a sufficient answer to these arguments. But their Lordships are of opinion that for other reasons they are irrelevant and beside the mark. They take no account of the power and duty of a Court to direct rectification of the register. So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the Court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified.

In this passage, reference is made to the position of a wrongdoer who becomes registered as the owner of land. In my opinion, the same reasoning, as to the power and duty of a Court to rectify the register, can and should also be

[1] [1913] A.C. 491, 82 L.J.P.C. 89.

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applied to a case in which registration of title has been obtained by a volunteer, who registers a transfer from a transferor who had no legal right to give it, provided that the rights of third parties are not implicated. While there is no suggestion of wrongdoing in the present case, yet it should be remembered that, whereas, in the *Loke Yew* case, the transferor was the registered owner of the land, who had the legal power to transfer it, in the present case the transferor had no interest of any kind in the minerals to convey.

The power of the Court to order a rectification of the register is set out in s. 116 of the 1906 Act, which provides as follows:

> 116. In any proceeding respecting land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorandum or entry affecting land, the judge by decree or order may direct the registrar to cancel, correct, substitute, or issue any duplicate certificate, or make any memorandum or entry thereon or on the certificate of title and otherwise to do every act necessary to give effect to the decree or order.

The same provision was incorporated in the later *Land Titles Acts* and presently appears as s. 188(1) in c. 170, R.S.A. 1955.

Referring to the passage, above quoted, from the *Loke Yew* case, Lamont J.A., in *Imperial Bank of Canada v. Esakin*[1], has this to say:

> Sec. 7, referred to by his Lordship, provided the title of the person named in the certificate of title should be absolute and indefeasible, except in cases of fraud, misrepresentation or adverse possession, and it was upon this section that the arguments for the plaintiffs were based. Notwithstanding the clear language of the section, the above-quoted passage, in my opinion, clearly indicates that, even if the Court had not found fraud on the part of the plaintiffs, it would "for other reasons" have set aside the plaintiffs' title to the Loke Yew lands for which they have given no consideration, and these "other reasons," as I interpret the judgment, were, that, as between the registered owner who is a volunteer and a person rightfully entitled to the land, the Court would hold the registered owner to be a trustee for the rightful owner and would rectify the title, by cancelling that of the registered owner and causing a new certificate to be issued to the person really entitled.

With this statement I agree. In the present case, unlike the *Loke Yew* case, it is not necessary to invoke the principle of trusteeship because, while Loke Yew's interest had, at all times, been an unregistered one, in the present case

[1] [1924] 2 W.W.R. 33 at 38.

the Lafleur Estate was the registered owner of the mines and minerals in question and had never, by transfer or otherwise, divested itself of those mines and minerals.

I turn now to ss. 42, 44 and 104 of the 1906 Act, previously cited. Section 42 declares the rights of an owner of land, under the Act, for which a certificate of title has been granted. Section 44 declares the evidentiary value of a certificate of title in legal proceedings and s. 104 defines those cases in which an action of ejectment, or for the recovery of land, may lie as against the owner. Are these sections to be construed as meaning that, once a certificate of title has issued, the title of the registered owner is thereafter to be deemed as conclusive and to be subject to attack only in the case of fraud, misdescription or the existence of a prior certificate of title? I think not, and in this respect I agree with the views expressed by Harvey C.J.A., in *Sutherland v. Rural Municipality of Spruce Grove No. 519*[1]. In that case the defendant municipality took forfeiture proceedings for tax enforcement in respect of certain lands registered in the name of Sutherland, obtained an adjudication which was registered and subsequently acquired certificates of title to the land in its name. The plaintiff Sutherland sued, asking for an order cancelling the certificates of title in the name of the municipality and vesting the land in himself and other parties interested, on the ground that the proceedings taken by the municipality leading to its obtaining its certificates of title had been illegal. The defendant contended that its certificates of title were an absolute bar to the plaintiff's action and, in particular, relied upon s. 104 of *The Land Titles Act* of 1906. After referring to the provisions of that section, Harvey C.J.A. went on to say:

> Is this an action for the recovery of land within the meaning of the section? I think not. It is to be noted that when it was begun the plaintiff supposed he was the registered owner, but even then he makes no claim for recovery of the land, but only for its discharge from taxes. Later, when it is found that the certificates of title have been issued to the defendants, he asks for their cancellation. If the certificate of title is to be a bar to any action to set it aside we would have a somewhat anomalous situation. Any one who had become registered as owner through any error in the office or otherwise, or in any of many other ways which occur to me, would thereby become entitled to hold land to which he has no right.

[1] [1919] 1 W.W.R. 274 at 276.

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In my opinion, the conclusiveness of a certificate of title, referred to in s. 44 of the 1906 Act, must be considered in the context of the scheme of the Act as a whole and, in particular, in relation to ss. 106, 114(2) and (3) and 135 of that Act. Those sections provide as follows:

106. Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of land in respect to which he is registered as owner, any purchaser or mortgagee *bona fide* for valuable consideration of land under this Act on the plea that his transferor or mortgagor has been registered as owner through fraud or error or has derived title from or through a person registered as owner through fraud or error, except in the case of misdescription, as mentioned in section one hundred and four.

* * *

114. (2) If it appears to the satisfaction of the registrar that any duplicate certificate of title or other instrument has been issued in error or contains any misdescription, or that any entry or indorsement has been made in error on any certificate of title or other instrument, or that any such certificate, instrument, entry or indorsement was fraudulently or wrongfully obtained, he may, whether such certificate or instrument is in his custody or has been produced to him in answer to a demand, so far as practicable without prejudicing rights conferred for value, cancel or correct any error in such certificate of title or other instrument, or in any entry made thereon or in any memorial, certificate, exemplification or copy of any instrument made in or issued from the land titles office, and may supply entries to be made:

Provided always that in the correction of any such error he shall not erase or render illegible the original words, and he shall affix the date upon which such correction was made or entry supplied.

(3) Every certificate of title so corrected, and every entry so corrected or supplied, shall have the like validity and effect as if such error had not been made or such entry omitted.

* * *

135. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease, from the owner of any land for which a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

The equivalent sections of the 1922 Act are 150, 160 and 175.

When regard is had to these sections it appears that the conclusiveness referred to in s. 44 is for the benefit of the *bona fide* purchaser for valuable consideration only. This

view was stated in this Court by Crocket J. in *Minchau v. Busse*[1], where he says, referring to the opinion of the dissenting judges in the Court below:

> I agree with the view expressed by Mr. Justice Clarke and Mr. Justice Ford in the reasons for their dissenting opinion, as delivered by the latter, that the sections of the *Land Titles Act* as to the conclusiveness of the certificate of title are for the benefit of those who *bona fide* acquire title on the faith of the register and that in the present instance Busse did not so acquire his title.

I do not find anything in the case of *C.P.R. and Imperial Oil Ltd. v. Turta, supra,* which is contrary to this view. The decision in that case rested solely upon the ground that Turta was a *bona fide* purchaser for value of the minerals there in question and that, because of that fact, his position could only be attacked on one or more of the three grounds previously mentioned. It emphasizes the special position enjoyed, under the Act, by the *bona fide* purchaser for value. In the present case, admittedly, the appellants are not in that position, it having been conceded that no consideration was given for the transfer which was made by Mrs. Kaup to herself and her husband.

I do not find in the *Turta* case any suggestion that Turta's position would have been the same had he not been a *bona fide* purchaser for value. The decision is based upon the fact that he was. Estey J. (at p. 443), with whom Kerwin J., as he then was, and Taschereau and Fauteux JJ. agreed, cited, with approval, the view of the Act expounded by Harvey C.J.A. in *Dobek v. Jennings*[2], as follows:

> The principle of the Act is that a person may ascertain the state of the title by a reference to the records of the land titles office and the person who is the registered owner has the right by transfer duly registered to convey a good title to a *bona-fide* purchaser subject only to what appears on the register and the reservations and exceptions of Sec. 58 (i.e. Sec. 44 of the 1906 Act).

He also cited the well known statement of Lord Watson in *Gibbs v. Messer*[3]:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

[1] [1940] 2 D.L.R. 282 at 306.
[2] [1928] 1 W.W.R. 348 at 351. [3] [1891] A.C. 248 at 254.

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The sections of the Act dealing with the position of the *bona fide* purchaser for value, which I have mentioned, support these views as to the purpose and intent of the Act. The fact that these provisions were incorporated in the statute negatives the suggestion that the Act further curtails the old common law rule that no man can convey a better title than he possesses, so as to enable a transferor, having no title at all, to vest in a volunteer a legal title valid as against the true owner. In my opinion, *The Land Titles Act* altered that rule only to the extent that it established certain special rights for the benefit of the *bona fide* purchaser for value. Accordingly, the registration of a transfer from Urbanie Kaup, who had no title to any minerals, to herself and her husband, made without consideration, did not confer any title to mines and minerals in the transferees.

Having reached this conclusion, I do not see how the provisions of *The Limitation of Actions Act* can be successfully invoked by the appellants to contend that the rights of the Lafleur Estate to mines and minerals had been extinguished. The position is that the appellants never, at any time, acquired a title to mines and minerals which was valid as against the Lafleur Estate. If the appellants acquired no interest in those mines and minerals, as a result of the erroneous registration of the two transfers, as against the Lafleur Estate, then there can be no basis for contending that the appellants ever had possession of them. There is no evidence which would support the claim that they exercised open, notorious and exclusive possession of them. On the contrary, Fred Kaup, in his evidence, when referring to the purchase of the land from John Lafleur, said: "There was nothing else discussed. Mineral rights—them days we didn't know what mineral rights was." There is no evidence of any attempt by the appellants to exercise control over, or to deal with the mineral rights. They merely farmed the surface of the land. On the contrary, the respondents paid the mineral taxes in respect of those minerals.

Under these circumstances I think the views expressed by Rand J. in this Court, in the *Turta* case at p. 456, properly should be applied:

> The remaining question is whether the action is barred by the *Limitation of Actions Act*, c. 133, R.S.A. 1942. On the view which I have taken that the petroleum rights were acquired by Turta and the Pacific Company deprived of them, the possession, in the absence of physical workings and

so far as such incorporeal rights can be the subject of possession, must be taken to be an incident of ownership. In the circumstances there has been no legal or physical disturbance of that possession; at the most, certain entries have been made on the certificate claiming rights which do not exist. The action is not, then, one to recover the land but to have those entries expunged and for a declaration of the plaintiff's interest. Since there has been no trespass and since the steps taken have, at the most, raised only a cloud upon the title, the question is whether an owner can be deprived of his land by the mere assertion on the register of unfounded claims. I know of no provision of law which, by the passage of time, raises any right based on that mode of protesting an interest; it would be a novel form of prescription which the law does not recognize. Its true interpretation is that of a continuing assertion against which proceedings of the nature here can be taken at any time, and no question of limitation arises.

The opinion of the minority judges in the Appellate Division of the Supreme Court of Alberta is clearly based on the proposition that, following the registration of the transfer to Fred Kaup and Urbanie Kaup, they thereby acquired a legal interest in the mines and minerals, other than coal, and that during the period from the issuance of their title until June 3, 1943, when the corrections were made, there had been no severance of the title to mines and minerals, other than coal, from the surface of the land. With respect, for the reasons already outlined, I do not accept this premise and without that premise the reasoning of the minority judgment cannot properly be applied.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitors for the defendants, respondents: Chambers, Might, Saucier, Peacock, Jones, Black & Gain, Calgary.

1961
*Nov. 27
1962
Jan. 23

THE GUARANTEE COMPANY OF NORTH AMERICA (*Defendant by Counterclaim*) .... APPELLANT;

AND

HARRISON COOLEY HAYES, the Trustee of THE PRELOAD COMPANY OF CANADA LIMITED, a bankrupt, (*Defendant by Counterclaim*)

AND

THE CITY OF REGINA (*Plaintiff by Counterclaim*) .... RESPONDENT.

THE PRELOAD COMPANY OF CANADA LIMITED .... (*Plaintiff*)

AND

THE CITY OF REGINA .... (*Defendant*)

HARRISON COOLEY HAYES, the trustee of the said The Preload Company of Canada Limited, a bankrupt, (*Plaintiff*)

AND

THE CITY OF REGINA (Defendant)

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Judgments and orders—Judgment against surety—Interest claimed on judgment and costs—Whether a judgment debt created within meaning of the Interest Act, R.S.C. 1952, c. 156, s. 15.

In a judgment, dated November 30, 1956, and subsequently sustained by the Court of Appeal for Saskatchewan and in this Court, the respondent municipality was found to have suffered damages by reason of non-performance of a contract by P. The latter was, at all relevant times, in bankruptcy. The appellant surety company bonded P for the due performance of its contract. On December 31, 1959, the appellant paid the respondent a sum comprising the amount of the bond plus the taxed costs. The respondent claimed interest on this sum to December 31, 1959, and interest on the amount so claimed, at five per cent per annum, from that date. It caused a writ of execution to issue against

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

the appellant for the amount claimed. The appellant applied to have the writ set aside, contending, on the hearing of the application, that the respondent was not entitled to claim the interest. The application was refused and an appeal from that decision was dismissed unanimously by the Court of Appeal. The appellant then applied to this Court for leave to appeal and the case was argued on the merits at the same time. The position of the appellant was that the judgment did not create a judgment debt within the meaning of the *Interest Act,* R.S.C. 1952, c. 156, because as of its date, there was no specific sum of money made payable by the appellant to the respondent.

Held: The appeal should be dismissed.

The effect of the judgment was that, at the expiration of thirty days from the date thereof, the respondent should recover from the appellant a sum of money then immediately ascertainable; *i.e.* the amount of the bond, minus any sum which, during that period, had been realized from P. That amount was a sum of money made payable by a judgment, within the meaning of s. 15 of the *Interest Act.* There was no reference by the Court to determine the amount of the damages, for the obvious reason that no such reference was necessary. There was no requirement that the matter be brought back before the Court after the thirty-day period, because that, too, was unnecessary. Interest, therefore, began to run, applying s. 15 of the Act, as soon as the amount payable became ascertained. *Gibbs v. Flight* (1853), 22 L.J.C.P. 256; *Garner v. Briggs* (1858), 27 L.J. Ch. 483, distinguished; *Ashover Fluor Spar Mines, Ltd. v. Jackson,* [1911] 2 Ch. 355, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Thomson J. declaring the respondent, a judgment creditor, to be entitled to interest on its judgment and costs. Appeal dismissed.

R. A. MacKimmie, Q.C., and *R. M. Balfour, Q.C.,* for the defendant by counterclaim, appellant.

J. L. McDougall, Q.C., E. D. Noonan, Q.C., and *G. Fraser Stewart, Q.C.,* for the plaintiff by counterclaim, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—In this action the respondent, the City of Regina, was found to have suffered damages in the amount of $1,281,407.55 by reason of non-performance by The Preload Company of Canada Limited (hereinafter referred to as "Preload") of its contract with the respondent to manufacture and deliver a type of prestressed concrete pipe. Preload was, at all relevant times, in bankruptcy. The appellant, The Guarantee Company of North America, bonded Preload for the due performance of its contract, the bond being in the amount of $1,209,258.57. The judgment at the

[1] (1961), 35 W.W.R. 529, 29 D.L.R. (2d) 183.

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trial was sustained by the Court of Appeal of Saskatchewan and in this Court[1]. In due course the costs against the appellant were taxed and allowed at $10,588.87.

On December 31, 1959, the appellant paid the respondent a total sum of $1,219,847.44, being the amount of the bond, plus the taxed costs. No payment was made in respect of interest on the judgment. The respondent claims interest of $183,925.15 on the judgment and taxed costs to December 31, 1959, and interest on that amount, at 5 per cent per annum, from that date. It caused a writ of execution to issue against the appellant on March 22, 1960, for the amount claimed. The appellant applied to have the writ set aside, contending, on the hearing of the application, that the respondent was not entitled to claim the interest. The application was refused and an appeal from that decision was dismissed unanimously by the Court of Appeal of Saskatchewan[2]. The appellant applied for leave to appeal from that decision and the case was argued on the merits at the same time. In view of the decision which I have reached on the merits, it is unnecessary for me to express any view as to whether leave to appeal was necessary or whether, if it was necessary, it should have been granted.

The issue is as to the respondent's right to claim interest from the appellant and that right depends upon the application of ss. 12 to 15 inclusive of the *Interest Act*, R.S.C. 1952, c. 156, which provide as follows:

MANITOBA, BRITISH COLUMBIA, SASKATCHEWAN, ALBERTA AND THE TERRITORIES.

12. Sections 13, 14 and 15 apply to the Provinces of Manitoba, British Columbia, Saskatchewan and Alberta and to the Northwest Territories and the Yukon Territory only.

13. Every judgment debt shall bear interest at the rate of five per cent per annum until it is satisfied.

14. Unless it is otherwise ordered by the court, such interest shall be calculated from the time of the rendering of the verdict or of the giving of the judgment, as the case may be, notwithstanding that the entry of the judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same court or in appeal.

15. Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any court whatsoever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt.

[1] [1959] S.C.R. 801, 20 D.L.R. (2d) 586.
[2] (1961), 35 W.W.R. 529, 29 D.L.R. (2d) 183.

In his reasons for judgment at the trial the learned trial judge said:

> For the above reasons the City is entitled to payment by the Surety of the amount of damages suffered by the City as a result of non-performance of the contract by the Preload Company and the Trustee up to and including the amount of the bond, namely $1,209,258.57, or such lesser amount as remains unrealized within a reasonable time by the City from its claim filed with the Trustee in bankruptcy. This claim amounts to $1,281,407.55.
>
> If, therefore, at the expiration of thirty days from the date hereof there is any amount up to and including the said sum of $1,209,258.57 unrealized by the City, the City will have judgment against the Surety for such amount together with its costs.

The formal judgment was dated November 20, 1956, and provided as follows:

> 6. AND IT IS HEREBY FURTHER ORDERED AND ADJUDGED that The City of Regina, Plaintiff (by counterclaim), is entitled to payment by The Guarantee Company of North America, Defendant (by counterclaim), of the amount of damages suffered by the said The City of Regina as a result of non-performance of the said contract by The Preload Company of Canada Limited up to and including the amount of the bond given by the said, The Guarantee Company of North America to The City of Regina, namely, $1,209,258.57, or such lesser amount as remains unrealized by The City of Regina from its said claim for the damages referred to in clause 3 hereof, namely, $1,281,407.55.
>
> 7. AND IT IS HEREBY FURTHER ORDERED AND ADJUDGED that if, at the expiration of thirty days from the date hereof, there is any amount up to and including the said sum of $1,209,258.57 unrealized by The City of Regina from its said debt provable against the said The Preload Company of Canada Limited, in bankruptcy, for the amount of damages referred to in clause 3 hereof, namely $1,281,407.55, that The City of Regina recover against The Guarantee Company of North America the said sum of $1,209,258.57, or such lesser amount as remains unrealized by The City of Regina from its said claim for the damages referred to in clause 3 hereof, namely, $1,281,407.55.

It further provided:

> 9. AND IT IS HEREBY FURTHER ORDERED AND ADJUDGED that proceedings under this Judgment be stayed for a period of thirty days from the date hereof and that if an appeal is taken from this Judgment then that proceedings under this Judgment be stayed until the matter is finally disposed of.

No payment was ever received by the respondent from Preload, save the costs taxed against the trustee personally, which were paid on March 29, 1960.

The appellant's position is that the judgment did not create a judgment debt within the meaning of the *Interest Act* because, as of its date, there was no specific sum of money made payable by the appellant to the respondent. The judgment, it is said, was conditional and was for an

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uncertain amount, whereas, to constitute a final judgment, it would have to be in terms sufficient in itself to adjudge payment of a specific sum of money. It was contended that some further step was necessary to have the amount of the judgment finally determined and that no such step had been taken. Reliance was placed on the English decisions of *Gibbs v. Flight*[1], and *Garner v. Briggs*[2].

In my opinion, while this argument might lead to the conclusion that there was not a judgment debt, within the meaning of s. 15 of the *Interest Act,* in existence on November 20, 1956, the date of the judgment, I think there was a judgment debt in existence after the expiration of thirty days from that date. Paragraph 6 of the judgment adjudged that the respondent was entitled to payment of its damages up to the amount of the bond, or such lesser amount as remained unrealized from Preload. Paragraph 7 then went on to provide that, if, at the expiration of thirty days from the date of the judgment, any amount up to $1,209,258.57 was unrealized by the respondent from its debt against Preload in bankruptcy, the respondent should recover that sum, or such lesser amount as remained unrealized from the appellant.

The effect of these two paragraphs is that, at the expiration of thirty days from the date of the judgment, the respondent should recover from the appellant a sum of money then immediately ascertainable; *i.e.,* $1,209,258.57, minus any sum which, during that period, had been realized from Preload. In my opinion, that amount was a sum of money made payable by a judgment, within the meaning of s. 15 of the *Interest Act.* There was no reference by the Court to determine the amount of damages, for the obvious reason that no such reference was necessary. There was no requirement that the matter be brought back before the Court after the thirty-day period, because that, too, was unnecessary. Interest, therefore, began to run, applying s. 15 of the *Interest Act,* as soon as the amount payable became ascertained.

The two English cases previously mentioned were concerned with the application of s. 18 of the *Judgments Act, 1838,* by which the effect of judgments was given to decrees and orders of Courts of Equity, rules of Courts of Law

[1] (1853), 22 L.J.C.P. 256, 138 E.R. 1417.
[2] (1858), 27 L.J. Ch. 483.

and orders in bankruptcy for the payment of money; all remedies given by the Act to judgment creditors were given to persons to whom any moneys were, by such orders or rules, directed to be paid.

The issue in *Gibbs v. Flight, supra,* was as to whether the rule of the Court in that case was within this section, so as to have the effect of a judgment. The question in issue was as to whether the order in question was an order to pay money. That order was that the defendants do pay, as costs, at a certain time and place, a certain sum of money "unless in the meantime the said sum be paid to the plaintiffs out of the funds of the Parish of St. Stephen, Walbrook". The plaintiffs in the proceedings were church wardens of the Parish mentioned and the earlier proceedings had indicated that the costs of both sides should be paid by the Parish.

The decision on this point is very brief, Jervis C.J. merely saying:

> But then comes the question as to the execution, founded on the Rule of Court, whether the order is an "order to pay money" under the Statute of Victoria and, upon that point, we think that the execution must be set aside; for we cannot consider that an order to pay money upon a condition, *under such circumstances as in the present case,* is such an order as will satisfy the statute.

The appellant contends that the order in the present case was similarly conditional and, therefore, was not an order for the payment of money under s. 15 of the *Interest Act.*

There is, however, a substantial difference between s. 18 of the *Judgments Act, 1838,* and s. 15 of the *Interest Act.* Section 18 provided:

> And be it enacted that all Decrees and Orders of Courts of Equity, and all Rules of Court . . . whereby any sum of money . . . shall be payable to any Person . . . shall have the effect of judgments in the Superior Courts of Common Law . . . .

This section is defining that kind of order which, by its terms, should be given the effect of a judgment in the Superior Courts of Common Law. Section 15 of the *Interest Act,* on the other hand, is defining those sums of money which shall be deemed to be a judgment debt.

The question in *Gibbs v. Flight* was as to the nature of the order which had been made and, rightly or wrongly, it was held that, in the circumstances of that case, the order, being conditional when made, was not an order for the payment of money so as to qualify for the benefits of the

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section. The order, once made, could not, thereafter, change its nature in the event that the Parish failed to pay the amount mentioned. The question in the present case, however, is not as to the nature of the order, but whether any sum of money was made payable by what is, undoubtedly, a judgment order. In my view, by the terms of that order, a sum of money, to be ascertained after the lapse of thirty days, was made payable.

In *Gibbs v. Flight,* after the failure of the Parish to pay the costs, I think there was, at that time, an order for the payment of a sum of money within the meaning of s. 15 of the *Interest Act.* But that was not the issue in that case. The sole question there was whether the order, at the time it was made, came within s. 18 of the *Judgments Act, 1838,* so as to have the effect of a judgment.

Garner v. Briggs, supra, decided only that an order, declaring that the executor of an estate was liable to make good to the estate a certain sum of money and that such sum should be charged in his account of the personal estate, was not, in its terms, an order for the payment of money by the executor, so as to fall within s. 18 of the *Judgments Act,* because it did not order the executor to pay it.

A statement of Eve J. in a more recent judgment, in *Ashover Fluor Spar Mines, Limited v. Jackson*[1], which also dealt with s. 18 of the *Judgments Act, 1838*, is of interest in considering the application of that section. At p. 359, dealing with the order then under consideration before him, he said:

> It belongs to a class of order with which we are all familiar, and stands somewhere between the two alternative forms in which such orders are usually made. In the first of the two alternative forms the inquiry is directed, and liberty to apply, after the result has been certified, is given. In the second alternative the Court, after directing the inquiry, goes on to order the defendant to pay to the plaintiff the amount certified. The latter of these orders is, in my opinion, within, and the former outside, the provisions of s. 18 of the Judgments Act, 1838.

I think it is clear that the judgment order in the present case is within the second classification, as it was an order for the payment of a sum of money to be ascertained after the lapse of thirty days from the date of the order.

[1] [1911] 2 Ch. 355.

For these reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant by counterclaim, appellant: Balfour & Balfour, Regina.

Solicitor for the plaintiff by counterclaim, respondent: G. Fraser Stewart, Regina.

GEORGE WILLIAM MEYER (*Plaintiff*) ..APPELLANT;

AND

GENERAL EXCHANGE INSURANCE CORPORATION, LAYTON R. COLBORNE and KEITH CHRISTENSON (*Defendants*) .... RESPONDENTS.

1961 *Oct. 25, 26
1962 Jan. 23

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Insurance—Fire—Arson charge dismissed—Action on policy allowed. Malicious prosecution—Action for—Matters to be established—Functions of trial judge sitting without a jury.

The defendant insurance company issued a policy of insurance against fire and other risks on a truck belonging to the plaintiff. Shortly thereafter a fire originating in the truck caused serious damage to the vehicle. The defendant C, an adjuster employed by the insurance company, was instructed by the defendant LC, the company's office manager, to investigate the nature and cause of the damage. Following C's report it was decided to refer the matter to the Royal Canadian Mounted Police. The findings of a police investigating officer were submitted to the Attorney General's Department which advised that there was sufficient evidence to warrant a prosecution. The police officer informed LC of these facts and asked him to lay a criminal charge; LC did so and the charge was dismissed. A statement of claim was subsequently issued, the plaintiff claiming upon the policy and damages against all three defendants for malicious prosecution. A third cause of action asserted against C was that he had "by false and malicious evidence and representations procured" the magistrate at the preliminary hearing to commit the plaintiff on the charge. The action on the policy was allowed, but the action with regard to malicious prosecution was dismissed. The plaintiff's appeal as to the latter having been dismissed by the Appellate Division of the Supreme Court of Alberta, an appeal was brought to this Court.

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

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et al.

Held: The appeal should be dismissed.

No action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause. Here the trial judge, who sat without a jury, reached the conclusion that LC had acted in good faith and that there were reasonable and probable grounds for his laying the charge. This finding was concurred in by the Appellate Division. The burden of proving malice rested upon the plaintiff and the judges below implicitly found against him on that issue. There were no grounds upon which this Court could properly interfere with the judgment appealed from upon either of these issues. There was no finding in either of the lower Courts as to the claim advanced against C for allegedly giving false evidence and the matter, not having been argued in this Court, should be considered as abandoned.

Abrath v. North Eastern Railway Co. (1883), 11 Q.B.D. 440; *Cox v. English, Scottish and Australian Bank Ltd.*, [1905] A.C. 168; *Lister v. Perryman* (1870), L.R. 4 H.L. 521; *Herniman v. Smith,* [1938] A.C. 305, referred to.

Per Cartwright J.: While, on the issue of the existence of malice, it may be said that the defendants were not responsible for the police officer's lack of care in the investigation which preceded the laying of the information, this could not be said with reference to the question whether or not the defendants had reasonable and probable cause for laying the information.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, dismissing an appeal from part of a judgment of Manning J. dismissing appellant's claim for damages for malicious prosecution. Appeal dismissed.

S. G. Main, Q.C., for the plaintiff, appellant.

D. H. Bowen, for the defendants, respondents.

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

LOCKE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing the appeal of the present appellant, the plaintiff in the action, from that part of the judgment of Manning J. at the trial which dismissed the plaintiff's claim for damages for malicious prosecution.

The respondent corporation, an insurance company, issued a policy of insurance against fire and other risks on a truck, the property of the appellant, for the period of one year from October 2, 1957. On the 14th day of November, 1957, while standing unattended on the property of the appellant

at Island Lake, Alta., where it had been left a few minutes earlier by the appellant, a fire originating in the truck caused serious damage to the vehicle.

The respondent Christenson was at the time an adjuster employed in the Edmonton office of the respondent corporation and was instructed by the respondent Colborne, the office manager of the company at Edmonton, to investigate the nature and cause of the damage. On November 25 the appellant went to Edmonton and had an interview with Christenson in the company's office and then signed a written statement prepared by the latter, as a result of their conversation. Thereafter, Christenson went to the scene of the fire and examined the damaged truck and had a further interview with the appellant and with the latter's wife, at which interview he expressed doubts as to whether the fire had resulted from accidental causes. There is evidence that, at this latter interview, abusive language was used by both the appellant and Christenson, the latter questioning the truth of various statements made by Meyer during their interview in Edmonton on November 25.

The respondent Christenson reported his findings to the respondent Colborne and it was decided to refer the matter for investigation to the Royal Canadian Mounted Police at Edmonton. As a result, Corporal Paley (later Sergeant), an experienced motor mechanic who had been charged with the duty of investigating automotive fires for the police since 1953, carried out an investigation. Before doing so, he interviewed the respondent Colborne and advised the latter that the policy of the Mounted Police in such investigations was to submit Paley's report to the Attorney General's Department and that, if the latter advised that there was sufficient evidence to prosecute, to ask the person requesting the police to investigate to lay a criminal charge. At that time Colborne agreed that if a prosecution was advised by the Department he would do this.

Paley proceeded to Athabaska where the truck had been placed in a garage and conducted a thorough examination in an endeavour to form an opinion as to the origin of the fire. The result of this examination was explained in great detail at the trial. The truck which had been bought by the appellant second hand was in many respects in poor mechanical shape. The piston in the 6th cylinder was seized

and in that condition the truck could not be operated. The gas tank situated behind the seat in the cab contained 4 gallons of gasoline which was intact and there was no leak in the tank. A gallon can of motor oil in the body of the truck was also found to be intact. There had, according to this witness, been but slight damage to that portion of the truck between the firewall and the radiator but the cab itself was extensively damaged, showing evidence of there having been a very intense fire there which occasioned very considerable destruction.

Paley was aware of the statements that had been made by the appellant to Christenson during their interviews, including a statement that it had looked like a gas fire, but appears to have formed the opinion that fire had been set by the appellant, from the nature of the damage to the truck and the admitted fact that the appellant was the last person who had been in it prior to the fire and was only a short distance away conducting an examination of the cabins owned by him at the time the fire commenced.

Paley prepared a written report of his findings and submitted it, with statements of certain witnesses, to Mr. J. W. Anderson, a solicitor in the Attorney General's Department whose duties included prosecuting criminal cases and who had several consultations with Paley. As a result Mr. Anderson said that:

> My recommendation after due consideration was that there was sufficient evidence available to warrant taking the matter to a preliminary inquiry on a charge of arson.

and he wrote a letter to the officer commanding the division of the Mounted Police to that effect. He did not mention in giving his evidence-in-chief and was not cross-examined as to the evidence submitted to him upon which he based his opinion, other than as above stated. Paley said that he informed the respondent Colborne of these facts and asked him to lay the charge and Colborne did so.

The charge as laid was that the appellant:

> did unlawfully and wilfully and for a fraudulent purpose, namely to defraud the General Exchange Insurance Corporation, set fire to a 1955 G.M.C. truck, property of the said George W. Meyer, contrary to the provisions of Section 374(2) of the Criminal Code.

At the preliminary hearing both Christenson and Colborne gave evidence and the appellant was committed for trial.

On October 8, 1958, the charge against the appellant was tried by McLaurin C.J. at the criminal sittings at Edmonton who dismissed it without calling upon the appellant to present any defence.

The statement of claim was issued on November 13, 1958, the appellant claiming the sum of $1,400 under the fire insurance policy and damages against all three of the respondents for malicious prosecution. A third cause of action asserted against the respondent Christenson was that he had:

> by false and malicious evidence and representations procured the said Magistrate Pearce to commit the plaintiff upon the said charge to the next Criminal Sittings of the Supreme Court of Alberta, to be held at Edmonton.

Damages were not claimed separately in the prayer for relief upon the last mentioned claim, nor was it alleged that the respondent corporation or the respondent Colborne were parties to the alleged wrongful acts of Christenson. On the other hand, Christenson had not laid the information nor is there any evidence in the extensive record to show that he did anything more than to investigate the claim and report the matter to Colborne.

By way of defence to the action upon the policy, the respondent corporation pleaded that the appellant had made wilfully false and fraudulent statements in the written statement given to Christenson on November 25, these including, *inter alia,* that he had left the truck after turning off the motor on the morning in question and that the fire in the truck was fed from the gas tank. It was further alleged that the appellant had refused to sign a statement that the loss did not originate by any act, design or procurement on his part, that he had not filed a statutory declaration proving the loss as required by the statutory conditions and that the fire and any loss suffered had been caused by the appellant's "wilful act, neglect, procurement and contrivance." The defence pleaded by all three defendants to the count for malicious prosecution was a general denial and an allegation that Colborne had reasonable and probable cause for laying the information. To the count alleging that Christenson had given false and malicious evidence at the preliminary hearing, the defence was a straight denial.

After a trial lasting some eight days, the learned trial judge, Manning J., gave a short oral judgment. Dealing with the claim upon the policy, he said that he was not satisfied that the statements complained of were made fraudulently and if they were inaccurate it was probably the result of careless use of language. As to the defence that the appellant had not furnished a statutory declaration proving the loss, the learned judge held that, as the respondent corporation had failed to provide the required form, it could not rely upon this as a defence. Judgment was given against the respondent corporation for a sum of $796.75.

The issue raised by the defendant corporation's claim that the fire had been caused by the wilful act or procurement of the appellant was not dealt with. Despite the acquittal of the appellant by McLaurin C.J., this defendant was entitled to insist upon this ground of defence and, as the record shows, a great deal of evidence was given which, if accepted, might have justified a finding that the appellant had by his own act brought about the fire. While the learned trial judge did not either refer to this defence or in terms make any finding upon the issue, it is obvious that he was of the opinion that this defence failed since he gave judgment upon the policy for the amount of the loss. As to the issue of malicious prosecution, the reasons do not differentiate the position of the respondent Christenson, who neither signed the information or was shown to have been responsible in any way for bringing about the institution of the criminal proceedings, from that of the other defendants. Saying that the insurance company had made an investigation and come to the conclusion that there were grounds for suspicion and handed their file to Sgt. Paley, the learned judge said:

> Sergeant Paley is a man who specializes in the investigation of fires. He investigated and concluded that there was a proper case for prosecution. I have obviously not agreed with the conclusion of Sergeant Paley because I have declined to give effect to the insurance company's claim of false and fraudulent statements; but I think I am bound to say that Sergeant Paley appeared to me to be a very competent man and a very reasonable man. When an official of the Royal Canadian Mounted Police, like Sergeant Paley, makes a careful investigation and advises that a prosecution should be commenced, it does seem to me that there are reasonable and probable grounds for following the suggestion that he makes. I think I would feel that way if Sergeant Paley himself had been the only person involved but Sergeant Paley's advice was considered and concurred in by

Mr. Anderson, a solicitor of the Attorney General's Department and it was following that that the charge was laid. Consequently, I feel that I must dismiss the action with regard to malicious prosecution.

The claim for damages against the respondent Christenson by reason of the evidence given by the latter at the preliminary hearing was not mentioned by the learned judge and there is no finding as to whether the evidence complained of was true or false. Since, however, the action was dismissed against Christenson, it must be assumed that the learned judge was of the opinion that the allegations made against him in the pleading had not been made out.

The appeal to the Appellate Division was heard by Macdonald, Johnson and Kane JJ.A. and the judgment of the Court was delivered orally by the last named at the conclusion of the argument. There had been no cross-appeal from the judgment delivered against the respondent corporation on the policy and the reasons delivered do not indicate that the claim against Christenson in respect of the evidence given by him at the preliminary hearing had been argued before the Court. In the brief reasons delivered the Court found that if there had been a want of care by Paley in his investigation the respondents were not liable for it and, as to Christenson's investigation, that "any failures on his part in respect of his investigation are not of the type from which malice must necessarily be inferred." It was further found that "the conduct of those concerned was a matter for consideration by the trial judge. This conduct does not in itself raise an inference of malice such as would require us to say the trial judge was wrong". The reasons concluded:

Considering all the evidence there is evidence on which the learned trial judge could find, as he did, that the respondents had reasonable grounds for laying the charge in the reasons stated by him. It is, therefore, a finding of fact.

The matters to be established by a plaintiff in an action for damages for malicious prosecution are as stated by Bowen L.J. in *Abrath v. North Eastern Railway Co.*[1]:

This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and,

[1] (1883), 11 Q.B.D. 440 at 455

lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice.

At p. 457 that learned judge said further:

> Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it.

This statement of the law was approved and adopted by the Judicial Committee in *Cox v. English, Scottish and Australian Bank Ltd.*[1]

The respondent Colborne did not know the appellant and obtained the information upon which he acted from the respondent Christenson and from Sgt. Paley, and swore that these facts indicated to him and there was no doubt in his mind that the fire was "intentional" and that in laying the charge he relied upon the advice of the Attorney General's Department, communicated to him by Paley.

No action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause (*Lister v. Perryman*[2]). Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified. This action was tried by the learned judge without the intervention of a jury and it was accordingly for him to find both the facts as to the matters which the complainant believed and upon which he relied, and also whether the facts so believed amounted to reasonable cause (*Herniman v. Smith*[3], Lord Atkin at 317).

While it would have been of assistance if the learned trial judge had dealt in somewhat more detail with this aspect of the matter, it appears to me to be clear that he reached the conclusion that Colborne had acted in good faith and that there were reasonable and probable grounds for his laying the charge. The learned judges of the Appellate Division have concurred in that finding.

The burden of proving malice of the nature referred to by Bowen L.J. rested upon the plaintiff and while the learned trial judge does not deal with this aspect of the matter in terms, it appears to me implicit in the reasons given that he found against the appellant on this issue. I consider that the reasons delivered by Kane J.A. are also to be construed as finding against the appellant on that issue.

[1] [1905] A.C. 168 at 170.
[2] (1870), L.R. 4 H.L. 521.
[3] [1938] A.C. 305, 1 All E.R. 1.

My consideration of the very lengthy evidence in this case leads me to the conclusion that there are no grounds upon which we may properly interfere with the judgment appealed from upon either of these issues.

As to the claim advanced against the respondent Christenson for allegedly giving false evidence at the preliminary hearing and doing so maliciously, there is no finding in either of the courts below and the matter not having been argued before us should, in my opinion, be considered as abandoned.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Locke and wish to add only a few words.

In the brief oral reasons of the Appellate Division delivered by Kane J.A. there is the following statement:

> As to Sergeant Paley, the respondents cannot be held liable for his shortcomings, if in fact there were any shortcomings.

On reading the reasons as a whole, I think it clear that the sentence quoted has reference only to the argument that the existence of malice on the part of the respondents should have been inferred from lack of care in the investigation which preceded the laying of the information. If it had had reference to the question whether or not the respondents had reasonable and probable cause for laying the information it is my present view that I would disagree with it; but as I am satisfied that it does not have reference to that question I do not pursue the matter further.

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

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Main, Dunne, Nugent & Forbes, Edmonton.

Solicitors for the defendants, respondents: Duncan, Miskew, Dechene, Bowen, Craig & Brosseau, Edmonton.

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*Oct. 26, 27

1962

Jan. 23

EDWARD GEORGE McBRIDE and WILMER PRENTICE HOGABOAM, Executors of the Will of Alfred Edward McBride, Deceased (*Defendants*) .APPELLANTS;

AND

DOROTHY BARBARA JOHNSON, also known as BARBARA McBRIDE (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contract—Action for breach of promise of marriage—Cohabitation—Promisee in constant expectation of marriage—Delay on part of promisor—Repudiation not to be readily inferred—Effect of promisor's death—Whether promisor's delay procrastination or fraudulent misrepresentation.

The plaintiff cohabited with the deceased for several years before his death in the constant expectation that he would marry her. The story of their relationship between the time when the deceased obtained a decree absolute dissolving his first marriage and the time of his death disclosed a consistent and continuing belief in, and assertion of, an existing contract of marriage between them on the part of the plaintiff and a consistent attitude of procrastination on the part of the deceased. The trial judge held that the deceased's refusal to marry the plaintiff and also his subsequent continued delay to so marry amounted to breach of promise. The defendants' appeal from that judgment was dismissed by the Appellate Division of the Supreme Court of Alberta and a further appeal was brought to this Court. The defendants contended that the marriage was still in contemplation on the day the deceased was killed and that there was then an existing contract outstanding between the parties which was brought to an end by the deceased's death. The plaintiff contended that there was a breach of contract during the deceased's lifetime, giving rise to a cause of action against his executors.

Held: The appeal should be allowed.

There were findings of fact by the trial judge that the deceased had renewed his promise of marriage, that he indicated his intention of carrying it out and that up to the date of his death no repudiation of this promise was ever communicated by him to the plaintiff. Repudiation of a contract is not to be readily inferred in the case of a promisor who reiterates his intention to carry out his promise and whose conduct, however inconsistent with his intention it may appear to be, has at no time had the effect of communicating such a repudiation to the promissee. *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, considered.

Even if the deceased's behavior was such as to make it entirely apparent that he never had the slightest intention of marrying the plaintiff, it was nevertheless equally clear from the evidence that the plaintiff never accepted his conduct as meaning any such thing, and that notwithstanding his repeated delays she insisted on the continued existence

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

of the contract and was at all times ready to carry out her part of it. The effect of the failure to marry on the day named in the written contract had been erased by the subsequent renewal and by the conduct of the parties, and the promise was one of which performance was currently due from day to day. *Frost v. Knight* (1872), L.R. 7 Exch. 111; *Avery v. Bowden* (1856), 6 E. & B. 953; *Heyman v. Darwins, Ltd.*, [1942] A.C. 356, considered.

The deceased's death was a supervening event not due to his own fault, which brought the contract to an end. *Hall v. Wright* (1859), E. B. & E. 765; *Stubbs (Administrator) v. Holywell Ry.* (1867), 2 Exch. 311; *Robinson v. Davison* (1871), L.R. 6 Exch. 269, applied. The deceased's continued existence was an implied condition of the contract.

The plaintiff's alternative plea, that as a result of the deceased's fraudulent misrepresentation she had cohabited with him, was not supported by the evidence. The deceased's conduct was at least as consistent with honest procrastination as it was with fraudulent misrepresentation, and that of the plaintiff suggested that she was prepared to cohabit in constant expectation of marriage.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, affirming a judgment of Cairns J. in an action for breach of promise of marriage. Appeal allowed.

T. Mayson, for the defendants, appellants.

MacDonald Millard, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta insofar as it affirmed those portions of a judgment of Mr. Justice Cairns which ordered that the respondent recover $10,000 from the appellants for breach of promise of marriage and that all the furniture and furnishings in a house at 4750 55th Street, Red Deer, Alberta, belonged to the respondent with the exception of one chesterfield, two chairs and one bed. The appellants also appeal from the Orders as to costs in the Courts below.

The appellants are the executors of the will of Alfred Edward McBride who was killed in an automobile accident on February 28, 1959, and who, at the time of his death, was living at Red Deer aforesaid in the same house with the respondent and holding her out as his wife to at least some other members of the community although they were not married.

The story of the relationship between the respondent and McBride between September 18, 1952, when he obtained a decree absolute dissolving his first marriage and the time

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of his death discloses a consistent and continuing belief in, and assertion of, an existing contract of marriage between them on the part of the respondent and a consistent attitude of procrastination on the part of McBride. The respondent's evidence which is uncontradicted is that the couple became engaged to be married in 1953 at which time she was 51 years of age and her fiancé 54. Pursuant to this engagement, she says that they went together on a trip to Idaho in July 1954 for the purpose of getting married, but unfortunately the day which they selected for the ceremony was July 4, and as this was a public holiday they were unable to get blood tests, and so decided that they "would go on to Coulee Dam and come back and get married another day". At this stage there was apparently a quarrel, as a result of which McBride refused to go through with the wedding, and they returned to Red Deer. Shortly after returning home, a contract was prepared by the respondent, signed by both her and McBride and duly witnessed which read as follows:

> I, Alfred Edward McBride & I Dorothy Barbara Johnson the undersigned do solemnly promise that on the 15th day of July, 1954 shall marry each other.
>
> Both of us being of sound mind do declare this covenant. No bills or debts of the other are either of our responsibility. Fat shall do his own business & I shall obey & mind my own.

When July 15 came, the respondent says that McBride "wanted a little more time, and he thought that we would wait until he had time that we could go away again". In preparation for the marriage, the couple went to a clinic and had their blood tests taken on August 19, and the necessary form in this regard, pursuant to *The Solemnization of Marriage Act,* was duly completed by a physician. This initial step having been completed, the respondent says that they "started making preparations to have a honeymoon and go away and get married", and finally in September McBride "booked off" some time from his work and they proceeded to the Court House at Red Deer for the purpose of getting a marriage licence, but when they got there it appeared that McBride did not have "a certificate of no appeal" from the Clerk of the Court in Edmonton where he had obtained his divorce without which certificate a marriage licence could not be obtained. McBride was "quite angry" and seemed to think that "he had paid enough already for a divorce without having to pay any more" and he refused to get the required certificate, but as he was all packed and he had his

time "booked off" the couple decided to go for "a honeymoon" anyway; they proceeded on a trip to the States and on their return the respondent moved in to the house where McBride was living and where she had been keeping house for him, although she had been living elsewhere. She says of this move:

> We were going to get married as soon as we had the furniture and things moved in, and were preparing to get the certificate from Edmonton, he said that when he went up he would go to the Court House and get it.

and again:

> A. Yes, he refused to marry me on the 15th of July when he wouldn't get his certificate, when he postponed the marriage until later on.
>
> Q. But whatever happened then, you moved in with him later, didn't you?
>
> A. I had no alternative but to move in with the promise I would be married when we got our house straightened up.

The furniture which was moved was found by the learned trial judge to be the property of the respondent, but in ordering that "all of the furniture and furnishings in the house . . . belong to the Plaintiff with the exception of 1 chesterfield, 2 chairs and 1 bed, ..." he included a stove, a television set and a refrigerator which had been purchased by McBride and which the appellants now claim to have been his property.

From the time of the move in September 1954 until McBride's death he and the respondent appear to have lived happily with each other and to have gone on holidays together. The respondent produced some valentine cards, letters and a photograph indicating that McBride's affection for her continued over the years and in 1957 she adopted her own granddaughter, a child of two years, of whom she says: "I took this child to raise because we loved her and she brought a great deal of comfort and happiness into the home of the deceased and myself." There is evidence that except when McBride was not sober he treated her well, and she says, "He led me to believe that he was going to marry me at all times". The following exchange occurred on the cross-examination of the respondent:

> Q. And he never repudiated his agreement, did he?
>
> A. He never repudiated his agreement, no.
>
> Q. And he never said anything to you to lead you to believe that he was misleading you in any way?
>
> A. No.
>
> Q. And he continued his promise right up to the time of his death, didn't he?
>
> A. That's right, Mr. Mayson.

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In support of the argument that McBride did not intend to marry the respondent after September 1954, counsel laid great stress on the fact that he made no provision for her in the will which he made in 1956, but in my view this falls into the same category as the evidence to the effect that the respondent would have lost her widow's pension of $90 a month if she had married. Both are circumstances from which inferences could be drawn but neither is of sufficient weight to support a conclusion as to the intention of the parties.

It is contended on behalf of the appellants that on February 28, 1959, the marriage was still in contemplation and that there was then an existing contract outstanding between the parties which was brought to an end by McBride's death on that date. The respondent, on the other hand, contends that there was a breach of the contract during McBride's lifetime, giving rise to a cause of action against his executors.

If there had been a breach of the contract during McBride's lifetime, it is not disputed that in accordance with the decision of this Court in *Smallman v. Moore*[1], an action could be maintained against his executors. That was an action brought against the administrator of a deceased promisor and the jury had expressly found that the deceased was in breach of his promise to marry and that the parties had not afterwards agreed to a postponement of the marriage. As to the contention that such an action could not be brought against the administrator, Mr. Justice Locke said:

> That the breach of a contract of this nature is a mere personal wrong is . . . concluded by authority: the injury occasioned is a personal injury to the plaintiff. Such an injury is . . . a wrong to the plaintiff "in respect of his person" within the meaning of the section [s. 37(2) of the *Trustee Act*, R.S.O. 1937, c. 165] whether it results from a breach of contract or is occasioned by a tort.

Although these observations were directed to the Ontario *Trustee Act, supra,* they apply with equal force in my opinion to the equivalent provision of the Alberta *Trustee Act,* R.S.A. 1955, c. 346, which reads as follows:

> 33. (1) Where any deceased person committed a wrong to another in respect of his person or of his real or personal property, except in cases of libel and slander, the person so wronged may maintain an action against the executors or administrators of the deceased person who committed the wrong.

[1] [1948] S.C.R. 295, 3 D.L.R. 657.

In the present case, however, it is contended on behalf of the appellants that there had been no breach of McBride's promise, that the respondent never recognized any repudiation by him being at all times ready, willing and anxious to carry out her part of the bargain, and that the obligations incidental to such a promise must, in the nature of things, be brought to an end by the death of the promisor.

The following paragraph in the reasons for judgment of the learned trial judge contains the essence of his finding on this branch of the case, and as the Appellate Division gave no reasons for dismissing the appeal these observations must be taken to have been adopted by that Court:

> The plaintiff was very frank to say that he intended to marry her as far as she knew to the date of his death and there is no doubt that he indicated this to her, but I am completely convinced from all of the evidence, excluding certain hearsay evidence at the trial, on which point I have considerable doubt, that he never had the slightest intention of marrying her after September, 1954, even though he did indicate his good intentions to her to such an extent that he convinced her of his sincerity. In my view, a breach of the contract occurred in 1954 when he refused to marry her and that breach continued until his death in spite of his protestations of love for her and his good intentions. Even though he did heal the breach as far as she was concerned, to some extent, by promises of marriage later, to the extent that he deceived her completely, his continued delay of four and a half years, in my view, also amounts to a breach of his contract, and that prior to his death he had completely repudiated his contract, if not expressly, at least by his conduct although this had not been communicated to the plaintiff. McBride had a scheme to maintain the status quo without incurring the obligations incident to marriage. There is no doubt that where the breach occurred prior to the death, a cause of action for breach of promise of marriage will lie against the representatives. Smallman v. Moore, [1948] S.C.R. 295.

This statement is a long way from the clear-cut findings of fact made by the jury in *Smallman v. Moore, supra,* and the analysis of what was passing through McBride's mind over the years must be based almost entirely on inference. There are nevertheless included in this forceful expression of the learned trial judge's deductions certain findings of fact which are directly supported by the respondent's evidence, namely, that McBride renewed his promise of marriage after September 1954, that he indicated his intention of carrying it out, and that up to the date of his death no repudiation of this promise was ever communicated to the respondent by him.

These findings of fact standing alone support the contention that McBride at no time repudiated the promise of marriage which he made after September 1954. Repudiation

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of a contract is not to be readily inferred in the case of a promisor who reiterates his intention to carry out his promise and whose conduct, however inconsistent with this intention it may appear to be, has at no time had the effect of communicating such repudiation to the promisee. The nature of the conduct which would justify an inference of repudiation is discussed by Lord Selborne in the case of *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*[1], where he says at pp. 442-443:

> You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract . . . and whether the other party may accept it as a reason for not performing his part.

Even if it is accepted, however, that McBride's behaviour was such as to make it entirely apparent that he never had the slightest intention of marrying her, it is nevertheless equally clear from the evidence that the respondent never accepted his conduct as meaning any such thing, and that notwithstanding his repeated delays she insisted on the continued existence of the contract and was at all times ready to carry out her part of it.

In delivering his well-known decision in *Frost v. Knight*[2], Cockburn C.J. was concerned with the repudiation of a promise to marry before the date due for fulfilment had arrived. The contract in that case was not to be performed until the death of the promisor's father, but the promise had been withdrawn during his lifetime. Under these circumstances, Cockburn C.J. said at pp. 112-113:

> The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.
>
> On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action

[1] (1884), 9 App. Cas. 434, 53 L.J.Q.B. 497.
[2] (1872), L.R. 7 Exch. 111.

he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

The present case, however, is not one in which performance was conditional on the happening of some future event nor is it one of repudiation prior to the time fixed for performance. The effect of the failure to marry on the day named in the written contract had been erased by the subsequent renewal and by the conduct of the parties, and the promise was one of which performance was currently due from day to day.

Before the decision in *Frost v. Knight, supra,* it had been decided in *Avery v. Bowden*[1], that if in a contract which involved the loading of cargo within a certain number of days the party required to load had positively informed the ship's captain that no cargo was to be loaded, then the captain might have treated this as a breach and renunciation of the contract and have sailed away, whereupon he would have had the right to maintain an action on the contract. On the other hand, if he continued to insist upon having a cargo in fulfilment of the contract, the renunciation could not be considered as constituting a cause of action and a declaration of war before the expiration of the period fixed for loading would have brought the contract to an end. The effect of the decision of the Court of Queen's Bench in this case is well summarized in the head-note to the proceedings which affirmed it in the Exchequer Chamber, *supra.* It is there said:

Held, by the Court of Queen's Bench, that, assuming that the defendant's agent had on his part renounced the contract before the declaration of war, such renunciation, not being accepted by the master, constituted neither a dispensation *nor cause of action.* (The italics are mine.)

This case has come to be taken as a precedent for the proposition which is clearly and authoritatively stated by Viscount Simon in *Heyman v. Darwins, Limited*[2], where he says:

If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor

[1] (1856), 6 E. & B. 953, 26 L.J.Q.B. 3.
[2] [1942] A.C. 356 at 361, 1 All E.R. 337.

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to the bargain, and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance: a classic example of this is to be found in *Avery v. Bowden* (1855) 5 E. & B. 714. Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) "accept the repudiation", by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages.

In the present case there was ample evidence that the respondent was insisting on holding McBride to his bargain and that she was continuing until the day of his death to tender due performance of her part of the contract.

Whether or not McBride's conduct amounted to an absolute refusal to perform his contract so as to give the respondent the right to sue for damages, the respondent's conduct in my opinion had the effect of keeping the contract alive, and the only remaining question is whether McBride's death was a supervening event not due to his own fault which brought it to an end. In my opinion it undoubtedly was.

In the case of *Hall v. Wright*[1], which was an action for breach of promise of marriage, the defendant who suffered from severe bleeding from his lungs pleaded that he was incapable of marriage without great danger to his own life. There was a strong difference of opinion between the judges of the Exchequer Court as to the validity of this defence, and although the majority, for varying reasons, held that the plea was bad, none dissented from the view expressed by Pollock C.B. that:

In the case of the ordinary contract to marry, such as it is presented to the Court by evidence in actions of this sort, I think no one can doubt that the continuance of life is an implied condition.

This reasoning was applied to the case of a contract of personal service in *Stubbs (Administrator) v. Holywell Railway Company*[2], where Martin B. said:

The contract, no doubt, is ended by the death of Stubbs, but only in this sense, that the act of God has made further performance impossible. The man's life was an implied condition of the contract, but the fact of his death can have nothing whatever to do with the payment due for what has been done—with what has been actually earned by the deceased.

[1] (1859), E. B. & E. 765 at 794, 120 E.R. 695 at 706.
[2] (1867), 2 Exch. 311 at 314, 36 L.J. Ex. 166.

In the case of *Robinson v. Davison*[1], Kelly B. adopted the following language used by Pollock C.B. in *Hall v. Wright, supra*:

> All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them: and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death.

It seems to me to be obvious that McBride's continued existence was an implied condition of the contract in the present case and that the contract ended with his death.

There is included in the Statement of Claim the following alternative plea:

> In the alternative the Plaintiff states that the said Alfred Edward McBride, deceased, fraudulently misrepresented to her that he intended at all times to marry her from the date that he entered into the said Agreement until the date of his death, and that as a result of the said misrepresentation and the fraud which he perpetrated on her, she took up residence in the said premises and kept house for the said Alfred Edward McBride and accepted the responsibilities which she would not otherwise have undertaken and was entirely misled by the representations made by the said Alfred Edward McBride, deceased.

I do not find it necessary to deal with the arguments presented concerning this plea because, with all respect to the learned trial judge, I do not think that it is supported by the evidence. The respondent was the mother of six grown-up children by her first husband and had been a nurse at a provincial training centre, she had known McBride for fifteen years, been engaged to him for six years and had lived with him for the last five years of his life, and I am, with respect, unable to accept as probable the inference that such an experienced woman could be completely deceived from day to day as to the meaning of the words and actions of a man with whom she had been so intimate for so long a time concerning a subject of such vital importance to them both. In my view, McBride's conduct as disclosed by the evidence is at least as consistent with honest procrastination as it is with fraudulent misrepresentation and that of the respondent suggests that although she was apparently ready to put up with the loose arrangement of cohabitation without marriage on a temporary basis, she was in constant expectation of the relationship being regularized by McBride carrying out his continuing promise of marriage which remained unfulfilled and unreleased at his death.

[1] (1871), L.R. 6 Exch. 269, 40 L.J. Ex. 172.

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As has been indicated, the appellants appeal also from that part of the Order of the learned trial judge which awarded a stove, television set and a refrigerator to the respondent. The respondent says that she bought the stove with the house, and as there is no appeal from the finding that she had no interest in the house, I am, with respect, unable to see any ground for declaring that the stove is her property. The television set and refrigerator were purchased by McBride, and although the respondent states that they were both given to her, there is no corroboration of this evidence as required by s. 13 of the Alberta *Evidence Act,* R.S.A. 1955, c. 101, and as there is no presumption of a gift under the circumstances here disclosed I do not think there is sufficient evidence to justify the award of these items to the respondent.

On the evidence I am not satisfied that the learned trial judge was wrong in failing to award damages to the appellants in respect of the respondent's refusal to deliver up the house to them nor do I find any evidence of the appellants having suffered damage by reason of the respondent retaining and using the stove, television set and refrigerator.

Save as aforesaid, I would allow this appeal and set aside the Order appealed from insofar as it awards $10,000 in damages to the respondent and insofar as it adjudges that the three last-mentioned items to be property belonging to the respondent and accords her the right to remove them. The appellants should have their costs of the claim and counterclaim on the trial and their costs of the appeal to the Appellate Division of the Supreme Court of Alberta and to this Court.

Appeal allowed with costs throughout.

Solicitors for the defendants, appellants: Steer, Dyde, Massie, Layton, Cregan & MacDonnell, Edmonton.

Solicitors for the plaintiff, respondent: Millard & Johnson, Calgary.

LA SARCHI COMPAGNIE (*Plaintiff*) ....APPELLANT;

1961
*Nov. 27
Dec. 15

AND

THE FIRST NATIONAL BANK OF BOSTON (*Defendant*) .... RESPONDENT.

MOTION TO QUASH

Appeals—Practice—Action in Quebec—Defendant non-resident and having no place of business there—Declinatory exception to jurisdiction—Whether judgment of appeal court a final judgment—Code of Civil Procedure, art. 94(4)—Supreme Court Act, R.S.C. 1952, c. 259, ss. 2(b), 36.

The plaintiff's claim arose out of agreements entered between the parties outside of Canada. Although the defendant did not reside or have any place of business in Quebec, the action was taken in that Province on the ground that the defendant had assets there. The trial judge dismissed the declinatory exception to the jurisdiction, but this judgment was reversed by the Court of Appeal. The plaintiff appealed to this Court where the defendant moved to quash on the ground that the judgment appealed from was not a "final judgment" within the terms of ss. 2(*b*) and 36 of the *Supreme Court Act.*

Held: The motion to quash should be dismissed.

The judgment allowing a declinatory exception and dismissing the action having finally disposed of the plaintiff's action, was a final judgment within the terms of the *Supreme Court Act. Ripstein v. Trower,* [1942] S.C.R. 107, and *Fiset v. Morin,* [1945] S.C.R. 520, referred to.

MOTION to quash for want of jurisdiction the appeal from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Caron J. which had dismissed a declinatory exception. Motion dismissed.

J. de M. Marler, Q.C., for the motion.

N. A. Levitsky, contra.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant's claim against respondent arises out of certain agreements alleged to have been entered into between the parties, in Italy and in the United States. Neither party resides in or has any place of business in the Province of Quebec. In its action, however, appellant alleged that the Superior Court has jurisdiction under art. 94, subpara. 4 of the *Code of Civil Procedure* by reason of the fact

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

[1] [1961] Que. Q.B. 702.

that respondent has assets in the province. Respondent made a declinatory exception to the action on the ground that the Superior Court was without jurisdiction, and that exception was dismissed by the learned trial judge. His judgment was unanimously reversed by the Court of Queen's Bench[1] and appellant's action dismissed with costs. From that judgment appellant has appealed to this Court.

Respondent has moved to quash the appeal on the ground that the judgment maintaining the declinatory exception and dismissing appellant's action is not a final judgment within the terms of ss. 36 and 2(*b*) of the *Supreme Court Act,* R.S.C. 1952, c. 259, the relevant portions of which read:

36. Subject to sections 40 and 44, an appeal to the Supreme Court lies from a final judgment or a judgment granting a motion for a nonsuit or directing a new trial of the highest court of final resort in a province, or a judge thereof, pronounced in

(*a*) a judicial proceeding where the amount or value of the matter in controversy in the appeal exceeds ten thousand dollars, or

(*b*) ....

2. In this Act,

(*a*) ....

(*b*) "final judgment" means any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding.

The judgment *a quo* has finally disposed of appellant's action. No doubt any rights which appellant may have, might be asserted in another action in a foreign jurisdiction, but that does not affect the character of the judgment under appeal.

We are all of opinion that the judgment allowing a declinatory exception and dismissing the action is a final judgment within the terms of the Supreme Court Act.

That was the view taken by this Court in *Ripstein v. Trower*[2], where the judgment maintaining a declinatory exception in the lower Courts, was successfully appealed to this Court. A motion to quash was rejected and the action was subsequently proceeded with on the merits. The judgment on the motion to quash is not reported, but it was subsequently referred to with approval in *Fiset v. Morin*[3].

[1] [1961] Que. Q.B. 702.
[2] [1942] S.C.R. 107, 1 D.L.R. 691.
[3] [1945] S.C.R. 520 at 525, 3 D.L.R. 800.

The motion to quash should be dismissed with costs.

Motion dismissed with costs.

1961

LA SARCHI CIE *v.* FIRST NATIONAL BANK OF BOSTON

Attorney for the plaintiff, appellant: N. A. Levitsky, Montreal.

Attorneys for the defendant, respondent: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

BEN SMITH ....APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

1961

*Oct. 5, 6, 10
Dec. 12

STANLEY I. SCHONBRUN ....APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

D. CHARLES STUART ....APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

SOL R. RAUCH ....APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Theft—Essential elements—Accused charged with theft of cheque forged and issued against account of company controlled by accused—Series of fraudulent transactions culminating in issue of cheque—Whether cheque property of company—Whether company had special property or interest in cheque—Criminal Code, 1953-54 (Can.), c. 51, s. 269.

The appellants were convicted by a jury on a charge of stealing money and securities or other property or a valuable security to the value of $960,000 belonging to B Mines Ltd. By an elaborate fabrication, including the fabrication of minutes of meetings that never took place, the

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*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Judson and Ritchie JJ.

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forgery of a cheque in the name of the company by the appellants and the sale of shares without the knowledge of the optionee, the company was fraudulently deprived of $960,000 from its bank account. All documents purporting to be signed by the company were signed by two of the appellants representing themselves as president and treasurer and the corporate seal was used where necessary. The convictions were affirmed by the Court of Appeal, and the appellants obtained leave to appeal to this Court.

Held: The convictions should be quashed.

The real case for the Crown was that the appellants stole the cheque, but the verdict of the jury indicated that they were satisfied beyond a reasonable doubt that the cheque was an integral and necessary part of an elaborate scheme of fraud to which the appellants were parties and that none of the appellants could have thought that the company had given its consent.

It was implicit in the findings of the jury that the cheque was a false document, known to be false by the parties to this scheme and made with the intent that it was to be used or acted upon as genuine to the prejudice of the company. On these findings the cheque was a forgery.

The company did not have any ownership or special property or interest in the cheque. The fact that the name of the company was fraudulently inscribed on the cheque, and that loss might result to the company, did not vest in the company any proprietary rights or special property or interest therein. It would be creating a new and strange mode of acquisition of property to hold that if A's signature is forged by B on a document, A for that sole reason could as owner recover that document from B. Possession of the cheque was not at any material time that of the company. It was the possession of those who created it to defraud the company. Therefore the cheque could not have been stolen.

APPEALS from a judgment of the Court of Appeal for Ontario[1], affirming the appellants convictions on a charge of theft of a cheque. Appeals allowed.

G. A. Martin, Q.C., for the appellant Smith.

C. L. Dubin, Q.C., for the appellant Schonbrun.

G. McLean, for the appellant Stuart.

S. R. Rauch, in person.

Peter White, Q.C., and *R. Shibley,* for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Pursuant to leave granted by this Court, under s. 597(1)(*b*) Cr.C., the appellants appeal from a unanimous judgment of the Court of Appeal for Ontario[1] dismissing an appeal from their conviction on the first of several counts contained in the indictment preferred against

[1] (1961), 131 C.C.C. 14.

them. The Crown had elected to proceed on this count. As amended at the close of the case for the prosecution, by the insertion of the words here italicized, this count reads as follows:

that Ben Smith, D. Charles Stuart, Stanley I. Schonbrun, Sol R. Rauch and Harold D. Rauch during the year 1957, at the City of Toronto in the County of York and elsewhere, did steal money and securities *or other property or a valuable security* to the value of $960,000 more or less, the property of Brilund Mines Limited, contrary to the Criminal Code.

The case for the Crown is not that these accused stole money or securities which were the property of Brilund Mines Limited. In essence, the case is that these appellants, by an elaborate fabrication, obtained for their own use and benefit the sum of $960,000 from the company's bank account. Stuart obtained a blank cheque at the counter of the Bay Street Branch of the Imperial Bank in Toronto and filled in the body of the cheque, payable to his order, for $960,000. Schonbrun and Sol R. Rauch signed the cheque representing themselves on its face as president and treasurer of the company. On May 1, 1957, this cheque was deposited to the credit of Stuart's bank account at the above-mentioned branch of the Imperial Bank. The real case for the Crown is that the appellants stole this cheque.

These dealings are recited at length in the address of the learned trial judge to the jury and in the reasons for judgment delivered by Laidlaw J.A., for the Court of Appeal. As full a recital, however, is unnecessary for the understanding of the questions of law to be considered on this appeal. A simple and, I think, a true outline of the case for the prosecution will sufficiently emerge from the following summary of the interdependent and interlocked transactions carried out by the appellants and their ultimate result, all of which happened within the four days from April 29 to May 2, 1957.

Prior to April 29, out of the 2,800,000 shares of the company issued and outstanding in the hands of some 1,800 shareholders, the appellant Ben Smith, with his brother Harry, owned or controlled 600,000 shares, of which 300,000 were in escrow. The market price of the company's shares on the Toronto Stock Exchange had been steadily declining for some time and was about 47 cents per share. At that price the total value of 600,000 shares was below $300,000. The company had a credit balance of $577,000 in its account at the King and York Streets Branch of the Imperial Bank

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in Toronto and a readily marketable block of shares in New Chamberlain Petroleum Company Limited and Spooner Oils Limited. The company had granted to Chapco Investments Corporation irrevocable and still exercisable options to purchase these shares. The exercise of the options would bring in $455,000 and thus increase the company's credit balance to over one million dollars.

The appellant Stuart, a resident of North Bay, Ontario, had for some years dealt in mining claims and was at that time the owner of 21 unpatented mining claims acquired by him within the year at a cost of $5,800 which, on the submission of the Crown, represented the maximum value of these claims.

Knowing that Ben Smith had considered selling his interest in the company, Stuart sought and obtained the confirmation that the "Brilund deal" was still available. With the assistance of two "finders", he then invited to Toronto the two appellants Schonbrun and Sol R. Rauch and the brother of the latter, Harold Rauch, who were all three associated in a company called Capital Funding Corporation, with offices in New York State. Upon their arrival in Toronto on April 30, these three were introduced to Smith and within 48 hours the following interlocked and interdependent transactions were arranged and completed:

(i) *A sale by Smith of the 600,000 share "control block" in the company to Stuart or his associates or both for a price of $900,000, which was three times their indicated value on the stock exchange.* For the payment of this price, Stuart, who had a credit balance of $16 in his account at the Bay Street Branch of the Imperial Bank in Toronto, drew a cheque on that account for $900,000 payable to the order of Ben Smith. He and Sol R. Rauch arranged with Udell, the Manager of that Branch, to certify this cheque but not to deliver it until he had in his possession a cheque for $960,000 expected by Stuart as a result of the transaction mentioned in the next paragraph (ii) and a cheque for $1,010,000 which the company was to draw in its favour on the completion of the transaction set out in paragraph (iii) in order to transfer its bank account from the King and York Streets Branch to the Bay Street Branch.

(ii) *A sale by Stuart to the company of his 21 unpatented mining claims, having a maximum value of $5,800 for the price of $960,000.* In payment for these claims, the cheque

which is the subject-matter of the amended count of the indictment was issued. Dated May 1, 1957, it was drawn on the new account of the company at the Bay Street Branch of the Bank in the amount of $960,000, made payable to the order of Stuart and signed for the company by Schonbrun and Sol R. Rauch, purporting to act as president and treasurer.

(iii) *A sale by the company to Ben Smith of the Chamberlain and Spooner shares for $460,356.* Carried out without the knowledge of the Chapco Investments Corporation, which had options on these shares, this sale was made on the condition that, in the event of the exercise of the options, Smith would surrender the shares to the optionee and be repaid by the company the amount paid by him for their acquisition. This cheque for $460,356, issued by Smith in favour of the company, was given by him to Findlay, his bank manager, with instructions that it was to be used only if the sale of the 600,000 shares was completed. Subsequently deposited to the King and York Streets Branch account of the company, this cheque increased the credit balance of the company's account to $1,010,000 before that account was transferred to the Bay Street Branch.

These transactions were all interlocked and mutually dependent. Stuart's cheque for $900,000 could only be paid if the company's cheque to his order for $960,000 was deposited to his credit. The company's cheque to Stuart for $960,000 could only be paid if the credit balance of $577,000 in the company's bank account was sufficiently increased. This increase could only be achieved by the deposit to the company's account of the cheque for $460,356 issued by Smith in favour of the company in payment of the Chamberlain and Spooner shares; and Smith's cheque could not be used until the sale by him of his 600,000 shares was completed.

All documents purporting to be signed by the company were signed by Schonbrun and Sol R. Rauch representing themselves as its president and treasurer. The corporate seal of the company was used wherever it was found necessary. However, on the submission of the Crown, the minutes of the meetings purporting to have been held on May 1, 1957 and recording the election of Schonbrun and Sol R. Rauch as directors and as president and treasurer of the company, the banking or other resolutions purporting to authorize

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them to sign for the company in the capacity aforesaid, and all documents wherein the veracity of these facts was represented, were false documents fabricated by the appellants for the attainment of their dishonest purpose.

The ultimate result of all these transactions, as related in respondent's factum, was that Ben Smith received $900,000 from Stuart for the sale of 600,000 shares of the company, half of which were in escrow; Stuart received 200,000 shares of the company, half of which were in escrow and retained about $4,000 cash in his bank account; Schonbrun and Sol R. Rauch or Capital Funding Corporation received 400,000 shares of the company of which 200,000 were in escrow, together with $6,000 in United States funds; and each of the two "finders" received $25,000. All the moneys thus distributed were derived from the $960,000 obtained from the company in exchange for the 21 unpatented mining claims of Stuart, valued at $5,800.

Such, in the main, are the facts relied on by the prosecution,—and which, for the purpose of this appeal, are assumed to have been found by the jury—as justifying in law the verdict of guilty returned against the appellants on the charge of having stolen the cheque for $960,000, the property of the company.

Two of the questions raised at the trial and on appeal were whether this cheque was the property of the company or whether the company had any special property or interest in it notwithstanding that its signatories had no authority to issue or deliver the same. With respect to these questions, the learned trial judge gave the following instructions to the jury:

> Now, I have explained the difference between the former indictment and the present indictment, and I have explained that you cannot convict any accused for stealing money or securities. All that is open to you now is to convict or acquit with respect to stealing other property or a valuable security, the property of Brilund.
>
> The charge, "a valuable security to the value of $960,000 more or less, the property of Brilund . . ." would certainly include the cheque for $960,000, Exhibit 49. If you have any doubt about that, it seems to me to be concluded by another provision of the Criminal Code which reads in this way, in part:
>
> "In this Act . . ."
>
> That is, in the Criminal Code,
>
> "a valuable security includes an
> order for the payment of money."

Now, the second point is this: did Brilund have any special property or interest in that cheque? If you find that Schonbrun and Sol Rauch signed that particular cheque purporting to act for Brilund, even without the authority of Brilund, then I tell you that Brilund did have a special property or interest in it before it was delivered to Stuart for negotiation. If you decide they signed it in furtherance of a dishonest purpose, they were not acting as officers for Brilund but in their own personal interests; but even so, Brilund would have a special interest in that cheque, if for no other purpose, to try to get it back before it was cashed. In any event, between the time the cheque was signed and when it was handed over to Udell or Stuart it was in the possession of Brilund, and that possession would be a special interest within the Code."

On appeal and with reference to the same matter, Laidlaw J.A., speaking for the Court, said:

It was contended first that the signatures Stanley I. Schonbrun and Sol R. Rauch on the cheque for $960,000 in favour of D. Charles Stuart were forgeries and that their acts in signing the cheque did not constitute a corporate act of the company; in other words there was no issue or delivery of the cheque in question by the company as a corporate body; that the paper bearing the forged signatures Stanley I. Schonbrun and Sol R. Rauch was not a "valuable security" within the meaning of that word as defined in sec. 2(42) of the Criminal Code as follows:

"a . . . order . . . for the payment of money." I do not accept that argument. In my opinion, Schonbrun and Rauch signed the cheque as officers of the company with ostensible authority and thereafter the cheque became a valuable security and the property of the company. Even if it be assumed that Schonbrun and Rauch had no authority in law or in fact to sign the cheque, nevertheless, in my opinion and in the opinion of the learned trial Judge, the company had a special property or interest in it and which could be the subject of theft.

The questions of law upon which leave to appeal to this Court was granted are:

1. Did the trial judge err in holding that Brilund Mines Limited did not consent to the issue and delivery of the cheque for $960,000, or, alternatively, did he err in holding that the cheque was nevertheless the property of Brilund Mines Limited?

2. Did the trial judge err in holding that there was no contract between Brilund Mines Limited and Stuart for the transfer of the twenty-one mining claims?

3. Did the trial judge err in holding that Brilund Mines Limited had a special property or interest in the cheque, notwithstanding that the signatories to the cheque had no authority to issue and deliver the same?

4. Did the trial judge err in instructing the jury that the interest of the corporation in seeing the cheque was not cashed constituted a special property or interest in the cheque?

I find it necessary to deal only with the two questions whether the learned trial judge erred in holding, and instructing the jury, that the cheque for $960,000 was the property of the company or that the company had a special

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property or interest therein. With the greatest deference to the learned judges of the two Courts below, my opinion is that there was error in both these instructions to the jury. On the directions given to the jury as to each of the essential elements of the offence of theft and as to the various circumstances in which a person may be held to be a party to a criminal offence, the verdict of the jury against the four appellants indicates that they were satisfied beyond a reasonable doubt that the cheque was an integral and necessary part of an elaborate scheme of fraud to which all appellants were parties and that none of the appellants could have thought that the company gave a corporate consent to the purchase of these mining claims for $960,000 or to the signing and delivery of the cheque purporting in appearance to be given in payment thereof. These findings, involving each of the appellants as *particeps criminis* in this fraudulent and indivisible scheme, constitute the background against which must be considered the two questions of law to be determined.

On the definition of theft given in s. 269 Cr.C., a thing cannot be said to have been stolen unless it appears that the thing was taken or converted

> . . . with intent to deprive . . . the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it.

The special property or interest, like the property itself, must be in the very thing alleged to have been stolen. The interest a person may have in protecting himself against loss or damage resulting from the use of a document forged by and in the possession of another is neither property nor "special property or interest" in the forged document. It is also clear from the section that the property or the "special property or interest" must exist at the time at which the theft, either by taking or conversion, is committed.

It is implicit in the findings of the jury that this cheque purporting to have been made by the company was a false document (s. 268-e Cr.C.), known to be false by the parties to this fraudulent scheme and made with the intent that it was to be used or acted upon as genuine to the prejudice of the company. On these findings this cheque was a forgery (s. 309 Cr.C.).

The company did not have any ownership or special property or interest in the blank cheque picked up by Stuart at the public counter of the bank; nor could it have any immediately prior to the instant at which, after signing it, Schonbrun and Sol R. Rauch delivered it to Stuart. The company acquired no property and no "special property or interest" in this cheque while it was under the control of any of the parties to this fabrication nor upon its delivery by Stuart to Udell. The fact that the name of the company was fraudulently inscribed on this cheque in the circumstances and for the purposes aforesaid, and that loss might result to the company, does not vest in the company any proprietary rights or special property or interest therein. It would be creating a new and strange mode of acquisition of property to hold that if A's signature is forged by B on a document, A, for that sole reason, could, as owner, recover that document from B. Had the appellants elected to destroy the cheque before handing it over to Udell or had Udell destroyed it upon its receipt, nothing whatever could be held to have been lost to the company or stolen from it. Possession of this cheque was not at any material time that of the company. It was the possession of those who created it to defraud the company. Possession of this cheque was never entrusted to them by the company. And if it was not entrusted to them by the company, they could not, while having it under their control, steal it by conversion any more than by taking.

In *The King v. Phipoe*[1], it was decided that to obtain from a person his note of hand, by threats, is not a felonious stealing of the note, for the reason that the note was never of value to or in the peaceable possession of such person.

Being of the view that the two questions of law extracted from the points on which leave to appeal was given and set out above must be answered in the affirmative and that there was no taking or conversion of this cheque by the appellants, I would allow the appeals, quash the convictions and direct a verdict of acquittal to be entered on count (1) of the indictment and the record to be returned to the Clerk of Assize of the Supreme Court of Ontario at Toronto.

Appeals allowed, convictions quashed.

[1] (1796), 2 Leach 673, 168 E.R. 438.

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*Oct. 13
Dec. 15

WOODWARD'S PENSION SOCIETY ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Exemptions—Income of society providing funds for payment of pensions—Whether society non-profit organization—Whether society acting as trustee—Whether income that of society—Whether exempt from income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 62(1)(i), 63(4) and (7)—Societies Act, R.S.B.C. 1936, c. 265.

The appellant was incorporated as a society under the *Societies Act*, R.S.B.C. 1936, c. 265. Its declared object was to assist in providing funds for the payment of pensions to employees and ex-employees of the Woodward's Stores Ltd. and to pay over its surplus funds from time to time to the trustee of a pension fund for those employees and ex-employees. For this purpose, it was authorized to acquire shares of the Woodward Stores Ltd. and to sell them to the employees. It purchased at par large blocks of shares in the various Woodward Stores and re-sold them at par to employees. It paid interest at the rate of 3 per cent. on the unpaid balance of its subscriptions for shares, but charged interest at 4 per cent. to those employees who did not pay in full upon their purchases of shares. This difference in the rate of interest which it paid and which it charged contributed to the building up of a substantial surplus, which in 1953 amounted to some $31,000.

The appellant objected to paying income tax on that amount on the ground that it was exempt as a non-profit organization under s. 62(1)(i) of the *Income Tax Act*, maintaining that it was a society organized and operated exclusively for a purpose "except profit". The appellant also argued that the net interest it received should not be treated as income in its hands since it was impressed with an obligation that it be devoted to payment to the pension trust for distribution as pensions. It further argued that it was merely a trustee of its surplus fund in favour of the pension trust. An appeal to the Exchequer Court was dismissed and the appellant appealed to this Court.

Held: The appeal should be dismissed.

The appellant society was not entitled to an exemption under s. 62(1)(i) of the Act, since it did not meet the requirements of that section. The appellant had entirely failed to establish that it was organized and operated exclusively for a purpose other than profit and the findings of the Exchequer Court that it was both organized and operated for a profitable purpose were unassailable.

The income received by the appellant was its own income, not subject to the legal claim of any other person. After receipt it was applied by the appellant in accordance with its stated objects. *Mersey Docks & Harbour Board v. Lucas* (1882-3), 8 App. Cas. 891, followed.

*PRESENT: Locke, Abbott, Martland, Judson and Ritchie JJ.

The incorporating instrument and by-laws of the appellant did not constitute a declaration of trust but were merely a statement of objects and purposes. There was no income of a trust during the taxation year payable to a beneficiary or other person beneficially entitled.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], affirming the Minister's decision. Appeal dismissed.

H. H. Stikeman, Q.C., and *D. N. Thorsteinsson,* for the appellant.

F. J. Cross and *P. M. Troop,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant was incorporated in 1945 as a society under the *Societies Act* of British Columbia. Its declared object on incorporation was to assist in providing funds for the payment of pensions to employees and ex-employees of Woodward Stores Limited and to pay over its surplus funds from time to time to the trustees of a pension fund for those employees and ex-employees. For the purpose of achieving its object, it was authorized to acquire, by purchase, gift or otherwise, shares of Woodward Stores Limited and to sell these shares and take options for their repurchase.

The by-laws of the society provided that the directors might borrow money on behalf of the society to pay for the shares purchased and that on dissolution of the society all its assets should be conveyed to the trustees of the pension fund for the purposes of their trust.

Until October 1951 the funds for the pensions were provided by the Woodward Store companies, of which there were a number. Until 1945 the administration of these pension payments was through the various companies with a pension committee comprised of company executives. After 1945 the administration was through the Woodward Pension Plan Trust. The Woodward Pension Plan Trust was set up at the same time as the appellant society.

Before the incorporation of the appellant and the constitution of the pension trust, the various Woodward stores had operated a share sale plan to their employees. After 1945 this plan was taken over by the appellant society. It was incorporated, in part at least, for this purpose. It carried

[1] [1959] C.T.C. 399, 59 D.T.C. 1254.

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out its objects in this way. It purchased at par large blocks of shares in the various Woodward stores and then resold them at par to employees. The appellant paid interest at the rate of 3 per cent. on the unpaid balance of subscriptions but it charged interest at 4 per cent. to the employees on their unpaid balances. This difference in the rate of interest which it paid and which it charged contributed to the building up of a substantial surplus. Other contributing factors were dividends received from the shares on hand and capital gains made on the reorganization of some of the companies whose shares it held. In the period from October 1, 1951, to January 31, 1952, the appellant paid over to the pension trust a total of $13,089.30 and in the 12 months period ending January 31, 1953, it paid over to the same trust the sum of $42,273.23.

The dealings in shares of the appellant are set out in some detail in the judgment under appeal but to show the scale of these dealings it is enough to state that in the eight fiscal periods from the date of incorporation to January 31, 1953, it sold 599,272 shares to employees and repurchased 263,593. In the 1953 taxation year, 66,931 shares were sold and 31,630 were repurchased. No shares were ever sold without taking an option to repurchase at par on death or the cessation of employment.

In the 1953 taxation year, the year in question in this appeal, the appellant received in interest $31,525.58 and from dividends, $35,954.17, making a total of $67,479.75. From this income the Minister, in his notice of reassessment, allowed the following deductions:

(a) $22.30 for sundry expenses;

(b) $35,954.17, being an amount equivalent to the dividends that the appellant had received from taxable corporations in Canada.

He did not allow as a deduction in computing income the amount of $42,273.23 which the appellant had paid to the pension trust and which the appellant described in its statement as pensions paid.

The appellant objected to the notice of reassessment but it was confirmed by the Minister. The appellant then appealed to the Exchequer Court[1]. Its appeal failed and it now appeals to this Court.

[1] [1959] C.T.C. 399, 59 D.T.C. 1254.

The first ground of error submitted is that the appellant was exempt from income tax in its taxation year 1953 under the provisions of s. 62(1)(i) of the *Income Tax Act*, R.S.C. 1952, c. 148. This section reads:

62(1) No tax is payable under this part upon the taxable income of a person for a period when that person was

(i) a club, society or association organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof.

The sole question under this section is whether the appellant was a society "organized and operated . . . for any other purpose except profit". The judgment of the Exchequer Court under appeal holds that the appellant had failed to bring itself within that subsection. The learned President found that the purpose for the organization of the appellant was a very limited one, namely, to earn money for the purpose of providing funds for the payment of pensions by the pension trust and that this was achieved by profitable dealings in the shares of the various Woodward stores.

It is true that the appellant is not an ordinary commercial company but a society incorporated under the *Societies Act*, R.S.B.C. 1936, c. 265, that no part of the appellant's property is payable to or otherwise available for the personal benefit of any proprietor, member or shareholder, and that the appellant was organized for the stated object and purpose of assisting in the provision of funds for pensions to be paid to employees and ex-employees of the stores. Nevertheless, this last-named purpose could not be achieved without the share sale plan which was designed to make a profit to enable the payments to be made to the pension trustees. In the taxation year in question the appellant earned in interest alone the sum of $31,525.58, a sum which went a long way towards the payments which were made to the pension trustees. The appellant has entirely failed to establish that it was organized and operated exclusively for a purpose other than profit and the findings of the learned President that it was both organized and operated for a profitable purpose are unassailable. This ground of appeal therefore fails.

The next ground of appeal is that the net interest received by the appellant in the taxation year was not income in its hands because it was not received beneficially since it was

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impressed with an obligation that it be devoted to payment to the pension trust for distribution as pensions. I have some difficulty in understanding the nature of the obligation, short of a trust, which the appellant sought to establish. The argument was based on *K. B. S. Robertson Ltd. v. Minister of National Revenue*[1]; *Phyllis Bouck v. Minister of National Revenue*[2]; and *Minister of National Revenue v. St. Catharine's Flying Training School Limited*[3]. These cases do not support the appellant's submission. The first case involved receipts which could only be retained for the use of the taxpayer if subsequent events permitted their retention. Until these events happened, the receipts were not income. In the other two cases, the monies which it was sought to tax were received in trust for payment to others. There is nothing analogous in any of these cases to the terms on which the appellant received its income. The income received by the appellant was its own income, not subject to the legal claim of any other person. After receipt it was applied by the appellant in accordance with its stated objects. The learned President rightly held that the case was within the principle of *Mersey Docks & Harbour Board v. Lucas*[4].

The third ground of appeal can scarcely be distinguished from the second ground. The second ground speaks of a receipt impressed with an obligation to pay it to the pension trustees. In the third ground it is urged that the appellant was a trustee of its surplus funds in favour of the pension trust and is entitled by s. 63(4) and (7) to deduct what otherwise would be its taxable income for 1953, the amount in fact paid in that taxation year to the pension trust as beneficiary. This argument is not mentioned in the reasons of the learned President and we were told that it was not submitted to him. In my opinion, it fails along with the other two arguments. One cannot construct such a trust of the surplus funds out of the instrument incorporating the society and its by-laws. There was, in the first place, no trust of the shares in which the appellant dealt by purchase and sale and by holding. If the incorporating instrument and the by-laws remain unchanged, the surplus funds are to be paid over in a certain way from time to time and the assets on a

[1] [1944] Ex. C.R. 170, 3 D.L.R. 239.

[2] [1952] 2 S.C.R. 17, C.T.C. 90, D.T.C. 1090, 3 D.L.R. 82.

[3] [1955] S.C.R. 738, C.T.C. 185, 55 D.T.C. 1145, 4 D.L.R. 705.

[4] (1882-3), 8 App. Cas. 891.

dissolution of the society are to be distributed in the same way. But this does not establish a trust. There is no obligation to make any payments which would enable the pension trust to assert a claim that the appellant's income was the income of the pension trust. The income might accumulate indefinitely. In fact, no payments were made to the pension trust during the period 1945 to 1951 when the appellant was building up a surplus. The society might never be dissolved, the objects might be changed, and the by-laws changed.

My conclusion is that the incorporating instrument and by-laws do not constitute a declaration of trust but are merely a statement of objects and purposes. There was no income of a trust during the taxation year in question payable to a beneficiary or other person beneficially entitled and the appeal fails on this ground also.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman & Elliott, Montreal.

Solicitor for the respondent: A. A. McGrory, Ottawa.

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*Nov. 14
Dec. 15

WILLIAM FERGUSSON .... APPELLANT;

AND

HER MAJESTY THE QUEEN .... RESPONDENT.

HER MAJESTY THE QUEEN .... APPELLANT;

AND

WILLIAM FERGUSSON .... RESPONDENT.

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

Criminal law—Conviction for robbery—Substituted on appeal for unlawful possession of property—Indictment dealt with robbery alone—Whether unlawful possession an included offence—Criminal Code, 1953-54 (Can.), c. 51, ss. 288, 296, 592.

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*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Judson JJ.

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Appeals—Jurisdiction—Criminal law—Appeal by Attorney General limited to pure question of law—Criminal Code, 1953-54 (Can.), c. 51, s. 598.

The accused was charged with the offence of robbery under s. 288(*b*) of the *Criminal Code* and was convicted as charged. The Court of Queen's Bench reached the conclusion that he was not guilty of robbery, and, exercising its power under s. 592(3) of the Code, found him guilty of unlawful possession under s. 296 in the view that this was an included or lesser offence to that of robbery. The indictment had contained a count for robbery only. The accused and the Attorney General were both granted leave to appeal to this Court.

Held: The accused's appeal should be allowed and the conviction under s. 296 set aside; the appeal of the Attorney General should be quashed for want of jurisdiction.

The authorities do not hold that receiving stolen goods is included in the offence of robbery or theft, but merely that recent possession of stolen goods, if unexplained to the satisfaction of the tribunal of fact, may be evidence of robbery or theft. A count in an indictment is divisible and where the commission of the offence charged includes the commission of another offence, the accused may be convicted of the offence so included if proven. Thus, a man charged with robbery may be found guilty of theft, but a person charged with robbery may not be found guilty of receiving stolen goods, as was done in this case, where the indictment contains a count for robbery alone. Receiving stolen goods is a less serious offence, but is not included in a charge of robbery. *R. v. Louie Yee* (1929), 1 W.W.R. 882, applied.

As to the appeal of the Attorney General since the appeal was based on a mixed question of law and fact and not on a pure question of law, this Court was without jurisdiction to entertain it.

APPEALS by the accused and the Attorney General from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], substituting a conviction of unlawful possession for that of robbery. Appeal of accused allowed; appeal of Attorney-General quashed.

R. Daoust, Q.C., for the accused.

Bruno J. Pateras, for the Attorney-General.

The judgment of the Court was delivered by

TASCHEREAU J.:—The appellant Fergusson was charged as follows under s. 288 (*b*) of the *Criminal Code*:

William Fergusson, en la cité d'Outremont, district de Montréal, le ou vers le 28 juillet 1959, a illégalement volé Gustave St-Germain de billets de banque, des effets de commerce et 120 coffrets de sûreté, le tout d'une valeur d'environ $50,000.00, la propriété de la Banque Provinciale du Canada, et en même temps ou immédiatement avant ou après ledit William Fergusson de s'être porté à des actes de violence contre ledit Gustave St-Germain, commettant par là un vol qualifié, un acte criminel, contrairement à l'article 288 (*b*) du Code Criminel.

[1] [1961] Que. Q.B. 542.

Section 288 (*b*) of the *Criminal Code* reads as follows:

> 288. Every one commits a robbery who
> (*b*) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person,

The case was heard in Montreal before His Honour Judge M. A. Blain of the Court of the Sessions of the Peace, who found the accused guilty, and sentenced him to be detained in the St. Vincent de Paul Penitentiary for a period of eight years.

The Court of Queen's Bench[1] reached the conclusion that Fergusson was not guilty of robbery, but found him guilty under s. 296 of the *Criminal Code,* which is to the effect that every one commits an offence who has anything in his possession knowing that it was obtained by the commission in Canada of an offence punishable by indictment. The Court decided that receiving is an included or a lesser offence to that of robbery, and that under s. 592, para. 3, of the *Criminal Code,* it could substitute the verdict that in its opinion should have been found and affirm the sentence passed by the trial judge or impose a sentence that is warranted in law.

It is the contention of the appellant Fergusson that the offence of which the Court of Queen's Bench found him guilty is not an offence included in the offence of robbery, and that the Court had no power to substitute a verdict of that kind for the one that was set aside by the Court itself. It is therefore submitted that the appellant should be acquitted.

In the Court of Queen's Bench Mr. Justice Casey relied on *Duplessis v. The King*[2], to support the view that an offence must be regarded as being included in another, if the elements of the latter include those of the former. For the same proposition, Mr. Justice Choquette cited *Baker v. Regem*[3]; *Rex v. Loughlin*[4]; *Rex v. Seymour*[5]; *Rex v. Siggins*[6].

[1] [1961] Que. Q.B. 542.

[2] (1935), 60 Que. K.B. 93, 65 C.C.C. 255, [1936] 2 D.L.R. 174.

[3] (1930), 49 Que. K.B. 193, 54 C.C.C. 353.

[4] (1951), 35 Cr. App. R. 69.

[5] (1954), 38 Cr. App. R. 68.

[6] [1960] O.R. 284, 32 C.R. 306, 127 C.C.C. 409.

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In *Duplessis v. Regem,* the Court of Queen's Bench for the Province of Quebec ruled that obtaining money under false pretence is of the same nature as theft, and that it is an included offence, the only difference being the means adopted for committing the offence.

In *Baker v. Regem,* it was held that possession by the accused shortly after a burglary of goods, stolen at the time of the burglary, if unexplained, is sufficient to warrant a conviction of burglary or theft.

In *Rex v. Loughlin,* the Court of Criminal Appeal of England held that where it is proved that premises have been broken into and property stolen therefrom, and that very soon after the breaking the prisoner has been found in possession of that property, it was open to the jury to find the prisoner guilty of breaking and entering, and the jury should be so directed. The Court of Criminal Appeal in *The King v. Seymour* applied the *Loughlin* case.

In *Rex v. Siggins,* the Ontario Court of Appeal reached the conclusion that the offence of theft, where the person charged is the actual thief, necessarily involves the taking of possession by him of the articles stolen, and the person found in possession of goods which he himself has stolen, has also committed the offence of having in his possession goods knowing them to have been stolen. The Crown of course is entitled to lay both charges against him. If the jury convict of theft, they should not convict on the charge of unlawful possession. If, however, they acquit on the charge of theft, they may then consider and, if they see fit to do so, convict on the other charge. It must be kept in mind that in *Siggins* the accused was charged on two counts, one of theft and the other of unlawful possession.

These judgments do not hold that receiving stolen goods is included in the offence of robbery or theft, but merely that recent possession of stolen goods, if unexplained, to the satisfaction of the tribunal of fact, may be evidence of robbery or theft. In *Seymour* it was held that there should be two counts where the evidence is as consistent with larceny as with receiving, and that the jury should be directed that it is for them to decide whether the prisoner was the thief or whether he received a property from the thief, and should be reminded that a man cannot receive property from himself.

In the present case, there was only one count in the indictment, and the charge was for robbery in violation of s. 288(*b*) of the *Criminal Code*. A count in an indictment is divisible and where the commission of the offence charged *includes* the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved, or of an attempt to commit an offence so included. (*Criminal Code* 569). Thus, a man charged with robbery may be found guilty of theft, but a person charged with robbery may not be found guilty of receiving stolen goods, as was held by the Court of Queen's Bench in the present instance. Receiving stolen goods is a less serious offence, but is not included in a charge of robbery.

The count must therefore include but not necessarily mention the commission of another offence, but the latter must be a lesser offence than the offence charged. The expression "lesser offence" is a "part of an offence" which is charged, and it must necessarily include some elements of the "major offence", but be lacking in some of the essentials, without which the major offence would be incomplete. *Rex v. Louie Yee*[1].

Fergusson's appeal should therefore be allowed and the conviction against him set aside.

As to the appeal of the Attorney General who submits that the judgment of the trial judge should be restored and that the accused should be found guilty of robbery as charged, this Court has no jurisdiction to make such an order. On June 26, 1961, Fergusson was granted leave to appeal by this Court, and on the same date, the application of the Attorney General was also granted. In the latter case, Mr. Justice Fauteux was "dubitante" as to our jurisdiction but, nevertheless, leave was granted. Upon consideration and a review of the whole case, the appeal of the Attorney General must be quashed.

This Court has jurisdiction to entertain appeals by the Attorney General in criminal matters under s. 598 of the Code. But, it is only where a judgment of a Court of Appeal sets aside a conviction pursuant to an appeal taken under para. (*a*) of s. 583, or dismisses an appeal taken pursuant

[1] (1929), 1 W.W.R. 882, 24 Alta. L.R. 16, 51 C.C.C. 405, 2 D.L.R. 452.

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to para. (*a*) of s. 584. Paragraph (*a*) of s. 598 states that it must necessarily be on a pure question of law, and here, I am of the opinion that the appeal of the Attorney General of Quebec is not based on a pure question of law, but on a mixed question of law and fact. The Court of Queen's Bench was not satisfied with the findings of the learned trial judge, particularly that the proof of identification and some other facts, while creating an atmosphere of suspicion, did not meet the test to which all circumstantial evidence must be put. Both Courts had to weigh the evidence. The trial judge found that there was direct and circumstantial evidence against the accused, sufficient to find him guilty of the offence as charged. The Court of Queen's Bench found that there was not.

In view of the decision of this Court in *The King v. Wilmot*[1], it may be contended that this Court has no jurisdiction on the further ground that the accused having been found guilty by the Court of Queen's Bench of receiving stolen goods, was not acquitted within the meaning of s. 598 of the *Criminal Code*. He was of course acquitted of robbery, but found guilty of a different offence. However, in view of my conclusion that we are not faced with a pure question of law, it becomes immaterial to discuss this point any further.

Fergusson's appeal is therefore allowed, and the order of the Court of Queen's Bench and the conviction are set aside. The appeal of the Attorney General is quashed for want of jurisdiction.

Appeal of accused allowed;

Appeal of Attorney-General quashed.

Attorney for the Attorney-General: J. Trahan, Montreal.

Attorney for the accused: R. Daoust, Montreal.

[1] [1941] S.C.R. 53, 75 C.C.C. 161, 1 D.L.R. 689.

IN RE ESTATE OF JOSEPH KENDALL CLEMENT, DECEASED.

1961 *Nov. 21

1962 Feb. 6

JOHN BRUCE GARDNER and RUSSELL GORDON GARDNER (*Applicants*) .... APPELLANTS;

AND

JOHN BRUCE GARDNER, HENRY LOUIS HAGEY AND THE CANADA PERMANENT TRUST COMPANY, THE EXECUTORS OF MAUD CLEMENT GORDON, THE SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOSEPH KENDALL CLEMENT,

AND

MAUDE BIXEL, CLARA MONTGOMERY, LILLIAN MESSECAR AND DANIEL J. MONTGOMERY, THE SURVIVING CHILDREN OF THE LATE CHARLES ALEXANDER MONTGOMERY (*Respondents*) .... RESPONDENTS.

Wills—Adoption—Residuary estate to issue of life tenant—Adopted child of life tenant dying before effective date of Child Welfare Act (Ont.)—Children of adopted child surviving life tenant—Effect of ss. 74 and 75 of The Child Welfare Act, as enacted by 1958 (Ont.), c. 11.

A testator left a life interest in his estate to his sister so long as she should remain separated from her then husband R. On the death of the sister, if she left issue by some husband other than R the estate was to go to such issue, but if she left no issue by any husband other than R, the estate was to go to the children of the testator's cousin. After the death of the testator, his sister divorced R and remarried. No children were born of this second marriage but the parties adopted a daughter, who subsequently married and had three children, of whom the two survivors were the appellants. The daughter died in the lifetime of her adoptive mother, the life tenant. The dispute was whether the appellants, the children of an adopted child who died in 1936, became the issue of the testator's sister by any other husband than R by virtue of the 1958 amendment to the Ontario *Child Welfare Act*, which came into effect on January 1, 1959, and was in force on the date of the death of the life tenant on January 1, 1960. The trial judge ruled against the appellants and his judgment was affirmed by the Court of Appeal. A further appeal was brought to this Court.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Judson and Ritchie JJ.: Section 74 of *The Child Welfare Act*, as enacted by 1958 (Ont.), c. 11, made the legal relationship of an adopted child and an adopting parent the same as that of parent and child in a lawful marriage. S. 75, which provided that persons "heretofore adopted . . . shall for all purposes . . . be governed

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

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by" Part IV of the Act, could have no effect upon the legal relationship or status of an adopted child who died in the year 1936. On January 1, 1959, when s. 75 came into effect, she was not a person heretofore adopted under the laws of Ontario to whom the section could apply. Accordingly, the section did not operate to make the appellants issue of the testator's sister by a husband other than R.

At the date of the death of the adopted child the legislation in force was *The Adoption Act,* R.S.O. 1927, c. 189. Under the provisions of s. 5(2) and (6) thereof, the adopted child was not a child of the testator's sister for the purposes of this will. It was only under a will made by the sister and only then if the other conditions of that section were met that the adopted child or issue of that child could so qualify.

Per Locke J.: The clear meaning of paragraphs 3 and 4 of the will was that, unless upon the death of the testator's sister she left surviving a child or children born of her body by a husband other than her then husband R, the estate was to be divided as directed by paragraph 3. There were no such children. The adopted daughter was not born of the body of the testator's sister and, accordingly, the former, if living, could have no claim and her children have none.

Per Cartwright J.: Sections 74 and 75 of *The Child Welfare Act* did not have the effect of making the appellants issue of the testator's sister by a husband other than R within the meaning of the words of the testator's will. As to the effect of these sections upon the distribution of the estate of a testator who died prior to their enactment *vide Re Gage, Ketterer et al. v. Griffith et al., infra,* at p. 241.

APPEAL from a judgment of the Court of Appeal for Ontario[1], from a judgment of Stewart J. on a motion for construction of a will. Appeal dismissed.

W. B. Williston, Q.C., and *I. A. McEwan,* for the appellants.

Terence Sheard, Q.C., and *A. H. Boddy, Q.C.,* for the respondents.

M. G. Kneale, Q.C., for the executors of the estate of Joseph Kendall Clement.

The judgment of Kerwin C.J. and of Judson and Ritchie JJ. was delivered by

JUDSON J.:—The issue in this appeal is the effect of *The Child Welfare Amendment Act,* 1958 (Ont.), c. 11, upon the right of the two appellants, who are children of an adopted child who is now dead, to take under the will of a stranger which was executed and came into effect long before there was any legal adoption in Ontario. The judgment of the Court of Appeal[1] is that they cannot take under this will.

[1] (1961), 25 D.L.R. (2d) 558.

The testator, Joseph Kendall Clement, died in 1904. He left a life interest in his estate to his sister, Edith Maud Ritchie, so long as she should remain separated from her then husband, Dr. Ritchie of Warren, Ohio. On the death of the sister, if she left issue by some husband other than Dr. Ritchie the estate was to go to such issue. But if she left no issue by any husband other than Dr. Ritchie, the estate was to go to the children of the testator's cousin, Charles Alexander Montgomery. After the death of the testator, his sister divorced Dr. Ritchie and, in 1911, she married Garfield Bruce Gordon. No children were born of this marriage but in 1924 Mr. and Mrs. Gordon adopted one Margaret Jukes Watson pursuant to an order made under *The Adoption Act* of the Province of Ontario. In 1931 Margaret Jukes Gordon married Frank Kenneth Gardner and had three children, two of whom still survive and are the present appellants. The adopted child, Margaret Jukes Gardner, died in 1936. The life tenant, Mrs. Edith Maud Gordon, the sister of the testator, survived until January 1, 1960.

More precisely, therefore, the dispute is whether the two appellants, John Bruce Gardner and Russell Gordon Gardner, the children of an adopted child who died in 1936, became the issue of the testator's sister by "any other husband than the said Dr. Ritchie" by virtue of the 1958 amendment to *The Child Welfare Act* which came into effect on January 1, 1959, and was in force on the date of the death of the life tenant on January 1, 1960.

The two relevant sections of *The Child Welfare Act* of 1958 are ss. 74 and 75 and read as follows:

74. (1) For all purposes the adopted child, upon the adoption order being made, becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted child as if the adopted child had been born in lawful wedlock to the adopting parent.

(2) For all purposes the adopted child, upon the adoption order being made, ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child.

(3) The relationship to one another of all persons, whether the adopted child, the adopting parent, the kindred of the adopting parent, the parent before the making of the adoption order and the kindred of that parent or any other person, shall be determined in accordance with subsections 1 and 2.

(4) Subsections 2 and 3 do not apply for the purposes of the laws relating to incest and the prohibited degrees of marriage to remove any person from a relationship in consanguinity which, but for this section, would have existed.

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75. Every person heretofore adopted under the laws of Ontario and every person adopted under the laws of any other province or territory of Canada or under the laws of any other country shall for all purposes in Ontario be governed by this Part.

Section 74 is a radical departure from any previous adoption legislation in the Province of Ontario in that it states the position of the adopted child and the adopting parent in broad general terms in order to make the legal relationship the same as that of parent and child in a lawful marriage. Prior legislation in Ontario had attempted to define the rights and obligations of the two, and only to the extent of the definition was the relationship analogous to that of parent and child. Section 75 is also new and the difficulty here is whether it has any application to the appellants on January 1, 1960, when their mother, the adopted child of 1924, had died in 1936.

In my opinion, s. 75 can have no effect upon the legal relationship or status of an adopted child who died in the year 1936. On January 1, 1959, when s. 75 came into effect, she was not a person heretofore adopted under the laws of Ontario to whom the section could apply.

Stewart J. held that the appellants' claim failed for two reasons. The first was that "issue by any other husband than the said Dr. Ritchie" meant children and not grandchildren and that the children must be born of a second marriage. The second was that the 1958 legislation only applied to adopted children who were living on January 1, 1959. In the Court of Appeal, the Chief Justice, with MacKay J.A. concurring, decided that in this will the *prima facie* meaning of issue as including descendants of every degree was displaced because the reference to parentage of the issue restricted the meaning to children and that the rule in *Sibley v. Perry*[1], applied. The majority, therefore, agreed in part with Stewart J. on the first point and did not find it necessary to consider s. 75. However, Lebel J.A. held that as a matter of construction, "issue" included descendants of every degree but he did adopt the conclusion of Stewart J. that s. 75 did not apply to an adopted child who had died before the section came into force.

It is unnecessary to decide which construction of the will should be adopted. An insuperable obstacle in the way of the appellants is that s. 75 does not operate to make them

[1] (1802), 7 Ves. 522, 32 E.R. 211.

issue of the testator's sister by a husband other than Dr. Ritchie. It does not confer a posthumous status upon their mother, the adopted child of the testator's sister. At the time of her death she was not a child for all purposes and on January 1, 1959, being dead, she was not a person heretofore adopted under the laws of Ontario "who shall for all purposes in Ontario be governed by this Part." Consequently, her children do not qualify under the will as issue of the second marriage.

At the date of the death of the adopted child in this case, May 30, 1936, the legislation in force was *The Adoption Act*, R.S.O. 1927, c. 189. Section 5(2) of that Act gave the adopted child the same rights of intestate succession as a child born of a marriage, but rights under a will were confined to rights arising under a will made by the adopting parent after the making of the adoption order. The precise words are:

and the expressions "child", "children" and "issue" where used in any disposition made after the making of an adoption order by an adopting parent, shall, unless a contrary intention appears, include an adopted child or children or the issue of an adopted child.

Subsection (6) of the same section provided:

Save as herein provided and as to persons other than the adopting parent, the adopted child shall not be deemed the child of the adopting parent.

Under this legislation, the adopted child was not a child of the testator's sister for the purposes of this will. It was only under a will made by the testator's sister and only then if the other conditions of the section were met that the adopted child or issue of that child could so qualify.

The legislation on this point was continued unchanged in R.S.O. 1937, c. 218, by s. 6(3) and s. 6(7), and in R.S.O. 1950, c. 7, by s. 12(3) and s. 12(7). In 1954 *The Adoption Act* was repealed and the provisions as to adoption were made Part IV of *The Child Welfare Act*, 1954 (Ont.), c. 8. In 1958 Part IV of *The Child Welfare Act* of 1954 was repealed and a new Part IV was enacted by Statutes of Ontario 1958, c. 11, from which ss. 74 and 75 are set out in full in these reasons and are the sections under consideration in this appeal.

The appeal should be dismissed with costs.

LOCKE J.:—The will of the late Joseph Kendall Clement which is the subject matter of these proceedings, after appointing his sister Edith Maud as one of the executors and trustees, reads in part:

> 3. .... During the life time of my said sister she shall be entitled to the whole income of my estate after payment thereout of all necessary expenses in the maintenance and management thereof and the legacy aforesaid, provided that she continues to live entirely separate from and have no communication of any kind with her present husband Dr. Ritchie of Warren, Ohio. Upon the death of my said sister without leaving any issue by any other husband than the said Dr. Ritchie or upon her failure to comply with the conditions hereinbefore mentioned regarding her said husband (in which event she shall forfeit all further right and title as executor and trustee of my estate, and the same shall vest exclusively in my other executor and trustee) the whole of my estate shall be held in trust for the child or children of my cousin Charles Alexander Montgomery of Brantford in equal shares.
>
> 4. In the event of my said sister leaving issue by some other husband than the said Dr. Ritchie then the whole of my estate shall be held in trust for such issue to be equally divided among them share and share alike.

In my opinion the clear meaning of this language is that, unless upon the death of the sister she left surviving a child or children born of her body by a husband other than her then husband Dr. Ritchie, the estate was to be divided as directed by paragraph 3.

There were no such children. The adopted daughter, Margaret Jukes Gordon, was not born of the body of Edith Maud Gordon and, accordingly, she, if living, could have no claim and her children have none.

I would dismiss the appeal with costs.

CARTWRIGHT J.:—I agree with the conclusion of my brother Judson that sections 74 and 75 of *The Child Welfare Act* as enacted by 1958 (Ont.), c. 11, s. 3, do not have the effect of making the appellants issue of the testator's sister by a husband other than Dr. Ritchie within the meaning of the words of the testator's will.

I express no opinion as to whether as a matter of construction the word "issue" as used in the will includes descendants of every degree.

I have stated my views as to the effect of the sections mentioned above upon the distribution of the estate of a testator who died prior to their enactment in the case of

Re Gage, Ketterer et al. v. Griffith et al.[1], judgment in which is being delivered at the same time as that in this appeal and I refrain from repeating them.

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I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the applicants, appellants: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitors for the respondents Gardner, Hagey, et al.: Trepanier, Hagey, Kneale & Wiacek, Brantford.

Solicitors for the respondents Bixel, Montgomery, et al.: Boddy, Ryerson, Houlding & Clarke, Brantford.

IN RE THE ESTATE OF WILLIAM JAMES GAGE, DECEASED.

1961 *Nov. 21, 22 — 1962 Feb. 6

MARY JOY KETTERER, MAZO MARIE IRELAND and DAVIDIANA G. GADSBY ....APPELLANTS;

AND

IRENE G. GRIFFITH, DIANNA GAGE TISDALL, GLORIA GAGE PRUSAC, CARMEN IRENE ANGLIN, W. GAGE GRIFFITH, GAGE H. LOVE, WILHELMINA HORSFALL and CHARTERED TRUST COMPANY, Executors and Trustees of the Estate of William James Gage ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Adoption—Life interest bequeathed to daughter with remainder to her children—Daughter survived by three adopted children—Legislation making an adopted child a child for all purposes—Whether applicable where testator died before enactment of statute—The Child Welfare Act, ss. 74 and 75, as enacted by 1958 (Ont.), c. 11, s. 3.

M had a life interest in one-quarter of the residue of the estate of her father, whose will provided that on her death that part of the residue from which she had been drawing the income should be held in trust for her children until the youngest reached the age of 21, when it was to be divided among the children equally. M died on October 25, 1959, survived by three adopted daughters. S. 74 of *The Child Welfare Act,* as enacted by 1958 (Ont.), c. 11, made an adopted child a child for all purposes.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

[1] [1962] S.C.R. 241.

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IN RE GAGE
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On an originating motion for the opinion, advice and direction of the Court, the trial judge held that the fund was divisible among and should be paid in equal shares to M's adopted children. The Court of Appeal in reversing that judgment held that the daughters could not take because they were adopted children and that the share from which M was drawing income must go over to other interests in accordance with the terms of the will as though she had died leaving no child her surviving. In the opinion of the Court of Appeal, the legislature in passing ss. 74 and 75 of *The Child Welfare Act,* thereby defining the status of adopted children, did not, in addition, intend to interfere with the disposition of an estate made by a testator who had died prior to the passing of the legislation. Also, the legislation was not to be construed as interfering with existing property rights in the absence of clear words showing such an intention. The adopted daughters appealed to this Court.

Held (Judson and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Locke and Cartwright JJ.: The question before the Court was not whether the three appellants had for all purposes the status of children born in lawful wedlock to M; it was rather whether on the true construction of the language used by the testator in his will he intended that in the events that had happened they should take as beneficiaries. For the reasons given by the Court below, as a matter of construction, the words "child" or "children" as used in the testator's will did not include the appellants. *Re Blackwell,* [1959] O.R. 377, overruled.

Per Judson and Ritchie JJ., *dissenting*: The class of children who were to take the remainder could not be ascertained until the death of the life tenant and, in the meantime, legislation had intervened to change the meaning of the word "children" and to make the appellants into "children". The meaning of the word in the will could not be considered apart from the statute.

The legislation must be applied to a state of facts as it exists at the time when the class of children is to be ascertained in order to determine who are children. Where this is the problem, and in the absence of any proviso limiting the application of the legislation, there is no basis for rejection of its application to wills made before its enactment, whether or not adoption was known to the law at the time of the execution of the will.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Spence J., declaring that certain adopted children were entitled to share in a bequest to "children" by virtue of ss. 74 and 75 of *The Child Welfare Act* (Ont.). Appeal dismissed, Judson and Ritchie JJ. dissenting.

F. R. Hume, Q.C., for the appellants.

J. J. Robinette, Q.C., for the respondents, Irene G. Griffith, Dianna Gage Tisdall, Gloria Gage Prusac, Carmen Irene Anglin and W. Gage Griffith.

[1] [1961] O.R. 540, 28 D.L.R. (2d) 469.

Stanley C. Biggs, Q.C., for the respondents, Gage H. Love and Wilhelmina Horsfall.

Terence Sheard, Q.C., for the respondent, Chartered Trust Company.

THE CHIEF JUSTICE:—I agree with Roach J.A., speaking on behalf of the Court of Appeal[1], and he has dealt with the matter so satisfactorily I have nothing to add.

The appeal should be dismissed but the costs of all parties in this Court should be paid out of the fund in question, those of the trustee as between solicitor and client.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—The relevant facts and the question raised for decision in this appeal are set out in the reasons of my brother Judson.

We have to decide whether the view of the effect of ss. 74 and 75 of *The Child Welfare Act,* as enacted by 1958 (Ont.), c. 11, s. 3 (now ss. 76 and 77 of *The Child Welfare Act,* R.S.O. 1960, c. 53) expressed by McRuer C.J.H.C. in *Re Blackwell*[2], or that of the unanimous Court of Appeal[3] expressed by Roach J.A. in the case at bar is the right one.

This appeal was argued immediately after that in the case of *Re Clement*[4] judgment in which is being given at the same time as this judgment. Counsel in this appeal adopted the arguments of counsel in the *Clement* case whose interests were similar to their own and in addition assisted us with further full and helpful argument.

I agree with the reasons and conclusion of Roach J.A. and wish in particular to adopt the following passages in his reasons:

> No legislation will be construed as thwarting the intention of a testator as expressed in his will, unless the language clearly and unmistakably indicates that the legislature so intended and has effectively brought about that result.

Having quoted the two sections referred to above the learned Justice of Appeal continued:

> Those sections make the status of adopted children, whether adopted prior or subsequent to the passing thereof, that of natural born children of the adopting parents. The question here, however, is not one of status

1 [1961] O.R. 540, 28 D.L.R. (2d) 469.
2 [1959] O.R. 377, 20 D.L.R. (2d) 107.
3 [1961] O.R. 540, 28 D.L.R. (2d) 469.
4 [1962] S.C.R. 235.

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but of the intention of the testator. In a case of intestacy certainly the status of the adopted children is the governing factor. As I earlier stated, we know without any doubt what the intention of the testator was. The only debatable question here is,—What was the intention of the legislature in passing those two sections? Did it intend thereby, in addition to defining the status of adopted children, to interfere with the disposition of an estate made by a testator who had died prior to the passing of the legislation. Having stated that question, I answer it at once by saying that in my respectful opinion the legislature did not so intend.

* * *

If the 1958 Act is to be construed as entitling the adopted children of Mrs. McCormack to share in this estate, then it means that the legislature has taken from the grandchildren by blood relationship of the testator property rights which he gave exclusively to them and given them to other persons who now, by virtue of the statute, stand in the relationship of grandchildren to the testator but whom he didn't even think of and assuredly had no intention of benefiting.

In my respectful opinion, plainer and more explicit language than is contained in the legislation here in question is necessary to impel the court to reach the conclusion that the legislature intended that result. That result would be tantamount to confiscation by the state and distribution by the state, of the property confiscated, to a class. It is a basic principle of interpretation that the court always leans against any interpretation of a statute as authorizing confiscation. Maxwell, 9th ed., p. 289-90. I think it makes no difference that the property confiscated is not retained by the state but is given, after confiscation, to other persons.

At the risk of repetition of what has already been said by Roach J. A. I propose to add only a few words.

The question before us is not whether the three appellants have for all purposes the status of children born in lawful wedlock to the late Mrs. McCormack; it is rather whether on the true construction of the language used by the testator in his will he intended that, in the events that have happened, they should take as beneficiaries.

In the course of the argument the question was put to counsel from the bench whether the testator could by the use of apt words have excluded the appellants from any share in his estate, the form of words suggested being: "Whenever in this will I use the expression 'child' or 'children' I mean a child or children actually born in lawful wedlock of the body of the parent of such child and I do not mean an adopted child". All counsel answered that such a form of words would effectively have excluded the appellants. I would not found my judgment on the answer of counsel to such a question put during the course of argument if I thought that any other answer were possible, but in my opinion no other answer could be made.

Once it appears that in spite of the terms of the sections of *The Child Welfare Act* referred to above a testator can by apt language exclude from his bounty, whether as individuals or as members of a class, children who have been adopted in favour of issue immediate or remote of his own body or of the body of a designated person, it seems to me that the question of the status of such adopted children becomes irrelevant and the only question is:—"What do the words of the testator's will mean?" For the reasons given by Roach J.A. I agree that, as a matter of construction, those words do not include the appellants.

I would dismiss the appeal and would direct that the costs of all parties in this Court should be paid out of the fund in question those of the trustee on a solicitor and client basis.

The judgment of Judson and Ritchie JJ. was delivered by

JUDSON J. (*dissenting*):—The appellants are three adopted daughters of the late Gladys McCormack, who died on October 25, 1959, after the amendment to Part IV of *The Child Welfare Act* by 1958 (Ont.), c. 11, had come into force. The question in the appeal is whether they can take under the will of Sir William Gage as children of his daughter Gladys McCormack.

Gladys McCormack had a life interest in one-quarter of the residue of the estate of her father, whose will provided that on her death that part of the residue from which she had been drawing the income should be held in trust for her children until the youngest reached the age of 21, when it was to be divided among the children equally. The judgment under appeal holds that the appellants cannot take because they are adopted children and that the share from which Gladys McCormack was drawing income must go over to other interests in accordance with the terms of the will as though she had died leaving no child her surviving.

Sir William Gage made his will on May 5, 1920, and died on January 14, 1921. This was before there was any adoption legislation in the Province of Ontario. The first *Adoption Act* in Ontario came into force on April 18, 1921. Mrs. McCormack adopted Mary Joy Ketterer on January 2, 1930, and Mazo Marie Ireland and Davidiana Gadsby on January 24, 1944. On January 1, 1959, the Ontario legislation

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making an adopted child a child for all purposes came into force and on October 25, 1959, Gladys McCormack died leaving these three adopted daughters surviving her.

The question therefore is precisely the same as the one raised in *Re Blackwell*[1], that is, the right of adopted children to take as a class answering the description of children when the life tenant dies after the coming into force of the 1958 legislation. The judgment in *Re Blackwell* held that after January 1, 1959, adopted children were children for all purposes and that when the class of children was ascertained on the death of the life tenant, adopted children would take as children. This judgment was not appealed. Consequently, when this application came before Spence J., he held himself bound to follow it. On appeal, however, the judgment of Spence J. was reversed[2], the Court of Appeal holding that these adopted children could not take as children and that the part of the residue from which Mrs. McCormack was drawing income must go over to the other interests designated in the will.

If these adopted children are to succeed, it must be because of the 1958 amendment to *The Child Welfare Act*. Sections 74 and 75 of this Act are:

74. (1) For all purposes the adopted child, upon the adoption order being made, becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted child as if the adopted child had been born in lawful wedlock to the adopting parent.

(2) For all purposes the adopted child, upon the adoption order being made, ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child.

(3) The relationship to one another of all persons, whether the adopted child, the adopting parent, the kindred of the adopting parent, the parent before the making of the adoption order and the kindred of that parent or any other person, shall be determined in accordance with subsections 1 and 2.

(4) Subsections 2 and 3 do not apply for the purposes of the laws relating to incest and the prohibited degrees of marriage to remove any person from a relationship in consanguinity which, but for this section, would have existed.

75. Every person heretofore adopted under the laws of Ontario and every person adopted under the laws of any other province or territory of Canada or under the laws of any other country shall for all purposes in Ontario be governed by this Part.

[1] [1959] O.R. 377, 20 D.L.R. (2d) 107.
[2] [1961] O.R. 540, 28 D.L.R. (2d) 469.

In my reasons for judgment in *Re Clement*[1], I traced in brief outline the history of adoption legislation in Ontario and its effect upon succession to property. The history is one of a progressive development towards equating the position of an adopted child with that of a natural child. There are three steps in this development. The original legislation of 1921 did no more than confer a right of succession on the intestacy of the adopting parent and provided by s. 12 (1921 (Ont.), c. 55) that the word " 'child' or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument."

The first change of any significance was enacted by 1927 (Ont.), c. 53, s. 6(2). It preserved the right of intestate succession and provided that "the expressions 'child', 'children' and 'issue' where used in any disposition made after the making of the adoption order by the adopting parent, shall, unless a contrary intention appears, include an adopted child or children or the issue of an adopted child." Further, subs. (6) of s. 6 stated:

> Save as herein provided and as to persons other than the adopting parent, the adopted child shall not be deemed the child of the adopting parent.

This was the statutory position in R.S.O. 1927, c. 189, s. 5; R.S.O. 1937, c. 218, s. 6; R.S.O. 1950, c. 7, s. 12, until it was changed in 1954 by the enactment of *The Child Welfare Act* of that year (1954 (Ont.), c. 8, Part IV). During this period, it is clear that these appellants could not take under this will because the will was prior to the adoption order. There may also be other disqualifications which it is unnecessary to consider.

One significant change introduced by the legislation of 1954 was the omission of the express limitation of rights of adopted children to those acquired under subsequent instruments. Section 77(6) and (12) of the 1954 legislation stated:

> (6) An adoption order confers upon the adopted child or any issue of the adopted child the same rights to and interests in property under any intestacy of or disposition by the adopting parent or any kindred of the adopting parent as if the adopted child was a child born to the adopting parent in lawful wedlock.
>
> (12) Except as provided in this Part, an adopted child shall not be deemed the child of the adopting parent.

[1] [1962] S.C.R. 235.

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The 1954 legislation was repealed in 1958 by *The Child Welfare Amendment Act*, 1958, c. 11, ss. 74 and 75, both of which are set out above. Again there is no limitation on the rights of adopted children to those acquired under subsequent instruments. The adopted child is now a child for all purposes except the law of incest and consanguinity in relation to marriage. He becomes a full member of the family of his adopting parent including the kindred of the adopting parent, and s. 75 says that this applies to every person heretofore adopted under the laws of Ontario.

When s. 75 of the 1958 legislation speaks of a "person heretofore adopted being governed by this Part" I take it to mean that on January 1, 1959, when the new legislation came into force, he then acquired the status of a child as defined in s. 74. In any case involving the status of an adopted child arising after this date, this Act and this Act alone is to be applied and this is an Act which has omitted a previous limitation on the rights of adopted children but which does not say in so many words that in the construction of all wills, whenever made, the word "child" now includes an adopted child. The question is whether the new legislation has done the same thing when it makes an adopted child a child for all purposes. The judgment of the Court of Appeal holds that it has not for the following reasons:

(a) The word "child" in a will in the absence of some strong context to the contrary means a lawful child of the body of the person named.

(b) There is no context in the will of Sir William Gage to the contrary. Unless the subsequent adopting legislation in force at the date of the death of Mrs. McCormack has the effect of *altering the meaning of the will*, Mrs. McCormack did die leaving no child her surviving. The Court of Appeal, therefore, is dealing with the problem not as one of after-acquired status but as one of alteration of a will by statutory compulsion after the will has been made and has come into effect.

(c) To the Court of Appeal, it must be shown that the will is now to be read as if it had said "leaving no child or adopted child her surviving".

(d) To the Court of Appeal, two basic principles prevent any such statutory alteration of the will. The first is that where a statute is passed altering the law, unless

> the language is expressly to the contrary, it has to be taken as intended to apply to a state of facts coming into existence after the Act. The second basic principle is that a statute should not be construed so as to interfere with existing property rights unless there are clear words showing such an intention.

It appears to me, with respect, that this treatment of the problem imposes a limitation on the application of ss. 74 and 75 which no longer exists. It involves a re-affirmation of the limitation of the rights of adopted children under wills which existed under the legislation from 1927 to 1954 but which no longer exists. My conclusion is that after January 1, 1959, these three appellants were the children of Mrs. McCormack and not adopted children with limited rights; that as children they answer the description in the will, and that Mrs. McCormack died leaving children who take that part of the residue from which she was drawing income.

I do not think that this conclusion is in any way weakened by *Re Donald, Baldwin v. Mooney*[1] and *Re Marshall*[2]. Both cases are concerned with a domestic will and the extent of the recognition to be given to an adoption in a foreign domicile. In the *Donald* case the testator left a share of the residue of his estate to a named individual with a substitutional gift to the children of that beneficiary should he predecease the testator. The beneficiary, who did predecease the testator, died domiciled in the State of Washington where he had adopted a child, who, according to the law of that State, was to all intents and purposes the child and legal heir of the adopting parent as though he were a child of that person born in lawful wedlock. This legislation is indistinguishable from that contained in s. 74 of the Ontario legislation of 1958. This Court held, on appeal *per saltum* from the Court of King's Bench of Saskatchewan, that the child did not take under the Saskatchewan will and that the question was not one of status but whether the adopted child was a person such as was mentioned and described in the bequest. At the date of the death of the testator, as is pointed out in the Reporter's Note at p. 306, there was no adoption legislation in force in Saskatchewan.

[1] [1929] S.C.R. 306, 2 D.L.R. 244.
[2] [1957] 1 Ch. 507.

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The Saskatchewan Court and this Court refused to recognize a status acquired by adoption which was unknown to the law of the province. This was a view that had some acceptance at that time (*vide* Dicey, Conflict of Laws, 3rd ed., 1922, p. 501). There is room for doubt whether this was ever a tenable view but even if it were, it has no application to the present case, where adoption is fully recognized by Ontario domestic law. In the circumstances, I would accept the suggestion made by Falconbridge in Conflict of Laws, 1st ed., p. 587, that the *Donald* case might be treated as a special case dependent on the then condition of provincial legislation and not as being a decision which should preclude reconsideration of the Court's attitude towards recognition of adoption under a foreign law.

Re Marshall, supra, was decided at a time when adoption had received some recognition in England but not to the extent of the Ontario legislation of 1958. The testator made his will in April of 1945 and died in June of that year domiciled in England. He left a life interest to his wife and on her death directed the division of the residuary estate among certain named cousins, with a substitutional gift as follows:

> Provided always that should any of the above cousins be then dead leaving issue then living such issue shall take the share his her or their parent would have taken had such parent survived me and my said wife.

One of the named cousins had acquired a domicile in British Columbia. In March of 1945, which was before the date of the will, he had adopted a child in British Columbia. This cousin died in 1950. The testator's wife died in 1955. The question again was whether the adopted child could take under this substitutional gift.

Both Harmon J.[1] and the Court of Appeal held that he could not. The Court of Appeal, after a detailed examination of the adoption legislation of British Columbia, namely, the Act of 1920, as amended in 1936, held that the rights and privileges conferred by this legislation fell far short of those which characterized the status of a child and that the Court could not find that an English testator in a bequest to "children" could have had in contemplation adopted children with rights so limited. The Court also considered the amending legislation of 1953 and doubted, contrary to

[1] [1957] 1 All E.R. 549.

the opinion of Harmon J., whether it would have been sufficient, even if it had applied. But in considering the 1956 legislation, which is the same as s. 74 of the Ontario legislation of 1958, the Court did say that it appeared to be sufficient to place an adopted child in the position of that of a natural child for all purposes. All this is *obiter* but the plain inference is that the decision would have been different if the 1956 legislation had applied.

We are not concerned here with one of the difficulties that troubled the Court of Appeal. The 1958 legislation is adequate to make an adopted child into a child. There is no such person in Ontario after 1958 as an adopted child. He is a child for all purposes. In order to take, must he be a child according to the law as it stood at the date of the testator's death? In considering the extent of the recognition to be given to a foreign adoption, both Harmon J. and the Court of Appeal held that the testator's death was the relevant date. The Court of Appeal said at p. 525:

> Accordingly, we think that so far as adopted children are concerned, their status and capacity to take under a gift to "children" in an English will is (subject, of course, to British legislation) fixed once and for all at the testator's death and that subsequent legislation in the country of their domicile enlarging their rights is to be disregarded.

Harmon J. had stated the rule without the qualification introduced by the Court of Appeal "subject, of course, to British legislation". It was this omission that led Whittaker J. in his judgment in *Re Stuart, Toronto General Trusts Corp. & Stuart v. Stuart*[1], to question the application of the rule to a purely domestic situation where the will and the adoption were governed entirely by the law of British Columbia.

The only rule enunciated in *Re Marshall,* and it has no application to the present case, was a rule of English conflict of laws that succession to the movables in England of a person dying domiciled abroad is governed by the law of the domicile as that law stood at the date of the death of the individual in question and was unaffected by changes in the law of the domicile subsequent to the death. This principle was applied in determining the extent of the recognition to be given to a foreign adoption but it leaves untouched the effect to be given to domestic legislation subsequent to the testator's death on a domestic adoption also subsequent to the testator's death.

[1] (1957), 10 D.L.R. (2d) 634.

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Re Marshall, therefore, contains no rule that the relevant date for ascertaining the class of persons capable of taking under this will is the date of the testator's death, which was January 14, 1921. The class of children is to be ascertained on the death of the life tenant Gladys McCormack. On that date these appellants, by Ontario legislation, had the status of children and the Court must recognize that status.

On the death of the testator, a gift to the children of A meant *prima facie* a gift to the legitimate children of A and not to illegitimate or adopted children. I can well understand the finding of the Court of Appeal that this is what the testator intended. But the class of children cannot be ascertained until the death of Mrs. McCormack and, in the meantime, legislation has intervened to change the meaning of the word "children" and to make these appellants into "children". The meaning of the word in this will cannot be considered apart from the statute and the statute has made them answer the description contained in the will in the same way that children born of the body of Mrs. McCormack in lawful wedlock would answer the description.

The legislation must be applied to a state of facts as it exists at the time when the class of children is to be ascertained in order to determined who are children. Where this is the problem, and in the absence of any proviso limiting the application of the legislation, I can see no basis for any rejection of its application to wills made before its enactment, whether or not adoption was known to the law at the time of the execution of the will.

I have examined the New Zealand and Australian cases referred to in the judgment in *Re Blackwell.* The New Zealand legislation has always provided that it does not apply to enable rights to be acquired under a prior will unless it is expressly so stated in the prior will. The legislation considered in *Pedley-Smith v. Pedley-Smith*[1], was to the same effect. The significance of these cases is that the enquiry is confined to the question whether the adopted child is claiming under a prior instrument, that is whether the case is within the proviso. If it is not, it seems fundamental to all the decisions that the legislation is of general application. For example, in the *Pedley-Smith* case a will made in 1934 settled property on a beneficiary for life with a special power

[1] (1953), 88 C.L.R. 177.

of appointment in favour of issue of that beneficiary. In 1940 she adopted two children and in 1949, exercised the special power in their favour. The New South Wales legislation made an adopted child a child for all purposes except with respect to prior wills. The judgment in *Pedley-Smith*, following *Muir v. Muir*[1], was that the child would take, if at all, under the prior will and not under the subsequent exercise of the special power. Had it not been for the proviso in the legislation, there would have been nothing to prevent the adopted child, under legislation of this kind, from taking.

I am therefore of the opinion that the sound approach to this problem is that stated in *Re Clark*[2] (Dysart J.); *Re Stuart*[3] (Whittaker J.) and *Re Blackwell*[4] (McRuer C.J.H.C.). For the reasons given, I would follow these decisions. The appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of Spence J. restored.

As to costs, I would restore the order of Spence J. made on the motion. The respondents in this appeal, other than the trustee, must pay the appellants their costs both in this Court and the Court of Appeal. The trustee's costs were provided for by Spence J. on the motion. In this Court and in the Court of Appeal I would make the same order, namely, that the trustee is entitled to its costs, on a solicitor and client basis, payable out of the estate.

Appeal dismissed, JUDSON *and* RITCHIE JJ. *dissenting.*

Solicitors for the appellants: Hume, Martin & Allen, Toronto.

Solicitors for the respondents, Irene G. Griffith, Dianna Gage Tisdall, Gloria Gage Prusac, Carmen Irene Anglin and W. Gage Griffith: Wegenast & Hyndman, Toronto.

Solicitors for the respondents, Gage H. Love and Wilhelmina Horsfall: Payton, Biggs & Graham, Toronto.

Solicitors for the respondent, Chartered Trust Company: Johnston, Sheard & Johnston, Toronto.

[1] [1943] A.C. 468.
[2] [1947] 1 D.L.R. 371.
[3] (1957), 10 D.L.R. (2d) 634.
[4] [1959] O.R. 377, 20 D.L.R. (2d) 107.

1961 *Oct. 24, 25 Dec. 15

ABRAHAM BELZBERG .... APPELLANT;

AND

HER MAJESTY THE QUEEN .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Bribery—Bribes offered to Chief Building Inspector of city—Whether proof that he was a municipal official—Whether bribery related to official act—Criminal Code, 1953-54 (Can.), c. 51, s. 104—City Act, R.S.C. 1955, c. 42, s. 2(q).

The accused was charged under s. 104 of the *Criminal Code* with offering bribes to W, the Chief Building Inspector for the City of Calgary, in consideration for that official to fail to perform certain official acts. The trial judge held that the bribes had been offered, but dismissed the charges on the ground that there was no evidence that W had been appointed as an official in accordance with s. 104 of the Code. The Court of Appeal set aside the acquittal and found the accused guilty, as charged.

Held: The appeal should be dismissed.

The finding of fact by the trial judge that the bribes had been offered having been unanimously affirmed by the Court of Appeal and being entirely consistent with the probabilities of the case, could not be disturbed.

The uncontradicted evidence of W that he was both the Chief Building Inspector and a municipal official, coupled with the description of his official activities contained in his own evidence and in that of the appellant, and which were appropriate to those of a person holding office within the dictionary sense of that term and under *The City Act*, R.S.C. 1955, c. 42, constituted *prima facie* evidence that he was a person who held office under the City of Calgary and was a municipal official within the meaning of s. 104 of the Code. It has been held on more than one occasion that evidence of a person acting in an official capacity raises a rebuttal presumption of his due appointment to that office. In this case there was not only evidence of W having performed the duties, but there was also direct evidence from W himself that he held the appointment and it was plain that the appellant recognized that he represented the city in an official capacity. There was evidence that the alleged bribes related to an official act.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Cairns J. and finding the accused guilty of having offered bribes. Appeal dismissed.

Joseph Sedgwick, Q.C., and *Robert H. Barron, Q.C.*, for the appellant.

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

[1] (1961), 35 W.W.R. 402, 35 C.R. 297, 130 C.C.C 371.

H. J. Wilson, Q.C., and *R. P. Adolphe*, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] allowing the appeal of the Crown from the judgment of Cairns J. whereby the present appellant had been acquitted of the following two charges:

1. That he, at Calgary, in the Judicial District of Calgary, on the 9th day of November, A.D. 1959, did offer to Lawrence Walker, Chief Building Inspector for the City of Calgary, a Municipal Official, the sum of $500 as consideration for the said official to fail to perform an official act, contrary to Section 104 of the Criminal Code.
2. That he, at Calgary, in the Judicial District of Calgary, on the 22nd day of August, A.D. 1960, did offer to Lawrence Walker, Chief Building Inspector for the City of Calgary, a Municipal Official, the sum of $300 as consideration for the said official to fail to perform an official act, contrary to Section 104 of the Criminal Code.

Mr. Walker, who testified that during the years 1959-60 he held the position of Chief Building Inspector of the City of Calgary and was a municipal official, recounted two separate occasions upon which the appellant offered him money. The first incident took place on November 9, 1959, after Walker, in his capacity as Chief Building Inspector, had condemned a building owned by the appellant and one J. Singer; Walker states that at this time the appellant said to him:

> Allow this building to remain in occupancy for another year, and forget about the condemning order, and if you will so do I will give you $500.

and that he then took some money out of his pocket and put it on the table between them. The second incident which took place on August 22, 1960, concerned an order issued by one of the building inspectors in Walker's department, notifying a "builder-owner" by the name of Korytko that a building on his property was being over-developed in contravention of a city by-law; in this regard Walker's best recollection of the relevant portion of his conversation with the appellant is that "he asked me if I would overlook this over-development, and if I would overlook it he would give me $300."

[1] (1961), 35 W.W.R. 402, 35 C.R. 297, 130 C.C.C. 371.

The appellant denied having made these offers, but the learned trial judge, having heard all of the evidence, expressed himself as follows:

> I have no doubt whatsoever on the facts of this case that the defendant offered the bribes alleged in the charges. It has been proved to me to a moral certainty and beyond reasonable doubt. There is no question about that at all. On that I accept the evidence of Mr. Walker, and I don't think I need to go any further; it follows that if I accept his evidence I do not accept other evidence.

It is contended on behalf of the appellant that because the learned trial judge acquitted him on the ground that there was no evidence that Mr. Walker had been appointed as an official in accordance with s. 104 of the *Criminal Code,* it must, therefore, follow that the above-quoted finding was *obiter* and should be disregarded as having been intended to be "a mere gratuitous rebuke to the appellant". This finding is also attacked on the ground that no reasons are given for it and one of the grounds stated in the notice of appeal to this Court is that the Appellate Division erred in law in not holding that the trial judge had misdirected himself in determining the credibility of witnesses without considering whether or not the evidence of the witnesses whom he believed was in accordance with the probabilities of the case.

In my view the excerpt above-quoted from the decision of the learned trial judge constitutes a clear finding of fact for which it was unnecessary to give any other reason than his acceptance of the evidence of Walker. (See *Lemay v. The King*[1]). As this finding has been unanimously affirmed by the Court of Appeal and as it is, in my view, entirely consistent with the probabilities of the case, I do not think it can be disturbed.

In acquitting the appellant, the learned trial judge said:

> However, I feel the Crown has failed to prove that in the acts which Mr. Walker did, he was acting as an official in accordance with the terms of Section 104. An official is one, as Mr. McGillivray points out, who is appointed either by by-law or resolution of a city. There is no evidence before me that Mr. Walker has been so appointed, and unless he does these acts as a person holding office under a municipal government, and the office is proven in the manner in which he is appointed, I think the charge must fail.

In setting aside the acquittals which were based on this finding, Macdonald J.A., speaking on behalf of the Appellate Division, held it to be "abundantly proved that Walker was Chief Building Inspector of the City of Calgary" and that

[1] [1952] 1 S.C.R. 232 at 238, 14 C.R. 89, 102 C.C.C. 1.

as such he "held an office under a municipal government, namely, the City of Calgary". It followed from these conclusions that the Appellate Division found him to be "a municipal official" within the meaning of s. 104 of the *Criminal Code,* the relevant portions of which read as follows:

104. (1) Every one who

(*a*) gives, offers or agrees to give or offer to a municipal official, or

(*b*) being a municipal official, demands, accepts or offers or agrees to accept from any person, a loan, reward, advantage or benefit of any kind as consideration for the official

* * *

(*f*) to perform or fail to perform an official act, is guilty of an indictable offence and is liable to imprisonment for two years.

* * *

104. (3) In this section "municipal official" means a member of a municipal council or a person who holds an office under a municipal government.

In conformity with the finding of the learned trial judge, it was urged on behalf of the appellant that there was no evidence that Walker was "a municipal official" within the meaning of this section or that either of the alleged offers of money related to "an official act". In support of this contention, it was said that the only evidence quoted by the Appellate Division as a basis for its finding that Walker was a municipal official was his affirmative answer to the question: "Mr. Walker, during the year 1959 and during the year 1960 and up to the present moment, were you a municipal official?" and that the finding cannot stand because this was an improper and leading question, the answer to which involved the very question of law which the trial court had to decide. I do not agree that this question and answer formed the basis for the finding of the Appellate Division, but in any event it is significant to note that no evidence was called to contradict this answer and that the first question and answer on Walker's cross-examination by appellant's counsel were:

Q. Mr. Walker, you have been the Chief Building Inspector for a matter of some four years?

A. That is correct.

This latter statement which is uncontradicted, when taken together with the extensive evidence illustrative of the manner in which Walker carried out his duties in the inspection of buildings, appears to me to fully justify the finding of the

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Court of Appeal that it is "abundantly proved that Walker was the Chief Building Inspector of the City of Calgary". That this evidence is of itself sufficient to support such a finding is shown by reference to *R. v. Gordon*[1], *Berryman v. Wise*[2] and other cases cited in Roscoe's Criminal Evidence, 16th ed., p. 11.

Certainly Walker's own evidence that he had been Chief Building Inspector for some four years disposes of the argument advanced on behalf of the appellant to the effect that the fact of Walker having signed certain letters as "Building Inspector" *simpliciter* raised some doubts as to whether he held the office of Chief Building Inspector.

It is, however, stated in the appellant's factum and was strenuously argued on this appeal that the real issue in the present case

> ... is not whether Walker was the Chief Building Inspector, but rather whether the Chief Building Inspector is a "municipal official" within the strict narrow meaning of that term as defined in sec. 104(3).

This resolves itself into the question of whether the Chief Building Inspector of the City of Calgary has been shown to be "a person who holds office under a municipal government" and this in turn depends in great degree on the meaning to be given to the word "office" as used in s. 104(3). Section 99(d) of the *Criminal Code* provides that in Part III of the Code the word "office" includes:

(i) an office or appointment under the government;
(ii) a civil or military commission; and
(iii) a position or employment in a public department.

I am satisfied, however, that this section does not apply to an "office" under a municipal government, and that Macdonald J.A. was entirely justified in referring to the definitions of "office" contained in the New Century and Shorter Oxford English Dictionaries. The evidence in the present case is that the duties of the Chief Building Inspector included the inspection of buildings for the purpose of enforcing the by-laws of the city, and that as Chief Building Inspector Walker had authority to supersede decisions made by building inspectors in the Building Inspection Division. A position which involved such authority, responsibility and

[1] (1789), 1 Leach 515, 168 E.R. 359.
[2] (1791), 4 T.R. 366, 100 E.R. 1067.

public trust can, in my view, properly be described as an "office" within the meaning of s. 104(3) of the *Criminal Code.*

The City Act, R.S.A. 1955, c. 42, which appellant's counsel describes as "the Charter of the City of Calgary" is advanced as containing a number of sections which are of considerable help in determining whether or not a "Chief Building Inspector" is an "official" of the City of Calgary. Section 2(q) of that Act reads as follows:

"official" includes a city commissioner, city manager, city clerk, city treasurer, assessor, city solicitor, auditor, comptroller, city engineer and *any other official appointed by the council to any office pursuant to the provisions* of Part III, Division B; (The italics are mine.)

It is provided in Part III, Division B (s. 55(1)) that "such other officials as are deemed necessary for carrying into effect of the provisions of the" *City Act* are to be appointed by resolution of the City Council and s. 81(1) requires that before entering upon the duties of his office such an official shall make and subscribe the official oath, solemn affirmation or declaration prescribed by the *Oaths of Office Act.* Although *The City Act* does not expressly mention the office of Chief Building Inspector, the provisions of ss. 385 to 389 deal with "Control of Buildings" and s. 388(*e*) provides that the

. . . Council may pass by-laws

* * *

(*e*) appointing street and building inspectors and defining their duties.

As the evidence makes it clear that there was a *Chief* Building Inspector and as there was no evidence that he was not properly appointed, it is to be assumed that the City Council of the City of Calgary deemed it necessary to appoint and did appoint such an official for carrying into effect the provisions of *The City Act.*

The substance of the appellant's argument in this regard is that there was no evidence that Walker had been appointed by resolution or by-law of the City Council. In my view, Walker's uncontradicted evidence that he was both the Chief Building Inspector and a "municipal official", coupled with the description of his official activities contained in his own evidence and in that of the appellant, constitutes *prima facie* evidence that he was a person who held office under the City of Calgary and was a "municipal

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official" within the meaning of s. 104(3). It has been held on more than one occasion that evidence of a person acting in an official capacity raises a rebuttable presumption of his due appointment to that office. (See Halsbury's Laws of England, 3rd ed., vol. 15, p. 347, para. 628; Phipson on Evidence, 9th ed., p. 120; *R. v. Smith*[1]; *R. v. Goodman*[2]; *R. v. Roberts*[3] and *Doe v. Brawn*[4]). In this case there is not only evidence of Walker having personally inspected buildings in the City of Calgary and of his having been the superior officer in control of other building inspectors, but there is also direct evidence from the official himself that he held the appointment, and it is plain that the appellant recognized that he represented the City of Calgary in an "official capacity". In the course of his direct examination, the appellant, referring to Walker's having condemned another building, said that he did whatever Walker asked him to do, and he was then asked:

Q. Why did you do what he asked you?

A. Why? I couldn't help it.

Q. Not because he is a nice fellow?

A. No.

Q. Just because you couldn't help it?

A. I couldn't help it, it is the City, you couldn't knock the City.

As to the contention that there was no evidence that either of the alleged bribes related to an official act, it seems to me to be sufficient to say that Walker's evidence, as to his refusal of the money offered in November 1959, is that he told the appellant,

> . . . that in my office as Building Inspector I had, it was my duty to do what I believed was the proper thing to do in relation to the building by-law regarding buildings.

and that when the appellant asked him in August 1960 to overlook the "over-development" by the builder-owner Korytko he was, in effect, asking him to countermand an order made by a building inspector who was under his authority which order was enforceable by the laying of a charge under By-law 4682 of the City of Calgary. In my opinion, if he had complied with either of these requests, Walker would have failed to perform an official act.

[1] (1930), 54 C.C.C. 359, 25 A.L.R. 100.

[2] (1951), 99 C.C.C. 366.

[3] (1877), 14 Cox C.C. 101.

[4] (1821), 5 B. & Ald. 243, 106 E.R. 1181.

The last error alleged in the decision of the Appellate Division was that the findings by that Court that Walker was "a municipal official" and that the bribes related to "an official act" were findings of fact which that Court had no jurisdiction to make on an appeal by the Crown. There was no conflict of evidence as to the fact that Walker was the Chief Building Inspector and the alleged findings of fact, in my opinion, constitute a decision of the Appellate Division that under the true construction of the language used in s. 104(3) of the *Criminal Code* the holder of such a position is a "municipal official" and the acts performed in his capacity as such are "official acts" within the meaning of those phrases as used in that section. This was a decision which the Appellate Division had jurisdiction to make in this case.

I would dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

Solicitor for the respondent: Edward P. Adolphe, Calgary.

MARY ORLANDO .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

1961 *Oct. 30
1962 Jan. 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Farm acquired as investment—Sales of topsoil—Whether adventure in the nature of trade—Whether profit in the course of trade or capital gain—Whether farming losses deductible—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(1)(j), 27(1)(e), 139(1)(e).

In 1944, the appellant, who was a shareholder in a company operating a mushroom farm in Toronto and of which her husband was president and principal shareholder, purchased a 97-acre farm as an investment and as an alternative site for the company in the event that it had to move due to the growth of the city. The farming operations carried on by the appellant between 1944 and 1953 were minimal. However, in each year during that period, with the exception of 1949, she sold topsoil from a 37-acre portion of her farm to the mushroom company.

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

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In 1953, she sold the 37-acre parcel to a highway contractor for $120,000. The contract of sale required the purchaser to remove the topsoil and spread it on the remaining portion of the appellant's farm. The appellant then sold all that topsoil to the mushroom company for $18,500.

The Minister ruled that the amounts she received for the topsoil were income subject to tax. This decision was reversed by the Income Tax Appeal Board but was, in turn, restored by the Exchequer Court. It was argued for the Minister that the amount was taxable as income from a business or, in the alternative, taxable under s. 6(1)(*j*) as payments dependent upon use of or production from property. The appellant contended that the topsoil profit was a capital gain from the partial realization of an investment. She also argued that if these amounts were taxable she was entitled under s. 27(1)(*e*) of the Act to deduct the losses sustained by her in operating the farm in the five years preceding and in the year following 1953.

Held (Cartwright J. dissenting): The appeal should be allowed, but only to the extent necessary to permit a minor adjustment which the Minister admitted should be made.

Per Taschereau, Abbott, Judson and Ritchie J.: The sales of topsoil had no relation to any farming operations since the disposal of the topsoil, if carried to its ultimate conclusion, would have rendered any farming operation impossible. In disposing of the topsoil the appellant was engaged in a scheme of profit making or an adventure or concern in the nature of a trade and the profits therefrom were taxable income within the meaning of ss. 3, 4 and 139(1)(*e*) of the Act. The appellant had no right to deduct losses incurred in the five years immediately preceding and the year immediately following 1953 since these losses were not incurred from the business of selling topsoil. Under s. 27(1)(*e*) of the Act, the right to deduct from income losses sustained in other years does not extend to income from an activity other than the business in which the loss was sustained. There was no essential distinction between the sales made in 1953 and those made in earlier years.

Per Cartwright J., *dissenting*: The payments for the topsoil paid over the years, with the exception of the payment of $18,500 in 1953, were payments for the granting to the company of a licence, analagous to a profit à prendre, and constituted taxable income as being amounts received from the use of property but not as profits from a business. The evidence did not establish the right to make any deductions from these sums.

The $120,000 plus the topsoil delivered by the purchaser represented the total consideration on the sale of a portion of the farm and such entire sum, including the $18,500 into which the topsoil was promptly converted, was a capital receipt in the hands of the appellant and as such was not subject to tax.

APPEAL from a judgment of Fournier J. of the Exchequer Court of Canada[1], reversing a decision of the Income Tax Appeal Board. Appeal dismissed with a variation, Cartwright J. dissenting.

J. J. Robinette, Q.C., and *D. Andison,* for the appellant.

[1] [1960] Ex. C.R. 391, [1960] C.T.C. 58, 60 D.T.C. 1051.

D. S. Maxwell and *G. W. Ainslie,* for the respondent.

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

ABBOTT J.:—The facts—as to which there is little or no dispute—are fully stated in the reasons of the learned trial judge and in those to be delivered by my brother Cartwright which I have had the advantage of considering.

The farming operations carried on by appellant on her property during the period 1944 to 1953 appear to have been minimal, to say the least. The only revenues shown as having been derived from such operations during that period are two amounts of $200 from the sale of hay in each of the years 1945 and 1946. However, in each year during the said period—with the exception of 1949—appellant disposed of topsoil taken from the portion of her property lying to the north of the Canadian Pacific Railway Company right of way, and which portion was sold by her to Miller Paving Limited in 1953 for $120,000.

It is clear I think, that these sales of topsoil had no relation to any farming operations which appellant may have been conducting on her property, since such disposal of the topsoil, if carried to its ultimate conclusion, would have rendered any farming operation impossible.

The learned trial judge held on the facts that in disposing of topsoil, appellant was engaged in a scheme of profit-making or an adventure or concern in the nature of a trade, and that the profits derived therefrom were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act* and subject to tax. In my opinion, he was right in so holding. I am in substantial agreement with his reasons and conclusions on this point and there is little I can usefully add to them.

The learned trial judge did not deal with the alternative argument of appellant that if the amounts in question were held to be income, she was entitled to deduct her losses in operating the farm property in the five taxation years immediately preceding 1953 and in the taxation year 1955. He may have felt that it was not necessary for him to do so.

As I have stated, in my view appellant's dealings in topsoil had no relation to any farming operations she may have been carrying on. Under the provisions of s. 27(1)(*e*) of the

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Income Tax Act the right to deduct from income in any taxation year business losses sustained in the five taxation years immediately preceding and the taxation year immediately following that taxation year does not extend to income from an activity other than the business in which the loss was sustained. *The Minister of National Revenue v. Eastern Textiles Ltd.*[1]; *Utah Company of the Americas v. The Minister of National Revenue*[2]. The losses, if any, incurred by appellant in the five years immediately preceding and the year immediately following the taxation year 1953 were losses which were not incurred from the business of selling topsoil, and accordingly are not deductible from the profits arising from that activity.

In my opinion what the appellant did during a period extending from 1945 up to and including 1953 was to sell topsoil for an agreed price to Maple Leaf Mushroom Farm Ltd., a company of which her late husband was the principal shareholder and of which she herself was an officer and shareholder. It is true that the purchaser undertook to defray all the costs of stripping and processing the topsoil and of taking delivery, but I am unable to see what bearing that had upon the essential character of the transaction. Had appellant undertaken to perform these services, the price would no doubt have been higher and for tax purposes the cost of performing such services would have been deductible from the price as an expense. So far as the appellant's profit was concerned, the result would have been the same. Under s. 12(1)(*a*) of the *Income Tax Act* the only expenses which may be deducted in computing income are those made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of such taxpayer. In virtue of the arrangement made with the purchaser, appellant incurred no expense in connection with the sales of topsoil made by her.

I am unable to discern any essential distinction between the sales of topsoil made by appellant in 1953 and those made in earlier years. It is clear from appellant's own evidence, that prior to her selling the 37 acres to Miller Paving Limited, Maple Leaf Mushroom Farm Ltd. had offered to buy and she had agreed to sell the remaining topsoil on that portion of her property for a total sum of $18,500. In order

[1] [1957] C.T.C. 48, 57 D.T.C. 1070.
[2] [1960] Ex. C.R. 128, [1959] C.T.C. 496, 59 D.T.C. 1275.

to carry that agreement into effect, appellant when selling the 37 acre tract to Miller Paving Limited made the sale subject to a covenant whereby the purchaser undertook to remove the topsoil from the land purchased and spread it over the land retained by appellant. That covenant was implemented and in due course Maple Leaf Mushroom Farm Ltd. took delivery of the topsoil and paid the price agreed upon.

In his factum and at the hearing before us counsel for respondent conceded that the amount received by appellant in the year 1953 from the sale of topsoil was $19,235 and not $20,000 as set out in the re-assessment of appellant's income for that year.

The appeal in respect of the assessment for the 1953 taxation year should be allowed in part and the re-assessment referred back for further re-assessment so as to include in appellant's income for that year the sum of $19,235 instead of $20,000, but otherwise the re-assessment should be affirmed. The appeal in respect of the re-assessment for the 1954 taxation period should be dismissed.

The respondent is entitled to his costs in this Court.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Exchequer Court[1] whereby an appeal by the Minister from a decision of the Income Tax Appeal Board was allowed.

The questions raised are whether the sums of $19,235 and $1,500 received by the appellant in the taxation years 1953 and 1954 as a result of transactions having to do with topsoil were part of her income and if so whether in the computation of her taxable income she was entitled to make certain deductions.

The appellant is the widow of Anthony Orlando who died in 1958 and who from 1944 until the date of his death was the president and principal shareholder of Maple Leaf Mushroom Farm Ltd. The appellant was a partner in a wholesale fruit business known as Scorsone Fruit Company and was also a shareholder and the secretary of Maple Leaf Mushroom Farm Ltd. She looked after the office records of that company.

[1] [1960] Ex. C.R. 391, [1960] C.T.C. 58, 60 D.T.C. 1051.

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The plant for growing mushrooms owned and operated by Maple Leaf Mushroom Farm Ltd. was located in a part of the metropolitan area of the city of Toronto which was developing rapidly into a residential, commercial and shopping centre district, and the appellant was of the opinion that the company might at some future time be obliged to move its plant. In June of 1944 the appellant purchased a farm property in the Township of Scarborough which was situate about four and one-half miles northeast from the plant of Maple Leaf Mushroom Farm Ltd. This property consisted of ninety-seven acres and the price was $18,000. The appellant bought this property as an investment having in view the possibility of reselling it to Maple Leaf Mushroom Farm Ltd. or allowing that company to use it in the event that it either needed additional land for the expansion of its plant or was forced to move its plant from its present location.

The farm purchased by the appellant was divided into two parcels by a right of way of the Canadian Pacific Railway running from east to west. The northerly parcel contained about 37 acres and the southerly parcel about 60 acres.

Shortly after she had purchased the farm, the appellant received a request from her husband, on behalf of Maple Leaf Mushroom Farm Limited that he be permitted to test some of the topsoil from the farm in the growing of mushrooms. The appellant consented and the soil proved to be suitable. As a result Maple Leaf Mushroom Farm Limited proceeded to take topsoil from the appellant's farm each year from 1945 to 1952 inclusive, but excluding 1949. There appears to have been no written agreement between the appellant and Maple Leaf Mushroom Farm Ltd. as to the taking of topsoil but the arrangements under which it was taken in those years were as follows. Appellant designated the area on the farm from which the topsoil could be taken; agents of Maple Leaf Mushroom Farm Limited then came on the property with their own equipment, conditioned the topsoil to their own satisfaction and then loaded and transported it off the property in their own vehicles. The appellant was paid at the rate of $2 per cubic yard for the topsoil so taken. At no time did the appellant supervise or cause to be supervised the removal of the topsoil and she relied upon the calculations of Maple Leaf Mushroom Farm Limited as

to the amounts taken. As a result of these arrangements the appellant received from Maple Leaf Mushroom Farm Limited the following amounts in the years 1945 to 1952.

Year	*Amount Received*
1945	$1,142.00
1946	1,620.00
1947	1,240.00
1948	1,575.00
1949	nil
1950	2,600.00
1951	1,350.00
1952	1,080.00

All of the topsoil taken in these years and in respect of which the said amounts were received by the appellant, was taken from the thirty-seven acre parcel of the appellant's property situated to the north of the Canadian Pacific Railway right-of-way.

In 1953 the appellant received a letter from the Department of Highways of the Province of Ontario advising her that the northerly thirty-seven acre parcel of her farm was required for departmental use. The letter contained an offer of $1,500 per acre for the land and threatened expropriation proceedings if the offer was not accepted. The appellant was then approached by Miller Paving Limited, a company which held a contract for the construction of a portion of Highway 401 in the vicinity of the appellant's farm and received an offer from that company for the purchase of the northerly thirty-seven acre parcel of her farm. Miller Paving Limited advised the appellant that they wanted the land for fill. The appellant was also approached by Maple Leaf Mushroom Farm Limited and received an offer from that company to purchase from her all of the topsoil from the same thirty-seven acre parcel.

The appellant accepted the offer of Miller Paving Limited but caused the following terms to be included in the agreement:

PROVIDED that the purchaser before making use of the said lands for its purposes or otherwise shall remove at its own expense the topsoil from the said lands to a maximum depth of six inches (6"); the said topsoil to be removed across the Canadian Pacific Railway right of way and spread on the northerly limit of other lands of the vendors in close proximity to the said railway right of way, the other lands of the vendors hereinbefore referred to being part of Lot 31 in Concession 2 of the Township of Scarborough.

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And it is further mutually agreed by and between the parties hereto that if the purchaser shall not have removed the topsoil from the said lands or from any of the said lands in accordance with the terms of this agreement by the date of closing of this transaction, the purchaser shall remove the topsoil at his own expense to a maximum depth of six inches (6") and stock-pile the same as provided in this agreement within a reasonable time after the date of closing, and will deliver to the vendor on or before closing his covenant under seal so to remove and spread the topsoil.

At the time the sale to Miller Paving Limited was closed, the topsoil had not been removed from the thirty-seven acres and an agreement was executed between the parties extending the time for its removal.

The appellant also accepted the offer of Maple Leaf Mushroom Farm Limited, thereby agreeing to sell them the topsoil from the thirty-seven acres.

The price in money which Miller Paving Limited agreed to pay for the thirty-seven acres of land was $120,000, i.e., approximately $3,300 per acre. The price which Maple Leaf Mushroom Farm Limited agreed to pay for the thirty-seven acres of topsoil was at the rate of $500 per acre, i.e., $18,500.

The sale of the topsoil from the thirty-seven acres was closed in 1953 and the $18,500 consideration was received by the appellant in December of that year.

In 1954 the appellant received $1,500 from Maple Leaf Mushroom Farm Limited. This was paid to her as consideration for topsoil taken from her farm in 1953 but prior to the time of the sale of the topsoil from the thirty-seven acres.

The appellant made no sales of topsoil after the year 1953. She has never sold topsoil to anyone other than Maple Leaf Mushroom Farm Limited nor has she ever offered topsoil for sale generally. She did no advertising. She was approached from time to time by gardeners and landscapers who sought to buy topsoil from her but in all cases she refused. She had no equipment for the removal of topsoil. She has never at any time been engaged in the business of buying and selling or trading in real estate.

At the trial, a chartered accountant called as a witness for the appellant, produced a statement which was filed as ex. 3 showing that even on the basis of treating all the amounts received for topsoil as an income receipt from the operation of the appellant's farm that operation had resulted in a loss

in every year from 1944 to 1954, inclusive, except the years 1946 and 1953, in which there was, on the basis stated, a profit of $163.22 in 1946 and of $17,800.09 in 1953.

In making her returns of income for the years 1944 to 1954 inclusive and in computing her income for each of those years the appellant did not include any receipts derived from the farm property either in relation to topsoil or otherwise and did not deduct any expenses incurred in relation thereto.

By notices of reassessment mailed on January 23, 1957, the respondent gave notice to the appellant that he had re-assessed her for the taxation years 1953 and 1954 to add to her income for those years amounts of $20,000 and $1,500 respectively in respect of the sale of topsoil to Maple Leaf Mushroom Farm Limited. Counsel for the respondent informed us that on the basis of his argument being accepted in its entirety the figure of $20,000 should be changed to read $19,235.

The respondent has not at any time sought to include in the appellant's income any amount in respect of the gain realized by her on the receipt of the sale price of $120,000 paid for the 37 acres by Miller Paving Limited. The learned trial judge expressed the opinion that this was properly treated as a capital gain. This was in accordance with the position taken by counsel for the Minister at the trial who said in part:

It is not the original purchase we are concerned about. We are not disputing that it was bought for an investment purpose. What we are saying is after she bought the farm she came into the business of selling topsoil.

At the trial it was contended on behalf of the Minister:

(*a*) that the amounts received by the appellant were income from a business within the meaning of sections 3, 4 and 139(1)(*e*) of the Income Tax Act; or

(*b*) in the alternative, that the amounts received were dependent upon use of or production from property and were therefore income within the meaning of section 6(*j*) of the Act.

It was contended on behalf of the appellant:

(*a*) that she had not carried on business or engaged in an adventure or concern in the nature of trade in respect of any topsoil and that the amounts in question were received by her on the realization of a portion of her capital and were therefore capital gains; or

(*b*) in the alternative that, if the amounts in question were income from a business within the meaning of the Income Tax Act, the appellant—

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(i) in computing her income from that business for the taxation years under appeal was entitled to deduct the expenses of operating the farm property in those years; and

(ii) in computing her taxable income from that business for those years, was entitled to deduct, pursuant to the provisions of section 27(1)(*e*) of the Act, the losses sustained by her in operating the farm property in the five taxation years immediately preceding 1953 and in the taxation year 1955.

It was further contended on behalf of the appellant that the amounts received were not income within the meaning of s. 6(*j*) of the Act because the amounts received were payments for a specified portion of the lands sold and were not dependent upon the use of or production from property.

The learned trial judge in his reasons stressed the fact that the appellant had been disposing of topsoil for money for a number of years and went on to hold that the sale for $18,500 in 1953 was a transaction of the same sort as those of earlier years. He said in conclusion:

In the final analysis, the respondent, when dealing with the Maple Leaf Mushroom Farm Limited in 1953, was not disposing of her land but was dealing with a commodity which had been deposited on her property and which was delivered, carted away and paid for by the buyers. As this transaction was preceded by many other sales during a long period of time and at a price and in a manner which could produce a profit, it cannot be said that the profit realized from the sale was a casual profit made on an isolated sale. The respondent incurred no expense nor made any outlay in these trading operations. The 1953 sale was one of many which from the moment when merged with all the others, in my view, clearly indicates that the respondent had embarked on a scheme for profit making, the profits of which are subject to taxation.

My conclusion is that the sums of $18,500 and $1,500 received by the respondent in the taxation years 1953 and 1954 were profits derived from an adventure or concern in the nature of a trade and not capital gains. They were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the Income Tax Act and subject to taxation.

The learned trial judge did not deal with the alternative argument of the appellant that if the amounts in question were held to be income she was entitled to deduct her losses in operating the farm property in the five taxation years immediately preceding 1953 and in the taxation year 1955.

Before this Court counsel for the appellant argued that the learned trial judge was in error in finding that the appellant was engaged at any time in the business of selling topsoil; he contended that all payments received for topsoil other than the $18,500 were the consideration paid to the appellant for the granting to Maple Leaf Mushroom Farm

Limited of a profit a prendre enforceable in equity (or a right analogous thereto) and that these sums were income liable to tax (subject to his argument as to the right to deduct expenses and losses) not as profits from a business but as income from property.

In my opinion the payments of $2 per cubic yard of topsoil paid over the years by the Maple Leaf Mushroom Farm Limited to the appellant were payments for the granting to the company of a licence, analogous to a profit a prendre, permitting it to enter the lands of the appellant and take therefrom for its use a portion of the soil subject to payment therefor at the price agreed; from this it follows that the amounts so paid constituted taxable income of the appellant as being amounts received by her from the use of her property but not as profits from a business.

Different considerations apply to the payment of the $18,500. In 1953, faced with the probability of expropriation the appellant decided to sell the northerly parcel of her farm consisting of 37 acres. The consideration offered by Miller Paving Limited for this parcel was not merely $120,000; it was that sum plus its covenant to remove the topsoil from the 37 acres to a maximum depth of 6 inches and to deposit the soil so removed on the southerly parcel retained by the appellant. The agreement of the appellant to sell this topsoil to Maple Leaf Mushroom Farm Limited appears to have been made contemporaneously with her agreement to sell the northerly parcel to Miller Paving Limited and in the result the consideration which she was to receive from Miller Paving Limited was substantially the equivalent of $138,500, that is about $3,740 per acre. The uncontradicted evidence of the appellant was that at the time of the sale the prevailing price for farm land in the vicinity of her farm was $4,000 per acre.

In my opinion the $120,000 plus the topsoil delivered by Miller Paving Limited represented the total consideration received by the appellant on the sale of a portion of her farm; all of this in her hands was a capital receipt; this applies no less to the $18,500 into which the topsoil was promptly converted than to the $120,000. The situation is, in principle, the same as if the appellant had received for the 37 acres, $120,000 plus some bonds or other securities which she had at once sold for $18,500. I conclude that the $18,500 was a capital receipt and is not subject to tax.

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If the view which I have just expressed fell to be rejected, it would be necessary to consider what other views might be taken of the transaction. It is, I think, obvious that the $18,500 could not be regarded as a payment for a licence analogous to a profit a prendre. The topsoil from the 37 acres placed on the appellant's property south of the railway did not thereby become part of her land. It was a commodity stockpiled there awaiting its removal by the purchaser Maple Leaf Mushroom Farm Limited.

A possible alternative view would be that the appellant acquired this topsoil as part of her stock-in-trade in the business of selling topsoil. But if this, contrary to my opinion, be the right view it seems clear that before she could be said to have made any profit on disposing of the topsoil some figure representing the cost of the soil would have to be entered in the accounts of the business. The judgment of the House of Lords in *Sharkey v. Wernher*[1] appears to me to make it clear that the figure to be entered would not, in the circumstances of the case at bar, be less than the market value of the topsoil delivered to the appellant.

What then was the market value of the topsoil delivered to the appellant in pursuance of the covenant of Miller Paving Limited? The evidence does not disclose the precise quantity delivered. If it be assumed that an average depth of only 3 inches, instead of the maximum of 6 inches provided in the covenant, was delivered, a simple arithmetical calculation shows the quantity to have been approximately 15,000 cubic yards. The uncontradicted evidence was that the current market price of topsoil at the time was not less than $2 per cubic yard. Consequently the figure to be entered in the accounts as the cost of the topsoil would be more than the $18,500 for which the appellant sold it and the accounts would shew no profit.

For the above reasons I am of opinion that the respondent erred in adding the sum of $18,500 to the appellant's income for the taxation year 1953.

It remains to consider the sum of $735 (the difference between the said sum of $18,500 and the sum of $19,235, the total amount received in payment for topsoil in 1953) and the sum of $1,500 received in payment for topsoil in 1954.

[1] [1955] 3 All E.R. 493.

In my opinion these two sums represent payments of the same sort as those made for topsoil prior to the year 1953, that is to say they were received by the appellant for a licence analogous to a profit a prendre granted to Maple Leaf Mushroom Farm Limited and are properly regarded as taxable income received by her from the use of her property. I do not think that the evidence established the right to make any deductions from these sums.

I would allow the appeal in part and direct that the assessment of the appellant for the taxation year 1953 be referred back to the respondent to be amended in accordance with these reasons, that is to say, by adding to the appellant's income for that year the sum of $735 instead of the sum of $20,000.

The appeal having succeeded to the extent of $18,500, although not as to the items of $735 and $1,500, I would direct that the appellant be entitled to her costs throughout.

Appeal dismissed with variation, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: McCarthy & McCarthy, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

IN RE ESTATE OF HAROLD ALFRED JONES DECEASED;

1962
*Feb. 6, 7
Mar. 12

BEVERLEY LOUISE McCARVILL (*Respondent*) .... APPELLANT;

AND

CATHERINE LOUISE JONES (*Petitioner*) .... RESPONDENT,

AND

MILDRED CLEMENTS FOX and NORMAN ROBERT McCARVILL, Executors of the Will of Harold Alfred Jones, Deceased (*Respondents*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Devolution of estates—Application by widow under Testator's Family Maintenance Act, R.S.B.C. 1948, c. 336—Award—Factors to be considered in deciding what is "adequate, just and equitable".

*PRESENT: Locke, Cartwright, Abbott, Judson and Ritchie JJ.

1962

IN RE JONES, McCARVILL *v.* JONES *et al.*

In 1948 the testator and his wife, the petitioner respondent, separated and later entered into a separation agreement under which the former conveyed the matrimonial home to the latter and paid her an allowance of $375 a month. It was provided that should the property be sold or subdivided the monthly payments would be reduced to $350. In his will the testator, who died in 1956, directed that his executors should pay to the respondent until her death or remarriage the monthly sum required by the separation agreement, but this was the only provision made for her. The bulk of the estate, which had a net aggregate value of approximately $1,300,000, was bequeathed to a daughter.

On application by the widow under s. 3 of the *Testator's Family Maintenance Act,* R.S.B.C. 1948, c. 336, the trial judge increased the maintenance allowance to $700 a month. The widow appealed and by the judgment of the Court of Appeal the judgment at trial was amended to provide that the petitioner should receive $25,000 in cash and $1,000 a month free of income tax. The daughter then appealed to this Court, and the widow cross-appealed, asking that the award be varied by granting to her a one-third interest in the net estate, or, in the alternative, an increase in the amount of the monthly allowance provided by the judgment of the Court of Appeal.

Held: The appeal and cross-appeal should be dismissed.

The language of s. 3 of the *Testator's Family Maintenance Act* authorizes the Court in its discretion on the application of a wife to direct that such provision as is deemed adequate, just and equitable in the circumstances shall be made out of the estate of the testator. In deciding what is adequate, just and equitable in the circumstances, the Court should properly consider the magnitude of the estate and the situation of others having claims upon the testator. *Walker v. McDermott,* [1931] S.C.R. 94, applied. The respondent should receive sufficient to maintain her in the manner in which a wife would normally be maintained by a husband financially situated as was the present testator. No sound reason was shown to justify this Court in interfering with the award made by the majority of the Court of Appeal.

The cross-appeal was also dismissed; the amount awarded was adequate, just and equitable in the circumstances disclosed by the evidence. *Re Dupaul* (1941), 56 B.C.R. 532; *Barker v. Westminster Trust Co.* (1941), 57 B.C.R. 21; *Re Callegari* (1958), 13 D.L.R. (2d) 585, distinguished.

APPEAL and cross-appeal from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Ruttan J. allowing a petition under the *Testator's Family Maintenance Act.* Appeal and cross-appeal dismissed.

J. G. Gould and *T. Reagh,* for the appellant.

J. J. Robinette, Q.C., and *A. B. Ferris,* for the petitioner, respondent.

[1] (1961-62), 36 W.W.R. 337, 30 D.L.R. (2d) 316.

F. H. Bonnell, Q.C., for the executors.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal by Beverley Louise McCarvill, the residuary legatee named in the will of Harold Alfred Jones, deceased, from a judgment of the Court of Appeal[1] allowing an appeal by the present respondent, Catherine Louise Jones, from an order made by Ruttan J. under the provisions of the *Testator's Family Maintenance Act,* R.S.B.C. 1948, c. 336. The respondent is the appellant's mother and has cross-appealed, asking that the award made by the judgment appealed from be increased.

The respondent is the widow of Harold Alfred Jones who died at Vancouver on December 24, 1956. The parties were married on April 15, 1922, and the appellant, born October 10, 1929, is the only child of the marriage. Throughout their married life together they lived at 1775 Trimble Street in Vancouver. In 1948 they separated and the respondent brought an action for a judicial separation at Vancouver, in consequence of which they entered into a separation agreement dated April 7, 1949. By the terms of this agreement, Jones agreed to pay to his wife during their joint lives $350 a month and to convey to her the property on Trimble Street, a desirable residential street in Vancouver, the property being between three and four acres in extent. The agreement provided that until such time as the wife should sell or subdivide the property the monthly allowance should be $375 and contained the usual provisions that the wife should support and maintain herself and indemnify the husband against any debts which she might incur. The property upon which an eleven-room house was situate was transferred to the respondent and she has continued to live there up to the present time. No steps have been taken by her to subdivide or to sell the property.

Following the transfer of this property to the respondent she executed a mortgage upon it, at her husband's request, to secure a sum of $3,500 of which Jones received $1,500 on terms that he would repay it and this was subsequently done. At that time, according to the respondent, Jones claimed that he was hard up financially but, as the evidence indicates, his circumstances improved greatly between the dates of the separation and of his death.

[1] (1961-62), 36 W.W.R. 337, 30 D.L.R. (2d) 316.

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Locke J.

The will in question was dated December 9, 1955, and was amended by a codicil dated December 19, 1956. The value of the estate for succession duty purposes was shown as $1,971,531.87 and the total debts $654,406.05, leaving a net aggregate value for succession duty purposes of $1,317,125.82. The executors named were described as Mildred Clements Fox Jones and McCarvill, the son-in-law of the testator. The former was referred to in the will of the testator as his wife. However, this was inaccurate since his marriage to the respondent, referred to in the will as his former wife, had not been dissolved.

The will provided that the trustees appointed should pay to the respondent until her death or remarriage the monthly sum required by the separation agreement. That agreement had stipulated that the payments were to be made only during the joint lives of the parties and the provision for the maintenance of the payments was the only provision made by the testator for the respondent.

Section 3(1) of the *Testator's Family Maintenance Act* reads as follows:

> 3. (1) Notwithstanding the provisions of any law or Statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the Judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may, in its discretion, on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate, just, and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband, or children.

The petition was filed on December 12, 1957, and was heard by Ruttan J., the present appellant opposing the making of any order. Evidence was given at length by the parties and, by an order entered on April 20, 1960, that learned judge directed that the executors should pay to the petitioner during her lifetime the sum of $700 a month, this amount to include the $375 payable under the will, the order to be effective from December 24, 1956, being the date of the death of the testator.

The respondent appealed from that order and by the judgment of the Court of Appeal the judgment at the trial was amended by providing that the executors pay to the petitioner the lump sum of $25,000 in cash from the *corpus* of the estate and during her lifetime the sum of $1,000 a

month, the amount to include the $375 payable under the terms of the will and to be paid income tax free from the date of the death of the testator. Davey J., dissenting in part, agreed that the award of $25,000 should be made but considered that the monthly allowance made by Ruttan J. was sufficient in the circumstances.

The principal assets of the testator were shares in the Vancouver Tug Boat Co. Ltd., Vancouver Tug and Barge Ltd., Vancouver Towing Co. Ltd., Vancouver Lighterage and Salvage Co. Ltd., Vancouver Scow Co. Ltd., and several other companies engaged in the tug boat and towing business on the West coast. Shortly prior to his death, he had purchased sixty per cent of the shares of the Dolmage Towing Co. Ltd. and its subsidiaries for $600,000, his liability for this purchase constituting the greater part of the debts owing at the time of his death.

The will authorized the executors to carry on the business of the first five of the companies above named for a period not to exceed twenty-one years and to accumulate the net income or to pay it to his daughter, the present appellant. At the end of such period of operation it was directed that the shares of Vancouver Scow Co. Ltd. should be given to certain named persons and at such time the rest of the shares were to be transferred to his daughter. The annuity directed to be paid to the respondent was to be paid out of the residue of the estate or out of dividends received by the executors on the shares hereinbefore mentioned and, subject to this, the entire residue, after payment of the debts and certain small specific legacies, was bequeathed to the daughter. This legacy, after payment of succession duties, was valued at $727,359. In addition to this, the appellant as the beneficiary of his life insurance policies and from gifts made in advance of the testator's death received approximately $125,000. He had also given to Mrs. Fox assets valued in excess of $42,000.

The evidence of the witnesses Vallance and Pearson, the latter of whom was the controller of the companies at the time of the trial, described the steps taken by the executors to provide for the payment of succession duties and of the debts. It is sufficient to say that, following the death of the testator, the executors deemed it advisable to reorganize the set-up of the various companies, to acquire the remaining

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IN RE JONES, McCARVILL v. JONES *et al.*

Locke J.

forty per cent of the shares of the Dolmage Towing Company and its subsidiaries, and to continue the operations. The company now controlling the various other companies in which the testator was interested is the Vancouver Tug and Barge Co. Ltd. and the consolidated balance sheet of that company and its wholly owned subsidiaries showed a profit in excess of $77,000 in 1957, and in excess of $157,000 in 1958.

The executors did not give evidence at the trial and the purpose of adducing evidence as to the financial position of the companies was apparently to indicate the difficulties faced by them in administering the estate and, presumably, those that might be met in paying any substantially increased allowance to the respondent.

The respondent was born in the year 1898 and since the date of the separation from her husband has endeavoured to supplement her income by renting portions of the house from time to time and by permitting its use for wedding receptions. The taxes upon the property approximate $1,200 a year and, at the time of the trial, there were arrears to the City of Vancouver and accumulated penalties amounting to $3,309. In addition, she was indebted to a bank for moneys borrowed in the amount of $3,000, owed trade accounts of $600 and there remained payable upon the mortgage given by her at the instance of her husband in 1940 the sum of $2,200. She was also indebted to her daughter, the present appellant, in the sum of $1,000 which she had borrowed in 1957 following her husband's death. The respondent had applied to the executors to lend her this amount but they had refused and her daughter then lent it to her on condition that if she proceeded with a claim against the estate the money must be repaid. Giving evidence at the trial the respondent said that she was in very poor health and her medical adviser, Dr. Grimson who had attended her for many years, gave evidence as to this and considered that she had a life expectancy of a little less than ten years.

Upon the appeal much was made of the fact that the respondent had not taken any steps to subdivide the property which she received at the time of the separation agreement. As above stated the separation agreement provided that until this property should be sold or subdivided the monthly payments should be $375 but upon such sale or subdivision they should be reduced to $350. The respondent

wished to continue to live in the house which had been her home since the early days of her marriage and, apparently, had made no serious effort either to sell the property or to have it subdivided. Evidence at the trial indicated, however, that there were serious difficulties in obtaining approval to a plan of subdivision which would permit the sale of the northerly part of the property for building lots. Davey J.A. considered that the property sold en bloc as a home was worth about $40,000. The wishes of the respondent in the matter are not, in the circumstances of this case, to be ignored.

The language of s. 3 of the Act authorizes the Court in its discretion on the application of a wife to direct that such provision as is deemed adequate, just and equitable in the circumstances shall be made out of the estate of the testator. Section 3 of the *Testator's Family Maintenance Act*, R.S.B.C. 1924, c. 256, the terms of which were identical with s. 3(1) above quoted, was considered by this Court in *Walker v. McDermott*[1]. Duff J. (as he then was) in delivering the judgment of the majority of the Court, said in part (p. 96):

> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of a child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

It is clear, in my opinion, that in this case the will did not make adequate provision for the proper maintenance and support of the testator's wife, within the meaning of that language in the Act. The difference in opinion between the learned judges who have considered the matter is as to the *quantum* of the added allowance that should be made.

So far as the evidence discloses, the only persons for whom the testator was under any moral obligation to provide were

[1] [1931] S.C.R. 94, 1 D.L.R. 662.

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his wife and daughter. There is no dower law in British Columbia and, accordingly, the only relief available to the respondent was under the Act referred to. The Act is not intended to vest in the court the power to make a new will for the testator (*Bosch v. Perpetual Trustee Co., Ltd.*[1]).

It is apparently the fact that the executors had up to the date of the trial exercised their right under the will to operate the companies referred to, and while the exact extent of the estate's shareholdings in the Vancouver Tug and Barge Co. Ltd. is not stated, I construe the evidence as showing that it owns the great majority of the shares in that company and its subsidiaries and that, in addition to the amounts received by the appellant from the life insurance and from gifts from her father, there will be a large annual income available from the company's operations as soon as the balance of the succession duties has been paid.

In deciding what is adequate, just and equitable in the circumstances, the court should properly consider the magnitude of the estate and the situation of others having claims upon the testator, as pointed out in *McDermott's* case. The respondent should, in my opinion, receive sufficient to maintain her in the manner in which a wife would normally be maintained by a husband financially situated as was the present testator in the Trimble street property.

In my opinion, no sound reason has been shown to justify this Court in interfering with the award made by the majority of the Court of Appeal and I would accordingly dismiss this appeal.

The respondent has cross-appealed, asking that the award be varied by granting to her a one-third interest in the net estate or, in the alternative, an increase in the amount of the monthly allowance provided by the judgment of the Court of Appeal.

Section 5 of the Act declares that the court may if it thinks fit order that the provision made shall consist of a lump sum, and we have been referred to three cases decided in the courts of British Columbia where the award made was a definite share of the estate. In *Re Dupaul*[2] and in *Barker v. Westminster Trust Co.*[3], the applications under the

[1] [1938] A.C. 463 at p. 477.
[2] (1941), 56 B.C.R. 532, 4 D.L.R. 246.
[3] (1941), 57 B.C.R. 21, 4 D.L.R. 514.

Act were made by the husbands of the testators. The value of the estate in the former case was some $9,400 and in the latter approximately $18,000 and in each case the husband claimed to have contributed substantially to the building up of the estate. The respective awards were something less than a third of the estate in *Re Dupaul* and the larger part of it in *Barker's* case. In a more recent case, *Re Callegari*[1], the applicant was the wife and the net value of the estate was something less than $7,300. The other claimants were nephews of the deceased and the award was one-half of the estate.

The disposition made of applications under the Act where the estates involved such small amounts are of no assistance in deciding the question to be determined in the present matter. In each of them there were special circumstances to be considered which are absent in the present matter and, except possibly in the case of the Barker estate, there was no income from which the provision referred to in s. 3 could have been made.

In my view, the amount that has been awarded is adequate, just and equitable in the circumstances disclosed by the evidence and I would dismiss the cross-appeal.

The respondent contended in argument that if the principal appeal was dismissed she should be awarded her costs as between solicitor and client in this Court. While a similar request was made to the trial judge and in the Court of Appeal it was not acceded to in either court.

The dismissal of the appeal and of the cross-appeal should, in my opinion, be with costs upon a party and party basis. The costs of the executors in this court should be paid as between solicitor and client out of the residue of the estate.

Appeal and cross-appeal dismissed with costs.

Solicitors for the respondent, appellant: Gould, Thorpe & Easton, Vancouver.

Solicitors for the petitioner, respondent: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

Solicitors for the executors, respondents: Campney, Owen & Murphy, Vancouver.

[1] (1958), 13 D.L.R. (2d) 585.

1961
*Jun. 5
Oct. 3

JEAN D. BRAULT (*Defendant*) ....APPELLANT;

AND

GUY POITRAS (*Plaintiff*) ....RESPONDENT.

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

Contracts—Agreement to sell business—Incorporation of company—Price to be paid in form of shares—Seller to retain title until full payment—Employment of purchaser in business—Seller procuring dismissal of purchaser—Action to set aside agreement—Whether contract of employment and agreement of sale severable.

The plaintiff agreed to purchase the defendant's hardware store after it was incorporated. The price was to be paid in the form of shares in the company. The defendant was to retain title to all shares until all were paid for. The plaintiff was to be given full control of the business and be employed at a weekly salary plus a monthly bonus. The plaintiff paid an initial $10,000 and an additional $500. When the defendant subsequently procured the dismissal of the plaintiff, the latter sued to have the agreement set aside and his money refunded. The action was dismissed by the trial judge, but was maintained by the Court of Queen's Bench. The defendant appealed to this Court.

Held: The plaintiff was entitled to have the agreement set aside and his money refunded.

The contract of employment could not be severed from the agreement for the sale of the shares. The plaintiff had a vital interest in working for the company in order to protect the payments already made and those to be made. The defendant could not keep for himself the payments which had been made and at the same time dismiss the plaintiff from his employment. *Dupré Quarries Ltd. v. Dupré,* [1934] S.C.R. 528, and *Bélanger v. Bélanger,* 24 S.C.R. 678, distinguished.

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

Lucien Thinel, Q.C., for the defendant, appellant.

J. G. Ahern, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le 15 septembre 1952, le défendeur-appelant Brault s'est engagé à vendre au demandeur-intimé son entreprise commerciale, connue sous le nom de Brault et Fils Enr., et il a été convenu qu'une compagnie à fonds

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

[1] [1960] Que. Q.B. 1126.

social devait être formée. D'après cette convention, la considération de la vente était une somme égale à la valeur nette de l'entreprise suivant inventaire en date du 30 septembre 1952.

La clause 3 de la convention stipule que l'appelant Brault s'engage à former cette compagnie par actions sous le nom de Brault et Fils Inc., avec un capital de $39,900 divisé en 399 actions ordinaires ayant une valeur nominale de $100 chacune. L'appelant Brault s'est également engagé à souscrire un nombre d'actions égal à la valeur nette de l'entreprise, et ces actions devaient être émises en considération du transport de son commerce.

L'article 4 de la convention dit que Poitras, le demandeur, s'engage à acheter de Brault toutes les actions de ladite corporation, à être acquises par ledit Brault à leur valeur nominale sur paiement de la somme de $10,000, représentant 100 actions, et la balance devant être payée graduellement à raison d'un versement minimum de $1,000 par année à compter du 1er octobre 1953. Il a en outre été stipulé à l'entente que les actions achetées par le demandeur Poitras du défendeur Brault n'auraient pas droit de vote tant que ledit Brault n'aurait pas reçu la pleine considération pour le nombre d'actions qu'il détenait originairement. En outre, Poitras s'est engagé à assurer sa vie au moyen d'une police de $10,000, et de la maintenir en vigueur tant qu'il n'aurait pas complètement effectué les paiements auxquels il était obligé. Le demandeur Poitras devait recevoir un salaire de $65 par semaine, payable hebdomadairement, plus un bonus égal à 30 pour cent des profits nets mensuels.

En exécution de cette convention, Poitras a payé au défendeur la somme de $10,000 le 20 novembre 1952, la somme de $100 le 15 novembre de la même année, et un montant additionnel de $400 le 11 novembre 1953, et la compagnie a été formée pour donner suite à la convention intervenue. Brault fut nommé président, et le demandeur Poitras secrétaire.

Le demandeur a travaillé pour la compagnie Brault et Fils Inc. au salaire stipulé, le défendeur a retiré pour sa part la rémunération prévue à la convention. Il est arrivé cependant que le 20 novembre 1952 Brault, agissant comme président, a donné au demandeur le contrôle de l'entreprise suivant une lettre qu'il lui a adressée le même jour. Mais,

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les relations entre le demandeur et le défendeur ne furent évidemment pas harmonieuses car, à une assemblée des directeurs de Brault et Fils Inc. tenue le 18 novembre 1953, l'intimé Poitras fut remercié de ses services comme employé, l'appelant s'empara des clés des portes du magasin et demanda au demandeur de ne plus revenir au magasin.

C'est la prétention de l'intimé que l'appelant a violé les conditions de la convention et qu'il a droit de demander que ladite convention, où il s'est engagé d'acheter, soit annulée et que le défendeur soit condamné à lui remettre la somme de $10,500 que le demandeur lui a payée en acompte sur le prix de vente. Le demandeur-intimé a également offert de remettre au défendeur le certificat d'actions qu'il avait reçues, égales au montant qu'il avait versé. Dans son action, le demandeur conclut que les offres faites par lui soient déclarées valables, que la convention du 15 septembre 1952 soit annulée, et que le défendeur soit condamné à payer la somme de $10,500 avec intérêts. L'honorable Juge Sylvestre a rejeté l'action du demandeur avec dépens, mais ce jugement a été unanimement renversé par la Cour du banc de la reine[1] qui a accordé les conclusions de l'action.

Je suis d'opinion que la Cour du banc de la reine a bien jugé, et qu'il n'y a pas lieu d'intervenir pour modifier les conclusions de ce jugement.

Dans l'examen de cette cause, il est essentiel de ne pas oublier que la convention intervenue entre les deux parties présente un aspect assez complexe. Il s'agit en effet d'un acte de vente, où l'appelant vend son commerce à l'intimé, et où ce dernier, moyennant salaire, devient employé de la compagnie qui a été formée. Le contrat de vente, et le contrat de louage de services, sont subordonnés l'un à l'autre, et il me semble impossible de faire subsister une partie de ce contrat et prononcer l'annulation de l'autre. Autrement, il faudrait arriver à l'extraordinaire résultat que l'appelant pourrait dire qu'il garde les $10,500 qui lui ont été versés et que l'intimé serait démis de ses fonctions, quand l'exercice de ces mêmes fonctions était une condition essentielle de la convention du 15 septembre 1952.

L'erreur fondamentale dans la présente cause est d'appliquer la décision de cette Cour rendue dans une cause de *Dupré Quarries Ltd. v. Dupré*[2]. Dans cet arrêt, qui suivait

[1] [1960] Que. Q.B. 1126. [2] [1934] S.C.R. 528.

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une décision antérieure de cette même Cour dans *Bélanger v. Bélanger*[1], il a été décidé que le contrat de vente par Dupré à la compagnie limitée, et le contrat de louage de services de Dupré, étaient divisibles, et que l'on pouvait mettre un terme au contrat de louage sans affecter la validité de la vente.

Mais ici, la situation est entièrement différente. Le contrat de vente et le contrat d'engagement sont indivisibles. L'intimé a en effet un intérêt fondamental à travailler pour la compagnie afin de protéger les versements qu'il a faits déjà et qu'il s'est obligé à faire dans l'avenir.

Il est fort possible, comme le signale M. le Juge Montgomery de la Cour du banc de la reine, que des recours aient été ouverts à l'appelant, si l'intimé ne remplissait pas ses fonctions tel qu'il aurait dû le faire, mais il n'a pas été jugé à propos de suivre cette ligne de conduite. Je suis convaincu que l'appelant ne peut pas diviser les clauses de la convention, qu'il ne peut garder pour lui les versements qui ont été effectués, et en même temps remercier l'intimé de ses services.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Thinel & Filfe, St. Jerome.

Attorneys for the plaintiff, respondent: Hyde & Ahern, Montreal.

1961
*May 17, 18
Oct. 3

GEORGES BURTON DESLONG-CHAMPS-DIONNE (*Plaintiff*) ... APPELLANT;

AND

ROLAND PELOQUIN AND NARCISSE DUMAIS (*Defendants*) .. RESPONDENTS.

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

Contracts—Obligation with a term—Debtor subsequently forming partnership with others—Partnership denying liability—Claim for payment in full—Whether loss of benefit of term—Civil Code, art. 1092.

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

[1] (1895), 24 S.C.R. 678.

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DESLONG-CHAMPS-DIONNE *v.* PELOQUIN AND DUMAIS

Courts—Practice—Motion to adduce new evidence— Supreme Court Act, R.S.C. 1952, c. 259, s. 67.

The defendant B borrowed a sum of money from the deceased creditor of which the plaintiff was the legatee. The defendant had agreed to reimburse that sum by paying 10 cents for every dozen canned food tins sold by the business of which he was, when he signed the promissory note, the sole owner. Payments were to be made every week. Subsequently, the defendant took two partners. The partnership made regular payments for some time and then the new partners stopped the payments and denied liability. The plaintiff sued the three partners jointly and severally for the balance of the payments on the ground that their denial of liability had made them loose the benefit of the term. The defendant B did not contest the action. The other two defendants argued that they were not liable and that the action was premature. The trial judge found these two defendants jointly and severally liable with the defendant B. The Court of Appeal dismissed the action on the ground that it was premature. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

When a deed filed in support of a claim, as in this case, shows on its face that the amount claimed is not due, the defendant does not have to plead specifically that the action is premature. This is not a fact, but a right in future which does not yet exist. Furthermore, there is no incompatibility between a denial of legal liability and the defence that the action is premature.

As found by the Court of Appeal, this action was premature. This was an obligation with a term and there was nothing to indicate that the defendants had lost the benefit of the term.

The motion to adduce as new evidence before this Court two deeds of sale signed while the case was before the Court of Queen's Bench, could not be entertained. These deeds could not modify the nature of the parties' rights as they existed when the action was instituted.

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

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

E. Veilleux, Q.C., and *J. L. Peloquin*, for the defendants, respondents.

The judgment of the Court was delivered by

TASCHEREAU J.:—Dans le cours de l'année 1952, Georges Adélard Deslongchamps, maintenant décédé, a prêté une somme de $15,045 à Gérard Breton qui faisait alors affaires sous le nom et raison sociale de «A LA CANADIENNE ENREGISTRÉE». Ce dernier a reconnu sa dette par acte signé devant Me Georges Sylvestre, notaire, le 13 novembre 1952. En vertu de cet acte, Breton a reconnu devoir cette

[1] [1960] Que. Q.B. 1106.

somme de $15,045 représentée par un billet promissoire portant intérêt au taux de 6 pour cent par année, et escompté au bureau de la Banque Canadienne de Commerce en la Cité de Sherbrooke.

Le débiteur s'est engagé à rembourser cette somme à raison de $0.10 par douzaine de boîtes de poulet sur la production totale de la semaine de «A LA CANADIENNE ENREGISTRÉE» jusqu'à l'extinction totale du billet ci-dessus mentionné. Tous les paiements devaient être faits au bureau de la Banque Canadienne de Commerce, détentrice du billet, et les versements devaient commencer à être effectués à partir du 21 novembre 1952, et les autres à chaque semaine jusqu'à parfait paiement de ce billet.

Le débiteur Gérard Breton a fait un certain nombre de paiements, et le 5 février 1953, il a formé une société avec les intimés Narcisse Dumais et Roland Péloquin et, dans l'acte, il est stipulé que la société a existé depuis le 1er juillet 1952. De plus, à la même date, savoir le 5 février 1953, les trois associés ont signé une déclaration de société qui a été déposée au bureau du Protonotaire de la Cour supérieure du district de St-François, et dans cette déclaration l'on constate que la société existe depuis cette date du 1er juillet 1952.

La société continua les paiements selon les termes du contrat intervenu entre Georges Adélard Deslongchamps et Gérard Breton, à partir du 7 février 1953 jusqu'au 16 mars 1957. Dans l'intervalle, le 8 mai 1956, Georges Adélard Deslongchamps est décédé et a laissé une partie de ses biens, dont la créance ci-dessus, à Georges B. Deslongchamps, l'appelant dans la présente cause.

Lorsque la société cessa ses paiements le 16 mars 1957, le présent appelant réclama de la société la balance due, soit la somme de $14,683.50, mais comme les paiements furent refusés, il intenta une action contre les trois associés conjointement et solidairement. Gérard Breton ne produisit aucune défense, et a été condamné par défaut, mais les intimés Dumais et Péloquin persistèrent dans leur refus de payer et contestèrent l'action du demandeur. L'honorable Juge de première instance a maintenu l'action contre les deux associés, mais ce jugement a été unanimement renversé par la Cour d'Appel[1] et quant à eux, l'action a été rejetée avec dépens.

[1] [1960] Que. Q.B. 1106.

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Taschereau J.

C'est la prétention des intimés que l'obligation contractée par Breton l'a été avant que la société dont ils ont subséquemment fait partie ne fût formée, et qu'ils ne sont pas responsables de cette dette antérieure créée par l'auteur de l'appelant. De plus, devant le juge au procès ils ont prétendu que l'action était prématurée, vu qu'au moment où elle a été instituée, les montants réclamés n'étaient pas dus.

Le juge au procès a rejeté le premier moyen, a trouvé les deux intimés conjointement et solidairement responsables de la dette de la société, et a rejeté le second pour le motif qu'il n'avait pas été plaidé. Sans examiner la question de responsabilité des intimés, la Cour du banc de la reine a maintenu l'appel et a rejeté l'action parce que les montants réclamés n'étaient pas encore exigibles.

Je dois dire en premier lieu que je suis clairement d'opinion que quand un acte produit au soutien d'une réclamation, comme dans le cas qui nous occupe, révèle à sa face que le montant réclamé n'est pas échu, le défendeur poursuivi qui conteste l'action n'a pas besoin de plaider qu'elle a été instituée prématurément. Il ne s'agit pas là d'un fait, mais bien d'un droit en puissance qui n'existe pas encore. Sans plaidoyer en fait, mais sur simple inscription en droit, l'action dans un cas comme celui-là peut être rejetée. De plus, contrairement à ce que l'on a soutenu, je ne crois pas qu'il existe aucune incompatibilité entre les deux défenses des intimés. Sûrement que des prétendus débiteurs peuvent répondre à une action qu'ils ne sont pas légalement responsables du paiement d'une réclamation, et soutenir subsidiairement que s'ils le sont, l'action est prématurée parce que la créance contre eux n'est pas exigible. C'est précisément ce qui s'est produit dans la cause qui nous est soumise.

Comme la Cour du banc de la reine l'a pensé, je crois que cette action est prématurée. Les intimés en effet ne devaient verser hebdomadairement que la somme de $0.10 par douzaine de boîtes de poulet sur leur production totale, jusqu'à l'extinction de la créance. Il s'agit bien là d'une obligation à terme, et quand l'action a été instituée le 16 avril 1957, la balance qui restait due était apparemment de $14,683.50. Rien n'indique au dossier que les intimés aient perdu le bénéfice du terme, ce qui aurait eu pour effet de rendre la créance exigible. L'appelant ne peut réclamer plus que le montant stipulé à la convention.

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Devant cette Cour, lors de l'audition, les procureurs de l'appelant ont présenté une motion afin qu'ils soient autorisés à verser au dossier deux actes de vente en date du 27 janvier 1960 et du 25 mars de la même année, c'est-à-dire que l'on veut établir des faits survenus plusieurs années après l'institution de l'action. Je ne crois pas que ces exhibits subséquents à la contestation, et signés alors que la cause était pendante devant la Cour du banc de la reine, peuvent être légalement admis. Ils ne peuvent modifier la nature des droits des parties tels qu'ils existaient au moment où l'action a été instituée.

Je crois donc que la motion pour produire des documents additionnels doit être rejetée avec dépens, et que le présent appel doit être également rejeté avec dépens de toutes les cours. Le présent jugement ne peut évidemment priver l'appelant d'exercer tout autre recours dont il peut être légalement investi.

Appeal and motion to adduce new evidence dismissed with costs.

Attorney for the plaintiff, appellant: Arcadius Denis, Sherbrooke.

Attorneys for the defendants, respondents: Blanchette, Peloquin & Savoie, Sherbrooke.

CHARLES E. EVEREST (*Defendant*) ....APPELLANT;

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*Nov. 10
Dec. 15

AND

CHAMPION SAVINGS CORPORATION LIMITED (*Plaintiff*) ...... RESPONDENT.

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

Appeals—Jurisdiction—Motion for peremption dismissed—Whether dismissal appealable to Court of Queen's Bench de plano—Code of Civil Procedure, art. 46, 279, 280, 1211.

The defendant made a motion for peremption which was dismissed by the Superior Court. He appealed *de plano* to the Court of Queen's Bench which quashed the appeal on the ground that leave to appeal had not been obtained. He was granted leave to appeal to this Court.

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

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Held: The appeal should be allowed.

A motion for peremption is an instance within an instance, and the Superior Court judgment which dismisses such a motion is a final judgment and consequently, the Court of Queen's Bench has jurisdiction to entertain an appeal *de plano* from such a judgment. *Kugel v. Malouin,* [1947] Que. K.B. 1, approved; *Wabasso Cotton Co. v. Commission des Relations Ouvrières de Québec et al.,* [1953] 2 S.C.R. 469, referred to.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], quashing an appeal from a judgment of Tellier J. which had dismissed a motion for peremption. Appeal allowed.

F. F. Hubscher, for the defendant, appellant.

J. Delorme, for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le 18 novembre 1952, l'intimée a institué contre l'appelant une action devant la Cour supérieure du district de Montréal, dans laquelle elle réclame la somme de $25,054.96 avec intérêts et dépens. L'appelant, en vertu d'une entente intervenue entre les parties, avait le droit exclusif de vendre dans la province de Québec, moyennant commission, des Certificats de la Champion Savings Corporation Limited, et comme conséquence de cette entente, il aurait eu droit de recevoir en commission la somme de $161,893.81. Il est arrivé, d'après les termes de la déclaration au dossier, que l'intimée aurait payé $186,948.77, soit un excédent de $25,054.96, que celle-ci réclame dans son action.

L'appelant-défendeur a produit un plaidoyer au cours du mois de décembre 1952, et le 30 décembre de la même année la cause a été inscrite au mérite, mais le 9 juin 1954 elle a été rayée du rôle de la Cour supérieure par ordre de M. le Juge Edouard Tellier. Le 24 août 1960, le défendeur a présenté une motion pour péremption, alléguant que la dernière procédure utile avait été faite le 9 juin 1954, et que l'action en conséquence devait être rejetée avec dépens, sauf recours s'il y avait lieu. (C.P. 279 et suivants)

M. le Juge Tellier a rejeté la motion pour péremption avec dépens, pour des raisons qu'il est actuellement inutile de discuter. L'appelant s'est pourvu en appel devant la Cour du banc de la reine[1], mais l'intimée a présenté une motion

[1] [1961] Que. Q.B. 169.

prétendant qu'il s'agissait de l'appel d'un jugement interlocutoire et que, suivant les dispositions de l'art. 1211 du *Code de procédure civile,* il fallait de toute nécessité que l'appelant obtînt la permission de l'un des juges de la Cour du banc de la reine pour que son appel puisse être légalement entendu. Cette motion a été accordée et l'appel a été rejeté avec dépens, avec la dissidence de M. le Juge Bernard Bissonnette. Le 17 février 1961, cette Cour a accordé à l'appelant la permission de loger son appel devant la Cour Suprême du Canada.

MM. les Juges Rinfret et Owen de la Cour du banc de la reine ont suivi la décision de leur Cour, rendue dans la cause de *L'Association Patronale v. Dependable Slipper Co.*[1], où il a été décidé ce qui suit:

> 1. Il ne peut y avoir en toute instance principale qu'un jugement *final* et des *interlocutoires.*
>
> 2. Le jugement *final* est proprement celui qui termine un procès et met fin à l'instance sur le fond; le jugement interlocutoire est celui qui est prononcé durant le procès, savoir entre l'institution de l'action ou de la demande initiale principale et le jugement qui y met fin, et comprend toute décision quant à un incident; le jugement *final* est, sous réserve de l'art. 43 C.P., appelable *de plano;* quant aux jugements interlocutoires, ils sont appelables ou non selon qu'ils sont définitifs ou provisoires (46 et 1211 C.P.).

Antérieurement, la Cour du banc de la reine avait été saisie d'une question semblable à celle qui nous est actuellement soumise. En effet, dans la cause de *Kugel v. Malouin*[2], il s'agissait d'une demande de péremption d'instance qui avait été rejetée. L'appelant avait obtenu la permission de se pourvoir en appel, mais MM. les Juges St-Germain et McKinnon ont exprimé l'opinion suivante:

> Lors de l'audition de cette cause, le savant avocat du demandeur a prétendu que le jugement dont est appel, n'était pas un jugement appelable aux termes de l'art. 46 C.P. et que, par conséquent, permission d'appeler dudit jugement n'aurait pas dû être accordée.
>
> Or, avec toute déférence, je suis d'avis qu'il n'était pas même nécessaire pour le défendeur de demander la permission d'appeler de ce jugement, et qu'il pouvait appeler dudit jugement de plano.

Cette opinion est nécessairement fondée sur le principe que j'approuve, qu'une motion pour péremption est une instance dans une instance. Un interlocutoire est une mesure d'instruction au cours d'un procès et a pour objet de préparer la décision finale du tribunal sur la controverse qui a donné naissance au litige. Mais il arrive souvent, comme dans le cas qui nous occupe, qu'un jugement soit *définitif,* car il ne

[1] [1948] Que. K.B. 355. [2] [1947] Que. K.B. 1.

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tend pas à mettre l'instance en état de recevoir une solution sur le fond du procès. Certains jugements revêtent un caractère de finalité, malgré qu'ils soient prononcés durant le procès, c'est-à-dire entre l'institution de l'action ou de la demande initiale principale et le jugement qui y met fin, mais ils ne déterminent pas un incident relatif à la demande principale. Comme le disait M. le Juge Bissonnette dans *Kugel v. Malouin, supra,* la demande en péremption provoque un incident qui doit être nécessairement vidé avant qu'il ne soit procédé ultérieurement sur l'instance principale. Il ne s'agit pas, en effet, de déterminer les droits des plaideurs sur le litige principal, mais de constater judiciairement la déchéance du droit de continuer l'instance.

Le meilleur exemple est un jugement accordant ou refusant une motion pour péremption. Si la demande est accordée, l'action est rejetée, parce que la procédure pendante est frappée de déchéance. Si elle est refusée, il résulte que le jugement nie à celui qui propose la motion, le droit qu'il peut avoir de rechercher l'extinction de l'instance. Dans l'un ou l'autre cas, la Cour ne statue pas sur le droit d'action. Je crois que c'est un droit fondamental que possède un plaideur, lorsque les conditions se rencontrent, de faire prononcer l'anéantissement de tous les actes de procédure accomplis dans un procès. Le jugement qui le refuse est final, et rien ne peut y remédier, sauf appel.

Une décision de cette Cour rendue dans la cause de *Wabasso Cotton Co. v. La Commission des Relations Ouvrières de Québec et al.*[1] nous aidera à déterminer le présent litige. Il s'agissait en l'espèce d'un jugement de la Cour supérieure annulant, au cours de l'instance, une injonction interlocutoire. La Cour du banc de la reine a décidé qu'il n'y avait pas lieu à appel *de plano,* parce qu'il s'agissait d'un jugement interlocutoire. Cette Cour a décidé que la Cour du banc de la reine avait été régulièrement saisie de l'appel par inscription en appel, et lui a retourné le dossier pour considération de toute question pouvant être soulevée sur un appel logé *de plano*. Dans cette cause, M. le Juge en chef Rinfret s'est exprimé de la façon suivante:

> Il est évident que le jugement qui a annulé cette injonction est un jugement final. Le résultat en est que, nonobstant l'action intentée par les appelants, rien n'empêche le Syndicat d'agir en vertu de la décision de la Commission et de poursuivre les appelants pour les raisons qu'ils ont invoquées lors de leur demande à la Commission.

[1] [1953] 2 S.C.R. 469, [1954] 2 D.L.R. 193.

Le jugement sur l'action en annulation de cette décision ne pourra avoir pour effet que, s'il est favorable aux appelants, d'y joindre une ordonnance d'injonction permanente, mais l'injonction au cours de l'action est disparue pour toujours.

S'inspirant de nombreuses autorités qu'il cite dans ses notes, M. le Juge Fauteux, avec qui j'ai concouru, en est venu à la conclusion qu'il s'agissait d'un jugement final. A la page 479, il dit:

L'injonction interlocutoire est une mesure dont l'effet et l'objet visent exclusivement au maintien du *statu quo pendente lite*. C'est donc, en soi, un remède manifestement indépendant et distinct de tous ceux dont l'obtention est—et peut être—recherchée par l'action et conditionnée par son succès. Sans doute, et en fonction de la période de temps pour laquelle il est établi, ce remède est, pour cette raison, de nature provisoire; mais la nature du remède ne fait pas la nature du jugement qui en dispose. Les deux ne peuvent être confondus.

Et concluant sur la question soumise, il ajoute à la page 480:

Conséquemment et sauf appel du jugement qui, en l'espèce, a annulé l'injonction interlocutoire, ce jugement dispose avec finalité dans la cause, et de ce remède, et du droit d'y recourir.

Pour toutes ces raisons, je suis d'avis que dans le cas qui nous est soumis, il s'agit bien d'un jugement final et non pas seulement de la détermination d'un incident dans le litige principal. La Cour du banc de la reine avait donc juridiction pour entendre le présent appel *de plano*. Je lui retournerais en conséquence le dossier pour qu'elle se prononce sur le jugement de M. le Juge Tellier qui avait rejeté la motion pour péremption.

L'appel doit donc être maintenu avec dépens devant la Cour du banc de la reine et devant cette Cour.

Appeal allowed with costs.

Attorney for the defendant, appellant: Frank F. Hubscher, Montreal.

Attorneys for the plaintiff, respondent: Walker, Chauvin, Walker, Allison & Beaulieu, Montreal.

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*Nov. 28, 29

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Mar. 26

THE CANADIAN FISHING COMPANY LIMITED, ERNEST FREDERICK PIPER, ROGER THOMPSON HAGER, DONOVAN FRANCIS MILLER and GEORGE BEAN McKAY, BRITISH COLUMBIA PACKERS LIMITED, EDMUNDS & WALKER LIMITED, J. H. TODD & SONS LTD., JOHN MURDOCH BUCHANAN, EDWARD LOY HARRISON and DONALD ROBERT RUSSELL, THE ANGLO-BRITISH COLUMBIA PACKING COMPANY LIMITED, RICHARD BELL-IRVING, PETER TRAILL and IAN M. BELL-IRVING, QUEEN CHARLOTTE FISHERIES LIMITED and ANDERSON & MISKIN LIMITED, NELSON BROS. FISHERIES LIMITED, ANGUS C. FINDLAY, RICHARD NELSON and WILLIAM LORNE WHITTAKER (*Plaintiffs*) ....APPELLANTS;

AND

C. RHODES SMITH, A. S. WHITELY and PIERRE CARIGNAN (*Defendants*) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Combines—Restrictive Trade Practices Commission—Inquiries by Director of Investigation and Research—Allegations of breaches of Combines Investigation Act included in statement of evidence—Application for full disclosure of all evidence and documents—Power of Commission to furnish material—Combines Investigation Act, R.S.C. 1952, c. 314, s. 18.

The Director of Investigation and Research under the Combines Investigation Act, R.S.C. 1952, c. 314, as amended, conducted inquiries into the operations of certain companies and individuals in relation to the production, purchase and sale of raw fish in British Columbia. After obtaining oral and documentary evidence, as authorized by the Act, the director prepared a statement of evidence of the nature referred to in s. 18(1). Included in this statement were a series of allegations based upon the evidence considered alleging various breaches of the Act by the appellants and by certain other individuals and organizations. Different portions of the allegations referred to different parties. One of the parties who had been investigated, and who, as required by the Act, had been supplied with a copy of the director's statement of evidence, applied to the Restrictive Trade Practices Commission for

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

a full disclosure of all the evidence and documents that had been examined by the director. In response to this request the Commission gave a direction to make all the material available.

The appellant companies brought actions in the Supreme Court of British Columbia in each of which an injunction was asked restraining the defendants (the chairman and members of the Commission) from making this material available to any person except to members of or employees of the Commission or to the Minister of Justice or any person acting in an official capacity under his direction. In addition, the appellant companies asked a declaration that publication of the material to any member of the public or to any of the persons named in the allegations was unlawful. The British Columbia Courts held that the Commission had power to direct that the material be supplied. In a similarly constituted case in Ontario the trial judge came to the opposite conclusion; there was an appeal pending from that decision to the Court of Appeal. Appeals from the decision of the Court of Appeal for British Columbia were brought to this Court.

Held (Taschereau, Fauteux, Abbott and Judson JJ. dissenting): The appeals should be allowed in part.

Per Kerwin C.J. and Locke, Martland and Ritchie JJ.: While the chairman of the Commission had informed the appellants of his intention to make available the transcript of the evidence and all of the documents to the party who had requested this material, after an injunction was granted in the Ontario proceedings he informed them that he proposed to hold a hearing to hear argument as to whether this should be done. The matter was thus reopened and in the circumstances the appellants were not entitled to an injunction.

The appellants were, however, entitled to a declaration that upon the true construction of s. 18 of the Act the director, and in this case, the Commission are required to furnish to each person against whom an allegation is made in the statement of evidence a copy of the evidence taken at the instance of the director, only in so far as such evidence relates to the allegations made against such person, and copies of only such of the documents taken from the possession of the appellant companies as are relevant to the allegations made against him.

Per Cartwright, Martland and Ritchie JJ.: The duty imposed on the Commission by s. 19(1) of the Act to make a report to the Minister in which it must review the evidence, appraise the effect on the public interest of arrangements disclosed in the evidence, and contain recommendations as to the application of remedies provided in the Act or other remedies is not limited to a review of the statement of evidence alone. It contemplates a consideration of the evidence and material on which the statement of evidence is based, together with such further or other evidence or material as the Commission has deemed it advisable to consider pursuant to s. 18(3).

The Commission, interposed as an impartial tribunal between the director and those against whom he makes allegations, and charged with the duty of giving full opportunity to be heard, has by necessary implication the power to furnish to one against whom an allegation is made the relevant evidence and documents on which the allegation is based, but it has no further power of disclosure.

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CANADIAN FISHING CO. LTD. *et al.* *v.* SMITH *et al.*

The decision as to what further information, if any, in addition to that contained in the statement of evidence was necessary in this case was committed to the Commission subject to the limitations set out in the declaration directed to be made.

Per Taschereau, Fauteux, Abbott and Judson JJ., *dissenting in part*: There was no express statutory power authorizing disclosure of all the evidence and documents. Nothing in the Act gave the Commission any express power over documents except in the event of a further inquiry under s. 22. Neither could the power of disclosure be found by implication in the duty to afford the applicant a full opportunity to be heard under s. 18. Whether full opportunity to be heard involves a right to this sort of production had been decided, adversely to the applicant, in *Advance Glass & Mirror Co. Ltd. v. Attorney-General of Canada & McGregor,* [1949] O.W.N. 451, and *Re The Imperial Tobacco Co. and McGregor,* [1939] O.R. 627. Nor could the power to order disclosure of documents be read into s. 18(3).

This was not a preliminary inquiry in a criminal prosecution nor anything in the nature of a preliminary inquiry. It was merely a hearing for the purpose of determining what kind of report was to be made to a Minister of the Crown. A full opportunity to be heard in these circumstances did not require and did not justify all this elaboration of procedure and discovery. There was no statutory authorization for it and there was risk of frustration of the whole purpose of the Act, which is directed solely to investigation and research. The right to be heard should be applied in this context.

APPEALS from a judgment of the Court of Appeal for British Columbia[1], dismissing appeals from the judgment of Sullivan J. Appeals allowed in part.

J. J. Robinette, Q.C., and *J. G. Alley,* for the plaintiffs, appellants.

D. S. Maxwell, Q.C., and *G. W. Ainslie,* for the defendants, respondents.

The judgment of Kerwin C.J. and of Locke, Martland and Ritchie JJ. was delivered by

LOCKE J.:—These are appeals from a judgment of the Court of Appeal for British Columbia[1] brought pursuant to leave granted by this Court. The judgment appealed from dismissed appeals of the present appellants from the judgment of Sullivan J. at the trial.

The respondents, the defendants in the action, are the members of the Restrictive Trade Practices Commission appointed under the provisions of s. 16 of the *Combines Investigation Act*, R.S.C. 1952, c. 314.

[1] (1961-62), 36 W.W.R. 456, 30 D.L.R. (2d) 581.

The facts necessary to be considered are, in my opinion, as follows:

In consequence of an application made to the Director of Investigation and Research, Mr. T. D. McDonald, appointed under the provisions of s. 5 of the said Act, the director conducted inquiries into the operations of the appellant companies, the United Fishermen and Allied Workers' Union and certain other associations and organizations, to be hereinafter referred to in relation to the production, purchase and sale of raw fish on the West Coast of British Columbia.

During the months of July and August 1956, representatives of the director, after obtaining a certificate of the nature referred to in subs. (3) of s. 10 of the Act, took from the premises of the appellant corporations, of the union and certain of such associations certain letters, copies of letters, reports, memoranda and other documents, as authorized by subs. (1) of s. 10. During the months of October and November 1957 some officers and employees of the appellant companies, including all of the individual appellants, were examined on oath before a member of the Board in private by the director or his authorized representatives pursuant to subs. (1) of s. 17.

Thereafter the director prepared a statement of the evidence of the nature referred to in s. 18(1) of the Act. This statement contains a summary of the oral evidence taken and of the contents of some of the documents seized and concluded with a series of allegations based upon the evidence considered, alleging various breaches of the *Combines Investigation Act* by the parties appellant, certain individuals and certain organizations, some of which are not parties to these proceedings.

This statement of evidence forms part of the Case in these matters and is some 565 pages in length. As required by s. 18(1) copies of this document were submitted to the Commission. On the assumption that this section required that it be done, copies of the entire statement were supplied to each of the persons against whom an allegation was made. The statement contains copious extracts from the evidence taken on the hearings which, in each case, were held in private and includes a large number

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of references to some of the documents seized as aforesaid. With these exceptions, none of the evidence which, as the record indicates, is some 3,000 pages in extent, and none of the documents were disclosed to any of the parties concerned.

The statement of the evidence and the allegations signed by the director bears the date May 27, 1959. Following the delivery of this document to the parties, Mr. Homer Stevens, the secretary-treasurer of the United Fishermen and Allied Workers' Union (hereinafter referred to as the Union) wrote to the respondent Smith on June 11, 1959, saying, *inter alia:*

> Your "Statement of Evidence" is only a partial summary of evidence submitted by other organizations and individuals connected with the fishing industry. We naturally want to know everything that was said or submitted, in order to prepare our defense against what appears to be a one-sided and extremely illogical set of allegations. Will you therefore send us a copy of the full transcript of evidence submitted by the persons listed in Appendix A, pages 583 to 592 inclusive, excepting of course the transcript of evidence by the writer which we already have received? Will you also send us copies of all the documents listed in Appendix B and Appendix C, pages 593 to 595 inclusive, except those obtained from Union files which we have in our possession.

The pages of the transcript referred to included the evidence of a considerable number of witnesses who were officials or employees of the appellant companies and the documents referred to included a large number taken from the files of the Fisheries Association of B.C., of which the appellant companies were members, and seven of the packing companies who are parties appellant.

On September 14, 1959, the union wrote to the chairman repeating the request of Stevens for the material referred to in the letter of June 11 above mentioned. To this the respondent Smith replied on September 21, 1959, saying that copies of the transcript of the evidence of the witnesses and of all the documents listed in Appendices B and C of the statement of evidence, other than those taken from the union files, were being prepared and would be forwarded shortly. On the same date the chairman wrote the appellant Canadian Fishing Co. Ltd. informing that company of the proposed action, and similar notices were given to the other appellant companies.

The appellant Canadian Fishing Co. Ltd., by letter dated October 2, 1959, informed the chairman that it objected to the delivery of the transcript or any of the documents, and similar objections were made on behalf of the other companies. Mr. Smith considered these objections and rejected them, setting out the Commission's reasons in a letter addressed to the solicitors for the appellant B.C. Packers Ltd. dated October 9, 1959, and wrote similar letters to the other appellant companies or their solicitors.

The appellant companies thereupon commenced an action in the Supreme Court of Ontario against the respondent Smith, the director, and the Attorney General of Canada, for an order restraining the delivery of the evidence or of the documents, and obtained an interim injunction from the local judge of that Court in Ottawa on October 22, 1959. The injunction was continued by an order of Aylen J. until the trial. That action came on for trial before the late Mr. Justice Danis on March 26, 1960, and judgment was reserved. At the trial the restraining order made by Aylen J. was amended so that it restrained the delivery of the transcript and of the documents:

> except to the extent that the said Restrictive Trade Practices Commission after the commencement of its public hearing to be heard pursuant to s. 18(2) of the said Act with respect to the said statement of evidence orders or directs the disclosure of the said material in whole or in part.

Danis J. died before delivering judgment and the case was then heard and decided by Parker J. whose judgment[1] granting the plaintiffs the relief asked was delivered on May 30, 1961, after the institution of the present proceedings. The defendants appealed to the Court of Appeal and that appeal is now pending in that Court.

No further steps had been taken by the respondents in British Columbia following the institution of the action in Ontario but on May 24, 1960, after the terms of the interim injunction granted in those proceedings had been altered in the manner above stated, the respondent Smith wrote to the appellant companies, referring to the Ontario proceedings and saying in part:

> In order to comply with the terms of the injunction the Commission has fixed 10 a.m. on the morning of Monday, the 25th day of July, 1960, in the City of Vancouver, British Columbia, as the time and place at which the hearing before the Commission will be held.

[1] [1961] O.R. 596, 28 D.L.R. (2d) 711.

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It is anticipated that the only matter that will be dealt with at that time is the request of certain parties to the proceedings for a copy of the transcript and of the documents upon which the Director has relied in the preparation of the Statement of Evidence, and that the hearing will then be adjourned to a subsequent date.

The Commission proposes that the subsequent date for resuming the hearing will be Monday, November 7th 1960. Argument may be presented on this point at the hearing in July.

This appears to have been a clear intimation that the decision of the Commission referred to in the letter of October 9, 1959, was to be reconsidered.

At the request of counsel for the appellant corporations, the date of the preliminary hearing referred to was changed to September 29, 1960.

On September 28, 1960, the writs were issued in the present actions and interim orders of injunction restraining the respondents from delivering the transcript or the documents until the trial of the actions obtained by the various plaintiffs.

No order for consolidation had been made but, by consent, the five actions were tried together. The case of the appellant Canadian Fishing Co. Ltd. was first presented, the evidence consisting of the matters disclosed in an agreed statement of facts, various documents and portions of the examination for discovery of the respondents Whiteley and Smith. No oral evidence was given. Certain of the other plaintiffs tendered further evidence relating to their own cases and all adopted that given on behalf of the Canadian Fishing Co. Ltd. Notwithstanding the fact that paragraph 8 of the statement of claim of that company alleged that the director or his representatives:

entered into the premises of the Plaintiff company and took away, inspected and copied statements, documents and letters, many of a confidential nature, disclosing the plaintiff company's methods of business and operation, some of which were written by the individual plaintiffs acting as officers of the Plaintiff company.

and notwithstanding that the allegation that the documents taken were of a confidential nature disclosing the plaintiff company's method of business and operation had been put in issue by paragraph 2 of the statement of defence, no evidence was given on the issue so raised and the only information as to the nature of the documents in this record is such as is given in the statement of evidence prepared by the director.

The expression "combine" is defined in s. 2 of the *Combines Investigation Act*. Section 32 declares that any person who is a party or privy to or knowingly assists in the formation or operation of a combine is guilty of an indictable offence.

When an application is made to the director in the manner required by s. 7 as amended, the director is required to conduct an inquiry whenever he has reason to believe that s. 32 or 34 of the Act or s. 411 or 412 of the *Criminal Code* has been or is about to be violated, or whenever directed so to do by the Minister of Justice. Section 18 of the Act as amended reads:

18. (1) At any stage of an inquiry,

(*a*) the Director may, if he is of the opinion that the evidence obtained discloses a situation contrary to section 32 or 34 of this Act, or section 411 or 412 of the *Criminal Code,* and

(*b*) the Director shall, if so required by the Minister, prepare a statement of the evidence obtained in the inquiry, which shall be submitted to the Commission and to each person against whom an allegation is made therein.

(2) Upon receipt of the statement referred to in subsection (1), the Commission shall fix a place, time and date at which argument in support of such statement may be submitted by or on behalf of the Director, and at which such persons against whom an allegation has been made in such statement shall be allowed full opportunity to be heard in person or by counsel.

(3) The Commission shall, in accordance with this Act, consider the statement submitted by the Director under subsection (1) together with such further or other evidence or material as the Commission considers advisable.

(4) No report shall be made by the Commission under section 19 or 22 against any person unless such person has been allowed full opportunity to be heard as provided in subsection (2).

Section 19(1) reads:

The Commission shall as soon as possible after the conclusion of proceedings taken under section 18, make a report in writing and without delay transmit it to the Minister; such report shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies.

This section further provides that, following the transmission of this report to the Minister, the director shall deliver all documents taken by him to those from whom they were taken, unless required to retain them by the Attorney General of Canada.

The inquiry conducted by the director was directed to the activities of the appellants, the Fisheries Association of B.C., the following organizations: United Fishermen and Allied Workers' Union, Native Brotherhood of British Columbia, Fishing Vessel Owners' Association of British Columbia, B.C. Fishermen's Independent Co-Operative Association, Prince Rupert Fishermen's Co-Operative Association, Prince Rupert Fishing Vessel Owners' Association, the Deep Sea Fishermen's Union, and of Stevens and other persons who were officers of certain of these organizations. The inquiry was directed to these activities in connection with the production, purchase and sale of raw fish in the four principal fisheries of British Columbia, namely, the salmon, herring, halibut and trawl fisheries.

Of these various organizations other than the appellant companies and the Fisheries Association of B.C. those most actively engaged in the operations which were considered were the two co-operative associations and the Native Brotherhood. Of the individuals named, the secretary-treasurer of the union appears to have taken the leading part.

With minor exceptions, the fishermen are not employees either of the packing companies by whom the larger part of the catch is purchased, or of the Fisheries Association which represented them in some of the negotiations. The arrangements under which the fishermen are generally remunerated in the salmon industry is by the division of the proceeds of the catch between the vessel owners, the crew and the fishermen. While the union represented the majority of the shore workers of the members of the Fisheries Association and, presumably, as their bargaining agent negotiated wage agreements on their behalf since the relationship of employer and employee did not exist between the fishermen and the companies, they being joint venturers with the vessel owners, the status of the union as regards the fishermen was not that of a trade union to which the *Labour Relations Act,* 1954 (B.C.), c. 17, or the *Trade-unions Act,* R.S.B.C. 1948, c. 342, applied. It was apparently as a voluntary association representing the fishermen that written agreements were signed by this union which determined the prices to be paid for the various types of salmon and regulated in various respects the

manner in which the vessels were to be operated. The director's report on this branch of the industry covers the period from 1945 to 1958.

The facts elicited in this branch of the inquiry are summarized by the director at p. 575 of the statement of evidence, the director alleging that during the period 1947 to 1958 the appellants: the Anglo-British Columbia Packing Company, British Columbia Packers Ltd., the Canadian Fishing Co. Ltd. and Nelson Brothers Fisheries Ltd. were parties or privies to or knowingly assisted in arrangements designed to have the effect of fixing prices and otherwise preventing or lessening competition in the production, purchase, sale or supply of raw salmon in British Columbia unduly or to the detriment or against the interests of the public. It was further alleged that during the said period Alexander L. Gordon, William Rigby, Homer J. Stevens, shown to have been officers of the union, the Native Brotherhood of British Columbia and the Fishing Vessel Owners' Association, respectively, were parties to arrangements of the same nature. In addition, it was alleged that during the period 1949 to 1958 Gordon, Rigby, Stevens and the Native Brotherhood were parties or privies to such arrangements.

The director asserted in this portion of his statement that the fish packing or canning companies in effect operated as one unit through the Fisheries Association in fixing prices or minimum prices to be paid for fish.

In the herring fishery the director found that the fishermen were joint venturers in the fishing and not employees and that the stoppages of work in this and in the other fisheries referred to as strikes were not labour disputes within the meaning of the provincial legislation. The agreement between the union representing the fishermen and the Fisheries Association representing the companies fixed prices and provided for the limitation of the number of vessels fishing and the director asserted that the result of the agreement was to prevent or lessen competition unduly, within the meaning of the statute. Between the years 1953 to 1957, both inclusive, he alleged that the Anglo-British Columbia Packing Co. Ltd., British Columbia Packers Ltd., the Canadian Fishing Co. Ltd., Nelson Brothers Ltd., Gordon, Rigby and Stevens were parties or privies to these

arrangements. He further asserted that in the years 1952 and 1953 and 1957 and 1958 Rigby and Stevens were parties or privies or knowingly assisted in arrangements having this effect in the herring industry.

In the halibut fishery the director said that the large majority of the longline vessels are owned by the companies who are members of the Fisheries Association and individuals who are members of the Fishing Vessel Owners' Association and the members of the Prince Rupert Fishing Vessel Owners' Association. There are no price agreements, minimum or otherwise. There are agreements as to the distribution of the proceeds of the catch between the union representing the fishermen and the Fishing Vessel Owners' Association and the Prince Rupert Fishing Vessel Owners' Association and the Deep Sea Fishermen's Union. The object of the agreements between the unions and the vessel owners is alleged to be to prevent non-union or non-association members from engaging in the longline halibut fishery, and thus restricting the facilities for producing, supplying or dealing in raw halibut. It is further asserted that rules designed to curtail the catch of halibut in the years 1956 and 1957 were adopted by the union, the Native Brotherhood and the Fishing Vessel Owners' Association and others. This portion of the report deals also with certain of the operations of the Vancouver Fishing Exchange where part of the catch of halibut is sold. Of the appellant companies, the Canadian Fishing Co. Ltd. and Edmunds and Walker Ltd. are members, the latter a subsidiary of the B.C. Packers, and it is said that the exchange was so operated as to substantially prevent and lessen competition.

In this fishery the director alleged that the Fishing Vessel Owners' Association and Wm. H. Brett, the secretary-treasurer of the Deep Sea Fishermen's Union, Stevens and Matthew H. Waters, the secretary of the Fishing Vessel Owners' Association, were between the years 1951 and 1957 parties to arrangement designed to have the effect of limiting facilities for producing, supplying and dealing in raw halibut unduly or to the detriment or against the interests of the public. Similar allegations are made against the Fishing Vessel Owners' Association and Gordon, Rigby and Stevens during the years 1956 and 1957 and against

the Canadian Fishing Company and Edmunds and Walker Ltd. during the period 1955 to 1957, regarding the operations of the Vancouver and New Westminster halibut exchange.

In the trawl fishery the majority of the vessels are owned by individuals, only a very few being owned by the companies. About one-third of the vessels are owned by members of the Fishing Vessel Owners' Association and a somewhat smaller proportion by the members of the B.C. Co-Operative. There is no employer-employee relationship between the companies, the vessel owners and the fishermen, and the only formal agreement is that made by the union with the Fishing Vessel Owners' Association referred to in connection with the halibut fishery. There are no minimum or specific price agreements. In 1947 and 1952 the fishermen refused to work during periods of varying length, these stoppages being described as strikes, and it is the steps taken on behalf of the union at these times which were the basis for the allegations made by the director.

As to this the director alleged that Rigby and Stevens were in the year 1947 parties or privies or knowingly assisted in arrangements having or designed to have the effect of preventing, limiting or lessening production of trawl or bottom fish unduly or to the detriment or against the interests of the public. Similar allegations are made against Gordon, T. Parkin and Stevens as to the stoppage in 1952.

No allegations were made against the appellants J. H. Todd and Sons, Queen Charlotte Fisheries Ltd. and Anderson and Miskin Ltd. and it is admitted that the director removed from the premises of these companies certain of their documents of the nature referred to in paragraph 9 of the statement of claim of the first mentioned of these companies, though their confidential nature was denied.

Sullivan J. considered that the statement of the evidence referred to in s. 18 included the documents referred to in it. That learned judge said in part:

> The difficulty of this case arises out of the unusual circumstance that the basis of the Director's allegations against sundry competing firms and the employees of some of them is contained in his one Statement of Evidence, some portions of which affect one of them and other portions of which refer only to others.

Considering that the Commission had a discretionary power to decide as to the material to be given to the various parties, he dismissed the action.

The appeals in the five actions were consolidated in the Court of Appeal. Desbrisay C.J.B.C. considered they should be dismissed and gave no written reasons. O'Halloran J.A. agreed that the statement of evidence referred to included all the evidence taken and documents referred to in it. He considered that while the duty to supply this material was imposed upon the director by s. 18 of the *Combines Investigation Act* it rested also on the Commission by necessary implication and that the Commission should direct that this be done.

Sheppard J.A. agreed that the Commission was vested with the power to supply the documents and held that it was for that body to determine what documents are fairly required in the case of such person against whom an allegation is made in the exercise of its powers under s. 18(3).

The disposition to be made of this matter depends, in my opinion, upon the interpretation which should be placed upon the language of subs. (1)(*b*) of s. 18, in so far as it relates to a person against whom an allegation is made by the director. The statement of evidence to be submitted to the Commission must, of necessity, be the evidence and the documents relating to all of the allegations made. But where, as in this case, there are allegations of conduct contrary to the statute against four of the companies, in respect of arrangements said to have been made *inter se* in relation to the salmon fishery with which Stevens and the other union officials are not concerned, and allegations of such conduct against Rigby, Stevens, Gordon and Parkin in relation to the trawl fishery with which none of the appellants are concerned, is it intended that nonetheless all the evidence taken on all the inquiries made and the relevant documents are to be supplied to persons other than those against whom the allegations are made?

The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention of the Parliament which passed them. Section 15 of the *Interpretation Act,* R.S.C. 1952, c. 158, which applies to this Act declares that every Act shall be deemed remedial and shall accordingly receive such fair, large and

liberal construction and interpretation as will best ensure the attainment of the object of the Act, according to its true intent, meaning and spirit.

Subsection (1)(*b*) is to be read together with subss. (2) and (4) of s. 18 which makes the purpose of the requirement perfectly clear, that being to enable such person to advance before the Commission, at the hearing to be held, such arguments as he may be advised against the allegations made against him.

As pointed out by Mr. Justice Sullivan, the difficulty has arisen by reason of the fact that the director prepared but one statement of evidence obtained by him in the course of several inquiries. Had a separate statement been prepared in respect of the alleged activities of the companies *inter se* and of those of the Trade union officials against whom the allegations are made in respect of the trawl fishery, no such question could have arisen. In my opinion, the construction to be placed upon the subsection should not be affected by the fact that the summary of the evidence taken during all of the inquiries was included in the one document.

Where the usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words if they are fairly susceptible of it (*Maxwell*, 10th ed. p. 68). It was this principle that was applied in the House of Lords in construing the *Workmen's Compensation Act* in *Lysons v. Andrew Knowles & Sons Limited*[1]. As it was said by Lindley L.J. in *The Duke of Buccleuch*[2], you are not to attribute to general language used by the legislature a meaning that would not only not carry out its object but produce consequences which, to the ordinary intelligence, are absurd. It was said in the Court of Appeal in *Holmes v. Bradfield Rural District Council*[3]:

> the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. It is, however, common practice that if there are two reasonable interpretations, so far as the grammar is concerned, of the words in an Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things.

[1] [1901] A.C. 79, 70 L.J.K.B. 170. [2] (1889), 15 P.D. 86 at p. 96.
[3] [1949] 2 K.B. 1, 1 All E.R. 381.

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It would, in my opinion, be manifestly unjust in this matter to require that the evidence and the documents relating to the allegations against the four companies in respect of the agreements *inter se* should be delivered to parties entirely unconcerned with the allegations made against them or, on the other hand, to supply to the appellant companies the evidence and the union or associations' documents seized which may be relevant to the allegations made against the four individuals.

In my view, it is not to be assumed that Parliament required this unless the language employed will not bear any other interpretation. In the present case it appears to me clear that what was intended was that the person referred to in subs. (1)(*b*) should receive only copies of the evidence taken and the documents referred to in the statement, so far as they are relevant to the allegations made by the director against such person.

The prayer for relief in the various actions asks an injunction restraining the defendants from furnishing or making available to any person a transcript of the evidence given by the officers or employees of the various appellant companies in the course of the inquiry, or any of the documents seized at the instance of the director, the property of the plaintiff company, except to members of or employees of the Commission or to the Minister of Justice or any person acting in an official capacity under his direction. In addition, the appellant companies ask a declaration that the furnishing or making available at any time by the defendants or any of them of all or any part of the said transcript or the said documents to any member of the public or to any of the persons named in the allegations made in the statement of evidence is unlawful. A claim of this nature is permitted by Marginal Rule 285 of the Rules of the Supreme Court of British Columbia.

As I have pointed out, while the chairman of the Commission had informed the appellants of his intention to make the transcript of the evidence and all of the documents available to Stevens in response to his request, after the judgment in the Ontario action he informed them that he proposed to hold a hearing to hear argument upon the question as to whether this should be done. The matter was thus reopened and in the circumstances the appellants are not, in my opinion, entitled to an injunction.

The appellants are, however, in my opinion, entitled to a declaration that upon the true construction of s. 18 of the *Combines Investigation Act* the director, and in this case, the Commission are required to furnish to each person against whom an allegation is made in the statement of evidence a copy of the evidence taken at the instance of the director, only in so far as such evidence relates to the allegations made against such person, and copies of only such of the documents taken from the possession of the appellant companies as are relevant to the allegations made against him. To this extent, I would allow the appeals.

In view of the fact that success is divided on these appeals there should, in my opinion, be no order as to costs in this Court or in the Courts below and the judgments at the trial and in the Court of Appeal should be amended accordingly.

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

JUDSON J. (*dissenting in part*):—The *Combines Investigation Act* as it now stands contemplates a division of responsibility between the Director of Investigation and Research, whose office is constituted by s. 5, and the Restrictive Trade Practices Commission, which is set up by s. 16(1). It is the director's duty to conduct an inquiry by examination of witnesses and investigation of documents, and he is given broad powers of compulsion and seizure. The purpose of his inquiry is to prepare a statement of evidence for submission to the Commission, and upon receipt of this statement the Commission conducts a hearing at which any person against whom an allegation has been made in the director's report must be allowed "full opportunity to be heard in person or by counsel".

After conducting this hearing the Commission must make a report in writing to the Minister. The report must review the evidence, appraise the effect on the public interest of the arrangements disclosed in the evidence, and contain recommendations as to the application of remedies provided in the Act or other remedies.

It is at once apparent that the functions which were once combined in one person, who was called the Commissioner under prior legislation, are now divided between the director and the Commission. They were vested in the Commissioner when *Proprietary Articles Trade Association v.*

Attorney General for Canada[1]; *O'Connor v. Waldron*[2]; and *Re The Imperial Tobacco Co. Ltd. et al. and McGregor*[3], were decided, but there has been no change in the sum total of the function, and its characterization in these cases is still applicable. The combination of exercise of powers under this Act even today results in no more than a recommendation by the Commission to the Minister. The analysis made in *O'Connor v. Waldron,* at p. 82, is still accurate when applied to the present Act. Speaking of the commissioner under the old Act, the judgment says:

> His conclusion is expressed in a report; it determines no rights, nor the guilt or innocence of any one. It does not even initiate any proceedings, which have to be left to the ordinary criminal procedure.

This action is brought by certain companies and individuals whose activities have been investigated by the director, who has delivered to the Commission a statement of evidence containing 640 pages. One of the parties who has been investigated, The Allied Fishermen & Workers' Union, has applied to the Commission for a full disclosure of all the evidence and documents that have been examined by the director. There are, I understand, more than 9,000 documents as well as the transcripts of the oral hearings. The applicant union has been supplied with a copy of the director's statement of evidence. The Act requires this. But the applicant goes further and says that it must have all the material. The Commission has given a direction to make all this material available. The British Columbia Courts have held that the Commission has power to direct that this material be supplied. In a similarly constituted action in Ontario[4], Parker J. has come to the opposite conclusion.

The question is whether the Commission has power to furnish anyone with this material. These plaintiffs object to the transcripts of the examinations of their officers and their documents being placed in the hands of the applicant and they seek an injunction to restrain such disclosure. All the inquiries made by the director, as required by s. 28 of the Act, have been conducted in private. The hearing under s. 18, pursuant to a ruling already given by the Commission, is to be held in public.

[1] [1931] A.C. 310.
[2] [1935] A.C. 76.
[3] [1939] O.R. 213, affirmed [1939] O.R. 627.
[4] [1961] O.R. 596, 28 D.L.R. (2d) 711.

There is, in my opinion, no express statutory power authorizing this disclosure. Part I of the Act deals with the director's powers of investigation and research and I will deal with these only to the extent that they deal with the gathering of information. Section 9 requires any person to give information under oath or affirmation, as called for by a notice in writing from the director. Section 10 authorizes him to enter any premises for the purpose of obtaining evidence. He may examine and take away any documents and make copies. If he takes away documents for copying, provision is made for the return of the originals within a certain time. Section 11(1) provides that "All books, papers, records or other documents obtained or received by the Director may be inspected by him and also by such persons as he directs." What the precise scope of this section is, I do not know. It is enough to say that it does not authorize the disclosure which the Commission proposes to make in this case. Section 12 requires any person, pursuant to notice in writing, to give evidence upon affidavit or written affirmation. This section seems to overlap s. 9 referred to above but this does not affect the question in this litigation.

In Part II, s. 16 sets up the Commission. Section 17 provides for oral examination. A member of the Commission may order this on his own motion or on the *ex parte* application of the director. It also provides for compelling the attendance of witnesses and the production of documents. The director has custody of these documents and must return them within 60 days. Up to this point in the Act, all documents, whether originals or copies, are in the hands of the director.

Then follows s. 18, which I set out in full:

18. (1) At any stage of an inquiry,

(*a*) the Director may, if he is of the opinion that the evidence obtained discloses a situation contrary to section 32 or 34 of this Act, or section 498 or 498A of the *Criminal Code*, and

(*b*) the Director shall, if so required by the Minister, prepare a statement of the evidence obtained in the inquiry, which shall be submitted to the Commission and to each person against whom an allegation is made therein.

(2) Upon receipt of the statement referred to in subsection (1), the Commission shall fix a place, time and date at which argument in support of such statement may be submitted by or on behalf of the Director, and at which such persons against whom an allegation has been made in such statement shall be allowed full opportunity to be heard in person or by counsel.

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(3) The Commission shall, in accordance with this Act, consider the statement submitted by the Director under subsection (1) together with such further or other evidence or material as the Commission considers advisable.

(4) No report shall be made by the Commission under section 19 or 22 against any person unless such person has been allowed full opportunity to be heard as provided in subsection (2).

This section authorizes the director to submit only a statement of evidence. He has done this in the two volumes above referred to and comprising 640 pages. The director may submit argument in support of his statement of evidence and other interested parties must be given a full opportunity to be heard. But it is the director who has possession of the documents and there is nothing in the Act, until proceedings for a further inquiry under s. 22 are taken, which gives the Commission any power over any documents. The hearing under s. 18 is preparatory to the report of the Commission under s. 19. It is this report which is to "review the evidence and material, appraise the effect on the public interest of the arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies."

If the Commission, after the hearing provided for in s. 18 is unable effectively to appraise the effect on the public interest, it makes an interim report giving its reasons. It then has power to require the director to make a further inquiry and only at this stage does it obtain any power over documents. By s. 22(2)(*c*) it may require the director to submit to the Commission copies of any books, papers, records or other documents obtained in such further inquiry. This gives only a very limited power over documents, restricted to those obtained in such further inquiry. Even if proceedings were going on under s. 22—and they are not—there would be no authority for the wide disclosure directed in this case. This case has not yet reached the stage provided for in s. 18, which is the hearing before the Commission. If a report is made under s. 19(1), it is significant that s. 19(2) imposes a duty on the director to return all documents, not already returned unless the Attorney General of Canada certifies that they are to be retained by the director for purposes of prosecution. My

conclusion, therefore, is that there is nothing in the Act which gives the Commission any express power over documents except in the event of a further inquiry under s. 22.

The next question is whether the power may be found by implication in the duty to afford a full opportunity to be heard under s. 18. I am satisfied that the applicant could not compel the disclosure, on the ground that, without it, it would be deprived of its statutory right. The applicant can come to this hearing with full knowledge of the allegations made against it and with full knowledge of the evidence against it as contained in the depositions (if any) of its own officers and the documents taken from its possession by the director. It is in a position to say that nothing coming from it justifies the director's statement of evidence, or that the statement should be modified in a certain way, or that the allegations made against it are unwarranted. It should be ready to say that the report to be made by the Commission to the Minister should or should not contain any criticism of the union. It should also be prepared to argue what, as far as it is concerned, should be contained in the report. There is no need of all the other material. What other people may have said, either under oral examination or in documents, is at this stage of no concern to the applicant. It is not bound by these statements, if there are any, and at this stage there is no question of the application of s. 41 of the Act. This only applies when there is a prosecution under the Act or the *Criminal Code*.

Whether full opportunity to be heard involves a right to this sort of production has been decided, adversely to the applicant, in *Advance Glass and Mirror Company Ltd. et al. v. Attorney-General of Canada and McGregor*[1] and *Re The Imperial Tobacco Company et al. and McGregor*[2]. I respectfully agree with these decisions and would apply them here. If there is no right on the part of the applicant, I can find no discretion on the part of the Commission, in the absence of statutory authorization.

Nor do I think that the power can be found in subs. (3) of s. 18, which directs the Commission to consider the statement submitted by the director together with "such

[1] [1949] O.W.N. 451.
[2] [1939] O.R. 213 (Hogg J.), affirmed [1939] O.R. 627, *per* Gillanders J.A. at p. 646.

further or other evidence or material as the Commission considers advisable." There is plenty of scope for this subsection without reading into it the power to order disclosure of documents. Any interested person has the right to submit anything that is relevant to his case but this does not enable the Commission to get the documents from the director and give them to any party.

I am therefore of the opinion that the Commission in this case has misconceived its function. This is not a preliminary inquiry in a criminal prosecution nor anything in the nature of a preliminary inquiry. It is merely a hearing for the purpose of determining what kind of report shall be made to a Minister of the Crown. A full opportunity to be heard in these circumstances does not require and does not justify all this elaboration of procedure and discovery. There is no statutory authorization for it and there is a serious risk of frustration of the whole purpose of the Act, which is directed solely to investigation and report. The right to be heard must be applied in this context.

I would allow these appeals with costs both here and in the courts below and order that the injunctions issue in the terms sought by the appellants.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J.:—The relevant facts and the terms of the *Combines Investigation Act,* hereinafter referred to as "the Act", are set out in the reasons of my brother Locke and those of my brother Judson, both of which I have had the advantage of reading. I find myself in substantial agreement with the reasons of my brother Locke and would dispose of the appeals as he proposes; I wish to add only a few observations.

In view of the fact that the director has already delivered a copy of the two-volume "Statement of Evidence" to each person against whom an allegation is made therein, nothing would be gained by considering whether each of those persons was entitled to receive the whole of the statement or only those portions thereof having relevance to the allegation made against him; but the circumstance that a person has in fact received the whole statement cannot

entitle him to receive copies of those portions of the evidence or of the documents therein referred to which are not relevant to the allegation made against him.

The powers given by the Act to the Commission and to the director are very wide, including as they do the power to compel persons to testify on oath and the power to take possession of documents which are private property. I think it clear that if it is asserted that the Commission or the director has power to give copies of the transcript of testimony given or copies of documents seized to business competitors or other persons who may have interests adverse to those of the person giving testimony or to whom the seized documents belong, the power asserted must be found in the terms of the Act.

The power is not given expressly and the question is whether it arises by necessary implication from the provisions of subs. (2) of s. 18, which require that at the hearing contemplated by the section "persons against whom an allegation has been made in such statement shall be allowed full opportunity to be heard in person or by counsel", and from the provisions of subs. (4) of s. 18 which forbid the Commission to make a report under ss. 19 or 22 "against any person unless such person has been allowed full opportunity to be heard as provided by subs. (2)."

The duty which lies on any body to which the maxim, *audi alteram partem,* applies has been stated in many cases. In *University of Ceylon v. Fernando*[1], Lord Jenkins says:

> From the many other citations which might be made, their Lordships would select the following succinct statement from the judgment of this Board in *DeVerteuil v. Knaggs* [1918] A.C. 557 at p. 560:
>
>> Their Lordships are of the opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.

I find myself unable to agree with the view of my brother Judson that unless the director chooses to produce them at the hearing provided for by s. 18 the Commission has no power over the documents seized by the director. By subs. (3) of s. 18 the duty laid upon the Commission is to consider not only the statement submitted by the

[1] [1960] 1 All E.R. 631 at p. 638.

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director but also "such further or other evidence or material as the Commission considers advisable". In my opinion, the Commission, should it consider it advisable to do so, could require the director to produce at the hearing under s. 18 any or all of the documents in his possession and the complete transcript of the evidence taken before him. By s. 19(1) a statutory duty is imposed on the Commission to make a report to the Minister in which it "shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies". The duty imposed by this subsection is not limited to a review of the "Statement of Evidence" alone; it contemplates a consideration of the evidence and material on which the "Statement of Evidence" is based, together with such further or other evidence or material as the Commission has deemed it advisable to consider pursuant to s. 18(3).

An essential part of the duty to give a full opportunity to be heard is to inform the person against whom an allegation is made of the substance of the relevant evidence, oral or documentary, on which the allegation is based; the imposition of the duty to give this information by necessary implication confers the power to give it. Nowhere in the Act can I find any other implied power to make the disclosure which the plaintiffs seek to prevent.

It is true that when the cases of *Re The Imperial Tobacco Company et al. and McGregor*[1], and *Advance Glass and Mirror Company Ltd. et al. v. Attorney-General of Canada and McGregor*[2], were decided, the commissioner was under the duty imposed by s. 13 of the *Inquiries Act*, R.S.C. 1927, c. 99, which read:

13. No report shall be made against any person until reasonable notice shall have been given to him of the charge of misconduct alleged against him and he shall have been allowed full opportunity to be heard in person or by counsel.

But, as was pointed out by Mr. Maxwell, there has been a substantial change in the scheme of the applicable legislation since the decisions referred to, in that the present

[1] [1939] O.R. 213, affirmed [1939] O.R. 627.
[2] [1949] O.W.N. 451.

Act has interposed an impartial tribunal between the director and those against whom he makes allegations. I cannot think that the tribunal so interposed and charged with the duty of giving full opportunity to be heard is without the power to furnish to one against whom an allegation is made the relevant evidence and documents on which that allegation is based. I have already indicated my opinion that the Commission has no further power of disclosure.

We are not, in the case at bar, called upon to consider how a person against whom an allegation is made should proceed to obtain the information if it were denied to him. The question before us is as to the relief to which the plaintiffs are entitled when they have been advised by the Commission that it proposes to give information the disclosure of which is beyond the implied power referred to above.

In my opinion the plaintiffs have claimed the appropriate relief. For the reasons given by my brother Locke I agree with his conclusion that injunctions are not now necessary in view of the fact that the Commission has reopened the question as to what information it will disclose and will no doubt decide that question in accordance with the declaration proposed by my brother Locke and which I agree should be made.

It may well be, as my brother Judson suggests, that the information contained in the "Statement of Evidence" already delivered will, in the case at bar, prove sufficient to give to each person against whom an allegation is made a fair opportunity "to correct or controvert any relevant statement brought forward to his prejudice" and that there will be no necessity of supplying any further information; but, in my respectful opinion, the decision as to what further information, if any, is necessary is committed to the Commission subject to the limitations set out in the declaration which our judgment directs to be made.

I would dispose of these appeals as proposed by my brother Locke.

Appeals allowed in part, Taschereau, Fauteux, Abbott *and* Judson JJ. *dissenting.*

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Solicitors for the plaintiffs, appellants: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

Solicitors for the defendants, respondents: Harper, Gilmour, Grey, De Vooght & Levis, Vancouver.

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*Feb. 7, 8
Mar. 26

HOWE SOUND COMPANY ....APPELLANT;

AND

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS (CANADA), LOCAL 663 .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Certiorari—Collective agreement—Union's grievance referred to board of arbitration—Whether certiorari lies against arbitration board—Labour Relations Act, 1954 (B.C.), c. 17.

The respondent union was certified as bargaining representative of the employees of company A which later ceased operations and dissolved. Subsequently the appellant company was incorporated and took over the operations of A and in due course entered into a collective agreement with the respondent. By article 23 of the agreement, the appellant agreed to contribute to a retirement benefit plan for employees and agreed "to recognize past service of those ex-employees of [A] who have not withdrawn from the plan prior to the date of this agreement". The union alleged that the company refused to carry out the provisions of article 23 the effect of which, as claimed by the union, was to cover all former employees of A who had not withdrawn from the plan prior to the date of the collective agreement, whether they had been rehired by the appellant company or not. The matter was referred to a board of arbitration the creation of which was provided for by the agreement; two members were appointed by the parties and a third by the Labour Relations Board pursuant to a request of the parties.

The company consistently maintained its position that the alleged grievance was not a proper subject for arbitration under the terms of the agreement. The majority of the arbitration board ruled that the board had jurisdiction to proceed with the hearing of the union's grievance. On an application by the company for a writ of *certiorari*, it was directed that the proceedings be moved into the Supreme Court of British Columbia and that the ruling of the board be quashed. In the Court of Appeal, for the first time, the question was raised whether *certiorari* would lie against the board; that Court held unanimously that it would

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PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Martland JJ.

not on the ground that *certiorari* does not lie against an arbitrator or arbitration board unless the arbitrator or board is a statutory arbitrator or statutory board. From that judgment the company appealed to this Court. It was argued that the provision in the agreement that the decision of the board shall be final, read in the light of s. 22(1) of the *Labour Relations Act*, 1954 (B.C.), c. 17, requiring "a provision for final and conclusive settlement . . . of all differences", had the effect of prohibiting recourse to the courts by either party to question the jurisdiction of the board or the validity of its award, and thus left prohibition and *certiorari* as the only available remedies.

Held: The appeal should be dismissed.

The appellant's submission that by the combined effect of ss. 21, 22, 24 and 60 of the *Labour Relations Act* the arbitration board set up under the terms of the collective agreement was, in substance, a statutory board to which the parties were required to resort was rejected.

Even if the agreement had not provided that it was made in recognition of and subject to all Dominion and provincial regulations pertaining thereto and to the laws of British Columbia, and that the decision of the arbitration board should be final, insofar as such decision was not inconsistent with any pertinent law, order or directive, words clearer than those used in the agreement and in the statute would be necessary to have the effect of ousting the jurisdiction of the courts. It was open to the parties should occasion arise, to question the jurisdiction of the board or the validity of any award it makes in such manner as is permitted by the *Arbitration Act*, R.S.B.C. 1960, c. 14 or by the common law. For these reasons and those of the Court below this arbitration board was not one to which *certiorari* lay and consequently the appeal failed.

R. v. National Joint Council for the Craft of Dental Technicians, [1953] 1 Q.B. 704, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], setting aside a judgment of McInnes J. given on an application for a writ of *certiorari* and directing that the proceedings before a board of arbitration be moved into the Supreme Court of British Columbia and quashing a decision of the board.

J. J. Robinette, Q.C., and *J. G. Alley,* for the appellant.

W. J. Wallace, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for British Columbia[1] whereby a judgment of McInnes J. was set aside. The last-mentioned judgment was given on an application for a writ of *certiorari* and directed that the proceedings before a board of arbitration

[1] (1961-62), 36 W.W.R. 181, 29 D.L.R. (2d) 76.

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be moved into the Supreme Court of British Columbia and that a decision or ruling of the board made on November 18, 1960, be quashed.

In order to make clear the questions which arise on this appeal it is necessary to set out the facts in some detail.

On June 8, 1944, the respondent was certified as bargaining representative of the employees of Britannia Mining and Smelting Company Limited, hereinafter sometimes referred to as "the Britannia Company". On December 23, 1958, the Labour Relations Board, established under the *Labour Relations Act*, 1954 (B.C.), c. 17, varied the certificate of June 8, 1944, by deleting the name of the Britannia Company each time it appeared therein and substituting in its place the name Howe Sound Company.

The details of the arrangement by which the appellant took over the operations formerly carried on by the Britannia Company are not set out in the record before us. The certificate of the Labour Relations Board dated December 23, 1958, contains the recital that the Board is satisfied that the name of the employer has been changed to "Howe Sound Company". The factum of the appellant puts the matter as follows:

> The appellant was successor to Britannia Mining & Smelting Co. Ltd. That company ceased its operations some considerable time before the present agreement came into force and the company dissolved. Subsequently the present company was incorporated and commenced operations and in due course entered into the present Collective Agreement. The respondent had obtained the exclusive right to represent the appellant's employees in collective bargaining by a ruling of the Labour Relations Board dated November 23rd, 1958.

In the factum of the respondent it is put as follows:

> The employer's operation was taken over by the appellant, Howe Sound Company, and the respondent's bargaining certificate from the provincial Labour Relations Board was amended accordingly on December 23, 1958.

The Standard Life Assurance Company issued a group pension policy to the Britannia Company dated August 21, 1956. By endorsement, dated February 27, 1959, attached to the policy it is recited that by an assignment dated August 9, 1958, the Britannia Company had assigned all its rights in the policy to the appellant and it is declared

[1] (1961-62), 36 W.W.R. 181, 29 D.L.R. (2d) 76.

and agreed that with effect from the last-mentioned date the person assured and employer under the policy shall be Howe Sound Company.

The policy provides pensions and death benefits for employees. The premiums are payable partly by the employees who participate in the plan and partly by the appellant. Pursuant to the policy a certificate and a booklet were given to each participating employee. Membership in the plan was made compulsory for new employees and irrevocable for those who had joined it so long as they continued in the employment of the appellant.

Paragraph 22 of the booklet appears to be in accordance with condition 8 of the policy; it reads as follows:

22. WHAT HAPPENS IF I LEAVE THE COMPANY'S SERVICE?

(*a*) You may take a return of all your contributions with compound interest in cash (See Clause 24);

or (*b*) You may take a paid-up deferred retirement benefit for the amount secured by your past contributions with payments commencing at your Normal Retirement Age.

If you leave after not less than five years' participation in the Plan as a contributing member and elect option (*b*), you will also receive the undernoted percentage of the retirement benefit purchased by the Company's contributions on your behalf up to the date of withdrawal, in the form of paid-up retirement benefit at Normal Retirement Age.

Years of participation in the Plan	*Percentage of retirement benefit purchased by the Company's contributions*
5	10%
6	20%
7	30%
8	40%
9	50%
10	60%
11	70%
12	80%
13	90%
14 (or within 10 years of Normal Retirement Age)	100%

Paragraph 29 of the booklet reads as follows:

29. DOES THE PLAN AFFECT MY FUTURE EMPLOYMENT?

The Plan does not guarantee you future employment with the Company nor does it in any way restrict the right of the Company to terminate your employment.

A collective agreement, dated November 27, 1958, and effective from December 1, 1958, was entered into between the appellant and the respondent. This agreement was to

remain in effect for two years and to remain in full force thereafter "until superseded by a new agreement or until negotiations are broken off by failure to agree."

Clauses A and B and the opening sentence of clause C of article 16 of the agreement read as follows:

ARTICLE 16.

GRIEVANCE PROCEDURE:

A. In the case of any dispute or grievance arising as to the interpretation of this Agreement or any local agreement made in connection therewith, whether the dispute or grievance is claimed by the Company to have arisen, or by any persons employed, or by the men as a whole, then the parties shall endeavour to settle the matter as hereinafter provided. But before any grievances or disputes shall be submitted to the Grievance Committee, the person or persons affected shall endeavour, by personal application to the shiftboss or foreman in charge of the work where the dispute arises, to settle the matter. In a case where a workman is making a personal application as referred to above and wishes to be accompanied by one member of the Grievance Committee, he shall be permitted to do so. The first step in the grievance procedure may be submitted in writing.

B. In the case of any local dispute arising in or about the property of the Company, and which there has been a failure to reach an agreement between the employee and the shiftboss or foreman in charge of the work, the matter shall be submitted in writing to the Grievance Committee for that particular plant and to the Superintendent who shall endeavour to settle the matter and, if they agree, their decision shall be final. In the event of the failure of the Plant Grievance Committee and the Superintendent of the plant or department to settle any dispute so referred to them, the matter in dispute shall be submitted in writing to the Manager, and the representative of the International Union of Mine, Mill and Smelter Workers or the General Grievance Committee of the local Union, and all parties shall endeavour to settle the dispute as speedily as possible; if they agree their decisions shall be final. In the event of their failure to agree, they shall endeavour to select an Arbitration Board of three (3). The arbitrator selected by the Union and the one selected by the Company shall be selected within five (5) working days (excluding Sundays and holidays) following the receipt of the written request originating the arbitration proceedings. Those who are selected shall, within three (3) working days (excluding Sundays and holidays) after the appointment of the last member of the Board, choose an additional member who shall be Chairman. In the event of failure to agree upon the additional member to act as Chairman, the parties involved shall request the Labour Relations Board (B.C.) to appoint the Chairman, further requesting that this appointment be made within seven (7) days of date such request is received (excluding Sundays and holidays). The decision of the Arbitration Board shall be final and binding on both parties, insofar as such decision is not inconsistent with any law, order or directive of any Government, agency of Government, or other body constituted to enact, administer or issue such law, order or directive, and such authority has jurisdiction on the date of the rendering of such decision.

In no event shall the Board have the power to alter, modify or amend this Agreement in any respect.

Expenses and compensation of the arbitrators selected by the parties as members of the Arbitration Board, shall be borne by the respective organizations selecting them. The expense and compensation, if any, of the Chairman of the Arbitration Board shall be divided equally between the parties involved. The Arbitration Board shall establish its own rules of procedure. Such rules, however, must not deny the right of hearing to the parties involved in the dispute.

C. In the meantime, and in all cases while disputes are being investigated and settled, the employee or employees or all other parties involved must continue to work pending investigation and until final decision has been reached.

Article 25 of the agreement reads as follows:

ARTICLE 25

THIS AGREEMENT between the Union and the Company is made in recognition of and subject to the provisions of all Dominion and/or Provincial regulations pertaining thereto and to the laws in force in the Province of British Columbia from time to time.

Article 23 of the agreement reads as follows:

ARTICLE 23

RETIREMENT PLAN:

The Company agrees to contribute to a Retirement Benefit Plan in accordance with an agreement between Howe Sound Company and The Standard Life Assurance Company. For the purpose of this Article the Company agrees to recognize past service of those ex-employees of Britannia Mining and Smelting Co. Limited (dissolved) who have not withdrawn from the Plan prior to the date of this agreement.

Under date of September 29, 1960, a document headed "Grievance Report, Local 663, I.U.M.M. & S.W." was signed by G. A. Bennett, business agent of the respondent. It reads as follows:

Nature of Grievance.

The effect of Article 23 of the current collective agreement signed and agreed between the Howe Sound Company Britannia Division and Local 663, of the International Union of Mine, Mill and Smelterworkers (Canada) of Britannia Beach, B.C. is to cover all former employees of the Britannia Mining and Smelting Co. Limited (whether such employees were hired by the Howe Sound Company Britannia Division or not) following the shutdown of February 28, 1958 as regards their past service with the Britannia Mining and Smelting Co. Ltd., who had not withdrawn from the Plan prior to the date of the said collective agreement; but the Company has refused to carry out the provisions of Article 23.

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By letter dated September 29, 1960, Mr. Bennett wrote to Mr. Pringle, the manager of the appellant. This letter reads in part:

At our meeting today it was agreed by the Company and the Union that the above grievance be referred to a Board of Arbitration as we had been unable to reach agreement.

It has also been mutually agreed that, as discussions had already taken place between Mr. G. A. Bennett, Business Agent of Local 663 and the Management of Howe Sound Company (Britannia Division) the first two stages of grievance proceedings have been completed.

The reply to this letter is dated October 5, 1960. It was written by the solicitors for the appellant and reads in part:

With reference to the second paragraph of your letter, we wish to advise that the Company reserves the right to take the position before the Board of Arbitration that the alleged grievance is not properly arbitrable under Article 16 of the present Collective Bargaining Agreement. We are strengthened in this position as it appears from the prior discussions which have taken place that this is an attempt on the part of the Union to have determined whether or not certain ex-employees of Britannia Mining and Smelting Co. Limited are still covered by the Group Pension Policy underwritten by The Standard Life Assurance Company. In our opinion, if any ex-employee claims to be entitled to participate in the scheme to a greater extent than to have paid back to him his contributions plus interest, he should begin a court action against the assurance company and our client. A court decision would be binding on all the parties. Such is not the case with respect to a decision of the Board of Arbitration. For example, how could a decision in favour of the Union or the Company bind the assurance company or an ex-employee who has not been rehired by Howe Sound? In these circumstances, we will have to contend before the Board that, in part at least, the matter is not properly a grievance.

The appellant has consistently maintained its position that the alleged grievance is not a proper subject for arbitration under the terms of article 16 and I think it clear that by taking part in the arbitration in the manner hereafter mentioned it has not lost its right to assert that the arbitrators have no authority to make an award. It is not necessary to set out the repeated protests made on behalf of the appellant.

The law on this point is correctly stated in the following passages in Russell on Arbitration, 16th ed., at pages 162 and 163:

If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before the

arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter.

* * *

Continuing to take part in the proceedings after protest made does not amount to consent.

The respondent appointed Mr. Harvey Murphy and the appellant appointed Mr. J. A. C. Ross to be members of the board of arbitration. They failed to agree upon a third member and on October 17, 1960, requested the Labour Relations Board to appoint a third member to act as chairman. Pursuant to this request the Labour Relations Board appointed Professor C. B. Bourne.

It is stated in the respondent's factum that the board met on November 4, 1960, that counsel for the appellant raised a preliminary objection to the board's jurisdiction, that the board reserved its decision on the objection and adjourned the hearing until November 21, 1960.

In a letter to Professor Bourne dated November 9, 1960, the solicitors for the respondent refer to suggestions made by him at "the first sittings of the Arbitration Board on the 4th instant". The letter reads in part:

In reference to the four specific questions which were asked, I am instructed as follows:

1. As to the identity of the person or persons on whose behalf the grievance is taken: this grievance is taken by the above Union on behalf of all ex-employees of the Britannia Company who had not, prior to the 1st day of December, 1958, withdrawn from the retirement plan in question. In this connection, it should be made clear that the Union does not propose to arbitrate the case of a single individual, but desires to arbitrate the rights of this group under Section 23.

2. As to whether the grievance and arbitration are stated under Article 16 A or B: the grievance and arbitration are under Article 16 A.

3. As to the manner in which it claimed the company has failed to recognize the rights of the ex-employees in question: this, of course, is a matter of evidence which will be presented before the Board at the appropriate time.

4. As to the issue of whether the dispute is between the parties to the agreement: the Union desires to submit argument on this issue at the appropriate time.

On November 18, 1960, the board gave its decision, written by the chairman and concurred in by Mr. Murphy.

After reciting the making and reiteration of the appellant's objection to the jurisdiction of the board the reasons continue:

The objection is based on the grounds (i) that the Union is making a claim on behalf of persons who are not employees of the Company and are not covered by the collective agreement, and (ii) that the disposition of the claim will involve determining the rights of an insurance company which is not a party to the collective agreement.

The dispute is about the meaning of Article 23 of the collective agreement made by the Company and the Union. The Union is contending that by it the Company made certain promises to the Union in relation to former employees of the Britannia Mining & Smelting Co. Ltd., whose successors the Company is, and that those promises are not being fulfilled.

By Article 16 of the collective agreement the Company and the Union agreed to arbitrate "any dispute or grievance arising as to the interpretation of this agreement . . . whether the dispute or grievance is claimed by any person employed, or by the men as a whole . . ." when they fail to reach agreement about such disputes. The Company argues that this article only applies to the grievances of specific present employees.

This interpretation of Article 16 is, in my opinion, too restrictive. When the Union entered into the agreement with the Company it was acting on behalf of "the men as a whole" and when it alleges that the Company is not complying with an article of the agreement, it is complaining on behalf of "the men as a whole". It is not necessary for the Union to show that some particular employee is prejudiced. If the Company fails to carry out any term of the collective agreement, it is a matter of concern for the whole body of employees covered by the agreement and they have a grievance even though the immediate beneficiary of the promise by the Company may be a third party to the agreement. I hold, therefore, that the grievance of the Union, involving as it does the interpretation of an article of the collective agreement, comes within the provisions of Article 16.

The objection that the rights of third parties are involved is also, in my opinion, not sufficient ground for holding that the Board cannot deal with the dispute between the parties, to this collective agreement. It is true that the decision of the Board cannot affect the rights of third parties. But that is not sufficient reason for the Board's refusing to declare the rights of the parties to the collective agreement as provided for by Article 16. In any case, at the present stage of this arbitration, before the hearing has even started, it is not certain that any rights of third parties will be adversely affected by anything the Board decides.

My decision, then, is that the Board has jurisdiction to proceed with the hearing of the Union's grievance.

It is stated in the respondent's factum that the board reconvened on November 21, 1960, that at the board's request counsel agreed on a formulation of the issue before it, that

the union called its first witness and the proceedings stopped upon the board being served with the notice of motion for a writ of *certiorari*. The issue formulated reads as follows:

Question Before Board

November 21, 1960.

Does Article 23 of the Collective Agreement dated December 1, 1958 impose on the Company the obligation to make pension contributions for past service of ex-employees of Britannia Mining and Smelting Co., Limited who had not withdrawn prior to the date of the agreement from the Retirement Benefit Plan referred to in that Article and who have not been rehired by the Company since that date?

John Stanton
Counsel for Local 663
I U M M S W
Under Protest
as recorded
A. W. Fisher.

It is said in the appellant's factum that at the hearing before McInnes J. counsel for the respondent stated that none of the persons referred to in the question quoted above had been hired by the appellant.

The grounds set out in the notice of motion are lengthy but they are really little more than repetitions in various forms of ground 1(a) which reads as follows:

(a) There was no statement before the said Board or submission to it of a dispute or grievance between the said Company and the said Union or any other person, persons or body of persons entitled to claim the benefit of the collective agreement between the said Company and the said Union dated the 27th day of November, 1958;

After reading the whole record with care I am unable to say just what it is of which the union complains. It is, I think, to be regretted that the board did not require the union to state plainly what it asserts the company has done or has failed to do in contravention of the combined effect of article 23 of the collective agreement and the agreement with the Standard Life Assurance Company referred to therein. Arbitrators have implied power to order each party to deliver particulars so as to define the actual point or points in dispute between the parties; see Russell on Arbitration, 16th ed., at pages 150 and 151. However, this was not done and we must deal with the matter on the material before us.

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The proceedings in the courts below have followed a somewhat unusual course. Substantially the only question raised on the motion before McInnes J. was whether the board had jurisdiction to determine the matter referred to it, but at the commencement of his reasons the learned judge says:

> At the outset objection was taken by counsel for the company to the jurisdiction of the Board to hear and determine the matter referred to it. In the view that I take of the matter it is not necessary to determine the question of jurisdiction and I will assume for the purposes of this judgment that the Board had jurisdiction without necessarily so finding.

The learned Judge goes on to consider the terms of the collective agreement and certain sections of the *Labour Relations Act* and says in part:

> The plain meaning and intent of the whole agreement, and particularly Articles 16 and 23, is that employees of the present company who were formerly employed by the Britannia company shall retain the full benefits to which they were entitled under the pension plan which was in existence between the old company and its employees. No other meaning is possible or was ever intended to be conveyed by the terms of the present Collective Agreement and in particular, Article 23 thereof.

With the greatest respect, that was not the question which the learned Judge was called upon to decide; his function was to determine whether or not the board had jurisdiction to decide it.

In the result McInnes J. ordered that the ruling of the board be quashed.

In the Court of Appeal, for the first time, the question was raised whether *certiorari* would lie against this arbitration board; that Court held unanimously that it would not and consequently allowed the appeal without dealing with any other questions.

The issue is succinctly stated in the following paragraph in the reasons of Tysoe J.A.:

> *Certiorari* does not lie against an arbitrator or arbitration board unless the arbitrator or board is a statutory arbitrator or statutory board; that is a person or board to whom by Statute the parties must resort. Prerogative Writs of *Certiorari* and Prohibition do not go to ordinary private arbitration boards set up by agreement of parties: *R. v. National Joint Council for the Craft of Dental Technicians* [1953] 1 Q.B. 704. We must, therefore, decide whether this arbitration board is a private arbitration body set up by agreement, or a statutory board.

In *R. v. National Joint Council for the Craft of Dental Technicians*[1], Lord Goddard says at pages 707 and 708:

> But the bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction.

and at page 708:

> There is no instance of which I know in the books where *certiorari* has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is one to whom by Statute the parties must resort.

I did not understand counsel for the appellant to question the accuracy of these passages as general statements of the law. He submitted, however, that by the combined effect of ss. 21, 22, 24 and 60 of the *Labour Relations Act* the arbitration board set up under article 16 of the collective agreement is, in substance, a statutory board to which by statute the parties must resort. He argued that while its creation is provided for and its powers are conferred upon it by the agreement and two of its members are appointed by the parties and the third pursuant to the request of those two, all these things are agreed to not of the free will of the parties but under the compulsion of the statute. In support of this submission the appellant relies, amongst others, on the case of *Re International Nickel Company of Canada Limited and Rivando*[2], a unanimous decision of the Court of Appeal for Ontario.

Whether this argument is entitled to prevail must depend chiefly on the wording of the statute which is said to compel the creation of the tribunal and to require the parties to resort to it, and there are differences between the Ontario legislation and that in force in British Columbia.

The sections of the *Labour Relations Act* upon which the appellant relies read as follows:

> 21. Every person who is bound by a collective agreement, whether entered into before or after the coming into force of this Act, shall do everything he is required to do, and shall refrain from doing anything that he is required to refrain from doing, by the provisions of the collective agreement, and failure to so do or refrain from so doing is an offence against this Act.

[1] [1953] 1 Q.B. 704.
[2] [1956] O.R. 379, 2 D.L.R. (2d) 700.

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22. (1) Every collective agreement entered into after the commencement of this Act shall contain a provision for final and conclusive settlement without stoppage of work, by arbitration or otherwise, of all differences between the persons bound by the agreement concerning its interpretation, application, operation, or any alleged violation thereof.

(2) Where a collective agreement, whether entered into before or after the commencement of this Act, does not contain a provision as required by this section, the Minister shall by order prescribe a provision for such purpose, and a provision so prescribed shall be deemed to be a term of the collective agreement and binding on all persons bound by the agreement.

24. Each of the parties to a collective agreement shall forthwith, upon its execution, file one copy with the Minister.

60. Every trade-union, employers' organization, or person who does anything prohibited by this Act, or who refuses or neglects to do anything required by this Act to be done by him, is guilty of an offence and, except where some other penalty is by this Act provided for the act, refusal, or neglect, is liable, on summary conviction:

(*a*) if an individual, to a fine not exceeding fifty dollars; or

(*b*) if a corporation, trade-union, or employers' organization, to a fine not exceeding two hundred and fifty dollars.

Counsel for the appellant argues that the provision in the agreement that the decision of the arbitration board shall be final, read in the light of s. 22 (1) of the Act requiring "a provision for final and conclusive settlement . . . of all differences", has the effect of prohibiting recourse to the courts by either party to question the jurisdiction of the board or the validity of its award, and thus leaves prohibition and *certiorari* as the only available remedies.

Even if the agreement did not contain article 25 and the concluding sentence of the first paragraph of clause B of article 16, quoted above, it would be my opinion that words clearer than those used in the agreement and in the statute would be necessary to have the effect of ousting the jurisdiction of the courts. In my view it is open to the parties should occasion arise, to question the jurisdiction of the board or the validity of any award it makes in such manner as is permitted by the *Arbitration Act*, R.S.B.C. 1960, c. 14 or by the common law.

For these reasons and those given by Tysoe J.A., with which I am in substantial agreement, I have reached the conclusion that this arbitration board is not one to which *certiorari* lies and that consequently the appeal fails.

I share the view of Tysoe J.A. that the question of what the situation would be should the parties to a collective agreement fail to include in it a provision for final and conclusive settlement without stoppage of work so as to bring into operation the provisions of subs. (2) of s. 22 of the *Labour Relations Act* should be reserved for future consideration.

It is to be regretted that after hearings in three Courts the parties have not received an answer to the question whether the board has jurisdiction to deal with the matter submitted to it but having held that *certiorari* does not lie it seems to me that we can only do as the Court of Appeal did and leave the parties to whatever recourse they may have.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

Solicitors for the respondent: Stanton & Buckley, Vancouver.

NICK NYKORAK (*Defendant*) ....APPELLANT;

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AND

THE ATTORNEY GENERAL OF CANADA (*Plaintiff*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Master and Servant—Injury to member of the armed forces of Canada—Action per quod servitium amisit by Crown—Whether action lies under s. 50 of the Exchequer Court Act, R.S.C. 1952, c. 98—Validity of s. 50.

An action was brought on behalf of the Crown to recover damages in respect of the loss of the services of a member of the Canadian armed forces, due to the defendant's negligence. The Attorney General succeeded at the trial and on appeal. The defendant appealed to this Court on two grounds: (i) that the action *per quod servitium amisit* does not lie at the suit of the Crown under s. 50 of the *Exchequer Court*

*PRESENT: Kerwin C.J. and Taschereau, Locke, Judson and Ritchie JJ.

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Act, R.S.C. 1952, c. 98, which establishes the master and servant relationship between the Brown and a member of the armed services, and (ii) that the section is beyond the powers of the Parliament of Canada.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Judson and Ritchie JJ.: As far as members of the armed forces are concerned it was decided in *The King v. Richardson,* [1948] S.C.R. 57, that s. 50 of the *Exchequer Court Act* does entitle the Crown to bring the *per quod* action for disbursements for medical and hospital expenses and pay and allowances. *Attorney General of Canada v. Jackson,* [1946] S.C.R. 489, referred to.

With the present use of mechanized vehicles by the military forces, the public interest required that the Crown should be in the same position as any other master for the torts of its servants committed in the course of their employment. If the Crown was to assume this responsibility to the public, there was every reason to insist on a reciprocal right of recovery for expenses incurred as a result of injury to the statutory servant and legislation of the nature of s. 50 came squarely under head 7 (militia, military and naval service and defence) of s. 91 of the *British North America Act,* notwithstanding the fact that it might incidentally affect property and civil rights within the province.

Per Locke and Ritchie JJ.: The question as to the right of the Crown to recover for the loss of services of members of the armed forces of Canada must be taken to have been determined in *The King v. Richardson, supra. Taylor v. Neri* (1795), 1 Esp. 386, referred to.

To declare the nature of the relationship existing between the Crown and members of the armed forces for any or for all purposes is legislation in relation to the matters within the exclusive jurisdiction of Parliament under head 7 of s. 91 of the *British North America Act* and, accordingly, *intra vires.* This does not depend upon any such ground as that to do this is necessarily incidental to the powers of Parliament under head 7: it is a direct dealing with the matter within such powers.

Section 50 does not purport to create a direct and specific right in the Crown but simply purports to place the Crown in a recognized common law relation, and its rights are those arising from that relation under the rules of that law. The relation of master and servant existed between the Crown and soldiers and non-commissioned officers of the armed forces, whose employment is authorized and regulated by the *National Defence Act* within the ordinary meaning of these expressions, prior to the enactment of s. 50 and the section does nothing more than declare that to be the case. This was not to say that such relationship supports an action *per quod*: but that it does was decided by the judgment of this Court in *Richardson's* case.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Macfarlane J. for the Crown in an action *per quod.* Appeal dismissed.

M. M. McFarlane, Q.C., and *G. S. Cumming,* for the defendant, appellant.

[1] (1961), 35 W.W.R. 110, 28 D.L.R. (2d) 485.

C. R. Munro, and *J. D. Lambert,* for the plaintiff, respondent.

The judgment of Kerwin C.J. and of Taschereau, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The Attorney General of Canada sued the defendant for expenses incurred by the Crown as a result of a motor car accident in which a soldier was injured. The defendant was found wholly to blame for the accident. The expenses were $867.45 for medical and hospital treatment and $563 for the soldier's pay and allowances paid by the Crown during his period of incapacity. The soldier himself recovered damages for his personal injuries and that question is not involved in the appeal. The Attorney General succeeded at the trial and on appeal[1] and the defendant now appeals to this Court on two grounds, namely, that the action *per quod servitium amisit* does not lie at the suit of the Crown under s. 50 of the *Exchequer Court Act* and that the section is beyond the powers of the Parliament of Canada. The section reads:

> For the purpose of determining liability in any action or other proceeding by or against Her Majesty, a person who was at any time since the 24th day of June, 1938, a member of the naval, army or air forces of Her Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

It was enacted following the decision in *McArthur v. The King*[2], in which a claim against the Crown under s. 19(*c*) of the *Exchequer Court Act* had been rejected on the ground that a soldier whose negligence was in question was not a servant of the Crown. The meaning of s. 50 is plain. It legislates away the *McArthur* decision and it also applies to proceedings brought by the Crown. In both cases the member of the armed forces is deemed to be a servant of the Crown.

The argument now put forward is that the legislation has succeeded in imposing liability on the Crown on the ground of a master and servant relationship but has failed in its attempt to enlarge the rights of the Crown because it still does not make the soldier into the kind of servant for loss of whose services the *per quod* action will lie. It is unnecessary here to repeat the detailed historical surveys

[1] (1961), 35 W.W.R. 110, 28 D.L.R. (2d) 485.
[2] [1943] Ex. C.R. 77, 3 D.L.R. 225.

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of this form of action which are to be found in *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.)*[1], and *Commissioner for Railways (N.S.W.) v. Scott*[2] As far as members of the armed forces are concerned it was decided in *The King v. Richardson*[3], that s. 50 does entitle the Crown to bring this action for disbursements for medical and hospital expenses and pay and allowances. This decision was foreshadowed in *Attorney-General of Canada v. Jackson*[4], where the Crown's claim failed only because the soldier himself, as a gratuitous passenger, had no cause of action against the driver of the car in which he was a passenger. That is all that these cases decide but they are conclusive of the present case. The result follows on the plain meaning of the enactment which merely says to a wrongdoer that it is not cheaper to injure a soldier than a civilian because the Crown assumes to look after a soldier during his period of disability.

The constitutional argument is that s. 50 of the *Exchequer Court Act* does not deal with the relations between the Crown and a soldier in such a way as to bring the matter within head 7 of s. 91 and that it is legislation in relation to matters falling within subss. 13 and 16 of s. 92 of the *British North America Act.* The submission is that the true nature of the legislation is to create a legal relationship between the Crown and a member of the services for the purpose of conferring civil rights of action upon the Crown and upon third persons, and that the creation of the relation of master and servant provided in the section is not necessary to the exercise of full legislative power over militia, military and naval service and defence.

There can be no question of the Crown's right to assume liability for the conduct of a member of the armed forces based upon a relationship of master and servant. The only possible constitutional objection to s. 50 must be to the imposition of liability upon a member of the public in the circumstances of the *Richardson* case. The only previous mention of this matter is in the judgment of Kellock J. in the *Jackson* case, *supra,* at p. 496, where he expressed the

[1] [1955] A.C. 457, 1 All E.R. 846.
[2] (1959-60), 33 A.L.J.R. 126.
[3] [1948] S.C.R. 57.
[4] [1946] S.C.R. 489, 2 D.L.R. 481.

opinion that the legislation was within s. 91(7). He followed *Grand Trunk Railway of Canada v. Attorney-General of Canada*[1], where Dominion legislation in relation to the terms of employment imposed by railway companies within Dominion jurisdiction upon their employees was upheld as being a law ancillary to railway legislation notwithstanding the fact that it affected civil rights within the province.

The appellant's argument in this case seems to me to be unduly restrictive of Parliament's exclusive jurisdiction under s. 91(7). Military forces cannot operate now in this day of mechanization without using all the means of communication that are available. They do not operate in isolation in camps or on routes over which they have exclusive use. They are part and parcel of the everyday life of the country. With this use of mechanized vehicles, the public interest requires that the Crown should be in the same position as any other master for the torts of its servants committed in the course of their employment. If the Crown is to assume this responsibility to the public, there is every reason to insist on a reciprocal right of recovery for expenses incurred as a result of injury to the statutory servant and legislation of this kind comes squarely under head 7 of s. 91, notwithstanding the fact that it may incidentally affect property and civil rights within the province. It is meaningless to support this legislation, as was done in the *Grand Trunk* case, on the ground that it is "necessarily incidental" to legislation in relation to an enumerated class of subject in s. 91.

It is also of some significance that the Attorney-General of British Columbia, although duly notified, did not appear in the proceedings in the provincial courts and that when, pursuant to an order of the Chief Justice of Canada, notice was served on the Attorney-General of each province, none of them chose to intervene in this Court.

I would dismiss the appeal with costs.

The judgment of Locke and Ritchie JJ. was delivered by

LOCKE J.:—This action was brought on behalf of the Crown to recover damages in respect of the loss of the services of Corporal E. E. Sims of the Royal Canadian Air

[1] [1907] A.C. 65, 76 L.J.P.C. 23.

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Force, due to the negligence of the appellant. Sims was serving at the Royal Canadian Air Force station at Sea Island where he was employed as an airframe mechanic.

As a member of the armed forces of Canada his relations with the Crown and his duties as a soldier were subject to and regulated by the provisions of the *National Defence Act,* R.S.C. 1952, c. 184, and regulations made under that statute. Section 50 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, provides that, for the purpose of determining liability in any action or other proceeding by or against Her Majesty, a person who was at any time since June 24, 1938, a member of the naval, army or air forces of Her Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

That portion of the section which refers to actions against the Crown appears to have been added as an amendment to the Act following the decision in *McArthur v. The King*[1], in which the President of the Exchequer Court had held that a member of the non-permanent active militia of Canada on active service was not an officer or servant of the Crown, within the meaning of s. 19(*c*) of the *Exchequer Court Act,* R.S.C. 1927, c. 34. That decision did not afford any reason for the reference in the amendment to the status of such persons for the purpose of determining liability in an action brought by the Crown.

In my opinion, the question as to the right of the Crown to recover for the loss of services of members of the armed forces of Canada, such as Sims, must be taken to have been determined by the judgment of this Court in *The King v. Richardson*[2]. There the soldier for the loss of whose services the action was brought was a second lieutenant who was injured in a motor vehicle accident. In the Exchequer Court[3], O'Connor J. decided that the action did not lie at the suit of the Crown for the loss of the services of a member of the armed forces. That decision was reversed by the unanimous decision of this Court. It is, however, said that a contention advanced by the appellant in this matter, that the action *per quod servitium amisit* is restricted to cases where the servant is employed in a

[1] [1943] Ex. C.R. 77, 3 D.L.R. 225. [2] [1948] S.C.R. 57, 2 D.L.R. 305.
[3] [1947] Ex. C.R. 55, 4 D.L.R. 401.

menial or domestic capacity, was not considered. The authority for this argument is the decision of Chief Justice Eyre in *Taylor v. Neri*[1], which has been referred to with approval in the Court of Appeal in *Inland Revenue Commissioners v. Hambrook*[2]. Eyre C.J. is reported to have said in that case that the person whose services were said to have been lost and who was a hired singer was not a servant at all.

I have examined the case and the factums in *Richardson's* case in this Court and while it is true that *Neri's* case is not mentioned in either factum the subject was canvassed extensively in the factum filed on behalf of the Crown and dealt with at length in the judgments delivered in this Court, and the question should be taken to be concluded.

The appellant's contention that s. 50, in so far as it declares that members of the armed forces shall be deemed to be servants of the Crown for the purpose of determining liability in actions brought by Her Majesty is *ultra vires*, is, in my opinion, ill founded.

This question was raised in this Court in the case of *Attorney-General of Canada v. Jackson*[3], but in that matter it was unnecessary to decide the point since the action for the loss of the services of a soldier on active service failed on the ground that the soldier himself had no right of action against the defendant. The question was, however, discussed by Kellock J. who considered that the section could be supported under head 7 of s. 91 of the *British North America Act*. Militia, military and naval service and defence under that heading are declared to be within the exclusive legislative authority of Parliament.

In my opinion, to declare the nature of the relationship existing between the Crown and members of the armed forces for any or for all purposes is legislation in relation to the matters within the exclusive jurisdiction of Parliament under head 7 and, accordingly, *intra vires*. This does not depend, in my view, upon any such ground as that to do this is necessarily incidental to the powers of Parliament under head 7: it is a direct dealing with the matter within such powers.

[1] (1795), 1 Esp. 386, 170 E.R. 393. [2] [1956] 2 Q.B. 641, 3 All E.R. 338.
[3] [1946] S.C.R. 489, 2 D.L.R. 481.

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As pointed out by Kellock J. in *Richardson's* case (p. 67), the section does not purport to create a direct and specific right in the Crown but simply purports to place the Crown in a recognized common law relation, and its rights are those arising from that relation under the rules of that law. I am of the opinion that the relation of master and servant existed between the Crown and soldiers and non-commissioned officers of the armed forces, whose employment is authorized and regulated by the *National Defence Act* within the ordinary meaning of these expressions, prior to the enactment of s. 50 and that that section does nothing more than declare that to be the case. This is not to say that such relationship supports an action *per quod*: but that it does is decided by the judgment of this Court.

The earlier decision of this Court in *Larose v. The King*[1], dealing with the status of a member of the militia established under the *Militia Act*, R.S.C. 1886, c. 41, turned upon considerations which do not apply in the present matter.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Cumming, Bird & Purvis, Vancouver.

Solicitor for the plaintiff, respondent: E. A. Driedger, Ottawa.

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NELSON JOHN IMBLEAU, DOUGLAS MILLAR and JAMES DAVID KIMMERLY, on their own behalf and on behalf of all other members of Oil, Chemical and Atomic Workers International Union, Local 16-14 .... APPELLANTS;

AND

BORA LASKIN, Q.C., C. L. DUBIN, Q.C., and MICHAEL O'BRIEN and POLYMER CORPORATION LIMITED .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour—Collective agreement—Breach by union of no-strike clause—Power of arbitration board to award and assess damages—Certiorari proceedings.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Martland JJ.

[1] (1901), 31 S.C.R. 206.

A collective agreement entered into by a union and a company (the labour relations between the company and its employees being governed by the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152) provided a procedure for the disposition of grievances, and grievances not settled could be referred to a board of arbitration. The latter was not to have power to alter or change any of the provisions of the agreement or to give any decision inconsistent therewith. A board of arbitration considered an alleged breach by the union of a no-strike clause in the agreement; it decided that there had been such a breach, that the union was responsible and liable in damages for it, and directed that the amount of damages be determined after a further hearing.

Subsequently the union challenged the authority of the board to award and assess damages against the union for this breach of the agreement. The board, by a majority award, rejected this challenge to its authority and the union then launched a motion for an order of *certiorari* and prohibition directed to the board's members. The judgment dismissing the motion was affirmed by the Court of Appeal and by leave of that Court the union further appealed. It was submitted that the jurisdiction of the board in dealing with the dispute was limited to making a finding as to whether or not the union had violated "the no-strike clause" and that the board was without power to award any consequential relief.

Held: The appeal should be dismissed.

The argument of counsel for the appellant that the agreement gave no express power to the board to award and assess damages and that the Courts below had erred in construing the agreement as giving such a power failed.

Having reached the opinion that the motion was rightly dismissed on the merits, no opinion was expressed as to whether it might have been dismissed *in limine* on the procedural objection had it been taken that a board of arbitration proceeding under the *Industrial Relations and Disputes Investigation Act* is not a public tribunal with respect to whose decisions *certiorari* lies.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of McRuer C.J.H.C. dismissing an application for an order of *certiorari* and prohibition directed to the members of a board of labour arbitration. Appeal dismissed.

David Lewis, Q.C., and *T. E. Armstrong*, for the appellants.

J. J. Robinette, Q.C., and *J. W. Healy*, for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by the Court of Appeal for Ontario, from a judgment of that Court[1] affirming a judgment of McRuer

[1] [1961] O.R. 438, 28 D.L.R. (2d) 81, *sub nom. Re Polymer Corporation & Oil Chemical & Atomic Workers International Union, Local 16-14.*

C.J.H.C. which dismissed the appellants' motion for an order of *certiorari* and prohibition directed to the respondents Laskin, Dubin and O'Brien, members of a board of arbitration, hereinafter sometimes referred to as "the board".

The respondent Polymer Corporation Limited, hereinafter referred to as "Polymer" entered into a collective agreement with Oil, Chemical and Atomic International Union, Local 16-14, hereinafter referred to as "the union", which was to remain in force from February 27, 1957, to July 7, 1958, and to be automatically renewed from year to year thereafter unless a specified notice was given.

The labour relations between Polymer and its employees are governed by the *Industrial Relations and Disputes Investigation Act,* R.S.C. 1952, c. 152.

Paragraph 8.01 of the collective agreement is as follows:

8.01—

The Union agrees that during the life of the agreement there will be no strike and the Company agrees that there will be no lockout.

On February 7, 1958, there was a stoppage of work at the plant and on February 10, 1958, Polymer filed a written grievance with the union reading as follows:

This grievance is submitted to the Union under Article 6.05 of the Agreement.

The Company alleges violation of Article 8.01 of the Agreement by reason of the strike which occurred on Friday, February 7th, 1958. The Company claims full compensation for its losses suffered as a result of this violation.

The parties failed to settle the grievance and Polymer requested in writing that it be submitted to arbitration in accordance with article 7.01 of the agreement which reads as follows:

7.01—

Both parties to this Agreement agree that any alleged misinterpretation or violation of the provisions of this Agreement, including any grievance which has been carried through the prescribed steps of the Grievance Procedure outlined in Article VI and which has not been settled, will be referred to a Board of Arbitration at the written request of either of the parties hereto, provided that such requests must be received not later than ten (10) regular working days after a decision has been rendered as provided in step 3 of the Grievance Procedure.

The board of arbitration was established in accordance with the relevant provisions of the agreement. By an award dated September 4, 1958, Messrs. Laskin and O'Brien, decided that there had been a violation of article 8.01 of the agreement, that the union was responsible for such breach and liable in damages for it and directed that the amount of damages be determined after a further hearing.

Subsequently the union challenged the authority of the board to award and assess damages against the union for this breach of the collective agreement. After hearing further argument and receiving written submissions on this point, the board issued a majority award dated November 10, 1959, which rejected the challenge to the board's power to award damages and stated that the board would proceed to assess the damages at a hearing to be convened. The union then launched the motion which was heard by McRuer C.J.H.C.

Other provisions of the collective agreement relevant to the question whether the board has jurisdiction to award damages are as follows:

6.01—(in part)

Parties to this Agreement are agreed that it is of the utmost importance to adjust grievances and disputes as quickly as possible.

* * *

6.05—

Any dispute arising between the Company and the Union regarding the administration, interpretation, alleged violation, or application of this Agreement may be submitted in writing by either party as Step No. 3 of the Grievance Procedure.

* * *

7.03—

The Board of Arbitration shall not have power to alter or change any of the provisions of this Agreement or to substitute any new provisions for any existing provisions nor to give any decision inconsistent with the terms and provisions of this Agreement.

7.04—

The decision of the majority shall be the decision of the Arbitration Board, and shall be binding upon both parties.

The main argument of counsel for the appellant is that the agreement gives no express power to the board to award and assess damages and that the Courts below have erred in construing the agreement as giving such a power. He submits that the jurisdiction of the board in dealing with the dispute formulated in the written grievance filed by Polymer was limited to making a finding as to whether or

not the union had violated "the no-strike clause" in the agreement and that the board was without power to award any consequential relief.

On this branch of the matter I find myself, as did the Court of Appeal, in complete agreement with the reasons of McRuer C.J.H.C. and for the reasons given by him I would dismiss the appeal.

Before parting with the matter mention should be made of an alternative ground on which it is submitted in the factum of the respondent that the appeal should be dismissed. It is stated as follows:

> A Board of Arbitration proceeding under the *Industrial Relations and Disputes Investigation Act* is not a public tribunal with respect to whose decisions *certiorari* lies.

While counsel for the respondent did not press this point he did not abandon it; in reply counsel for the appellant relied chiefly on the decision of the Court of Appeal for Ontario in *Re International Nickel Company of Canada Limited and Rivando*[1].

It is not necessary to deal with this point and, in my opinion, we should not do so.

There is nothing in the reasons delivered in the Courts below to indicate that the point was taken there. Early in his reasons the learned Chief Justice of the High Court says:

> The only point at issue in this application is whether the Board of Arbitration has power to award and assess damages for breach of the collective agreement.

Had the point that *certiorari* does not lie been raised before the learned Chief Justice I think it certain that he would have mentioned it and probable that he would have dealt with it before considering on its merits the question whether the board had jurisdiction to award damages; but he would not have been bound to follow that course. If he had seen fit he might have first considered the merits and if on the merits the motion failed it would have become unnecessary to deal with the procedural point. If, on the other hand, he had reached the conclusion on the merits that the board did not have jurisdiction to award damages, it would then have become necessary to determine whether the board was a tribunal to which *certiorari* would lie.

[1] [1956] O.R. 379, 2 D.L.R. (2d) 700.

The merits were fully inquired into in the Courts below and in the argument before us, and having reached the opinion that the motion was rightly dismissed on the merits I express no opinion as to whether it might have been dismissed *in limine* on the procedural objection had it been taken.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Jolliffe, Lewis & Osler, Toronto.

Solicitors for the respondents: Miller, Thompson, Hicks, Sedgewick, Lewis & Healy, Toronto.

SAMUEL LEVINE AND HYMAN LEVINE (*Plaintiffs*) .... APPELLANTS;

1961 *Nov. 13

AND

1962 Jan. 23

FRANK W. HORNER LIMITED (*Defendant*) .... RESPONDENT.

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

Real property—Sale of building—Bulge on front wall—Examination by experts—Whether latent defect—Civil Code, art. 1522, 1523.

The plaintiffs purchased from the defendant a building which had been built originally about 1916 and which had been constructed in four stages, the last important alteration having taken place some 30 years ago. Before the purchase, they had the building examined by architects and engineers who noticed a bulge on the front wall which they regarded as of no importance. After the purchase, the plaintiffs made extensive alterations and discovered that a structural defect was causing the front wall to bulge. This wall had to be partly rebuilt and the plaintiffs sued to recover the cost of the additional work caused by the structural defect. The trial judge dismissed the action and this judgment was affirmed by a majority in the Court of Queen's Bench. The plaintiffs appealed to this Court.

Held: The appeal should be dismissed.

PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

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LEVINE AND LEVINE v. FRANK W. HORNER LTD.

Assuming that the sale was one made with full legal warranty, the sole question in issue was whether the defect was a latent defect within the meaning of art. 1522 of the *Civil Code*. The Courts below rightly held that it was not such.

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

H. L. Aronovitch, for the plaintiffs, appellants.

Albert Bissonnette, for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—In their action appellants claim a sum of $12,000 as damages suffered as the result of an alleged latent defect in a building in the city of Montreal purchased by them from respondent. The action was dismissed by the learned trial judge and that judgment was confirmed by the Court of Queen's Bench[1], Choquette and Montgomery JJ. dissenting.

The facts, as to which the parties are in substantial agreement, are concisely set forth in the reasons of Montgomery J. as follows:

The building in question is located on the westerly side of St. Urbain Street (civic No. 950) and was sold to Appellants with legal warranty by deed dated 4th January 1952, for a price of $140,000. Respondent had acquireed it from its predecessor company, Frank W. Horner Limited (1912), for which the building had been constructed.

The building, as it was when sold to Appellants, had been constructed in four stages, designated by the witness Bernstein stages A, B, C, and D. These stages are shown on four drawings filed as Exhibit P-8. There are also photographs, one (Exhibit D-2) showing the building as it was after the first addition (stage B) and three (Exhibit D-1) showing it as it was at the time of the trial. (These drawings and photographs are not reproduced in the joint case, but I have examined them in the original record.)

The original building, as constructed in 1916 or shortly thereafter, comprised the first three floors of the southerly half of the building as it now is. In 1919 a fourth storey was added (stage B). The front wall of this new storey was supported on a beam or slab of concrete 12 inches thick by 5 feet high and extending across the whole front of the building. In 1922 or 1923 the northerly half of the building was added (stage C). This was built against the existing northerly wall, which was not demolished.

Up to this point, almost the entire front of the building as originally constructed was made up of a single window on a steel frame. The new part of the building had smaller windows with brick between. The proprietors apparently wishing to make the appearance of the building more uniform, partly bricked over this large window (stage D). This was done very shortly after the completion of the new part.

[1] [1961] Que. Q.B. 108.

When they bought the building Appellants intended to make extensive alterations and, particularly, to remove the wall between the old and new Parts. Before buying it, they had it examined by an architect, the witness Bernstein, and an engineer, the witness Berenstein. Starting in April, 1952, the proposed alterations were carried out by Frank & Pascal, general contractors, under the direction of the witness Frank. In the process of removing the interior wall, the contractors discovered that the concrete beam supporting the front wall of the fourth storey had tilted, so that the lower part had moved outward and was pushing out the brickwork. They also discovered the steel-framed window behind the bricks on the front of the original building. This situation was reported to the architect Bernstein and the engineer Berenstein and, on their recommendation, the front of the southerly part of the building was rebuilt. For this additional work, Appellants paid $8,445.03 to the contractors plus a fee of $422.25 to the architect.

Appellants' witnesses testified that the concrete beam above referred to had not been properly anchored and that the brickwork over the window was of varying thickness and not properly bonded to the pre-existing structure. It was established in evidence, and both Courts below have so found, that there was a bulge in the exterior brickwork in the vicinity of the concrete beam which had been observed by appellants' architect and engineer when they examined the property, but which they regarded as of no importance. An architect called on behalf of respondent testified that had he noticed such a bulge he would have suspected that there was some structural defect and would have made further investigation which would, in his opinion, have revealed the defects of which appellants complained. There is no suggestion of bad faith on the part of either appellants or respondent.

The building had been built originally about 1916, an additional storey was added and various other structural changes made in the intervening years. After purchasing the property appellants made further extensive alterations at a cost of approximately $80,000, of which they attributed $8,867.28 as being the cost of additional work caused by the structural defect complained of.

Although appellants did not ask to be furnished with the plans of the building until after the purchase had been completed, they did have it examined by an architect and an engineer. The bulge in the front wall was apparent to the latter but, as I have stated, they considered it to be of no consequence. In fact, as found by the trial judge it indicated the existence of, and was caused by, the structural defect complained of by appellants.

1962 LEVINE AND LEVINE v. FRANK W. HORNER LTD. Abbott J.

Assuming as I do, but without deciding, that the sale was one made with full legal warranty, the sole question in issue here is whether the defect complained of was a latent defect within the meaning of art. 1522 of the *Civil Code*. The learned trial judge and the majority in the Court below have held that it was not and I am in respectful agreement with that finding.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the plaintiffs, appellants: Chait & Aronovitch, Montreal.

Attorneys for the defendant, respondent: Stikeman & Elliott, Montreal.

1961 *Oct. 25 — 1962 Mar. 26

IRRIGATION INDUSTRIES LIMITED ..APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital gain or income—Mining shares purchased by company—Profit on resale—Whether transaction "an adventure or concern in the nature of trade"—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).

The original purpose of the promoters of the appellant company, incorporated in 1947, was to erect a mill for the dehydration of alfalfa, but this object was abandoned by August 1948. The company remained inactive until 1952 when it acquired an office building. In the following year it purchased directly from a mining company 4,000 treasury shares of an initial issue by that company of 500,000 shares. The appellant resold the shares within a few months and thereby realized a total profit of $26,897.50. This profit was taxed by the Minister on a reassessment of the appellant for the taxation year 1953. The Minister's reassessment was upheld by the Tax Appeal Board and by the Exchequer Court, where it was held that the transaction in question was an adventure in the nature of trade and that the profit arising from it was taxable under the applicable sections of the *Income Tax Act*, R.S.C. 1952, c. 148. The appellant appealed to this Court.

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

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

Per Taschereau, Locke and Martland JJ.: The transaction in question did not fall within either of the positive tests which the authorities have suggested should be applied in determining whether or not a particular transaction does or does not constitute an adventure in the nature of trade, *i.e.*, (1) whether the person dealt with the property purchased by him in the same way as a dealer would ordinarily do, and (2) whether the nature and quantity of the subject-matter of the transaction may exclude the possibility that its sale was the realization of an investment or otherwise of a capital nature, or that it could have been disposed of otherwise than as a trade transaction. *Minister of National Revenue v. Taylor,* [1956] C.T.C. 189; *The Commissioners of Inland Revenue v. Livingston* (1926), 11 Tax Cas. 538; *Leeming v. Jones,* [1930] 1 K.B. 279, referred to.

The appellant's operations in purchasing and selling the shares did not constitute the sort of trading which would be carried on ordinarily by those engaged in the business of trading in securities. What the appellant did was to acquire a capital interest in a new corporate business venture, in a manner which had the characteristics of the making of an investment, and subsequently to dispose, by sale, of that interest.

Although it might be contended that persons may make a business merely of the buying and selling of securities without being traders in securities in the ordinary sense, and that the transactions involved in that kind of business are similar, except in number, to that which occurred here, it had, however, been pointed out in *Californian Copper Syndicate v. Harris* (1904), 5 Tax Cas. 159, that, where the realization of securities is involved, the taxability of enhanced values depends on whether such realization was an act done in the carrying on of a business.

The nature and quantity of the property in question were not indicative of an adventure in the nature of trade. *Commissioners of Inland Revenue v. Fraser* (1942), 24 Tax Cas. 498; *Edwards v. Bairstow,* [1956] A.C. 14, referred to.

The test, applied by the trial judge, whether the appellant entered into the transaction with the intention of disposing of the shares at a profit so soon as there was a reasonable opportunity of so doing, standing alone, was not sufficient to determine whether or not the transaction constituted an adventure in the nature of trade. An accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realization does not make it income. *Leeming v. Jones,* [1930] 1 K.B. 279 and [1930] A.C. 415, referred to.

Per Cartwright and Judson JJ., *dissenting*: The finding of fact made by the trial judge that the purchase of the shares was not an investment, but a purely speculative purchase, and was entered into with the intention of disposing of the stock at a profit as soon as there was a reasonable opportunity of so doing was justified by the evidence and should be accepted.

While the guides formulated in *Minister of National Revenue v. Taylor, supra,* as to the meaning of the phrase "adventure or concern in the nature of trade" were helpful, it was there recognized "that the question whether a particular transaction is an adventure in the nature of trade depends on its character and surrounding circumstances and no single criterion can be formulated." That the transaction in question here was an adventure did not admit of doubt. Equally, it was "in the nature of trade".

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IRRIGATION INDUSTRIES LTD. v. MINISTER OF NATIONAL REVENUE

The profit realized was not the enhancement in price of an ordinary investment but rather "a gain made in an operation of business in carrying out a scheme for profit making." *Californian Copper Syndicate v. Harris, supra; Regal Heights Ltd. v. Minister of National Revenue,* [1960] S.C.R. 902, referred to.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], affirming a reassessment made by the Minister of National Revenue. Appeal allowed, Cartwright and Judson JJ. dissenting.

Donald McLaws, Q.C., for the appellant.

G. W. Ainslie and *J. R. H. Tucker,* for the respondent.

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

MARTLAND J.:—This is an appeal from a judgment of Cameron J.[1], who dismissed the appellant's appeal from a decision of the Tax Appeal Board, which had affirmed the reassessment of the appellant for the taxation year 1953.

The facts are outlined in the judgment of my brother Cartwright and I will not repeat them here in full. There are, however, two matters which should be mentioned. The first is that the shares of Brunswick Mining and Smelting Company Limited (hereinafter referred to as "Brunswick") were purchased by the appellant directly from Brunswick, being a part of an initial issue of shares by Brunswick to finance additional drilling and exploration work and for some underground development.

The nature of Brunswick's enterprise is described by Cameron J. as follows:

> The Brunswick assets, according to the evidence, consisted of a number of mining claims in New Brunswick. The area had been previously explored and found to be unprofitable. But in 1952, when iron ore was scarce, geologists went into the area and found indications of certain minerals. Geophysical surveys followed and they indicated the possibility of very substantial deposits of lead, tin, sulphur and zinc. The company then decided to issue 500,000 shares of stock at $10 per share to raise funds for its exploitation, development, and the construction of a mill.

The other matter is that the purchase and sale of the Brunswick shares was not authorized by the Memorandum of Association of the appellant, or by the statutory powers conferred upon it by s. 19 of *The Companies Act,* R.S.A. 1955, c. 53. There can, therefore, be no suggestion that in

[1] [1960] C.T.C. 329, 60 D.T.C. 1232.

purchasing and selling the shares in question the appellant was engaged in a business which it had been created to carry on. The purchase and sale of the shares was outside the scope of its business activities and consequently nothing can turn on the fact that the appellant is a limited company as contrasted with an individual.

The relevant provisions of the *Income Tax Act,* R.S.C. 1952, c. 148, as amended, are the following:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

* * *

139. (1) In this Act,

* * *

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

The issue in this appeal is as to whether an isolated purchase of shares from the treasury of a corporation and subsequent sale thereof at a profit, not being a part of the business carried on by the purchaser of the shares, or in any way related to it, constitutes an adventure in the nature of trade so as to render such profit liable to income tax.

The only evidence given in the Court below was that submitted by the appellant. There are no findings as to credibility. The decision is based upon that evidence and upon inferences drawn therefrom.

Cameron J. held that there was an adventure in the nature of trade and the basis of his decision is stated as follows:

On the facts in evidence and drawing what I consider to be the proper inferences therefrom, I have reached the conclusion that the purchase in question was not an investment, but a purely speculative purchase, and was entered into with the intention of disposing of the stock at a profit as soon as there was a reasonable opportunity of so doing. It was therefore an adventure or concern in the nature of trade.

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The reasons leading to his conclusion that the purchase was not an investment are:

1. The fact that the appellant borrowed the funds necessary to effect the purchase of the shares;

2. The inference that the nature of Brunswick indicated that its shares were speculative in value and that dividends could not be expected for some years.

With respect, I would not think that the question of whether securities are purchased with the purchaser's own funds, or with money borrowed by him, is a significant factor in determining whether their purchase and subsequent sale is or is not an investment.

Similarly, the fact that there was no immediate likelihood of dividends being paid on the shares should not have much significance, for there are many corporate ventures, financed by the sale of shares to the public, in which immediate payment of dividends may not be anticipated, and yet the purchase of the treasury shares of a company embarking on a new enterprise is a well-recognized method of making an investment.

However, assuming that the conclusion was correct that this purchase was speculative in that it was made, not with the intention of holding the securities indefinitely, with a view to dividends, but made with the intention of disposing of the shares at a profit as soon as reasonably possible, does this, in itself, lead to the conclusion that it was an adventure in the nature of trade?

It is difficult to conceive of any case, in which securities are purchased, in which the purchaser does not have at least some intention of disposing of them if their value appreciates to the point where their sale appears to be financially desirable. If this is so, then any purchase and sale of securities must constitute an adventure in the nature of trade, unless it is attempted to ascertain whether the primary intention at the time of purchase is to retain the security or to sell it. This, however, leads to the difficulty mentioned by my brother Cartwright that the question of taxability is to be determined by seeking to ascertain the primary subjective intention of the purchaser at the time of purchase.

I cannot agree that the question as to whether or not an isolated transaction in securities is to constitute an adventure in the nature of trade can be determined solely upon that basis. In my opinion, a person who puts money into a business enterprise by the purchase of the shares of a company on an isolated occasion, and not as a part of his regular business, cannot be said to have engaged in an adventure in the nature of trade merely because the purchase was speculative in that, at that time, he did not intend to hold the shares indefinitely, but intended, if possible, to sell them at a profit as soon as he reasonably could. I think that there must be clearer indications of "trade" than this before it can be said that there has been an adventure in the nature of trade. As Scott L.J. said, when delivering the judgment of the Court of Appeal in *Barry v. Cordy*[1]:

> That a single transaction may fall within Case 1 is clear; but, to bring it within, the transaction must bear clear *indicia* of "trade"; e.g., *Martin v. Lowry,* (1925) 11 Tax Cas. 297—the single purchase of a vast quantity of linen for re-sale; or *Rutledge v. Commissioners of Inland Revenue,* (1929) 14 Tax Cas. 495, where there was a single purchase of paper. Unless *ex facie* the single transaction is obviously commercial, the profit from it is more likely to be an accretion of capital and not a yield of income.

The history of the phrase "adventure or concern in the nature of trade" was considered by the learned President of the Exchequer Court in *Minister of National Revenue v. Taylor*[2], where he said:

> The expression "advanture or concern in the nature of trade" appeared for the first time in a Canadian income tax act in Section 127(1)(*e*) of the 1948 Act. It was, no doubt, taken from the *Income Tax Act,* 1918 of the United Kingdom. In that Act under Case I of Schedule D tax was chargeable in respect of any trade . . . and Section 237 defined trade as including "every trade, manufacture, adventure or concern in the nature of trade". Prior to its inclusion in the definition of trade by Section 237 of the *Income Tax Act* 1918, the expression appeared in the *Income Tax Act* of 1842. In that Act provision was made in the First Case under Schedule D for the charging of duties in respect of any "Trade, Manufacture, Adventure, or Concern in the nature of Trade, ..." Indeed, the expression goes back to the Act of 1803.

In that case Thorson P. reviewed a number of the leading English and Scottish cases which had dealt with the meaning of the expression and, from those decisions, he formulated certain general propositions, some negative and some positive, applicable in determining whether or not a particular

[1] [1946] 2 All E.R. 396 at p. 400.
[2] [1956] C.T.C. 189 at p. 198, 56 D.T.C. 1125.

transaction did or did not constitute an adventure in the nature of trade. These are set out in the judgment of my brother Cartwright.

The positive tests to which he refers as being derived from the decided cases as indicative of an adventure in the nature of trade are: (1) Whether the person dealt with the property purchased by him in the same way as a dealer would ordinarily do and (2) whether the nature and quantity of the subject-matter of the transaction may exclude the possibility that its sale was the realization of an investment, or otherwise of a capital nature, or that it could have been disposed of otherwise than as a trade transaction.

I will deal first with the second of these tests, which, if applied to the circumstances of the present case, would not, in my opinion, indicate that there had been an adventure in the nature of trade.

The nature of the property in question here is shares issued from the treasury of a corporation and we have not been referred to any reported case in which profit from one isolated purchase and sale of shares, by a person not engaged in the business of trading in securities, has been claimed to be taxable.

Cases in which the nature and quantity of the property purchased and sold have indicated an adventure in the nature of trade include *The Commissioners of Inland Revenue v. Livingston*[1] (a cargo vessel); *Rutledge v. The Commissioners of Inland Revenue*[2], (a large quantity of toilet paper); *Lindsay v. The Commissioners of Inland Revenue*[3], and *Commissioners of Inland Revenue v. Fraser*[4], (a large quantity of whisky); *Edwards v. Bairstow*[5], (a complete spinning plant) and *Regal Heights Ltd. v. Minister of National Revenue*[6], (40 acres of vacant city land).

Corporate shares are in a different position because they constitute something the purchase of which is, in itself, an investment. They are not, in themselves, articles of commerce, but represent an interest in a corporation which is itself created for the purpose of doing business. Their acquisition is a well-recognized method of investing capital in a business enterprise.

[1] (1926), 11 Tax Cas. 538.
[2] (1929), 14 Tax Cas. 490.
[3] (1932), 18 Tax Cas. 43.
[4] (1942), 24 Tax Cas. 498.
[5] [1956] A.C. 14.
[6] [1960] S.C.R. 902.

This point is made by Lord Normand in *Commissioners of Inland Revenue v. Fraser, supra,* at p. 502:

> There was much discussion as to the criterion which the Court should apply. I doubt if it would be possible to formulate a single criterion. I said in a case which we decided only yesterday that one important factor may be the person who enters into the transaction . . . . It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a transaction entered into by an individual outside the line of his own trade or occupation is an adventure in the nature of trade. But what is a good deal more important is the nature of the transaction with reference to the commodity dealt in. The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit, and yet it may be that that is not the only purpose for which he purchased the article or the commodity, nor the only purpose to which he might turn it if favourable opportunity of sale does not occur. In some cases the purchase of a picture has been given as an illustration. An amateur may purchase a picture with a view to its resale at a profit, and yet he may recognize at the time or afterwards that the possession of the picture will give him aesthetic enjoyment if he is unable ultimately, or at his chosen time, to realise it at a profit. A man may purchase stocks and shares with a view to selling them at an early date at a profit, but, if he does so, he is purchasing something which is itself an investment, a potential source of revenue to him while he holds it.

Similarly, Viscount Simonds, in his judgment in *Edwards v. Bairstow*[1], when considering the suggested characteristics of an adventure in the nature of trade, said:

> I find "activities which led to the maturing of the asset to be sold" and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to commercial transactions. And by that I mean, what I think Rowlatt J. meant in *Leeming v. Jones,* [1930] 1 K.B. 279, that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.

Furthermore, the quantity of shares purchased by the appellant in the present case would not, in my opinion, be indicative of an adventure in the nature of trade, as it constituted only 4,000 out of a total issue of 500,000 shares.

The first of the two tests mentioned was stated by Lord Clyde in *The Commissioners of Inland Revenue v. Livingston, supra,* and is commented upon by Rowlatt J. in *Leeming v. Jones*[2]:

> I venture to refer, with respect, to what the Lord President, Lord Clyde, said in *Inland Revenue Commissioners v. Livingston,* 11 Tax Cas. 538 at 542. He is dealing with this very point, and he says: "I think the

[1] [1956] A.C. 14 at p. 29.

[2] [1930] 1 K.B. 279 at p. 283.

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test, which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade,' is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made." That covers all the cases. In the *Cape Brandy Syndicate* case, [1921] 2 K.B. 403, what the appellants had was in the ordinary line of business as brandy importers, and so on; what they had in *Martin v. Lowry,* [1927] A.C. 312, was what is done in the ordinary case of merchants buying a thing, advertising it and so on; and what was done in *Livingston's* case, 11 Tax Cas. 542, was in the ordinary course of the business of ship dealers and repairers, and so on.

Were the operations involved in the present case of the same kind and carried on in the same way as those which are characteristic of ordinary trading in the line of business in which the venture was made?

The only operations of the appellant in the present case were the purchase of 4,000 treasury shares directly from Brunswick and their subsequent sale, presumably through brokers. This is not the sort of trading which would be carried on ordinarily by those engaged in the business of trading in securities. The appellant's purchase was not an underwriting, nor was it a participation in an underwriting syndicate with respect to an issue of securities for the purpose of effecting their sale to the public, and did not have the characteristics of that kind of a venture. What the appellant did was to acquire a capital interest in a new corporate business venture, in a manner which has the characteristics of the making of an investment, and subsequently to dispose, by sale, of that interest.

But it may be contended that persons may make a business merely of the buying and selling of securities, without being traders in securities in the ordinary sense, and that the transactions involved in that kind of business are similar, except in number, to that which occurred here. It has, however, been pointed out in the well-known case of *Californian Copper Syndicate v. Harris*[1], that, where the realization of securities is involved, the taxability of enhanced values depends on whether such realization was an act done in the carrying on of a business. In that case the Commissioners had held that the transaction there in question was an adventure or concern in the nature of trade. The judgments on appeal make no reference to that point, but are based on the ground that the turning of the investment to account in

[1] (1904), 5 Tax Cas. 159 at p. 165.

that case was not merely incidental, but was the essential feature of the appellant's business. The passage in question reads as follows:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

In my opinion, the transaction in question here does not fall within either of the positive tests which the authorities have suggested should be applied.

The only test which was applied in the present case was whether the appellant entered into the transaction with the intention of disposing of the shares at a profit so soon as there was a reasonable opportunity of so doing. Is that a sufficient test for determining whether or not this transaction constitutes an adventure in the nature of trade? I do not think that, standing alone, it is sufficient. I agree with the views expressed on this very point by Rowlatt J. in *Leeming v. Jones, supra,* at p. 284. That case involved the question of the taxability of profits derived from purchase and sale of two rubber estates in the Malay Peninsula. The Commissioners initially found that there was a concern in the nature of trade because the property in question was acquired with the sole object of disposing of it at a profit. Rowlatt J. sent the case back to the Commissioners and states his reasons as follows:

> I think it is quite clear that what the Commissioners have to find is whether there is here a concern in the nature of trade. Now, what they have found they say in these words (I am reading it in short): That the property was acquired with the sole object of turning it over again at a profit, and without any intention of holding the property as an investment. That describes what a man does if he buys a picture that he sees going cheap at Christie's, because he knows that in a month he will sell it again at Christie's. That is not carrying on a trade. Those words will not do as a finding of carrying on a trade or anything else. What the Commissioners must do is to say, one way or the other, was this—I will not say carrying

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on a trade, but was it a speculation or a venture in the nature of trade? I do not indicate which way it ought to be, but I commend the Commissioners to consider what took place in the nature of organizing the speculation, maturing the property, and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not.

The case was returned to the Commissioners, who then found as a fact that there had not been a concern in the nature of trade. Ultimately it reached the House of Lords[1], where the main issue was as to whether the profits were taxable under Case VI of Schedule D of the *Income Tax Act*, 1918. There is, however, a general statement of principle by Lord Buckmaster, at p. 420, which aptly applies to the present case, when he says:

an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realization does not make it income.

In my opinion, therefore, the appeal should be allowed, with costs here and in the Court below, and the matter should be referred to the respondent with the direction that he deduct from the income of the appellant, for the taxation year 1953, the sum of $26,897.50.

The judgment of Cartwright and Judson JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of Cameron J.[2] dismissing an appeal from a decision of the Tax Appeal Board whereby the reassessment of the appellant for the taxation year ending December 31, 1953, was affirmed.

The relevant facts are fully set out in the reasons of Cameron J. and a brief summary will be sufficient to make plain the question which arises for decision.

The appellant was incorporated on October 25, 1947, under the *Companies Act* of the Province of Alberta as a limited company. The original purpose of its promoters was to erect a mill for the dehydration of alfalfa, but this was abandoned by August 1948. The appellant remained inactive until the autumn of 1952 when it purchased an office building in Calgary; it spent a substantial amount on alterations and, towards the end of 1955, sold the building for a sum equal to the total amount which it had spent on it.

[1] [1930] A.C. 415.

[2] [1960] C.T.C. 329, 60 D.T.C. 1232.

Early in 1953 the directors of the appellant received a favourable report on the shares of the Brunswick Mining and Smelting Corporation Limited, herinafter referred to as "Brunswick", and on or about February 23, 1953, the appellant purchased 4,000 treasury shares of that company at $10 per share, the total purchase price being $40,000. Between March 10 and March 13, 1953, the appellant sold 2,400 of these shares for a total of $38,513.50 and in June 1953, it sold the remaining 1,600 shares for a sum in excess of $28,000. It is common ground that the appellant realized a total profit of $26,897.50 from the purchase and sale of these 4,000 shares.

With the exception of certain debentures purchased in 1955 after the sale of the building referred to above the appellant had no dealings in securities other than the purchase and sale of the 4,000 shares of Brunswick.

There is no dispute as to any of the facts set out above.

At the trial before Cameron J. the only witness examined was Mr. Cheshire, the president of the appellant. The effect of his evidence was that the appellant purchased the Brunswick shares because it "felt that this was an excellent opportunity to invest money in a company which appeared to have an excellent chance for growth and development into a large mining operation", that the sales in March were prompted by the fact that the bank was pressing the appellant for repayment of a loan and those in June by the decision reached by the directors of the appellant at an informal meeting that the price of the shares had risen to such a point that, having regard to the aggregate value of Brunswick's known assets, it ceased to be in accordance with sound judgment to continue to hold them as an investment. There is, I think, an implication in the evidence of this witness that the shares were purchased as a long term investment rather than as a speculation looking to a quick turnover but there is no express statement to that effect.

Cameron J. made the following finding of fact:

> On the facts in evidence and drawing what I consider to be the proper inferences therefrom, I have reached the conclusion that the purchase in question was not an investment, but a purely speculative purchase, and was entered into with the intention of disposing of the stock at a profit as soon as there was a reasonable opportunity of so doing.

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The considerations which brought Cameron J. to this conclusion were, (i) that the appellant at the time of purchasing the Brunswick shares had no funds of its own available for investment and used borrowed funds to pay for them, (ii) that the nature of the Brunswick undertaking was such that its shares were of speculative value, (iii) that even if Brunswick's operations proved successful its shares could not be expected to yield any dividends for a considerable time, and (iv) that the shares were held by the appellant only for the short time mentioned above.

After considering the whole record, in the light of the full and able argument of counsel, I find myself unable to say that the finding of fact made by Cameron J. was not justified by the evidence, and in my opinion it should not be disturbed.

There are difficulties in ascertaining the intention of a corporation in entering into a transaction. In *Inland Revenue Commissioners v. Fisher's Executors*[1], Lord Sumner said:

> In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention that the company has is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance.

On the other hand in *Regal Heights Ltd. v. Minister of National Revenue*[2], Judson J., who gave the judgment of the majority of the Court held that the intentions of the appellant company were throughout its existence identical with those of its promoters who later became its directors.

In the case at bar there is no record of any resolution of the board of directors of the appellant or indeed of any formal proceeding to assist the Court in ascertaining its intention. The decisions in relation to the sale of the Brunswick shares appear to have been made at "informal meetings" of the directors. Mr. Cheshire's evidence regarding the appellant's intention was, as has been pointed out above, somewhat indefinite and it was proper for the learned trial judge to draw an inference as to what that intention was from the surrounding circumstances.

[1] [1926] A.C. 395, 42 T.L.R. 340.
[2] [1960] S.C.R. 902, 26 D.L.R. (2d) 51.

Having concluded that we should accept the finding of fact made by Cameron J. and quoted above, the point which arises for decision may be briefly stated as follows. The appellant, which was not at any time engaged in the business of trading in securities, made an isolated speculative purchase of a block of shares, not with the intention of retaining them as an investment which would sooner or later yield an income by way of dividends but in the expectation and with the intention of disposing of the shares in the near future at an increased price; this expectation was realized as to part of the shares in less than a month and as to the balance within four months. The question is whether the resulting profit constitutes taxable income or a non-taxable capital gain.

The applicable sections of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, are sections 3, 4 and 139(1)(*e*) which read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

139(1) In this Act,

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

Cameron J. was of opinion that the purchase and sale of the Brunswick shares was an adventure or concern in the nature of trade. The respondent supports this view while the appellant contends that what occurred was simply the realization at an enhanced price of a capital asset or investment and did not constitute an adventure or concern in the nature of trade.

In *Minister of National Revenue v. Taylor*[1], the learned President of the Exchequer Court points out that while the phrase "adventure or concern in the nature of trade" first appeared in a Canadian *Income Tax Act* in s. 127(1)(*e*) of

[1] [1956] C.T.C. 189, 56 D.T.C. 1125.

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the 1948 Act it has been found in the *Income Tax Acts* of the United Kingdom since the Act of 1842 and indeed goes back to the Act of 1803. He then proceeds to a careful examination of the leading cases dealing with the meaning of the phrase decided up to the time of his decision and arrives inductively at certain general propositions to guide the Court in dealing wtih a particular case; these are accurately summarized in the head-note to the report as follows:

On the negative side:

(i) The singleness or isolation of a transaction cannot be a test of whether it was an adventure in the nature of trade—it is the nature of the transaction, not its singleness or isolation that is to be determined.

(ii) It is not essential to a transaction being an adventure in the nature of trade that an organization be set up to carry it into effect.

(iii) The fact that a transaction is totally different in nature from any of the other activities of the taxpayer and that he has never entered upon a transaction of that kind before or since does not, of itself, take it out of the category of being an adventure in the nature of trade.

(iv) The intention to sell the purchased property at a profit is not of itself a test of whether the profit is subject to tax for the intention to make a profit may be just as much the purpose of an investment transaction as of a trading one. The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity.

On the positive side:

(i) If a person deals with the commodity purchased by him in the same way as a dealer in it would ordinarily do such a dealing is a trading adventure.

(ii) The nature and quantity of the subject matter of the transaction may exclude the possibility that its sale was the realization of an investment or otherwise of a capital nature or that it could have been disposed of otherwise than as a trade transaction.

The learned President while formulating these guides as helpful recognizes (*vide* p. 214 of the report) "that the question whether a particular transaction is an adventure in the nature of trade depends on its character and surrounding circumstances and no single criterion can be formulated."

In *McIntosh v. Minister of National Revenue*[1], Kerwin C.J., delivering the judgment of the Court said at p. 121:

It is impossible to lay down a test that will meet the multifarious circumstances that may arise in all fields of human endeavour . . . it is a question of fact in each case.

[1] [1958] S.C.R. 119, 12 D.L.R. (2d) 219.

In the case at bar it appears to me that on the view which he took of the facts Cameron J. was right in holding that the transaction in question was an adventure in the nature of trade and that consequently the profit arising from it was taxable.

Among the meanings of the word "adventure" given in the Shorter Oxford Dictionary are "a pecuniary venture" and "a speculation"; "venture" in turn is given the meaning, "a commercial enterprize in which there is considerable risk of loss as well as chance of gain". That the transaction was an adventure does not seem to me to admit of doubt.

Equally, I think, it was "in the nature of trade". In *Edwards v. Bairstow*[1], Lord Radcliffe said at p. 38:

> Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

In the case at bar the appellant's transaction was a deal in mining shares.

There is nothing in the reasons of Cameron J. or in what I have said above to throw the slightest doubt on the applicability to the *Income Tax Act* in this country of the principle stated by the Lord Justice Clerk, in *Californian Copper Syndicate v. Harris*[2]:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax.

On the facts as found by Cameron J. in the case at bar, the profit realized was not the enhancement in price of an ordinary investment but rather "a gain made in an operation of business in carrying out a scheme for profit-making". To hold otherwise would appear to me to be contrary to the reasoning of the majority in the *Regal Heights* case, *supra.*

I have arrived at this conclusion with some hesitation. It appears to me to involve the result that in cases of this nature the answer to the question whether a profit is or is not taxable depends on the purely subjective test as to the intention of the taxpayer when he acquired the shares which have subsequently been sold at a profit. If, for example, in the case at bar it had been found as a fact that the intention of the appellant when it acquired the shares was to hold

[1] [1956] A.C. 14.
[2] (1904), 5 Tax Cas. 159 at p. 165.

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them as an investment looking forward to the time when Brunswick would pay dividends the circumstance that a few weeks later it sold the shares at a profit would not have rendered that profit subject to tax. In *Bawlf Grain Co. v. Ross*[1], Duff J., as he then was, pointed out that the law does not as a rule "take note of subjective events in the stream of consciousness save in relation to or as manifested by some external word or deed." It seems strange that the question whether a certain profit is subject to tax should depend on the intention with which the taxpayer entered into the transaction from which it resulted, but the words of Bowen L.J. in *Edgington v. Fitzmaurice*[2], have often been quoted with approval:

> . . . 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.

The other cause of my hesitation is that while the expression "adventure or concern in the nature of trade" has been in the acts in the United Kingdom for a century and a half and in the act in this country for thirteen years counsel have not referred to any reported case in which the profit arising from one isolated purchase and sale of shares by a taxpayer not engaged in the business of trading in securities has been claimed to be taxable. However this is perhaps not the type of problem in the solution of which the maxim *omnis innovatio plus novitate perturbat quam utilitate prodest* is of assistance.

I would dismiss the appeal with costs.

Appeal allowed with costs, CARTWRIGHT *and* JUDSON JJ. *dissenting.*

Solicitors for the appellant: McLaws, McLaws, Bancroft, Deyell & Floyd, Calgary.

Solicitors for the respondent: Department of National Revenue, Ottawa.

[1] (1917), 55 S.C.R. 232 at p. 255. [2] (1885), 29 Ch. D. 459 at p. 483.

BEULAH GORKIN AND JACK ADILMAN, AS ADMINISTRATORS WITH WILL ANNEXED OF THE ESTATE OF NATHAN ADILMAN, DECEASED .... APPELLANTS;

1961 *Dec. 5
1962 Mar. 26

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Succession duties—Transfer of property for legitimate family reasons in consideration of annuity—Whether transaction a gift or for partial consideration—Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 3(1)(d), (k).

Of the 160 issued shares of A. Ltd., a company carrying on a department store business, A owned 72 and the appellants, his son and daughter, owned the rest. A was intending to remarry and in view of that expected event entered into a written agreement on June 1, 1956, whereby he transferred his 72 shares of A. Ltd., together with three lots and the building where the company operated its business, to E. Ltd., a corporation of which the appellants were the only beneficial shareholders. The consideration for the transfer of this property, which had a fair market value of $344,400, was an annuity having a value of $148,000, payable to A. The latter died on June 20, 1956.

The Minister assessed succession duty on the whole of the $344,400, as a gift under s. 3(1)(*d*) of the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89. The appellants, administrators of A's estate, conceded that the difference between $344,400 and $148,000 was subject to duty, but contended that only that difference was subject to duty under s. 3(1)(*k*) of the Act. In the Exchequer Court it was held that the transaction in question was a "gift" with a benefit to the donor provided "by contract", within the meaning of s. 3(1)(*d*), and that the property was not "transferred for partial consideration", within the meaning of s. 3(1)(*k*), because the obtaining of the consideration was not, in the view of the trial judge, the real object of the transaction. The administrators of the estate appealed to this Court.

Held: The appeal should be allowed.

The transaction fell squarely within the provisions of s. 3(1)(*k*) of the *Dominion Succession Duty Act*. It involved a transfer of property for a partial consideration agreed to be paid.

If para. (*k*) is to have any effect at all, it must apply to transactions in which, while there is an element of bounty involved, there is also a partial consideration paid or agreed to be paid for a transfer of property. That was clearly the intention in the circumstances of the present case. There was certainly an element of bounty involved, but, notwithstanding that fact, there was an agreement to pay a partial

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

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consideration for the transfer of property. It, therefore, fell within para. (*k*) and, that being so, it did not constitute a gift within the meaning of s. 3(1)(*d*) of the Act.

Attorney General v. Worrall, [1895] 1 Q.B. 99; *Attorney-General v. Johnson,* [1903] 1 K.B. 617, distinguished; *In re Baroness Bateman,* [1925] 2 K.B. 429; *Attorney-General for Ontario v. Perry,* [1934] A.C. 477, referred to.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], dismissing an appeal from an assessment for succession duties. Appeal allowed.

H. H. Stikeman, Q.C., and *P. N. Thorsteinsson,* for the appellants.

D. S. Maxwell, Q.C., and *G. W. Ainslie,* for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—On June 1, 1956, Nathan Adilman, of Saskatoon, then 67 years of age, entered into a written agreement with Edison Wholesale Ltd., a Saskatchewan corporation (hereinafter referred to as "Edison"), whereby he transferred to Edison 72 common shares in the capital stock of a company known as Adilman's Limited and three lots, and the building situated thereon, in the City of Saskatoon. The consideration for the transfer was his receiving from Edison a monthly sum of $1,666.66, during his lifetime, payable on the first of each month, commencing July 1, 1956. It was agreed that, in any event, the payments should cease after a total of $200,000 had been received.

Adilman's Limited carried on a department store business in the building in question prior to the transfer. Out of its 160 issued shares, Nathan Adilman owned 72 and the appellants, his son and daughter, owned the rest. The appellants were the only beneficial shareholders of Edison.

It was agreed, in an agreed statement of facts, that "the said agreement was entered into by the deceased and Edison Wholesale Ltd. in good faith, for legitimate family reasons and in view of the intended remarriage of the deceased, and not in an attempt to avoid the payment of any Succession Duty."

Nathan Adilman died on June 20, 1956.

[1] [1960] Ex. C.R. 531, C.T.C. 238, 60 D.T.C. 1177.

The fair market value of the shares and the land mentioned in the agreement, as of the date of his death, was $344,400. The annual value of that property, as in June 1956, was $28,000. The present value of the annuity payable pursuant to the agreement, as of its date, was $148,000.

The respondent seeks to charge succession duty on the whole of the $344,400, as a gift under s. 3(1)(*d*) of the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89. The appellants, who are the administrators of Nathan Adilman's estate, concede that the difference between $344,400 and $148,000 is subject to duty, but contend that only that difference is subject to duty under s. 3(1)(*k*) of the Act.

The learned trial judge[1] reached the conclusion that the transaction in question was a "gift" with a benefit to the donor provided "by contract", within the meaning of s. 3(1)(*d*) of the *Dominion Succession Duty Act,* and that the property was not "transferred for partial consideration", within the meaning of s. 3(1)(*k*) of the Act, because the obtaining of the consideration was not, in his view, the real object of the transaction.

The relevant provisions of the Act are as follows:

3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:

(*d*) property taken under a gift whenever made of which actual and *bona fide* possession and enjoyment has not been assumed by the donee or by a trustee for the donee at least three years before the death of the deceased and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise;

(*k*) property transferred within three years prior to the death of the deceased for partial consideration in money or money's worth paid or agreed to be paid to the deceased, to the extent to which the value of the property when transferred exceeds the value of the consideration so paid or agreed to be paid;

The words "agreed to be paid", where they appear in para. (*k*), were added to that paragraph by an amendment to the Act in 1952.

The learned trial judge reached his conclusion that the transaction fell within s. 3(1)(*d*) on the basis that, in substance, the agreement between Nathan Adilman and Edison was entered into for the purpose of conferring a benefit on

[1] [1960] Ex. C.R. 531, C.T.C. 238, 60 D.T.C. 1177.

the appellants and not for the purpose of acquiring the annuity; that the transaction was not dictated by commercial considerations and that, accordingly, on the authority of certain English decisions, it was a gift within the meaning of s. 3(1)(*d*).

The relevant English legislation, to which reference is made in those cases, was contained in the *Customs and Inland Revenue Act, 1881*, 44 & 45 Vict., c. 12, as amended, and in the *Finance Act, 1894*, 57 & 58 Vict., c. 30.

Section 38 of the first-mentioned statute provided, in part, as follows:

> 38. (1) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.
>
> (2) The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—
>
> (*a*) Any property taken as a donatio mortis causa made by any person dying on or after the first day of June one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made three months before the death of the deceased.

This provision was amended in 1889, by c. 7, 52 & 53 Vict., by s. 11 thereof, which provided:

> 11. (1) Sub-section two of section thirty-eight of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—
>
> The description of property marked (a) shall be read as if the word "twelve" were substituted for the word "three" therein, and the said description of property shall include property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise:
>
> * * *

The *Finance Act, 1894* provided for the imposition of estate duty, which, in respect of property falling within its terms, replaced the duties payable under the *Customs and Inland Revenue Act, 1881*. Section 2(1)(*c*) of the *Finance Act, 1894* provided:

> 2. (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—
>
> * * *
>
> (*c*) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section

eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom;

In addition, s. 3 of this Act provided for an exception, regarding the payment of estate duty, in the following terms:

3. (1) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

(2) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of Estate duty.

Attorney General v. Worrall[1], one of the cases mentioned by the learned trial judge, arose prior to the enactment of the *Finance Act, 1894*. In that case, Lopes L.J., at p. 105, said:

One question is whether in this case there was a "gift" of property at all. It is suggested that there was not, because there was a collateral covenant by the son to pay to the father an annuity. It appears to me that there was not the less a gift within the meaning of the Act on that account.

A. L. Smith L.J., at p. 107, said:

The next point is this. It is said that the transaction is not a gift within the meaning of the statute because a consideration was given. On reading s. 11, sub-s. 1, it seems clear that the legislature in using the word "gift" in that section contemplated cases where the donee enters into a covenant such as this.

Attorney-General v. Johnson[2], was concerned with the application of the *Finance Act, 1894*. In that case 500 pounds was paid to the directors of an unincorporated charitable society in lieu of a legacy, the trustees of the society to pay to the donor and to his wife, if she survived him, an annuity of 25 pounds. The Crown claimed that, on the donor's death, estate duty became payable by the society

[1] [1895] 1 Q.B. 99. [2] [1903] 1 K.B. 617, 72 L.J.K.B. 323.

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on the 500 pounds. Phillimore J., at the trial, held that the 500 pounds was, in the first instance, taxable, but further held that there should be deducted from that amount the value of the annuity of 25 pounds. This view was overruled by the Court of Appeal, which held that this was not a case of a *bona fide* purchase of an annuity at all and that it was a case of a testamentary gift effected by the machinery of a present donation subject to a reservation of something intended to be the equivalent of a life interest in the subject-matter of the donation.

It will be noted that the first of these cases, having arisen prior to the enactment of the *Finance Act, 1894,* was not concerned with the possible application of s. 3(2) of that Act. The second case did deal with that provision and, as pointed out, the Court of Appeal disagreed with Phillimore J., who would have applied it.

Section 3 of the *Finance Act, 1894* was not a definition of a certain kind of property which was deemed to pass on the death of the deceased. It created an exception to the obligation to pay estate duty, an exception which, in both its subsections, was limited to "a bona fide purchase". Consequently, in deciding whether or not s. 3(2) was applicable in *Attorney-General v. Johnson,* the issue before the Court was as to whether or not the transaction in question was a *bona fide* purchase. On the other hand, para. (*k*) of s. 3(1) of the *Dominion Succession Duty Act* does not define an exception to the obligation to pay duty. It defines a certain kind of transaction which shall be deemed to be a succession under the Act. I agree with the contention of the appellants that when that definition was included in s. 3(1) it must be assumed that it was placed there so as to include, as a succession, a certain type of transaction which would not otherwise have been included under any of the other paragraphs of that subsection.

Furthermore, para. (*k*) is in terms substantially different from those of s. 3 of the *Finance Act, 1894.* Paragraph (*k*) does not refer to "a bona fide purchase". It refers to "property transferred for partial consideration in money or money's worth paid or agreed to be paid". I accept the view

of Rowlatt J., in *In re Baroness Bateman*[1], when, in interpreting the English provision, he construed the words "partial consideration" as meaning something less than the full and fair value of the property.

In my opinion, the transaction in question here fell squarely within the provisions of para. (*k*). It involved a transfer of property for a partial consideration agreed to be paid. With respect, I cannot agree with the view of the learned trial judge that, in applying this definition, it must be determined that the obtaining of the partial consideration was "the real object of the transaction". It seems to me that para. (*k*) defines a certain kind of situation which, on the facts of the present case, existed here.

As we are called on, in the present case, to deal with a provision which did not exist in the English statute, it is necessary to construe s. 3(1)(*d*) of the *Dominion Succession Duty Act* in the light of the existence, in the same subsection, of para. (*k*). The English cases cited do not assist us in this matter. Whatever the word "gift" might mean within s. 2(1)(*c*) of the *Finance Act, 1894*, standing by itself, it is necessary, in construing the present Act, to construe s. 3(1)(*d*) in the light of the existence of para. (*k*) and, in my view, a transaction which falls within para. (*k*) cannot be regarded as being a gift within the meaning of s. 3(1)(*d*).

My view as to the proper method of construing these provisions of our own statute is, I think, reinforced by what was said by Lord Blanesburgh, in *Attorney-General for Ontario v. Perry*[2], when he said, with respect to the construction of the Ontario *Succession Duty Act*:

> First then, is the Ontario sub-section, unlike the corresponding British enactment, an "original" section? In their Lordships' judgment it undoubtedly is, and must be so construed. It contains on its face no reference to any origin. It comes into Ontario legislation full grown and without ancestry. It would, in their Lordships' judgment, be contrary to all principle, for the purpose of construing it, to look at the evolution even of the same enactment under some other system of law.

I do not agree, therefore, with the submission of the respondent that the question before us is as to whether or not the agreement in question can be fairly considered to have been merely a commercial agreement, or whether, looking at the substance of it and the circumstances in which

[1] [1925] 2 K.B. 429, 95 L.J.K.B. 199. [2] [1934] A.C. 477 at p. 487.

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it was entered into, one may regard it as a gift. In my opinion, if para. (*k*) is to have any effect at all, it must apply to transactions in which, while there is an element of bounty involved, there is also a partial consideration paid or agreed to be paid for a transfer of property. That was clearly the intention in the circumstances of the present case. There was certainly an element of bounty involved, but, notwithstanding that fact, there was an agreement to pay a partial consideration for the transfer of property. It, therefore, fell within para. (*k*) and, that being so, in my opinion it does not constitute a gift within the meaning of s. 3(1)(*d*) of the *Dominion Succession Duty Act*.

In my opinion, therefore, the appeal should be allowed, with costs throughout, on the basis that, pursuant to s. 3(1)(*k*) of the *Dominion Succession Duty Act*, only the difference between $148,000 and $344,400, *i.e.*, $196,400, was dutiable as a succession to Edison Wholesale Ltd. from the estate of Nathan Adilman, deceased, and the matter should, therefore, be referred back to the respondent for reassessment accordingly.

Appeal allowed with costs.

Solicitors for the appellants: Stikeman & Elliott, Montreal.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

ARTHUR NEALE BROWN ....APPELLANT;

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*Jan. 23, 24
Mar. 15

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

Criminal law—Charge of murder—Conviction of manslaughter—Appeal.

Courts—Conviction affirmed by Court of Appeal—Dissenting judgment—Whether conflict between majority and minority on questions of law—Jurisdiction of Supreme Court to entertain appeal—Criminal Code, 1953-54 (Can.), c. 51, ss. 592(1)(a), (b), (c), 597(1)(a).

The appellant was charged with the murder of a woman with whom he was sharing a one-room cabin. He testified he had noticed that a rifle in the porch was cocked and that on re-entering the cabin he had asked the woman if it was loaded and she answered it was not. He, nevertheless, proceeded to uncock the rifle and it discharged, the bullet killing the woman instantaneously. The accused's story indicated that when he attempted to uncock the rifle, the rifle barrel was directly in line with the head of the deceased then lying in bed. Thereafter, and on three successive occasions, the appellant admitted responsibility for the shooting, but at the trial his evidence, in substance, was that he had no intention of harming the deceased and the shooting was purely accidental.

The jury were particularly instructed as to murder; manslaughter; provocation, drunkenness and criminal negligence, as incidents reducing murder to manslaughter, and directed that if the shooting was accidental and unaccompanied by criminal negligence, there was no crime. At the close of the trial they brought in a verdict that "we find death by accidental means with elements of criminal negligence, and bring in a verdict of manslaughter". The appellant's conviction was affirmed by a majority of the Court of Appeal. He then appealed to this Court on the grounds, (i) that the trial judge misdirected the jury, and (ii) that the verdict of the jury was ambiguous and the trial judge should not have directed a verdict of guilty of manslaughter to be entered.

Held (Taschereau and Fauteux JJ. dissenting): The appeal should be allowed, the conviction quashed and a new trial directed on the charge of manslaughter.

Per Locke, Cartwright and Martland JJ.: Assuming that *Rozon v. The King*, [1951] S.C.R. 248, is authority for the proposition that a person who is convicted of an indictable offence whose conviction is affirmed by the Court of Appeal and who asserts a right of appeal to this Court under the provisions of s. 597(1)(*a*) of the *Criminal Code* must show not only (i) that a judge of the Court of Appeal dissented and (ii) that his dissenting judgment was founded on a question of law, but also (iii) that the question of law upon which the dissenting judge founded his judgment was considered by the majority in the Court of

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

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Appeal and that they disagreed with the view of the dissenting judge upon it, this Court had jurisdiction to entertain the present appeal on both of the grounds put forward.

With respect to the first ground, the Chief Justice of the Court of Appeal found that a passage in the charge to the jury was material and fatally misleading, while Johnson and Kane JJ.A. held that the same passage was irrelevant. This was a disagreement on a point of law.

As to the second ground, there was direct disagreement between the majority and the minority in the Court of Appeal and the question was one of law. In deciding what verdict should be entered by the Court following the rendering of a special verdict by the jury the judge was deciding a question of law.

As to the merits of the appeal, there was, as found by the Chief Justice of the Court of Appeal, misdirection in the charge to the jury. Also as found by the Chief Justice, there was ambiguity or uncertainty in the jury's verdict.

The argument of counsel for the respondent, based on s. 592(1)(*b*)(iii) of the Code, was rejected.

Per Taschereau J., *dissenting*: There was no dissent within the meaning of s. 597(1)(*a*) of the *Code*; there was no conflict between the majority judgment and the one delivered by the minority on questions of law. In order to give jurisdiction to this Court there must necessarily exist a difference between the views of the majority and those of the minority. None could be found in the present case. *The King v. Décary,* [1942] S.C.R. 80; *Rozon v. The King, supra; The Queen v. Fitton,* [1956] S.C.R. 958, referred to.

Per Fauteux J., *dissenting*: All the members of the Court of Appeal agreed that there was evidence to support a verdict of manslaughter founded on criminal negligence; there was no dissent expressed by the majority on the views taken by the minority on the question of the validity of the instructions in the charge to the jury; the only point of difference was confined to the verdict held to be ambiguous by the minority and unambiguous by the majority. The determination of the question whether the answer or opinion given by the jury on the facts was clear or ambiguous did not involve the determination of any question of law, nor was there any determined by either the members of the majority or those of the minority. The difference in the view they formed in the matter was not a difference on a question of law within the meaning of s. 597(1)(*a*).

However, contrary to these views, assuming the appellant did bring his appeal within the section and that it was open to this Court to consider the grounds of appeal, the appeal should, nevertheless, be dismissed. Once the appellant's account of the occurrence was accepted, as it was by the jury, a verdict of manslaughter based on criminal negligence was, in the circumstances of the case, the only verdict which a reasonable jury acting judicially could return. With respect to the alleged misdirections, the jury having accepted appellant's testimony, it became irrelevant to the appeal to consider the validity of these instructions, and, in any event, no miscarriage of justice or substantial wrong resulted therefrom. As to the verdict, when considered with the evidence and the judge's charge, it meant no more than that

the jury were indicating to the judge that of the three types of manslaughter which it was open for them to find—that is, due to criminal negligence, provocation or because of drunkenness—they were finding him guilty of manslaughter because of criminal negligence.

APPEAL from a judgment of the Court of Appeal of the Northwest Territories[1], affirming by a majority the appellant's conviction of manslaughter. Appeal allowed, Taschereau and Fauteux JJ. dissenting.

A. W. Miller, Q.C., for the appellant.

T. D. MacDonald, Q.C., for the respondent.

TASCHEREAU J. (*dissenting*):—I had the advantage of reading the reasons delivered by my brothers Cartwright and Fauteux, and I agree with my brother Fauteux that this appeal should be quashed. I only wish to add a few personal observations.

The jurisdiction of this Court is determined by s. 597(1) of the *Criminal Code* which is as follows:

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. 1960-1961, c. 42, s. 27(1).

(*a*) on any question of law on which a judge of the court of appeal dissents, or

(*b*) ....

I think that in the present case, there has been no dissent within the meaning of this section. I can find no conflict between the majority judgment and the one delivered by the minority, on questions of law.

In *The King v. Décary*[2], it was held that the Court had no jurisdiction to entertain the appeal because neither of the judgments of the two dissenting judges of the appellate court disclosed a dissent on a question of law within the meaning of (former) s. 1023 of the *Criminal Code*.

In his reasons, speaking for the full Court, Sir Lyman Duff said:

It is quite plain that the judgment does not rest upon any view of the majority upon a question which is a question of law alone.

And further, at p. 84, he says:

Mr. Justice Walsh, in the reasons delivered by him for his conclusion that there should be a new trial, does not say, either expressly or by implication, that this conclusion is based *upon an opinion that the majority proceeds upon any error in point of law alone.*

[1] (1961), 131 C.C.C. 287, 36 C.R. 405. [2] [1942] S.C.R. 80, 2 D.L.R. 401.

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In *Rozon v. The King*[1], it was held that,

> the appeal should be dismissed as the dissent in the Court of Appeal was not on any ground of law dealt with by the majority, and upon which there was a disagreement in the Court of Appeal.

Speaking for the majority of the Court, Mr. Justice Fauteux said:

> Being of opinion that the judgment of the majority in this case does not rest upon a question of law alone and that the judgment of the minority rests upon a question of law upon which there was no expressed or implied dissent from the majority, I must conclude that it is not within the jurisdiction of this Court to review the answer given by the Court of Appeal, etc. . . .

The same jurisprudence has been followed in *The Queen v. Fitton*[2]. In that case, at p. 978, Mr. Justice Cartwright says:

> In my opinion the motion should be granted. After reading all the evidence and everything that was said by counsel and by the learned trial judge during the hearing and disposition of the issue raised as to the admissibility in evidence of the oral and written statements above referred to and everything said on the point in the reasons for judgment delivered in the Court of Appeal I am unable to discern any dissent on, *or indeed any difference of opinion as to any point of law.*

These judgments clearly hold that in order to give jurisdiction to this Court, there must necessarily exist a difference between the views of the majority and those of the minority. I can find none in the present case. The case of *Brooks v. The King*[3] is not an authority to support the contention that this difference of view is not a necessary element to confer jurisdiction to this Court. In that case the matter has not even been considered.

I would quash the appeal.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—I have had the advantage of reading the judgments to be delivered in this matter by my brothers Cartwright and Fauteux.

I agree with my brother Cartwright that there is, in this case, a dissent—as that expression in s. 597(1)(*a*) of the Code is interpreted in *Rozon v. The King*[1]—upon the two questions of law to which he has referred. Accordingly, there is jurisdiction in this Court to entertain this appeal.

[1] [1951] S.C.R. 248, 2 D.L.R. 594. [2] [1956] S.C.R. 958, 116 C.C.C. 1.
[3] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.

For the reasons assigned by the learned Chief Justice of Alberta and by my brother Cartwright, I would quash the conviction and direct that there be a new trial on a charge of manslaughter.

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal of the Northwest Territories[1] affirming, by a majority, the appellant's conviction of manslaughter before Sissons J. and a jury. S. Bruce Smith C.J. and Hugh John Macdonald J.A. dissenting, would have allowed the appeal, quashed the conviction and directed a new trial on the charge of manslaughter.

The appellant was tried on an indictment charging "that he at Yellowknife in the Northwest Territories on the 17th day of December, A.D., 1960, did murder Madelaine Marlowe contrary to section 206 of the *Criminal Code*".

The facts are summarized in the reasons of my brother Fauteux, which I have had the advantage of reading. I shall refrain from repeating them but will make reference hereafter to one or two matters appearing in the transcript which appear to me to require special mention.

Before turning to the merits of the appeal it is necessary to consider the question of our jurisdiction.

While the notice of appeal contains a number of paragraphs, counsel for the appellant put forward only two grounds of appeal, (i) that the learned trial judge misdirected the jury, and (ii) that the verdict of the jury was ambiguous and the learned trial judge should not have directed a verdict of guilty of manslaughter to be entered.

Counsel for the Crown submits that as to the second of the above grounds there is no dissent on a question of law by a Judge of the Court of Appeal which would give a right of appeal to this Court under s. 597(1)(*a*) of the *Criminal Code*. In his factum he puts this submission as follows:

> There was no difference of opinion in the Court of Appeal upon the question of what constitutes criminal negligence or manslaughter; the only difference of opinion was as to what the jury intended to say.

Counsel for the Crown does not in his factum make a similar submission as to the first ground of appeal, based on misdirection, and I did not understand him to do so in his oral argument; but, of course, neither failure to object nor indeed express consent can confer jurisdiction on the

[1] (1961), 131 C.C.C. 287, 36 C.R. 405.

Court if the right of appeal is not given by the statute. My brother Fauteux has reached the conclusion that we are without jurisdiction to entertain either ground of appeal and both must be examined.

For the purpose of this branch of the matter I will assume that the case of *Rozon v. The King*[1] is authority for the proposition that a person who is convicted of an indictable offence whose conviction is affirmed by the Court of Appeal and who asserts a right of appeal to this Court under the provision of clause (*a*) of subs. 1 of s. 597 of the *Criminal Code* must show not only (i) that a Judge of the Court of Appeal dissented and (ii) that his dissenting judgment was founded on a question of law, but also (iii) that the question of law upon which the dissenting judge founded his judgment was considered by the majority in the Court of Appeal and that they disagreed with the view of the dissenting judge upon it. I use this form of expression because, with the greatest respect, if the judgment of the majority in the *Rozon* case does enunciate the proposition stated, it is my opinion that, giving full effect to the rule of *stare decisis,* it is still open to this Court to reconsider it on the ground that it is at variance with other judgments of this Court equally binding upon us and which were not referred to in the reasons in *Rozon*; an example being *Brooks v. The King*[2]. The fact that *Rozon* was followed in *Pearson v. The Queen*[3], does not preclude this reconsideration; for the reasons in *Pearson* simply follow *Rozon* and make no mention of the other judgments of this Court referred to above which were not dealt with in *Rozon.* It would not, I think, be proper to endeavour to enter upon such a reconsideration in the case at bar, because proceeding on the assumption that *Rozon* is authority for the proposition stated above I have reached the conclusion that we have jurisdiction to entertain this appeal on both of the grounds argued before us by counsel for the appellant.

[1] [1951] S.C.R. 248, 2 D.L.R. 594.
[2] [1927] S.C.R. 633, [1928] 1 D.L.R. 268.
[3] [1959] S.C.R. 369, 123 C.C.C. 271.

As to the first ground, that of misdirection of the jury in a material matter, the learned Chief Justice found that the misdirection occurred when the learned trial judge gave the jury additional directions, from which he quoted the following passage:

> I think the most serious objection taken by counsel for the defence was when I stated to you if you did not believe the evidence of the accused as to this being an accident that it did not automatically follow that the verdict would be murder, and that the accused would still be presumed to be innocent until proved guilty, and that it was necessary for you to find beyond a reasonable doubt that he had the intent to murder Madelaine Marlowe. I think perhaps I should have gone a little further than I did, and made my remarks clearer than I probably did. All you have got, the situation you have then if you disbelieve that story, you have the evidence that the accused shot Madelaine Marlowe, but there is no evidence as to intent, or what intent he had in his mind when he shot her, and it doesn't rule out even an accidental death.
>
> It is conceivable he might have shot at her, he might have shot at her with the intent of scaring her, or he may not even have pointed the rifle at her at all, but if he did point the rifle at her, it might have been a case of trying to scare her—it might have been in itself an unlawful act, the unlawful act of point (sic) a rifle—but in any of those things, any of those things would make it manslaughter, instead of murder.
>
> Now I don't know whether I can make myself any clearer, and in fact, I doubt very much if I have met the wishes of counsel for the defence, and I am afraid all I have done is to make this situation more confusing, but that is the best I can do.

Dealing with this passage later in his reasons the learned Chief Justice said:

> Before concluding I wish to add, with every respect to the learned trial judge, that in my opinion he misdirected the jury, (a) in instructing them after they were brought back that any of the "things" set out in the second last paragraph of his additional directions and quoted by me at page 6, "would make it manslaughter", (b) in directing the jury that if the accused shot the deceased when he "may not even have pointed the rifle at her at all", "that would make it manslaughter".
>
> It seems clear to me that in respect to the matters referred to in (a) the jury should have been left to find whether their verdict was manslaughter or not guilty as was suggested at the trial by counsel for the Crown. The jury were in my view directed to find manslaughter in any of the circumstances set out in the paragraph referred to.
>
> I am satisfied that the jury should not have been told that it "would make it manslaughter" if the accused had not pointed the rifle at the deceased at all, at all events unless there was coupled with this direction the qualification that in order to so convict they must find the accused was negligent in the degree required in manslaughter cases, or a reference to this requirement as explained earlier in the charge.

Turning to the reasons of the majority it will be found that Parker J.A. did not disagree with the learned Chief Justice on this first ground; indeed he pointed out further errors in the charge. After quoting the second paragraph from the additional directions which had been quoted by the learned Chief Justice, Parker J.A. said:

> This portion of the charge is not, with respect, completely sound.

The learned Justice of Appeal went on to hold that the appeal should be dismissed for the reason which he stated as follows:

> Although there are, with respect, certain deficiencies in the charge of the jury, no substantial wrong or miscarriage of justice has occurred and, accordingly, I would dismiss the appeal against conviction having regard to the provisions of Section 592(1)(*b*)(iii) of the *Criminal Code.*

Johnson J.A., with whom (except on the question of sentence) Kane J.A. agreed, says early in his reasons:

> The two grounds of appeal which require consideration are, (1) that there was no evidence upon which to found a verdict of manslaughter, and (2) that the jury's verdict was in fact a verdict of acquittal, or alternatively, that the verdict indicated a doubt as to there being criminal negligence within the meaning of the *Criminal Code.*

It will be observed that this sentence makes no mention of the question of misdirection; however, later in his reasons the learned Justice of Appeal in the course of his discussion of the question whether the words used by the jury when they returned to render a verdict were unambiguous refers to several portions of the charge and says:

> At the end of the charge, defence counsel objected that this latter part of the charge was bad because it stated that the story of the accused must be accepted before the jury could find that death was caused by accident. The jury was recalled and further instructed. The instructions on this point were preceded by the words "if you disbelieve that (appellant's) story", and what followed is not very clearly expressed. Much was made at the hearing of this appeal of these additional instructions but I think it is quite clear from their verdict that the jury accepted the appellant's account of what happened, for it is only on this evidence that a verdict of criminal negligence would be founded. That being so, these additional instructions to the jury became irrelevant as far as this appeal is concerned.

With the greatest respect to those who entertain a different view, it appears to me that when one judge holds that a passage in the charge to the jury is material and fatally misleading and another judge holds that the same passage is irrelevant they are in disagreement on a point of law.

Turning now to the question whether we have jurisdiction to consider the second ground of appeal it is at once apparent that as to this ground there was direct disagreement between the majority and the minority in the Court of Appeal and all that has to be considered is whether the question is one of law. It is desirable to state precisely what occurred when the jury returned to the court-room for the purpose of giving their verdict. The transcript reads as follows:

The Clerk: Gentlemen of the Jury, have you arrived at your verdict? if so, say so by your foreman.

Foreman of the Jury: (Mr. H. McCaskill): We have.

The Clerk: What is your verdict?

Foreman of the Jury: We find death by accidental means, with elements of criminal negligence, and bring in a verdict of manslaughter.

The Clerk: Gentlemen of the Jury, do you all agree? (Each name was called, and each juror answered "Yes").

The Clerk: Harken to your verdict as rendered by your foreman, you find death by accidental means, with elements of criminal negligence.

Mr. Miller: In the light of the finding of the Jury, I am asking that Your Lordship direct that the accused be acquitted. The finding is that death was accidental, with elements of criminal negligence, which indicates a doubt that it was caused by criminal negligence, and therefore the accused is entitled to an acquittal.

Mr. De Weerdt: I have nothing to say, except that I would disagree.

The Court: No, I am accepting the verdict of the jury as the verdict of manslaughter.

It will be observed that when the clerk directed the jury to harken to their verdict and proceeded to state it he omitted the final words which had been used by the foreman: "and bring in a verdict of manslaughter".

It will also be observed that the clerk did not use the form of question which is usual: "Harken to your verdict as recorded . . . so say you all?" The reason for this would seem to be that the clerk rightly regarded the findings of the jury as reported by the foreman to be a special verdict upon which it would be for the judge to direct whether a verdict of guilty or not guilty should be recorded. While the argument that followed as to what verdict should be entered by the Court is extremely brief and the decision of the learned trial judge even more so, it would appear that the learned judge and counsel also regarded the verdict as a special one.

Special verdicts in criminal cases are unusual; the *Criminal Code* makes express provision for them in only two cases, defamatory libel (s. 267), and cases in which evidence is given that the accused was insane at the time the offence was committed (s. 523); but the *Criminal Code* does not forbid the giving of a special verdict in any case and it is open to the jury to do so if they see fit.

The matter is put briefly and accurately in Halsbury's Laws of England, 3rd ed., vol. 10, under the title "Criminal Law and Procedure" as follows:
at page 428:

> The verdict may be either a general verdict of guilty or not guilty on the whole charge, or a verdict of guilty on one part of the charge and not guilty on another part, or a special verdict which finds the facts of the case and reserves the legal inference to be drawn from them for the judgment of the Court.

at page 430:

> Where a special verdict is returned, it is for the Court to act upon it and to direct a verdict of guilty or not guilty to be entered.

and at page 431:

> If the finding of the jury is ambiguous or inconsistent, and a verdict of guilty has been entered on it, the conviction will be quashed.

It is sufficient to refer to one of the cases cited. In *Regina v. Gray*[1], the prisoner was indicted for obtaining food and money by false pretences. After the summing up the jury retired to consider their verdict and upon their return handed to the trial judge a paper which they said contained their verdict. It read as follows: "Guilty of obtaining food and money under false pretences, but whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy". The trial judge accepted this verdict and discharged the jury. After hearing argument the trial judge directed a verdict of guilty to be entered but at the request of counsel for the prisoner stated a case for the Court of Crown Cases Reserved. The members of that Court, Lord Coleridge C.J. and Denman, Mathew, Charles and Williams JJ., were unanimous in deciding that the conviction should be quashed. Denman J. said at page 302:

> If the verdict had been guilty merely, no question could have arisen. But when the jury go beyond the mere verdict of guilty or not guilty and add words, they at once give rise to the question whether their verdict is sufficient.

[1] (1891), 17 Cox C.C. 299, 7 T.L.R. 477.

It is scarcely necessary to point out that the jurisdiction of the Court of Crown Cases Reserved was limited to deciding questions of law which arose in criminal trials. The strictness with which that rule was observed is illustrated by the case of *The Queen v. Clark*[1].

That Parliament contemplated the giving of special verdicts in criminal cases appears from the wording of clause (*c*) of subs. (1) of s. 592 of the *Criminal Code* which reads as follows:

> 592. (1) On the hearing of an appeal against a conviction, the Court of Appeal
>
> * * *
>
> (*c*) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion as to the effect of a special verdict, and may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court;

The opening words of this clause "may refuse to allow the appeal" would indicate that but for the power conferred by this subsection the Court of Appeal should allow the appeal if of opinion that the trial court arrived at a wrong conclusion as to the result of a special verdict.

The Court of Appeal derives its power to allow an appeal against a conviction from subs. (1) of s. 592 and, in my opinion, it is only in clause (*a*)(ii) of that subsection that power is found to allow an appeal because the trial court has arrived at a wrong conclusion as to the effect of a special verdict; in arriving at that wrong conclusion the trial court has made "a wrong decision on a question of law". It will be remembered that s. 592(1)(*a*) reads as follows:

> 592. (1) On the hearing of an appeal against a conviction, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice.

In my opinion in deciding what verdict should be entered by the Court following the rendering of a special verdict by the jury the judge is deciding a question of law; the task of

[1] (1866), L.R. 1 C.C.R. 54.

the jury has been completed and it becomes the function of the judge to interpret their finding and to order the appropriate verdict of guilty or not guilty to be entered; *ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores.*

On the merits of the appeal I find myself as regards both of the grounds argued before us, in substantial agreement with the reasons of the learned Chief Justice who dissented and in whose reasons Macdonald J.A. concurred.

I agree with the view of the learned Chief Justice that the learned trial judge should have asked the jury to reconsider their verdict, but as this was not done we must, of course, deal with the matter on the record as it stands.

I have already quoted the passage from the reasons of the Chief Justice in which he found that there had been misdirection and I agree with it. His reasons on the second ground conclude as follows:

> I find myself unable to conclude what the jury meant by the phrase "with elements of criminal negligence" and where there is ambiguity or uncertainty in a jury's verdict and their intention is not clear, this court cannot speculate or guess what the jury meant. The confusion is added to by the clerk having recorded the verdict as 'you find death by accidental means with elements of criminal negligence' without reference to their words 'and bring in a verdict of manslaughter'. The jury made no comment when the clerk asked them to 'harken to your verdict as rendered by your foreman'. The jury may have accepted the accused's statement as to what occurred and found that he failed to act as a reasonable person, that is that he was negligent and that his negligence caused the deceased's death, but reached the conclusion that his negligence was not of the high degree required to prove manslaughter. There is so much doubt whether the jury intended to convict of manslaughter that in my opinion it would be quite unsafe to accept the jury's verdict as one of guilty of this offence and on this ground I would quash the conviction and direct a new trial. I do not consider that the verdict which the jury rendered is a verdict which can be recorded as a verdict at all.

With this passage also I agree.

It remains to consider the argument of counsel for the respondent based on s. 592(1)(*b*)(iii) of the *Criminal Code*:

> 592 (1) On the hearing of an appeal against a conviction, the court of appeal
>
> (*b*) may dismiss the appeal where
>
> * * *
>
> (iii) notwithstanding that the court is of opinion that on any ground mentioned in subparagraph (ii) of paragraph (*a*) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

It may be observed, in passing, that it is only in cases of which the court is of opinion that the appeal might be decided in favour of the appellant because the judgment of the trial court should be set aside on the ground of error in law that it can require to consider subpara. (iii) of s. 592(1)(*b*) at all.

On this point also I am in agreement with the reasons of the learned Chief Justice and propose to add only a few words.

The finding of the jury has negatived any intention on the part of the appellant to injure the deceased. There was evidence on which it was open to the jury to find that immediately before the happening of the fatal accident the appellant was engaged in endeavouring to unload the rifle in case it should be loaded. The rifle was cocked and the appellant did not know whether it was loaded or not. He had not loaded it but apparently he was not satisfied of the reliability of the statement of the deceased that she had not done so. The rifle was made an exhibit; we had an opportunity of examining it and it was described by the witness Corporal Kirby of the R.C.M.P., an expert in the matter of fire-arms. It is a .22 calibre rim-fire, bolt-action, single-shot rifle. After a cartridge has been inserted and the breech closed the rifle is cocked by "grasping the bolt by the tail and bringing it to the rear". The rifle is then ready to be fired. It is so constructed that when there is a live round in the breech and the rifle is cocked the breech cannot be opened to permit of the extraction of the live round until the rifle is either discharged or uncocked. Corporal Kirby was asked how the rifle could be uncocked without firing it and explained that this operation "requires both hands, one to grasp the tail of the bolt, and the second to release the trigger and then it is allowed to travel forward slowly". It is obvious that if while this procedure was being carried out the bolt should slip from the fingers of the operator the rifle would be discharged. The concluding question and answer in Corporal Kirby's cross-examination read as follows:

> Q. And if one is not careless, but is careful, one might still accidentally lose contact with the tail of the bolt?
>
> A. Yes sir, and allow it to fire.

It appears to me that it would have been open to the jury to take the view that the appellant, engrossed in the operation of uncocking the rifle, was momentarily inattentive to

the direction in which it was pointing; and on that view it would be a question of degree for the jury whether his conduct amounted to the "very high degree of negligence required to be proved before the felony is established"—to use the words of Lord Atkin in *Andrews v. Director of Public Prosecutions*[1], quoted in the reasons of Johnson J.A.

The question was eminently one on which the appellant was entitled to have the verdict of a properly instructed jury; I find it impossible to say that had the jury been properly instructed they would necessarily have convicted him.

While I do not found my judgment upon what was said by Crown counsel at the trial after the misdirection referred to above had occurred, it is worthy of note that, with exemplary fairness, Mr. Price submitted to the learned trial judge that it was open to the jury to find a verdict of not guilty and that he should so instruct them.

For the above reasons and those given by the learned Chief Justice in the Court of Appeal, I would allow the appeal, quash the conviction and direct a new trial on the charge of manslaughter.

FAUTEUX J. (*dissenting*):—Tried, last May at Yellowknife in the Northwest Territories, on a charge that he, at Yellowknife on the 17th day of December 1960, did murder one Madelaine Marlowe, contrary to s. 206 C.C., appellant was found guilty of manslaughter. His appeal from this conviction to the Court of Appeal of the Northwest Territories was dismissed by a majority decision[2]; Johnson, Parker and Kane JJ.A., of the majority, affirmed the conviction while Smith C.J.A., and Macdonald J.A., would have ordered a new trial. Appellant now appeals to this Court.

For the purpose of this appeal, the facts adduced in evidence by the prosecution and by the accused, sole witness heard for the defence, need only be shortly stated.

Appellant and the deceased were sharing a small one-room cabin on Joliffe Island in Yellowknife. The accused testified that, on the night of December 16, both left the cabin at 6 p.m. and, from that time to 11 p.m., consumed four bottles of wine with two other persons. Upon their return home at 11 p.m., appellant went to bed while Marlowe, already inebriated, left the cabin to obtain more

[1] [1937] A.C. 576 at p. 583. [2] (1961), 131 C.C.C. 287, 36 C.R. 405.

liquor. Appellant said he became concerned with her condition and went looking for her at a neighbour's place where admittance was refused to him. Early in the morning of the 17th, he went out again and found her at a neighbour's place "just about as drunk as I have ever seen her". He brought her home and both went to bed. He got up in the forenoon when some visitors came. As he followed the last visitor leaving the cabin, he said that he glanced at the .22 calibre bolt-action, single-shot rifle which was behind the door in the porch, noticed that it was cocked and realized that it was dangerous because a little boy used to run around the premises. Having re-entered the cabin, he asked Marlowe, who was still lying in bed, whether the rifle was loaded and she answered it was not. He testified that he, none the less, proceeded to uncock the rifle and said: "I don't know what happened, whether the bolt slipped or I touched the trigger or what but it went off." The bullet struck Marlowe's head in the left temporal region penetrating the brain in a straight horizontal direction. This fact, if appellant's story is to be believed, indicates that when he attempted to uncock the rifle, the rifle barrel was directly in line with the head of the deceased then lying in bed. Marlowe died instantaneously. Thereafter, and on three successive occasions, appellant admitted responsibility for the shooting. To McKechnie, the last visitor to leave the cabin prior to the event, he handed the rifle, saying: "Here, Trapper, I did it. I shot her. You go to Scratchet's and phone the police." To Larsen, a neighbour, he said: "I shot Madelaine Marlowe." And to the police, he declared: "I shot her" or "I shot a woman" and when asked why, he answered: "She lied to me." After the usual warning, he said: "I shot her. I don't care. I told Trapper I shot her and I asked him to phone the police." He then inquired whether she was dead and being informed that she was, said: "Thank God for that. I won't write anything, and I won't say anything." At trial, he explained that when he said "She lied to me", he was referring to her statement that the gun was unloaded and that by saying "Thank God for that", he was expressing thankfulness for the fact that being dead she was not going to suffer. In substance, his evidence was that he had no intention of harming the deceased and the shooting was purely accidental.

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The jury were particularly instructed as to murder; manslaughter; provocation, drunkenness and criminal negligence, as incidents reducing murder to manslaughter, and directed that if the shooting was accidental and unaccompanied by criminal negligence, there was no crime. At the close of the trial, they brought in the following verdict:

> We find death by accidental means with elements of criminal negligence, and bring in a verdict of manslaughter.

Requested to say whether they all agreed to this verdict, each juryman answered affirmatively.

Appellant then appealed his conviction to the Court of Appeal with the result already indicated.

His appeal to this Court purports to be lodged pursuant to s. 597 (1)(*a*) C.C., reading:

> 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. 1960-1961, c. 42, s. 27(1).
>
> (*a*) on any question of law on which a judge of the court of appeal dissents, or
>
> (*b*) ....

It behooves the appellant to show that the record discloses material enabling him to bring his appeal within the conditions prescribed by this section. While, in certain respects having here no relevancy, the text of this section differs from that of its predecessors, the section still, as did the latter, conditions the right of appeal given thereby to the presence, in the reasons for judgment delivered in the Court of Appeal, of points of difference between the views of the majority and those of the minority, on pure questions of law. *Rozon v. The King*[1] and the decisions therein referred to and applied; *The Queen v. Fitton*[2]; *Pearson v. The Queen*[3]. It is therefore expedient to compare the two sets of reasons, as was done by this Court in *The King v. Décary*[4], to ascertain whether this statutory condition is here present.

[1] [1951] S.C.R. 248, 2 D.L.R. 594. [2] [1956] S.C.R. 958, 116 C.C.C. 1.
[3] [1959] S.C.R. 369, 123 C.C.C. 271. [4] [1942] S.C.R. 80, 2 D.L.R. 401.

For the minority, Smith C.J.A., with the concurrence of Macdonald J.A., found (i) that there was doubt as to what the jury meant by their verdict; (ii) that there were misdirections in the following excerpt from the charge:

> It is conceivable he might have shot at her, he might have shot at her with the intent of scaring her, or he may not even have pointed the rifle at her at all, but if he did point the rifle at her, it might have been a case of trying to scare her—it might have been in itself an unlawful act, the unlawful act of point (sic) a rifle—but in any of those things, any of those things would make it manslaughter, instead of murder.

Being unable to say that no substantial wrong or miscarriage of justice had occurred as a result of these instructions, he concluded that the conviction should be quashed and a new trial ordered.

For the majority, Johnson J.A., with the concurrence of Kane J.A., said that there were two grounds of appeal requiring consideration, namely (i) that there was no evidence upon which to found a verdict of manslaughter and (ii) that the jury's verdict was in fact a verdict of acquittal or, alternatively, that the verdict indicated a doubt as to there being criminal negligence within the meaning of the *Criminal Code*. He rejected the first ground as being unfounded, adopting, in this respect, a view similar to that of the Judges of the minority who would have ordered a new trial. As to the second ground, *i.e.*, the meaning of the verdict, he also rejected it. While considering this ground, the learned Judge did refer to the criticism made in relation to the instructions above quoted and found to be misdirections by the minority. However, he expressed no view in the matter. He considered these instructions irrelevant as far as the appeal was concerned, in view of the fact that it was quite clear from the verdict that the jury had accepted the appellant's account of what had happened.

Parker J.A., said that there were only two grounds of appeal to which need was to refer, namely, (i) that the trial Judge misdirected the jury and (ii) that the jury in stating the basis upon which they found the accused guilty of manslaughter used language raising a doubt whether they had proceeded upon the right principle. Considering at first the latter ground, he rejected it. As to the instructions to the jury, he said that while there were certain deficiencies in the charge, no substantial wrong or miscarriage of justice had occurred.

In short, all the members of the Court agreed that there was evidence to support a verdict of manslaughter founded on criminal negligence; there was no dissent expressed by the majority on the views taken by the minority on the question of the validity of the instructions quoted above; the only point of difference is confined to the verdict held to be ambiguous by the minority and unambiguous by the majority. Hence the question is whether this disagreement is on a pure question of law.

It is certain that if the verdict is ambiguous, it cannot be accepted in that form. On that proposition, there is not the slightest disagreement in the Court below.

By definition, a verdict is "The answer of a jury on a question of fact in a civil or criminal proceeding" Osborn, A Concise Law Dictionary, or "The opinion of a jury on a question of fact in a civil or criminal proceeding" Earl Jowitt, Dictionary of English Law. In this particular case, the determination of the question whether the answer or opinion given by the jury on the facts is clear or ambiguous does not involve the determination of any question of law, nor was there any determined by either the members of the majority or those of the minority. The difference in the view they formed in the matter is not a difference on a question of law within the meaning of s. 597(1)(*a*).

Under these circumstances, I would say that the record does not disclose material enabling appellant to bring his appeal within the section and that the appeal should be quashed.

I will assume, however, that contrary to these views, appellant did bring his appeal within the section and that it is open to this Court to consider grounds of appeal raised on behalf of appellant, namely, lack of evidence to support a verdict of manslaughter founded on criminal negligence, misdirections, and ambiguity of the verdict.

None of the members of the Court below found any merits in the first ground. A former soldier, appellant was familiar with the danger of loaded firearms. It was indeed that very danger which, on his own story, prompted him to uncock the trigger of the rifle. He did not rely on Marlowe's answer that it was not loaded. In performing this operation, he had a duty to take these ordinary precautions in the absence of

which human life would necessarily be endangered. The elementary if not the only one called for was to make sure that during the operation the rifle would point in a direction opposite to that of the woman. The special hazards allegedly attending the uncocking of this particular rifle, whether known or unknown to appellant, did not minimize but rendered more imperative the duty to do so. Proceeding as he did while the rifle was directly in line with the deceased's head, appellant did show wanton or reckless disregard for the life and safety of the victim. In my view, once appellant's account of the occurrence is accepted, as it was by the jury, a verdict of manslaughter based on criminal negligence was, in the circumstances of this case, the only verdict which a reasonable jury acting judicially could return.

With respect to the alleged misdirections, I agree with Johnson and Kane JJ.A., that the jury having accepted appellant's testimony, it became irrelevant to the appeal to consider the validity of these instructions, and, in any event, as found by Parker J.A., no miscarriage of justice or substantial wrong resulted therefrom.

As to the verdict, Johnson J.A., with the concurrence of Kane J.A., had this to say:

> I have said that the verdict must be considered in the light of the judge's charge. It must also be considered with the facts of this case. I have said it was apparent that the jury accepted the appellant's account of the events preceding the shooting. It was the acts of the appellant as related by himself, which, taken together with and in the circumstances related by him, that were criminally negligent. That evidence was not capable of being broken down into separate "elements" which could be believed or not without destroying the whole fabric of the explanation. The only exception to this was the conversation between the accused and the deceased about whether the rifle was loaded. That could be believed or not without affecting the narrative of events.
>
> The language of a jury of laymen should not be subjected to minute scrutiny or to fine shading of dictionary meanings. When the verdict is considered with the evidence and the judge's charge, it means no more than this: they, the jury, were indicating to the judge that of the three types of manslaughter which it was open for them to find—that is, due to criminal negligence, provocation or because of drunkenness—they were finding him guilty of manslaughter because of criminal negligence.

With these views, I am in substantial agreement.

I would, therefore, quash the appeal.

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Appeal allowed, the conviction quashed and a new trial directed on the charge of manslaughter, TASCHEREAU *and* FAUTEUX JJ. *dissenting.*

Solicitors for the appellant: Miller, Miller and Witten, Edmonton.

Solicitor for the respondent: The Attorney General of Canada.

1962
*Mar. 6
Apr. 24

IN THE MATTER OF THE ESTATE OF JOHN KARKALATOS, DECEASED;

THE OFFICIAL GUARDIAN, on behalf of the infant MARIA GETTAS ....APPELLANT;

AND

JOHN KARAVOS, LOUKIA KARAVOS, and MARINA KARAVOS, and GEORGE GETTAS, GEORGE CONSTANTINE BOUKYDIS and CONSTANTINE KARAVOS, Executors of the last Will and Testament of John Karkalatos ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Gift "to among and between my grandchildren, per stirpes, in equal shares"—Whether testator's children or grandchildren constitute the "stirpes" or "stocks".

A testator's will made provision for his wife out of the income of his estate during her lifetime, and provided that after her death all the net profits of his estate, after paying the amounts required as a result of the illness of either of his daughters or any of his grandchildren, should be paid annually to and between his two daughters in equal shares until the death of one of them. After such death the trustees were to divide and distribute one-half of the estate "to among and between my grandchildren, per stirpes, in equal shares", and to pay all the net profits of the remainder of the estate annually to the surviving daughter until her death. The testator died in 1953 and was survived by his widow who died later in the same year and by his two daughters, one of whom died in 1959 leaving only one child, the appellant herein. The respondents were the three children of the surviving daughter.

In proceedings to determine certain questions arising in the administration of the estate, the trial judge held that one-half of the estate was available for distribution and that the four grandchildren of the testator

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

were entitled to share equally therein. This judgment was affirmed by the majority of the Court of Appeal, and it was from the portion of the judgment of that Court which affirmed the declaration as to equal division of the estate among the four grandchildren that the present appeal was taken.

Held: The appeal should be allowed.

The gift "to among and between my grandchildren, per stirpes, in equal shares" was a gift to persons of different stocks but of the same generation "per stirpes", and the testator's own "children leaving children" constituted the stocks between which the estate now available for distribution was to be divided "in equal shares". *Robinson v. Shepherd* (1863), 3 De G. J. & S. 129, distinguished; *Sidey v. Perpetual Trustees Estate & Agency Co. of N.Z.*, [1944] A.C. 194, applied.

The words "my grandchildren" meant "the children of my daughters", and this being the case, the provision for an equal division of profits between the two daughters during their respective lifetimes by the use of the words "to among and between both of them in equal shares", followed as it was by the division of the estate at their respective deaths, "to among and between" their children "per stirpes, in equal shares", supported the view that equality of division between the two daughters during their lifetimes and their respective families after their deaths was a part of the testamentary scheme. This was the only construction which could give effect and meaning both to the words "per stirpes" and the words "in equal shares" used as they were with reference to a gift to persons of different stocks and of the same generation.

The provisions for payment of the illness expenses of all the grandchildren out of the estate moneys in the hands of the trustees could not be construed as reflecting an intention on the part of the testator to have the corpus divided equally between the grandchildren when the time for distribution came, particularly as such an intention would run contrary to that which appeared to be expressed elsewhere in the will to the effect that the two daughters and their two families were to be separately and equally treated as to the division of both the profits and the corpus of the estate.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming, by a majority, a judgment of Barlow J., respecting the distribution of a deceased's estate. Appeal allowed.

J. J. Robinette, Q.C., for the appellant.

Terence Sheard, Q.C., for John Karavos, Loukia Karavos and Marina Karavos, respondents.

J. P. Bassel, for the executors.

The judgment of the Court was delivered by

RITCHIE J.:—These proceedings were initiated by an originating notice taken out by the executors of the last will and testament of John Karkalatos (hereinafter called

[1] [1961] O.R. 335, 27 D.L.R. (2d) 327.

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the "testator") pursuant to Rule No. 600 of the Rules of Practice of the Supreme Court of Ontario to obtain the information, advice and direction of that Court upon the following questions arising in the administration of the estate under the said will:

1. Is any portion of the balance of the corpus of the estate distributable at the present time?
2. If the answer to question number 1 is in the affirmative, then:
   (a) What portion is available for distribution?
   (b) Who is entitled to share and in what proportion?

This motion came on for hearing before Barlow J. who rendered judgment declaring that one-half of the estate was available for distribution and that the four grandchildren of the testator were entitled to share equally therein. This judgment was affirmed by the majority of the Court of Appeal of Ontario[1] (MacKay J.A. dissenting), and it is from the portion of the judgment of that Court which affirms the declaration as to equal division of the estate among the four grandchildren that this appeal is now taken on behalf of the infant, Maria Gettas, who is one of the testator's granddaughters.

The testator died on January 24, 1953, having first made his last will dated August 27, 1948, which makes provision for his wife out of the income of his estate during her lifetime, and provides that after her death "all the net profits" of his estate, after paying the amounts required as a result of the illness of either of his daughters or any of his grandchildren, shall be paid annually to and between his two daughters in equal shares until the death of one of them, after which it directs that his trustees:

> . . . shall pay divide and distribute approximately one-half of my then remaining estate to among and between my grandchildren, per stirpes, in equal shares, and—they shall pay all the net profits of the remainder of my estate (available in cash for such payment and distribution), annually and every year, to my surviving daughter until her death.

The testator was survived by his widow who died in 1953 and by his two daughters, Evaggelia Gettas, who died in October 1959 leaving only one child, the infant appellant, Maria Gettas, and Maria Karavos who is still living and has three children, John, Loukia and Marina who are all over 21 years of age and who are the respondents in this appeal.

[1] [1961] O.R. 335, 27 D.L.R. (2d) 327.

The question to be determined is whether, in using the words "to among and between my grandchildren, per stirpes, in equal shares", the testator intended, as the courts below have found that he did, to designate his grandchildren as the *"stirpes"* or "stocks" so that each of the four of them would take an equal share of the portion of the estate made available for distribution by the death of Evaggelia Gettas, or whether he intended, as the appellant contends, to refer to the "stocks" represented by his two daughters so that one-half of that portion of the estate would go to the infant appellant, Maria Gettas, and the other half to the three children of Maria Karavos.

In the course of his reasons for judgment which were rendered on behalf of the majority of the Court of Appeal, Aylesworth J.A. reviews the relevant English authorities as to the meaning to be attached to the words *"per stirpes"* in the case of a gift to beneficiaries of more than one generation, and he notes the early conflict between the decision of Lord Westbury in *Robinson v. Shepherd*[1], where he held that the words were used to designate the different families of each of the first generation of beneficiaries, and the subsequent decision of Lord Romilly M.R. in *Gibson v. Fisher*[2], in which he disregarded Lord Westbury's ruling and held that the "stocks" were to be found amongst the immediate ancestors of the first generation of beneficiaries. Aylesworth J.A. notes also that the decisions of single judges in England in *Re Wilson, Parker v. Winder*[3], *in Re Dering, Neall v. Beale*[4], and *in Re Alexander*[5], follow the construction adopted in *Robinson v. Shepherd, supra,* but after considering what was said by Lord Simonds, speaking on behalf of the Privy Council, in *Sidey v. Perpetual Trustees Estate & Agency Co. of N.Z.*[6], he finds himself free to turn to a consideration of the present will "untrammelled by any hard and fast rule of construction".

The question of where to look for the "stocks" in the case of a stirpital division between beneficiaries of different generations which was the subject of the decision in *Robinson v. Shepherd, supra,* and the cases which followed it does not, however, arise at all where all the beneficiaries are of

[1] (1863), 4 De G. J. & S. 129, 46 E.R. 865.
[2] (1867), L.R. 5 Eq. 51.
[3] (1883), 24 Ch. D. 664.
[4] (1911), 105 L.T. 404.
[5] [1919] 1 Ch. 371.
[6] [1944] A.C. 194.

the same generation to which latter situation the following language used by Lord Simonds in *Sidey v. Perpetual Trustees Estate & Agency Co. of N.Z., supra,* at pp. 202-3 is directly applicable:

> In the simplest case, where a gift is made to a number of persons of different stocks, but of the same generation per stirpes and not per capita, it is manifest that the stocks are to be found not in the takers, but in the ancestors, and this result is reached not by the displacement of any prima facie rule of construction, but by the construction of the language of the gift without any predilection.

In the same case Lord Simonds later had occasion to observe (p. 203) that:

> If the division had been directed "per stirpes among the children of such of my children as shall have left issue" it could not have been doubted that the testator's own children leaving issue formed the stirpes.

Counsel on behalf of the respondents sought to apply the reasoning employed in *Robinson v. Shepherd, supra,* and other cases where the beneficiaries were of more than one generation to the language of the present will on the ground as he put it in his factum that "it is not impossible for a bequest to grandchildren to be made in a context showing an intention to benefit more remote descendants by substitution;" and he contended that the use of the words "per stirpes, in equal shares" as they occur in the present will evidences an intention to provide for a substitutionary gift in favour of great-grandchildren of the testator. In support of this contention, reference was made to the case of *In re Perlmutter's Will*[1], which was a decision of the Surrogate judge of King's County in the State of New York, holding that in a gift to children "per stirpes and not per capita" the latter words must be taken as "implying a substitutionary gift", but it is not suggested that this case can be taken as establishing anything in the nature of a rule of general application in our Courts.

A consideration of the cases of *Strutt v. Finch*[2], *Hussey v. Dillon*[3], *Orford v. Churchill*[4], and *In re Hall*[5], all of which are concerned with the meaning to be attached to the word "grandchildren", when used in a will, clearly shows that its primary meaning of "descendant of the second degree" can only be extended to include remoter descendants when the

[1] (1935), 282 N.Y.S. 282.
[2] (1829), 7 L.J.O.S. Ch. 176.
[3] (1763), 2 Amb. 603.
[4] (1814), 3 Ves. & B. 59, 35 E.R. 401.
[5] [1932] 1 Ch. 262.

context of the will demonstrates the testator's intention to use the word in this extended sense. I am unable to find that the use of the phrase "per stirpes, in equal shares" or any other language in the present will demonstrates the intention of the present testator to use the word "grandchildren" in any sense that would displace its *prima facie* meaning to "my children's children".

I am of opinion, therefore, that the gift "to among and between my grandchildren, per stirpes, in equal shares" in the 14th clause of the present will is a gift to persons of different stocks but of the same generation "per stirpes" and that the testator's own "children leaving children" constitute the stocks between which the estate now available for distribution is to be divided "in equal shares".

The majority of the Court of Appeal has, however, reached a different conclusion by a consideration of the words of the gift in the context of paras. 13, 14 and 15 of the will which read as follows:

> 13. My said TRUSTEES, after the death of my wife, shall pay all such amounts, if any, as shall be required (after the death of my wife as aforesaid) by my daughters MARIA KARAVOS and EVAGGELIA GETTAS or either of them or the survivor of them, or by any of the children of either of them by reason of illness, for medical, surgical, dental, hospital and nursing services, and for supplies in connection therewith, and for transportation or other expenses caused by or resulting from such illness.
>
> 14. My said TRUSTEES, after the death of my wife leaving her surviving both of my said daughters MARIA KARAVOS and EVAGGELIA GETTAS, shall pay divide and distribute all the net profits of my estate (available in cash for such payment division and distribution), annually and every year, to among and between both of them in equal shares, until the death of one of them; and, after the death of one of them—they shall pay divide and distribute approximately one-half of my then remaining estate to among and between my grandchildren, per stirpes, in equal shares, and—they shall pay all the net profits of the remainder of my estate (available in cash for such payment and distribution), annually and every year, to my surviving daughter until her death.
>
> 15. My said TRUSTEES, after the death of my wife and both of my said daughters MARIA KARAVOS and EVAGGELIA GETTAS, shall pay divide and distribute all the rest residue and remainder of my estate to among and between my grandchildren, per stirpes, in equal shares.

Mr. Justice Aylesworth considered that the words "to among and between my grandchildren, per stirpes, in equal shares" spoke "eloquently of the testator's intention that each of

his grandchildren should be treated equally" and he expressed the opinion that if the testator had "had a contrary intention it is unlikely that the word 'equal' would have been chosen".

As I have indicated, I am of opinion that the words "my grandchildren" as used in the present will mean "the children of my daughters", and this being the case it seems to me, with the greatest respect, that the provision for an equal division of profits between the two daughters during their respective lifetimes by the use of the words "to among and between both of them in equal shares", followed as it is by the division of the estate at their respective deaths, "to among and between" their children "per stirpes, in equal shares", supports the view that equality of division between the two daughters during their lifetimes and their respective families after their deaths was a part of the testamentary scheme. It may be added that, in my view, this is the only construction which can give effect and meaning both to the words "per stirpes" and the words "in equal shares" used as they are in the present will with reference to a gift to persons of different stocks and of the same generation.

The decision of the Court of Appeal appears to be based also upon the "considerable significance" which Aylesworth J.A. attached to the provisions of para. 13 of which he said:

> Therein the trustees are directed to pay any amounts required after the death of the widow by his daughters or either of them or the survivor of them "or by any of the children of either of them" by reason of illness for medical expenses and the like. It is to be observed that there is no provision for charging such advances against any particular share; as to such expenses every grandchild is to be treated exactly as every other grandchild. It seems strange that the testator should have had in his mind such an equal sharing among his grandchildren merely up to the point of time of the first distribution of residue and then an intention directly against such equal sharing in the first or final residual division. Such an intention, in my view, would require words of plain meaning for its accomplishment.

It is to be noted that the directions given by clause 13 of the will relate to payments to be made from the estate in the hands of the trustees and that they are quite distinct from the directions subsequently given respecting the equal division of profits and the distribution of capital. I am, with respect, unable to construe the provisions for payment of the illness expenses of all the grandchildren out of estate

moneys in the hands of the trustees as reflecting an intention on the part of the testator to have the corpus divided equally between the grandchildren when the time for distribution comes, particularly as such an intention would run contrary to that which appears to me to be expressed elsewhere in the will to the effect that the two daughters and their two families are to be separately and equally treated as to the division of both the profits and the corpus of the estate.

It was contended by counsel on behalf of the respondents that at the time when the will was drawn the testator must have been aware of the fact that it was unlikely, having regard to their age, that either of his daughters would have any more children, and upon this basis it was submitted that it would not be reasonable to assume that the testator intended that one grandchild would inherit one-half of his estate while the other three only inherited a one-sixth part each. There is no evidence before us as to the financial circumstances of the two daughters, and in my view the mere fact that one daughter had a larger family than the other cannot of itself have the effect of defeating the provisions for stirpital division contained in the 14th and 15th paragraphs of the will.

For all these reasons, as well as for those recorded in the dissenting opinion of MacKay J.A. in the Court of Appeal of Ontario, I would allow this appeal, set aside the judgments of the Court of Appeal and of Barlow J. and direct that the infant appellant, Maria Gettas, is entitled to one-half of the one-half portion of the estate now available for distribution and that the respondents, John Karavos, Loukia Karavos and Marina Karavos, are each entitled to a one-sixth share of that portion of the said estate. The costs of all parties should be paid by the executors out of the said one-half of the said estate, those of the executors to be taxed and allowed as between solicitor and client.

Appeal allowed with costs of all parties to be paid out of the said one-half of the estate.

Solicitor for the appellant: John J. Robinette, Toronto.

Solicitors for the respondents, John Karavos, Loukia Karavos and Marina Karavos: Johnston, Sheard & Johnston, Toronto.

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Solicitors for the respondents, the executors of the last will and testament of John Karkalatos: Bassel, Sullivan, Holland & Lawson, Toronto.

1961 *Nov. 2
1962 Feb. 6

CANADIAN NATIONAL RAILWAY COMPANY (*Defendant*) .... APPELLANT;

AND

DAME OLIVINE TRUDEAU (*Plaintiff*) .... RESPONDENT.

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

Courts—Jurisdiction—Construction of elevated railway line—Obstruction of view—Action for injurious affection in Superior Court—Declinatory exception—Exclusive jurisdiction of Exchequer Court—The Railway Act, R.S.C. 1952, c. 234—The Canadian National Railways Act, 1955 (Can.), c. 29—The Expropriation Act, R.S.C. 1952, c. 106—The Exchequer Court Act, R.S.C. 1952, c. 98—Civil Code, art. 407—Code of Civil Procedure, arts. 40, 48.

The defendant railway company constructed on expropriated land an elevated railway line directly in front of and alongside the plaintiff's property, and thereby obstructed the plaintiff's view of the St. Lawrence River and surroundings. The plan of expropriation registered in accordance with s. 17(1) of the *Canadian National Railways Act* had originally included the plaintiff's land, but notice of abandonment respecting that land was subsequently filed as permitted by s. 24 of the *Expropriation Act*. The plaintiff alleged that the value of her land had been depreciated and claimed before the Superior Court damages under art. 407 of the *Civil Code*. The defendant railway made a declinatory exception in which it alleged that the action was in connection with certain works done pursuant to an expropriation made by virtue of the railway's incorporating statute and the federal *Expropriation Act*, and submitted that the Superior Court was without jurisdiction.

The trial judge held that the Superior Court had jurisdiction since no indemnity was claimed for lands taken or for damages caused by reason of the expropriation. This view was upheld by the Court of Queen's Bench, Appeal Side. The railway company appealed to this Court.

Held (Kerwin C.J. and Taschereau, Fauteux and Abbott JJ. dissenting): The appeal should be allowed and the action dismissed.

Per Locke, Cartwright, Martland, Judson and Ritchie JJ.: The Superior Court was without jurisdiction to entertain the action. The railway's undertaking being a work for the general advantage of Canada, its rights and powers were declared by federal legislation, and the right to

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

exercise such powers could not be prevented or interfered with by Acts of a provincial legislature. The right of the plaintiff to recover damages for injurious affection, if it existed, must be founded upon s. 166 of the *Railway Act,* R.S.C. 1952, c. 234, which provides that the railway shall, in the exercise of its powers granted by this Act or the Special Act (*the Canadian National Railways Act*), make compensation "in the manner herein and in the Special Act provided to all persons interested for all damage by them sustained by reason of the exercise of such powers". Section 17(1)(*c*) of the *Canadian National Railways Act* provides that the compensation payable in respect of any lands taken by the company shall be ascertained in accordance with the *Expropriation Act,* and that, for that purpose, the Exchequer Court has jurisdiction "in all cases relating to or arising out of any such expropriation or taking". While s. 17(1)(*c*) does not in terms declare that the jurisdiction of the Exchequer Court is exclusive, compensation can only be recovered when provided by the statutes and in the manner provided by them: in this case by proceedings in the Exchequer Court.

Sisters of Charity of Rockingham v. The King, [1922] 2 A.C. 315; *Hammersmith Railway Company v. Brand,* L.R. 4 H.L. 171; *Jones v. Stanstead Railroad Company,* L.R. 4 P.C. 98; *The Mayor, Alderman and Citizens of the City of Montreal v. Drummond,* 1 App. Cas. 384, referred to. *The Corporation of Parkdale v. West,* 12 App. Cas. 602, and *North Shore Railway v. Pion,* 14 App. Cas. 612, distinguished.

Per Cartwright, Martland, Judson and Ritchie JJ.: Having conceded that there was no fault or negligence on the part of the railway, the plaintiff's only claim was for compensation the right to which was created by Act of Parliament which prescribed the manner in which that right was to be asserted and adjudicated. The jurisdiction to deal with the plaintiff's claim was conferred by Parliament exclusively upon the Exchequer Court.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ., *dissenting*: Section 17(1)(*c*) of the *Canadian National Railways Act* refers only to compensation for land "therein taken" and its provisions do not apply to what occurred in this case. There is nothing in the *Railway Act,* the *Canadian National Railways Act,* the *Expropriation Act,* the *Exchequer Court Act,* that purports to confer exclusive jurisdiction upon the Exchequer Court. In fact s. 44 of the *Canadian National Railways Act* permits actions against the railway in respect of its undertaking or in respect of its operation or management in "any Court of competent jurisdiction in Canada". Consequently, by virtue of arts. 40 and 48 of the *Code of Civil Procedure,* the Superior Court had jurisdiction.

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

Chateauguay Perreault, Q.C., for the defendant, appellant.

[1] [1960] Que. Q.B. 1141.

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Wm. S. Tyndale, for the plaintiff, respondent.

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

THE CHIEF JUSTICE (*dissenting*):—By leave of this Court Canadian National Railway Company appeals against a judgment of the Court of Queen's Bench (Appeal Side) of the Province of Quebec[1] affirming the judgment of Marier J. which had dismissed a declinatory exception filed by the appellant in which it was alleged that the Superior Court had no jurisdiction either to hear the action or to refer it to the Exchequer Court of Canada. By my direction notice of the appeal to this Court was served upon the Attorney General of Canada and the Attorney-General of each of the Provinces so that they might have an opportunity to intervene. The only one who desired to do so was the Attorney-General of Ontario, who was given leave, but he finally filed a notice of withdrawal.

The declinatory exception recites that the action by the present respondent against the appellant "is in connection with an expropriation made by Canadian National Railway Company by virtue of its incorporating statute and The Federal Expropriation Act and with respect to works done pursuant to said expropriation although none of plaintiff's property remained taken by the expropriation at the time of the institution" of the action. As has been pointed out in the Court of Queen's Bench (Appeal Side) this statement is not correct. While the appellant at one time had filed a notice of expropriation of the respondent's property that notice was withdrawn. In her declaration the respondent alleged that the defendant had constructed an elevated railway line directly in front of and alongside her property to a height of thirty feet; that prior to the construction of the elevated railway line her property had commanded an unrestricted view of the St. Lawrence River and environments and that as a result of the construction the value of her property had been depreciated, for which she claimed damages. It is true that the elevated line has been erected upon property of another which the appellant expropriated, but the respondent's claim is not based on any expropriation by the appellant of her property.

[1] [1960] Que. Q.B. 1141.

By art. 40 of the *Code of Civil Procedure* the Superior Court is one of the Courts having jurisdiction in civil matters in the Province, and by art. 48

The Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Magistrate's Court or of the Exchequer Court of Canada and particularly in all suits or actions for alimentary pension; saving the special jurisdiction of the Municipal Courts, the Commissioners' Court and the Court of Justices of the Peace.

In *Southern Canada Power Company Ltd. v. Mercure*[1], the Court of Queen's Bench (Appeal Side) of Quebec, held that the Superior Court is authorized to consider every case which is not within the exclusive jurisdiction of another Court and this was approved by this Court in *Fortier v. Longchamp*[2]. At common law the same rule was expressed many years ago in England in *Peacock v. Bell and Kendal*[3]:

and the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.

This was adopted by Mr. Justice Willes, speaking on behalf of all the judges summoned in *The Mayor and Aldermen of The City of London v. Cox*[4], and in *Board v. Board*[5], the statement of Willes J. was referred to with approval and adopted by the Judicial Committee.

There is nothing in the *Railway Act,* the *Canadian National Railways Act,* the *Expropriation Act,* the *Exchequer Court Act* or any Rules passed under the authority of the last mentioned Act that purports to confer exclusive jurisdiction upon any other Court in the circumstances of this case. In fact s. 44 of the *Canadian National Railways Act,* 3-4 Eliz. II, c. 29, reads as follows:

44. (1) Actions, suits or other proceedings by or against the National Company in respect of its undertaking or in respect of the operation or management of Canadian Government Railways, may, in the name of the National Company, be brought in and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.

(2) Any defence available to the respective corporations, including Her Majesty, in respect of whose undertaking the cause of action arose shall be available to the National Company, and any expense incurred in

[1] (1940), 70 Que. K.B. 353 at 355.
[2] [1942] S.C.R. 240 at 243, 4 D.L.R. 564.
[3] (1667), 1 Wms. Saund. 73, 85 E.R. 84.
[4] (1867), L.R. 2 H.L. 239 at 259.
[5] [1919] A.C. 956 at 963, 48 D.L.R. 13.

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connection with any action taken or judgment rendered against the National Company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose.

(3) Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the National Company, be a court of competent jurisdiction under the provisions of this section.

Sections 164 and 166 of the *Railway Act,* R.S.C. 1952, c. 234, so far as relevant read:

164. (1) The company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained

* * *

(*d*) make, carry or place the railway across or upon the lands of any person on the located line of the railway;

* * *

(*k*) make or construct in, upon, across, under or over any railway, tramway, river, stream, watercourse, canal, or highway, which it intersects or touches temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences;

166. The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

By s. 16 of the *Canadian National Railways Act* the procedure to fix compensation referred to in ss. 207 to 246 of the *Railway Act* is declared to be inapplicable. By s. 17:

17. (1) The Expropriation Act applies *mutatis mutandis* to the National Company, subject as follows:

(*a*) any plan deposited under the Expropriation Act may be signed by the Minister of Transport on behalf of the National Company, or by the President or any Vice-President of the National Company, and no description need be deposited;

(*b*) the land shown upon such plan so deposited thereupon vests in the National Company, unless the plan indicates that the land taken is required for a limited time only or that a limited estate or interest therein is taken, in which case the right of possession for such limited time or such limited estate or interest vests in the National Company upon the deposit of the plan;

(*c*) subject to paragraph (*d*), the compensation payable in respect of any lands or interests therein taken by the National Company shall be ascertained in accordance with the Expropriation Act, and for that purpose the Exchequer Court has jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the National Company, of judicial proceedings and the conduct thereof;

(*d*) notwithstanding section 16, in any case where the offer of the National Company does not exceed two thousand five hundred dollars, compensation may be ascertained under the Railway Act, beginning with notice of expropriation to the opposite party; and

(*e*) the amount of any judgment awarding compensation is payable by the National Company.

(2) Lands or interests in lands required by any company comprised in Canadian National Railways may be acquired for such company by the National Company under the provisions of this Act.

The words underlined in subs. 1(*c*), "therein taken" make it clear that the provisions do not apply to what occurred in this case. If this be the correct interpretation, then such cases as *Sisters of Charity of Rockingham v. The King*[1]; *Hammersmith Railway Company v. Brand*[2]; *Jones v. Stanstead Railroad*[3] and *The Mayor, Aldermen and Citizens of the City of Montreal v. Drummond*[4], have no application. It may be that under the provisions of s. 27 of the *Expropriation Act* appellant could initiate proceedings in the Exchequer Court to have that Court fix the amount due by it as compensation for the injurious affection of respondent's property, but it is unnecessary to pursue that matter further because no such proceedings were taken.

The appeal should be dismissed with costs.

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

LOCKE J.:—This is an action for damages brought by the respondent in the Superior Court of Quebec against the appellant whose lines of railway are declared by s. 18 of the *Canadian National Railways Act,* 1955 (Can.), c. 29, to be works for the general advantage of Canada. The declaration alleges that the property of the respondent in St. Lambert has suffered damage by the construction of an elevated railway line by the appellant "directly in front of and alongside plaintiff's said property", which obstructs the view from such property of the St. Lawrence River and surroundings.

Paragraph 8 of the declaration reads:

That the said elevated Railway line has been constructed contrary to the zoning and building by-laws of the City of St. Lambert and in virtue of the statutory powers of expropriation of the Defendant.

[1] [1922] 2 A.C. 315, 67 D.L.R. 209, 28 C.R.C. 308.
[2] (1868), L.R. 4 H.L. 171.
[3] (1872), L.R. 4 P.C. 98.
[4] (1876), 1 App. Cas. 384.

Paragraph 11 alleged, *inter alia,* that the said damages "resulted from the building of said elevated Railway line which is permitted by the statutory powers of the Defendant."

No defence has been entered but the appellant has filed a declinatory exception alleging that the said action:

is in connection with an expropriation which was made by Defendant by virtue of its incorporating statute and the Federal Expropriation Act, and with respect to works done pursuant to said expropriation

and asks the dismissal of the action on the ground that the Superior Court is without jurisdiction.

Evidence was called by the appellant as to the expropriation proceedings referred to in the declaration and the declinatory exception. Marc Dancose, a land surveyor employed by the appellant, identified a blue print of the plan which showed the area to be expropriated by the railway company which had been registered in the appropriate registry division on March 5, 1946, accompanied by a certificate signed by a Vice-President of the Railway Company, as required by the *Canadian National Railways Act*. The lands thus taken included the lands of the respondent and other lands lying between that property and the St. Lawrence River.

There was also put in evidence a notice of abandonment of the expropriation in so far as it included the respondent's and certain other properties dated December 28, 1956, signed by the said Vice-President, which was filed in the said registry office on December 31, 1956. Accompanying this was a plan showing the portions of the original lands which had been expropriated in connection with which the proceedings were abandoned. Such an abandonment is permitted by s. 24 of the *Expropriation Act,* R.S.C. 1952, c. 106, applicable to proceedings of this nature by the appellant. The witness confirmed that the railway line had been constructed upon the expropriated lands.

Marier J., by whom the motion was heard, in written reasons said that the Superior Court had jurisdiction to entertain actions for damages against the appellant and that it was not necessary to decide if, in cases of expropriation, the Exchequer Court alone had jurisdiction or if its jurisdiction is concurrent with that of the Superior Court, since in the action no indemnity was claimed for lands taken or for damage caused by reason of the expropriation.

On appeal[1], this view of the matter was upheld, St. Jacques J., with whose judgment Choquette and Montgomery JJ. concurred, said in part:

Il s'agit d'une action en dommages ne résultant en aucune façon, ni directement ni indirectement, d'une expropriation de terrain, mais uniquement d'un avantage spécial dont jouissait la propriété de la demanderesse, jusqu'au jour où la Compagnie des chemins de fer nationaux a érigé cette voie élevée et a privé cette propriété de cet avantage qui lui donnait, suivant elle, une valeur marchande particulière.

With great respect, it is my opinion that the nature of the cause of action pleaded has been misconceived by these learned judges. The matter has been treated in both Courts as if a claim against a railway company for compensation for injurious affection such as this, resulting from the expropriation of lands and the construction of a railway line upon such lands, was to be dealt with upon the same footing as if, by way of illustration, some individual had acquired land lying between the respondent's property and the river and built a tall building upon it which obscured the view, the loss of which is the cause of action asserted in the declaration. This is not such a case.

The Canadian National Railway Company's undertaking extends throughout Canada and, being a work for the general advantage of Canada, its rights and powers are declared by federal legislation and the right to exercise such powers may not be prevented or interfered with by Acts of a provincial legislature.

The right to recover compensation for lands taken or injuriously affected is statutory and depends on statutory provisions: *Sisters of Charity of Rockingham v. The King*[2].

The right of a claimant such as the respondent to recover damages for injurious affection, if it exists, must be founded upon s. 166 of the *Railway Act,* R.S.C. 1952, c. 234, which reads:

The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

[1] [1960] Que. Q.B. 1141.

[2] [1922] 2 A.C. 315, 67 D.L.R. 209, 28 C.R.C. 308.

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This provision first appeared in the *Railway Act* as s. 92 of the Act of 1888 (c. 29). If it were not for this provision, there could be no claim for injurious affection resulting from the expropriation of lands or the construction of works under statutory authority, as pointed out in the judgment of the House of Lords in *Hammersmith Railway Company v. Brand*[1], Blackburn J. at 196, other than claims based on a negligent exercise of such powers.

The question as to the forum in which such claims shall be adjudicated is one of substance and not a technical one. In *Jones v. Stanstead Railroad Company*[2], an appeal taken from the Court of Queen's Bench in Lower Canada, the action was brought for damages against a railroad company constituted by an Act of the provincial Legislature for damage claimed to have been suffered by the construction of a railroad bridge, to which the company pleaded that the Acts of the Legislature empowered them to build the bridge and that there was no violation of the appellant's statutory rights. Sir Montague Smith, in delivering the judgment of the Judicial Committee, said in part (p. 115):

> The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had.

In *The Mayor, Aldermen and Citizens of the City of Montreal v. Drummond*[3], the above quotation from the *Stanstead Railroad Company* case was repeated in the judgment of the Judicial Committee and it was further said in part at p. 410:

> Upon the English legislation on these subjects, it is clearly established that a statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are "injuriously affected"—words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable if the work causing it had been executed without statutable authority.

[1] (1868), L.R. 4 H.L. 171 at 196. [2] (1872), L.R. 4 P.C. 98.
[3] (1876), 1 App. Cas. 384.

In that action, brought in the Superior Court of Quebec, damages were claimed against the defendant for damage alleged to have been occasioned to the plaintiff's property by the closing of a street which interfered with access to his property. The head note reads in part:

> The special Acts relating to this corporation must be read in connection with 27 & 28 Vict. c. 60, which prescribes the particular mode in which the compensation payable to any party "by reason of any act of the council for which they are bound to make compensation" should be ascertained. But actions of indemnity for damage in respect of such acts are excluded by necessary implication; for they assume that the acts in respect of which they are brought are unlawful, whilst the claim for compensation under the statute supposes that the acts are rightfully done under statutable authority.
>
> *Jones v. Stanstead Railway Company,* approved.

Sections 207 to 246 of the *Railway Act* which provide the manner in which a railway company may expropriate lands required for the purpose of its undertaking and defines the manner in which compensation for the value of such lands or lands injuriously affected are declared inapplicable to the National Company by s. 16 of the Special Act and, in lieu thereof, the provisions of the *Expropriation Act* apply *mutatis mutandis* by virtue of s. 17 of the Special Act. Section 217 of the *Railway Act* declares in terms that questions of this nature are to be settled in the manner defined, that is, in case of disagreement, by arbitration. It could not, therefore, be suggested that if the claim advanced in the present matter were against the Canadian Pacific Railway Company the Superior Court would have jurisdiction. The question to be determined is whether it is otherwise in the case of the National Company.

The Act of 1955 continues the corporate existence of the Canadian National Railway Company incorporated by c. 13 of the Statutes of 1919. By s. 16 all the provisions of the *Railway Act* apply to the company, except those therein mentioned, including those referred to in the last paragraph. Section 17 declares that the *Expropriation Act* shall apply *mutatis mutandis* to the National Company and subs. (*c*) that the compensation payable in respect of any lands taken by the company shall be ascertained in accordance with the *Expropriation Act* and that, for that purpose, the Exchequer Court has jurisdiction "in all cases relating to or arising

out of any such expropriation or taking" and may make rules governing the institution by or against the National Company of judicial proceedings.

Section 44 provides that actions against the company in respect of its undertaking or in respect of the operation or management of Canadian Government railways may be brought and heard by any judge of any Court of competent jurisdiction in Canada. Thus, actions for damages for torts or delicts or breach of contract and suits of that nature are dealt with in the provincial Courts. This section has no bearing upon or relation to the determination of compensation of the nature referred to in s. 17.

The manner in which the National Company may obtain title to lands differs from that provided by the expropriation sections of the *Railway Act*. Under s. 17 of the 1955 Act, upon the deposit of a plan in the manner provided by the *Expropriation Act,* signed by the Minister of Transport on behalf of the National Company or by the President or any Vice-President of that company, the lands shown vest forthwith in the National Company. It is this procedure that was followed in the present matter.

The compensation to be paid in respect of lands or property taken or injuriously affected by the construction of the work is determined in the manner provided by s. 27 of the *Expropriation Act.* That section speaks of an information exhibited by the Attorney General of Canada but, applying the Act *mutatis mutandis,* such information would presumably be exhibited by the National Company. In the information the names of the persons considered to be interested are given and the sums of money which the Crown or the company is ready to pay in respect of their interest is stated. Such parties may appear in the proceedings as provided by ss. 28 and 29 and the judgment of the Court as to the manner in which the compensation is to be allotted is binding upon all such parties. In the case of such an action being brought without naming some person who claimed to be interested, that person may apply to the Court to be added as a party and to have his rights determined.

There is no evidence in the present matter indicating whether or not any proceedings were taken by the National Company to determine the compensation payable in respect

of the lands taken for the line in question. The witness Dancose merely said that the railway had been built upon that line and that no offer of compensation had been made to the respondent.

As shown by subs. (*c*) of s. 17 of the Act above mentioned, the Exchequer Court has jurisdiction in all cases arising out of expropriations made by the National Company and that Court is authorized to make rules governing the institution, either by or against the company, of judicial proceedings. The respondent might, therefore, by petition of right have claimed compensation or damages for injurious affection, if so advised. Illustrations of such actions brought by persons claiming injurious affection when none of the claimant's property has been taken are *Autographic Register Systems Ltd. v. Canadian National Railway Co.*[1] and *Renaud v. Canadian National Railway Co.*[2]. The *Exchequer Court Act*, s. 18, declares the exclusive jurisdiction of that Court in respect of claims against the Crown for property taken for any public purpose or for damage to property injuriously affected by the construction of any public work. The case of *Sisters of Charity of Rockingham,* above mentioned, was such an action. While s. 17(*c*) which declares the jurisdiction of the Exchequer Court does not in terms declare that such jurisdiction is exclusive s. 166 of the *Railway Act* above quoted, upon which any such claim must be based, provides that it shall be made "in the manner herein and in the Special Act provided," and the Special Act in this case is the *Canadian National Railways Act* of 1955. As was said by the Judicial Committee in *Drummond's* case, compensation is only recoverable when provided by the statutes and in the manner prescribed by them. In this matter the manner prescribed is by proceedings in the Exchequer Court. If this were not thus made clear, actions for damages would, in my opinion, be excluded by necessary implication, for the reasons given in that case and summarized in the head note above quoted.

The cases of *Corporation of Parkdale v. West*[3] and *North Shore Railway v. Pion*[4], do not touch the question in the present case. In each of those cases there had been a failure to comply with the statutory provisions, the performance

[1] [1933] Ex. C.R. 152.
[2] [1933] Ex. C.R. 230.
[3] (1887), 12 App. Cas. 602.
[4] (1889), 14 App. Cas. 612.

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of which was a condition precedent to the right of the appellants to possession and they were in no better position than trespassers: *Saunby v. Water Commissioners*[1]. The declaration in this case contains no such allegation and the evidence of the witness Dancose shows that possession was taken in the manner prescribed by the Special Act.

The question to be decided is of importance in all of the provinces in Canada since in all of them the provincial Superior Courts of original jurisdiction are invested with powers similar to those of the Superior Courts in Quebec described in art. 48 of the *Code of Civil Procedure.*

I would allow this appeal, set aside the judgments below and direct that judgment be entered upon the declinatory exception dismissing the action, with costs throughout. The dismissal should not affect the right of the respondent to take such proceedings in the Exchequer Court as she may be advised. I express no opinion as to whether the respondent has any enforceable right in respect of the matters alleged in the declaration.

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

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Locke and wish to add only a few words.

From reading the respondent's declaration it appears that the only claim asserted is one for compensation for diminution in value of her property, number 145 Riverside Drive, resulting from the lawful act of the appellant in constructing an elevated railway in proximity to her property. The declaration alleges that this construction would have been unlawful by reason of municipal zoning and building by-laws but for the fact that it was authorized by Act of Parliament. There is no allegation of negligence in the exercise of the statutory power or of any unlawful act or omission on the part of the appellant.

In case any doubt should be entertained as to whether the above is a correct statement of the nature of the respondent's claim I quote the following excerpts from her counsel's factum:

> We readily concede that respondent's action is not based on fault or negligence or Articles 1053 and following of the Civil Code.
>
> * * *

[1] [1906] A.C. 10.

Respondent's claim is based, not on articles 1053 C.C. and following, nor on expropriation; it is based on article 407 of the Civil Code and on sections 164, 166 and 392 of the Railway Act.

* * *

Appellant, exercising without negligence its special statutory powers, has deprived respondent, at least in part, of the enjoyment of her property; she is therefore entitled to a just indemnity, Article 407 C.C., as interpreted by the authors and the courts, is ample to found respondent's action.

* * *

Granted that appellant is lawfully exercising its said powers, section 166 of the Railway Act clearly provides that appellant "shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested for all damage by them sustained by reason of the exercise of such powers."

The only claim asserted in the declaration is for compensation the right to which is created by an Act of Parliament which prescribes the manner in which that right is to be asserted and adjudicated. Article 407 of the *Civil Code* does not purport to enlarge or diminish that right, and it is unnecessary to consider whether if it did so it would be *pro tanto* ineffective.

Counsel for the respondent submits that we are not, at this stage of the proceedings, concerned with the question whether the claim set up in the declaration is well founded; if this be conceded the fact remains that we are required to ascertain the nature of that claim and to decide whether the Superior Court of the Province of Quebec has jurisdiction to adjudicate upon it and to fix the compensation, if any, to which the respondent is entitled. The reasons of my brother Locke seem to me to make it clear that jurisdiction to deal with the respondent's claim has been conferred by Parliament exclusively upon the Exchequer Court.

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

Appeal allowed with costs.

Attorneys for the defendant, appellant: Perrault, Angers & Pinsonnault, Montreal.

Attorneys for the plaintiff, respondent: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

1962
*Feb. 14
Apr. 24

JOHN C. JACKSON LTD. (*Plaintiff*) ....APPELLANT;

AND

SUN INSURANCE OFFICE LIMITED, THE HOME INSURANCE COMPANY, THE ROYAL EXCHANGE ASSURANCE, PROVIDENCE WASHINGTON INSURANCE COMPANY, THE PRUDENTIAL ASSURANCE COMPANY LIMITED (*Defendants*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Insurance—Marine—Motor vessel partially submerged—Cargo of fish rendered valueless by decomposition—Policy insuring "against loss or damage by . . . sinking . . . while being transported in any . . . motor vessel . . ."—Meaning of "sinking".

The motor vessel *Mina C* while carrying a cargo of herring encountered heavy weather; water entered the engine room and was thrown on to the generator, thereby causing a short circuit, with the result that the vessel's electrical equipment including the pumps that pumped out the bilges in the cargo holds would not work. The water continued to rise, but with help obtained from another vessel the *Mina C* remained afloat and was pushed into a neighbouring bay where she was pumped out. When the vessel eventually arrived at its destination it was found that the cargo was in an advanced stage of deterioration as a result of water having entered the hold. In an action on a policy of insurance the trial judge held that the damage to the cargo was directly caused by the fact that the *Mina C* was "sinking" within the meaning of the policy. The Court of Appeal did not find it necessary to deal with the meaning of the word "sinking" and disposed of the matter on the ground that the loss was not directly caused by a peril insured against. An appeal from that judgment was brought to this Court.

Held: The appeal should be dismissed.

"Sinking . . . while being transported in any . . . motor vessel" was one of the perils against which the cargo was specifically insured and this meant the sinking of such a vessel from any cause whatever including a leak and failure of pumps. The insurer was not entitled to sever the cause of the sinking from the sinking itself and to say that no indemnity was provided against damage directly caused to the cargo in the course of the process which culminated in the sinking on the ground that that process was initiated by a peril against which the cargo was not insured.

However the words "this policy insures against loss or damage by . . . sinking . . . while being transported in any . . . motor vessel . . ." could not be construed as intending to afford indemnity against loss or damage to cargo while transported in a motor vessel which was in fact saved from sinking, as the *Mina C* was, by the timely action of others.

*PRESENT: Locke, Abbott, Martland, Judson and Ritchie JJ.

The additional contention that the policy should be construed as affording indemnity against loss or damage by the sinking of the raw fish as distinct from the sinking of the vessel in which it was being transported and that the insurer was, therefore, liable for damage sustained by the cargo being submerged in sea water while in the holds, also failed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Macfarlane J. in an action on a policy of insurance. Appeal dismissed.

D. McK. Brown, Q.C., and *D. E. Jabour*, for the plaintiff, appellant.

W. J. Wallace, for the defendants, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia[1] allowing an appeal from a judgment of Macfarlane J. and dismissing the appellant's claim for the loss of a cargo of 400 tons of raw herring by sinking while being transported in a motor vessel for which loss the appellant alleges that indemnity is provided by the terms of a policy of insurance issued by or on behalf of the respondents. The policy in question afforded wide coverage by no means confined to marine risks, but the provisions sought to be invoked by the appellant, which have been treated throughout as constituting marine insurance, read as follows:

On Stock consisting principally of Raw Fish, Fish in process, Fish Meal, Fish Oil and Packing Materials, whilst in the building situate—Shingle Bay, North Pender Island, B.C., and anywhere else in Canada or Continental United States of America.

THIS POLICY INSURES AGAINST LOSS OR DAMAGE BY:

* * *

(*j*) Stranding, sinking, fire or collision, capsizing, careening or upset including general average or salvage charges and risks of loading and unloading while being transported in any coastwise steamer and/or motor vessel and/or approved barge or scow conveyance except as provided in sub-section (iii) hereof.

The provisions of subs. (iii) are not pertinent to this appeal.

On February 19, 1958, the motor vessel *Mina C*—a former Royal Canadian Navy Minesweeper—which was then under charter to the appellant, was packed with a full load of

[1] (1960-61), 33 W.W.R. 420, 25 D.L.R. (2d) 604.

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herring, the property of the appellant, in the two cargo holds and departed from the fishing grounds in the Queen Charlotte Islands on a voyage to the appellant's fish processing plant at Shingle Bay which would ordinarily have taken approximately two days. On the afternoon of the departure fairly heavy weather was encountered and it was found that the forward compartment of the vessel forward of the forward hold was partially filled with water, and it was necessary to put into Thurston Harbour where the compartment was pumped out and the cause of the leak repaired. The vessel put to sea again on the 20th and on the afternoon of the 22nd it was found that water had entered the engine room and that the action of the flywheel on the main engine had thrown water on to the generator which had shorted out all the vessel's electrical equipment including the pumps that pumped out the bilges in the cargo holds. As the auxiliary diesel pump ultimately gave out and the water continued to rise so that it was hopeless to try to control it with the hand pump, distress rockets were fired and the *Island Prince,* a coastal vessel, answered the call, but, as she had no pumps aboard, the *Island Prince* went off to obtain help from the *Island Sovereign* which was nearby.

At the time when the *Island Prince* arrived, the condition of the *Mina C* was described by the master as follows:

> I don't think at the time that the *Island Prince* came along there was any water on the deck although there was a little breeze at that time and there may have been a certain amount of slop on the deck. The vessel fully loaded has not too much freeboard.
>
> Q. Had it lost some freeboard?
>
> A. Yes, definitely.

It was evening before the *Island Sovereign* came alongside to transfer its three portable gasoline pumps to the *Mina C,* and by that time the weather was freshening and there was almost a foot of water on the deck amidships although the forecastle head was completely out of the water. The *Island Sovereign* pushed the disabled vessel into Hardy Bay where it tied up alongside a barge, and being sheltered from the bad weather the water was pumped out and repairs effected to the leaking stern gland through which it had been entering. The following day another vessel arrived and took the *Mina C* in tow to Shingle Bay, arriving on February 24 where it was met by Mr. Jackson, the president of the appellant and an insurance adjuster, in whose presence the

hatches were opened, and it was found that the cargo was in an advanced stage of deterioration conservatively described by the master as being "a little ripe".

It is apparent that when such a cargo is being loaded, the squashing of the fish on top of each other results in blood and entrails exuding from them and that this material which is commonly called "gurry" is washed down into the bilges with the water that enters while loading where it is normally pumped off, but that if, as in the present case, the pumps cease to work and water comes into the hold the fish are not only reimmersed in water which of itself has a bad effect, but the gurry is raised with the water which is acid from the decomposing fish; it floats the gurry up through the fish and greatly hastens the action of the decomposition. There is no doubt that the cargo in question was rendered valueless as a result of this having happened.

The appellant's claim is asserted in paras. 10, 11 and 12 of the statement of claim in the following terms:

> 10. The said goods were duly shipped in the said motor vessel on the 19th day of February, 1958, but during the currency of the said policy and while so insured as aforesaid, namely on the 19th day of February and/or on the 22nd day of February, 1958, the said goods and all of them became a total loss by one or more of the aforesaid perils insured against in that on the 19th day of February, 1958, and on the 22nd day of February, 1958 the said motor vessel developed a leak and on both occasions was sinking thereby flooding the holds of the said motor vessel and causing the said goods becoming a total loss by deterioration.
>
> 11. Alternatively the said goods were damaged and became a total loss by reason of the deterioration caused by the delay in continuing the said voyage, such delay being a direct result of a peril insured against, namely sinking.
>
> 12. Alternatively, the said goods were damaged and became a total loss in that the incursion of sea water from the said leak flooded the engine room of the said vessel, thereby stopping the hold pumps and allowing the body acid of the said herring contained in the fluid excreted therefrom to accumulate in the holds such body acid causing the total deterioration of the said goods.

In holding that the damage complained of was directly caused by the fact that the *Mina C* was "sinking" within the meaning of the policy, the learned trial judge said:

> If then, applying the principles of interpretation I have set out above, there has been no judicial definition of the word "sinking" and if the word is to be construed in its popular sense and the collocation of the words here is to be our guide, I think it may include the partial submersion of

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the ship. I do not think anyone can contend that when a ship becomes submerged to the extent that if help does not arrive, it will be entirely submerged that it is not sinking. If there is an ambiguity then I think the word should be construed . . . against the person responsible for its insertion.

and he concludes:

I think that the direct cause of the damage to the goods here was the intrusion of sea water in such quantities that it put the generator and pumps out of commission and that . . . the failure of the pumps to work was simply an incident caused by that event and not a separate occurrence. I think that the plaintiffs should succeed . . . .

The Court of Appeal of British Columbia did not find it necessary to deal with the meaning of the word "sinking", and Davey J.A., speaking on behalf of the Court, disposed of the matter on the ground that the loss was not directly caused by a peril insured against. In so holding, he said:

The danger of sinking only arose because, after the incursion of water had submerged the lower part of the cargo so as to make its loss inevitable, it continued until it greatly impaired the buoyancy of the vessel. Thus the loss of the cargo was directly caused by the leak and the failure of the pumps which allowed the water to well up into the holds; neither is a peril insured against. The sinking condition was only a later incident in the chain of events that led to the loss of the cargo and unrelated to it.

It has now long been recognized that the liability of a marine underwriter is limited to losses caused by the direct operation of one of the perils insured against, and indeed the provisions of para. (iv) of the present policy expressly state that it does not insure against:

Loss or damage by delay, wet or dampness, or by being spotted, discoloured, rusted, moulded, steamed, *except the same is the direct result of a peril insured against.* (The italics are mine.)

As Davey J.A. has said, a leak and failure of pumps are not perils against which this cargo was specifically insured under the policy in question, but *"sinking . . . while being transported in any . . . motor vessel" is such a peril,* and in my view this means the sinking of such a vessel from any cause whatever including a leak and failure of pumps. Under such a policy, if a vessel sinks and the insured cargo is damaged, I do not think that the insurer is entitled to sever the cause of the sinking from the sinking itself and to say that no indemnity is provided against damage directly caused to the cargo in the course of the process which culminated in the sinking on the ground that that process was initiated by a

peril against which the cargo was not insured. With the greatest respect for the view expressed by Davey J.A. on behalf of the Court of Appeal, I am of the opinion that the main question for determination in this case is whether or not there was a sinking within the meaning of the policy.

The circumstances appear to me to justify the conclusion that when the pumps from the *Island Sovereign* were transferred to the *Mina C* the latter vessel was in a condition which would probably have resulted in sinking if no help had been given, but the *Island Sovereign* arrived in time to transfer its gasoline pumps and with their aid the *Mina C* stayed afloat while being pushed into a neighbouring bay where she was pumped out.

Notwithstanding the doubts which have been properly raised as to the true construction to be placed on the language of this policy, I am unable to conclude that the words "THIS POLICY INSURES AGAINST LOSS OR DAMAGE BY . . . sinking . . . while being transported in any . . . motor vessel . . ." were intended to afford indemnity against loss or damage to cargo while being transported in *a motor vessel which was in fact saved from sinking,* as the *Mina C* was, by the timely action of others. I have not failed to consider the argument which is based on the proposition that a ship whose decks are submerged in water is a sinking ship, but I am unable to overcome the difficulty which I find in holding that sinking has occurred in the case of this vessel which remained afloat and was ultimately brought safely to the dockside for unloading and I accordingly find that there was no sinking of the *Mina C* within the meaning of the policy in question.

Counsel on behalf of the appellant, however, contended also that the policy should be construed as affording indemnity against loss or damage by the sinking of the raw fish as distinct from the sinking of the vessel in which it was being transported and that the insurer was, therefore, liable for damage sustained by the cargo being submerged in sea water while in the holds. If this was a policy which simply insured "Raw Fish . . . against loss or damage by sinking . . . ." there would undoubtedly be some force in this contention, but under the provisions of clause (*j*) of the policy the cargo is only insured "while being transported in any coastwise steamer and/or motor vessel and/or approved

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barge or scow . . . ." and in my opinion the word "sinking" as used in that clause is so directly associated with other words such as "stranding, careening, etc." which, in the context in which they are found, can only be meant to apply to the vessel, that it would be extending the language of the policy far beyond its natural and ordinary meaning to construe it as providing insurance against the sinking of the cargo while being transported in a vessel which remains afloat.

For these reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Bourne, Lyall, Shier & Davenport, Vancouver.

Solicitors for the defendants, respondents: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

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COSMO UNDERWEAR COMPANY LIMITED (*Defendant*) .... APPELLANT;

AND

VALLEYFIELD SILK MILLS LIMITED (*Plaintiff*) .... RESPONDENT.

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

Contracts—Real property—Sale—Accepted offer to purchase—Purchaser's refusal to sign deed—Breach of contract—Objections to title—Lack of good faith.

The defendant company made an offer to purchase "free and clear of all mortgages and encumbrances of any kind" premises owned by the plaintiff company. The offer was accepted together with a deposit of $10,000, the full purchase price being $300,000. A few days before the date of closing, an officer of the defendant company asked permission to withdraw the offer of purchase and offered to forfeit the deposit. The plaintiff company refused to do so. When the purchaser failed to complete the contract, the vendor placed the property on the market once more and instituted an action for damages for breach of contract.

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

The purchaser's defence was that the title offered by the vendor was not a clear title. The trial judge and the Court of Appeal found that the defence had no merit. The purchaser appealed to this Court.

Held: The appeal should be dismissed.

The purchaser company did not validly justify its refusal to complete the purchase and must therefore compensate the vendor. The technicality of the objections to the title coupled with the purchaser's conduct showed clearly that the refusal to sign the deed of sale was based solely on its desire not to proceed with the purchase. The purchaser never allowed the vendor to remove the objections to title and showed complete lack of good faith.

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

Hon. Gustave Monette, Q.C., and *André Michaud*, for the defendant, appellant.

John F. Chisholm, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—L'appelante appelle d'une décision unanime de la Cour du banc de la reine[1] confirmant un jugement de la Cour supérieure en vertu duquel elle fut condamnée à payer à l'intimée des dommages-intérêts pour rupture de contrat.

Ce contrat s'est formé à la suite d'une offre d'achat, faite par l'appelante le 24 mai 1955, par le ministère de son mandataire, Me Louis-H. Rohrlick, aux courtiers en immeubles H. F. C. Stikeman & Co., chargés de vendre la propriété de l'intimée et de l'acceptation, en temps utile, de cette offre par cette dernière. L'offre et l'acceptation apparaissent à l'écrit suivant:

May 24th, 1955.
NO. 286.

Messrs: H. F. C. Stikeman & Co.,
1117 St. Catherine Street West.,
MONTREAL, Que.
Dear Sir: *Attn: Mr. J. T. L. Shum*

On behalf of undisclosed principals, I hereby offer to purchase that certain property known as cadastral number 158 of the Parish of St. Cecile, in the City of Valleyfield, measuring approximately two (2) arpents, fronting on Ellice Street, in the City of Valleyfield and bearing civic number 201 Ellice Street, Valleyfield, and ten (10) arpents deep with the buildings and equipment erected on the said immoveable property, and belonging to the VALLEYFIELD SILK MILLS LTD.

[1] [1961] Que. Q.B. 220.

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On behalf of the principals, I hereby agree to purchase the same in its present state and condition for the sum of THREE HUNDRED THOUSAND DOLLARS ($300,000.00), which shall be paid as follows—

(a) The sum of TEN THOUSAND DOLLARS ($10,000.00) herewith as a deposit to be held by you in trust and applied on account of the purchase price if this offer is accepted, otherwise the same shall be returned to me.

(b) The sum of TWO HUNDRED AND NINETY THOUSAND DOLLARS ($290,000.00) upon execution of the Deed of Sale to be executed and signed on the 1st day of August 1955. Notary to be selected by the purchaser.

CONDITIONS OF SALE

1. The cost of the Deed of Sale and the registration thereof to be paid by the Purchaser.

2. The Vendor to give good and marketable titles to the property, furnish a certificate of search and title deeds, and to represent in the deed that the said property is free and clear of all mortgages and encumbrances of any kind.

3. Vacant possession of the property to be given to the purchaser on the 1st day of August 1955.

4. All adjustments of taxes, water rates, insurance, etc., shall be made as at the 1st day of August 1955.

5. For the said consideration, it is agreed that the sale besides the immoveable property shall include all equipment, lighting, hoists and all other equipment located on the said premises necessary for the use and operation of the plant in the said building, as well as the motors operating the ventilating and humidifying systems, save and except the moveable machinery garnishing the said plant and used in its operations, office furniture and scales.

This offer is open for acceptance until Friday, the 27th day of May 1955, up to 6.00 P.M.

AND I HAVE SIGNED:

LOUIS H. ROHRLICK

WE HEREBY ACCEPT THIS OFFER—
May 26th 1955.
MONTREAL, Que.

THE VALLEYFIELD SILK MILLS LTD.
PER: C. F. WOODWARD VICE-PRESIDENT /SEAL/
N. D. SHALDICH SECRETARY

Sur acceptation de l'offre, Me Rohrlick, qui partageait alors son bureau d'avocat avec le notaire Isaac Kert, donna instructions à ce dernier de procéder à l'examen des titres de propriété et à la préparation de l'acte de vente. A ces fins, le notaire entra en communication avec J. T. L. Shum qui, pour le compte de Stikeman and Co., avait été chargé de la vente de la propriété de l'intimée. Par une lettre en date du 16 juin, Shum, à ce autorisé par l'intimée, instruisait le

notaire Kert de commander copie de tous documents nécessaires à la préparation de l'acte et le priait d'y procéder diligemment pour assurer que le texte en soit soumis à l'intimée avant le premier août, jour fixé pour son exécution. Plus d'un mois plus tard, le notaire fit rapport de ses travaux à Me Rohrlick et le jour suivant, 26 juillet, il prépara et soumit le projet d'acte de vente aux avocats de l'intimée.

Le même jour, d'autre part, soit le 26 juillet, E. J. Leranbaum, trésorier de la compagnie appelante se rendait à St. Catharines, Ontario, pour obtenir de l'intimée la permission de retirer l'offre de l'appelante. Au cours de l'entrevue qu'il eut à cette fin avec C. F. Woodward, vice-président de la compagnie intimée, et E. Staub, l'un des directeurs d'icelle, il invoqua, comme unique motif de sa demande, le fait que l'appelante avait modifié ses plans et que, partant, elle n'avait plus besoin de la propriété; il offrit d'abandonner à l'intimée la somme de $10,000 jointe à l'offre d'achat. Cette proposition fut refusée sur-le-champ.

Le jour suivant, les avocats de l'intimée retournaient au notaire le projet d'acte de vente avec une résolution en approuvant le texte et en autorisant la signature.

Un ou deux jours après, soit le 28 ou 29 juillet, Me Rohrlick demanda d'ajourner au 4 août l'exécution de l'acte de vente. Mais advenant le 4 août, il informa l'intimée que sa cliente refusait de le signer.

Devant ce refus, l'intimée remit sa propriété en vente et poursuivit l'appelante en dommages pour rupture de contrat.

En défense l'appelante soumit, en substance, que le titre de propriété offert par l'intimée n'était pas un titre clair. Elle prétendit, principalement, que des servitudes en faveur de Bell Telephone Company of Canada et de Shawinigan Water and Power Company et deux hypothèques—l'une en faveur de Royal Trust Company et l'autre en faveur de Montreal Trust Company—grevaient l'immeuble. Soumettant que l'intimée avait ainsi fait défaut de satisfaire, dans le délai prévu à l'offre d'achat, à la deuxième condition, des conditions de vente y mentionnées, elle conclut qu'elle était relevée de l'obligation résultant du contrat formé par l'acceptation de son offre.

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En Cour d'appel comme en Cour supérieure on jugea cette défense mal fondée.

On considéra, en Cour d'appel comme en Cour supérieure, que le titre offert par l'appelante rencontrait substantiellement les conditions mentionnées à l'offre d'achat. En Cour d'appel, particulièrement, on jugea que les objections faites par l'intimée étaient en l'espèce non fondées, frivoles, techniques, sans importance matérielle ou facilement remédiables. On considéra en outre que l'intimée aurait sûrement—tel que d'ailleurs la lettre écrite le 16 juin par Shum au notaire Kert en manifestait virtuellement le désir—effectué toutes corrections exigibles si simplement l'appelante en avait fait la demande ou avait au moins signalé ces griefs en temps utile; que de la date de l'acceptation de l'offre au jour fixé pour l'exécution de l'acte de vente, pour la prise de possession et pour le paiement de la balance du prix, l'appelante n'avait donné à l'intimée aucune indication quelconque de ces griefs; et que les objections, faites subséquemment, au titre de propriété ou au certificat de recherches, étaient le fruit d'une arrière-pensée, née du désir de se dégager de l'offre d'achat, désir auquel l'intimée avait refusé de donner suite nonobstant l'offre de l'appelante de lui abandonner la somme de $10,000.

La véritable question à considérer est celle du principe de la responsabilité de l'appelante. Sur le quantum des dommages, aucune raison n'a été soumise pour justifier cette Cour de modifier le montant arrêté, par convention entre les parties, pour corriger les erreurs cléricales qu'elles avaient constatées au jugement rendu en première instance.

Comme les juges de la Cour d'appel et celui de la Cour supérieure, je suis d'avis que l'appelante n'a pas validement justifié son refus d'exécuter l'acte de vente et qu'elle doit compenser l'intimée pour les dommages lui résultant de cette inexécution.

L'opinion ci-dessus indiquée, qu'on s'est formée en Cour du banc de la reine, sur le caractère des griefs de l'appelante et sur la portée qui devait leur être donnée dans la question à décider est, à mon avis, bien fondée. Dans les raisons de jugement émises, en particulier, par M. le Juge Owen, avec le concours de la majorité de ses collègues, celui-ci dispose de façon entièrement satisfaisante des prétentions de l'appelante. C'est ainsi, par exemple, que relativement aux hypothèques invoquées par celle-ci, il note avec justesse que

l'hypothèque en faveur de Royal Trust Company était éteinte par confusion et que le titre le constatant était enregistré; que l'hypothèque en faveur de Montreal Trust Company n'affectait pas la propriété vendue, mais simplement la ligne de transmission de la Shawinigan Water and Power Company. Je ne vois rien d'utile à ajouter aux raisons du savant juge auxquelles il est suffisant de référer.

Le caractère de ces griefs; le singulier silence de l'appelante, son défaut de les signaler en temps opportun pour obtenir les corrections dont la demande pouvait être justifiée; le fait que son notaire avait été virtuellement invité par la lettre de Shum à faire le nécessaire pour assurer l'exécution de la convention; sa proposition de retirer l'offre et d'abandonner les $10,000 l'accompagnant; bref, toutes les circonstances en l'espèce manifestent que le refus de l'appelante de signer l'acte de vente était nullement fondé sur le motif qu'elle a plaidé mais, en vérité, et comme l'a laissé entendre le juge de première instance et l'ont clairement affirmé les juges de la Cour d'appel, était motivé uniquement par le désir de se libérer des obligations résultant de l'acceptation de son offre d'achat.

La bonne foi est de l'essence des conventions. Elle doit présider non seulement à leur formation mais aussi à leur exécution. La sécurité des contrats en dépend. Le principe n'est pas nouveau. Dans Dalloz, Nouveau Répertoire, vol. 1, p. 749, n° 77, on l'exprime ainsi:

> Tout contrat impose à chacune des parties l'*obligation d'agir de bonne foi*. Le manquement à cette obligation, dans l'exécution d'un contrat, constitue un *dol* qu'il ne faut pas confondre avec le dol dans la formation d'un contrat.

Dans Planiol et Ripert, Traité de Droit Civil Français, 2ᵉ éd., tome VI, p. 508, n° 379, on lit ce qui suit:

> Les conventions *doivent être exécutées de bonne foi*, dit l'article 1134. Héritage du droit romain où, en dehors des autres sens qu'elle a encore aujourd'hui, elle avait surtout une portée précise dans les actions de bonne foi, s'opposant aux actions de droit strict, l'idée n'a actuellement dans l'article 1134 qu'une portée plus floue. Elle signifie que tout contractant doit agir en honnête homme dans tout ce qui a trait à l'exécution du contrat. Ne pas agir en honnête homme constitue une faute. Dès lors, en ce qui concerne le débiteur, il s'agit de savoir ce à quoi il est tenu en vertu du contrat. C'est parce que le contrat ni la loi ne précisent jamais complètement quels doivent être ses agissements, et que c'est donc le juge qui doit dire quelle conduite il devait tenir en présence des circonstances particulières où il s'est trouvé, qu'on dit, à titre de directive, que cette con-

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duite doit être conforme à la bonne foi. On entend par là que sa conduite doit être jugée non pas seulement sous l'angle de la prudence et de l'habileté, mais aussi sous l'angle de l'honnêteté.

Voir aussi: Mignault, Droit Civil Canadien, vol. 5, p. 264; Trudel, Traité de Droit Civil du Québec, vol. 7, p. 345.

Les tribunaux ne s'autoriseront pas de ce principe pour modifier les termes de la convention à laquelle les parties ont donné leur accord de volonté. L'intimée, qui avait assumé l'obligation de fournir un titre conformément aux exigences de la deuxième condition des conditions de vente, devait sans doute, s'il était évident que son titre ne correspondait pas aux exigences de cette condition, y apporter les rectifications qui s'imposaient. L'obligation par elle assumée ne comprenait pas cependant celle de deviner toutes les objections techniques que l'appelante pouvait être susceptible de soulever et qu'un tribunal, ultérieurement saisi de la question du mérite de ces objections, aurait possiblement pu trouver fondées. Il appartenait à l'appelante, dont le notaire était au surplus virtuellement autorisé par l'intimée à faire le nécessaire pour assurer la préparation de l'acte de vente en temps utile, de signaler à l'intimée les rectifications auxquelles elle pouvait prétendre avoir droit.

Assumant même que l'intimée avait l'obligation d'anticiper la possibilité de ces griefs et la possibilité que l'appelante en exigerait le redressement, je dirais que l'intimée était raisonnablement justifiée d'inférer de toutes les circonstances de cette cause que l'appelante n'y attachait aucune importance et n'entendait pas s'en prévaloir. Ces circonstances, et particulièrement la conduite de l'appelante en l'espèce rendaient nécessaire une mise en demeure de sa part.

Aussi bien, je dirais avec la Cour supérieure et la Cour d'appel que l'appelante a la responsabilité de réparer le dommage résultant de l'inexécution de ses obligations. Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Monette, Filion & Labelle, Montreal.

Attorneys for the plaintiff, respondent: Hugessen, Macklaier, Chisholm, Smith & Davis, Montreal.

EDWIN CHASE (*Plaintiff*) ....APPELLANT; 1962 *Feb. 12, 13 Apr. 24

AND

COLIN CAMPBELL (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Cash payment for services in staking and recording claims—Prospector to be given a share of proceeds if claims developed or dealt with—Subsequent agreement settling prospector's participation in any sale that might be made—Nothing in nature of partnership subsisting between parties—Inapplicability of s. 27 of Partnership Act, R.S.B.C. 1960, c. 277 or of similar common law rule.

The plaintiff agreed to stake certain properties as agent for the defendant who agreed to pay him a specified sum of money to cover his expenses and a further sum for his services; these amounts were paid in part at the time of the agreement and the balance after the claims were staked and recorded. The plaintiff alleged that there was also an agreement in which his interest in the claims was defined as 48 *per cent*, and it was on this alleged agreement that the claim advanced in the statement of claim was based, though an alternative claim, alleging the staking of the claims was a joint venture and that the interests of the parties in the claims were equal, was pleaded. The evidence of the plaintiff as to the alleged agreement was rejected and the Courts below dealt with the case on the footing of the defendant's evidence, according to which the defendant had agreed that if he decided to do anything further with the property he would give the plaintiff a share in it.

The defendant did decide to spend some money on initial development and advised the plaintiff that he would give him 10 *per cent* of the net return resulting from the development of the property as his interest in the matter and employ him in some capacity to assist in its further development. The defendant then prepared an agreement between a proposed company and the plaintiff whereby the latter, for claims discovered by him, was to be entitled to "10% interest in the usual vendor's share of any new company formed by the Company on said claims or in any other sale consideration received by the Company in respect to said claims." Following the signing of this document additional claims were staked by the plaintiff and recorded in the defendant's name.

Diamond drilling carried on upon the property indicated an extensive deposit of iron ore and, in the result, the defendant was able to effect a sale of all the said claims. In a subsequent action, the judgment of the trial judge declared that the plaintiff was entitled to 10 *per cent* of the moneys payable to the defendant after deducting therefrom defendant's expenditures made upon the claims. The plaintiff's appeal was dismissed by the majority of the Court of Appeal, whereupon a further appeal was brought to this Court.

Held: The appeal should be dismissed.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Martland and Ritchie JJ.

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The proper construction to be placed upon the evidence of the defendant as to the arrangements made at the time of his original interview with the plaintiff was that, in addition to the cash payment made for the plaintiff's services in staking and recording the first group of claims, he agreed in the event of his deciding to develop or deal with the claims to give the plaintiff some fair share of the proceeds, if any, that were realized. Thereafter the defendant who was under no obligation to spend money on the development, before undertaking the very considerable expenditure which would be necessary to have the claims diamond drilled, settled the question of the plaintiff's participation in any sale that might be made by agreement with him.

There was nothing of the nature of a partnership subsisting between the parties at any time and neither the provisions of s. 27 of the *Partnership Act,* R.S.B.C. 1960, c. 277, nor the rule at common law that in the absence of an agreement defining such interests all the partners are entitled to share equally in the capital of a business touched the matter. *Briggs v. Newswander* (1903), 32 S.C.R. 405, discussed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Lord J. dismissing the action. Appeal dismissed.

P. E. Hogan, for the plaintiff, appellant.

D. McK. Brown, Q.C., and *D. E. Jabour,* for the defendant, respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] which, by a decision of the majority of the members, Sheppard J.A. dissenting, dismissed the appeal of the present appellant from a judgment of Lord J. dismissing the action.

The appellant is a mining prospector and on January 18, 1960, called upon the respondent at his office in Vancouver and endeavoured to interest him in staking certain ground in Vancouver Island which, it was indicated by a report in his possession, might contain deposits of iron ore.

As to what transpired between the parties at this interview there is a wide difference in the evidence tendered by the parties. It is, however, common ground that at this time the appellant signed a letter dated January 18, 1960, dictated by the respondent and addressed to him, which read:

For $1.00 and other considerations I agree to stake the two properties at Serita River and the iron property northwest of Maggie Lake as your agent.

[1] (1961-62), 36 W.W.R. 1, 30 D.L.R. (2d) 106.

The respondent agreed to pay the appellant $250 to cover his expenses in staking and recording the claims and a further sum of $250 for his services, and these amounts were paid in part on January 18 and the balance on the appellant's return from Vancouver Island. The claims designated as C.C. 1 to 16 were staked and recorded, as required by the *Mineral Act,* R.S.B.C. 1960, c. 244, in the name of the respondent.

According to the appellant, who had denied signing the letter above mentioned when examined for discovery but admitted having done so at the trial, a further written agreement was made and signed by him on January 18 in which the respective interests of the parties in the claims were defined as 48 *per cent* to the appellant and 52 *per cent* to the respondent. It was on this alleged agreement that the claim advanced in the statement of claim was based, though an alternative claim, alleging that the staking of the claims was a joint venture and that the interests of the parties in the claims were equal, was pleaded.

The learned trial judge rejected the evidence of the appellant as to this and this finding of fact was accepted by all of the members of the Court of Appeal, the case being dealt with on the footing that the respondent's account of what had transpired on January 18 was to be accepted. According to the respondent, the only evidence produced to him of the nature of the ground proposed to be staked was a document referred to as Linderman's report, which the appellant said he had bought from the British Columbia Department of Mines in 1959. It appears that the probability that there was iron ore in the area had been reported in the annual report of that department in 1903.

The respondent's evidence is that, at the interview on January 18, the appellant had asked for a 50 *per cent* interest in the claims, in addition to the payments of money then agreed upon. This the respondent refused but said that:

> I made a proposal to him that I would take a chance or a gamble on this with the understanding that he would go and stake the property as my agent and that at some future date if the thing proved worthwhile I would give him an interest in it.

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And again:

It was to be at my discretion if I did anything further with the property. The majority of these things that you go and investigate never prove to be anything; I would say 90 out of 100, so I didn't see any point in going into a great deal of detail at the time other than the fact that he would act in the capacity of my agent and I would have complete control of the property at my discretion.

During cross-examination, in answer to a question reading:

So, in other words, when he left you on January 18th part of the agreement was he was to participate in this ground?

he said:

That is correct.

Prior to the staking and recording of the claims, an agreement as to the appellant's interest so expressed would clearly be unenforceable. Different considerations arise, however, when this was done and the property recorded in the respondent's name.

The arrangement made on January 18 does not, however, stand alone since the rights of the parties in the proceeds of the sale of the claims later made to the Noranda Company were subsequently defined.

With the information available to him after the staking of the 16 claims, the respondent estimated that there was a substantial ore body of magnetite or magnetic iron on the property. Whether it was sufficient in extent to make a mine could only be determined by diamond drilling. The respondent, a contractor by occupation, after making inquiries decided, as he said, to risk $20,000 to $25,000 in diamond drilling and initial development and, after informing the appellant that he was prepared to do so, advised him that he would give him 10 *per cent* of the net return resulting from the development of the property as his interest in the matter and employ him in some capacity to assist in its further development. The respondent says that the appellant accepted this, saying that it was very satisfactory to him.

Having made this arrangement, the respondent instructed his solicitors to incorporate a company to handle the work on the claims. The proposed name of this company was Western Ferric Ores Ltd. but, before the certificate of incorporation had issued, the respondent had prepared an agreement between the proposed company and the appellant and,

while this document said nothing as to the arrangement which according to the respondent he had made shortly theretofore with the appellant, it appears to me to lend support to the respondent's version of that arrangement. By this document the company purported to agree to employ the appellant for two months from March 21, 1960, at $400 per month, in addition to an allowance for food and travelling expenses, and to supply him with the required equipment, the appellant agreeing to diligently prospect for mines and to record any mining claims staked in such names as the company should direct. For claims discovered by the appellant he was to be entitled to "10% interest in the usual vendor's share of any new company formed by the Company on said claims or in any other fair sale consideration received by the Company in respect to said claims." For other claims located but not discovered by the appellant he was to receive a lesser amount. The agreement further provided that the manner in which the claim should be developed and the terms upon which they should be disposed of should be in the absolute discretion of the company and that the company might allow all or any of the claims to lapse. Following the signing of this document, nine further claims named Mollie 1 to 9 were staked by the appellant and recorded in the respondent's name.

The diamond drilling carried on upon the property indicated an extensive deposit of iron ore and, in the result, the appellant was able to effect a sale of all of the said claims to Noranda Exploration Co. Ltd. The agreement made with that company provided for a purchase price of $1,150,000 to be paid $50,000 in cash and the balance by the payment of a royalty of .50¢ for each long ton of ore shipped by the purchaser from the property. In addition, the purchaser agreed to assume certain obligations of the vendor under a drilling contract and to expend a minimum of $25,000 upon the claims. The agreement, however, provided that the Noranda Company should not be obligated to expend more than $75,000, which amount included the cash payment, the company to have the privilege of continuing the work or abandoning the claims. The respondent, prior to action, offered to pay to the appellant 10 *per cent* of the cash payment of $50,000 made by him surplus to the amount of

his expenditures for diamond drilling and developing the property, and when this was refused paid a sum of $2,900 into court.

The learned trial judge accepted the evidence of the respondent as to the making of the arrangement by which the appellant would receive 10 *per cent* of the moneys realized from the sale of the claims after deducting the expenditures made upon the claims by the respondent. The judgment entered declared that the plaintiff was entitled to that percentage of the moneys payable to the respondent after deducting therefrom the expenditures made by him amounting to $11,961.78 and dealt with the costs of the action.

Tysoe J.A., with whom Bird J.A. agreed, found that this finding of the learned trial judge was supported by the evidence and agreed with it. That learned judge considered that whatever obligation rested upon the respondent under the arrangement made in January crystallized into an obligation to give the appellant a 10 *per cent* interest in the proceeds of the sale under the arrangement made before the written agreement of March 21, 1960, was signed and that, from that time, the appellant's interest was established at 10 *per cent* and the claims impressed with a trust in favour of the appellant to that extent.

Sheppard J.A. considered that since the appellant, by virtue of the arrangement made on January 18, was entitled either to an undivided interest in the claims or in the proceeds of their sale and since, relying upon this, he had recorded the claims in the respondent's name, there was a resulting trust in his favour. Since that interest had not been defined by the agreement of January 18, 1960, he was of the opinion that the decision of this Court in *Briggs v. Newswander*[1], governed the rights of the parties and that, accordingly, it should be declared that the respondent held the claims subject to a trust as to a half interest for the appellant.

In *Briggs'* case the facts were that the plaintiff had staked two mineral claims in the Ainsworth Mining Division in British Columbia and the defendants had subsequently wrongfully staked the same ground. The resulting dispute was settled by two agreements made between the parties under which the defendant Newswander purchased the

[1] (1902), 32 S.C.R. 405.

claims and agreed, *inter alia,* to immediately form a company under the laws of the Province and that Briggs should receive, in addition to a sum in cash, "a reasonable amount of the stock of said corporation according to the value thereof." Instead of doing this, Newswander and his co-defendants Crown granted the claims, failed to form the company mentioned and, relying apparently upon the vague nature of the undertakings in the agreements, proceeded to operate the property for their own purposes. The action failed before the Court *en banc* in British Columbia but the plaintiff's appeal was allowed in this Court.

It is to be noted that the head-note at p. 405 of 32 S.C.R. incorrectly states the result of the appeal. Sedgwick J. who delivered the judgment of the Court did say that, in strictness, upon the failure of the defendants to incorporate the company, Briggs was entitled to a reconveyance of the claims but, after consultation with the other members of the Court, he came to the conclusion that the relief granted should be to direct a conveyance to Briggs of a one-quarter interest in the claims rather than a one-half interest, there being in addition to Newswander two other persons who were also defendants on whose behalf Newswander had contracted and whose interests were equal to his own. As the report at p. 415 shows, Sedgwick J. considered that the rights of the parties were to be determined in accordance with a rule stated in s. 25 of the *Partnership Act* of British Columbia, R.S.B.C. 1897, c. 150. That section declared, *inter alia,* that the interest of partners in the partnership property should be determined, subject to any agreement, express or implied, between them, by the rule that all the partners are entitled to share equally in the capital of the business. Section 25 appears as s. 27 of c. 277, R.S.B.C. 1960. That rule, it was said, is merely a statement of what has always been the English law.

With great respect, I do not think that anything decided in that case affects the disposition to be made of the present matter where, by agreement between the parties, their respective rights to the proceeds of the sale have been defined.

In my opinion, the proper construction to be placed upon the evidence of the respondent as to the arrangements made on January 18, 1960, is that, in addition to the cash payment made for the appellant's services in staking and

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recording the first group of claims, he agreed in the event of his deciding to develop or deal with the claims to give the appellant some fair share of the proceeds, if any, that were realized. Neither party knew at that time whether there was enough ore in these locations to make a mine and, if it were an iron mine, it was never contemplated by either that it would be developed by the respondent himself, since to bring any considerable iron property into production would, according to the appellant's own evidence, involve an expenditure of at least $2,500,000. The respondent expressly stipulated that he should have control of the disposition of the property at the outset. Thereafter, as pointed out by Tysoe J.A., the respondent who was under no obligation to spend money on development, before undertaking the very considerable expenditure which would be necessary to have the claims diamond drilled, settled the question of the appellant's participation in any sale that might be made by agreement, and it was not until this was done that he incorporated the Western Ferric Ores Ltd. and expended the moneys necessary to ascertain the extent of the ore deposit and to stake the Mollie claims, to protect those originally staked. It is a proper inference from the evidence that it was upon the faith of the agreement so made that those expenditures were undertaken. According to the respondent, the appellant did not claim that he was entitled to 48 *per cent* of the claims or anything realized from them until after the respondent had agreed to sell the property to the Noranda Company.

There was, in my opinion, nothing of the nature of a partnership subsisting between these parties at any time and neither the provisions of s. 27 of the *Partnership Act* nor the rule at common law touch the matter. When the appellant proposed that he should have a 50 *per cent* interest at the outset, the suggestion was rejected at once and the arrangement was made which has been above described.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Hogan, Webber & Woodliffe, Vancouver.

Solicitors for the defendant, respondent: Russell & Du Moulin, Vancouver.

MUNSHAW COLOUR SERVICE LTD. (*Plaintiff*) .... APPELLANT;

1962 *Jan. 30, 31 Apr. 24

AND

CITY OF VANCOUVER (*Defendant*) ...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Sewer flushing operations by municipality in vicinity of film developer's premises—Sediment in mains stirred up by opening of hydrant—Heavily sedimented water reaching processing tanks and damaging film therein—Failure of plaintiff's filter system—Whether municipality liable for negligence.

In the course of sewer flushing operations carried on by the defendant municipality sediment was stirred up, due to the opening of a hydrant, in the city's water-mains in the vicinity of the premises of the plaintiff's film developing business. As a result, heavily sedimented water reached the plaintiff's processing tanks and damaged film then being processed. Because of an unexplained breakdown the plaintiff's filter system had failed to work properly. In proceedings brought against the city and the local water district, the trial judge gave judgment against the city and dismissed the action against the water district. On appeal, this judgment was set aside, one judge dissenting. The plaintiff then appealed to this Court pursuant to leave granted by the Court of Appeal.

Held: The appeal should be dismissed.

Per Cartwright and Ritchie JJ.: The evidence did not warrant a finding that there was so great an accumulation of sediment in the water-mains that the failure to have removed it amounted to negligence.

The contention that the defendant was negligent in failing to notify the plaintiff that the hydrant was going to be opened was rejected. The defendant, through its agents, knew that the opening of the hydrant would tend to stir up some sediment but it had no reason to anticipate that so great a quantity of sediment would be stirred up and no means of knowing whether it would be likely to reach the premises of the plaintiff. Even if it were held that the city should have foreseen that an undue amount of sediment would be contained in the water reaching the plaintiff's premises, a reasonable person in the position of the city would not have foresèen that it would do any damage. The giving of a warning would not have prevented the damage, as it was altogether probable that the plaintiff would have gone ahead with its usual operations relying upon its filter system to protect its product.

If, as was held by the trial judge, the evidence adduced by the plaintiff raised a presumption of negligence on the part of the city, the evidence taken as a whole rebutted that presumption.

Per Fauteux, Abbott and Judson JJ.: The plaintiff, as one who used water for processing colour films, was a consumer of extraordinary sensitivity; he could not use the water without filtering it at all times. If, therefore, his filtration system broke down through no fault of the city, the special loss was to be assumed by him.

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

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The use of the hydrant for sewer flushing purposes, an ordinary everyday procedure, could not in itself be negligence, nor could it be negligence even if considered in relation to the presence of sediment in the underground pipes. The city had been using the procedure for two days before there was any complaint and there was no evidence to suggest that it should have known that the use of the hydrant would stir up more silt than it had done on other occasions. There was no reason for the defendant to warn anyone of the operation; to impose on the city the duty of notice in the circumstances was to require a standard of perfection.

It was not negligence on the part of the city employee to fail, as no doubt he did, to think about the effect of opening the hydrant upon water consumers of peculiar sensitivity. Neither was it negligence to fail to clean out the sediment in the pipes; to say that the city must periodically flush the pipes to remove the sediment so that this particular kind of consumer would not be affected was again to impose too high a duty on a municipal waterworks system.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Lett C.J.S.C. Appeal dismissed.

C. C. Locke, Q.C., for the plaintiff, appellant.

B. E. Emerson and *C. S. G. C. Fleming*, for the defendant, respondent.

The judgment of Cartwright and Ritchie JJ. was delivered by

CARTWRIGHT J.:—The facts out of which this appeal arises are set out in detail in the reasons of Lett C.J. and are summarized in the reasons of my brother Judson.

In maintaining and operating its system of water-mains and other water-pipes and carrying on its undertaking of supplying water the respondent was doing that which the legislature has authorized it to do. Counsel for the appellant did not question the finding of the learned Chief Justice that the city was not under an absolute statutory duty to supply water of a specified quality or standard. Counsel for the respondent conceded that the city would be liable for the damages suffered by the appellant if the city was guilty of negligence in its operations and that negligence caused the plaintiff's damage.

The grounds upon which the learned Chief Justice held the respondent liable are set out in the following passages in his reasons:

I hold that the Plaintiff has established negligence upon the part of the City consisting of

[1] (1961), 35 W.W.R. 696, 29 D.L.R. (2d) 240.

(1) supplying water from its mains to the Plaintiff which was not wholesome or ordinarily pure and was unfit for ordinary domestic purposes or ordinary human consumption;

(2) in permitting a hydrant in the vicinity of the Plaintiff's premises to be turned on when it knew or ought to have known that the sediment known to be in its mains was thereby likely to be released and likely to result in delivery to the Plaintiff of water which was not of proper quality;

(3) in failing either to take steps to remove the sediment from its water mains by means not injurious to the Plaintiff, or to warn the Plaintiff in advance that the means to be used by the City were liable to result in delivery to the Plaintiff of water which was not of proper quality.

* * *

If I am in error in my findings of negligence against the City, then in my view the evidence adduced by the Plaintiff has raised a presumption which the City has not satisfactorily answered or explained so as to absolve itself from the implication of negligence: (See judgment of Evershed M.R. in *Moore v. R. Fox & Sons,* [1956] 1 Q.B. at p. 610), and in my view, as Lord Evershed M.R. stated at p. 611—"the sum of the Defendant's evidence was not to explain the accident, but to show that it was inexplicable".

In the Court of Appeal[1], O'Halloran J.A., who would have upheld the judgment given at the trial, was of opinion that the city "owed a common sense duty" to notify the plaintiff that it planned flushing the sewers from the hydrant; he ends his reasons as follows:

The negligence of the appellant is found as a matter of inference from the known evidential circumstances coupled with appellant's failure to notify respondent that it was going to clear the sewers during the day in question.

With respect, by reason of the preponderance of the evidence, the nature of the damage to the licenced operation of the respondent was foreseeable by the City and hence notice should have been given the respondent to enable it to withhold its operations during the hours the City was engaged in clearing the sewers in respondent's neighbourhood.

As is pointed out in the reasons of my brother Judson, Davey J.A. with whom Sheppard J.A. agreed, based his judgment upon two grounds. I find it necessary to consider only the second of these, *i.e.*, that the city was not guilty of negligence either in failing to remove the sediment from the water-mains or in failing to notify the plaintiff of its intention to have the hydrant opened.

I agree with Davey J.A. that in the circumstances of this case, the city was not under a duty to use procedures for cleaning out its water-mains that are not in general use.

[1] (1961), 35 W.W.R. 696, 29 D.L.R (2d) 240.

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No doubt if sediment accumulated in the mains to such an extent that as a result it frequently happened that the water delivered was not wholesome or ordinarily pure and was unfit for ordinary domestic purposes or ordinary human consumption a duty to use all reasonable diligence to remedy the situation would fall upon the city; but the evidence does not warrant a finding that there was so great an accumulation of sediment that the failure to have removed it amounted to negligence.

The contention that the city was negligent in failing to notify the plaintiff that the hydrant was going to be opened is based on the submissions, (i) that the city knew or ought to have known that the opening of the hydrant might cause an undue amount of sediment to be contained in the water delivered to the plaintiff's premises, (ii) that a reasonable person in the position of the city should have foreseen that if this happened it would cause damage to the plaintiff, and (iii) that the giving of the notification would have resulted in the damage being avoided. There is little, if any, dispute as to the primary facts of this case and the question is as to what inferences should be drawn from them.

As to the first of these submissions, it appears to me that the proper inference to be drawn from the evidence is that the city, through its agents, knew that the opening of the hydrant would tend to stir up some sediment but that it had no reason to anticipate that so great a quantity of sediment would be stirred up as was in fact stirred up and no means of knowing whether it would be likely to reach the premises of the plaintiff situate on another street and at a distance of 1,250 feet. It is significant that while the same hydrant had been used for the same purpose on the two days preceding the damage suffered by the plaintiff the evidence does not suggest that on those days any undue amount of sediment was contained in the water received by the plaintiff.

As to the second submission, it is my opinion that even if it were held that the city should have foreseen that an undue amount of sediment would be contained in the water reaching the plaintiff's premises, a reasonable person in the position of the city would not have foreseen that

it would do any damage. It would in fact have done no damage but for the unforeseen and unexplained failure of the plaintiff's filter system.

As to the third submission, it is necessary to consider the nature of the notification which the city should have given to the plaintiff, assuming it was under a duty to give one. It could not give notice that a large quantity of sediment would be contained in the water delivered to the plaintiff, for it did not know whether or not this would happen. The duty to give the notification, if it existed at all, existed equally on the two preceding days. I suppose the notice should have been worded somewhat as follows: "At — o'clock to-morrow the hydrant at the northwest corner of Helmcken and Homer Streets will be partially opened for the purpose of flushing sewers, this operation will continue until — o'clock. This may stir up sediment in the mains and may result in the water delivered to you containing a large amount of sediment." If such a notice had been given, what course would the plaintiff have been likely to pursue? One of the inferences drawn by the learned Chief Justice in his reasons is:

> That if Plaintiff had been warned in advance of the proposed sewer-clearing operations it could have taken precautions to avoid the damage to the films.

The learned Chief Justice does not specify what precautions the plaintiff could have taken. In the factum of the appellant it is said that obviously it could have deferred its operations; but it appears to me very unlikely that it would have done so, particularly in view of the fact that the opening of the hydrant on the two preceding days had not had any observable ill effect on the quality of the water supplied. It is, I think, altogether probable that the appellant would have gone ahead with its usual operations relying upon its filter system to protect its product. I share the view of Davey J.A. that the giving of a warning would not have prevented the damage.

If, as held by the learned Chief Justice, the evidence adduced by the plaintiff raised a presumption of negligence on the part of the city, it is my opinion that the evidence taken as a whole rebutted that presumption.

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For the above reasons, and for those given by Davey J.A. on this branch of the matter, I have reached the conclusion that in carrying out its undertaking of supplying water the respondent was not guilty of any negligence which caused the damage suffered by the appellant.

I would dismiss the appeal with costs.

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

JUDSON J.:—The appellant carries on the business of developing and finishing photographic coloured film in the City of Vancouver. On August 1, 1957, it claimed that heavily sedimented water had reached its processing tanks from the city's water system and had damaged large quantities of film then being processed. It brought an action for damages against the city and the Greater Vancouver Water District. The action was dismissed against the water district but the trial judge gave judgment against the city for $3,694.89. On appeal, this judgment was set aside, O'Halloran J. dissenting. The plaintiff now appeals to this Court pursuant to leave granted by the British Columbia Court of Appeal.

The City of Vancouver purchases its water from the Greater Vancouver Water District and distributes it to the consumer through a grid system of water-mains under the streets. It supplies water to domestic, commercial and industrial consumers. On the morning of August 1, 1957, and for two days previously a crew of city workmen had been engaged in cleaning and flushing sewers on Homer Street between Davie and Helmcken Streets. To do this the workmen connected a hose to a fire hydrant located at the northwest corner of Helmcken and Homer Streets, 1,250 feet from the appellant's premises. The complaint about the sedimented water was received by the waterworks department about mid-morning on August 1. It was given immediate attention and the fire hydrant was turned off, but by this time the damage had been done, the sedimented water being already in the tanks. After the hydrant had been shut off the water being delivered to the appellant returned to its normal condition.

The findings of the learned Chief Justice at trial show

(*a*) That the water supplied by the water district to the city contains a certain amount of sediment but that except for some slight discolouration in freshet seasons, is ordinarily and consistently of excellent quality;

(*b*) That it was the sediment in the water that damaged the plaintiff's films and that this sediment included sand and iron oxide;

(*c*) That the filter system of the plaintiff was ordinarily effective to accomplish its purpose of eliminating from the water particles of sediment larger in size than 25 microns;

(*d*) That the filter system of the plaintiff broke down and permitted entry into the plaintiff's tanks, of particles of sediment of a size larger than 25 microns. No witness was able to explain why the filter system broke down. It was designed to permit the passage of sediment not larger than 25 microns, but the evidence disclosed that particles as large as 74 microns were found in the tanks of the processing machines. It was not satisfactorily established that the breakdown in the filter system was caused by "bursts" or changes in pressure or velocity of the water supplied by the city;

(*e*) That the city knew or ought to have known that there was sediment consisting of particles of sand and rust in its water-mains in the vicinity of the plaintiff's premises and that it knew or ought to have known that the sewer flushing operation within 1,250 feet of the plaintiff's premises was likely to cause the sediment to be disturbed so that it could enter the plaintiff's premises.

The inference drawn by the learned Chief Justice from all this was that it was the opening of the hydrant on August 1 that did stir up the sediment in the city's pipes and caused the damage. It is admitted that no warning of the sewer clearing operation was given by the city to the plaintiff or anyone else.

The city's powers in connection with the supply of water are to be found in the Vancouver Charter, 1953 (B.C.), c. 55, in the following sections:

300. The Council may provide . . .

(*a*) For acquiring water from the Greater Vancouver Water District, or elsewhere, and for distributing, supplying, and making it available for use to persons within the city at such rates and upon such terms and conditions as may be provided by by-law, . . .

(*b*) For the construction, installation, maintenance, repair, and regulation of a system of water-mains and other water-pipes, including valves, fittings, hydrants, meters, and other necessary appliances and equipment, for the purpose of such distribution and supply . . .

330. The Council may make by-laws:

(*d*) For providing for the periodical examination and analysis of the water supplied by the city and for tests as to its purity and wholesomeness.

It was admitted that there is no statutory duty upon the city to supply water of a specified quality or standard. The litigation was therefore conducted on the basis that the city had done negligently what it was authorized to do by statute and it seems obvious that the negligence, if any, must be found in

(i) conducting the sewer cleaning operation by the use of water from a hydrant;

(ii) failure to warn;

(iii) stirring up the sediment in the pipes; and

(iv) possibly allowing sediment to collect in the pipes so that it could be stirred up by an operation of this kind.

The learned Chief Justice made the following findings of negligence:

1. That the water on this occasion was not wholesome or ordinarily pure and was unfit for ordinary domestic purposes or ordinary human consumption.

2. That the city was negligent

(*a*) in turning on the hydrant in the vicinity of the plaintiff's premises when it knew or ought to have known that the sediment was likely to be stirred up and delivered to the plaintiff's premises;

(*b*) in failing to take steps to remove the sediment from its main or to warn the plaintiff in advance that the means to be used by the city were liable to result in the delivery to the plaintiff of water containing the sediment and the rust.

The Court of Appeal founded its judgment on two grounds. It said in effect that the damage was done by the failure of the filter system and that in opening the hydrant for sewer flushing purposes the city was following ordinary routine practice, which could not involve it in liability for an accident of this kind.

The plaintiff was conducting a very sensitive operation and had at all times to filter the water in order to exclude pieces of sediment larger than 25 microns. The evidence furnished no explanation of the breakdown in the filter system. In the past, when a situation of this kind had arisen, the filter system had done the work for which it was intended by stopping the larger particles and eventually clogging up and obstructing the flow of water. The Court of Appeal found that everybody knew that there would be occasionally excessive amounts of sediment in the water and that there was nothing in the city's experience from which it ought to have foreseen that the flushing of the sewer from the hydrant in question would be likely to stir up more silt than on other occasions when the use of hydrants had caused temporary departures from ordinary standards of purity, with which departures the consumers were familiar.

This finding is linked to the filtration problem within the appellant's plant. This kind of disturbance does no harm to the ordinary consumer. He can see the water coming through the tap. He lets the tap run until the water comes clear. He does not drink or use turbid water. If he did it would not be harmful to health but might be unpleasant to taste. But a consumer of extraordinary sensitivity, such as one who is using water for processing colour films, must at all times filter the water. He cannot use it without doing this. If, therefore, his filtration system breaks down through no fault of the city, he must assume the special loss.

It seems to me clear that the Court of Appeal has declined to accept the findings of negligence made by the learned trial judge and I think it was right in so doing. The use of the hydrant for sewer flushing purposes was an ordinary everyday procedure. How else is it possible to flush sewers? The use of this procedure, in itself, cannot be negligence. Nor do I think it can be negligence even if it is considered in relation to the presence of silt and

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rust in the underground pipes. The city had been using this procedure for two days before there was any complaint and there is no evidence to suggest that it should have known that the use of the hydrant would stir up more silt than it had done on other occasions.

There was no reason for the city to warn anyone of a simple operation of this kind. What kind of warning could be given? Should it be a warning that a hydrant is going to be opened to flush a sewer and that it may stir up some rust and sediment? It had not done this on the previous two days. Over what area should such a notice be given? This hydrant was 1,250 feet away from this particular consumer. To impose on the city the duty of notice in circumstances such as these is to require a standard of perfection. Hydrants have to be opened repeatedly not only for this purpose but for street cleaning purposes and, in emergencies, for fire purposes. There is no evidence that the hydrant was opened in a careless manner. On the contrary, the evidence is that the hydrant was open to a thirty pounds pressure which would deliver no more water than the plaintiff itself was consuming in its own operation.

Even if it were foreseeable that the use of the hydrant would result in the delivery to some consumers of turbid water, this in itself amounts to nothing. Everybody is familiar with turbid water and knows what to do with it. Although the waterworks officials, had they thought of the matter, might have concluded that there must be people in the city engaged in the processing of films, the city should not have to pay damages because a routine operation results in the delivery of turbid water to a film processing plant. I have not the slightest doubt that the city employee, in going about his work, never thought about the effect of opening the hydrant upon water consumers of peculiar sensitivity. In my opinion, it is not negligence to fail to turn one's mind to this problem. It would be impossible to do anything with a waterworks system if the city had to consider these minutiae, in relation to routine operations. Those who have particular requirements, and in this case it was a particular requirement over and above water of ordinary standards, must deal with the problem as part of their ordinary operating procedure.

It was not negligence to fail to clean out the sediment and rust in the pipes. It was not shown that Vancouver had more of this than any other municipality. It was admitted that at certain times of the year there was apt to be more sediment in the water than at other times. It was also shown that there was more sediment in the water before a certain dam was constructed in the area where the water is collected. This dam acted as a settling basin. But the presence of sediment and rust in cast iron pipes is an everyday matter in the operation of a waterworks system and to say that the city must periodically flush the pipes to remove the sediment and rust so that this particular kind of consumer will not be affected is again to impose too high a duty on a municipal waterworks system.

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I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.

Solicitor for the defendant, respondent: B. E. Emerson, Vancouver.

FRANK R. KUNGL (*Plaintiff*) ....APPELLANT;

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*Mar. 5, 6
Apr. 24

AND

TONY SCHIEFER (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Adultery—Action brought for criminal conversation and alienation of affections—No separate cause of action for "alienation of affections" in Ontario—Such alienation a matter to be considered in assessment of damages for criminal conversation.

In an action for damages for criminal conversation and alienation of affections judgment was given in favour of the plaintiff for a total of $10,000, $2,000 for adultery and $8,000 for alienation of affections. The Court of Appeal set aside this judgment and directed a new trial limited to the ascertainment of the plaintiff's damages. It was held that the findings of the jury as to the commission of adultery ought not to be disturbed but that there had been non-direction as to certain matters which the jury should have been told to consider in mitigation of damages and that there had been misdirection which may well have resulted in a duplication in the two sums awarded

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

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by the jury. The plaintiff appealed to this Court asking that the judgment at trial be restored. The defendant's cross-appeal raised two propositions, (i) that in Ontario there is no separate cause of action for alienation of affections although alienation of a wife's affection if established may be an element in the assessment of the husband's damages in an action for criminal conversation or for enticement, and (ii) that in any event there was, in the case at bar, no evidence to support any assessment of damages for alienation separate from those for criminal conversation. Counsel for both parties requested this Court to assess the damages instead of directing a new trial.

Held: The order of the Court of Appeal should be varied; in lieu of the direction of a new assessment of damages it should be directed that judgment be entered in favour of the plaintiff against the defendant for $5,000 and the costs of the action.

Under s. 1 of *The Property and Civil Rights Act,* now R.S.O. 1960, c. 310, it is provided that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as they stood on the 15th day of October 1792 except so far as they have been altered by legislation having the force of law in Ontario. It was not suggested that there was any legislation in force in Ontario bearing upon the matter raised in the defendant's submission that in Ontario there is no separate cause of action for alienation of affections.

The action for damages for criminal conversation and the action for damages for enticement were introduced into Ontario as part of the common law of England. There was in 1792 no case in the books and no case has since that date been decided in England holding that a husband is entitled to damages on proof of the fact that he has lost the affection of his wife by reason of the conduct of the defendant unless that conduct was such as would support an action for criminal conversation or an action for enticement or was itself tortious.

Hence, there is no separate cause of action for "alienation of affections" known to the law of Ontario. *Winsmore v. Greenbank* (1745), Willes 577, distinguished; *Bannister v. Thompson* (1913), 29 O.L.R. 562, (1914), 32 O.L.R. 34, not followed; *Lellis v. Lambert* (1897), 24 O.A.R. 653, approved.

In the case at bar on the findings of the jury the plaintiff had established his cause of action for damages for criminal conversation; he did not have a separate cause of action for alienation of his wife's affections but such alienation in so far as it had been established was the result of the criminal conversation and was one of the matters to be taken into consideration in assessing the damages.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside a judgment of Treleaven J. and ordering a new trial as to damages in an action for criminal conversation and alienation of affections. Order of the Court of Appeal varied.

E. A. Goodman, Q.C., G. J. Karry, Q.C., and *L. H. Schipper,* for the plaintiff, appellant.

[1] [1961] O.R. 1, 25 D.L.R. (2d) 344.

M. Lerner, Q.C., and *E. Cherniak,* 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 Ontario[1], setting aside a judgment of Treleaven J. in favour of the plaintiff for $10,000 and directing a new trial limited to the ascertainment of the plaintiff's damages.

The action was brought for damages for criminal conversation and alienation of affections.

The appellant asks that the judgment at the trial be restored with costs throughout.

While the respondent did not serve a notice of cross-appeal or a notice, pursuant to Rule 100, asking that the decision of the Court of Appeal should be varied, he is described in his factum as "Respondent and Cross-Appellant" and the factum contains an elaborate argument in support of two propositions, (i) that in Ontario there is no separate cause of action for alienation of affections although alienation of a wife's affection if established may be an element in the assessment of the husband's damages in an action for criminal conversation or for enticement, and (ii) that in any event there was, in the case at bar, no evidence to support any assessment of damages for alienation separate from those for criminal conversation. The factum concludes with the submission that:

the cross-appeal be allowed, and one of the following dispositions be made:

(*a*) The claims for alienation of affections be dismissed and the matter be remitted for a new trial limited to damages for criminal conversation;

(*b*) The claim for alienation of affections be dismissed and the damages for criminal conversation be assessed by this Court;

(*c*) That there be one assessment of damages for criminal conversation and alienation of affections, either in a new trial or by this Court.

At the opening of the argument counsel for the appellant submitted that the respondent ought not to be allowed to raise the matters set out in his factum as recited above because (i) they had not been raised in the courts below and (ii) no notice of intention had been given. The Court was of opinion that we should hear counsel for the respondent on these matters and asked counsel for the appellant whether in view of this he wished an adjournment of the

[1] [1961] O.R. 1, 25 D.L.R. (2d) 344.

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hearing as contemplated by Rule 100. Counsel replied that he was ready to proceed and filed a supplementary factum dealing with the points raised in the cross-appeal.

The action was commenced on September 12, 1957.

In the statement of claim it is alleged that during a period of approximately four months before August 1954 the defendant resolved to alienate the affection of the plaintiff's wife, that he succeeded in doing so, that he committed adultery with her "thereby destroying the plaintiff's home and marriage and causing the plaintiff to lose the enjoyment of the society, affection, comfort and services of his said wife", that as a result of the adultery the plaintiff's wife gave birth to a female child of which the defendant was the father. The statement of claim continues:

7. As a result of the Defendant's conduct aforesaid, the Plaintiff suffered a severe blow to and an invasion of his honour and great laceration to his feelings owing to the successful attack by the Defendant upon the Plaintiff's exclusive right to intercourse with the Plaintiff's wife.

8. As a result of the Defendant's conduct aforesaid, the Plaintiff's family life has been very greatly damaged and has caused an estrangement between the Plaintiff and his wife, as well as a confusion in his household over the birth and future welfare of the said child.

9. The Plaintiff states that he has suffered serious loss and will continue to suffer further loss.

The Plaintiff, therefore, claims:

(*a*) Damages for criminal conversation in the sum of $25,000;

(*b*) Damages for alienation of affections in the sum of $25,000;

(*c*) Loss of earnings of the Plaintiff's wife in the sum of $557;

(*d*) Medical expenses in the sum of $157;

(*e*) Past and future maintenance of the said child born to the Plaintiff's wife and the Defendant in the sum of $25,000;

(*f*) His costs of this action;

(*g*) Such further and other relief as to this Honourable Court may seem just.

By the statement of defence all the material allegations in the statement of claim were denied and the defendant pleaded that if any estrangement had been caused between the plaintiff and his wife it had been caused not by any conduct of the defendant but by the plaintiff's own conduct.

The trial took place on October 14 and 15, 1959. The questions put to the jury and their answers were as follows:

Q. 1. Was there any adultery committed between the Defendant and the Plaintiff's wife?

Answer. Yes.

Q. 2. If your answer is "yes", when and where was the adultery committed?

Answer. July 1954 to November 1956 at his house and her house.

Q. 3. If your answer is "yes", at what amount do you assess the damages for adultery?

Answer. $2,000.

Q. 4. Did the Defendant alienate the affections of the Plaintiff's wife?

Answer. Yes.

Q. 5. If your answer to question No. 4 is "yes", at what amount do you assess the damages for such alienation?

Answer. $8,000.

On these answers judgment was entered for $10,000 and costs.

The defendant appealed to the Court of Appeal on the grounds, *inter alia,* that the damages were excessive and that there was non-direction and misdirection on the part of the learned trial judge.

In the unanimous judgment of the Court of Appeal delivered by Schroeder J.A. it was held that there was evidence to support the findings made by the jury in answering questions one, two and four and that these findings should not be disturbed, but that there had been non-direction as to certain matters which the jury should have been told to consider in mitigation of damages and that there had been misdirection which may well have resulted in a duplication in the two sums awarded by the jury. A new trial limited to the assessment of damages was accordingly directed. The decision of the Court of Appeal that the findings of the jury as to the commission of adultery ought not to be disturbed was not questioned before us.

At the conclusion of the argument of counsel for the appellant the Court stated that we were all of opinion that the Court of Appeal was right in directing a new trial and that we would hear counsel for the respondent on the matters raised in his factum by way of cross-appeal.

Mr. Cherniak presented a carefully prepared argument in support of the submission that in Ontario there is no separate cause of action for alienation of affections; Mr. Goodman in reply contended the contrary but also submitted that in the case at bar the question has little, if any, importance as the finding of adultery is not now questioned

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and the plaintiff is entitled to urge the loss of his wife's affection as one of the matters to be considered in assessing his damages for criminal conversation.

At the conclusion of the reply counsel for both parties joined in requesting that this Court assess the plaintiff's damages instead of sending the matter back for another trial and in our opinion it is in the best interest of the parties that we should take this course.

While it may be that in the case at bar we could fix the plaintiff's damages without dealing with the point argued by Mr. Cherniak I think it better that we should decide that question, for, strictly speaking, if there are two separate causes of action we ought, I suppose, to make a separate assessment on each; and the matter is one of general importance.

I have reached the conclusion that Mr. Cherniak's argument is sound and that there is no separate cause of action for "alienation of affections" known to the law of Ontario.

Under s. 1 of *The Property and Civil Rights Act,* now R.S.O. 1960, c. 310, it is provided that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as they stood on the 15th day of October 1792 except so far as they have been altered by legislation having the force of law in Ontario. It is not suggested that there is any legislation in force in Ontario bearing upon the matter.

In 1792, the action for damages for criminal conversation and the action for damages for enticement were well known and both were introduced into Ontario as part of the common law of England. In my opinion, there was in 1792 no case in the books and no case has since that date been decided in England holding that a husband is entitled to damages on proof of the fact that he has lost the affection of his wife by reason of the conduct of the defendant unless that conduct was such as would support an action for criminal conversation or an action for enticement or was itself tortious as, for example, if the defendant's conduct which resulted in the plaintiff's loss of his wife's affection was the publication of a libel concerning the plaintiff.

The present position of the law in England on this point is, I think, accurately stated in Lush on Husband and Wife, 4th ed., 1933, at p. 35 as follows:

> This action of enticement lay against anyone, male or female, friend or relative, who unlawfully induced the wife to leave her husband, or unlawfully harbours her after she has left him.
>
> Adultery was irrelevant to the action, the husband's appropriate remedy therefor was the action technically laid in trespass, but in substance one upon the case for criminal conversation, now abolished, but replaced by a petition against the alleged adulterer for damages brought in the Divorce Division.
>
> Moreover, the action is not one for alienation of affections; an action on such ground is unknown to the law of England, would be new in principle and not merely in instance, and would therefore not lie, unless such a right of action were expressly created by statute.

There are, however, a number of cases in Ontario, some of them judgments of the Court of Appeal, in which, while the above quotation is recognized as a correct statement of the law in England, the assertion is made that the right of action for alienation of affections does exist in Ontario. On examination, it appears that in all of these cases the assertion mentioned is derived directly or mediately from *Bannister v. Thompson*[1]. *Bannister v. Thompson* was tried before Middleton J. and a jury. It is stated in the reasons of Middleton J. that the defendant had acquired a malign influence over the wife of the plaintiff, that his conduct was such that to the learned judge the inference that he was guilty of adultery appeared almost irresistible (although he dealt with the case on the basis that no adultery had been proved, as the jury had failed to find it), that the misconduct of the defendant had resulted in the total alienation of the affection of the wife and the wrecking of the plaintiff's home, that the wife while continuing to live under her husband's roof had entirely ceased to discharge any wifely function, slept in her own room locking the door, refused to speak to her husband, and the husband was as fully deprived of her *consortium* as if she lived in a separate building.

Middleton J. submitted two questions to the jury and instructed the jury to assess damages "separately upon each count" if they found for the plaintiff. The questions were put in the precise words of the plaintiff's claim and the jury

[1] (1913), 29 O.L.R. 562, affirmed in part (1914), 32 O.L.R. 34.

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found that the defendant, (i) "enticed away from the plaintiff his wife, Annie Bannister, and procured her to absent herself unlawfully without his consent for long intervals from the house and society of the plaintiff", and (ii) "by his wrongful acts has alienated from the plaintiff the affections of his wife, Annie Bannister, and deprived the plaintiff of the love, services, and society of his wife, thus destroying the peace and happiness of his household".

The jury assessed the damages at $500 on the first head and $1,000 on the second.

For the defendant it was argued that on these findings the plaintiff was not entitled to judgment. The learned judge stated that the considerations applicable to each of the counts differed and that they must be treated separately.

Dealing first with enticement Middleton J. said, at p. 564:

> The wife, while living under her husband's roof, had entirely ceased to discharge any wifely function. She slept in her own room, locking the door. She refused to speak to her husband; and he was as fully deprived of her *consortium* as if she lived in a separate building.
>
> It is said that this constitutes no cause of action, because the defendant himself has not actually received her to his own house. I do not think that this is so. It is not the fact that the woman is staying with her paramour that constitutes the wrong; it is depriving the plaintiff of the wife's *consortium*, which, under the circumstances, is just as full and complete as if the woman had been forcibly abducted.

In my opinion this is a correct statement of the law. The ingredients of the cause of action for enticement are stated in the reasons of the Lords Justices in *Place v. Searle*[1], particularly by Greer L.J. at p. 517, and are accurately summarized in the head-note to the report as follows:

> A wife owes the duty to her husband to reside and consort with him, and any one who, without justification, procures, entices or persuades her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages.

The judgment in *Bannister* simply makes it clear that a wife may violate her duty to reside and consort with her husband although continuing to live under the same roof.

Turning to the second branch of the case Middleton J. rejects the dictum of Osler J.A. in *Lellis v. Lambert*[2] (to be examined shortly), taking the view that it is *obiter* and continues, at pp. 565 and 566:

[1] [1932] 2 K. B. 497.

[2] (1897), 24 O.A.R. 653 at p. 664.

I find myself quite unable to accept this statement of the law. I think the case of *Winsmore v. Greenbank* (1745), Willes 577, establishes otherwise, and that the law recognises the right of the husband to recover damages against a defendant for any misconduct which deprives the plaintiff of the love, services, and society of his wife—to use the words of this pleading—commonly called *consortium*. It may be that the two counts in this statement are really an alternative description of the same wrong, and that the view already expressed sufficiently shews the plaintiff's right to recover.

I think this case illustrates the distinction between the action of enticement and the action of crim. con. To maintain the latter, proof of adultery is essential, and the action may be maintained even though there has been no consequent loss of the wife's affections, society, and services.

* * *

and at pp. 566 and 567:

Winsmore v. Greenbank is not, so far as I can ascertain, doubted or qualified. It is everywhere cited as authority. It is there said, (p. 581): "There must be *damnum cum injuriâ;* which I admit. I admit likewise the consequence, that the fact laid down before *per quod consortium amisit* is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By *injuria* is meant a tortious act: it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie. This rule therefore being admitted, the only question is whether any such injury be laid here."

An unlawful procuring, it is said, is shewn where the defendant persuades the wife with effect to do an unlawful act, this rendering it unlawful in the defendant; for "every moment that a wife continues absent from her husband it is a new tort, and every one who persuades her to do so does a new injury and cannot but know it to be so." The consequence of the unlawful act was said to be sufficiently laid when it was alleged that by means thereof the plaintiff "lost the comfort and society of his wife and her aid and assistance in his domestic affairs and the profit and advantage he would and ought to have had of and from her estates."

As Middleton J. says, *Winsmore v. Greenbank* is "everywhere cited as authority"; but the cause of action, the *injuria,* recognized in that case was enticement; alienation of the wife's affections was only one of the items going to make up the total of the damages caused to the plaintiff.

It will be observed that, in the quotation from his reasons above, Middleton J. suggests that "the two counts . . . are really an alternative description of the same wrong, and that the view already expressed (*i.e.,* the view that the plaintiff had a cause of action for enticement) sufficiently shews the plaintiff's right to recover". With respect, I am of opinion that the correct statement would have been that the *injuria* which gave the plaintiff a cause of action was the

enticement and that the alienation of the wife's affections which was one of the consequences of the enticement was part of the *damnum* resulting from that *injuria.*

This appears to me to be in accord with the view of the Court of Appeal whereby the appeal from the judgment at the trial was allowed in part and the damages were reduced to $1,000. Maclaren J.A. who gave the judgment of the Court said (at 32 O.L.R., pp. 36 and 37):

> The appellant also urges that the two paragraphs above referred to overlap. The first alleges that the defendant enticed away from the plaintiff his wife and procured her to absent herself unlawfully for long intervals from his house and society; the second, that the defendant by his wrongful acts alienated from the plaintiff the affections of his wife and deprived him of her love, services, and society.
>
> * * *
>
> The first paragraph refers rather to the means used, the second to the damages resulting therefrom. This is dealt with in the case of *Winsmore v. Greenbank, supra,* at p. 582, where, in answer to the objection that procuring, enticing, and persuading were not sufficient, if no ill consequences followed from them, it was held to be sufficient in that case because it was specifically alleged that the plaintiff had thereby lost the comfort and society of his wife, and the advantage of her fortune, etc.

The dictum of Osler J.A. in *Lellis v. Lambert*[1], referred to above, which was rejected by Middleton J. reads as follows:

> The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her *consortium,* never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no "procuring and enticing", or "harbouring and secreting" of the wife, no action lay at the suit of the husband against the man.

There may be some difficulty in suggesting a case in which the conduct of a defendant which results directly in a wife's refusal to live with her husband would not amount to procuring and enticing her to leave her husband and result in a total loss of *consortium*; but in so far as Osler J.A. says that, where there is no adultery, no "procuring and enticing" or "harbouring and secreting" of a wife and no loss of her *consortium,* the mere fact that conduct of the defendant has

[1] (1897), 24 O.A.R. 653 at p. 664.

caused the loss of a wife's affections does not give her husband a cause of action, it appears to me that he has stated the law correctly.

I do not propose to refer in detail to the decisions in Ontario cited by counsel in which it has been asserted that the fact of alienation of a wife's affections caused by the defendant gives a separate cause of action to the wife's husband. I have examined all of them. I am satisfied that in each the ground of the assertion can be traced to the judgments in *Bannister v. Thompson* and *Winsmore v. Greenbank,* and for the reasons I have given above it is my opinion that in so far as they do make the assertion they ought not to be followed.

I have reached the conclusion that in the case at bar on the findings of the jury the plaintiff has established his cause of action for damages for criminal conversation, that he has not a separate cause of action for alienation of his wife's affections but that such alienation in so far as it has been established is the result of the criminal conversation and is one of the matters to be taken into consideration in assessing the damages.

It remains to assess the damages. The facts are unusual; they are stated in the reasons of Schroeder J.A. and it is not necessary to set them out in great detail.

The appellant and his wife, Anna Kungl, were married in Hungary on April 27, 1937. Three children, Mary Kungl, born on July 15, 1938, Theresa Kungl, born on May 28, 1940, and Joseph Kungl, born on April 29, 1942, were born in Hungary.

The respondent was married to the appellant's sister and in 1952 he brought the appellant and his family to Canada. The cost of moving was borne by the respondent. The appellant and his family moved into the respondent's home. There was a friendly relationship between the appellant and the respondent and their families. In 1953 the appellant and his family moved out of the respondent's house into their own living quarters in the nearby town of Leamington, Ontario.

The respondent's wife became ill and for six weeks prior to her death on April 15, 1954, the appellant's wife stayed with her day and night and nursed her. About three weeks after his wife's death the respondent requested Mrs. Kungl

to come to work for him by the day as a housekeeper and she did so until 1955. During this time the respondent transported her to and from his home each day. Mrs. Kungl stated that on the first day on which she attended at the respondent's home to do the housecleaning the respondent made improper advances to her and offered her $100 to submit to him but she refused, that for several weeks thereafter the advances continued, that she finally yielded and from about August 1954 to October 1956 the respondent regularly had sexual intercourse with her and professed his love for her.

On January 9, 1957, Mrs. Kungl gave birth to a daughter, Rosann, of whom she stated that the respondent is the father. The learned trial judge instructed the jury as a matter of law that this daughter must be presumed to be the child of the appellant and this direction was not attacked in argument.

In the month of June 1957, the appellant's wife stated to her husband that the respondent was the father of the child Rosann.

Up to this time the appellant and his wife were living together as man and wife and having normal sexual relations with each other and in spite of the wife's statement as to the paternity of Rosann they continued to do so thereafter.

There is no suggestion in the evidence that at any time after the birth of Rosann the respondent had any improper relations with the appellant's wife or made any attempt to entice her or indeed to have anything to do with her.

After his wife's statement as to the paternity of Rosann the appellant and his wife sold the house which they jointly owned and bought another the title to which was taken in their joint names. Commencing with the summer of 1958 there were intermittent separations between the appellant and his wife but they were still living together in September 1959. They separated again a few weeks before the trial of the action. In reply to a question put by the learned trial judge as to whether she was willing to stay with her husband, Mrs. Kungl said "Yes, I would have stayed but my husband couldn't stand me."

There was evidence that the family life of the appellant and his wife had been a reasonably happy one but that it became less happy following her disclosure of her relationship with the respondent.

Three witnesses called by the defence gave evidence which, if accepted, established, in the words of Schroeder J.A., "that the plaintiff's wife had on several occasions engaged in the most vulgar sort of familiarity with friends or acquaintances of her husband". Mrs. Kungl was not called as a witness in reply to deny the evidence of these witnesses.

It is not necessary to restate the general principles by which the Court is guided in assessing damages for adultery. They are accurately set out in the reasons of McCardie J. in *Butterworth v. Butterworth & Englefield*[1]. In a case of this sort there is no method of calculation by which a figure can be reached with any exactitude. Our task is to endeavour to approach the matter as would a properly instructed jury, bearing in mind the general principles referred to above and the circumstances which Schroeder J.A. points out ought in this case to be considered as matters of mitigation, and to estimate the figure which appears proper on the particular facts of this case. We have reached the conclusion that the damages should be fixed at $5,000.

But for the fact that counsel for both parties asked us to assess the damages, the appeal to this Court would have been dismissed and the respondent is entitled to his costs of the appeal. I would make no order as to costs of the cross-appeal. The respondent is entitled to his costs in the Court of Appeal but the appellant is entitled to the costs of the trial.

In the result the order of the Court of Appeal should be varied; in lieu of the direction for a new assessment of damages it should be directed that judgment be entered in favour of the appellant against the respondent for $5,000 and the costs of the action. The respondent should recover from the appellant his costs of the appeal to the Court of Appeal and of the appeal to this Court.

[1] [1920] P. 126.

1962 KUNGL v. SCHIEFER — Cartwright J.

Order of Court of Appeal varied. Judgment to be entered in favour of appellant for $5,000 and costs of the action. Respondent entitled to his costs of the appeal to the Court of Appeal and of the appeal to this Court.

Solicitor for the plaintiff, appellant: George J. Karry, Kingsville.

Solicitors for the defendant, respondent: Lerner, Lerner, Bitz & Bradley, London.

1961 *Nov. 6

1962 Jan. 23

GENERAL TRUST OF CANADA (*Intervenant*) .... APPELLANT;

AND

ROLAND CHALIFOUX LIMITÉE (*Plaintiff*) .... RESPONDENT.

AND

LAVAL TRANSPORT INC. ....MIS-EN-CAUSE.

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

Real property—Lien—Unpaid balance on repair work—Bankruptcy of debtor—Trust deed—Possession of property by trustee—Whether trust deed prevents lien from taking effect—Civil Code, arts. 1981, 2081.

Having executed repairs to buildings belonging to L Co., the plaintiff registered in April 1955, a builder privilege on these buildings. In September 1955 it instituted this action against L Co. for debt and for a declaration that the privilege was valid. Neither L Co., who was in bankruptcy at the time, nor the trustee in bankruptcy defended the action. However, the appellant trust company intervened, invoked a trust deed, dated February 1948, stipulating that on default the trust company had a right to be put in possession of these buildings and to administer or sell them, and pleaded that the privilege was invalid since the ownership of L Co. had become conditional or precarious by virtue of the trust deed. By a judgment, dated June 1955, the trust company had been put in possession of the assets of L Co. The trust company's claim was dismissed by the trial judge, and this judgment was affirmed by the Court of Queen's Bench. The trust company appealed to this Court.

Held: The appeal should be dismissed.

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

The trust company's claim that the trust deed had rendered the privilege null could not be supported. The trust deed was a contract of warranty and not of alienation, a loan and not a transfer of ownership. The rights given to the trust company by the trust deed did not have the effect of making the ownership of L Co. conditional or precarious. The privilege claimed by the plaintiff was not extinguished by virtue of art. 2081 of the *Civil Code,* since L Co. was owner at the time the repairs were effected. The trust company's claim was incompatible with the provisions of art. 1981 of the Code, which declares that the property of the debtor is the common pledge of his creditors.

The covenant in the trust deed by which L Co. assumed the obligation to keep his property clear of liens could not bind a third party.

Laliberté et al. v. Larue, Trudel et Picher et al., [1931] S.C.R. 7, applied; *Vachon v. Deschênes,* 59 Que. K.B. 193, distinguished.

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

Ernest Lafontaine, for the intervenant, appellant.

Jean-Louis Dorais, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—La compagnie Roland Chalifoux Limitée a, du 8 septembre 1953 au 9 avril 1955, effectué des travaux de réfection sur des immeubles appartenant à Laval Transport Inc. au coût de $30,560.08 dont $17,585.08 demeura non payé. Le 22 avril 1955, elle fit enregistrer sur ces immeubles un privilège d'entrepreneur pour le solde ci-dessus, donnant, le même jour, avis de cet enregistrement à la compagnie débitrice. Le 25 septembre suivant, elle poursuivait cette dernière demandant, en outre d'une condamnation personnelle pour la dette, la reconnaissance de la validité de son privilège et adoptant les conclusions usuelles pour en assurer la pleine réalisation.

Au moment de l'institution de cette action, la défenderesse était en faillite. Ni le failli, ni le syndic ne contestèrent.

L'appelante, d'autre part, produisit une intervention. Elle invoqua un acte de fiducie signé le 27 février 1948 par Laval Transport Inc. pour garantir une émission d'obligations de celle-ci; sa qualité de fiduciaire; le défaut de la débitrice de satisfaire aux obligations par elle assumées en cet acte de fiducie; un jugement du 28 juin 1955 de la Cour supérieure la mettant en possession de l'actif de la débitrice, ainsi que pourvu à l'acte de fiducie dans le cas de défaut.

[1] [1960] Que. Q.B. 1236.

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Fauteux J.

Elle allégua de plus que la défenderesse n'avait jamais autorisé les travaux en question; que ceux-ci avaient été entrepris en paiement d'une dette de reconnaissance; que l'enregistrement de ce privilège était tardif aussi bien que le fruit d'une arrière-pensée née à la suite de la requête en faillite. Concluant sur cette intervention, l'intimée demanda à ce que ce privilège soit déclaré illégal, nul et radié, et qu'ordre soit donné au mis-en-cause, le Régistrateur de la Division d'enregistrement concernée, d'en effectuer la radiation.

La Cour supérieure rejeta cette intervention et accueillit la demande de l'entrepreneur.

Porté en appel, ce jugement fut confirmé par une décision unanime de la Cour du banc de la reine[1]. D'où le pourvoi de l'intervenante à cette Cour.

Il n'y a, à vrai dire, qu'une seule question à considérer, savoir si, telle que formulée par l'appelante en son factum et à l'audition, l'acte de fiducie constitue une fin de non-recevoir du privilège de l'intimée même si, par ailleurs, ce privilège est valide nonobstant les autres moyens plaidés par l'appelante. En effet, si l'appelante n'a pas formellement abandonné ces autres moyens, la Cour supérieure et la Cour d'Appel les ont écartés comme mal fondés et l'appelante n'a aucunement tenté de démontrer que cette conclusion des deux Cours sur les faits était erronée.

C'est, en substance, la prétention de l'appelante que le droit de propriété de Laval Transport Inc. sur les immeubles hypothéqués par celle-ci en sa faveur est devenu conditionnel ou précaire par suite de ces dispositions de l'acte de fiducie prévoyant que sur défaut de la débitrice de se conformer à ses obligations, l'appelante avait droit, aux fins d'obtenir satisfaction de sa créance, d'être mise en possession de ces immeubles, les gérer ou en disposer de gré à gré ou par vente en justice.

Au soutien de cette prétention, l'appelante a invoqué le para. 2 de l'art. 2081 C.C., la décision de la Cour du banc de la reine dans *Vachon v. Deschênes*[2], et d'autres causes dans

[1] [1960] Que. Q.B. 1236.

[2] [1935], 59 Que. K.B. 193.

lesquelles, suivant elle, le même principe aurait été reconnu. Les parties pertinentes de l'art. 2081 C.C. se lisent comme il suit:

2081. Les hypothèques et privilèges s'éteignent:

1. ....

2. Par la résolution ou par l'extinction légale du droit conditionnel ou précaire dans la personne qui a donné lieu au privilège ou à l'hypothèque.

3. ....

Cette disposition est une application de l'art. 2038 C.C., aux termes duquel ceux qui n'ont sur un immeuble qu'un droit suspendu par une condition ou résoluble dans certains cas, ou sujet à récision, ne peuvent consentir qu'une hypothèque soumise aux mêmes conditions ou à la même récision. Migneault, Droit Civil Canadien, vol. 9, p. 180. Que ces dispositions de l'art. 2081 C.C. puissent trouver une application et entraîner l'extinction d'un privilège d'entrepreneur dans les cas où, comme dans *Vachon v. Deschênes, supra,* se trouve une clause de réméré permettant au vendeur de reprendre la propriété vendue sans obligation de rembourser aucun des deniers déboursés, ni paiement fait en rapport avec la vente, ni le coût des améliorations, le tout devant être considéré à titre de loyer et dommages liquidés, il ne s'ensuit pas qu'elles doivent s'appliquer en l'espèce. L'acte de fiducie ne contient aucune disposition de la nature de celles apparaissant à la convention examinée dans *Vachon v. Deschênes, supra,* ou aux conventions invoquées dans les autres causes citées par l'appelante.

Dans *Laliberté et al. v. Larue, Trudel et Picher et Les Appartements Lafontaine Limitée*[1], on considéra un acte de fiducie comportant des clauses substantiellement semblables à celles apparaissant à l'acte de fiducie produit en la présente cause et sur lesquelles l'appelante veut appuyer ses prétentions.

On jugea que cet acte ne conférait au fiduciaire que le droit d'un créancier hypothécaire ou gagiste et non ceux d'un propriétaire; que le sens de l'acte, tant dans son texte que dans son esprit, était celui du contrat hypothécaire et de nantissement; que le titre de propriété était demeuré entre les mains de l'obligée puisque sur paiement des obligations par elle assumées, le fiduciaire n'avait pas à lui signer

[1] [1931] S.C.R. 7, 2 D.L.R. 12, 12 B.C.R. 436.

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GENERAL TRUST OF CANADA *v.* ROLAND CHALIFOUX LTÉE. *et al.*
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une rétrocession mais qu'à lui donner une quittance finale et mainlevée des hypothèques. On en a conclu que les biens hypothéqués faisaient partie des biens de la compagnie débitrice et que, par suite de la faillite, ils avaient été dévolus au syndic et non aux obligataires.

Je suis clairement d'avis que l'acte de fiducie en la présente cause est également un contrat de garantie et non d'aliénation, un emprunt et non un transfert de propriété. Le droit de l'appelante, comme créancière hypothécaire, comme d'ailleurs celui de l'intimée, comme créancière privilégiée, de poursuivre la réalisation de leurs créances respectives sur les immeubles affectés n'a pas pour effet de rendre conditionnel ou précaire le droit de propriété de Laval Transport Inc. sur ces immeubles. A la vérité, la prétention de l'appelante est fondamentalement incompatible avec les dispositions de l'art. 1981 C.C. prescrivant que:

> Les biens du débiteur sont le gage commun de ses créanciers et, dans le cas de concours, le prix s'en distribue par contribution, à moins qu'il n'y ait entre eux des causes légitimes de préférence.

L'appelante a également invoqué cette clause de l'acte de fiducie où Laval Transport Inc. assuma l'obligation:

> De défendre, s'il y a lieu, ses titres aux biens ci-dessus désignés et particulièrement à ceux spécifiquement hypothéqués, qu'elle déclare et garantit être bons, et de tenir les dits biens libres et clairs de tous privilèges, charges et hypothèques, qui pourraient avoir priorité sur les garanties créées par le présent acte ou avoir rang égal avec ces garanties.

Cette stipulation, dit l'appelante, invalide le privilège de l'intimée. Il ne s'agit là, à mon avis, que d'une obligation purement personnelle assumée par la débitrice à l'endroit du fiduciaire. L'inobservation de cette obligation constitue sans doute un défaut donnant ouverture aux droits conférés au fiduciaire au cas de défaut, mais est ineffective pour empêcher un entrepreneur étranger à cette convention d'acquérir valablement un privilège qui lui résulte de la loi. 1983 C.C.

Pour ces raisons, je dirais que c'est à bon droit qu'on a rejeté la demande de l'appelante de déclarer illégal, nul et radié le privilège enregistré par l'intimée et d'ordonner au Régistrateur de la Division d'enregistrement concernée d'en effectuer la radiation.

Je rejetterais l'appel avec dépens.

Appeal dismissed with costs.

Attorney for the intervenant, appellant: E. Lafontaine, Montreal.

Attorney for the plaintiff, respondent: J. L. Dorais, Montreal.

GERMAINE PHANEUF (*Plaintiff*) ......APPELLANT;

1961 *Nov. 16

AND

CHAMPOUX ET BELLAVANCE LIMITÉE (*Defendant*) .... RESPONDENT.

1962 Jan. 23

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

Motor vehicles—Tort—Collision—Negligence—Snowplow travelling on left side of highway—Visibility poor—Liability.

The plaintiff was a passenger in an automobile which collided with a snowplow at midnight on February 20, 1959. The snowplow was travelling on the left side of the road and the accident happened on a curve. The trial judge came to the conclusion that the accident was caused, at least in part, by the fault of the operator of the snowplow, and maintained the action. The Court of Queen's Bench, by a majority decision, dismissed the action. The plaintiff appealed to this Court.

Held: The appeal should be allowed.

The dangerous situation was created by the presence of the snowplow on the wrong side of the road. The driver of the car was on a road which curved to his right. The snow banks on the side of the road varied from 4 to 7 feet in height. Drifting snow reduced visibility to 150 feet for the driver of the car. It might be true that the driver of the snowplow could see at a distance of 400 feet, but that was because he was seated high in his cab.

By driving his snowplow on the left side of the road without any valid reason and in full knowledge of the danger he was creating, the driver of the snowplow did not exercise the standard of care which a reasonable prudent man would have exercised in the circumstances. Assuming that the driver of the car had failed to keep a proper lookout, the character of his fault was not abnormal and unforeseeable in relation to the danger caused by the driver of the snowplow. In this hypothesis the liability would be divided between the two drivers, so that there was at least contributory negligence on the part of the driver of the snowplow.

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

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PHANEUF *v.* CHAMPOUX ET BELLAVANCE LTÉE.

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

Evender Veilleux, Q.C., for the plaintiff, appellant.

Laurent E. Belanger, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Dans la nuit du 19 au 20 février 1959, vers minuit, l'appelante, passagère dans une automobile conduite par René Couture, sur la route n° 1, dans la province de Québec, fut grièvement blessée lorsque, dans une courbe entre Garth Bay et St-Gérard, ce véhicule, procédant à droite de la route, est entré en collision avec un camion chasse-neige venant en sens opposé et conduit par le préposé de l'intimée, Lorenzo Audit, à sa gauche et non à sa droite.

Dans une action en dommages intentée par la victime à l'intimée, le Juge de première instance considéra que le préposé de cette dernière n'avait en l'occurrence aucune raison valable de circuler sur la route à sa gauche pour y enlever la neige; qu'en ce faisant, dans une courbe où la visibilité était presque nulle, il avait créé une situation inusitée, imprévisible et rendant périlleuse la circulation des véhicules venant à sa rencontre; que la prudence exigeait alors qu'il prît au moins les précautions nécessaires pour prévenir suffisamment à l'avance les usagers de la route, venant en sens opposé, du danger, qu'il réalisait d'ailleurs créer en conduisant ainsi illégalement; que même si on pouvait reprocher à Couture d'avoir, en cette courbe, maintenu une vitesse trop grande, ou un manque de maîtrise de son véhicule, cette collision ne serait pas survenue Audit n'eût-il d'abord barré le chemin. La Cour en conclut que cet accident était attribuable, au moins en partie, à la faute du préposé de la défenderesse et condamna celle-ci à payer à l'appelante la somme de $14,707.80.

Porté en appel par l'intimée, ce jugement fut infirmé par une décision majoritaire de la Cour du banc de la reine[1]. La question considérée fut de savoir quelle était la cause directe de cet accident, la présence du camion sur la gauche du chemin ou l'imprudence, négligence et manque d'attention de la part de Couture, ou les deux.

[1] [1961] Que. Q.B. 631.

MM. les Juges Badeaux et Hyde, de la majorité, furent d'avis que le préposé de l'intimée, qui, quelques secondes avant l'accident, avait constaté la venue d'une automobile à une distance d'environ 400 pieds, ne pouvait prendre d'autres précautions que celles qu'il avait alors adoptées par la mise à l'arrêt de son camion et par le signalement de sa présence en allumant et éteignant à quelques reprises les phares d'avant de son véhicule; que si Couture avait été attentif, il aurait pu voir le camion en temps utile, modérer sa vitesse et passer à côté sans incident. On jugea que les faits de cette cause ne pouvaient se distinguer de ceux qui avaient donné lieu aux décisions de la Cour du banc de la reine dans *Trudel v. Broughton Soapstone Quarry Company Limited*[1] et *Lauzier v. Asbestos Transport Limited*[2].

Dissident, M. le Juge Bissonnette rappela, en droit, les principes posés dans les causes ci-dessus et dans celle de *Brisson v. Potvin*[3]. En fait, cependant, il considéra que le préposé de l'intimée avait, en l'espèce, commis une faute causale en rapport avec le fait dommageable. Peu importe, ajoute-t-il, que ce soit là ou non l'unique cause de l'accident; la passagère de Couture n'ayant pas à établir ni à départager la responsabilité de chaque conducteur, la faute causale de l'intimée étant constatée, son droit au recouvrement de ses dommages était dès lors légalement fondé.

L'examen attentif et complet de tous les témoignages, nécessité par ces divergences de vues sur les faits, révèle ce qui suit. Au moment de l'accident, la nuit était claire et, au dire de témoins désintéressés, le pavé était quelque peu glissant. La collision se produisit dans une courbe que Couture devait prendre en inclinant vers la droite. De ce côté de la route, la présence de bancs de neige variant en hauteur, suivant les témoignages, de 4 à 7 pieds, et la neige soulevée et poussée en tourbillons par le vent, réduisaient considérablement la distance qui, sans ces circonstances, aurait permis à Couture d'apercevoir, dans cette courbe, un véhicule conduit, en sens opposé, à gauche de la route. Ceci, comme l'a signalé M. le Juge Bissonnette, est amplement confirmé par le fait que peu de temps après la collision, Audette, le conducteur de l'ambulance transportant la victime à l'hôpital, en suivant le même parcours précédemment

[1] [1957] Que. Q.B 314. [2] [1945] Que. K.B. 579.
[3] [1948] Que. K.B. 38.

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effectué par Couture, évita de justesse ce camion chasse-neige qu'il ne put apercevoir qu'à une distance de 150 à 200 pieds. Il se peut que le conducteur du camion ait pu, lui, voir venir une automobile à une distance de 400 pieds; le banc sur lequel il était assis pour conduire était, en hauteur, à un niveau deux fois supérieur à celui du siège de l'automobile conduite par Couture. A la vitesse combinée à laquelle ces deux véhicules approchaient l'un de l'autre avant l'imminence du danger, il est certain que lorsque Couture fut en position de pouvoir réaliser la présence du camion sur la travée où lui-même procédait légalement, il ne lui restait à peine que quelques secondes pour réagir, aviser et passer à gauche du camion.

La faute du préposé de l'intimée ne fait aucun doute. La conduite de son camion à gauche du chemin, sans aucune raison valable et en pleine connaissance de la situation périlleuse qu'il créait, ne correspond pas au standard de prudence qu'un homme raisonnablement prudent devait adopter dans les circonstances. La nécessité ou l'urgence qu'il peut y avoir d'enlever la neige sur les grandes routes n'exclut pas l'obligation de ceux qui y sont préposés de se conformer à ce degré de prudence dont dépend la sécurité des usagers de la route et à l'observation duquel il est légitime pour ceux-ci de s'attendre.

Assumant que Couture ait commis cette faute d'inattention, que lui ont imputée les Juges de la majorité, le caractère de cette faute n'était pas anormal et imprévisible par rapport au danger causé par le conducteur du camion. L'état de choses délibérément créé par la faute première de celui-ci comportait, à sa connaissance d'ailleurs, une puissance dommageable propre que la faute subséquente de Couture a déclenchée. Dans cette hypothèse, la responsabilité se partage entre les auteurs des deux fautes. Savatier, Traité de Responsabilité civile en droit français, tome 2, p. 40, nº 480. En somme, cette collision, normalement prévisible par le préposé de l'intimée, a été la conséquence logique de sa faute. En toute déférence pour les Juges de la majorité, je dirais donc que sa faute a été, pour le moins, contributive au fait dommageable.

En Cour d'Appel, l'intimée a plaidé que le montant des dommages accordés était excessif. Étant donné la conclusion à laquelle ils en sont arrivés, les Juges de la majorité n'ont

pas eu à considérer la question. M. le Juge Bissonnette, d'autre part, a trouvé que ce grief était sans fondement et, devant cette Cour, l'intimée en a formellement fait l'abandon.

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Dans ces vues, je maintiendrais l'appel et infirmerais le jugement de la Cour du banc de la reine, avec dépens des deux Cours.

Appeal allowed with costs.

Attorney for the plaintiff, appellant: E. Veilleux, Sherbrooke.

Attorneys for the defendant, respondent: Slattery, Bélanger & Fairbanks, Montreal.

FREDERICK WILFRED HALL AND HAROLD DAVID LINDEN .... } APPELLANT;

1962 *Mar. 6, 7 Mar. 19

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Bribery—Municipal officials—Charge of attempt—Directed verdict of acquittal—Evidence—Misdirection—Appeal against order granting new trial—Criminal Code, 1953-54 (Can.), c. 51, ss. 104(1)(b), (e), 584.

The accused H was reeve of the Township of York and L was a councillor. They were jointly charged under s. 104(1) of the Criminal Code for offering to accept a sum of money to aid in procuring the passing of a measure, motion or resolution concerning the issue of a building permit. A second count of indictment contained a separate charge against L of accepting a sum of money for the same purpose. The evidence related to certain conversations by M, president of a company, and P, a building contractor, with the accused. The trial judge directed the jury to acquit on the ground that all preparations had been made for the issue of the permit before the alleged conversations had taken place, or before any money had been paid over to L. The Court of Appeal ordered a new trial. The accused appealed to this Court.

Held: The appeal should be dismissed.

It is true that the permit was issued before the passing of the bylaw but on the evidence it was issued after the conversations had taken place and it was followed by the passing of the bylaw. Although there was

PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

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no express mention in the evidence of the payment of money for the purpose of procuring a vote for the adoption of the bylaw, the jury was entitled to look at the evidence as a whole—the preliminary conversations, the issue of the permit and the subsequent passing of the bylaw with the two accused voting for it. It was an error to isolate the vote from the issue of the permit and there was, in these circumstances, evidence to go to the jury on both counts.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside the verdict of acquittal and directing a new trial. Appeal dismissed.

Joseph Sedgwick, Q.C., for the appellant Linden.

E. Arthur Martin, Q.C., for the appellant Hall.

W. C. Bowman, Q.C., for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—In the year 1956 the two appellants were municipal officials of the Township of York, Frederick W. Hall being the reeve and Harold D. Linden one of the councillors. They were jointly indicted under s. 104(1) of the *Criminal Code* for offering to accept a sum of money from one Neil J. May to aid in procuring the adoption of a measure, motion or resolution concerning the issue of a building permit to him. The second count of the indictment contains a separate charge against Harold D. Linden of accepting from one Harry D. Payne a sum of money for the same purpose. At the conclusion of the case for the Crown, on the motion of counsel for the defence, the learned trial judge directed the jury to return a verdict of not guilty on both counts. The Court of Appeal[1] held that there was error in so directing the jury, being unanimously of the opinion that there was some evidence fit for submission to the jury on both counts. The two accused now appeal to this Court from the judgment of the Court of Appeal setting aside the verdict of acquittal and directing a new trial.

The evidence on which the Court of Appeal acted is set out in full in its reasons. I do not propose to repeat more than the following brief summary.

Early in 1956 Neil J. May, the president and sole shareholder of Carbide Tool Company Limited, decided to extend his factory building in the Township of York. He first discussed a building permit with the Township Engineer and, on March 6, 1956, he completed the filing of the necessary

[1] (1961), 35 C.R. 38.

documents for the issue of the permit. On March 8, he entered into a building contract with Harry D. Payne for the construction of the building.

On March 12, at a meeting of the Committee of General Purposes of the township, May's application for the permit was approved subject to a ten-foot set-back of the north wall of the proposed building from the neighbouring lands. On March 19, the next meeting of the Committee of General Purposes took place. In the meantime May secured the consent of the owners of the neighbouring lands to the erection of the building as shown on the original plans. At this meeting of the Committee the application was approved unanimously.

The general building by-law of the township provides as follows:

> S. 4 A permit shall be obtained from the Building Inspector by the owner or the legally authorized agent of the owner, for the erection, alterations, reconstruction, removal or wrecking of, or repairs to any (or part of any) building or structure.
>
> S. 84 (aa) Notwithstanding anything in this By-law contained, the Building Inspector shall not grant a permit for nor shall any person erect, construct or alter, a building or structure within the Township of York to be used for the purpose of a factory, . . . unless and until the plans and specifications have been first submitted to and been approved by Council after a report thereon has been submitted to Council by the Building Inspector and by the Chief of the Fire Department.

Evidence was given by the township solicitor that the usual practice was to issue a building permit without waiting for the passing of the by-law approving the minutes of the meeting of the Committee for General Purposes, and that the passing of the by-law authorizing the permit was regarded as a mere formality. The township engineer gave evidence to the same effect.

On March 20, 1956, May applied to the township office for his building permit and was told that it was not ready. On March 21, May had a meeting with Hall in the latter's office, having made the appointment by telephone the day before. May says that at this meeting Hall solicited a bribe and sent him on to see Linden, who also made the same suggestion. May also says that Linden called Hall in his presence and discussed the issue of the permit and stated that May understood what the position was. Following this conversation, May spoke to his lawyer before he returned to

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speak to Hall. On the second interview with Hall the township engineer was called in. He said that everything in connection with the permit was in order. After the engineer had left Hall referred to the arrangement which May had made with Linden and suggested that the money could be left in the glove compartment of his car. He pointed out where the car was parked. May also says that Hall, after a telephone conversation with the building department, told him that the permit was ready and to go down to the building department. May says that he did go down to the building department but the permit was not ready and that he was told to pick it up the following day. He did attend on the following day at the building inspector's department and the permit was delivered to him. May says that he did not give any money either to Linden or to Hall. He had already spoken to a solicitor and afterwards he and his solicitor interviewed the Assistant Crown Attorney.

Payne says that he did give the sum of $100 to Linden for the issue of a permit.

Up to this time, of course, the authorizing by-law had not been passed. There was nothing except the minute of the General Purposes Committee and what was referred to as the general practice to support the issue of the permit.

The grounds on which the learned trial judge directed the jury to acquit both accused were as follows:

> The evidence clearly indicates that everything had been done as far as finalizing the preparation for the issuing of the building permit or the authorizing of the issuing of the building permit, before these alleged conversations took place with the two accused men, or before any money was paid over to Linden, as is alleged.
>
> So it could not have been paid or could not have been promised for the purpose alleged against them, because the thing had already been done, it could not have been agreed to be paid or paid for the purpose of procuring the passage of a measure authorizing it.

The case for the prosecution is that it is open to the jury to infer from the evidence that the two appellants made an offer to accept money for assistance in obtaining a valid building permit and that this necessarily involved the passing of a by-law upon which each was entitled to vote and subsequently did in fact vote. I have outlined above the chronology of the evidence until the building by-law was passed. May, as an applicant, was in no position to demand of the building inspector that he issue a permit. It is true that the permit was issued before the passing of the

by-law but on this evidence it was issued after the conversations between May and Hall and Linden and between Payne and Linden had taken place and it was followed by the passing of the by-law. Although there is no express mention in the evidence of the payment of money for the purpose of procuring a vote for the adoption of the by-law, the jury is entitled to look at the evidence as a whole—the preliminary conversations, the issue of the permit and the subsequent passing of the by-law with the two accused voting for it. It was error to isolate the vote from the issue of the permit and there is, in these circumstances, evidence to go to the jury on both counts.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant Linden: J. Sedgwick, Toronto.

Solicitor for the appellant Hall: G. A. Martin, Toronto.

Solicitor for the respondent: W. C. Bowman, Toronto.

ARTHUR JAMES KENDALL .... APPELLANT;

AND

HER MAJESTY THE QUEEN .... RESPONDENT.

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*Mar. 14, 15
Mar. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Capital murder—Offence committed in 1952—Prosecution in 1961—Evidence of children now grown up supporting killing—Body never recovered—Whether jury properly instructed—Jurisdiction of Appeal Court—Criminal Code, s. 597A as enacted by 1960-61 (Can.), c. 44, s. 11.

The accused was convicted in 1961 of the capital murder of his wife in 1952. The accused, in 1952, was a married man with five children then 12, 10, 8, 5 and 1½ years old. He was convicted on the evidence of the three eldest children whose evidence indicated that their mother had been murdered by their father. The wife's body was never found. The evidence given by the children at the trial in 1961 differed materially from their stories as given in 1952. It was argued by the accused that the evidence was an unsafe foundation for the conviction. The Court of Appeal affirmed the conviction. The accused appealed to this Court.

Held: The appeal should be dismissed.

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

The contradicting story given by the children in 1952 and their evidence given in 1961 raised a serious question of credibility, but this was clearly and adequately put to the jury on evidence that the children were under fear and intimidation in 1952. The jury was fully seized of this matter and there could be no attack on the judge's instruction on this ground.

The children who gave evidence in 1961 were testifying as people of mature intelligence to what they had observed as children. Questions of weight and credibility in these circumstances were entirely for the jury. It would have been wrong for the trial judge to warn the jury that they must treat this evidence as though it had been given by children of immature years and to have warned them of the special risk in acting on the uncorroborated evidence of a young child, even when sworn.

When the charge is read as a whole, there was no substance to the argument that the trial judge had failed to instruct the jury to convict the accused of non-capital murder in case they had any doubt of his having committed capital murder.

The Court of Appeal could only exercise its jurisdiction to set aside the conviction on the ground that the evidence was an unsafe foundation for conviction, if it found that the jury could not reasonably have convicted of capital murder on the evidence. In this case, there was very substantial evidence to go to the jury of planned and deliberate murder, and it would have been unwarranted interference with the function of the jury to substitute the finding of the Court of Appeal for that of the jury on this point.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the conviction of the accused on a charge of capital murder. Appeal dismissed.

C. L. Dubin, Q.C., for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant was convicted in the year 1961 of the capital murder of his wife committed in the year 1952. His appeal to the Court of Appeal was dismissed by unanimous judgment and he now appeals to this Court pursuant to s. 597(*a*) of the *Criminal Code* enacted by 9-10 Elizabeth II, Chapter 44.

In 1952 the accused was a married man with five small children. The three eldest were James, Margaret and Ann, then 12, 10 and 8 years old. There were two other children then 5 and 1½ years old. All these children were living in a small, one-room cabin with their father and mother on August 2, 1952, and the three eldest gave evidence in the year 1961 that would show that their father had killed their mother early in the morning nine years before.

In 1952 the appellant was a farmer in the County of Perth near Listowel. He had lost some of his farm buildings by fire and in the summer of 1952 he went to work in a sawmill at Johnson's Harbour, in a remote part of the Bruce Peninsula, 15 to 20 miles south of Tobermory and 4½ miles in from the highway that runs between Wiarton and Tobermory. He first of all occupied the small cabin as living quarters with three young men, who were also working at the sawmill. His wife was still living on the farm 90 miles away. During this period he began an adulterous association with a married woman in Wiarton. She knew him as a widower with 5 children. When the school term ended, the appellant brought his wife and 5 children to Johnson's Harbour and they all lived in the small, one-room cabin and for part of the time two of the three young men also lived there. But some time before August 2, 1952, the young men went home, leaving as occupants of the cabin Kendall, his wife and the children. During this period he was continuing his association with the married woman in Wiarton. It was also during this period that he made a visit to his farm with this woman and made an attempt to get her installed as a housekeeper with a neighbouring farmer with whom he had business dealings. When he made this visit back to the farm his wife remained at Johnson's Harbour with the children.

The three elder children gave evidence of what they saw during the early dawn of the day on which they left the cabin. This day was August 2, 1952. The submissions on this appeal make some review of this evidence necessary. Margaret said that she saw her father dragging the limp body of her mother out of the cabin and past the window, that he rolled up two blankets from the bed and took them out, that there was blood on the floor at the foot of the bed and that subsequently, she found that the butcher knife was missing, and that her father returned to the cabin a short time later and mopped the floor.

Ann's evidence is that she heard her mother cry, "Arthur, please don't". She saw her father lay a knife with blood on it on the table and then drag her mother out of the cabin and down the road. He returned to the cabin and gathered up a bed sheet and some of her mother's clothes and the knife, wiped blood from the floor and left the cabin again. Her sister Margaret put her hand over her mouth to keep her quiet.

James, when he awakened, heard his mother cry, "Don't Art." He saw his father drag the limp body of his mother out of the cabin. He saw the bloody knife on the table and blood on the floor. His father was wearing hip rubber boots. When the father returned to the cabin he wiped the blood off the knife and off the floor. He also saw the father take bed clothes away.

Margaret said she remained quiet because it had been a strict family rule that the children would not get up or make any noise until their parents called them. She placed her hand over her younger sister's mouth to prevent her from crying out. James said that he was too frightened to make a noise because he was wondering if his father was going to come back and "get the rest of them".

After his return to the cabin the appellant got the children out of bed, arranged their breakfast and went to work as usual. He told Margaret that if anybody asked where her mother was she was to say that she left on Thursday, which was two days before. On his return to the cabin from his work at the sawmill the appellant put the children in the car and went to Wiarton to the other woman. He moved in with her along with the 5 children, of whom this woman had only seen one, on a previous occasion. Next day the appellant returned to the cabin with his son James and a son of this woman to collect some of his belongings. He left a note that he was leaving his employment because he had to get in his flax harvest and had had family troubles. There is evidence that on this Sunday, August 3, the wife's purse, which was the only one that she had with her, was still in the cabin. A few days later both families moved back to the family farm in the County of Perth. Some time later Kendall asked the owner of the sawmill to send his wife's ring which had been left in the cabin. Nothing was ever heard again of the appellant's wife.

There is evidence that the appellant spread word in his neighborhood that his wife had left him for another man. Those neighbours who gave evidence indicated disbelief in any such story. When one of them made it clear to Kendall that he did not believe him, Kendall changed his story and said that his wife had gone back to her mother. This neighbour then telephoned the wife's relatives, who came to inquire about her and reported the matter to the police. The police made inquiries and searches but never found the

body. They also questioned the children at the time but the children would not give any information about their mother's disappearance beyond the fact that she had gone away alone on the Thursday before they left the cabin. One of them gave evidence in some detail of what she was wearing at the time she left.

Ann was the first of the children who talked to the police in 1961. She did so after a disagreement with her stepmother and after leaving her father's house. At this time the daughter Margaret was married and living in Winnipeg. Ann telephoned her sister Margaret and told her that she had informed the police of what had happened in 1952. James continued to live with his father until after the preliminary hearing.

The contradiction between what the children said in 1952 and what they said in 1961 raised a serious question of credibility. This was clearly and adequately put to the jury on evidence that the children were under fear and intimidation. They never discussed what they had seen among themselves and they never mentioned it to any outside person until 1961. The jury was fully seized of this matter and there could be no attack on the judge's instruction on this ground.

The substantial attack on the children's evidence was that the trial judge failed in his duty to warn the jury as to the care with which such evidence should be weighed. The argument is that the evidence of the children given when they were grown up suffers from the same frailty which would have attached to it had they given their evidence as children and that it could not be any stronger when given in 1961 than it would have been if given in 1952.

The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility. (Wigmore on Evidence, 3rd ed., para. 506.)

The last point, a sense of moral responsibility, disappears when the children are of mature years and understand the duty to speak the truth. When these children gave evidence they were respectively 21, 19 and 17 years of age. They were

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in the same position at that age as any other witness. Their capacity of communication was likewise the same as that of any other witness. It is quite clear that they were testifying as mature persons to what they had observed as children. But they were not testifying to a routine matter that had happened 9 years before. If they were telling the truth, what they had seen must have made an indelible impression on their minds at the time and must have been something that they could never forget. Again, the trial judge clearly and adequately instructed the jury, if any such instruction was needed, that these witnesses were mature witnesses testifying to something that had happened 9 years before. Questions of weight and credibility in these circumstances were entirely for the jury. It would, in my opinion, have been wrong for the trial judge to warn the jury that they must treat this evidence as though it had been given by children of immature years and to have warned them of the special risk in acting on the uncorroborated evidence of a young child, even when sworn. This would be a totally unwarranted and undesirable extension of the rule of practice. The need for this special warning disappears when the children give evidence as mature persons. It then becomes a matter of weight and credibility for the jury.

In this case we do not, in fact, know what a trial judge, sitting in 1952, would have done with the evidence of these children. What we do know is that in 1961 they were fully competent, testifying to recollections of revolting events that happened 9 years before and there was ample instruction given on the question of credibility, testimonial capacity and recollections.

I turn now to the submission that the learned trial judge in his charge failed to direct the jury in express terms that if they entertained any doubt between capital murder and non-capital murder, they must give the accused the benefit of the doubt and convict of non-capital murder only. Any force in this submission entirely disappears when the charge is read as a whole. Counsel for the accused did not question the correctness of the judge's charge of capital murder. He told them correctly and clearly what they must find beyond a reasonable doubt before they could convict of this offence. He told them that if they entertained any reasonable doubt on any of the ingredients of the offence, they must acquit of capital murder. He told them correctly what

they had to find to bring in a verdict of non-capital murder and told them correctly that if they entertained a reasonable doubt on this, they must acquit. When read as a whole there could be no doubt left in the jury's mind that if they entertained a reasonable doubt on capital murder but still found that the accused intended to kill his wife or meant to cause her bodily harm that he knew to be likely to cause death and was reckless whether death ensued or not, they must find non-capital murder, and that if they entertained any reasonable doubt on either score, they must acquit. There is no substance to this objection.

It was also submitted that this is a case where the Court of Appeal should have exercised its jurisdiction to set aside the conviction because of an irresistible conclusion that the evidence was an unsafe foundation for a conviction. Undoubtedly the Court of Appeal has this jurisdiction but in order to exercise it here, it would have to find that the jury could not reasonably convict the appellant of capital murder on the evidence. It is, of course, no answer to the exercise of this jurisdiction by an appellate court for the prosecution to say that there was some evidence to go to the jury and that the appellate court should not interfere. But this is not such a case. There was very substantial evidence here to go to the jury of a planned and deliberate murder and it would be unwarranted interference with the function of the jury to substitute the finding of an appellate court for that of the jury on this point.

The appellant also seeks a new trial on the ground that his defence was prejudiced by the introduction into evidence of two pillows taken from his residence in 1961. The evidence was that there were bloodstains on these pillows and that such blood had been on the pillows for a period of from 6 months to 15 years. This objection should be rejected. The pillows must be considered in relation to the whole of the evidence, including that of the children. The objection to them is entirely a matter of weight. They undoubtedly had some relevancy but I notice that in his address to the jury, counsel for the Crown did not mention them, the learned trial judge did not mention them but counsel for the defence did deal with them and made his submission that they had no weight in the circumstances of the case. The evidence was not improperly admitted. It was not

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unduly emphasized as to weight and it must be considered, not in isolation, but as part and parcel of a large volume of evidence given during the course of a lengthy trial.

At the conclusion of the argument in the Court of Appeal, Laidlaw J.A., in delivering the unanimous judgment of the Court, noted that the charge was complete and correct in all matters touching the issues to be determined by the jury and that there was no room for misunderstanding or want of understanding on the part of the jury as to the principles of law properly applicable to the evidence and that the verdict was given according to law. I respectfully agree with this conclusion.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: McAvoy, Craig & McKerroll, Owen Sound.

Solicitor for the respondent: W. C. Bowman, Toronto.

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*Mar. 13, 14
Mar. 26

FREDERICK J. COWAN ....APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Forgery—Forged endorsement of cheque—Intent to prejudice—Defence of authorization—Admissibility of evidence—Criminal Code, 1953-54 (Can.), c. 51, s. 309(1)(a).

The accused, a solicitor, acted for Mrs. F in an expropriation proceeding and for that purpose retained the services of O, a real estate consultant. O submitted an account of $300 to the accused who forwarded it to Mrs. F. The latter caused her daughter to deliver to the accused a cheque payable to O in that amount. The accused endorsed the name of O on the back of the cheque and cashed it. A letter from Mrs. F, dated some months later, addressed to O, in which she expressed her surprise to learn that he had not been paid by the accused, was admitted in evidence. Subsequent to this letter the accused sent his cheque to O, but it was not honoured. Mrs. F testified, in cross-examination, that her daughter had reported to her some two weeks after the delivery of the cheque that she had told the accused at that time that he was free to do as he wished with the cheque.

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

The defence was that the accused was authorized to endorse the cheque and that O was eventually paid at a later date. The accused was convicted of forgery, and his appeal was dismissed. He was granted leave to appeal to this Court.

Held (Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Taschereau, Fauteux and Judson JJ.: There was no admissible evidence in the record to support the defence of authorization and the facts indicated that that defence was ill-founded and was an afterthought. Even if the hearsay evidence given by Mrs. F concerning the authorization to deal with the cheque was properly before the jury, it provided no answer to the charge. Nothing that went on between the accused and Mrs. F's daughter could authorize the accused to sign O's name on the back of the cheque. When the accused signed O's name as endorser, he did so to the prejudice of O and the offence was proved. The accused made a false document knowing it to be false with the intent that it should be acted upon as genuine to the prejudice of O. It made no difference that O was eventually paid and that if things had been done another way the accused might have had a defence. Nor did it matter that when this cheque was in the accused's hands with instructions for delivery countermanded, if they were, O could not have successfully sued for its delivery.

Per Taschereau and Fauteux JJ.: The only material in the record to support the defence of authorization was that conversation between Mrs. F and her daughter and that evidence was inadmissible as hearsay evidence. The fact that there was no objection to it was entirely immaterial, because the absence of objection did not give it any probative value. There was consequently no evidence whatever in the record to support this alleged defence. It could not be said that the accused, in the circumstances of this case, could honestly have thought that the admission of that hearsay evidence made it unnecessary for him to testify or to call Mrs. F's daughter to give evidence. As to the letter by Mrs. F to O, it was inadmissible. However, it became immaterial as it could not be held to contradict a fact which was not proved.

Per Cartwright and Ritchie JJ., dissenting: The trial judge improperly admitted in evidence the letter from Mrs. F to O and this resulted in a substantial wrong or miscarriage of justice.

This appeal should be dealt with on the basis that the hearsay evidence given by Mrs. F concerning the accused's authority to deal with the cheque was properly before the jury. That evidence was put in without objection and was treated by the trial judge and by both counsel at the trial as being properly before the jury. Had it not been so treated it was possible that the daughter would have been called as a witness and that the accused would have given evidence. It was open to the jury on that evidence to find that Mrs. F had in fact given the accused authority to cash the cheque or to deal with it as he saw fit, and that on that view it was open to them to find that an intent to prejudice O had not been established; and that was the real defence which the trial judge failed to put to the jury. But the inadmissible letter of Mrs. F, which was objected to by defence counsel, would almost certainly prevent the jury from taking that view of the evidence.

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APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the conviction of the accused on a charge of forgery. Appeal dismissed, Cartwright and Ritchie JJ. dissenting.

E. P. Hartt, for the appellant.

John J. Freeman, for the respondent.

The judgment of Taschereau and Fauteux JJ. was delivered by

FAUTEUX J.:—I agree with my brother Judson and only wish to express my views as to one particular aspect which, with deference, is fatal to this appeal.

The defence raised by the appellant is that Mrs. Finlay expressly authorized him to deal as he saw fit with the cheque made by her to the order of Outram. The only material in the record that can possibly be referred to, in an attempt to support the fact that such authority was ever given to or received by appellant, is that part of Mrs. Finlay's testimony where, in cross-examination by counsel for the accused, she relates a conversation she had with her daughter Mary some two weeks after remittance of this cheque by the latter to the appellant:

> Q. Would you tell his honour and the gentlemen of the jury what that conversation was.
>
> A. She came home and she said that Fred needed money, and she said: "Mother, I told him to go ahead and cash the cheque. Is that all right?", and I said: "I guess it is" because we owed him money too.

Admittedly such evidence is inadmissible as hearsay evidence. The fact that there was no objection to it is entirely immaterial: *Schmidt v. The King*[2]. The absence of objection does not give this hearsay evidence any probative value. This part of Mrs. Finlay's testimony is no evidence of the truth of what her daughter told her and *a fortiori* of what her daughter reported as having been told by appellant. There is consequently no evidence whatever in the record to support this alleged defence advanced on behalf of appellant.

It is said, however, that this inadmissible evidence having been admitted and dealt with at trial as if it were admissible, the accused, for that reason, may well have honestly

[1] (1962), 131 C.C.C. 305, 36 C.R. 313.
[2] [1948] S.C.R. 333, 92 C.C.C. 53, 6 C.R. 317, 4 D.L.R. 217.

considered that there was no need for him to testify or call Mrs. Finlay's daughter to give evidence supporting this alleged defence of authorization. Assuming that such an argument could be put forward in a proper case, in my opinion, it cannot be said that the accused could honestly have thought that the admission of that hearsay evidence made it unnecessary for him to testify or to call Mrs. Finlay's daughter to give evidence. For, at the close of the case for the prosecution, the record contained evidence elicited by cross-examination of Mrs. Finlay by his own counsel, which clearly indicated that she never gave such an authorization. The evidence shows that after several attempts to obtain payment of his account, Outram received this letter dated July 13, 1959, from the appellant:

Suite 33-34 Office: CE2-2341
74 Sparks St. CE2-2350
Ottawa 4, Ontario

FREDERICK JAMES COWAN
Barrister Solicitor Notary Public
Supreme Court and Parliamentary Agent

July 13, 1959.

Mr. A. A. Outram,
175 Rumsey Road,
Toronto, Ontario.

Re: *Cora Finlay Expropriation*

Dear Sir:

I enclose herewith my cheque in the amount of $300.00 in payment for your services in regard to the above matter.

I apologize for the delay in this matter and I was under the impression that you had been paid.

Perhaps the mix-up was due to my change in offices as I am unable to find the above client's file. In any event I apologize for any embarrassment that may have been caused to you in the above entanglement.

Sincerely yours,

ss/fc Frederick J. Cowan

Attached to this letter was a cheque for $300 dated July 10, 1959, drawn on the Toronto-Dominion Bank in Ottawa-South, payable to the order of A. A. Outram and signed Ronco Auto Parts Reg'd, per: Frederick Cowan. On this cheque appeared the notation: "Re: Finlay". Having been endorsed and deposited by Outram, it was returned marked

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"Not sufficient funds". When cross-examined on this matter by counsel for the accused, Outram gave the following evidence:

Q. Did you telephone Mrs. Finlay and advise her of that fact—that is, Mrs. Cora Finlay?

A. Yes, I advised her after the cheque was returned N.S.F.

Q. In that telephone conversation you had with her do you recollect whether or not you told her that she was dealing with crooks, and you were going to retain your own lawyer when he came back from his holidays?

A. I don't remember the first part because I think perhaps she knew it and told me, because she started telling me immediately: "Well, I have paid him long enough ago the money to give you", but as nearly as I can remember I said: "I am . . ."—yes: "If I am not paid very soon I will take it up with my lawyer", who was Mr. John Arnup of Mason, Foulds, Arnup, Walter and Weir, and I think I said I would take it up with the Bar Association if I did not get it in due course.

Q. Your recollection is that you intimated to her that you were going to take it up with your own solicitor?

A. Yes.

Q. But you have no recollection of saying she was dealing with crooks?

A. No, I think she brought that point out instead of me when she said she had given him the money long ago.

Subsequent to this testimony and again in cross-examination by counsel for the appellant, Mrs. Finlay was referred to this telephone conversation related by Outram and gave the following testimony:

Q. Mrs. Finlay, Mr. Outram, a prior witness, has testified that he made a telephone call to you after a certain cheque forwarded to him was returned N.S.F. In that telephone call did you refer to anybody as a crook?

A. Oh, no, I don't think so.

This answer is a clear admission that she had that telephone conversation with Outram and that the only part thereof which remained open to question was whether she had referred to anybody as a crook, to which she answered she did not think so. This telephone conversation is evidence that Mrs. Finlay never gave the authorization contended for and, with deference, it cannot be contended that the accused could sincerely and honestly have thought that there was no need for him to give or call evidence to show that he had received from Mrs. Finlay the alleged authorization.

With respect to the letter written on the 7th of July 1959 by Mrs. Finlay to Outram, wherein the former expressed to the latter her surprise to learn that he had not been paid by Cowan, I agree that it was inadmissible. However, holding the view that there was no evidence at all to establish that appellant had received authority to deal with this cheque as he saw fit, this letter became immaterial as it could not be held to contradict a fact which was not proved.

For the reasons of my brother Judson and those here given, I would say that there is no substance in this appeal from the unanimous judgment of the Court of Appeal for Ontario and that it should be dismissed.

The judgment of Taschereau and Judson JJ. was delivered by

JUDSON J.:—The appellant was convicted of forgery under s. 309(1)(*a*) of the *Criminal Code* and his conviction was affirmed on appeal. The precise form of the count in the indictment on which he was convicted was that he did

> forge an endorsement on a certain document, to wit, a cheque drawn on the Royal Bank of Canada, Perth Ontario Branch, dated Perth, January 23rd, 1959, to the order of A. A. Outram, for $300.00, with intent that the same should be used or acted upon as genuine, to the prejudice of the said A. A. Outram, contrary to Section 310(1) of the Criminal Code.

The defence was that the Crown failed to prove that the accused had the necessary intent required by s. 309(1)(*a*) of the Code, which reads:

> 309. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent
>
> (*a*) that it should in any way be used or acted upon as genuine, to the prejudice of any one whether within Canada or not.

Cowan was a solicitor practising in the City of Ottawa. He acted for Mrs. Finlay in an expropriation proceeding and for that purpose retained the services of one Outram as an expert witness. On completion of his work, Outram sent to Cowan his account for $300. Mrs. Finlay then drew a cheque payable to Outram for $300 for payment of this account. She had her daughter take the cheque to Cowan's office. Cowan signed Outram's name on the back of the cheque and obtained cash from the Plaza Hotel. The hotel endorsed the cheque and it was duly paid by the bank on which it was drawn.

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The defence is founded on the fact that Mrs. Finlay was in some doubt between Outram and Cowan as the proper payee of the cheque; that her daughter had reported to her, some time after the delivery of the cheque to Cowan, that she had told Cowan, at the time of delivery, that he was free to do as he wished with it. Mrs. Finlay acquiesced in what her daughter had done because she owed Cowan money for his account, not yet rendered, in the expropriation proceedings.

This evidence came out in a very peculiar way. Neither Cowan nor the daughter gave evidence and therefore there was no admissible evidence that any such conversation ever took place between the daughter and Cowan. The trial judge might well have ruled out this evidence of the mother. It is indeed very doubtful whether any such authority was given to Cowan, for many months later when Mrs. Finlay received a letter from Outram stating that his bill still remained unpaid, she replied that she thought it had already been paid and that she had sent a cheque to Mr. Cowan a long time ago. This indicates that the defence of an authorization was ill-founded and was an afterthought. Why would Mrs. Finlay say that she had sent a cheque to Cowan to pay this bill if she had authorized Cowan to use the cheque for his own purposes? But this letter from Mrs. Finlay to Outram was also inadmissible.

I would, however, deal with this appeal on the basis that the hearsay evidence given by Mrs. Finlay concerning Cowan's authority to deal with the cheque was properly before the jury. In my opinion it provides no answer to the charge. There was an existing indebtedness between Mrs. Finlay and Outram and the cheque, in the first place, was given to pay that indebtedness. As it was issued this cheque could only be negotiated by Outram and it was not so negotiated. Nothing that went on between Cowan and Mrs. Finlay's daughter could authorize Cowan to sign Outram's name on the back of the cheque. If the cheque was to be used at all in the form in which it was drawn, there could be only one endorser, namely, Outram. When Cowan signed Outram's name as endorser, he did it to the prejudice of Outram and the offence is proved. Cowan made a false document knowing it to be false with the intent that it should be acted upon as genuine to the prejudice of Outram. If there was error in the direction of the learned trial judge to

the jury on this point, it was error in favour of Cowan when he told the jury that if Cowan had reasonable grounds to believe that he was authorized to act as he did, then they must acquit. The proper instruction would have been that there was no evidence before the jury that Cowan had any ground for belief that he was authorized to deal with the cheque as he actually did, that this authority could not come from Mrs. Finlay, and that it was quite clear that it did not come from Outram.

It makes no difference that Outram was eventually paid and that if things had been done another way Cowan might have had a defence. If, in fact, Mrs. Finlay's instructions to deliver the cheque to Outram were countermanded and Cowan was authorized to deal with the cheque as he chose, he might have inserted his own name as payee and crossed out Outram's name or he might have made the cheque payable to bearer or he might have destroyed it.

Nor does it matter that when this cheque was in Cowan's hands with instructions for delivery countermanded, if they ever were, Outram could not have successfully sued for delivery of the cheque. This cheque was an unconditional order in writing drawn by Mrs. Finlay and addressed to the bank to pay to the order of Outram, who was her creditor. It was not made payable to a fictitious or non-existing person. In the form in which it was drawn it could only be endorsed by Outram. Outram's signature was endorsed by Cowan and this act, as the Court of Appeal has held, was to the prejudice of Outram.

The appeal should be dismissed.

The judgment of Cartwright and Ritchie JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are stated in the reasons of my brother Judson which I have had the advantage of reading. I think it desirable, however, to set out the words in which Mrs. Finlay related the circumstances surrounding the drawing of the cheque and its delivery to the appellant.

Mrs. Finlay was called by the Crown. In her examination in chief, she stated that her daughter Mary was present when she drew and signed the cheque, that she had not

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received a bill from Cowan for his services but understood his charges would be in the neighbourhood of $500. Her evidence in chief continues as follows:

The WITNESS: I didn't really owe Mr. Outram money. It was Mr. Cowan. Mr. Outram never really billed me, but we owed him money, and I had a little discussion with my daughter as to who I should make the cheque out to, and she said: "Mother, we owe both of them money", and she said: "Make it out to Mr. Outram, and if Fred wants it he can have it". He had a power of attorney.

* * *

Q. Coming back to the cheque in question, Mrs. Finlay, the name "A. A. Outram" is written very legibly on this cheque. When you made it out to whom did you make it out at that time on January 23, 1959?

A. I made it out to that name; Mr. Outram.

Q. Then what did you do with the cheque?

A. I gave it to my daughter and she brought it into Ottawa.

Q. Did you give her certain instructions when you gave it to her?

A. I said: "Give that to Mr. Cowan, and he will do with it as he sees fit".

Q. As he sees fit?

A. Yes.

* * *

In cross-examination, Mrs. Finlay gave the following evidence:

Q. And to make it abundantly clear, Mrs. Finlay, in the first instance you would have had no objection at all to making the cheque for $300, Exhibit No. 5, payable to Mr. Cowan, or to Mr. Cowan using it?

A. No; how could I have?

Q. Because you owed him money?

A. Yes, because I owed him money.

Q. And in the second instance, even though you made the cheque payable to A. A. Outram, and it was given to Mary to give to Mr. Cowan, you had no objection, and still have no objection, to Mr. Cowan's having negotiated it by putting down Mr. Outram's name?

A. No, neither has Mr. Outram.

Q. You were not done out of it, and Mr. Outram has been paid?

A. That is right. I cannot see the point of it.

* * *

Q. You told us that about two weeks later Mary came back to Perth?

A. Yes.

Q. Did you have a conversation with her over this cheque, Exhibit No. 5?

A. Yes.

Q. Would you tell his honour and the gentlemen of the jury what that conversation was?

A. She came home and she said that Fred needed the money, and she said: "Mother, I told him to go ahead and cash the cheque. Is that all right"?, and I said: "I guess it is" because we owed him money too.

Q. That was the conversation?

A. Yes.

Q. So two or three weeks after you gave the cheque to Mary you knew Mr. Cowan had gone ahead and cashed the cheque?

A. That is correct.

Q. Did Mary look after most of your business interests in Ottawa?

A. Yes, she did.

Q. And did she have general authority to look after your business interests in Ottawa?

A. Yes.

Q. And as far as you were concerned did Mary have the authority to authorize Mr. Cowan to negotiate the cheque?

A. Well, as I told her so I guess she had.

While some of this evidence may have been admissible to prove the extent of the authority which Mrs. Finlay had given to her daughter, Mary, it was not admissible to prove the conversation between Mary and Cowan alleged to have taken place at the time the cheque was delivered to him. However, in the peculiar circumstances of this case, I think that we should deal with this appeal on the basis, set out in the reasons of my brother Judson, that the hearsay evidence given by Mrs. Finlay concerning Cowan's authority to deal with the cheque was properly before the jury.

I reach this conclusion for the following reasons. Mrs. Finlay's evidence quoted above was put in without objection and was treated by the learned trial judge and by both counsel at the trial as being properly before the jury. Had it not been so treated it is possible that the defence would have called Mary as a witness and that the appellant would have given evidence. It would be contrary to the manner in which the trials of criminal cases are conducted to tacitly treat evidence favourable to an accused as being properly before the court and later to reject it after the opportunity to supply admissible evidence of the same facts has passed.

On the other hand, the admission of the letter dated July 7, 1959, written by Mrs. Finlay to Outram was objected to by defence counsel and, after some discussion in the absence of the jury, was admitted notwithstanding his objection.

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In my view, it was open to the jury on the evidence quoted above to find that when, through the agency of her daughter, Mrs. Finlay handed the cheque to Cowan she, through the same agency, not only refrained from instructing him to deliver it to Outram but expressly authorized him to cash it or deal with it in such other manner as he saw fit.

Of course such an authorization given by the drawer of the cheque would not have given Cowan the right to sign the name of Outram as endorser but it would have given him the right to make the cheque payable to bearer and to cash it, or the right to destroy it or to return it to Mrs. Finlay and ask her to send him another cheque payable to himself. On the suggested view of the facts, which it was open to the jury to take, Outram had no property interest in the cheque and no right to require Cowan to deliver it to him. He was no more delayed or prejudiced in fact by Cowan having endorsed his name than he would have been if Cowan had adopted any of the other permissible courses suggested above.

With the greatest respect, it appears to me that the learned trial judge failed to put the real theory of the defence adequately to the jury. The case was put to them as if the main question was whether Cowan believed on reasonable grounds that he had the right to endorse Outram's name on the cheque, whereas the theory of the defence was that although Cowan, of course, had no right to sign Outram's name and did in fact sign it, he did so without any intent to prejudice Outram.

I have already expressed my opinion that it was open to the jury on the evidence to find that Mrs. Finlay had in fact given Cowan authority to cash the cheque or to deal with it as he saw fit and that on that view it was open to them to find that an intent to prejudice Outram had not been established; but the inadmissible letter of Mrs. Finlay of July 7, 1959, would almost certainly prevent the jury taking the view of the evidence which I have just suggested.

The Court of Appeal rightly held that the letter was clearly inadmissible but concluded that its admission did not result in any substantial wrong or miscarriage of justice. With respect, I cannot share that view. The letter would tend to make the jury reject the only view of the evidence upon which the appellant might have been acquitted.

I do not intend to suggest that the jury should have drawn from the evidence the view of the facts favourable to the appellant which I have outlined above but it was open to them to do so, and they may have regarded the inadmissible letter as decisive against this view.

I find it necessary to base my judgment on only one of the grounds on which leave to appeal was granted, that is ground number 5 which reads:

That the Learned Trial Judge erred in directing the Jury that they were entitled to rely on the truth of the contents of Exhibit 10 (the letter of July 7, 1959) when in fact it was not properly in evidence at the trial for that or any other purpose.

For the above reasons, I would allow the appeal and quash the conviction. As it is the view of the majority of the Court that the appeal fails nothing would be gained by considering what further order should have been made had the appeal succeeded.

Appeal dismissed, CARTWRIGHT *and* RITCHIE JJ. *dissenting.*

Solicitor for the appellant: E. Patrick Hartt, Toronto.

Solicitor for the respondent: John J. Freeman, Toronto.

JOHN M. M. TROUP LTD. AND NATIONAL PAINTING & DECORATING, LTD. (*Plaintiffs*) .... APPELLANTS;

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*Mar. 12, 13
June 11

AND

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

AND

THE ATTORNEY-GENERAL FOR ONTARIO .... RESPONDENT;

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Statutory trust fund provisions—Payment to contractor deposited in current account—Deposit applied by bank to reduce contractor's overdraft—Unpaid accounts of sub-contractors—Extent of bank's knowledge as to breach of trust—No notice given of assignment of book debts held by bank.

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

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A cheque for $77,000 representing the greater part of a holdback on a contract for the construction of a public building was drawn by the County of Lambton in favour of the contractor of the project. The contracting company deposited the cheque in its current account with the defendant bank and the latter applied the deposit towards the reduction of the company's overdraft. The contractor was from time to time a borrower from the bank and these borrowings were secured by a general assignment of book debts from the contractor to the defendant, a guarantee by the president of the company, and the deposit of certain securities. Although registered, no notice of the assignment of book debts was given to anyone.

The plaintiffs were sub-contractors whose accounts remained unpaid. They claimed that they were beneficiaries of the trust created by s. 3(1) of *The Mechanics' Lien Act,* R.S.O. 1950, c. 227, as amended by 1952, c. 54, s. 1, and that the bank must account to them because it received their money, appropriated it to its own use and therefore participated in a breach of trust. The plaintiff's action was dismissed by the trial judge and this decision was affirmed by the Court of Appeal. The plaintiffs then appealed to this Court.

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

Per Taschereau, Abbott, Judson and Ritchie JJ.: The only knowledge that the bank had of a possibility that the contractor was a trustee was imputed knowledge of the provisions of s. 3(1) of *The Mechanics' Lien Act,* assuming that the branch manager knew of this provision of the Act. But in the circumstances of the case, he did not know and had no reason to inquire into the possibility of a breach of trust. *Fonthill Lumber Ltd. v. Bank of Montreal,* [1959] O.R. 451, distinguished.

The basis of the plaintiffs' argument that they were entitled to succeed on the authority of *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Mfg. Co. Ltd.,* [1955] S.C.R. 694, and *Canadian Bank of Commerce v. McAvity,* [1959] S.C.R. 478, was that the bank held an assignment of book debts from the customer and that this document provided that all moneys received by the customer from the collection of debts under the assignment should be received in trust for the bank, and that if the bank's trustee or agent received these moneys in trust for the bank, they were already subject to the prior statutory trust created by s. 3(1) in favour of the plaintiffs. The fallacy in the argument was that the contractor did not receive the cheque under the assignment of book debts as trustee for the bank. The bank made no use of this assignment and served no notice on the county under it. Until notice was given, the assignment could have no effect on a payment made in the ordinary course of business by the county to the contractor.

Per Cartwright and Ritchie JJ.: The evidence was clear that the bank manager did not know that the customer was committing a breach of trust and therefore could not have knowingly participated therein. The principle of law that where a trustee has overdrawn his banking account, his bankers have a first and paramount legal lien on all moneys paid in by him, unless they have notice, not only that they are trust moneys, but also that the payment to them constitutes a breach of trust, was applicable here.

The bank had no notice, actual or constructive, of any breach of trust committed by the construction company. The plaintiffs' argument, based on the existence of the assignment of book debts, that when

the bank acquired legal title to the $77,000 it did so with notice of the trust in favour of the plaintiffs was rejected. When the cheque was deposited in the overdrawn account neither the bank nor the construction company was acting in pursuance of the assignment; they were acting not as assignee and assignor or as *cestui que* trust and trustee but as bank and customer in the ordinary course of business. Neither the county nor the plaintiffs were aware of or parties to the assignment; the only parties to it were the bank and the construction company and the former did not act on it. In view of the manner in which the dealings between the bank and the construction company were carried on the existence of the assignment was irrelevant. *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Mfg. Co. Ltd., supra* distinguished.

Per Martland and Ritchie JJ.: The situation which arose upon the contractor's receipt of the money, paid by the county, was that he became trustee thereof for competing beneficiaries; *i.e.,* the plaintiffs, as sub-contractors pursuant to s. 3 of the Act, and the defendant, by virtue of the clause in its assignment providing that all moneys received by the contractor from the collection of debts under the assignment should be received in trust for the bank. The contractor, who had an overdraft, then paid the money into his bank account. The defendant received the deposit in good faith and gave value for it. The defendant, therefore, which initially had only an equitable right, subordinate to that of the plaintiffs, acquired legal title to the money, *bona fide,* for value, without notice of any breach of trust on the part of the contractor.

So long as the defendant was unaware that, by paying the money to it, the contractor was committing a breach of trust, the fact that the defendant had, itself, previously had an equitable interest in the money could not alter the application of the principle that where a trustee has overdrawn his banking account, his bankers have a first and paramount legal lien on all moneys paid in by him, unless they have notice not only that they are trust moneys, but also that the payment to them constitutes a breach of trust.

Per Locke J., *dissenting*: By virtue of the assignment of book debts from the contractor to the defendant, the moneys owing by the county to the contractor on the completion of the work were, as between the contractor and the bank, the property of the bank. When the cheque was issued payable to the contractor in satisfaction of part of that debt, it was received by it as trustee for the bank, subject to the statutory trust attaching to the moneys under the provisions of s. 3 of *The Mechanics' Lien Act.* The contractor *qua* trustee was obligated to transfer the cheque to the bank, which was done by endorsement and delivery. The right of the defendant to retain the moneys realized from the cheque was not as holder in due course of that instrument, but as owner of the debt by the county to the contractor which had been assigned to it. The fact that no notice of the assignment of book debts had been given to the county was aside from the point. The question was merely one of determining in what manner as between the bank and its customer it became entitled to these moneys.

The defendant's claim to the moneys was *qua* assignee and they were received by it subject to the statutory trust in favour of the plaintiffs by virtue of s. 3 of *The Mechanics' Lien Act. Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Mfg. Co. Ltd., supra,* referred to.

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JOHN M. M. TROUP LTD. *et al.* *v.* ROYAL BANK OF CANADA

Constitutional law—Constitutionality of s. 3 of The Mechanics' Lien Act, R.S.O. 1950, c. 227, as amended by 1952 (Ont.), c. 54, s. 1.

Per Taschereau, Abbott, Judson and Ritchie JJ.:

While the rights given by s. 3(1) of *The Mechanics' Lien Act* did not depend on the right to a lien, it was competent provincial legislation in relation to the obligations of a building contractor, which was clearly within s. 92 (13) of the *British North America Act.* There was no conflict with federal legislation in either of the fields of banking or bankruptcy.

Per Locke J.: The right of the legislature to enact s. 3 of *The Mechanics' Lien Act* was undoubted under s. 92(13) of the *British North America Act.* The legislative power to impose a lien upon the land by *The Mechanics' Lien Act* extended to declaring that, in addition, there was a charge upon the moneys in the hands of the contractor.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Wells J. Appeal dismissed, Locke J. dissenting.

W. J. Smith, Q.C., R. E. Holland, and *P. G. Furlong,* for the plaintiffs, appellants.

P. B. C. Pepper, Q.C., and *Hugh Rowan,* for the defendant, respondent.

E. R. Pepper, Q.C., for the Attorney-General for Ontario.

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

JUDSON J.:—The appellants claim against the respondent bank under s. 3(1) of *The Mechanics' Lien Act,* R.S.O. 1950, c. 227, as amended by 1952, c. 54, s. 1. Their claim was rejected at the trial and on appeal (Morden J.A. dissenting). Section 3 reads:

3. (1) All sums received by a builder or contractor or a subcontractor on account of the contract price shall be and constitute a trust fund in the hands of the builder or contractor, or of the subcontractor, as the case may be, for the benefit of the proprietor, builder or contractor, subcontractors, Workmen's Compensation Board, workmen and persons who have supplied material on account of the contract, and the builder or contractor or the subcontractor, as the case may be, shall be the trustee of all such sums so received by him, and until all workmen and all persons who have supplied material on the contract and all subcontractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, may not appropriate or convert any part thereof to his own use or to any use not authorized by the trust, 1942, chap. 34, s. 21.

The appellants were sub-contractors of Town & Country Construction Limited, which company held the main contract from the County of Lambton for the construction of

[1] [1961] O.R. 455, 28 D.L.R. (2d) 257.

a public building. Their accounts remained unpaid but they omitted to file claims for liens against the building. On March 2, 1956, the contractor deposited a cheque for $77,000 in its current account with the respondent bank. This cheque was drawn by the County of Lambton in favour of the contractor and represented the greater part of the holdback on this contract required under *The Mechanics' Lien Act*. The appellants say that they are beneficiaries of the trust created by s. 3(1) of *The Mechanics' Lien Act* and that the bank must pay them because it received their money, appropriated it to its own use and therefore participated in a breach of trust.

The facts are fully stated in the judgments of the learned trial judge and the Court of Appeal. I will summarize them briefly. The contractor's head office was in the Town of Brampton and its account was carried in the branch of the respondent bank in that town. The contractor was engaged on several important contracts at one time in widely separated parts of the province. It did not open a separate account for each contract. All its receipts went into one current account and its disbursements were paid from the same account. As far as I can see from the evidence, all its receipts were from owners for whom it was building and its disbursements were to sub-contractors, material men and wage-earners and for the other ordinary expenses of a firm of contractors. Its volume of business was large and its account was very active as is shown in the statement for the period December 15, 1955, to April 8, 1957, contained in the reasons of Porter C.J.O. On December 15, 1955, the overdraft was approximately $70,000. It reached almost $109,000 immediately before the payment in question in this action. The $77,000 deposit reduced the overdraft to $36,000. There was a credit balance in the account on March 13, 1956, because of the sale on instructions of the customer of $50,000 Dominion of Canada bonds held as security. After this date there was a credit balance in the account except for the period April 12 to April 20, 1956, when the overdraft was approximately $7,000. The account remained active until September 1956.

As security for the overdraft the bank held Government of Canada bonds of the face amount of $95,000, a general assignment of book debts, a guarantee of another company, a personal guarantee from the principal shareholder of the

customer, and an assignment of a life insurance policy on that shareholder's life. After the sale of the $50,000 Dominion of Canada bonds on the customer's instructions and the establishment of a credit balance in the current account, the customer asked for and received the return of the remaining $45,000 Dominion of Canada bonds held as security. Both the trial judge and the Court of Appeal reviewed in detail the dealings between bank and customer and came to the conclusion that the $77,000 deposit of March 2, 1956, was made and received in the ordinary course of business. These are concurrent findings of fact and should not be disturbed.

What was the extent of the bank's knowledge when the customer made the deposit? It knew that the cheque for $77,000 had been received by the customer as part of the contract price on the construction project in the County of Lambton. It knew that this cheque represented a substantial part of the holdback. Payment by the county was therefore very strong evidence that the officials of the county thought that there were no enforceable mechanics' liens except those that had been provided for in the rest of the holdback. The bank had no knowledge of any unpaid accounts of the plaintiffs or of any other sub-contractors. The bank was in a fully secured position and had no knowledge of any financial difficulties of the customer and had no reason to suspect that the deposit in the current account of the customer was an appropriation or conversion of any part of the contract price to any use not authorized by the trust created by s. 3 of *The Mechanics' Lien Act.*

On these facts, with an amply secured overdraft and no reason to press for payment, a bank does not participate in a breach of trust merely because it receives payment by a cheque drawn by a third party in favour of the customer and deposited in the customer's current account. It seems to me that in the circumstances, the bank cannot be chargeable with notice of breach of trust. The strongest evidence of good faith is that the cheque was taken for value in the ordinary course of business and that as a result of the reduction in the overdraft and the sale of the securities to liquidate the remaining overdraft, the bank surrendered the balance of its security. It did not matter to the bank whether it was paid in the ordinary course or by a realization of

security and the absence of benefit to the bank from the deposit is cogent evidence, on which the trial judge was entitled to act, of non-participation in a breach of trust.

The only knowledge that the bank had of a possibility that the contractor was a trustee was imputed knowledge of the provisions of s. 3(1) of *The Mechanics' Lien Act* and I make the same assumption as the Court of Appeal in this respect and take it that the branch manager knew of this provision of *The Mechanics' Lien Act*. But in the circumstances of this case, he did not know and had no reason to inquire into the possibility of a breach of trust and he is not chargeable with notice of a breach of trust. I agree with the judgment in the Court of Appeal and at trial in distinguishing this case from *Fonthill Lumber Ltd. et al. v. Bank of Montreal*[1], which is based on proof of knowledge of the existence of the trust under s. 3(1) and knowledge of the commission of a breach of trust.

The appellants also argued that they were entitled to succeed on the authority of *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Mfg. Co. Ltd.*[2] and *Canadian Bank of Commerce v. McAvity*[3]. The basis of this argument is that the bank held an assignment of book debts from the customer and that this document provided that all moneys received by the customer (*i.e.*, the contractor) from the collection of the debts under assignment should be received in trust for the bank, and that if the bank's trustee or agent received these moneys in trust for the bank, they were already subject to the prior statutory trust created by s. 3(1) in favour of the appellants.

The fallacy in this argument is that the contractor did not receive this cheque under the assignment of book debts as trustee for the bank. The bank made no use of this assignment and served no notice on the County of Lambton under it. The assignment of book debts, it is true, was registered but until notice was given, it could have no effect on a payment made in the ordinary course of business by the County of Lambton to the contractor. Both judgments in the courts below properly distinguish a claim by the bank as assignee from the present one. There was no stakeholder against whom competing claims were being made by the

1 [1959] O.R. 451, 19 D.L.R. (2d) 618.
2 [1955] S.C.R. 694, 3 D.L.R. 561.
3 [1959] S.C.R. 478, 17 D.L.R. (2d) 529.

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bank as assignee of book debts and by s. 3(1) claimants as beneficiaries of a trust. The appellants' claims on this ground were properly rejected.

The respondent bank also submitted that this legislation was unconstitutional. While it is true that the rights given by s. 3(1) do not depend on the right to a lien, it is competent provincial legislation in relation to the obligations of a building contractor, which is clearly within s. 92(13) of the *British North America Act.* If there is any force in the submission, it must be because competent provincial legislation comes into conflict with and to that extent is overborne or rendered inapplicable by valid federal legislation. It is suggested that the legislation is in conflict with federal legislation on banking and bankruptcy but in my opinion the conflict does not exist in either field. The bank is in the same position with this trust as with any other trust and the ordinary principles must apply. The fact that it may make it difficult for the bank to deal with one particular class of customer does not raise a question of conflict. Nor does difficulty of dealing bring the legislation within the principles stated in *Reference re Alberta Statutes*[1].

As to bankruptcy, the creation of the trust by s. 3(1) does affect the amount of property divisible among the creditors but so does any other trust validly created.

I would dismiss the appeal with costs.

LOCKE J. (*dissenting*):—The claims of the appellant companies against the respondent bank are for moneys due to them for services rendered under contracts with Town and Country Construction, Ltd. (hereinafter referred to as the contractor) in connection with the building of a home for the aged in Petrolia, Ont. That work was done pursuant to a contract made between the contractor and the Corporation of the County of Lambton.

The contractor had been for several years prior to the performance of the work in question a customer of the branch of the bank at Brampton. By an instrument dated September 9, 1952, executed at Brampton and duly registered in the office of the County Court for Peel County as permitted by *The Assignment of Book Debts Act,* R.S.O. 1950, c. 25, the contractor assigned to the respondent "all book accounts and book debts and generally all accounts,

[1] [1938] S.C.R. 100, [1939] A C. 117.

debts, dues and demands of every nature and kind howsoever arising or seecured and now due, owing or accruing or growing due, or which may hereafter become due, owing or accruing or growing due,". The assignment declared that the debts should be held by the bank as general and continuing collateral security for the fulfilment of all obligations of the customer to the bank and authorized the bank to collect, sue for and recover such debts and to give valid and binding receipts therefor. Paragraph 5 of the assignment read:

> All moneys received by the undersigned from the collection of the debts or any of them shall be received in trust for the Bank.

In the year 1955 the contractor was engaged in the construction under various contracts of nine buildings, including the one in question.

The contractor was from time to time a borrower from the bank and these borrowings were secured by the general assignment of book debts above referred to, a guarantee by the president of the company, and the deposit of certain securities as to the nature of which we are not concerned.

By reason of the provisions of s. 11 of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, the County of Lambton was required to retain 15 *per cent* of the value of the work, service and material done, placed or furnished by the contractor, and this was done. The work having been completed, upon the expiry of the time limited by that section the county, at the solicitation of the contractor, delivered to it a cheque payable to the contractor's order for $77,000 which bore on its face the notation "Payment on Contract." That cheque was endorsed in blank by the contractor and deposited on March 1, 1956, in its current account with the respondent, in accordance with its obligations under the assignment. The cheque did not represent the entire amount held back by the county but the evidence is lacking as to the disposition that was made of the balance.

No notice had been given by the respondent to the County of Lambton that the account owing to it by the contractor had been assigned to it, which, no doubt, accounts for the fact that the contractor was named as the payee of the cheque.

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By virtue of the provisions of s. 3 of *The Mechanics' Lien Act* the sum received by the contractor constituted a trust fund in its hands for the benefit, *inter alia,* of the appellants who had performed services or done work upon the premises, that section declaring, *inter alia,* that the contractor shall be:

> the trustee of all such sums so received by him, and until all workmen and all persons who have supplied material on the contract and all subcontractors are paid for work done or material supplied on the contract . . . may not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

The appellants contended before the learned trial judge that the moneys received by the respondent from the County of Lambton, in payment of the cheque, were so received by it *qua* assignee of the contractor and that, in such capacity, the moneys in its hands were impressed with the same trust as that imposed upon it in the hands of the contractor.

Wells J., who found against the appellants, was of the opinion that, since no notice of the assignment of book accounts had been given by the respondent to the County of Lambton and the cheque had been deposited to the contractor's credit in the ordinary course of business, the moneys were not subject to the trust in the hands of the bank.

In the judgment of the majority of the Court of Appeal[1], delivered by the Chief Justice of Ontario, no mention is made of this assignment and its bearing upon the question of the appellants' rights was, apparently, not considered. In the reasons delivered by the late Mr. Justice Morden the fact of the making of the assignment is mentioned, but the effect of that fact upon the legal rights of the parties is not discussed.

The facts to be considered in disposing of the issue are undisputed. By virtue of the assignment of September 9, 1952, the moneys owing by the County of Lambton to the contractor on the completion of the work were, as between the contractor and the bank, the property of the bank. When the cheque was issued payable to the contractor in satisfaction of part of that debt, it was received by it as trustee for the bank, subject to the statutory trust attaching to the moneys under the provisions of s. 3 of *The Mechanics' Lien*

[1] [1961] O.R. 455, 28 D.L.R. (2d) 257.

Act. The contractor *qua* trustee was obligated to transfer the cheque to the bank, which was done by endorsement and delivery. The right of the respondent to retain the moneys realized from the cheque was not as holder in due course of that instrument, but as owner of the debt due by the county to the contractor which had been assigned to it. The fact that no notice of the assignment of book debts had been given to the county is aside from the point. The question is merely one of determining in what manner as between the bank and its customer it became entitled to these moneys.

As pointed out by Rand J. in delivering the judgment of the majority of this Court in *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Mfg. Co. Ltd.*[1], sub-contractors and workmen may not be deprived of the charge in their favour upon moneys in the hands of the principal contractor by the simple expedient of assigning those moneys to someone else. The respondent's claim to these moneys is *qua* assignee and they were received by it, in my opinion, subject to the statutory trust in favour of the appellants by virtue of s. 3 of *The Mechanics' Lien Act.*

Much stress has been laid in the argument before us upon the fact that no notice of the assignment of book accounts had been given to the County of Lambton, that the deposit of the cheque was made in the ordinary course of business and that an examination of the contractor's account with the bank discloses this, that the bank manager did not know that the sub-contractors were unpaid, that the bank had no notice that the contractor was in financial difficulties and that the manager did not know that, in failing to pay the claims of the appellants out of the moneys to be realized from the cheque given by the county, the contractor was committing a breach of trust and acting in a manner contrary to the prohibition in s. 3, which is above quoted.

Assuming all these facts to be proven by the evidence, with the greatest respect for the learned judges who have upheld the claim of the respondent and for those in this Court who have contrary views, none of them are relevant or have any bearing on the question to be decided, in my opinion.

[1] [1955] S.C.R. 694 at p. 697.

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Had the County of Lambton paid to the contractor the sum of $77,000 in currency instead of by cheque, the money would have been, in its hands, impressed with a trust in favour of, *inter alia,* the sub-contractors and, until they were paid, the contractor would have been prohibited from converting it to its own use. When the money was so received by the contractor it would have been held by it, by virtue of s. 5 of *The Assignment of Book Debts Act,* in trust for the bank, subject to what is, in effect, a statutory lien. Would any one seriously suggest in these circumstances that, had the currency then been paid over by the contractor to its *cestui que trust,* the bank, as would have been its duty by reason of—and only by reason of—the assignment, it would be freed of this lien or charge? The right of the sub-contractors is not "an equitable right" as has been suggested. It is a statutory right conferred by s. 3.

How then is the situation altered when the county paid the $77,000 by cheque? That cheque and the moneys realized from it were subject to the same charge and, unless the bank should attempt to support its claim on the ground that it became holder in due course of the cheque—and no such insupportable claim has been advanced on its behalf—the situation would, of necessity, be exactly the same as if the amount had been paid in currency. It is perhaps unnecessary to point out that, but for the assignment of book debts, the contractor, after satisfying the claims of the sub-contractors, could have used the moneys for its own purposes and deposited it elsewhere. But as between the contractor and the bank the latter was the *cestui que trust,* the former merely holding the cheque on its behalf. Since as between the contractor and the bank the cause of action in respect of which the cheque was given was the property of the bank, the latter could not attain the position of the holder in due course of the cheque as defined by s. 56 of the *Bills of Exchange Act,* R.S.C. 1952, c. 15, for obvious reasons.

While the facts in the *Minneapolis-Honeywell* case differed from those in the present matter, the statement of Rand J. to which I have above referred is, in my opinion, directly applicable.

The decisive point in the case is that as between the contractor and the bank the cheque and the moneys realized from it, subject to the statutory trust created by s. 3 of *The*

Mechanics' Lien Act for the benefit of workmen, supply men and sub-contractors, were the property of the bank, and the endorsement and delivery of the cheque merely passed the legal title to it.

The fallacy of the proposition that by failing to notify the County of Lambton of the assignment and requiring it to pay the moneys directly to the bank, or by failing to expressly require the contractor to endorse the cheque to it under the assignment, the sub-contractors may be deprived of their statutory rights appears to me to be demonstrated by stating it.

It was contended before us that s. 3 of *The Mechanics' Lien Act* was *ultra vires* the Legislature of Ontario. As to this, it is sufficient to say that, in my view, the right to so legislate is undoubted under head 13 of s. 92 of the *British North America Act*. The legislative power to impose a lien upon the land by *The Mechanics' Lien Act* extends, in my judgment, to declaring that, in addition, there is a charge upon the moneys in the hands of the contractor.

I would allow this appeal and direct that the respondent account to the appellants for the amounts of their respective claims, together with interest at the legal rate in the case of the appellant John M. M. Troup Ltd. from the date upon which the demand for payment was made by its solicitors on its behalf, and in the case of the appellant National Painting and Decorating Ltd. from the date of the issue of the writ. I would allow the appellants their costs throughout.

The judgment of Cartwright and Ritchie JJ. was delivered by

CARTWRIGHT J.:—The relevant facts are set out in the reasons of other members of the Court. While endeavouring to avoid repetition I wish to refer shortly to some of the findings made in the courts below.

The manager of the respondent's branch at Brampton stated that he was familiar with the terms of s. 11 of *The Mechanics' Lien Act* requiring the owner to retain 15 per cent of the value of the work done for a period of 37 days after the completion of the work but that he was not aware of the provisions of s. 3 of the Act constituting sums paid to a contractor a trust fund for the benefit of sub-contractors

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and others. However, the case was dealt with in the courts below and argued before us on the assumption that knowledge of the terms of s. 3 should be imputed to the manager, and it is unnecessary to consider whether his ignorance in fact of the terms of that section might otherwise have been relevant.

The following findings of fact made by the learned trial judge appear to me to be fundamental:

> In my opinion, on a fair valuation of the evidence there is no evidence to show that any of these moneys were ever paid in to the defendant bank by virtue of the general assignment of book debts which the bank took from the Construction Company. It is quite clear I think, that no notice was ever given of the assignment by the bank to anyone or that it ever relied on the general assignment or acted on it. While it was taken at an early stage, it was never used or acted upon.
>
> * * *
>
> It is also argued on behalf of the plaintiffs that there is here a trust which the bank manager at Brampton had knowledge of and that his knowledge was the knowledge of the bank. In my view, the evidence falls very far short of establishing anything of the sort.
>
> * * *
>
> The moneys (scil. the cheque for $77,000) were unquestionably deposited by the Construction Company in the ordinary course of business in their account and the bank, which at that time had no question in its mind as to the solvency of that Company, went on paying the cheques of the Construction Company and in fact, raised the overdraft. As I have already indicated, there was no suggestion at this time that the bank had any knowledge of the accounts of the plaintiff which are the subject of this action.

In the reasons of the majority in the Court of Appeal delivered by the learned Chief Justice of Ontario the first of the three findings of the learned trial judge set out above is not dealt with but, in my view, that finding is supported by the evidence and is clearly right. The second and third findings are concurred in by Porter C.J.O.

The late Mr. Justice Morden, in his dissenting judgment, quoted at length from the evidence of the manager and reached the conclusion which he expressed as follows:

> This evidence makes it abundantly clear that the bank knew that the $77,051.84 was part of the hold-back and that at the time it was deposited and set-off by it against the contractor's indebtedness to it, subcontractors were unpaid.

There is no doubt that the manager knew that the cheque for $77,000 was part of the hold-back but, with the greatest respect, after reading all the evidence, I am unable to agree with the finding that at the time the cheque was deposited the manager knew that sub-contractors were unpaid.

I agree with the view which Porter C.J.O. summarized in the following passage:

> The test to be applied is whether the Bank manager knew that the customer was committing a breach of trust and he knowingly participated therein. In my view it has not been clearly demonstrated on the evidence that to the knowledge of the Bank manager there were unpaid accounts of workmen and for supplies or that they would not be paid. The evidence in this case is clear that at all material times he did not know and therefore could not have participated in any breach of trust.

The law applicable to this branch of the matter is, in my opinion, accurately stated in the following passages in Underhill on Trusts, 11th ed., 1959, at pp. 565 and 566:

> Where, however, a trustee has overdrawn his banking account, his bankers have a first and paramount lien on all moneys paid in if they have no notice that they are trust moneys; for where the equities are equal the law prevails, and, in the case supposed, the bankers have in point of law received the money in payment of their debt.

and at p. 606:

> So, as has been already stated, where a trustee has overdrawn his banking account, his bankers have a first and paramount legal lien on all moneys paid in by him, unless they have notice, not only that they are trust moneys, but also that the payment to them constitutes a breach of trust.

For the reasons given by my brother Judson I agree with his conclusion that the bank had no notice, actual or constructive, of any breach of trust committed by the construction company, subject only to one argument put forward on behalf of the appellants which remains to be considered.

This argument is based on the existence of the assignment of book debts. Reliance is placed particularly on para. 5 of the assignment which reads:

> All moneys received by the undersigned from the collection of the debts or any of them shall be received in trust for the Bank.

There is no doubt that the debt owing by the County of Lambton to the construction company, in part payment of which the cheque for $77,000 was delivered, was covered by the assignment in the sense that the bank, had it seen fit to do so, could have given notice to the county to make payment to it instead of to the construction company, or could have called upon the construction company (if that company had retained the proceeds of the cheque instead of endorsing and delivering it to the bank) to account to it for the proceeds of the cheque as being trust moneys in

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its hands to which the bank was beneficially entitled. It is equally clear that the bank did not follow either of these courses and that the county, the construction company and the bank all acted in the transaction without reference to, and probably without any thought of, the existence of the assignment.

It is argued that, (i) although the bank gave no notice of the assignment to anyone and did not at any time seek to enforce or make use of it, the assignment was none the less an existing and valid instrument which by its express terms created the relationship of trustee and *cestui que* trust between the construction company and the bank, (ii) that the construction company received the $77,000 from the county as trustee for the bank, (iii) that as trustee for the bank it was also agent for the bank, (iv) that the construction company knew that the accounts of the two plaintiffs were unpaid and that consequently the $77,000 was, by virtue of s. 3 of *The Mechanics' Lien Act,* impressed with a trust in their favour, (v) that notice to its agent or trustee was in law notice to the bank and (vi) that, therefore, when the bank acquired the legal title to the $77,000 it did so with notice of the trust in favour of the plaintiffs and must account to them for the amount of the debts due to them.

This argument, if valid, would destroy the bank's defence that when it obtained the legal title to the $77,000 it did so without notice of the beneficial interests of the plaintiffs therein. Among the authorities on which the appellants rely in support of this argument are the case of *Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Mfg. Co. Ltd.*[1], and the following passage in Scott on Trusts, 2nd ed., vol. 3, pp. 2231 and 2232:

> In considering whether a transferee of trust property has notice that the transfer is in breach of trust, the general principles of agency are applicable. Thus if a third person purchases trust property through an agent, the purchaser is chargeable with notice that the trustee is committing a breach of trust in making the sale if the agent has such notice.

The *Minneapolis-Honeywell* case is distinguishable on the facts. The judgment proceeds on the view that the

[1] [1955] S.C.R. 694, 3 D.L.R. 561.

respondent had notice of the appellant's claim. Rand J. with whom Kellock, Estey and Fauteux JJ. agreed said in part at p. 698:

> The respondent, knowing all the facts, was therefore properly found liable as for a breach of trust.

Rand J. adopted the statement of the facts contained in the reasons of Locke J. who reached the same result. Locke J. said, at pp. 700 and 701:

> Upon obtaining this assignment the respondent gave notice of it to the general contractors and thereafter payments by the general contractors, other than those for small amounts, were made by cheques made payable jointly to the respondent and the sub-contractor. These payments included the entire amounts payable to the sub-contractor on its contracts for the four schools mentioned, which included the automatic heat control system supplied and installed by the appellant at the request of the sub-contractor. By virtue of the manner in which these payments were made, the respondent obtained what amounted to complete control over the financial operations of the sub-contractor. When cheques payable to their joint order were received, it was necessary for the sub-contractor to obtain the consent of the respondent to the payment of any sums, other than the small amounts referred to which do not enter into the matter, to its other creditors.

and at p. 705:

> The claim of the respondent to moneys payable by the contractor to the sub-contractor depended entirely on the terms of the written assignment of February 4, 1950.

This case does not appear to me to be of assistance in the case at bar in which I have already expressed my agreement with the concurrent findings of fact in the Courts below that the bank obtained legal title to the $77,000 without notice of the equitable rights of the plaintiffs, unless it can be said, as is argued by the appellants, that because of the terms of para. 5 of the assignment the notice of the plaintiffs' claims which the construction company undoubtedly had must be imputed to the bank.

The answer to this argument of imputed notice appears to me to be that made by the learned trial judge in the passage from his reasons firstly quoted above. When the $77,000 was deposited in the overdrawn account neither the bank nor the construction company was acting in pursuance of the assignment, they were acting not as assignee and assignor or as *cestui que* trust and trustee but as banker and customer in the ordinary course of business. It appears that the cheque was endorsed by the construction company

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and handed to the bank with a deposit slip directing the bank to credit it to the construction company's account, and this was done. At the moment of deposit in point of law the money was received by the bank in part payment of its customer's debt. The argument that the bank received it *qua* assignee or *qua cestui que* trust appears to me to fail on the facts. Neither the county nor the plaintiffs were aware of or parties to the assignment; the only parties to it were the bank and the construction company and so long as the former saw fit to refrain from acting upon it I am unable to see how the mere fact of its existence could improve the position of the plaintiffs. In view of the manner in which the dealings between the bank and the construction company were carried on the existence of the assignment appears to me to be irrelevant.

If, contrary to the view I have just expressed, it should be held that the $77,000 was paid by the construction company in the capacity of agent or trustee and was received by the bank in the capacity of principal or *cestui que* trust it would be necessary to consider whether on the facts the case falls not within the general rule that notice to an agent is notice to his principal but within the exception illustrated by the decision in *Cave v. Cave*[1], in which it was held that knowledge of an agent will not be imputed to his principal where the agent is party to a fraud of which the principal is ignorant and innocent and which would be exposed if the agent communicated the notice to his principal. However, as, in my view, on the facts of the case at bar this question does not arise I do not pursue it.

I do not find it necessary to express an opinion on the constitutional points which were so fully and ably argued before us.

For the reasons given by my brother Judson and those stated above I would dismiss the appeal with costs.

Since writing these reasons I have had the opportunity of reading those of my brother Martland; I agree with them and wish to found my judgment upon them as well as on what I have said above.

[1] (1880), 15 Ch. D. 639.

The judgment of Martland and Ritchie JJ. was delivered by

MARTLAND J.:—I agree with the reasons given by my brothers Cartwright and Judson, and wish only to make some comment regarding the effect of the general assignment of debts.

The evidence makes it clear that the money which came into the respondent's hands was not received by it by the operation of that assignment. Although registered, no notice of the assignment was given to anyone. The County of Lambton was unaware of it, and did not pay the money owing to Town and Country Construction Ltd. (hereinafter referred to as "the contractor") to the respondent, but directly to the contractor. The debt had been paid before the money came into the respondent's hands from the contractor.

The assignment contained in clause (5) a covenant by the contractor that: "All moneys received by the undersigned (the contractor) from the collection of the debts or any of them shall be received in trust for the Bank." The application of that covenant in the present case would mean that, upon receipt of the money paid to it by the County of Lambton, the contractor would become trustee of the money for the benefit of the respondent.

At the same time, by virtue of the operation of s. 3 of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, the contractor became a trustee of the same money for the benefit of unpaid sub-contractors, etc. This section does not purport to do more than to create a trust for the benefit of the class named in it. It does not create a statutory lien upon the sums received by a contractor. It makes him a trustee of that fund. Although the trust is created by statute, it thereupon becomes subject to the application of the rules of equity applicable to trusts.

The situation which arose upon the contractor's receipt of the money, paid by the County of Lambton, was that he had become trustee thereof for competing beneficiaries; i.e., the appellants, as sub-contractors, pursuant to s. 3 of the Act, and the respondent, by virtue of clause (5) of its assignment. At that stage there were two competing equities and, while the money remained in the contractor's hands, I have no doubt that the appellants had the superior claim.

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However, the matter did not end there. The contractor, who had an overdraft with the respondent, paid the money into his bank account. The respondent received the deposit in good faith and gave value for it. A study of the evidence satisfies me that the finding of Porter C.J.O. is correct when he said that the evidence did not demonstrate that the bank manager knew there were unpaid accounts of workmen and for supplies when the money was received by the respondent and that he did not know of any breach of trust by the contractor.

What has occurred, therefore, is that the respondent, which initially had only an equitable right, subordinate to that of the appellants, has acquired legal title to the money, *bona fide,* for value, without notice of any breach of trust on the part of the contractor. The proposition stated in Underhill on Trusts, 11th ed., 1959, at p. 606, cited by my brother Cartwright, is applicable; *i.e.,*

> So, as has been already stated, where a trustee has overdrawn his banking account, his bankers have a first and paramount legal lien on all moneys paid in by him, unless they have notice, not only that they are trust moneys, but also that the payment to them constitutes a breach of trust.

The fact that the respondent had, itself, previously had an equitable interest in the money cannot, in my view, alter the application of this principle, so long as it was unaware that, by paying the money to it, the contractor was committing a breach of trust.

I would dismiss the appeal with costs.

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

Solicitors for the plaintiffs, appellants: Furlong & Furlong, Windsor.

Solicitors for the defendant, respondent: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitor for the Attorney-General for Ontario: E. R. Pepper, Toronto.

HER MAJESTY THE QUEEN ....APPELLANT;

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*Mar. 7
Apr. 24

AND

CORA CUMMING ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Stealing from the mail—Decoy letter—Post Office investigators inserting money in decoy letter—Employee stealing same—Verdict of ordinary theft substituted by Court of Appeal—Whether letters "sent by post"—Whether intention of sender a determining factor—Activities conducted under direction of Postmaster General—Criminal Code, 1953-54 (Can.), c. 51, s. 298(1)(a).

Appeals—Leave to appeal to Supreme Court of Canada—Question of law—No dissent—Criminal Code, 1953-54 (Can.), c. 51, s. 597, as amended by 1960-61, c. 43, s. 27.

In order to secure evidence against the accused, a post office mail sorter suspected of stealing from mail passing through her hands, the post office investigators prepared three decoy letters in which they placed some money and which, after being addressed, stamped and the stamps cancelled, were put in a tray with other letters for the accused to sort. Subsequently the three letters were discovered to have been opened and the accused was found in possession of the money. She was convicted of stealing "anything sent by post, after it is deposited at a post office and before it is delivered" contrary to s. 298(1)(*a*)(i) of the *Criminal Code*. The Court of Appeal substituted a conviction of simple theft and varied the sentence. The Crown appealed to this Court to have the conviction at trial restored, and at the hearing the accused was allowed to apply for leave to appeal against the substituted conviction.

Held (Taschereau and Cartwright JJ. dissenting): The appeal should be allowed and the conviction for the offence as charged restored.

Per Fauteux, Judson and Ritchie JJ.: The letters were sent through and by means of activities conducted under the direction of the Postmaster General, and as such were sent by post within the meaning of s. 298(1)(*a*). The intention of the sender could not be a determining factor in deciding whether or not these letters were "sent by post" within the meaning of the section, and as the expression "post letter" has been dropped from the Criminal Code, the question of whether or not a "post letter" is necessarily a letter "sent by post" could not affect the interpretation to be placed on the section. It is true that the intention was to have them taken out of the mail, but if they had been missed, and had gone as addressed, they undoubtedly would have been sent "by post" in the colloquial sense of these words as well as in the special meaning assigned to them by the *Post Office Act*. Whether the intention to have them removed from the post had been carried out or not could not alter the fact that when they were opened and their contents stolen, they were passing through the hands of a person who was then engaged in the activities of the Canada Post Office and they were so passing because the investigator had sent them by that route.

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

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Per Taschereau and Cartwright JJ., dissenting: It is only after it has been established that something has been "sent" that the question can arise whether it was "sent by post". In the case at bar nothing has been "sent". Three requisites are required to render the use of that word appropriate: (i) a sender, (ii) an object to be sent, and (iii) a destination to which the object is to be sent. In this case although there was an object to be sent, it would be a distortion of the meaning of a plain English word to say that the letters were sent by anyone or were sent anywhere.

Per Curiam: As to the appeal against the substituted charge, it did not lie without leave since it did not raise any question of law on which a judge of the Court of Appeal had dissented, and leave to appeal ought not to be granted.

APPEAL by the Crown from a judgment of the Court of Appeal for Ontario[1], substituting a conviction on a charge of theft for a conviction on a charge of stealing from the mail. Appeal allowed, Taschereau and Cartwright JJ. dissenting.

F. L. Wilson, for the appellant.

J. A. Hoolihan, for the respondent.

The judgment of Taschereau and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are set out in the reasons of my brother Ritchie.

I have reached the conclusion that the appeal fails. I am in full agreement with the reasons of the majority in the Court of Appeal[1], delivered by Roach J.A. and concurred in by the learned Chief Justice of Ontario, but, in view of the differences of opinion in the Court of Appeal and in this Court, I propose to add a few words.

The wording of the information on which the respondent was convicted is as follows:

that Cora Cumming on the 25th day of January in the year 1961 at the Municipality of Metropolitan Toronto, in the County of York, unlawfully did steal the contents of three letters, to wit: three one dollar bills, the property of the Post Master General of Canada, the letters having been sent by post, and after they had been deposited at a post office and before they were delivered.

There is no doubt that the respondent stole the three one dollar bills. The question is whether the letters from which she took them had been sent by post. If they were sent by

[1] (1961), 130 C.C.C. 107, 35 C.R. 163.

post there is no doubt that the theft occurred before they were delivered; they were never delivered and there was no intention that they should be.

In the case at bar the question is of importance because if the contents of the letters were sent by post the respondent, upon conviction, was, under s. 298(1) of the *Criminal Code,* liable to imprisonment for a maximum term of ten years and to a compulsory minimum term of six months, whereas if they were not sent by post she was, under s. 280(*b*), liable to a maximum term of two years and no minimum term was prescribed.

The only rule of construction to which reference need be made is that stated by Baron Parke in *Perry v. Skinner*[1]:

> The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done.

The word of crucial importance in the information and in s. 298(1)(*a*)(i) is "sent". The transitive verb "send" of which it is the past participle is a word the plain and ordinary meaning of which is so well known that there is no need to refer to dictionaries, but it may be observed that the meaning given in the Concise Oxford Dictionary is "secure conveyance of to some destination (destination given by *to* or other preposition or by indirect object, or merely implied)". To render the use of the word appropriate there are three requisites, (i) a sender, (ii) an object to be sent, and (iii) a destination to which the object is to be sent. In the case at bar we have the second of these, the contents of the three letters, but the first and the third are lacking. In my respectful opinion, it is a distortion of the meaning of a plain English word to say that the letters were sent by anyone or were sent anywhere. Suppose the facts of the case were recited and the question were put: "By whom and to what destination were the three letters sent?" Can it be doubted that the same answer would be made by the man in the street as by the meticulous philologist: "No one sent them anywhere; they were placed in the tray to test the honesty of the sorter." It is only after it has been

[1] (1837), 2 M. & W. 471 at 476, 150 E.R. 843.

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established that something has been sent that the question can arise whether it was sent by post; and, in the case at bar, nothing has been sent.

I would dismiss the appeal.

Counsel for the respondent in addition to arguing that the appeal should be dismissed sought to appeal from the judgment of the Court of Appeal in so far as it ordered that a conviction on a charge of theft be substituted for the conviction of an offence under s. 298(1)(*a*)(i) of the *Criminal Code*. On this branch of the matter I agree with my brother Ritchie that the proposed appeal does not lie without leave and that leave to appeal ought not to be granted.

The judgment of Fauteux, Judson and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] from which Mr. Justice MacKay dissented, which allowed the appeal of the respondent from a conviction for stealing the contents of three letters,

> . . . the property of the Post Master General of Canada, the letters having been sent by post, and after they had been deposited at a post office and before they were delivered . . . .

The judgment now appealed from substituted a conviction on "a charge of theft" and varied the sentence imposed by the magistrate from a period of six months to one of three months' imprisonment.

The evidence, which is uncontradicted, discloses that the respondent was on duty in her capacity as a sorter of mail in the city delivery branch of the Toronto Post Office on the evening of January 25, 1961, when three envelopes bearing cancelled stamps, addressed to the Canadian National Telegraphs and each containing some coins and a $1 bill were introduced, on instructions from Post Office investigators, amongst other letters placed before her for sorting. These envelopes which had been prepared by the investigators, who had inserted the $1 bills after making a note of their serial numbers, were taken to the supervisor of the sortation unit in which the respondent worked by investigator Allen who gave certain instructions as a result of which the supervisor placed the envelopes in a tray of ordinary

[1] (1961), 130 C.C.C. 107, 35 C.R. 163.

mail to be sorted and then saw to it that this tray was placed in front of the respondent who was kept under supervision while she sorted it, after which it was taken directly to the supervisor's office where the same investigator, Allen, extracted the three envelopes and found that they had been opened and the $1 bills removed. The bills were later found in the respondent's possession and there is no doubt that they were removed from the envelopes by her.

It is apparent from the evidence that these envelopes were prepared and mingled with the mail for the sole purpose of testing the honesty of the respondent, and that the investigators did not intend that they would ever leave the Post Office building. The only question to be determined is whether, under these circumstances, it can be said that the envelopes were letters "sent by post" within the meaning of s. 298(1) of the *Criminal Code,* the relevant portions of which read:

> 298. (1) Every one who
>
> (*a*) steals
>
> (i) anything sent by post, after it is deposited at a post office and before it is delivered,
>
> * * *
>
> is guilty of an indictable offence and is liable to imprisonment for ten years and, where the offence is committed under paragraph (*a*), to imprisonment for not less than six months.

The point at issue is stated in the factum of the appellant in the following terms:

> Whether a letter is sent by post within the meaning of section 298(1)(*a*)(i) when the sender does not intend the letter to be delivered to the addressee and the letter is handed by the sender to the supervisor of sorters to be placed in the course of post.

The history of legislation having to do with theft of letters or their contents from the mails in Canada discloses that from the enactment of the *Criminal Code* in 1892 (s. 327) until the coming into force of the present *Criminal Code* in 1955 the offence was described as stealing "a post letter" or "from or out of a post letter", and the definition of "post letter" in the *Post Office Act* was originally limited to letters "to be transmitted or delivered through the post". Similarly, under the English *Post Office Act* (1837), 1 Vict., c. 36, a "post letter" was confined to any letter or packet

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"transmitted by the post under the authority of the Postmaster General", and in the cases of *Regina v. Rathbone*[1] and *Regina v. Shepherd*[2], decoy letters employed in much the same manner as they were in the present case were held not to be "post letters" within the meaning of this definition because they were not introduced into the mail in the ordinary way for transmission by post.

The definition of "post letter" in the Canadian *Post Office Act* was broadened by c. 19 of the Statutes of Canada (1901) whereby it was enacted that the expression meant, *inter alia,* "any letter . . . deposited in any post office . . . whether it is intended for transmission by post or delivery through the post or not." It was under this statute that the Ontario Court of Appeal decided in the case of *Rex v. Ryan*[3] that a decoy letter intended for the testing of a postman's honesty was a "post letter".

However, when all reference to "post letter" was omitted from the present *Code,* the offence became stealing "anything sent by post after it is deposited in a post office and before it is delivered", and it is contended on behalf of the respondent that the expression "sent by post" as used in this context cannot apply to the envelopes in question on the ground that, like the letters in *Regina v. Rathbone, supra,* and *Regina v. Shepherd, supra,* they were not introduced into the Post Office in the ordinary way for the purpose of transmission by post.

This latter reasoning appears to me to leave out of account the definitions of "send by post" and "Canada Post Office" which were introduced in to the *Post Office Act* by c. 57 of the Statutes of Canada (1951) and which control the meaning of the words "sent by post" as used in s. 298(1) of the *Criminal Code* (see s. 3(5) of the *Criminal Code*). Subsection 2(1)(*o*) and 2(1)(*a*) of the *Post Office Act* now read as follows:

> 2. (1) (*o*) "send by post" or "transmit by post" means to send by, through or by means of the Canada Post Office;
>
> 2. (1) (*a*) "Canada Post Office" means the activities conducted under the direction and control of the Postmaster General;

[1] (1841), 2 Mood. C.C. 242, 169 E.R. 96.
[2] (1856), Dears. C.C. 606, 169 E.R. 865.
[3] (1905), 9 C.C.C. 347.

It is to be noted that under the *Post Office Act* the Postmaster General is required to operate, and empowered to regulate the operation of, a "post office" which term includes, *inter alia,* any room or building for "sortation, handling or despatch of mail" (see ss. 5(1)(*a*), 6(*h*) and 2(1)(i) of the *Post Office Act*).

The basis of the judgment of the Court of Appeal in respect of the question here at issue appears to me to be epitomized in the following paragraph of the decision rendered by Roach J.A. on behalf of the majority of that Court:

> I can say at once also that, in my respectful opinion, while every letter that is "sent by post" is a "post letter", the converse is not true, that is to say, every post letter is not necessarily a letter "sent by post". In my respectful opinion, a letter is "sent by post" when the sender deposits it in a "post office" as defined in sec. 2(1)(i) of the Post Office Act, with the intention that it shall be conveyed or transported by means of the Canada Post Office to the person to whom it is being sent. It is not "sent by post" when, as here, it is placed somewhere in the post office by a post office official under such circumstances that he has it in his power and intends to intercept it so that it shall not be delivered to the person to whom it is addressed. In those circumstances it seems clear to me that the letter is not being sent to anyone; it is being retained under the control of the person who deposited it. In the instant case, the investigators did not send these three letters to the Canadian National Telegraph Company. They were decoy letters which they pretended had been "sent by post". If they had been "sent by post" within the meaning of the Act the inspectors would have had no right to interfere with or prevent their transmission; Section 41 Post Office Act. The fact that they did retrieve them shows that they did not regard them as being in the course of post, that is "sent by post".

With the greatest respect, I am unable to adopt the view that the intention of the sender can be a determining factor in deciding whether or not these envelopes were "sent by post" within the meaning of s. 298(1)(*a*), and as the expression "post letter" had been dropped from the *Criminal Code* I do not think that the question of whether or not a "post letter" is necessarily a letter "sent by post" can affect the interpretation to be placed on that section.

Speaking of the envelopes in question, one of the Post Office investigators, in the course of his evidence, after having agreed that the intention was to have them taken out of the mail in any event, went on to say, "but if they had missed them, they would go as addressed." If these envelopes had been "missed" and had gone "as addressed", it appears to me that they would undoubtedly have been

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sent "by post" in the colloquial sense of these words as well as in the special meaning assigned to them by the *Post Office Act* irrespective of the fact that the sender had never intended the addressee to receive them. I am unable to see how the fact that they were not "missed" can change their character in this regard.

These envelopes were sent by a Post Office investigator through a sortation unit of the Toronto Post Office for the purpose of testing the honesty of one of the sorters, and whether his intention to have them removed from the post before they reached the addressee had been carried out or not could not alter the fact that when they were opened and their contents stolen they were passing through the hands of a person who was then engaged in the activities of the Canada Post Office and that they were so passing because the investigator had sent them by that route. In my opinion, therefore, the envelopes were sent through and by means of activities conducted under the direction of the Postmaster General, and as such they were sent by post within the meaning of s. 298(1)(*a*).

The respondent also entered an appeal which raised questions based on the contention that there was no evidence that the envelopes in question were "the property of the Postmaster General of Canada" from whom the Information alleges that they were stolen. In my opinion, however, the appeal so entered must be quashed as it does not raise any question of law on which a judge of the Court of Appeal has dissented (see s. 597 of the *Criminal Code*). At the hearing of this appeal counsel on behalf of the respondent was allowed to apply for leave so to appeal, but there does not appear to me to be any ground for granting that application.

For the above reasons, I would allow this appeal and restore the conviction for the offence as charged in the Information.

Appeal allowed, TASCHEREAU *and* CARTWRIGHT JJ. *dissenting.*

Solicitor for the appellant: E. R. Pepper, Toronto.

Solicitors for the respondent: Fellowes, Hoolihan & Elaschuk, Toronto.

LOUIS DESROSIERS ....APPELLANT;

1962
*Feb. 27
Apr. 24

AND

J. M. R. THINEL ....RESPONDENT.

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

Criminal law—Carrier—Taxi—Transporting passengers for hire within limits of airport—Order-in-Council—Validity of regulations—Whether delegated powers to Minister—Department of Transport Act, R.S.C. 1952, c. 79 s. 25—Aeronautics Act, R.S.C. 1952, c. 2—Airport Vehicle Control Regulation 4A.

The appellant was summarily convicted of illegally operating a taxi service within the limits of an airport. His conviction was quashed in a trial *de novo* before a judge of the Superior Court. The Court of Appeal restored the conviction. Leave to appeal was granted by this Court.

Held: The appeal should be dismissed.

Regulation 4A of the Airport Vehicle Control Regulations, which provides that no person shall, without the authority in writing of the Minister of Transport, operate a commercial passenger vehicle on an airport, and which was adopted by the Governor-in-Council pursuant to s. 25 of the Department of Transport Act for, *inter alia,* the management, proper use and protection of airports under the management or control of the Minister of Transport, is within the scope of the legislative authority conferred upon the Governor-in-Council by Parliament. The granting of such authority to the Minister by Order-in-Council was not a delegation of legislative authority. It merely indicated how the Minister should exercise his responsibility of managing and controlling a public work entrusted to him by statute.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], restoring the conviction of the appellant for illegally operating a taxi service within an airport. Appeal dismissed.

L. P. Pigeon, Q.C., for the appellant.

R. Bédard, Q.C., and *G. Côté,* for the respondent.

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

ABBOTT J.:—Appellant, a taxicab operator in Sept-Iles, on October 14, 1958, was convicted by a district Magistrate of having

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

[1] [1960] Que. Q.B. 813.

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illégalement, le ou vers le 3 mai 1958 exploité à Sept-Îles, district de Saguenay, sans autorisation écrite du Ministre des Transports à cet effet un véhicule commercial à voyageurs sur l'aéroport de Sept-Îles, propriété de la Couronne du Chef du Canada en transportant contre rémunération des voyageurs au moyen d'un auto-taxi, le tout contrairement à l'article 4-A du règlement concernant le contrôle des véhicules sur les aéroports édicté par le décret C.P. 1953-942 et de ses amendements à date, C.P. 1955-1443 et C.P. 1956-1666, se rendant ainsi passible des peines prévues à l'article 22 dudit règlement.

He was condemned to pay a fine of $5 and costs.

The Superior Court for the District of Saguenay, sitting in appeal, and in a trial *de novo* pursuant to s. 719 et seq. of the *Criminal Code,* quashed the conviction. Upon appeal to the Court of Queen's Bench[1], the appeal was allowed and the conviction restored. Leave to appeal from that judgment was granted by this Court.

The facts are not in dispute. The sole question in issue is one of law, namely, whether certain provisions contained in an Order-in-Council concerning the operation of commercial passenger vehicles within airports under the administration and control of the Minister of Transport, are within the scope of the legislative authority conferred upon the Governor-in-Council by Parliament.

The provisions in question are contained in the "Airport Vehicle Control Regulations", established by Order-in-Council P.C. 1953-942 as amended by P.C. 1955-1443 and P.C. 1956-1666, s. 4A, of which reads:

4-A (1) No person shall, without the authority in writing of the Minister,

(*a*) carry on any business on an airport relating to the renting or otherwise providing of commercial passenger vehicles, or

(*b*) except as provided in subsection (2) operate a commercial passenger vehicle on an airport.

(2) A commercial passenger vehicle may be operated within an airport, without authority in writing by the Minister, for the purpose of carrying passengers

(*a*) from a place outside the airport to a place inside the airport; or

(*b*) on a trip originating within the airport, pursuant to arrangements made prior to the arrival of the vehicle at the airport.

The Sept-Iles airport is a civil airport and is the property of the Crown in the right of Canada. In addition to landing strips and surrounding land together with buildings, plant

[1] [1960] Que. Q.B. 813.

and machinery, access roads leading from the landing strips and buildings to public roads outside the property are provided by the Crown.

The Court below held—and in my respectful view held correctly—that authority for the provisions contained in s. 4A of the Airport Vehicle Control Regulations, is to be found in the *Department of Transport Act*, R.S.C. 1952, c. 79, and in particular in s. 25 of that Act which reads:

> 25. The Governor in Council may from time to time make such regulations as he deems necessary for the management, maintenance, proper use and protection of all or any of the canals or other works under the management or control of the Minister, and for the ascertaining and collection of the tolls, dues and revenue thereon.

The airport at Sept-Iles is clearly a work "under the management or control" of the Minister of Transport. Section 3(*c*) of the *Aeronautics Act*, R.S.C. 1952, c. 2, provides that it is the duty of the Minister

> to construct and maintain all Government aerodromes and air stations, including all plant, machinery and buildings necessary for their efficient equipment and upkeep;

As Mr. Justice Hyde has pointed out in the Court below, the vehicular approaches within an airport are properly subject to control in the interests of proper management and have not the full character of public highways upon which the public has the right to pass and repass. The management of an airport, in the interest both of the Crown and of the public, may well require a limitation and control of many kinds of commercial activities within its boundaries, including the regulation of taxi services. The operation of a taxi service is clearly a commercial activity, is so defined in s. 2 of the Airport Vehicle Control Regulations above referred to and, in my opinion, the regulation of commercial activity within an airport clearly comes within the meaning of "management, proper use and protection" of such airport.

The Governor-in-Council exercising the powers given in the statute, established the Airport Vehicle Control Regulations which provide for the control of all vehicular traffic using an airport and which limit such use by commercial vehicles. Under these Regulations the Minister of Transport is given discretion and authority to determine, among other matters, what persons shall be allowed to "carry on any business on an airport relating to the renting or otherwise providing of commercial vehicles". The granting of

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such authority to the Minister by Order-in-Council is not a delegation of legislative authority. It merely indicates how the Minister shall exercise his responsibility of managing and controlling the public work entrusted to him by the statute.

I would dismiss the appeal with costs.

FAUTEUX J.:—I agree with my brother Abbott whose reasons I had the advantage to read. I only wish to point out some of the reasons why the decision of this Court in *City of Verdun v. Sun Oil Co. Ltd.*[1], strongly relied on by appellant in support of the contention that s. 4A of the Airport Vehicle Control Regulations is *ultra vires* of the Governor-in-Council, has here no application.

Purporting to implement its statutory authority to restrict by a zoning by-law the right of land-owners to use their property as they see fit, the City of Verdun did, by the provision impugned in that case, transform that authority into a mere administrative and discretionary power to cancel by resolution a right which, untrammelled in the absence of any by-law, could only be regulated in a proper one. For that reason, the provision was declared *ultra vires* of the City.

The situation here is entirely different. The right to carry on a private business on airports which are the property of the Crown in the right of Canada is vested in no one. The Crown may find it expedient to grant this right to any one under such terms and conditions as may be found appropriate. By the statutory provisions referred to in the reasons of my brother Abbott, Parliament authorizes the Governor-in-Council to make such regulations as the latter deems necessary for, *inter alia,* the management, proper use and protection of airports which are under the management or control of the Minister of Transport. Pursuant to this authority, the Governor-in-Council adopted the Airport Vehicle Control Regulations, of which s. 4A provides that no person shall, without the authority in writing of the Minister, i.e. the Minister of Transport, carry on, on these airports, a business similar to that conducted by appellant. This provision cannot be held to be restrictive of the alleged right claimed but not possessed by appellant. In its prohibitive form, the provision, if violated, gives rise to penal

[1] [1952] 1 S.C.R. 222, 1 D.L.R. 529.

sanctions, thus insuring with greater effectiveness the management and control of these airports. With the unlimited discretion given by Parliament to the Governor-in-Council, the latter, had he deemed it necessary, might well have determined, by regulations, the circumstances in which the Minister should grant the authority. This, however, Parliament did not require the Governor-in-Council to do. In the exercise of the power given to him by s. 4A, the Minister performs an act which, of its nature, is clearly administrative.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorney for the appellant: François Francoeur, Seven Islands.

Attorney for the respondent: Louis Paradis, Baie Comeau.

DOMINIQUE GRIECO AND DAME JOSEPHINE ZICARDI (*Plaintiffs*) ... APPELLANTS;

1961 *Nov. 6

AND

1962 Jan. 23

L'EXTERNAT CLASSIQUE STE. CROIX (*Defendant*) .... RESPONDENT.

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

Negligence—Torts—Liability—Summer camp—15 year old boy drowning—Water fight under supervision of camp councillors—Boy disobeying orders and swimming in deep water although only a beginner—Action against camp authorities—Whether joint liability—Civil Code, arts. 1053, 1054, 1056.

The plaintiffs' son, a boy of 15 years of age and a pupil of the defendant school, was drowned while attending, on payment of a nominal sum, a summer camp operated by the defendant. The summer camp had been advertised by a circular letter sent to the parents. The fatality occurred while the boy was participating in a "water fight" between the occupants of the two rowboats, which consisted of splashing water from one boat to another and which was supervised by two camp councillors. The boy, who was just learning to swim, jumped into the

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

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water in disregard of express orders which had been given to all the boys to remain in the boats. He stayed in the water near the boat although specifically told several times to get back into the boat by one of the councillors, who was himself swimming between the two boats. The boy swam some 15 feet away from the boats and was soon in difficulty. The two councillors, one of whom was very nearsighted, went to his rescue but could not save him.

The trial judge maintained the action. The Court of Appeal, by a majority judgment, found the boy to have been 50% negligent. The dissenting judges would have affirmed the trial judge's decision. The plaintiffs appealed to this Court and the defendant school cross-appealed.

Held: (Locke J. dissenting): The appeal and the cross-appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: The relationship between the parents and the camp authorities was not contractual but was quasi-delictual; and since that relationship was not that of school masters and pupils within art. 1054 of the *Civil Code*, whereby there is a presumption of fault against the school master requiring him to prove that he could not have prevented the event which caused the harm, the liability of the camp authorities must be found in art. 1053 of the *Civil Code* and consequently must be proven. The warranty of security was neither an essential nor a necessary element of the contract.

In the present case there was common fault. The boy was negligent in disobeying orders. His actions were inexcusable for a boy of his age who, scarcely knowing how to swim, knew or should have known the danger of jumping in deep water. A child of tender years could be forgiven such stupidity and lack of judgment but not a mature adolescent. *O'Brien v. A.G. of Quebec,* [1961] S.C.R. 184, referred to.

As to the camp authorities, they were equally at fault. The councillors' failure to maintain the proper vigilance which was required by the playing of this dangerous game, was a contributory factor to this unfortunate accident.

Per Locke J., dissenting: The water fight was not a dangerous game and the boys were perfectly safe so long as they followed orders and remained in the boats, whether they could swim or not. The fatality which occurred resulted not from the game itself but from the deliberate act of the boy in disobeying the councillors. The boy was not a child of 7 or 8 years of age who might be expected to be heedless and perhaps disregard instructions, but on the contrary he was old enough to understand the risk he assumed in disregarding the requests of the councillors. In so far as the action was based in contract and alleged that the defendant school had agreed to ensure the safety of the boy, it must fail since no such obligation was assumed. In so far as the matter was based on art. 1053 of the *Civil Code,* the position was similar to the common law doctrine as stated in *Cook v. Midland Great Western Railway,* [1909] A.C. 234. In the circumstances of this case there was no liability upon the defendant school, since the direct and proximate cause of the accident was the deliberate act of the boy in disobeying.

It would be exceedingly unfortunate if those public-spirited and charitable people who organize these summer camps for the purpose of giving an outing to poor children or to children who pay merely a nominal amount, were to be held responsible for such mishaps to boys of 14 or 15 years of age who act in defiance of their instructions.

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GRIECO *et al.* *v.* EXTERNAT CLASSIQUE STE. CROIX

APPEAL and cross-appeal from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing in part a decision of Charbonneau J. Appeal and cross-appeal dismissed, Locke J. dissenting.

A. Villeneuve, for the plaintiffs, appellants.

L. P. de Grandpré, Q.C., for the defendant, respondent.

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

TASCHEREAU J.:—Dans le cours de l'année 1955, M. et Mme Dominique Grieco, demandeurs dans la présente cause, décidèrent d'envoyer leur fils Joseph, élève à l'Externat Classique Ste-Croix, passer trois semaines au camp de vacances de cette institution, défenderesse-intimée. Ce camp est situé au Lac Provost à St-Donat, comté de Terrebonne, et le prix fut déterminé à $10 par semaine. Il est arrivé que le 4 juillet, quelques jours après le début des vacances, le jeune Joseph se noya au Lac Lajoie, situé non loin du camp principal, où une excursion avait été organisée.

Comme conséquence de ce malheureux accident, dont leur fils fut la victime, les demandeurs-appelants ont réclamé de l'intimée la somme de $22,061. L'honorable Juge Charbonneau de la Cour supérieure a fait reposer la faute sur l'intimée, et l'a condamnée à payer la somme de $6,129.06. La Cour du banc de la reine[1], MM. les Juges Hyde et Owen dissidents, a partiellement accueilli l'appel, a conclu qu'il y avait faute contributive, a partagé la responsabilité, a modifié le jugement, et a réduit à $3,109.53 le montant de l'indemnité. MM. les Juges Hyde et Owen auraient rejeté l'appel et confirmé le jugement de la Cour supérieure.

Cette excursion au Lac Lajoie avait évidemment été organisée avec l'assentiment des autorités du camp, et elle était sous la surveillance de trois moniteurs: Jacques Gougeon, âgé de 17 ans, qui était en charge de l'expédition; Michel Côté, âgé de 19 ans, remplissait les fonctions d'assistant, et un troisième du nom de Pierre Belleau exerçait également la surveillance sur ces adolescents dont les âges variaient de 14 à 15 ans.

Le groupe, composé d'environ une douzaine d'écoliers, partit du Lac Provost dans trois chaloupes pour se rendre au Lac Lajoie qui est relié par une rivière, et situé à quelques milles de distance. Lorsque les excursionnistes furent

[1] [1961] Que. Q.B. 363.

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rendus au Lac Lajoie, ils revêtirent leurs costumes de bain, et il fut décidé, pour l'amusement des élèves, que deux chaloupes se rendraient au large, à environ 100 ou 150 pieds de la rive où il y aurait une petite bataille navale en miniature. Ce jeu consistait à se lancer de l'eau d'une chaloupe à l'autre à l'aide des rames. Dans l'une de ces chaloupes, avec quelques élèves, se trouvait le moniteur en charge Jacques Gougeon, et dans l'autre, son assistant Pierre Belleau. Le troisième groupe resta sur la plage, sous la surveillance de l'assistant Michel Côté.

Une défense formelle fut faite aux occupants des chaloupes de plonger à l'eau au cours de cet exercice, mais il est arrivé qu'en désobéissance de cet ordre, Joseph Grieco se jeta en dehors de la chaloupe où il se trouvait. Il se tint suspendu durant quelques instants à l'arrière de l'embarcation, donna quelques coups de brasse, et revint de nouveau à quelques reprises s'accrocher à la chaloupe. Durant ce temps, Belleau, le surveillant de cette embarcation, avait lui-même plongé dans le lac. Bon nageur, il prenait plaisir à aller près de l'embarcation des adversaires, où il les arrosait avec l'aide d'une canette métallique qu'il remplissait d'eau.

Il aperçut Grieco qui était à l'eau, lui ordonna à plusieurs reprises de retourner dans la chaloupe, mais apparemment, il n'insista pas davantage. L'endroit où se trouvait le jeune Grieco, à cause de la disposition des embarcations, ne pouvait être vu de Gougeon. Grieco décida cependant de nager plus loin, de s'éloigner de la chaloupe, mais évidemment, ses forces l'abandonnèrent, et il se noya malgré les efforts de Gougeon et de Belleau pour le sauver.

Les appelants basent leur réclamation sur les plans contractuel et quasi-délictuel. Il est vrai qu'à l'invitation de l'intimée, ils ont consenti à ce que leur fils, moyennant $30, séjournât trois semaines à cette colonie de vacances. Mais, je suis clairement d'accord avec la Cour du banc de la reine, qui a vu entre les appelants et l'intimée non pas une relation contractuelle mais bien quasi-délictuelle. La responsabilité de l'intimée doit reposer sur une faute prouvée ou présumée, suivant les dispositions des arts. 1053 et 1054 du *Code Civil* de la province.

Mais je crois qu'il faut nécessairement éliminer la faute présumée, car les directeurs des *colonies de vacances* ne sont pas des instituteurs au sens de l'art. 1054, sur qui pèse la présomption de la loi. C'est 1053 C.C. qui doit régir les relations des parties en cause.

L'article 1054 C.C., para. 5, dit que l'instituteur est responsable du dommage causé par ses élèves, et cette disposition de la loi crée une présomption, et pour s'en libérer, le défendeur doit prouver qu'il n'a pu empêcher le fait qui a causé le dommage. En France, malgré que l'art. 1384 C.N. soit quelque peu différent de notre art. 1054 C.C., il a tout de même été décidé que l'opinion dominante en doctrine est à l'effet que l'art. 1384, 6e alinéa, qui prévoit à la responsabilité des instituteurs, ne soit pas applicable aux *colonies de vacances,* patronages, ou autres institutions charitables, car ils n'ont pas pour mission de donner l'instruction aux enfants qu'ils reçoivent. La Cour de Cassation, dans un arrêt rendu le 15 décembre 1936 (Gazette du Palais 1937, 1.255), a décidé qu'il est donc nécessaire d'établir à la charge soit du directeur de l'œuvre, soit de ses préposés, une faute dans le sens de l'art. 1382 C.N. (notre art. 1053 C.C.), et cette faute doit avoir une relation directe de cause à effet avec l'accident. *Vide* également un arrêt de la Cour de Paris du 26 novembre 1932 (Gaz. Pal. 1933, 1.335) et Savatier «Traité de Responsabilité Civile», vol. 1, 2e éd., n° 136.

Pour donner suite à cette décision de la Cour de Cassation, *supra,* l'art. 1384 du Code français a été amendé le 5 avril 1937, et on y a ajouté le paragraphe suivant:

> En ce qui concerne les instituteurs, les fautes, imprudences ou négligences invoquées contre eux comme ayant causé le fait dommageable, devront être prouvées, conformément au droit commun, par le demandeur à l'instance.

Il s'ensuit qu'en ce qui concerne les instituteurs, la loi française n'est pas semblable à la nôtre actuellement. Mais quand l'arrêt a été rendu, il y avait similarité. Il ressort donc de la doctrine française et de la décision de la plus haute Cour de la République, que la responsabilité des colonies de vacances ne doit pas reposer sur le plan contractuel, qu'aucune présomption n'existe contre leurs directeurs, mais qu'il faut prouver la faute qu'ils auraient pu commettre, suivant l'art. 1382 C.N. ou 1053 C.C. Je m'accorde avec

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cet enseignement et cette jurisprudence, et je suis d'opinion que dans le cas qui nous occupe, la faute de l'intimée n'est pas présumée mais qu'elle doit être prouvée.

Pour souligner davantage la différence qui existe entre les instituteurs et les directeurs de colonies de vacances, on peut s'inspirer de l'art. 245 C.C. qui donne, parce qu'il est délégué par le père ou la mère, un droit de correction à ceux à qui l'éducation d'un enfant est confiée. On ne pourrait sérieusement prétendre que les directeurs de colonies de vacances peuvent exercer ce même droit de correction.

Il est certain qu'à l'origine, il y a eu entente entre les parties, une convention en vertu de laquelle les demandeurs ont confié pour trois semaines leur fils à l'intimée. Ceci ne signifie pas que cette entente comporte une obligation de sécurité de la part de l'Externat Classique, et le contrat intervenu ne fait pas naître chez l'intimée une obligation de rendre l'enfant dans l'état où il l'a reçu, et ne crée pas à sa charge une présomption de responsabilité en cas d'accident. L'obligation de sécurité n'est pas un élément essentiel ni nécessaire au contrat, et c'est au droit commun de l'art. 1053 relatif à la responsabilité quasi-délictuelle qu'il faut s'en tenir. C'est ce qu'a décidé la Cour d'Appel de Lyon le 18 juillet 1928. *Vide* également Douai, 27 novembre 1933; Trib. de Nîmes, 25 janvier 1939; Trib. de Lyon, 21 décembre 1929.

L'intimée a bien contracté l'obligation de nourrir, de loger le jeune Grieco, mais rien ne répugne à l'esprit légal, qu'au cours de l'exécution d'une obligation contractuelle, à défaut d'entente préalable, naisse une obligation quasi-délictuelle. C'est, je crois, ce qui est arrivé dans le cas qui nous occupe.

Cette action repose évidemment sur l'art. 1056 C.C. qui veut que dans tous les cas où la partie, contre qui le délit ou le quasi-délit a été commis, décède en conséquence, sans avoir obtenu indemnité ou satisfaction, son conjoint, *ses ascendants* et ses descendants ont, pendant l'année seulement à compter du décès, le droit de poursuivre celui qui en est l'auteur ou ses représentants, pour les dommages-intérêts résultant de tel décès. Ici, ce sont les parents qui ont institué l'action pour réclamer des dommages qui leur résultent du décès de leur enfant. Il ne fait pas de doute que, s'il y a faute commune, il faut tenir compte de la faute de la victime dans l'octroi des dommages aux personnes lésées par sa mort. Les ascendants ne peuvent recevoir plus que la

personne décédée aurait pu recevoir elle-même, si elle eut exercé son recours en son vivant. La faute de la victime n'est pas étrangère au montant des dommages qui peuvent être accordés. *Rainville Automobile v. Primario*[1].

Je crois qu'il y a eu faute commune dans le cas qui nous est soumis. Le jeune Grieco a commis un geste imprudent. Nouvel arrivé à ce camp, et sachant à peine nager, malgré la défense répétée de ne pas plonger à l'eau, il s'est jeté dans le lac, et a refusé d'écouter et d'obéir aux ordres qui lui ont été donnés de retourner au canot. Son acte a été spontané, et je dirai même qu'il est inexcusable de sa part. Agé de 14 ans et 11 mois, ce jeune savait ou devait savoir le danger qu'il y avait de se lancer ainsi dans l'eau profonde. On pardonnerait cette étourderie, ce manque de réflexion et de jugement, à un enfant en bas âge, mais non pas à un adolescent mûri, qui peut parfaitement réaliser le danger de poser un acte tel qu'il l'a fait. *O'Brien v. Procureur Général de la Province de Québec*[2].

Quant à l'Externat, je crois qu'il doit aussi supporter sa part de négligence et de responsabilité. Ses moniteurs, évidemment, n'ont pas fait preuve de la vigilance nécessaire dans l'occasion. Belleau, au lieu de rester dans la chaloupe avec ceux dont il avait le garde, s'en est éloigné à la nage, et n'a pas vu à ce que les instructions qu'il a données à Grieco de retourner à la chaloupe fussent suivies. Gougeon, myope, voyant à peine à dix pieds de distance, lorsqu'il a entendu les cris, a entrepris d'aider Belleau qu'il ne reconnaissait pas, au lieu de se diriger pour porter secours à Grieco qui calait dans le lac. Le jeu que l'on pratiquait était assez dangereux, et aussi fallait-il exercer la plus grande surveillance possible. Je crois que ceci n'a pas été fait et que ce manque de soin a contribué à ce malheureux accident.

Je crois donc que la Cour du banc de la reine a bien jugé lorsqu'elle a statué qu'il y a eu faute contributive dans une proportion de 50%.

L'appelant demande de rétablir le jugement du juge au procès qui a attribué la totalité de la faute à l'intimée. Mais, cette dernière a produit un contre-appel prétendant qu'elle doit être complètement exonérée, et dans l'alternative que le montant des dommages soit réduit. Je ne crois pas qu'il

[1] [1958] S.C.R. 416. [2] [1961] S.C.R. 184.

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y ait lieu d'intervenir pour changer l'évaluation de ces dommages faite par la Cour supérieure et la Cour du banc de la reine. Comme j'en viens à la conclusion qu'il y a eu faute commune, l'appel de même que le contre-appel doivent être rejetés.

Cependant, comme le succès est divisé, je crois qu'il ne devrait pas y avoir d'ordonnance quant aux frais devant cette Cour, ni sur l'appel principal ni sur le contre-appel.

LOCKE J. (*dissenting*):—Unless the liability which has been imposed upon the respondent in the present matter is either dependent upon or affected by the terms of the arrangement made between the boy's father and the respondent, the issue to be decided is one that is of importance throughout Canada. There are vacation camps similar to that operated by the respondent in the year 1955 provided during the summer months in all parts of Canada by various religious, charitable and other public-spirited organizations, for the purpose of giving children who live in cities a holiday in the woods, near lakes or rivers. In some of these a nominal amount is paid towards the upkeep of the camp, as was done in the present case by the appellant Dominique Grieco—in others the expenses are met by public subscription where the parents are unable to pay anything towards giving their children such an outing. In such camps there are invariably older boys and young men interested in such charitable work who serve as camp leaders or assistants, generally gratuitously, and who supervise the camp activities, teach the children to swim and to look after themselves in the woods. If the liability of such organizations in respect of activities of this nature is as it has been found to be in the courts of Quebec, it is in the public interest that this Court should declare and define it. If the liability is imposed by arts. 1053 and 1054 of the *Civil Code,* the liability at common law is, in my opinion, the same.

The declaration alleges that the boy Joseph Grieco, the son of the appellants, was a scholar in the college carried on by the respondent, aged 14 years and 11 months; that the pupils were invited to go to a vacation camp to be operated by the respondent at Lake Provost for which they would be required to pay $10. per week and that the boy went to the camp for three weeks, paying this amount. It was further said that the parents were advised that there

would be three priests at the camp to exercise surveillance over the children. Various allegations of negligence and "imprudence" were made on the part of the respondent and its officials, these including, *inter alia,* the fact that there were not three priests to supervise the children, that those supervising the children were inexperienced monitors and that they were not qualified in life saving and that the defendant should have seen that the children were accompanied by an adult.

Paragraph 8(*o*) of the declaration reads:

> La défenderesse était garante de la sécurité des enfants confiés à ses soins et à sa surveillance et elle a manqué à cette obligation de sécurité pour les raisons plus haut mentionnées.

The invitation referred to was given in a circular dated March 31, 1955, and referred to a previous letter which was not put in evidence but which was said to have given information of the establishment of a camp for the pupils of the college. The circular stated that the camp would provide an adventure for the students, that the boys who attended would be part of a well organized party "where there is team work, leaders, responsibilities" and that this was the great characteristic of the camp, and that the boys would take part in it and have responsibilities. The activities of the camp were described as religious, sports, including swimming and excursions, lectures and other social activities. It was said further that the camp grounds offered all kinds of possibilities for play and that the beach located nearby did not present any danger for swimmers (ce qui n'empêche pas la surveillance des moniteurs). The weekly payment of $10. covered food, lodging in tents and all of the facilities of the camp.

As described in the evidence the camp appears to have been well organized. Father Fagnan, a teacher in the college, was the director of the camp: in his temporary absence at the time of the accident Father Leonard was in charge. The "chef du camp" or camp leader was Claude Lalonde who had had a lengthy experience in that capacity in various similar camps in Quebec and who directed the camp activities. He was assisted by his brother Jacques Lalonde, a theological student aged 20 years who, similarly, had had several years' experience in such work. They were assisted

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by various older boys referred to as monitors, these including Jacques Gougeon then 17 years of age, described as a student, Michel Côté aged 19 years, a telephone technician, and by some younger boys including the witness Belleau. There is no indication that a third priest was present in the camp but nothing turns upon this.

One of the activities carried on under the direction of the two Lalondes was giving lessons in swimming and Jacques Lalonde was teaching the beginners, these including the boy Joseph Grieco. The evidence does not disclose whether the boy had any previous lessons in swimming but, as the evidence later disclosed, he was able to swim at least a short distance.

Joseph Grieco had finished his first year in classics at the college and, according to his father, was a studious boy who passed his evenings in study and who intended to qualify eventually as a doctor. The course which the boy was taking at the college included French grammar, authors and composition, Latin grammar and vocabulary, English grammar and vocabulary, ancient history, geography, mathematics, botany and zoology. The reports of the examinations upon which he had written from the Faculty of Arts of the University of Montreal for the term preceding his death were excellent, and those from the college itself were equally good. There is nothing in the evidence except his unfortunate actions at the time he lost his life which indicates that he was other than a sensible and dependable boy who might be counted upon to exercise due care for his own safety.

The excursion was discussed on the evening preceding the accident by Father Fagnan, the two Lalondes and the monitors. The plan was to go in three row boats to an adjoining lake some two miles distant. On arriving there some of the boys decided to remain on the shore with Côté, the others embarked in two of the boats which were of sturdy construction and proceeded a distance variously estimated as from 50 to 100 ft. from shore. There the boys engaged in what may be described as a water fight, throwing or splashing water on each other with the oars and with metal containers of some sort.

It was found by the learned trial judge, and his finding accepted on appeal, that before leaving the shore the boys were warned by Gougeon that they were not to get out of

the boats. The water at the place where the game was carried on was some 12 or 15 ft. deep. The game itself was described by the learned trial judge as very dangerous, an opinion which, with respect, I do not share. So long as the boys remained in the boats they were perfectly safe and the fatality which occurred did not result from the game itself but from the deliberate act of Joseph Grieco in disobeying the requests of the monitor and those of the witness Belleau, getting out of the boat and swimming in the immediate vicinity.

There were some 12 boys who engaged in this game, 6 in each of the two boats. Gougeon was in one boat and took part in the game. Joseph Grieco was in the other boat where a boy of 15, Jacques Belleau, who described himself as "second de patrouille", was present. Both Gougeon and Belleau were good swimmers. According to Belleau, the two boats were some 50 ft. from the bank and during the progress of the game he plunged in to the water and when he was seen to do this by Gougeon the latter ordered him back in to the boat. At or about this time Belleau saw young Grieco in the water at the back of their boat, in a position where the latter would not be visible to Gougeon in the other boat. Grieco was then holding on to the boat and not swimming. Belleau asked Grieco to get back into the boat and the latter said that he would not get far behind the boat and would be careful. Belleau says that he warned him several times without effect. Shortly thereafter Grieco, who apparently was able to swim a short distance, was seen some 12 or 15 ft. from the boat, obviously in difficulty. Belleau who had returned to the boat plunged in and Gougeon plunged from the other boat and went to the boy's rescue. In spite of Gougeon's best efforts he was unable to save Grieco. The latter, as is unfortunately so often the case, became panic stricken and seized Gougeon around the neck, impeding his efforts, and three times the two sank below the surface. The boys remaining in the boats were apparently unable to render any assistance and Côté, who was on the shore, did not assist saying that he was not a good enough swimmer to help in such rescue work.

Much emphasis was laid at the trial upon the fact that Gougeon was short sighted and had taken off his glasses while the water fight was in progress. Without his glasses he said that he could see the boy in the water from his boat

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and that he was in distress but that he could not identify him. This circumstance did not, however, contribute to the accident since young Grieco had entered the water at the stern of the row boat where he was obscured from view and, presumably, the time taken for his swimming from the rear of the boat to the point where he was in difficulty would be a matter of moments.

Gougeon was described by Father Fagnan as a well qualified swimmer and both Claude and Jacques Lalonde were of the same opinion, the latter saying that Gougeon was a better swimmer than he was. He had taken what were described as some Red Cross lessons in life saving but it was not contended that he had any particular qualifications in this respect, other than that of being a good swimmer. Gougeon had not only told the boys before they left the bank that they were not to go into the water but repeated this when they were at the scene where the game was carried on and Joseph Grieco's action in getting out of the boat was a deliberate refusal to follow what can only be described as a request.

With great respect for the contrary opinion of the learned trial judge and of the Court of Appeal[1], I consider that there is no liability upon the respondent in these circumstances. The cardinal error, in my opinion, has been in considering the case as if the unfortunate boy had been a child of 7 or 8 years of age who might well be expected to be heedless and perhaps to disregard the instructions given to him by the monitor. Entirely different considerations apply where, as in the present case, the boy was nearly 15 years of age who might properly be expected to understand the risk he assumed in disregarding the requests made by Gougeon and Belleau.

The boys invited to this camp were apparently carefully selected by the college authorities. Speaking of this, Father Fagnan said that:

> Le camp s'adressait aux étudiants de notre collège d'un certain âge, surtout les élèves d'éléments latins, syntaxe surtout ou de classes plus avancées, mais pas tellement vieux d'âge.

He considered that they had made a judicious selection of the boys after consulting the principals, the school masters and certain professors, to find out if the boys were of a good disposition and would adapt themselves to camp life.

[1] [1961] Que. Q.B. 363.

Claude Lalonde had been chosen by the authorities of the college and was considered to be well qualified for the position of camp leader. Gougeon had had experience at the college as the leader of a troup of scouts and was deemed suitable to act as a monitor.

The average age of the boys was 14 or 15 years and the patrol leaders were chosen from among these boys and they worked under the four monitors who averaged 17 or 18 years of age. Jacques Lalonde, speaking of his previous experience with boys of this age, said:

Q. Quelle expérience antérieure aviez-vous?

A. Tout d'abord plusieurs expériences dans les camps scouts depuis ma méthode.

Q. Ça veut dire quel âge?

A. Quinze ans, quatorze ans. Alors, ensuite j'ai été un été comme moniteur à Louisbourg dans un orphelinat, un autre été, après ma belle-lettres, moniteur à l'orphelinat d'Huberdeau. Ensuite j'ai fait des camps scouts spécialisés, le camp Radisson, spécialisé pour les assistants chefs et j'ai été aussi chef scout pendant deux ans avant d'aller au camp Esca.

Q. Au cours de vos expériences dans différents camps, avez-vous vu des enfants de quatorze à quinze ans avec certaines responsabilités à l'endroit de leurs compagnons?

A. Oui, par exemple, dans une troupe scoute les C.P. ont cet âge-là ordinairement. Les chefs de patrouilles, ils n'ont pas la responsabilité d'un moniteur, il y a tout le temps un assistant ou un chef qui est responsable.

Claude Lalonde said that it was a practice in other such camps to place boys of this age in charge of younger children as assistant to the camp leader.

It is a matter of common knowledge that boys of this age all over Canada engage in hunting and fishing expeditions, unaccompanied, and that they constantly carry fire arms. It is only in the case of children under 14 years of age that s. 88 of the *Criminal Code* requires that they obtain a permit in the prescribed form. This would appear to indicate that boys of this age are regarded by the authorities as being responsible and safely to be entrusted with weapons. These activities are carried on on marshes, lakes and rivers all over the country by such boys in canoes, row boats and other such craft, and it is perhaps needless to say, without supervision.

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In the judgment delivered by Mr. Justice Taschereau in the Court of Queen's Bench, dealing with this aspect of the matter, he said in part:

> Le premier Juge a-t-il cependant raison de dire que la défenderesse doit être aussi tenue responsable parce que:
>
> > Connaissant le peu d'expérience de cet enfant il était de toute imprudence de . . . et de lui avoir fourni l'occasion de se mettre à l'eau à un endroit trop profond pour sa capacité. . . . La désobéissance et l'étourderie d'un enfant sont choses qui étaient prévisibles et qui, en fait, étaient prévues; et c'est justement pour cela qu'on leur assigne des surveillants.
>
> J'aurais été enclin à admettre la proposition du premier Juge s'il se fut agi d'un enfant de 7 à 8 ans parce que l'expérience démontre qu'à ce bas âge, un jeune garçon n'a pas toujours la maturité suffisante pour connaître le danger et l'éviter. Toutefois, tel n'est pas le cas d'un élève de quinze ans, qui a l'avantage de faire un cours classique et qui est, par conséquent, encore plus mûri que le sont normalement ceux de son âge.
>
> Je crois donc que les autorités pouvaient et devaient faire confiance au jeune Grieco, qu'elles n'avaient aucune raison de croire que celui-ci se jetterait à l'eau malgré la défense qui lui en avait été faite, et que la noyade qui en a été la conséquence est le résultat d'un acte qui n'était ni probable ni prévisible.

Having said this, however, the learned judge concurred in the opinion of the majority of the Court that there was some fault on the part of the respondent, a conclusion with which I must respectfully disagree.

In so far as the action is based in contract and alleges that the respondent agreed to ensure the safety of the boy, it must fail since no such obligation was assumed by the respondent in the offer hereinbefore mentioned which, when accepted by the boy's father, presumably became the alleged contract.

In so far as the matter is based on arts. 1053 and 1054 of the *Civil Code,* in order to disclose a cause of action for *quasi* delict or negligence it is necessary that it be shown that there was a duty owing to the boy and a breach of that duty resulting in damage. As pointed out by Barclay J.A. in *Bisson v. Les Commissaires d'École de St-Georges*[1], referring to an earlier decision by Létourneau J. in *L'Oeuvre des Terrains de Jeux de Québec v. Cannon*[2], the position under art. 1053 is similar to the common law doctrine as stated by Lord Macnaghten in *Cook v. Midland Great Western Railway*[3].

[1] [1950] Que. K.B. 775 at 785. [2] (1940), 69 Que. K.B. 112, 119.
[3] [1909] A.C. 229 at 234.

It is quite impossible, in my opinion, in the absence of a contract to that effect to sustain a contention that the respondent was an insurer of the safety of this boy. Unless, therefore, the respondent was under an obligation to provide monitors skilled in life saving and capable of rescuing boys who, in defiance of the request and warnings of those in charge, persisted in attempting to swim in deep water, there can, in my opinion, be no liability in the present case.

The game of splashing water from one boat to another was not in itself dangerous. The boys were perfectly safe if they followed instructions and remained in the boats, whether or not they could swim. It was not the nature of the game that caused the unfortunate accident since there is nothing in the record to show that Joseph Grieco either fell or was pushed from the boat. All the evidence indicates that his action in climbing over the stern of the boat and getting into the water was deliberate and done in such a way that Gougeon, the monitor in the other boat, would not see him. These boys were not, as small children are in relation to a school master, subject to the orders of the monitor but Gougeon had requested that they should not leave the boats, and Belleau when he saw Grieco at the stern of the boat asked him to get into it and warned him of the danger. In spite of this he persisted in the course which unhappily resulted in the loss of his life.

Thus the direct and proximate cause of the accident was the deliberate act of the boy and, accordingly, in my opinion there is no basis for the action.

We have not been referred to any decided cases in the courts of Quebec or elsewhere where liability has been found in circumstances such as exist in the present matter. Claims for damage due to lack of supervision of children by those having them over their control are more often found in actions against school authorities such as in *Camkin v. Bishop*[1], and in the recent case of *Schade v. Winnipeg School District*[2]. In the first of these cases the action was brought against a school and the head master alleging a breach of the duty of supervision imposed at common law where a boy 14½ years of age was injured by the negligent act of a playmate. The Court of Appeal was unanimous in finding that there was no liability. In *Schade's* case the duty

[1] [1941] 2 All E.R. 713.
[2] (1959), 66 Man. R. 335, 19 D.L.R. (2d) 299.

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of supervision was imposed by the *Public Schools Act* of Manitoba and the boy, 13 years of age, was injured in the course of a game of baseball upon the school property by coming in contact with a stake which was driven in the ground in the outfield, where it was plainly visible. The report of this case contains a valuable collection of the authorities by Chief Justice Williams who found that there was no liability.

Apart from the present case, it would be exceedingly unfortunate, in my view, if those public-spirited and charitable people who organize these summer camps for the purpose of giving an outing to poor children or to children who pay merely a nominal amount towards the expense of the camp, should be under any such liability as has been found in the present case. To so hold would tend to prevent the carrying on of such camps since if those operating them are to be held responsible for such mishaps to boys 14 or 15 years of age who act in defiance of their instructions, it would, I think, discourage these charitable activities, to the great detriment of a large number of children throughout Canada.

I would dismiss this appeal, allow the cross-appeal and direct that judgment be entered dismissing the action, with costs throughout if they are demanded.

Appeal and cross-appeal dismissed without costs, LOCKE J. *dissenting.*

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ANDREW KROOK, BARBARA KROOK, IVAN KROOK, AND GEORGE KROOK (*Plaintiffs*) .. } APPELLANTS;

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*Feb. 27
June 11

AND

PETER YEWCHUK AND MIKE PANAS (*Defendants*) .... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mortgages—Sale of lands and chattels—Mortgage on lands and collateral mortgage on chattels—Default in payments—Foreclosure proceedings—Whether chattel mortgage invalid by reason of provisions of s. 34 (17) of The Judicature Act, R.S.A. 1955, c. 164—The Seizures Act, R.S.A. 1955, c. 307—The Conditional Sales Act, R.S.A. 1955, c. 54.

By an agreement in writing the plaintiffs agreed to sell to the defendants an hotel together with the furnishings, fixtures and equipment therein for $90,000. The initial payment was $20,000, and the defendants agreed to execute and deliver to the plaintiffs a first mortgage on the lands and premises to secure payment of the balance owing and a chattel mortgage on the other property transferred as collateral thereto. Later, by a bill of sale, the plaintiffs transferred to the defendants the goods and chattels for an expressed consideration of $20,000. Subsequently the defendants executed a mortgage on the lands for $70,000, and a collateral mortgage on the goods and chattels. The mortgage on the lands contained a personal covenant for payment. The defendants fell into arrears in respect of the stipulated monthly payments, and in foreclosure proceedings brought by the plaintiffs in respect of the lands and the personal property the trial judge held in favour of the plaintiffs. On appeal from this judgment, the Appellate Division of the Supreme Court refused foreclosure of the goods and chattels, holding that the chattel mortgage was invalid. The plaintiffs appealed to this Court.

Held: The appeal should be allowed.

It was not intended under the agreement between the parties that the initial payment should be applied solely in respect of the purchase of the chattels, leaving the balance relating entirely to the land, and the intent of the agreement was not affected by the fact that the bill of sale showed as its consideration the amount of the down payment under the agreement.

The plaintiffs were possessed of two securities for the defendants' indebtedness, and the question was as to whether s. 34(17) of *The Judicature Act*, R.S.A. 1955, c. 164, precluded the enforcement of the security on the chattels. This section of the Act limits the right of a mortgagee of land who brings action upon the mortgage to the right to the land conferred by that mortgage. The effect of para. (*a*) is that in an action on a mortgage of land no action lies on a covenant for payment "in any such mortgage". This takes away the right to bring action on the covenant for payment in a land mortgage. There was nothing in this

*PRESENT: Locke, Abbott, Martland, Judson and Ritchie JJ.

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provision which forbids a debtor to give security for a debt on property in addition to a mortgage on land or which forbids the creditor to enforce such security.

Here the taking of the chattel mortgage was not an indirect method of attempting to enforce the personal covenant contained in the land mortgage, nor was this action, in so far as it sought foreclosure of the chattel mortgage, an action based on a mortgage of land, whose purpose was to recover the debt referred to in the land mortgage. The essence of the transaction was that it consisted of a sale of a totality of assets, consisting partly of land and partly of chattels, under the terms of which the vendor was to be entitled to security on all assets sold. The chattel mortgage was a security upon a specific part of those assets and its enforcement was not merely an indirect attempt to enforce the covenant for payment contained in the land mortgage.

Macdonald v. Clarkson, [1923] 3 W.W.R. 690; *Holland-Canada Mortgage Co. Ltd. v. Hutchings,* [1934] 2 W.W.R. 137; *British American Oil Co. Ltd. v. Ferguson* (1951), 1 W.W.R. (N.S.) 103; *Crang v. Rutherford,* [1936] 2 W.W.R. 205, distinguished; *Martin v. Strange and Stocks Co-op. Credit Society,* [1943] 2 W.W.R. 123, referred to.

The additional contention that the Supreme Court of Alberta did not have jurisdiction to foreclose the chattels secured by the chattel mortgage because of the provisions of *The Seizures Act,* R.S.A. 1955, c. 307, and of *The Conditional Sales Act,* R.S.A. 1955, c. 54, was rejected. *The Seizures Act* restricted the plaintiffs' rights regarding the taking of possession of the chattels mortgaged under power of distress. It did not, however, expressly or by implication, purport to prevent proceedings for the foreclosure of a chattel mortgage. Section 19 of *The Conditional Sales Act* did nothing more than limit the remedy of the plaintiffs, in respect of the chattel mortgage, to the chattels mortgaged. The plaintiffs were not, in these proceedings, seeking anything more than foreclosure of the land and of the chattels. They did not ask for a judgment over in respect of any deficiency and the judgment given by the trial judge did not purport to give them anything more.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], allowing an appeal from a judgment of Primrose J. Appeal allowed.

W. G. Morrow, Q.C., for the plaintiffs, appellants.

J. W. K. Shortreed, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—By an agreement, in writing, dated June 30, 1959, the appellants agreed to sell to the respondents, who agreed to purchase from the appellants, an hotel, situated at Cold Lake, Alberta, with the furniture, furnishings, fixtures and equipment therein, for a total price of $90,000. The initial payment was $20,000, paid partly in cash and partly by the transfer to the appellants of some lands in Edmonton, subject to mortgage. The remaining

[1] (1961-62), 36 W.W.R. 547, 30 D.L.R. (2d) 754.

balance of $70,000 was to be paid, with interest at the rate of 7 *per cent per annum,* by monthly payments of $1,000, commencing on September 1, 1959.

It was agreed that on September 1, 1959, the appellants would transfer clear title to the respondents of the lands on which the hotel was situated and would give a bill of sale of the goods and chattels clear of all liens, charges and encumbrances. The respondents agreed to execute and deliver to the appellants a first mortgage on the lands and premises to secure payment of the balance owing and a chattel mortgage on the other property transferred as collateral thereto. It is clear that these mortgages were to be delivered to secure payment for both the land and the chattels.

Pursuant to the agreement, a transfer of the lands was registered, and on November 5, 1959, a mortgage from the respondents to the appellants, executed on August 31, 1959, was duly registered, securing the payment of the sum of $70,000.

On August 25, 1959, the appellants executed a bill of sale of the goods and chattels in favour of the respondents, who, on August 31, 1959, executed a chattel mortgage on the same goods and chattels, in favour of the appellants, to secure payment of the sum of $70,000. Both these documents were registered on November 4, 1959.

The bill of sale stated that the goods and chattels were transferred in consideration of the sum of $20,000 paid by the respondents to the appellants. There is no evidence as to how this figure was determined, but it is the amount of the initial payment made under the agreement of June 30, 1959. There is no evidence as to the consideration disclosed in the transfer of the land, which was not filed as an exhibit at the trial.

The chattel mortgage recited the indebtedness of the respondents to the appellants in the amount of $70,000 under the agreement for the sale of the hotel, and recited that it was a term of that agreement that that sum should be secured by a mortgage on the land and a collateral mortgage on the personal property, included in the sale. It was stated in the chattel mortgage that it was collateral to the mortgage on the land.

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The respondents fell into arrears in respect of the stipulated monthly payments and the appellants commenced foreclosure proceedings in respect of the lands and the chattels. A judgment was obtained declaring that, as at its date, June 19, 1961, there was due and owing by the respondents the sum of $67,954.82 to be realized by sale of the mortgaged lands, goods and chattels, in default of which foreclosure might be ordered. A six months period of redemption was fixed, with a provision that this might be extended to twelve months if the respondents paid to the appellants $750 per month commencing July 1, 1961, with a right to apply for a further extension.

On appeal from this judgment, the Appellate Division of the Supreme Court of Alberta[1] refused foreclosure of the goods and chattels, holding that the chattel mortgage was invalid.

The main issue in this appeal is as to whether the chattel mortgage was invalid by reason of the provisions of s. 34(17) of *The Judicature Act*, R.S.A. 1955, c. 164, the relevant portions of which provide as follows:

(17) In an action brought upon a mortgage of land whether legal or equitable, or upon an agreement for the sale of land, the right of the mortgagee or vendor thereunder is restricted to the land to which the mortgage or agreement relates and to foreclosure of the mortgage or cancellation of the agreement for sale, as the case may be, and no action lies

(*a*) on a covenant for payment contained in any such mortgage or agreement for sale,

The Court below has stated its conclusions in the following terms:

It seems to me that the only logical conclusion in relation to the facts of the present case is that it is an action based upon a mortgage of land. While it is true that the original transaction was one in which both lands and chattels were agreed to be sold, nevertheless the chattels were paid for in full, according to the consideration expressed in the bill of sale dated the 25th day of August 1959. Having obtained clear title to the chattels, the appellants several days later gave a chattel mortgage to the respondents expressed to be collateral to the land mortgage. The position of a mortgagee under that chattel mortgage cannot be any higher than if the mortgagors had pledged goods other than those they had obtained under the bill of sale.

The land mortgage contains a personal covenant requiring the appellants to pay to the respondents the sum of $70,000 in lawful money of Canada, together with interest as stipulated in the mortgage.

[1] (1961-62), 36 W.W.R. 547, 30 D.L.R. (2d) 754.

The chattel mortgage is, in my view, an indirect method of attempting to enforce the personal covenant contained in the land mortgage. That phase of the present action by which the mortgagees endeavour to foreclose under the chattel mortgage is in reality an action based upon the mortgagors' covenant to pay and as such is in direct contravention to Section 34 (17) of The Judicature Act, being Chap. 164, Revised Statutes of Alberta 1955. See the reasoning of Clarke, J.A., in Macdonald v. Clarkson [1923] 3 W.W.R. 690, and of Frank Ford, J., in Holland-Canada Mtge. Co. Ltd. v. Hutchings [1934] 2 W.W.R. 137, and also the judgment of Macdonald, J.A. in British American Oil Company Limited (1951) 1 W.W.R. (N.S.) 103. See also Crang v. Rutherford [1936] 2 W.W.R. 205.

It follows that the order nisi of foreclosure granted by the learned trial judge respecting the chattels must be set aside. It also follows that the respondents' aforesaid chattel mortgage is invalid.

With respect, I do not agree that subs. (17) of s. 34 of *The Judicature Act* renders the chattel mortgage invalid.

The reasoning in the Court below would appear to be based upon the view of the transaction between the appellants and the respondents expressed in the first paragraph of the portion of the reasons for judgment above quoted; namely, that the chattels had been paid for in full and that thereafter the appellants' position was no different from what it would have been if the respondents had pledged goods other than those which they had obtained under the bill of sale. I do not share this view of the arrangement. The transaction between the appellants and the respondents is set forth in their agreement of June 30, 1959. It was, essentially, for the sale of an hotel business as a going concern, including both land and chattels. It was not intended under this agreement that the initial payment should be applied solely in respect of the purchase of the chattels, leaving the balance relating entirely to the land, and I do not think that the intent of the agreement is affected by the fact that the bill of sale showed as its consideration the amount of the down payment under the agreement. Under that agreement title to the chattels was to be vested in the respondents, but the bill of sale which transferred that title must be considered as being only one stage in the total transaction, which contemplated payment for both the land and the chattels in instalments, with security being given to the appellants for payment in the form of mortgages upon both the land and the chattels.

It is true that both the agreement and the chattel mortgage refer to that mortgage as being collateral to the land mortgage, but, as used in those documents, this does not

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mean anything more than that the security on the chattels is in addition to that on the land. I do not construe it as meaning that this security was subordinate to that upon the land. (See Earl Jowitt's Dictionary of English Law, p. 403.)

In my opinion, the appellants were possessed of two securities for the respondents' indebtedness, and the question then is as to whether s. 34(17) of *The Judicature Act* precludes the enforcement of the security on the chattels.

It provides that in an action brought upon a mortgage of land the right of the mortgagee *thereunder* is restricted to the land to which the mortgage relates and to foreclosure of the mortgage. In its context, the word "thereunder" must refer to the mortgage, for it is by virtue of the mortgage, not the action, that the mortgagee has a "right". The section, therefore, limits the right of a mortgagee of land who brings action upon it to the right to the land conferred by that mortgage.

The effect of para. (*a*) is that in an action on a mortgage of land no action lies on a covenant for payment contained "in any such mortgage". This takes away the right to bring action on the covenant for payment in a land mortgage.

I do not find anything in this provision which forbids a debtor to give security for a debt on property in addition to a mortgage on land or which forbids the creditor to enforce such security. It derogates from the common law rights of a mortgagee of land and, consequently, I see no reason to read into it any intention beyond what is to be determined by a strict consideration of the words actually used.

The cases mentioned in the portion of the judgment of the Appellate Division, previously quoted, do not deal with this issue.

Macdonald v. Clarkson[1] dealt with an earlier provision of *The Judicature Act,* R.S.A. 1922, c. 72, s. 37(*o*)(i), which stated that, unless otherwise ordered by the Court or a judge, a judgment in an action brought on a mortgage of land should provide for realization, in the first instance, *pro tanto,* by a sale of the mortgaged land. A mortgagee, who had transferred his mortgage to the plaintiff, with a covenant to pay the mortgage if the mortgagor made default, was sued on that covenant. The mortgagor was a defendant in the same action to a suit brought in respect of

[1] [1923] 3 W.W.R. 690.

the mortgage. The case held that the action was an action on a mortgage, within the subsection, and that personal judgment could not be obtained on the covenant for payment until after sale of the land.

This decision was applied in *Holland-Canada Mortgage Co. Ltd. v. Hutchings*[1], in an action brought on a bond by which the defendant became a surety for the repayment of a mortgage. It was held that he had the right to compel the plaintiff to add the mortgagors as parties to the action.

British American Oil Co. Ltd. v. Ferguson[2] related to the application of the provisions of the predecessor of the subsection involved in the present case, but related to an action on a bond given by the individuals who, as a partnership, had agreed to purchase lands, whereby they were obliged to pay the amount of the purchase price if the partnership failed so to do.

Crang v. Rutherford[3] dealt with the earlier provision of *The Judicature Act,* and involved a "guarantee" by the mortgagors to pay the mortgage debt, without the mortgagee having to resort to foreclosure. This covenant was given in consideration of an extension by the mortgagee of the time for payment of the mortgage debt. It was held that the action, so far as it was based on the so-called guarantee, was an action brought on a mortgage of land, within the section.

Each of these cases was an action on a separate covenant for the payment of the amount payable either under a mortgage or an agreement for sale of land. In two of them the covenant was given by a surety. In the other two it was given by the debtors themselves. The reasoning in these cases may be summarized in the following extracts from two of them.

In the case of *Macdonald v. Clarkson,* at p. 692, Clarke J.A. said:

> I think there can be little doubt that the substance of the action is the recovery of the mortgage debt, it is immaterial how or by whom paid, if paid in any way the action is at an end. The personal liability of the mortgagor arises from his covenant to pay contained in the mortgage and that of the appellant from his covenant to pay contained in the transfer, but in either case it is the mortgage debt that is to be paid. The plaintiff could not succeed without establishing the mortgage and the amount owing upon it. The covenants are the means of fastening liability for the mortgage

[1] [1934] 2 W.W.R. 137.
[2] (1951), 1 W.W.R. (N.S.) 103.
[3] [1936] 2 W.W.R. 205.

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debt upon the covenantors. Certainly an action against the mortgagor alone upon the covenant in a mortgage under *The Land Titles Act* would be an action brought upon a mortgage and if the covenants of the appellant were contained in the mortgage it would be an action upon the mortgage. What difference does it make that the covenant is contained in another instrument? It is still a covenant to pay the mortgage debt.

In *British American Oil Co. Ltd. v. Ferguson,* at p. 110, W. A. Macdonald J.A. said:

> It seems to me that the whole transaction and the only transaction between the parties was one relating to the sale of land. This transaction, at plaintiff's insistence, was expressed in two documents, and the two together constitute the agreement covering the sale of the land. They should be read and considered together.
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> In vol. II, *Corpus Juris (Secundum),* under the title "Bonds," para. 43, the following proposition, for which a number of authorities are cited, appears:
>
> > It may be stated generally that, where a bond and another contract or instrument relate to and form one and the same transaction or the bond refers to such other instrument or is conditioned for the performance of specific agreements set forth therein, such instrument with all its stipulations, limitations, or restrictions becomes a part of the bond, and the two should be read together and construed as a whole.
>
> In form, the liability of the defendants in this action arises under the obligation imposed by the terms of the bond, but in substance it is an action based on an agreement for the sale of land and its purpose is to recover the purchase-price of the land. When the two documents are read and construed as a unit, the action on the bond comes within the scope of *The Judicature Act,* RSA, 1942, ch. 129, sec. 36 (*o*), as completely as would an action based on the purchaser's covenant to pay.

In another decision of the Appellate Division, in the case of *Martin v. Strange and Stocks Co-op. Credit Society*[1], the Court expressly reserved the question of the applicability of the predecessor of the present subsection in respect of security collateral to an agreement for sale of land.

In my opinion the taking of the chattel mortgage in the present case was not an indirect method of attempting to enforce the personal covenant contained in the land mortgage, nor was this action, in so far as it sought foreclosure of the chattel mortgage, an action based on a mortgage of land, whose purpose was to recover the debt referred to in the land mortgage. The essence of the present transaction is that it consisted of a sale of a totality of assets, consisting partly of land and partly of chattels, under the terms of which the vendor was to be entitled to security on all assets sold. The chattel mortgage was a security upon a specific

[1] [1943] 2 W.W.R. 123, 4 D.L.R. 367.

part of those assets and its enforcement is not, in my view, merely an indirect attempt to enforce the covenant for payment contained in the land mortgage.

The respondents also contended that the Supreme Court of Alberta did not have jurisdiction to foreclose the chattels secured by the chattel mortgage because of the provisions of *The Seizures Act,* R.S.A. 1955, c. 307, and of *The Conditional Sales Act,* R.S.A. 1955, c. 54. In view of the decision of the Appellate Division on the first point, it did not have to deal with this issue.

The former statute, as its title indicates, is "An Act respecting Executions, Seizures under Writs of Execution, and Seizures under Powers of Distress". Clearly the present case does not relate to an execution or a seizure under a writ of execution.

"Power of distress" is defined in s. 2(*h*) as follows:

> (*h*) "power of distress" means the right that a person has to enforce the payment of any claim against, or the taking of any goods or chattels out of the possession of, another person by the taking of a personal chattel out of the possession of such last mentioned person otherwise than by the authority of a writ of execution or other process of a similar nature;

"Distress" is defined in s. 2(*d*):

> (*d*) "distress" means any and all acts or things done in the exercise of a power of distress;

Section 22 provides:

> 22. No distress shall be made and no levy shall be made under any distress unless the person entitled to cause the distress and levy to be made or his duly authorized agent has executed and delivered to some person authorized by this Act to make and levy a distress a proper warrant in that behalf.

The Act contains provisions as to the procedure to be followed where goods have been seized under a distress warrant.

The Act restricts the appellants' rights regarding the taking of possession of the chattels mortgaged under power of distress. It does not, however, expressly or by implication, purport to prevent proceedings for the foreclosure of a chattel mortgage.

I agree with the statement made in Barron & O'Brien on "Chattel Mortgages & Bills of Sale", 3rd ed., p. 128, that "It seldom happens in practice that a mortgagee of personal chattels seeks the assistance of the Court by foreclosure, yet

such a course is open to him." In my opinion the Supreme Court has jurisdiction to entertain such proceedings and there is nothing in *The Seizures Act* which precludes it from so doing.

The provisions of *The Conditional Sales Act* on which the respondents rely are the following:

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19. (1) When any goods or chattels are hereafter sold and after delivery the vendor has a lien on them for all or part of the purchase price, the vendor's right to recover the unpaid purchase money, if he seizes or causes the said goods or chattels or a portion thereof to be seized under a conditional sale agreement, is restricted to his lien on the goods or chattels and his right to repossession and sale thereof, in which case no action is maintainable for the purchase price or any part thereof notwithstanding anything to the contrary in any other Act or in an agreement or contract between the vendor and purchaser.

(2) Instead of seizing or causing to be seized the goods or chattels or any of them under the provisions of the conditional sale agreement, the vendor may elect to bring an action against the purchaser for the purchase price or part thereof of any of the goods or chattels so sold.

(3) If the said goods or chattels or any of them are seized under an execution issued pursuant to a judgment obtained in the said action, then the vendor's right to recover under the said judgment in so far as it is based on the purchase price of the said goods or chattels is restricted to the amount realized from the sale of the said goods or chattels so seized and the said judgment, to the extent that it is based upon the purchase price of the said goods or chattels and the taxed costs, shall be deemed to be fully paid and satisfied.

(4) This section applies to all instalment sales whether effected by way of a conditional sale agreement or lien note or by way of an agreement or arrangement made at the time of sale or subsequent thereto whereby the purchaser gives to the vendor a chattel mortgage or bill of sale covering the whole or part of the purchase price of the goods or chattels sold.

If, by virtue of subs. (4), the provisions of s. 19 are applicable in the present case to the agreement of June 30, 1959, I do not see how, in the present proceedings, that section does anything more than to limit the remedy of the appellants, in respect of the chattel mortgage, to the chattels mortgaged, just as s. 34(17) of *The Judicature Act* limits their rights, in respect of the land mortgage, to the land. The appellants are not, in these proceedings, seeking anything more than foreclosure of the land and of the chattels. They do not ask for a judgment over in respect of any deficiency and the judgment given by the learned trial judge does not purport to give them anything more.

I would, therefore, allow this appeal and restore the judgment of the learned trial judge. The appellants should be entitled to their costs in this Court and in the Court below.

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Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitors for the defendants, respondents: Shortreed, Shortreed & Stainton, Edmonton.

HENRI-PAUL DUFOUR AND RENE DROLET (*Defendants*) .... APPELLANTS;

1961 *Nov. 16

AND

1962 Apr. 24

JEAN FERLAND (*Plaintiff*) .... RESPONDENT.

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

Jury trial—Motor vehicles—Jury's verdict—Written questions and answers—Sufficiency—Clarity—Code of Civil Procedure, art. 483.

The plaintiff was driving his motorcycle when it collided with a vehicle owned by the defendant Dufour and driven by his employee Drolet. The jury came to the conclusion that the action should be dismissed and the trial judge so ordered. The Court of Appeal ordered a new trial on the ground that the jury's answers to the questions put to it were not sufficiently clear so as to satisfy the requirements of art. 483 of the *Code of Civil Procedure*. The defendants appealed to this Court.

Held: The appeal should be allowed, and the jury's verdict as well as the judgment of the trial judge should be restored.

The jury's verdict must be sufficiently clear so that the trial judge can determine whether or not there was civil liability. Some of the jury's answers in this case could have been clearer, but the verdict taken as a whole allowed the Court to supply the minor deficiencies. Article 483 is not to be construed too narrowly, and the Court should consider the answers as a whole. Meticulous criticisms of a jury's findings were not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. In the present case the verdict clearly showed that the plaintiff had failed to make out a case, and that the plaintiff's motocycle struck the rear of the defendant's vehicle. This finding was sufficient to allow the trial judge to render judgment in accordance with the verdict of the jury. *B.C. Electric Ry. v. Dunphy*, 59 S.C.R. 263, and *Sloan v. Fraid,* [1943] Que. K.B. 91, referred to.

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

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APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Lacroix J. and ordering a new trial. Appeal allowed.

W. Desjardins, Q.C., and *A. Desjardins,* for the defendants, appellants.

J. de Billy, Q.C., and *A. Marceau,* for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Il s'agit dans la présente cause d'un jugement de la Cour du banc de la reine de la Province de Québec[1], qui a maintenu l'appel du demandeur en Cour supérieure et a ordonné un nouveau procès.

Le demandeur-intimé conduisait sa motocyclette dans les limites du Village de Beaupré, et vint en collision avec une camionnette, propriété de Henri-Paul Dufour et conduite par son préposé René Drolet. A l'issue du procès, le jury vint à la conclusion que l'action devait être rejetée, et l'honorable Juge Gérard Lacroix a confirmé le verdict rendu. La Cour du banc de la reine, M. le Juge Miquelon dissident, a cru que les réponses du jury aux questions posées n'étaient pas suffisamment précises, et que les exigences de l'art. 483 C.P. qui veut que le verdict soit explicite et articulé, n'ont pas été satisfaites.

Les questions posées au jury et pertinentes à la détermination de la présente cause sont les suivantes:

1.—Le demandeur a-t-il été victime d'un accident le ou vers le 10 juin 1959, alors qu'il conduisait sa motocyclette, sur la route Royale à Beaupré?

2.—Cet accident a-t-il été le résultat d'une collision entre la motocyclette du demandeur et une camionnette de livraison appartenant à Henri-Paul Dufour et conduite par René Drolet?

3.—Le conducteur de cette camionnette était-il l'employé et le préposé du défendeur Henri-Paul Dufour, et dans l'exercice de ses fonctions?

4.—L'accident dont fut victime le demandeur est-il dû à la seule faute ou la seule négligence ou imprudence de René Drolet, l'employé du défendeur?
Si oui, en quoi consiste cette faute ou cette négligence?

5.—L'accident est-il dû à la seule faute ou la seule négligence du demandeur Jean Ferland lui-même?
Si oui, en quoi consiste cette faute ou cette négligence?

[1] [1961] Que. Q.B. 290.

6.—Cet accident est-il dû, pour une partie, à la faute ou à la négligence de René Drolet, l'employé du défendeur Dufour, et en même temps, pour une partie, à la faute ou à la négligence du demandeur Jean Ferland?

Si oui, dites:

a) quelle a été la faute ou la négligence de René Drolet?

b) quelle a été la faute ou la négligence du demandeur Jean Ferland?

Les réponses ont été ainsi rédigées:

1re question: Oui, 12.
2e question: Oui, 12.
3e question: Oui, 12.
4e question: Non, 12.
5e question: Oui 11 sur 12, on a supposé qu'il avait eu une distraction.
6e question: Sans réponse.
a) sans réponse.
b) sans réponse.

Personne ne conteste, et personne ne peut contester, que les réponses du jury, comme dans le cas présent, lorsqu'il y a eu définition des faits, le verdict doit être suffisamment précis pour permettre au juge au procès de déterminer si, en droit, il y a eu ou non responsabilité civile.

Il s'agissait dans cette cause de déterminer si c'est le camion de Dufour qui a frappé la motocyclette de Ferland, ou si c'est Ferland, comme l'expliquait le juge aux jurés, qui, par inhabilité ou distraction, a frappé le camion sur le côté droit arrière. C'est sur ce point que le débat a été engagé.

En formulant les réponses qu'il a données, le jury évidemment est arrivé à la conclusion que c'est la motocyclette qui a frappé le camion. Certaines réponses pourraient être sûrement plus précises, mais l'ensemble du verdict permet de suppléer à ces insuffisances mineures. Les réponses n'attribuent aucune faute au conducteur du camion, et, à la cinquième question, le jury exprimait l'opinion que l'accident était dû à la seule faute de Ferland qui aurait été distrait. C'est la conclusion qu'il faut nécessairement tirer de l'ensemble des réponses, à la lumière des instructions données par M. le juge Lacroix qui a clairement défini les questions qui étaient en litige.

La loi ne veut pas et n'a pas cette rigidité qui exige une précision rigoureuse à chaque réponse, mais c'est l'ensemble

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Taschereau J

de ces réponses qu'il faut considérer. Ainsi, dans son Manuel de la Cour d'Appel, commentant cet art. 483 du Code de P.C., M. le juge Rivard dit avec infiniment de raison:

> qu'il y a lieu d'intervenir seulement si la réponse omise importe pour la décision du procès, et que le reste du verdict ne permet pas d'y suppléer.

Dans une cause de *British Columbia Electric Railway Company v. Dunphy*[1], la Cour Suprême du Canada a eu l'occasion de dire sous quel aspect il fallait expliquer cet art. 483 et l'honorable juge Anglin dit, dans des notes, à la page 271, ce qui suit:

> Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. While it might have been more satisfactory had the second finding been more specific, if dealt with in the manner I have indicated it seems to be sufficiently certain what the jury meant by it.

Et l'honorable juge Mignault, à la page 273:

> I think it sufficiently assigns the lack of sufficient precautions which in the jury's opinion caused the accident.

Dans *Sloan v. Fraid*[2], la Cour d'Appel a refusé d'intervenir et s'est exprimée de la façon suivante:

> If a jury answering the usual questions as to fault finds that the accident was not due exclusively to the fault of the defendant, that there was no common fault and that it was due exclusively to the fault of the plaintiff, without stating in what such fault consisted, such answers (not unreasonable in the light of the evidence) are sufficient to entitle the defendant to a judgment according to the verdict.

A mon sens, l'ensemble du verdict révèle clairement que le demandeur n'a pas prouvé son action, mais qu'il a, au contraire, été décidé par le jury que c'est la motocyclette qui a frappé l'arrière de la camionnette. Ceci était suffisant pour permettre au juge au procès de rendre un jugement suivant le verdict rendu.

L'appel doit donc être maintenu, le verdict de même que le jugement du juge au procès rétablis, et l'action rejetée avec dépens de toutes les Cours.

Appeal allowed with costs.

Attorneys for the defendants, appellants: Desjardins & Desjardins, Quebec.

Attorneys for the plaintiff, respondent: Marquis, Marceau & Jessop, Quebec.

[1] (1919), 59 S.C.R. 263, 50 D.L.R. 264.
[2] [1943] Que. K.B. 91.

THERESE CHAMPAGNE (*Defendant*) ..APPELLANT;

1962
*Feb. 21
Apr. 24

AND

GERMAIN LABRIE (*Plaintiff*) ....RESPONDENT.

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

Motor Vehicles—Child found injured on road—Defendant's car only one travelling on the road—Inference drawn by trial judge—Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53.

The plaintiff's three year old son was injured when he was struck by an automobile on a quiet country road. The boy was playing near the road at the time. Witnesses testified that they heard a noise, that they saw the child lying on the road, and that they saw a black car driving away. There was no other traffic. The defendant had driven a black car on that road at that time but denied any knowledge of the accident. The trial judge came to the conclusion, upon the evidence, that it was the black car driven by the defendant which had struck the child. This judgment was affirmed by the Court of Appeal. The defendant appealed to this Court.

Held: The appeal should be dismissed.

There were concurrent findings of facts and this Court could not interfere.

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

W. Desjardins, Q.C., and *A. Desjardins*, for the defendant, appellant.

S. Laverdière, Q.C., and *J. Turgeom, Q.C.*, for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Il s'agit d'un accident, où le jeune Gilles Labrie, âgé de trois ans aurait été frappé par une automobile, et sérieusement blessé. Le père de l'enfant a été ès-qual dûment autorisé à instituer les présentes procédures et il a réclamé de H. Champagne, propriétaire de la voiture, et de Thérèse Champagne qui conduisait le véhicule, conjointement et solidairement, la somme de $109,492.15. La Cour supérieure a maintenu l'action jusqu'à concurrence de $32,457.15 contre Thérèse Champagne, et l'a rejetée quant au propriétaire. La Cour du banc de la reine[1] qui n'a été saisie que de l'appel de Thérèse Champagne, a confirmé le jugement.

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

[1] [1961] Que. Q.B. 480.

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v.
LABRIE
Taschereau J.

Le dossier révèle que le jeune Champagne était à jouer sur le bord de la route, dans la paroisse de St-Magloire, où il a été vu par plusieurs personnes vis-à-vis la résidence des Labrie, et quelques instants plus tard, il a été retrouvé sur le pavé, grièvement blessé. Les témoins Labrie, Mme Arthur Racine établissent qu'ils ont entendu un bruit, qu'ils ont vu l'enfant étendu sur la rue, les jambes sur l'accotement—on vit également une auto noire qui montait dans la direction de la maison Champagne—il n'y en avait pas d'autre sur la route, et il est clair que c'est Thérèse Champagne qui conduisait cette voiture, modèle 1948.

Le juge au procès est arrivé à la conclusion, d'après l'ensemble de toutes les circonstances, que c'est Thérèse Champagne qui a frappé cet enfant, et la Cour du banc de la reine a partagé cette opinion—on s'est basé tel qu'on devait le faire, sur la balance des probabilités, et je ne vois pas, quand il y a unanimité sur les faits, que cette Cour puisse intervenir. Comme la Cour du banc de la reine, je suis d'opinion qu'il n'y a pas lieu de réduire le montant des dommages accordés.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Desjardins & Desjardins, Quebec.

Attorney for the plaintiff, respondent: Simon Laverdière, Quebec.

1961
*Nov. 3
1962
Apr. 24

EUGENIE GUERIN AND OTHERS (*Defendants*) .... APPELLANTS;

AND

MAURICE GUERIN AND OTHERS (*Plaintiffs*) .... RESPONDENTS.

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

Wills—English form—Testamentary incapacity—Undue influence—Medical evidence—Surrounding circumstances—Prima facie presumption of incapacity—Whether onus of capacity discharged.

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

The deceased, a bachelor of 87 years of age, after living in furnished lodgings for many years, went to reside with his sister, one of the defendants. He was suffering from diabetes, was hard of hearing and almost blind. Some two months later he was admitted to hospital for an operation. Before the operation, he expressed to his nephew, the other defendant, a sudden desire to make a new will. The nephew consulted a notary by telephone; the latter refused to attend but advised the nephew as to how a will in the English form should be drafted. No attempt was made to get in touch with the deceased's own notary. A document was written out from a draft prepared by the nephew. It was read out to the deceased, signed by him and witnessed by two witnesses. In this will the deceased left everything to his sister and named his nephew as sole executor. The will was attacked on grounds of testamentary incapacity and undue influence. The trial judge found in favour of the will but his judgment was reversed by the Court of Queen's Bench. The sister and the nephew appealed to this Court.

Held: The appeal should be dismissed.

The Court of Queen's Bench found that the medical evidence as to the physical and mental condition of the deceased at the time the will was executed coupled with the circumstances surrounding the preparation and execution of the will, were sufficient to raise a *prima facie* presumption of incapacity; that the burden of establishing capacity to have made the will was therefore shifted to the defendants; and that the latter had failed to discharge that burden. These findings should not be disturbed.

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

M. Marquis, for the defendants, appellants.

E. Poissant, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—In their action, respondents, who are a brother and certain nephews and nieces of the testator, Joseph Samuel Guérin, contest the validity of a will made on October 2, 1954, which left everything to the appellant Eugénie Guérin Foisy, a sister of the testator, and which named her son the appellant Edouard Foisy as sole executor. The will is attacked upon grounds of testamentary incapacity and undue influence.

The learned trial judge found in favour of the will but his finding was unanimously reversed on appeal[1].

[1] [1961] Que. Q.B. 84.

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GUERIN
Abbott J.

The impugned will, in the form derived from the laws of England, was made some four days prior to the testator's death in hospital following an operation, and is a short one. It reads as follows:

> Je lègue tous mes biens, meubles et immeubles, sans exception ni réserve, à ma sœur Eugénie Guérin, veuve non remariée de Adélard Foisy.
>
> Je révoque tous autres testaments que j'ai pu faire avant ce jour.
>
> Je nomme mon neveu, Edouard Foisy, comme mon seul exécuteur testamentaire.

If valid, the will revoked another will made by the deceased in authentic form on January 26, 1954, before I. R. Lavoie and colleague, notaries. Under the terms of this notarial will the testator after providing for certain particular legacies to the respondent Maurice Guérin and the respondents Paul Béchard and Marguerite Béchard, children of a deceased sister, named as his residuary legatees the appellant Madame Foisy and the children of two other sisters who had predeceased the testator.

The facts are fully set forth in the judgments of the learned trial judge and in the Court below. For the purpose of this appeal they can be shortly stated.

In 1954 the deceased Joseph Samuel Guérin was 87 years of age. He was a bachelor and for many years prior to August 1954 had been living in furnished lodgings. Early in August 1954, following a visit with relatives near Mont Laurier, he went to reside in the home of his sister, one of the appellants.

He had suffered for some time from diabetes, for which he was treated with insulin, was hard of hearing, and almost blind. Near the end of September 1954 he developed a serious infection in the form of an abscess on one of his buttocks.

His physician Dr. Louis Lamarche was called in to see him on September 27, 1954, and thereafter saw him every day until his death, with the exception of Sunday, October 3. Dr. Lamarche called in consultation a surgeon, Dr. Wilfrid Perrault, who visited the deceased for the first time on the afternoon of October 2, 1954. He recommended that an operation be carried out in hospital as soon as possible. The deceased was admitted to the Maisonneuve Hospital that same evening. Dr. Perrault visited his patient in hospital

the next day Sunday, October 3, operated on him the following day Monday October 4, and thereafter saw him each day until his death early in the morning of October 6.

The circumstances surrounding the preparation and execution of the impugned will must be ascertained largely from the evidence given by the appellant Edouard Foisy. According to Foisy, the deceased suddenly, between 5 and 6 p.m. on Saturday, October 2, expressed to him the desire to make a new will. Foisy then consulted by telephone a friend or acquaintance of his, one Etienne Duval, a notary, but the latter apparently refused to come to the Foisy home, pleading other engagements. Foisy testified however that Duval offered to advise him and did advise him over the telephone as to how a will in the English form should be drafted. No attempt was made to get in touch with the testator's own notary, and no reason was given for the failure to do so.

Foisy also telephoned to a friend, one Jean Loranger, who came to the Foisy house accompanied by another friend, one Jean-Paul Paquette, and these two acted as witnesses to the impugned document. This document was written out by Loranger in Foisy's room from a draft prepared by the latter, and after this had been done the three then entered the deceased's room. Apparently the appellant Madame Foisy and one of her daughters were also present at this time. After the document had been read to the deceased by Foisy, he signed it in the presence of the witnesses Loranger and Paquette. All this appears to have taken place between six and eight o'clock on the evening of October 2nd.

Evidence as to the physical condition and mental attitude of the deceased was given by Dr. Lamarche and Dr. Perrault. It is clear from their testimony that the deceased was a very sick man, suffering from chronic diabetes and uremia, complicated by a severe diabetic abscess. As to his mental attitude, Dr. Lamarche testified that when he saw him on the morning of October 2 he found him "un peu hébété". Dr. Perrault when he saw the deceased that afternoon stated that he was "plus ou moins conscient".

The records of the Maisonneuve Hospital of the admission and treatment of the deceased were received in evidence as an exhibit at the trial by consent of both parties. Dr.

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Gervais, the interne who examined the patient on admission had recorded—"Le patient est sourd et répond très mal aux questions".

Dr. Julien Pesant, a specialist in diabetes—who had not seen the patient—was examined as an expert, and gave as his opinion based upon the medical record of the deceased, that by reason of his age and physical condition "il pouvait être certainement un petit peu omnibulé . . . . un peu dans les nuages".

Testamentary capacity was considered by this Court in *Léger v. Poirier*[1]. In the judgment of the majority delivered by Rand J., the leading cases were examined and that learned judge said at p. 161:

> But there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like; this has been recognized in many cases: . . . .
>
> Merely to be able to make rational response is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole.

That statement has been approved subsequently by this Court in *Mathieu et al. v. St. Michel*[2]; *McEwen v. Jenkins*[3]; and *Hayward v. Thompson*[4].

The medical evidence in the case at bar, taken by itself was not perhaps sufficient to establish a *prima facie* case of testamentary incapacity. That evidence, however, must be considered in conjunction with the surrounding circumstances. These included such matters as (1) the unseemly haste in the preparation and execution of the will; (2) the fact that no attempt was made to obtain independent advice from the deceased's own notary, who had acted for him for many years, and before whom he had recently executed a will in authentic form; and (3) the absence of any satisfactory explanation as to why the deceased should suddenly have decided to bequeath all his property to one sister—

[1] [1944] S.C.R. 152, 3 D.L.R. 1.
[2] [1956] S.C.R. 477, 3 D.L.R. (2d) 428.
[3] [1958] S.C.R. 719 at 725.
[4] (1960), 25 D.L.R. (2d) 545.

with whom he had recently come to reside—and to disinherit his brother and the other immediate relatives benefited under the notarial will.

The Court below found that the medical evidence as to the physical and mental condition of the deceased at the time the will was executed and the circumstances surrounding its preparation and execution, were sufficient to raise a *prima facie* presumption of incapacity, that the burden of establishing capacity to have made the will was therefore shifted to appellants, *Russell v. Lefrançois*[1], and that they had failed to discharge that burden. In my opinion those findings should not be disturbed.

It should be added, perhaps, that the judgment of the learned trial judge did not depend upon any finding as to credibility. Even accepting that the deceased knew and approved of the contents of the will as it was put to him immediately before execution, as my brother Judson has pointed out in *Hayward v. Thompson, supra*, at p. 557, this still leaves untouched the quality of the judgment that he was able to bring to bear on the making of a will.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the defendants, appellants: Nadeau, Villeneuve & Pigeon, Montreal.

Attorney for the plaintiffs, respondents: Emile Poissant, Montreal.

SURVEY AIRCRAFT LTD. (*Plaintiff*) ...APPELLANT;

1962
*Feb. 8, 9
May 7

AND

R. C. STEVENSON, in his quality as Attorney in Canada for the Non-Marine Underwriters at Lloyds, London, referred to in Lloyd's Policy of Aviation Insurance No. CA 93410X and ORION INSURANCE CO. LTD. (*Defendants*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Insurance—Aviation—Policy covering loss or damage to aircraft—Clause providing for exclusion of coverage if terms of Certificate of Airworthiness violated—Term of certificate prohibiting carriage of passengers—Crash of aircraft while passenger aboard—Risk excluded.

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*PRESENT: Locke, Abbott, Martland, Judson and Ritchie JJ.

[1] (1883), 8 S.C.R. 335 at 372.

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v.
STEVENSON *et al.*

A policy of insurance covering an aircraft owned by the plaintiff company contained a clause providing for exclusion of liability if such aircraft was operated in violation of the terms of the airworthiness certificate issued by the Department of Transport. A term of the certificate was that flight crew, mechanic or survey operators only were to be carried in the aircraft during flight. In the policy "passenger carrying" was included in the definition of "private business and pleasure" which was one of the uses for which the aircraft was insured. On a test flight, during which a 15-year old boy was carried as a passenger, the plaintiff's pilot engaged the plane in various acrobatics in the course of which it crashed. The pilot and his passenger were killed and the plane was totally destroyed. An action brought by the plaintiff to recover indemnity in respect of the aircraft was allowed by the trial judge, but, on appeal, the Court of Appeal by a majority set aside this judgment and dismissed the action. The plaintiff then appealed to this Court.

Held: The appeal should be dismissed.

Per Locke and Abbott JJ.: The restrictive terms of the airworthiness certificate were material to the risk and should have been disclosed by the plaintiff when applying for the insurance.

Per Locke, Abbott, Martland and Judson JJ.: The risk was excluded while the aircraft was carrying a passenger contrary to the provisions of the certificate, by reason of the exclusion clause in the policy.

Per Ritchie J.: By the provisions of the exclusion clause in the policy, a flight, during which any of the terms of the Certificate of Airworthiness were being violated, was excluded from the coverage. As the plaintiff did not disclose the terms of the certificate there could be no ground for the suggestion that the inclusion of passenger liability coverage or any other provision of the policy could have the effect of overriding the provisions of the exclusion clause and the Certificate of Airworthiness.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing by a majority a judgment of Sullivan J. Appeal dismissed.

D. McK. Brown, Q.C., and *D. E. Jabour*, for the plaintiff, appellant.

W. J. Wallace and *H. Housser*, for the defendants, respondents.

The judgment of Locke and Abbott JJ. was delivered by

LOCKE J.:—In this action the appellant sought to recover from the respondent Stevenson, as attorney in Canada for the Non-Marine Underwriters at Lloyd's, and from the respondent company, indemnity in respect of the damage suffered by it in the crash and burning of an aircraft near Prince George, B.C., on June 25, 1956.

[1] (1961-62), 36 W.W.R. 446, 30 D.L.R. (2d) 539.

The insurance contract upon which recovery is sought against Stevenson is embodied in a document described as a Certificate of Aviation Insurance dated April 27, 1956, signed by Hansen and Rowland, Inc., an American corporation, in which that company certified that it had procured insurance on the terms specified from underwriters at Lloyd's, London, upon three airplanes, the property of the appellant, including a Lockheed P.38, upon the terms and conditions stated. At a later date, Orion Insurance Co. Ltd. issued a policy to the appellant, insuring 10.46 *per cent* of the risk upon the same terms.

The action was tried before Sullivan J. who gave judgment for the appellant against both of the defendants, but that judgment was set aside by a judgment of the Court of Appeal[1] and the action dismissed, Desbrisay C.J.B.C. dissenting.

The business of the appellant company, as stated on the face of the certificate, is the making of aerial surveys which involves taking photographs at heights approximating 35,000 ft. The aircraft in question was engaged in such work at Prince George, being operated for the appellant by Frank Pynn, a qualified and licensed pilot. The work upon which he was engaged at the time in question was carrying out high altitude aerial surveys of terrain lying to the north of Prince George.

On the day of the accident, Pynn proposed to take the plane from the Prince George Airport and make what was apparently a test flight for the purpose of checking the intercommunicating radio with which it was equipped. Some work had been done on this at Pynn's request by Allan F. Clarke, the radio operator of the Department of Transport at the airport. Pynn asked Clarke if he would like to go up with him while this was being done but the latter declined and suggested that his son, some 15 years old, might like to go. As a result, the boy was carried as a passenger and while the plane was flown, at first, to a considerable height after it left the airport, thereafter it was flown by Pynn at a very low altitude over Prince George and engaged in various acrobatics, including flying upside down, when it crashed. Pynn and young Clarke lost their lives and the plane was totally destroyed.

[1] (1961-62), 36 W.W.R. 446, 30 D.L.R. (2d) 539.

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STEVENSON *et al.*
Locke J.

Under the provisions of s. 4 of the *Aeronautics Act*, R.S.C. 1952, c. 2, the Minister of Transport is authorized, subject to the approval of the Governor in Council, to make regulations to control and regulate air navigation over Canada, including the licensing of pilots and defining the conditions upon which aircraft may be used or operated.

Regulation 210 of the *Air Regulations*, made pursuant to this power which were applicable at the relevant times, provided that no person shall fly an aircraft unless there is in force in respect of such aircraft a Certificate of Airworthiness issued under such regulations and unless all conditions upon which a certificate or permit was issued have been complied with.

Regulation 211 provided that the Minister may establish standards of airworthiness for aircraft including, *inter alia*, requirements in respect of any matter relating to the safety of such craft and, upon being satisfied that an aircraft conforms to the standards of airworthiness established in respect of it, may issue a certificate to be known as a Certificate of Airworthiness. Subsection (6) of Regulation 211 provided that a Certificate of Airworthiness should contain such conditions relating to the equipment, maintenance and operation of the aircraft as may be prescribed by the Minister.

The Certificate of Airworthiness obtained, upon the application of the appellant, for the aircraft in question was issued by the Air Services Branch of the Department of Transport on June 24, 1954. The category of the aircraft was described as being "Normal (restricted)". "Normal category" was described under a sub-heading reading "Classification of Aircraft by Employment" as including public transport for passengers, mails and goods, private purpose aircraft and aerial work other than in respect of the first three mentioned uses. A separate category, the nature of which was described, was designated Acrobatic Category. Below these categories the following appeared:

> Aircraft in normal category are precluded from evolutions causing abrupt changes in altitude.

On page 3 of the certificate, under a general heading reading "Precautions To Be Taken For Safety In Navigation", appeared, *inter alia*:

2. Valid for aerial survey only.
3. Flight crew, mechanic or survey operators *only* to be in the aircraft during flight.

The certificate issued to the appellant described its occupation as aerial surveys. In the space reserved for the description of the purpose for which the aircraft would be used appeared the following:

> See endorsement No. 1, paragraph No. 6, section "A" & "E" private business & pleasure & serial (sic) surveys.

The word "serial" should presumably have read "aerial". The endorsement referred to defined the expression "private business and pleasure" as including, *inter alia,* passenger carrying not for hire or reward.

On the face of the certificate there appeared the following:

> The insurance afforded hereunder is made in consideration of the declaration herein made and payment of premiums herein provided and subject to the limits of liability, exclusions, conditions and other terms of this certificate and/or policy, and is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the insurer's liability as to each such coverage shall be as stated herein, subject to all the terms and conditions of this Certificate and/or Policy having reference thereto.

Endorsement No. 3, forming part of the certificate, included under the risks covered, passenger liability to an amount of $100,000.

The insuring agreements were stated with particularity on the second page of the certificate and these were followed by a series of exclusions from the risks. Of these, the principal one to be considered, read with the context, is as follows:

> This certificate and/or policy does not cover any liability:—
>
> (J) While in flight occurring: While the terms of the Civil Aeronautics Administration Airworthiness Certificate, or Operations Record of the insured Aircraft are violated, or while with the consent of the Assured the terms of the pilot's certificate are being violated.

Liability was denied by the insurers and this action was commenced on June 28, 1957. The original statement of defence was filed on October 31, 1957, and it is evident from its terms that the respondents' solicitors were at that time unaware of the restrictions upon the use of the plane imposed by the airworthiness certificate, as no mention was made of that document. The appellant had filed a proof of loss dated August 23, 1956. This contained no mention of these restrictions or, in the description of the accident, that the aircraft had been destroyed while engaging in acrobatics. Thereafter, the respondents became aware of the terms of

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Locke J.

the certificate and an amended defence setting up, *inter alia,* the defence that the aircraft was carrying a passenger and engaging in acrobatics at the time the accident occurred, was filed. In addition, the non-disclosure of the terms of the certificate when applying for the insurance and when filing the proofs of loss was raised as a defence.

Agreeing as I do with Sheppard J.A. that the term of the certificate that flight crew, mechanic or survey operators only were to be carried in the aircraft applied to all flights, whether aerial surveys or otherwise, and that exclusion (J) of the policy applied, these terms of the airworthiness certificate were material to the risk and should have been disclosed by the appellants when applying for the insurance. The evidence is clear that there was no such disclosure.

Mr. D. V. Magee was the manager of the Aviation Insurance Department of Hansen and Rowland, Inc. at the time the insurance was applied for and the certificate issued. While there had been a written application for policies previously issued, there is no mention of any in respect of the certificate in question. Magee said that he did not inquire as to the terms of the airworthiness certificate when deciding to issue the certificate insuring against passenger hazard, the reason apparently being that he assumed that the applicant would not be applying for insurance protection against a risk which it was not authorized to assume. As he put it, the insurers relied upon the exclusion clauses in the certificate.

At the trial, the respondents tendered the evidence of the witness Spexarth who was experienced in aviation insurance underwriting and he was asked whether, if he had known of the terms of the airworthiness certificate to which reference has been made, he would have undertaken the risk. The question was intended obviously to obtain the opinion of the witness as to whether these restrictive terms were, in his opinion, matters which he would consider to be material in deciding whether or not to recommend that the risk be undertaken. The evidence was objected to and excluded. It was clearly admissible, in my opinion (Phipson on Evidence, 9th ed., p. 404, and the cases there cited). However, the evidence, while admissible, was unnecessary since the materiality of this information is in this matter obvious.

The learned trial judge who found for the plaintiff proceeded upon the ground that the defendants had failed to satisfy the onus resting upon them to prove that the loss was within the exclusions in the certificate. He was of the opinion that the evidence of Magee showed that there had been no failure by the applicants to make full disclosure, a conclusion with which, with great respect, I am unable to agree. The restrictive terms of the airworthiness certificate were admittedly not communicated.

Sheppard J.A. held that the risk was excluded while the aircraft was carrying a passenger contrary to the provisions of the airworthiness certificate, by reason of the exclusion clause (J) above quoted. Davey J.A. agreed that the action should fail upon this ground. I respectfully agree with this conclusion and with the reasons assigned for it by Sheppard J.A.

I see no ambiguity in the language of the exclusion clause or of the terms of the airworthiness certificate to which I have referred. In view of this conclusion, I find it unnecessary to deal with the various other defences raised, such as the legal consequences of the failure to disclose the material facts referred to when applying for the insurance and when filing the proofs of loss.

I would dismiss this appeal with costs.

MARTLAND J.:—I concur with my brother Locke in expressing agreement with the conclusion reached by Sheppard J.A., with which Davey J.A. agreed, that the risk was excluded while the aircraft was carrying a passenger, contrary to the provisions of the Certificate of Airworthiness, by reason of the exclusion created by clause (J) of the exclusions from the risks covered by the insurance contract. I would dispose of this appeal in the manner proposed by him.

JUDSON J.:—I would affirm the judgment of the Court of Appeal dismissing this action on the ground which is common to the reasons of Davey and Sheppard JJ.A., namely, that the plaintiff's pilot was operating the aircraft contrary to clause (3) of the Certificate of Airworthiness by carrying a passenger.

RITCHIE J.:—I have had the advantage of reading the reasons for judgment prepared by my brother Locke in which the circumstances of the unfortunate accident which

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gave rise to this litigation are fully outlined, and I agree that the matter should be disposed of in the manner proposed by him.

I would dismiss this appeal on the common ground taken by Mr. Justice Davey and Mr. Justice Sheppard that the coverage afforded by the policy sued upon did not include any loss occurring while a passenger was being carried in the insured aircraft.

By the provisions of s. 2A of Endorsement No. 1 to the policy now sued upon (hereinafter called "Exclusion J"), a flight, during which any of the terms of the Certificate of Airworthiness issued by the Department of Transport in respect of the insured aircraft are being violated, is excluded from the coverage.

The terms of the paragraph numbered 3 of clause D of the Second Part of the Certificate of Airworthiness have the effect of limiting the capacity of this aircraft during flight to "Flight Crew, Mechanic or Survey Operators", and I agree that when this paragraph is read in conjunction with Exclusion J the effect is to exclude the aircraft from coverage under the policy while carrying passengers, but it is contended on behalf of the appellant that the inclusion of "Passenger Carrying" in the policy definition of "PRIVATE BUSINESS AND PLEASURE" which is one of the uses for which the aircraft was insured should be read as overriding this exclusion or at least as creating an ambiguity which is to be resolved in the appellant's favour.

In the present case, however, the terms of the Certificate of Airworthiness were not disclosed to the insurers, and Mr. D. V. Magee, one of the appellant's witnesses, who was the manager of the Aviation Insurance Department of Hansen & Rowland, Inc., general agents for the insurers, at the time when the terms of the policy were negotiated with Rush & Upton Limited, insurance brokers, who were agents for the appellant, testified that if he had known that carrying passengers was in violation of the terms of the Certificate of Airworthiness he would either have refused the premium for passenger liability carriage or taken it upon himself to modify the provisions of Exclusion J so as to extend the coverage. It is apparent to me, however, that as the appellant did not disclose the terms of the Certificate there can be no ground for the suggestion that the inclusion

of passenger liability coverage or any other provision of the policy can have the effect of overriding the provisions of Exclusion J and the Certificate of Airworthiness.

The argument of counsel for the appellant is founded in large measure on the proposition which is stated in his factum in the following terms:

> Exceptions or exclusionary clauses are to be construed strictly against the Insurer, and in case of doubt or ambiguity the wording is to be construed in accordance with the principle of *contra proferentum.*

The extent of the exclusion for which provision is made in Exclusion J is governed by the terms of the Certificate of Airworthiness, and it is, therefore, contended that "the underwriters have brought into play the same interpretation of the certificate as would apply to the policy."

Under the so-called principle of *contra proferentum,* ambiguities in insurance policies are, in appropriate cases, construed in favour of the insured on the ground that the insurers have selected the wording of the policy and that they are, therefore, not to be entitled to the benefit of any genuine doubts created by their own draftsmanship which cannot be resolved by employing the ordinary rules of construction. In my view the principle was correctly stated by Lord Sumner in *London and Lancashire Fire Insurance Company v. Bolands, Limited*[1], and the following language in my opinion has direct application to the present case:

> It is suggested further that there is some ambiguity about the proviso, and that, under the various well-known authorities, upon the principle of reading words contra proferentes, we ought to construe this proviso, which is in favour of the insurance company, adversely to them. That, however, is a principle which depends upon there being some ambiguity—that is to say, some choice of an expression—*by those who are responsible for putting forward the clause,* which leaves one unable to decide which of two meanings is the right one. In the present case it is a question only of construction. There may be some difficulty, there may be even some difference of opinion, about the construction, but it is a question quite capable of being solved by the ordinary rules of grammar, and it appears to me that there is no ground for saying that there is such an ambiguity as would warrant us in reading the clause otherwise than in accordance with its express terms. (The italics are mine.)

It is clear that the principle is limited in its application to cases in which the ambiguity has been created by words which the insurers have themselves selected and its force is very considerably weakened when it appears that the wording of the policy has been arrived at, as it was in the present

[1] [1924] A.C. 836 at p. 848.

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case, as the result of negotiation between the insurers and a broker for the insured. In any event, I cannot see that the principle could have any application to the terms of a document such as the Certificate of Airworthiness in the present case which was at all times in the possession of the insured and the wording of which was not selected by the insurers but was unknown to them because the insured failed to disclose it. I do not find any ambiguity in the combined effect of clause J of the policy and the provisions of the Certificate of Airworthiness, but if such ambiguity existed, the *contra proferentum* rule could not, in my opinion, be applied to the Certificate.

As I have indicated, I would dispose of this appeal as proposed by my brother Locke.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Russell & Dumoulin, Vancouver.

Solicitors for the defendants, respondents: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

1962
*May 1
June 25

WALTER DRESSLER (*Complainant*) ....APPELLANT;

AND

TALLMAN GRAVEL & SAND SUPPLY LTD. (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Appeal by way of stated case—Whether questions of law raised—Whether necessary facts before the Court—Whether proper procedure.

The appellant, who had been an employee of the respondent, laid an information under *The Employment Standards Act*, 1957 (Man.), c. 20, charging that the respondent had unlawfully failed to pay him overtime rates. When the matter came before the magistrate, he, without hearing any evidence, ordered the charges dismissed on the grounds that the information was for an offence which took place more than six months before the time when the proceedings were commenced and that the information was void for duplicity and could not be amended. On appeal by way of a stated case, the respondent moved in the Court of Appeal, before any hearing on the merits, to dismiss the appeal upon grounds that the stated case did not raise a question of law; that the

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

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stated case was defective in form in that it did not contain a statement of facts sufficient to enable the Court to come to a decision of the question of law; and that the appellant's proper procedure was not to appeal by way of stated case but to move for a *mandamus* to compel the magistrate to exercise his jurisdiction. By a majority decision the motion was allowed and the stated case quashed. Pursuant to special leave, the appellant appealed to this Court.

Held: The appeal should be allowed and the order of the Court of Appeal set aside.

The rules of the Court of Appeal for Manitoba which prescribed what was to be contained in a case stated under the Code were made by the Judges of the Court of Appeal under the powers vested in them by the Code on May 13, 1930. The case in the present matter complied with these requirements.

The points referred to in the stated case were matters of law which had in fact been dealt with by way of written submissions to the magistrate. Every fact necessary to decide the questions of law was before the Court and the points of law were arguable upon the face of the information itself. As to the objection that the proper procedure was not by way of stated case but by *mandamus* to compel the magistrate to exercise his jurisdiction, this was not the case of a magistrate declining to enter upon a hearing because he was of the opinion that he had no jurisdiction, but one in which, exercising his jurisdiction, he had dismissed the information on grounds of law which appeared to him sufficient.

The motion to dismiss or quash the stated case, as it was expressed, should have been dismissed and the questions of law, which were clearly raised, determined.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], which dismissed an appeal from a decision of Police Magistrate Kyle dismissing an information laid under *The Employment Standards Act*, 1957 (Man.), c. 20. Appeal allowed.

D. Gibson, for the complainant, appellant.

G. A. Higenbottam, and *R. B. Goodwin,* for the defendant, respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal brought by special leave of this Court from a judgment of the Court of Appeal for Manitoba[1] which dismissed the appeal of the present appellant from a decision of Police Magistrate Kyle of the Provincial Police Court, dismissing an information laid against the respondent under the provisions of *The Employment Standards Act*, 1957 (Man.), c. 20.

[1] (1961), 35 W.W.R. 452, 131 C.C.C. 48, 36 C.R. 227, 29 D.L.R. (2d) 130.

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Locke J.

At the request of the present appellant, the magistrate stated a case under the provisions of s. 734 of the *Criminal Code*. The respondent moved before the Court of Appeal to "quash or dismiss the appeal" and it was upon this motion that the appeal to that Court was dismissed and, accordingly, the questions of law propounded were not considered.

Section 27 of *The Employment Standards Act* provides that no employer shall require or permit an employee to work or be on duty for more than 8 hours in a day and, if a male employee, for more than 48 hours in any week unless in place of the rate of wages ordinarily paid the employer pays him overtime rates for each hour in excess of these limits the employee is required or permitted to work.

Section 14 declares, *inter alia,* that every person who contravenes any provision of the Act is guilty of an offence and, if no other penalty is by the Act provided, is liable on summary conviction to a fine, in the case of an employer, of $500, and to imprisonment or to both. By subs. (2), where the contravention continues for more than one day, the person is guilty of a separate offence for each day that it continues.

Section 16(2) provides that in default of payment by an employer of wages found to be due by him, the magistrate may issue his warrant to levy the amount of the wages and costs by seizure and sale of the goods and chattels of the employer.

Prosecutions for offences under this statute are subject to the provisions of *The Summary Convictions Act,* R.S.M. 1954, c. 254. By s. 7 of that Act, Part XV of the *Criminal Code* applies and, *inter alia,* the present s. 693(2). This provides that no proceedings may be instituted more than six months after the time when the subject-matter of the proceedings arose.

The information charges the respondent with having permitted Dressler

> to be on duty for more than eight hours on various days between the 9th day of February, A.D. 1959 and the 28th day of November, A.D. 1959; and between the 6th day of April, A.D. 1960 and the 18th day of May, A.D. 1960, did (sic), on the 18th day of May A.D. 1960, unlawfully fail to pay to the said Walter Dressler, overtime rates for each hour or part of an hour in excess of the said eight hours worked on the said days in place of the rate of wages ordinarily paid to the said Walter Dressler, contrary to the provisions of the Employment Standards Act R.S.M. 1957, Chap. 20,

The matter came before the magistrate on November 21, 1960, and, without hearing any evidence, he ordered that the charges be dismissed on the following grounds, namely that:

(1) The Information was defective in that it disclosed the occurrence of an offence the subject matter of which took place in part more than six months before the time that the proceedings were instituted

(2) The Information was void for duplicity and not capable of being amended.

The respondent moved in the Court of Appeal, before any hearing on the merits, to dismiss the appeal upon grounds only three of which require consideration, namely, that the stated case did not raise a question of law: that the stated case was defective in form in that it did not contain a statement of facts sufficient to enable the Court to come to a decision of the question of law: and that the appellant's proper procedure was not to appeal by way of stated case but to move for a *mandamus* to compel the magistrate to exercise his jurisdiction.

The learned Chief Justice of Manitoba, with whom Schultz and Guy JJ.A. agreed, considered that the stated case was defective in not disclosing that the dismissal was made on preliminary objections without hearing evidence: that the facts upon which the magistrate based his ruling that the information was void for duplicity and not capable of being amended were not set out in the case as stated: that while reference was made to the information the case did not state what evidence was offered by way of admission of facts or otherwise to contradict or support the charges made and that there was not a sufficient disclosure of the grounds upon which the magistrate based his decision. Accordingly, he considered that the stated case should be quashed. The learned Chief Justice, while mentioning an objection raised that the stated case should not have been entitled "In the Court of Appeal", considered that it was unnecessary to deal with it.

In the dissenting judgment of Tritschler J.A. (now C.J.Q.B.), with whom Freedman J.A. agreed, there is a résumé of the contents of certain affidavits filed before the Court of Appeal by the parties which described what had taken place before the magistrate and the manner in which the stated case had been approved before being signed by him and its terms are stated *in extenso*.

The rules of the Court of Appeal for Manitoba which prescribe what is to be contained in a case stated under the Code were made by the Judges of the Court of Appeal under the powers vested in them by the Code on May 13, 1930 (see the Canada Gazette, June 7, 1930, vol. 63, p. 4464). The case in the present matter, in my opinion, complies with these requirements.

Dealing with the objections advanced in the respondent's motion to the Court, Tritschler J.A. said in part:

> As to ground 1, that the stated case does not raise a question of law: Defendant's counsel submits that what the magistrate decided were questions of fact; it was a matter of knowing the calendar and applying simple mathematics; he had only to count back from August 15, 1960, the date of the information, to certain dates mentioned in the information, or to count forward from those dates to August 15 and see if the period exceeded 6 months; if there was an error it was an error of calculation; as to the alleged duplicity of the information, it was simply a question of counting the charges and if there was an error it was a mistake of counting. I found it difficult to believe, and still do, that these submissions could be seriously put forward. The points involved were matters of law which had in fact been dealt with by way of written submissions to the magistrate by solicitors for both sides. The complainant's position as outlined in his factum to us is: that the six months' limitation period is not applicable because the Legislature has "otherwise specially provided" (The Summary Convictions Act, R.S.M. 1954, Cap. 254, Sec. 7); that employment at overtime is not an offence but the offence is failure to pay for overtime; the offence takes place at termination of employment if overtime wages are left outstanding; sec. 14(2) of The Employment Standards Act makes the non-payment for overtime a continuing offence; if the six months' limitation was applicable and part of the offence took place six months prior to the date of the information, the magistrate should not have dismissed the information but should have allowed recovery in respect of that part of the wages claimed which were earned and not paid within a period of six months before the date of the information; there was one offence and not two and it occurred on May 18, 1960; in any event the magistrate had the right under sec. 704 of the Code to permit amendment.

And again:

> Every fact necessary to decide the questions of law is before the Court. As appears from what has been said under the head of ground 1, the points of law are arguable upon the face of the information itself. The learned Magistrate's question (i) raises the issue whether "the Information was defective in that it disclosed", etc. The only fact necessary here is the Information itself, which is fully set out in the case. Question (ii) raises the issue whether the Information was void for duplicity. Here again the Information is the only fact required. Obviously what the learned Magistrate said is that, looking at the Information alone, he could see duplicity in it; that it showed duplicity on its face. No amount of facts other that the Information could be relevant here. Whether the Information was capable of amendment is pure law.

As to the objection that the proper procedure was not by way of stated case but by *mandamus* to compel the magistrate to exercise his jurisdiction, he pointed out that this was not the case of a magistrate declining to enter upon a hearing because he was of the opinion that he had no jurisdiction, but one in which, exercising his jurisdiction, he had dismissed the information on grounds of law which appeared to him sufficient.

With these conclusions I agree and, with the greatest respect for the contrary opinion of the learned Chief Justice of Manitoba, I consider that the motion of the respondent to dismiss or quash the stated case, as it was expressed, should have been dismissed and the questions of law, which appear to me to be clearly raised, determined.

If it were the opinion of the Court that any clearer statement of the questions of law to be determined was required, the proper course, in my opinion, was to send the case back to the magistrate for amendment and to deliver judgment after it had been amended under the powers contained in s. 740 of the *Criminal Code.*

I would allow this appeal and set aside the order of the Court of Appeal with costs in this Court and in the Court of Appeal, to be paid by the respondent to the appellant in any event of the appeal forthwith after taxation.

Appeal allowed, the order of the Court of Appeal set aside and the matter returned to that Court to be dealt with on the merits. Respondent to pay in any event costs in this Court and costs in the Court of Appeal.

Solicitors for the complainant, appellant: Mitchell & Green, Winnipeg.

Solicitors for the defendant, respondent: Monk, Goodwin, Higenbottam & Goodwin, Winnipeg.

1962
*Apr. 30, May 1 June 25

MONTREAL TRUST COMPANY, Trustee of LODESTAR DRILLING COMPANY, a bankrupt .... } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Sale of interest in farmout agreement by oil drilling company—Whether proceeds income or capital—Amended tax return not filed within statutory time limit—New issue raised before Supreme Court respecting purchase of farmout interest in United States—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4, 12(1)(a) and (b), 42 (4A) (as enacted by 1951 (Can.), c. 51, s. 14) and 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(a) and (b), 46(5) and 139(1)(e).

The Lodestar Drilling Co. was incorporated to carry on the business of contractors for drilling oil wells and under its charter was empowered to acquire and sell mineral rights. The company became bankrupt in 1953 and the appellant trust company was appointed trustee. In 1952 Lodestar purchased a half interest in a farmout agreement in consideration of its undertaking to drill a certain well. The estimated cost of drilling the well was more than the company wanted to risk and it therefore sold one-half of its own one-half interest for $27,500. It treated the sum so received as a capital receipt. For the year ending March 31, 1952, Lodestar declared an income of $114,916.05, and for the year ending March 31, 1953, its return showed a loss of $3,516. On September 30, 1953, it filed an amended return for 1952 claiming as a deduction for that year the loss incurred in 1953. On April 28, 1955, the Minister re-assessed the company for the taxation year 1952, adding the $27,500 to the declared income for that year and disallowing part of the 1953 loss previously claimed. In June 1955 the trustee in bankruptcy, after the company's accounts were revised to provide for additional capital cost allowance not previously claimed, filed amended returns for the fiscal years 1952 and 1953, in which a loss of $52,958.57 alleged to have been incurred in 1953 was claimed as a deduction from the 1952 income.

On the two issues raised, *i.e.*, (i) whether the item of $27,500 was properly added to the income by the notice of re-assessment and (ii) whether in June 1955 the trustee could claim an additional capital cost allowance for 1953 so as to increase the loss to be carried back to 1952, appeals by the trustee to the Tax Appeal Board and the Exchequer Court failed. On appeal to this Court a third issue, not dealt with in the reasons of either the Tax Appeal Board or the Exchequer Court, was raised. Close to the time when the company sold the half interest in the farmout agreement, it also purchased an interest in a farmout agreement in the State of Nebraska. It was contended that the amount paid by the company to acquire the latter interest was chargeable against income.

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

Held (Taschereau and Judson JJ. dissenting): The appeal should be allowed in part.

Per Locke, Martland and Ritchie JJ.: The $27,500 received by Lodestar in 1952 was realized from the sale of a capital asset and was not income in its hands. There was nothing in the evidence to support the view that the sale of half the company's interest in the farmout was an activity in the nature of a trade in such properties within the meaning of that expression in s. 139(*e*) of the *Income Tax Act,* R.S.C. 1952, c. 148, as amended. *Irrigation Industries Ltd. v. Minister of National Revenue,* [1962] S.C.R. 346, referred to. This was an isolated transaction, the company not having purchased or sold properties of this nature during the thirteen years of its life. *Western Leaseholds Ltd. v. Minister of National Revenue,* [1960] S.C.R. 10, distinguished.

Per Taschereau and Judson JJ., *dissenting*: Lodestar made no capital investment in the acquisition of the farmout interest. The company, whose business was the drilling of oil and gas wells for others, undertook, in this particular case, to spend its own money to drill on its own account. What it undertook to do was to spend approximately $55,000 in drilling expenses to find out whether there was oil or gas on the property. These drilling expenses being more than the company wished to incur, the receipt of $27,500 before undertaking any development was really a reduction of drilling costs in advance of drilling, with the result that this item was properly included in the company's income.

Per curiam: The second amended return for 1952 having been filed outside the time limit provided by s. 42 (4A), enacted by 1951 (Can.), c. 51, s. 14, the Minister was under no compulsion to act on it. If a taxpayer wishes to carry back business losses, he must file his amended return within the statutory time limit. Otherwise, the Minister cannot be compelled to accept the amended return.

Upon the evidence, the purchase by Lodestar of the interest in the Nebraska property was simply a capital investment and, accordingly, was not a proper charge against the company's income.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], dismissing an appeal from a decision of the Tax Appeal Board. Appeal allowed in part, Taschereau and Judson JJ., dissenting.

F. R. Matthews, for the appellant.

R. L. Fennerty, Q.C., and *F. J. Dubrule,* for the respondent.

The judgment of Taschereau and Judson JJ. was delivered by

JUDSON J. (dissenting in part):—The appellant is the trustee in bankruptcy of Lodestar Drilling Company Limited, which made an assignment in bankruptcy in October 1953. The appeal is against a re-assessment of the income

[1] [1961] Ex. C.R. 309, C.T.C. 228, 61 D.T.C. 1158.

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of the bankrupt company for the fiscal year 1952. Appeals to the Income Tax Appeal Board and the Exchequer Court[1] have been dismissed.

The company was incorporated to carry on the business of drilling petroleum and natural gas wells. For the year ending March 31, 1952, it declared an income of $114,916.05. For the year ending March 31, 1953, its return showed a loss of $3,516. On September 30, 1953, it filed an amended return for 1952 claiming as a deduction from income for that year the loss of $3,516 incurred in 1953. The result was that the amended return showed a taxable income for 1952 of $111,400.05 instead of $114,916.05.

On April 28, 1955, the Minister re-assessed the company for the taxation year 1952 at $141,342.90. The increase was brought about by the addition to income of a disputed receipt of $27,500 and the disallowance of part of the 1953 loss previously claimed.

In June 1955, the trustee in bankruptcy, following the receipt of the notice of re-assessment in April 1955, filed amended returns for the fiscal years 1952 and 1953. For the 1953 fiscal year the trustee in bankruptcy claimed an additional sum of $51,855.42 for capital cost allowance. This brought the total loss for that year to $52,958.57. The trustee then claimed to apply this 1953 loss against the 1952 income of $141,342.90, bringing the revised income down to the figure of $88,384.33.

Two issues are raised in this appeal:

1. Whether the item of $27,500, being the proceeds of a sale of an interest in a farmout agreement which the company had taken from Trans Empire Oils Limited, was properly added to income by the notice of re-assessment.

2. Whether in June 1955 the trustee could claim an additional capital cost allowance for 1953 so as to increase the loss to be carried back to 1952. It is on both these grounds that the appeal has hitherto failed.

Ground 1. In February 1952 Lodestar purchased through its president an interest in a farmout agreement from Trans Empire Oils Limited. The terms of the purchase were that Lodestar would drill a test well within a certain time and to a certain depth at its sole risk and expense, and would thereby earn an undivided half interest in the Trans

[1] [1961] Ex. C.R. 309, C.T.C. 228, 61 D.T.C. 1158.

Empire lease. In the same month, February 1952, Lodestar made an agreement with Reality Oils Limited to assign a half interest in this farmout for a sum of $27,500. Lodestar proceeded to drill the test well at its own expense and found nothing. The enterprise was abandoned and no further drilling was done on these lands. The substance of the transaction is that Lodestar purchased a half interest in a lease in consideration of its undertaking to drill a certain well; that the estimated cost of drilling this well was more than the company wanted to risk and that it therefore sold one-half of its own one-half interest for $27,500, leaving itself still subject to the obligation to pay the full cost of drilling. The Minister held that this receipt of $27,500 was income from a business within the meaning of ss. 3, 4 and 127(1)(*e*) of the 1948 *Income Tax Act*.

This company was in the business of drilling oil and gas wells for others. In this particular case it undertook to spend its own money to drill on its own account. It made no capital investment in the acquisition of this property. What it undertook to do was to spend approximately $55,000 in drilling expenses to find out whether there was oil or gas on the property. These drilling expenses being more than the company wished to incur, the receipt of $27,500 before undertaking any development was really a reduction of drilling costs in advance of the drilling. This is the Minister's view and I think it is the correct one.

The company's contention that it bought a capital asset, namely, a half interest in an oil lease, which half interest was more than it wanted, fails. It was not buying a capital asset; it was not making a capital investment; it was undertaking to drill for oil at its own expense. By selling a part interest it reduced its cost of drilling. There is really no analogy between this situation and one where a purchaser wants to buy a limited parcel of land and must acquire more because of the vendor's determination. The sale of surplus land, in some such circumstances, might well give rise to a capital receipt. But that is not this case. This company was in the business of drilling for gas and oil. It was carrying on its business when it purchased the interest from Trans Empire Oils Limited. Its sale of the half interest in the interest to be acquired merely reduced the cost to be incurred for drilling. These costs were chargeable against

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income under the provisions of the *Income Tax Act* and they were actually so charged for the year 1952. This branch of the appeal fails.

Ground 2. I have noted above that the company filed its first amended return for the fiscal year 1952 in September 1953. The next amended return was filed after June 27, 1955. This was for the purpose of carrying back the vastly increased capital cost allowance which had arisen as a result of a rewriting of the company's books on instructions from the trustee in bankruptcy after receipt of the notice of re-assessment. The relevant section of the Act as it then stood was s. 42(4A) enacted by c. 51, s. 14, Statutes of Canada 1951. This reads:

> Where a taxpayer has filed the return of income required by section 40 for a taxation year and, within one year from the day on or before which he was required by section 40 to file the return for that year, has filed an amended return for the year claiming a deduction from income under paragraph (*d*) of subsection (1) of section 26 in respect of a business loss sustained in the taxation year immediately following that year the Minister shall re-assess the taxpayer's tax for the year.

The second amended return filed in 1955 does not qualify under this section. When the Minister re-assessed in April 1955, he had before him only the original return and the first amended return. He was under no compulsion to act on the second amended return filed after the notice of re-assessment. Both the Income Tax Appeal Board and the Exchequer Court have so held. The mere fact of a re-assessment in 1955 does not open the matter of taxability at large and compel the Minister to re-assess in accordance with an amended return made out of time, according to the above quoted section. Under this legislation, if a taxpayer wishes to carry back business losses, he must file his amended return within the statutory time limit. Otherwise the Minister cannot be compelled to accept the amended return.

The appellant also raised a third point which has not been dealt with either in the reasons of the Tax Appeal Board or those of the Exchequer Court. Close to the time when the company sold the half interest in the farmout agreement above dealt with, it also purchased an interest in a farmout in the State of Nebraska. This was exactly the converse of the present case. The vendor in the State of Nebraska was obligated to do the drilling and Lodestar was the purchaser in this case of the interest. It happens that it

expended $27,500 for the purchase of this interest. The identity of the two figures is entirely accidental. Lodestar says that the receipt from Reality and the disbursement for the Nebraska property must both be treated in the same way. If the receipt in question in the re-assessment was income, then the disbursement for the Nebraska property is also chargeable against income. Conversely, if the Nebraska disbursement is capital, the receipt from Reality must also be capital. There is some appearance of logic in this argument but I think that the two transactions are easily distinguished in character on the ground

(a) that the disputed receipt came from a sale that was made to reduce drilling costs to be incurred and was in substance a contribution by a co-adventurer to those drilling costs;

(b) that there is no evidence to indicate that Lodestar is entitled to a deduction in the amount of $27,500 in respect of the Nebraska property on the ground that such sum was laid out by the taxpayer for the purpose of gaining or producing income within the meaning of s. 12(1)(*a*) of the *Income Tax Act,* R.S.C. 1952, c. 148.

I would dismiss the appeal with costs.

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

LOCKE J.:—The agreement entered into between Trans Empire Oils Ltd. and William Ford on an unspecified date in February 1952, recited that the company was the lessee from the Crown of the petroleum and natural gas rights in Section 31, Township 50, Range 21, West of the Fourth Meridian. This instrument, referred to as a farmout agreement, obligated Ford to commence before February 10, 1952, to drill and carry to completion the drilling of a test well on Legal Subdivision 4 of that section and to continuously thereafter drill until the well was carried to completion. Completion was defined as drilling to a depth sufficient to adequately test the Viking sands, or to a depth where commercial production was found, or to a depth where granite or other impenetrable formation was encountered. In the event that petroleum substances were encountered in quantities sufficient to justify an attempt to place the well on production, Ford agreed at his own expense to take the necessary steps to do this. In the event the well

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was drilled to completion in accordance with these terms it was declared that the Trans Empire Company should be deemed to hold the lease in trust for the use and benefit of Ford, to the extent of an undivided one-half interest in all zones down to the depth to which the well was completed for the remainder of the term of the lease, Ford to be thereafter liable for one-half of the rentals. In the event that the well was productive of petroleum substances, Ford was to be entitled to receive and retain the net proceeds of the production until such time as he had received a sum equivalent to the drilling costs and completion costs of the well. Various other contingencies dealt with by the instrument are irrelevant to the point to be decided.

By an agreement made between Ford and Lodestar Drilling Company Ltd. on an unstated date in February 1952, the former assigned all his interest in the farmout agreement to the Lodestar Company, the latter agreeing to indemnify him against the performance of his obligations under that instrument.

The agreement between the Lodestar Company and Reality Oils Ltd. also made on an unstated date in February 1952, after reciting that under the farmout agreement assigned to the Lodestar Company by Ford that company was entitled to acquire an undivided one-half interest in the Crown lease hereinbefore mentioned, declared that Lodestar assigned to the Reality Company "the full undivided one-half interest in the said Farmout Agreement dated the day of February, A.D. 1952, together with the ful undivided one-half share or interest in all benefits, rights and advantages, subject to the further provisions of this Agreement, which may be derived by Lodestar thereunder in and to the petroleum and natural gas in the hereinbefore recited lands." Lodestar further covenanted to commence and to drill the well to completion and that, if petroleum were found in quantity sufficient to justify production, to fulfil the obligations undertaken by Ford in the farmout agreement and that, after Lodestar had recovered its costs of drilling from the production, the share of the proceeds to which Lodestar should be entitled should be owned by the parties in equal undivided one-half shares.

The Lodestar Company had been incorporated by memorandum of association on March 16, 1949, under the provisions of *The Companies Act* of Alberta. By the

memorandum its objects were declared to include, *inter alia,* carrying on the business of contractors for operating, working, drilling and repairing oil wells and to acquire rights or other interests in wells, claims and places which might seem to be capable of producing petroleum, carbon oils, gas or other mineral substances, and to develop, sell or otherwise deal with the same.

The only witness giving evidence as to the activities which had, in fact, been carried on by the company between the time of its incorporation and the relevant dates was the witness Ford who had been with the company throughout and was, at the time the farmout agreement was entered into, the president and manager. These activities had been carried on in Saskatchewan and Alberta and, with a named exception in the year 1951, had been entirely the drilling of oil and gas wells for others. The exception was that on August 1, 1951, the company had entered into an agreement with Matlo Oils Ltd. and R. R. Dillabaugh, whereby the parties agreed to drill a well on property described in a farmout agreement made by the Lodestar Company, as trustee for the three parties, with Imperial Oil Ltd., the parties agreeing to contribute in defined proportions to the cost of the drilling operations and to the division of any benefits between them in like proportions. The company had not at any time dealt in the purchase and sale of oil or other mineral rights to others.

According to Ford, and there is no contradiction of his evidence, the agreement made by him with the Trans Empire Company was entered into in the hope that, through the discovery of oil, it would produce a steady income for the Lodestar Company. Ford apparently controlled the operations of the company and as the anticipated cost of drilling the well on the farmout in question was about $55,000 he considered this was too big an investment for the company and, accordingly, sold the half interest to the Reality Company for the sum of $27,500.

It was only upon the company drilling the well to completion, as defined, that it became entitled to the specified one-half interest and, at the time the agreement was made with the Reality Company, the company had an equitable interest only in the leasehold interest referred to. The leasehold interest of the Trans Empire Oils Ltd. was an interest

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in land and the interest of the Lodestar Company at the time of the sale to the Reality Company was a right to acquire such an interest. On the face of it, the acquisition of such an interest made for the purpose of obtaining revenue is in the nature of a capital investment.

In the result, when Lodestar drilled the well to completion no production was obtained and the well and the leasehold interest were abandoned. These circumstances do not, however, affect the disposition to be made of this case.

Unlike the arrangement made in the preceding year by the Lodestar Company with Matlo Oils Ltd. and Dillabaugh, there was nothing in the nature of a joint venture between Lodestar Company and the Reality Company for drilling the well and the fact that the purchase price paid by the latter for the half interest in the property apparently was used to pay part of the drilling costs which, in the result, amounted to some $60,000 is an irrelevant circumstance.

Upon the evidence this was an isolated transaction, the Lodestar Company not having purchased or sold properties of this nature during the thirteen years of its life. The learned trial judge, in deciding that the payment received was income in the hands of the present appellant, relied upon the decision of this Court in the case of *Western Leaseholds Ltd. v. Minister of National Revenue*[1], where the judgment of Cameron J. in the Exchequer Court was confirmed. With respect, however, the circumstances in the present matter are quite different, there being in that case a series of dealings in the oil rights of that company conducted in a variety of manners which extended over a period of several years, which the trial judge had found as a fact to be part of its business operations and a carrying on of a business of disposing of such rights.

In the present matter there is nothing in the evidence to support the view that the sale of this half interest was an activity in the nature of a trade in such properties, within the meaning of that expression in s. 139(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended. I refer to the review of the authorities dealing with the necessity of showing an adventure in the nature of a trade to be found in the

[1] [1960] S.C.R. 10, [1959] C.T.C. 531, 21 D.L.R. (2d) 385.

judgment of my brother Martland in the case of *Irrigation Industries Ltd. v. Minister of National Revenue*[1].

In my opinion, the $27,500 received by the Lodestar Company from Reality Oils Ltd. was realized from the sale of a capital asset and was not income in its hands.

I have had the advantage of reading the judgment to be delivered in this matter by my brother Judson and I agree with him that the second amended return filed by the trustee in 1955 does not qualify under s. 42(4A), enacted by Statutes of Canada 1951, c. 51, s. 14.

As to the purchase by the Lodestar Company of the half interest in the Nebraska property, upon the evidence this appears to have been simply a capital investment and, accordingly, not a proper charge against the company's income.

I would allow this appeal in part and refer the assessment back to the Minister to delete from the assessment the sum of $27,500 received by the Lodestar Company from Reality Oils Ltd.

As the appellant has succeeded on the principal issue argued before us, in my opinion, it should have its costs in this Court and in the Exchequer Court.

Appeal allowed in part with costs, TASCHEREAU *and* JUDSON JJ. *dissenting.*

Solicitors for the appellant: Allen, MacKimmie, Matthews, Wood, Phillips & Smith, Calgary.

Solicitor for the respondent: A. A. McGrory, Ottawa.

[1] [1962] S.C.R. 346, 33 D.L.R. (2d) 194.

1961 *Nov. 9

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LA VILLE SAINT-LAURENT (*Defendant*) .... APPELLANT;

AND

JOSEPH ARMAND MARIEN (*Plaintiff*) .... RESPONDENT.

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

Municipal corporations—Liability—Refusal to issue building permit—Council acting under erroneous interpretation of bylaw—Good faith—Civil Code, art. 1053.

In June 1951, the plaintiff, owner of a large tract of land, submitted to the city defendant, a plan for the erection of 7 to 8-storey apartment houses on his land. The city council refused to approve the plan as it considered that these dwellings could not be erected pursuant to the building bylaw then in force. In December 1951, the plaintiff submitted a formal application for a permit to erect 3 to 4-storey apartment houses. This application was turned down by the building inspector and the council. Two days later the plaintiff applied for a writ of *mandamus*. The writ was granted in July 1952, and this judgment was affirmed by the Court of Queen's Bench in October 1953. A month later, the city told the plaintiff that he could obtain his permit at the offices of the city. The plaintiff did not call for his permit, but instituted the present action against the city for damages. He alleged that economic conditions had changed to an extent where his earlier plans had now become impossible of execution. He alleged further that the members of the council had discriminated against him and had shown bad faith. The city denied these allegations and pleaded that prior to the judgment on the *mandamus* its building bylaw had always been interpreted in good faith as permitting the erection of dwellings of only two stories or less. The Superior Court awarded damages, and this judgment was affirmed by a majority in the Court of Queen's Bench. The city appealed to this Court.

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

Good faith is always presumed and bad faith must be proved. On the question as to whether the city had acted in good faith, this Court was not bound by the judgment rendered in the action for *mandamus* but by the proof submitted in the present action, since the judgment on the *mandamus* was founded on the interpretation of the bylaw without having to take into consideration the question of the good or bad faith of the council. In the present case, neither the evidence nor the bylaw disclosed any circumstances permitting to infer bad faith on the part of the council. The loss of profits which were claimed were occasioned by changes in economic conditions and delays in Court proceedings, for which the city could not be held liable. It was not an abuse of the judicial process for the city to defend its interpretation of the bylaw in the action for *mandamus*. The plaintiff had therefore no cause of action. Rules of equity existing in the common law have no application in the Quebec law.

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

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

F. Mercier, Q.C., for the defendant, appellant.

J. G. Ahern, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Propriétaire d'un vaste terrain situé dans les limites de la Ville Saint-Laurent et mesurant quelque 425,000 pieds carrés, l'intimé projeta, au cours de 1951, d'utiliser 30 p. cent de cette superficie pour y ériger un nombre de maisons-appartements de sept à huit étages et 70 p. cent pour l'établissement de jardins, de terrains de jeux, etc. Son architecte écrivit, le 1er juin de la même année, au Conseil municipal de l'appelante pour lui faire part de ce projet et en demander une approbation de principe. Le Conseil considéra cette demande avec les rapports du gérant et de l'ingénieur de la ville. Il jugea qu'en raison du règlement de construction, le règlement numéro 145, il ne pouvait permettre sur le site en question les constructions projetées. Le gérant de la ville communiqua cette décision à l'architecte de l'intimé et, tout en lui exprimant ses regrets, l'avisa que le Conseil était prêt à considérer tous autres projets qu'on pourrait désirer soumettre pour le site en question.

Le 12 décembre suivant, l'intimé fit une demande formelle de permis, adressée à l'inspecteur de construction et remise à M. Chagnon, ingénieur de la ville, cumulant vraisemblablement cette fonction d'inspecteur. Il ne s'agissait plus du même, mais d'un nouveau projet; les maisons-appartements à construire n'ayant que trois à quatre étages et la superficie du terrain engagé n'étant que de 125,800 pieds carrés. Cette demande de permis fut refusée par M. Chagnon et par le Conseil municipal. (Voir paragraphe 8 de la déclaration de l'intimé).

Le 14 décembre 1951, soit deux jours après la date de cette demande de permis, l'intimé fit émettre un bref de *mandamus* pour contraindre l'appelante à lui émettre ce permis. Cette action fut contestée et subséquemment maintenue par jugement rendu par la Cour supérieure le 8 juillet 1952. La Ville Saint-Laurent en appela et, le 27 octobre

[1] [1961] Que. Q.B. 310.

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1953, la Cour d'Appel confirma le jugement de la Cour supérieure. Après avoir considéré de se pourvoir à la Cour Suprême du Canada à l'encontre de cette décision, l'appelante avisa les procureurs de l'intimé, le 24 novembre 1953, qu'elle avait renoncé à ce faire et qu'en conséquence ce dernier pouvait se présenter aux bureaux de la ville pour obtenir le permis demandé dans l'action sur *mandamus.* L'intimé ne donna pas suite à cette invitation.

Plus de cinq mois plus tard, soit le 26 avril 1954, il prit contre l'appelante l'action qui nous concerne en cet appel pour lui réclamer une somme de $228,610.59 à titre de dommages-intérêts. En substance et au soutien de cette action, l'intimé allégua, outre les faits ci-dessus, qu'en raison de l'augmentation du coût des matériaux, de la main-d'œuvre et du taux d'intérêt sur les prêts, ainsi que de la diminution de la demande pour des appartements de ce type, la situation existant lorsque l'appelante lui offrit son permis, soit en novembre 1953, n'était plus la même que celle prévalant en décembre 1951 lorsqu'il en fit la demande; qu'en raison de ce changement de conditions, son projet de construction ne pouvait plus être économiquement réalisé et que, pour ce motif, il avait dû en faire l'abandon; que le refus illégal de l'appelante de lui donner son permis avait été motivé par des sentiments de malveillance entretenus à son endroit par les membres du Conseil et qu'il avait été victime de discrimination. L'intimé en conclut qu'il avait droit de réclamer de l'appelante la somme ci-dessus «as damages suffered by him through the latter's continuous fault lasting from December 12, 1951 to the 24th of November, 1953».

En défense, l'appelante plaida particulièrement l'inexistence des motifs d'hostilité imputés aux membres de son Conseil; qu'antérieurement à la décision judiciaire rendue sur le *mandamus,* les dispositions de son règlement de construction avaient toujours été interprétées de bonne foi comme limitant à des habitations de deux étages tous les bâtiments qui pouvaient être érigés dans cette partie de la municipalité où se trouvait le terrain sur lequel l'intimé voulait construire des maisons-appartements de trois à quatre étages et qu'aucun permis n'avait jamais été accordé pour la construction de tels bâtiments à cet endroit.

La Cour supérieure considéra que cette omission d'émettre le permis—ainsi judiciairement reconnue illégale—fit rater le projet de l'intimé et jugeant que même la bonne foi de l'appelante ne pouvait affecter l'obligation imposée par l'art. 1053 C.C. de réparer les dommages en découlant, n'eut pas à se prononcer sur l'allégation de mauvaise foi. La Cour condamna l'appelante à payer à l'intimé $14,470.88, somme ainsi inutilement déboursée par lui en paiement des services rendus par l'architecte, ingénieurs et autres, pour travaux préparatoires à la réalisation de son projet.

Seule la ville appela de ce jugement qui fut maintenu par une décision majoritaire de la Cour d'Appel[1]; MM. les Juges Casey, Rinfret, Montgomery et Badeaux formant la majorité et M. le Juge Choquette étant dissident. Cette décision majoritaire repose sur différentes raisons et il convient de donner la substance de celles qui sont pertinentes au présent appel.

M. le Juge Casey, ayant signalé que, tel que la cause fut présentée en Cour d'Appel, la question de bonne foi assume une extrême importance, formule ainsi ses vues:

> If in their dealings with Respondent the members of Appellant's Council acted in good faith, if their refusal to grant the permit sought resulted from their understanding of the law—and on this point there is room for an honest difference of opinion—I would be inclined to say that their error did not engage Appellant's responsibility for the damage caused. But if they acted in bad faith then I think that Appellant's responsibility was engaged.

Reproduisant alors le texte du paragraphe 9 de la déclaration où l'intimé allègue que le refus du permis avait été motivé par des sentiments d'hostilité de la part des membres du Conseil à son endroit et qu'il avait été victime de discrimination, le savant Juge poursuit:

> In the ordinary course of events the burden of proof would be on Respondent; if this rule were applied here basing myself on what is contained in this record, I would say that the burden had not been discharged and in agreement with Mr. Justice Choquette I would dismiss Respondent's action.
>
> But in the earlier case between the same parties (1953 K.B. 792) this same refusal was considered and it is my view that what was decided there carries over to this case with the result that Appellant commenced with a burden, establishing the good faith of its Council, that otherwise it would not have had. As this burden was not discharged I would dismiss this Appeal.

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M. le Juge Rinfret est aussi d'avis qu'il n'y a, au dossier, aucune preuve des allégations du paragraphe 9 et que non seulement la discrimination n'est pas prouvée, mais qu'au contraire, il est établi qu'aucun bâtiment, y compris les maisons-appartements, ayant plus de deux étages, n'a été construit dans le territoire concerné. Il ajoute qu'une faute volontaire ne peut être imputée à l'appelante. Il considère cependant que:

L'excuse de la Ville à l'effet qu'elle a toujours interprété son règlement comme défendant l'érection de bâtiments de plus de deux étages ne tient pas au regard du texte clair du par. I de l'art. 77, qui établit explicitement une exception en faveur des maisons à appartements et ce partout dans les limites de la ville.

M. le Juge Montgomery se résume comme suit:

For the reasons given by my colleagues Mr. Justice Casey, Mr. Justice Rinfret and Mr. Justice Badeaux, I am of the opinion that the circumstances of Appellant's refusal to issue the building permit indicate that it acted either in bad faith or with such recklessness as to be tantamount to bad faith.

Pour apprécier les raisons de M. le Juge Badeaux, il faut préciser que, pour refuser le permis, l'appelante s'était appuyée, non seulement sur ces dispositions valides du règlement qui, tel que par elle interprétées, justifiaient adéquatement son refus, mais aussi sur une autre disposition déclarée *ultra vires* par le jugement de la Cour supérieure sur le *mandamus* qui, sur ce point, n'a pas été attaqué en appel. Le savant Juge n'a considéré le mérite de l'appel dans l'action en dommages qu'au regard de cette disposition *ultra vires*. Exprimant l'avis que l'appelante a été négligente à ne pas se rendre compte de cette invalidité, il la déclare responsable bien que reconnaissant qu'en fait, elle croyait en la validité de cette disposition. Assumant que ces vues soient fondées, ceci ne dispose pas du mérite de la défense basée sur l'erreur, commise de bonne foi, dans l'interprétation des dispositions valides. Et vu l'opinion ci-après sur ce dernier point, il n'y aura pas lieu de revenir sur les raisons du savant Juge.

Dissident, M. le Juge Choquette, ayant considéré que le jugement de première instance reconnaissait la bonne foi de l'appelante, s'exprime ainsi sur la question:

Cette bonne foi n'est pas infirmée du fait que l'appelante a exercé un droit, celui de contester les procédures de l'intimé et d'en appeler du jugement qui les a accueillies, ni du fait d'un arrêt (Sun Oil v. Cité de Verdun) qui ne paraît pas avoir été porté à sa connaissance. D'ailleurs, cet arrêt ne s'applique que partiellement au litige mû entre les parties.

Quant à l'erreur d'interprétation, elle en est une que tout conseil municipal aurait pu commettre de bonne foi (C. E. Campeau, p. 164 sv). Durant vingt ans l'appelante avait interprété son règlement de la même façon, sans exception pour personne, et sans opposition de qui que ce soit. Si son erreur en est une que les tribunaux ont pu corriger en vertu de l'art. 50 C.P., elle n'en est pas une, à mon avis, qui donne ouverture à l'action en dommages-intérêts.

Il convient de déterminer, en premier lieu, si les membres du Conseil et les officiers de l'appelante ont agi de bonne foi.

La bonne foi se présume toujours et c'est à celui qui allègue la mauvaise foi de la prouver. (Art. 2202 C.C.). En tout respect, le jugement sur le *mandamus* n'affecte pas l'opération de ces principes, en l'espèce. La décision finale sur le *mandamus* fut fondée juridiquement sur l'interprétation du règlement et, pour en déterminer le sens et la portée véritables, la Cour n'avait pas, en cette cause, à s'occuper de la question de savoir si les membres du Conseil et les officiers de l'appelante avaient été de bonne ou de mauvaise foi en en faisant eux-mêmes l'interprétation. C'est l'interprétation et non l'exercice d'un pouvoir discrétionnaire qui était en question. Il n'y a pas identité d'objet entre le jugement sur le *mandamus* et celui à rendre en la présente cause. Pour les fins de ce dernier jugement, cette Cour n'est pas liée par celui qui fut prononcé sur le *mandamus*. *Beach v. The Township of Stanstead*[1]. C'est donc au regard de la preuve faite en la présente cause que la question de la bonne ou mauvaise foi de l'appelante doit être résolue.

La preuve au dossier ne révèle, à mon avis, aucunes circonstances permettant d'inférer mauvaise foi. Le règlement lui-même, en raison d'une rédaction imparfaite, pour ne pas dire contradictoire, ne saurait non plus justifier une telle inférence. Jusqu'au jour où sa portée fut judiciairement déterminée par le jugement final sur le *mandamus*, ce règlement, comme l'indiquent MM. les Juges Casey et Choquette, pouvait en toute sincérité être honnêtement interprété de la façon dont il l'avait toujours été jusqu'alors par l'appelante.

Ainsi donc, ayant, de bonne foi, interprété son règlement et soumis cette interprétation aux tribunaux, qui ne l'ont pas accueillie, l'appelante doit-elle, pour cette raison, être tenue responsable des dommages subis par l'intimé par suite de

[1] (1899), 29 S.C.R. 736.

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l'abandon de son projet en raison du changement des conditions économiques, changement progressivement survenu au cours du débat sur le *mandamus* et qui, à la conclusion de ce débat, se serait avéré fatal au projet. Suivant l'interprétation que l'appelante entretenait, avant qu'il en soit jugé, avait-elle le droit d'accorder le permis? Assumant qu'en raison de l'adjudication subséquente sur la question, son refus d'émettre le permis lorsque demandé, deux jours à peine avant l'émission du bref de *mandamus,* doive être maintenant considéré rétrospectivement comme illégal et constituer en outre une faute engendrant responsabilité, cette faute n'a pas été active ou génératrice du dommage dont se plaint l'intimé. Ce qui fit rater son projet, c'est le changement des conditions économiques survenu au cours de la longue durée des procédures sur le *mandamus.* Ce changement, comme la lenteur de la marche de la justice, ne peuvent être imputés à l'appelante. Aussi bien, la question fondamentale qui se pose dans les circonstances de cette cause est-elle de savoir si l'appelante a commis une faute engageant sa responsabilité en soumettant, de bonne foi, ses prétentions à la décision des tribunaux par sa contestation du *mandamus.*

Agir en justice, que ce soit en demande ou en défense, ne constitue pas une faute. C'est un droit. Tous les arrêts de la Cour de cassation, dit Savatier, s'accordent à reconnaître que l'action en justice, c'est-à-dire le droit de soumettre au Juge ses prétentions, est un droit dont l'exercice n'entraîne, en principe, aucune responsabilité, même si ces prétentions sont éventuellement rejetées. Ce principe comporte des exceptions en cas d'abus de ce droit légal reconnu à tout justiciable. C'est ainsi que l'exercice de ce droit peut dégénérer en faute susceptible d'entraîner une condamnation en dommages intérêts s'il constitue un acte de malice, de mauvaise foi ou s'il est tout au moins le résultat d'une erreur grossière équipollente à dol. Savatier, Traité de la responsabilité civile en droit français, tome I, p. 83, n°s 65 *et seq.*; Colin et Capitant, Droit civil français, tome 2 (1948), p. 238, n° 326; et H. et L. Mazeaud, Responsabilité civile délictuelle et contractuelle, 4e éd., tome I, p. 559, n° 591.

Cette théorie de l'abus du droit ne déroge pas mais est conforme à l'économie de la loi sous l'art. 1053 C.C. Suivant la doctrine classique, le fait invoqué au soutien de l'action

en dommages sous cet article doit, outre d'être dommageable au demandeur et imputable au défendeur, être en soi un fait illicite. L'exercice d'un droit, s'il n'y a pas d'abus, ne constitue pas un fait illicite. Les dispositions de l'art. 893 C.P.C. offrent un exemple de l'application de ces principes. Ces dispositions prescrivent que le renvoi d'aucune des mesures provisionnelles adoptées contre la personne ou les biens d'un défendeur, ne donne à ce dernier un recours en dommages que s'il prouve absence de cause raisonnable et probable dans la poursuite de ces voies extraordinaires.

Ces considérations suffiraient, à mon avis, pour conclure que l'intimé n'a pas établi avoir une cause d'action contre l'appelante.

S'il était nécessaire d'élever la question au plan du droit public pour considérer les défenses possiblement ouvertes à un gouvernement municipal, je dirais que l'intimé n'a cité et que je n'ai pu trouver aucune décision accordant des dommages intérêts dans un cas identique à celui qui nous occupe. Les décisions suivantes supportent, au contraire, l'opinion opposée. *Beach v. The Township of Stanstead, supra*; *Malouin v. Cité de Drummondville*[1]; *Municipal District of Springbank v. Render*[2]; *The City of Belleville v. Moxam and Wood*[3]. Dans cette dernière cause, les défendeurs, ayant obtenu un permis de construire, avaient commencé l'exécution des travaux lorsqu'il fut constaté que ce permis avait été émis sans droit. La ville prit une injonction pour arrêter l'exécution de ces travaux. La Cour accorda une injonction permanente. Cette injonction fut accordée à la condition que la ville paie d'abord les dépenses faites par les défendeurs jusqu'au jour de la demande d'injonction. Pour pouvoir se justifier d'imposer cette condition, la Cour dut s'appuyer sur les règles d'équité formulées et administrées par la Court of Chancery pour supplémenter aux règles et à la procédure de la Common Law. Ces règles d'équité, prévalant dans les juridictions de la common law, n'ont pas d'application sous le droit du Québec.

[1] [1944] Que. K.B. 262.
[2] [1936] 2 W.W.R. 430 at 433, 4 D.L.R. 193.
[3] [1953] O.W.N. 567, 4 D.L.R. 151.

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Pour ces raisons, je maintiendrais l'appel, infirmerais les jugements de la Cour du Banc de la Reine et de la Cour Supérieure, et renverrais l'action de l'intimé, avec dépens dans toutes les Cours.

Appeal allowed with costs.

Attorney for the defendant, appellant: F. Mercier, Montreal.

Attorneys for the plaintiff, respondent: Hyde & Ahern, Montreal.

1962
*May 8
May 8

THE MINISTER OF NATIONAL REVENUE AND OTHERS ...... APPELLANTS;

AND

RENE LAFLEUR .... RESPONDENT.

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

Jurisdiction—Appeal—Objection to jurisdiction of Sessions Court to hear complaints under the Income Tax Act—Writ of prohibition—Competency of Superior Court to issue writ attacked by declinatory exception—Whether Court of Queen's Bench had jurisdiction to hear appeal from dismissal of declinatory exception—Code of Civil Procedure, arts. 170 et seq.

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 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 Minister obtained leave to appeal to the Court of Queen's Bench, but that Court, 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*. The Minister was granted leave to appeal to this Court.

Held: The appeal should be allowed and the case should be returned to the Court of Queen's Bench.

The Superior Court is a Court of civil jurisdiction and its procedures are regulated by the *Code of Civil Procedure*. Under arts. 170 *et seq.* of that Code, if the Superior Court has no power *ratione materiae* to

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

entertain an action brought before it, not only has it jurisdiction to declare itself incompetent, but it is obliged to do so if requested by a party or of its own motion if not so requested. Even if the writ of prohibition should, because it was incidental to a criminal prosecution, be held to be a criminal proceeding, it did not follow that the judgment of the Superior Court on the declinatory exception was a judgment in a criminal matter. The sole issue on the exception was one of competency in the administration of justice and, in the present case, one depending on whether the subject-matter of the action in the Superior Court should be held by that Court to be of a civil or criminal matter. The judgment on the declinatory exception was not a judgment in a criminal matter but one as to the competency of the Superior Court, and therefore, the Court of Queen's Bench had jurisdiction to hear the appeal against that judgment whether or not the matter in which the question was raised was a criminal or civil matter.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], dismissing, for lack of jurisdiction, an appeal from a judgment of Reid J. Appeal allowed.

R. Bédard, Q.C., and *M. Charbonneau*, for the appellants.

R. Paré, Q.C., for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Summoned before the Court of Sessions, in the district of Montreal, to answer seven complaints lodged against him under the Dominion *Income Tax Act*, respondent, in each of the cases, objected to the jurisdiction of the Court of Sessions and prior to the date set for preliminary inquiry, applied for and obtained in the Superior Court the issuance of a writ of prohibition ordering the suspension of the proceedings in the Court of Sessions.

In obedience to the writ of prohibition, appellants appeared in the Superior Court and 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. This exception was dismissed as ill-founded by Reid J.

Appellants then obtained leave from Bissonnette J. to appeal this judgment of the Superior Court to the Court of Queen's Bench (Appeal Side).

By a majority decision, the Court of Appeal[1] decided that it had no jurisdiction to hear the appeal.

[1] [1962] Que. Q.B. 327.

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This decision rests on the following reasoning. The writ of prohibition issued in this case is incidental to a criminal prosecution and, on the principle of *In re Fred Storgoff*[1], a criminal proceeding; therefore, it is said, the judgment dismissing the declinatory exception is a judgment in a criminal matter; such a judgment is appealable only if an appeal is provided for under the *Criminal Code*; and since the *Criminal Code* does not provide in s. 691 for an appeal from a judgment dismissing a declinatory exception but only from judgments *granting* or *refusing* the relief sought in proceedings by way of prohibition, the Court of Appeal has no jurisdiction.

Casey J., dissenting, found that this approach of the majority to the question of the jurisdiction of the Court revealed a misunderstanding of the problem presented by the case. He expressed the opinion that whenever the jurisdiction of the Superior Court is questioned, there is an appeal to the Court of Queen's Bench (Appeal Side) from the judgment that maintains or dismisses the declinatory exception and this without regard to the matter in which the question is raised. Being of the view that the Court of Appeal had jurisdiction, he proceeded to consider the merit of the appeal and concluded that it should be maintained.

Appellants then appealed with leave of this Court from this majority judgment of the Court of Appeal.

When the case was called, counsel for respondent was apprised that the Court desired to hear him at first on the question of the jurisdiction of the Court of Queen's Bench (Appeal Side). Having heard counsel on the point, the Court indicating that reasons would be delivered later, rendered judgment maintaining the appeal, declaring that the Court of Queen's Bench (Appeal Side) had jurisdiction to hear the appeal from the decision of the Judge of first instance and ordering the case to be returned to the Court of Queen's Bench (Appeal Side) so that it may decide whether the Superior Court had jurisdiction to issue the writ of prohibition.

With deference to the members of the majority, we are all in respectful agreement with the conclusion reached by Casey J. on the question of jurisdiction. Jurisdiction is the

[1] [1945] S.C.R. 526, 84 C.C.C. 1, 3 D.L.R. 673.

extent and the limit of the power of a Court or of a Judge to entertain an action, petition or other proceeding. The Superior Court is a Court of civil jurisdiction, R.S.Q. 1941, c. 15, Part I, Division II, and the procedures as to that Court are regulated by the *Code of Civil Procedure*. Sections 170 *et seq.* of this Code provide, *inter alia,* that if the Superior Court has no power *ratione materiae* to entertain an action brought before it, the Superior Court has not only jurisdiction to declare itself incompetent, but is obliged to do so if requested by the defendant or of its own motion if not so requested. Counsel for respondent readily admitted that the Superior Court had jurisdiction to entertain the declinatory exception made by appellants and render a judgment either affirming or negativing its jurisdiction to issue the writ of prohibition. However, he contended that, for the reasons accepted by the majority of the Court of Appeal, the Court of Appeal had no jurisdiction to review the decision of the Superior Court. It is difficult to reconcile this admission as to the competency of the Superior Court to entertain the declinatory exception made in the matter by appellants under s. 170 C.P.C., and this submission of incompetency of the Court of Queen's Bench (Appeal Side) to entertain an appeal in the very same matter from the judgment of the Superior Court, under the appellate provisions of the *Code of Civil Procedure.* Even if the writ of prohibition should, because it is incidental to a criminal prosecution, be held to be a criminal proceeding, it does not follow that the judgment of the Superior Court on the declinatory exception is, in the true sense, a judgment in a criminal matter. The sole issue on the exception is one of competency in the administration of justice and, in the present case, one depending on whether the subject-matter of the action initiated in the Superior Court should be held by that Court to be of a civil or a criminal nature. If found to be of a civil nature, the Superior Court is competent to entertain the action and it should dismiss the exception. If found to be of a criminal nature, the Superior Court is incompetent to entertain the action and it should maintain the exception. Were the nature of the subject-matter of the action determining the nature of the judgment to be rendered on the exception, the Superior Court would, in the first alternative, be competent to dismiss the exception and, in the second alternative,

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incompetent to maintain the same. The acceptance of this contention would render the exception illusory and purposeless. The judgment of Reid J. is not a judgment in a criminal matter but one as to the competency of the Superior Court.

That the Court of Queen's Bench (Appeal Side) had jurisdiction to hear the appeal against the judgment pronounced in first instance by Reid J. is shown in the reasons for judgment of Casey J.

There only remains to indicate that, by agreement of the parties, the judgment rendered in this appeal from the decision of the Court of Queen's Bench (Appeal Side) in file no. 7638 of the records of that Court, also applies to the other appeals to this Court between the same parties and on an identical question of law.

Appeal allowed.

Attorney for the appellant: E. A. Driedger, Ottawa.

Attorneys for the respondent: Pinard, Pigeon, Paré & LeJour, Montreal.

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*Feb. 14
Apr. 24

WESTERN MINERALS LTD. ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Notice of assessment showing income tax at figure disclosed in taxpayer's return—Further examination and subsequent re-assessment—Interest on unpaid tax—Whether initial notice was "the notice of the original assessment for the taxation year"—The Income Tax Act, 1947-48 (Can.), c. 52, ss. 42, 50(6) (Income Tax Act, R.S.C. 1952, c. 148, ss. 46, 54(6).

The appellant's 1952 income tax return, filed June 30, 1953, showed income tax payable in the amount of $240,342.24, which was paid. On July 22, 1953, the respondent mailed a notice of assessment to the appellant, showing its income tax at the figure which had been disclosed in the return. Subsequently, on December 21, 1956, the respondent mailed a

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

notice of re-assessment to the appellant, showing its income tax to be $324,286.36. There were two subsequent notices of re-assessment, on February 13, 1957, and on July 10 of the same year, reducing the appellant's income tax to $308,571.81. The appellant was charged, for that portion of its income tax which was not paid until 1957, interest in the amount of $17,123.57, of which sum $10,488.25 was interest for the period from June 30, 1954, to January 21, 1957.

The appellant contended that the notice mailed on July 22, 1953, was a nullity because, before it was mailed and at the time it was mailed, it had been decided by the officers and employees of the Department of National Revenue to conduct a further examination of the appellant's return. Until that intention had been carried out, there had not been an examination of the return, within s. 42(1) of *The Income Tax Act,* and there was, therefore, no assessment made pursuant to that subsection. If the notice of July 22, 1953, was a nullity, the notice of original assessment would then be that of December 21, 1956, and, accordingly, the appellant, by virtue of s. 50(6), would not be liable for payment of interest for the period from June 30, 1954, being the date twelve months after the date fixed for filing the appellant's return, to January 21, 1957, being the date thirty days after the mailing of the notice of December 21, 1956. Having lost its appeal in the Exchequer Court, the appellant appealed to this Court.

Held: The appeal should be dismissed.

The Minister had full authority, under s. 42 of the Act, to assess tax on the basis of the appellant's return and thereafter, if he so decided, to re-assess on the basis of a further examination of that return. The time at which he decided to make that further examination did not, in any way, affect the validity of the initial assessment which he had made and consequently the notice of that initial assessment constituted "the notice of the original assessment for the taxation year" within the meaning of s. 50(6). *Provincial Paper, Ltd. v. M.N.R.,* [1955] Ex. C.R. 33; *Western Leaseholds Ltd. v. M.N.R.,* [1958] Ex. C.R. 277, applied.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], dismissing the appellant's appeal against re-assessment of its income tax for the year 1952. Appeal dismissed.

C. M. Leitch, for the appellant.

D. S. Maxwell, Q.C., and *T. Z. Boles,* for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the learned President of the Exchequer Court[1], which dismissed the appellant's appeal against re-assessment of its income tax for the year 1952. It relates solely to the amount of $10,488.25, being a part of the amount of $17,123.57 included in the final assessment for that year as interest upon the appellant's unpaid income tax.

[1] [1961] C.T.C. 477, 61 D.T.C. 1270.

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Martland J.

The facts are contained in an agreed statement of facts. On June 30, 1953, within the time limited by *The Income Tax Act* for filing its income tax return, the appellant filed its return for the period ending December 31, 1952. In the return the appellant showed income tax payable in the amount of $240,342.24, which was paid.

On July 22, 1953, the respondent mailed a notice of assessment to the appellant, showing its income tax at the figure which had been disclosed in the return. Subsequently, on December 21, 1956, the respondent mailed a notice of re-assessment to the appellant, showing its income tax to be $324,286.36. There were two subsequent notices of re-assessment, on February 13, 1957, and on July 10 of the same year, reducing the appellant's income tax to $308,571.81.

The appellant was charged, for that portion of its income tax which was not paid until 1957, interest in the amount of $17,123.57, of which sum $10,488.25 was interest for the period from June 30, 1954, to January 21, 1957.

When the appellant's income tax return had been received in the Calgary District Taxation Office, the mathematical computations which it contained were checked by an assessor. The return was then handed to another assessor, who checked it to ensure that there had not been any errors. Following this, the original notice of assessment was prepared and mailed to the appellant on July 22, 1953. It was admitted that the total time spent by the two assessors working on this return prior to the mailing of the notice of assessment would not exceed fifteen minutes.

At the time the first assessor performed his work, he wrote the letter "R" in the lower right-hand corner of the first page of the return. This letter is an abbreviation of the word "Review" and, by marking the return in this way, it was thereby segregated to ensure that it would be subject to further examination. It is admitted that prior to and at the time the notice of July 22, 1953, was mailed it had been decided by the officers and employees of the Department of National Revenue to conduct a further examination of the appellant's return.

That examination was conducted by another assessor prior to December 21, 1956. His work consisted in reviewing the seven exhibits attached to the return and the obtaining

of additional information as to the appellant's income for 1952 by an examination of the appellant's books and records and by interviews with officers and servants of the appellant.

The only question in issue is as to whether the judgment below was right in holding that the original notice, mailed on July 22, 1953, was "the notice of the original assessment for the taxation year" within the meaning of s. 50(6) of *The Income Tax Act,* 1947-48 (Can.), c. 52, as amended, (later s. 54(6) of c. 148, R.S.C. 1952, and subsequently repealed in 1955).

The relevant sections of *The Income Tax Act* are as follows:

42. (1) The Minister shall, with all due despatch, examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable.

(2) After examination of a return, the Minister shall send a notice of assessment to the person by whom the return was filed.

* * *

(4) The Minister may at any time assess tax, interest or penalties and may

(*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and

(*b*) within 6 years from the day of an original assessment in any other case,

reassess or make additional assessments.

(5) The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

(6) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a re-assessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

* * *

50. (6) No interest under this section upon the amount by which the unpaid taxes exceed the amount estimated under section 41 is payable in respect of the period beginning 12 months after the day fixed by this Act for filing the return of the taxpayer's income upon which the taxes are payable or 12 months after the return was actually filed, whichever was later, and ending 30 days from the day of mailing of the notice of the original assessment for the taxation year.

The contention of the appellant is that, on the admitted facts, the notice mailed on July 22, 1953, was a nullity because, before it was mailed and at the time it was mailed, it had been decided to conduct a further examination of the appellant's return. Until that intention had been carried

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out, there had not been an examination of the appellant's return, within s. 42(1), and there was, therefore, no assessment made pursuant to that subsection. If the notice of July 22, 1953, was a nullity, the notice of original assessment would then be that of December 21, 1956, and, accordingly, the appellant, by virtue of s. 50(6), would not be liable for payment of interest for the period from June 30, 1954, being the date twelve months after the date fixed for filing the appellant's return, to January 21, 1957, being the date thirty days after the mailing of the notice of December 21, 1956.

In two cases decided in the Exchequer Court in circumstances similar to the present one, it has been decided that an assessment made on the basis of the taxpayer's return, subject only to the checking of the computations made in it, was an assessment within the meaning of *The Income Tax Act*: *Provincial Paper, Limited v. Minister of National Revenue*[1], and *Western Leaseholds Limited v. Minister of National Revenue*[2]. The appellant does not take issue with these two decisions in the present appeal, but seeks to distinguish them on the ground that in the present case the evidence established that the intention to make the further examination of the appellant's return existed before the notice of July 22, 1953, was mailed.

The conclusions reached in the first of those two cases and applied in the second are accurately stated in the headnote as follows:

Held: That it is not for the Court or anyone else to prescribe what the intensity of the examination of a taxpayer's return in any given case should be. That is exclusively a matter for the Minister, acting through his appropriate officers, to decide.

2. That there is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is exclusively for the Minister to decide how he should, in any given case, ascertain and fix the liability of a taxpayer. The extent of the investigation he should make, if any, is for him to decide.

3. That the Minister may properly decide to accept a taxpayer's income tax return as a correct statement of his taxable income and merely check the computations of tax in it and without any further examination or investigation fix his tax liability accordingly. If he does so it cannot be said that he has not made an assessment.

I am in agreement with these propositions.

[1] [1955] Ex. C.R. 33.
[2] [1958] Ex. C.R. 277.

Do they cease to be applicable if, at the time the first notice was mailed, there existed an intention to conduct a further examination of the appellant's return? I do not think that they do. I cannot agree that that which would constitute a valid assessment if not accompanied by a present intention to conduct a further examination is not a valid assessment if that intention does exist. In my opinion there can be a valid assessment made even though a further examination of the return is intended. The examination of the return which was made prior to July 22, 1953, was, in my view, an examination within the meaning of subs. (1) of s. 42. I think the Minister had authority under s. 42 to make the assessment of which notice was given on July 22, 1953. I am reinforced in this conclusion by other subsections of s. 42. Subsection (4) provides that "the Minister may at any time assess tax . . .", subs. (5) empowers him to assess tax notwithstanding a return and subs. (6) provides that an assessment shall be deemed to be valid notwithstanding any error, defect, or omission therein or in any proceeding under the Act relating thereto.

In summary, my opinion is that the Minister had full authority, under s. 42, to assess tax on the basis of the taxpayer's return and thereafter, if he so decided, to re-assess on the basis of a further examination of that return. The time at which he decided to make that further examination did not, in any way, affect the validity of the initial assessment which he had made and consequently the notice of that initial assessment constituted "the notice of the original assessment for the taxation year" within the meaning of s. 50(6).

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Macleod, McDermid, Dixon, Burns, Love & Leitch, Calgary.

Solicitor for the respondent: A. A. McGrory, Ottawa.

1962
*Feb. 28,
Mar. 1
June 11

FLOTA MARITIMA BROWNING de CUBA S. A. (*Plaintiff*) .... APPELLANT;

AND

THE STEAMSHIP CANADIAN CONQUEROR, THE STEAMSHIP CANADIAN HIGHLANDER, THE STEAMSHIP CANADIAN LEADER, THE STEAMSHIP CANADIAN OBSERVOR, THE STEAMSHIP CANADIAN VICTOR, THE MOTOR-VESSEL CANADIAN CONSTRUCTOR, THE MOTOR-VESSEL CANADIAN CRUISER re-named CUIDAD de DETROIT (*Defendants*)

AND

THE REPUBLIC OF CUBA (*a party interested*) .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—International law—Vessels in Canadian port sold to Republic of Cuba—Vessels arrested on behalf of private suitor—Whether doctrine of sovereign immunity extends to protect vessels from seizure.

The plaintiff company was incorporated in Cuba in 1958 for the taking over and operation of ocean-going ships owned by an autonomous Cuban banking institution B. On August 19, 1958, B purchased the defendant ships, then lying in the Port of Halifax, and on the same day entered into a lease-purchase agreement with the plaintiff which provided for the operation of the ships by the latter with an option to purchase. On October 30, 1958, the plaintiff cabled B alleging certain breaches of the terms of the agreement and declaring it to be "a nullity in its entirety" although reserving to itself the right to take such action as might be deemed appropriate. On June 9, 1959, B sold the ships to the Republic of Cuba.

The plaintiff on August 4, 1960, instituted proceedings *in rem* in the Nova Scotia Admiralty District by a writ directed to "the owner and all others interested in the defendant vessels". On the same day the defendant ships were arrested at Halifax pursuant to a warrant of arrest granted on the application of the plaintiff. The Republic of Cuba as the then owner of the ships entered an appearance under protest on August 11, 1960, raising the ground that the Court had no jurisdiction, and this was followed by a notice of motion to set aside the writ of summons, the warrant for arrest and the service thereof on the grounds the ships were public national property of and in possession of the Republic which could not be impleaded; and further that by the agreement relating to the use and hire of the ships the plaintiff expressly submitted itself and all questions relating to the agreement to the jurisdiction of the Cuban Courts. Pottier D.J.A. dismissed the application, but an appeal from this judgment was allowed in the Exchequer Court. The plaintiff then appealed to this Court.

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

Held: The appeal should be dismissed.

Per Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.: The ships in question were "public ships" owned by and in the possession of a foreign sovereign state and were, for this reason, immune from arrest in the Exchequer Court. Although the ships might ultimately be used by Cuba as trading or passenger ships, there was no evidence as to the use which they were destined, and the Court was not in a position to say that these ships were going to be used for ordinary trading purposes. The defendant ships were to be treated as "the property of a foreign state devoted to public use in the traditional sense", and the Exchequer Court was, therefore, without jurisdiction to entertain this action. *The Parlement Belge* (1880), 5 P.D. 197, *The Tervaete,* [1922] P. 259, *The Porto Alexandre,* [1920] P. 30, *Reference re Powers of the City of Ottawa and the Village of Rockcliffe Park to Levy Rates on Foreign Legations, etc.,* [1943] S.C.R. 208, *Rahimtoola v. Nizam of Hyderabad,* [1958] A.C. 379, *Sultan of Johore v. Abubakar Turku Aris Bendahar,* [1952] A.C. 318, *Thomas White v. The Ship Frank Dale,* [1946] Ex. C.R. 555, referred to; *Compania Naviera Vascongada v. S.S. Cristina,* [1938] A.C. 485, discussed.

Per Locke and Judson JJ.: The vessels as of the time of the issue of the writ and their seizure on August 4, 1960, were the property of the Republic of Cuba, a sovereign state recognized by Canada. The Republic was in possession and control of the ships on that date. In the circumstances, the two propositions of international law referred to in *Compania Naviera Vascongado v. S.S. Cristina,* [1938] A.C. 485 at p. 490, were applicable: (i) the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages; (ii) They will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], allowing an appeal from a judgment of the District Judge in Admiralty for the Nova Scotia Admiralty District. Appeal dismissed.

D. A. Kerr and *G. S. Black,* for the plaintiff, appellant.

Donald McInnes, Q.C., and *J. H. Dickey, Q.C.,* for the respondent.

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

RITCHIE J.:—This is an appeal from a judgment of Cameron J. of the Exchequer Court[1], allowing an appeal from a judgment of Pottier J., District Judge in Admiralty for the Nova Scotia Admiralty District, and ordering that

[1] [1962] Ex. C.R. 1.

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FLOTA MARITIMA BROWNING DE CUBA S.A. *v.* THE REPUBLIC OF CUBA
Ritchie J.

the writ and warrant of arrest in this action and the service thereof be set aside on the ground that the Court was without jurisdiction to entertain the action.

The appellant company was incorporated in Cuba in 1958 for the taking over and operation of ocean-going ships owned by an autonomous Cuban banking institution named Banco Cubano del Comercio Exterior (hereinafter called "Banco"), one of the purposes of which was to promote Cuban trade generally.

On August 19, 1958, Banco purchased the seven ships which are the defendants in this action from Canadian National (West Indies) Steamships Limited and on the same day entered into a lease-purchase agreement providing for their operation by the appellant under the usual demise charter terms together with an option entitling the appellant to convert the contract to one of purchase and sale and to apply all rental and charter hire payments theretofore made to the purchase price of each vessel. On October 30, 1958, however, the appellant cabled Banco alleging certain breaches of the terms of the agreement and declaring it to be "a nullity in its entirety" although reserving to itself the right to take such action as might be deemed appropriate.

There is evidence in the material before us that the defendant vessels became the property of the Republic of Cuba on June 9, 1959, and for the purposes of this appeal the appellant admits that they have since that date

> . . . been owned by various agencies controlled by the Cuban Government, and that Flota has taken no part in the operation of the said vessels . . . .

In fact it appears from the affidavit of John Thompson Campbell, the accountant of G. T. R. Campbell & Company, Marine Surveyors and Consultants at Montreal, that since June 8, 1959, the latter company

> . . . has supervised the said ships and has submitted its reports and accounts to the Government of the Republic of Cuba represented in this behalf by the Oficina de Fomento Maritimo a division of the Department of Defence and subsequently by the Departmento de Fomento Maritimo a division of the Ministry of Revolutionary Armed Forces, Republic of Cuba.

It was not until August 4, 1960, more than a year after Banco had transferred the ships to the Republic of Cuba, that these proceedings *in rem* were commenced against the defendant ships in the Nova Scotia Admiralty District of

the Exchequer Court of Canada. The writ was directed to "the owner and all others interested in the defendant vessels" and it bore the following endorsement:

> The Plaintiff claims against the Defendant Vessels the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) for injury, loss and damage sustained by the Plaintiff by reason of the breach of a Lease-Purchase Agreement (being an Agreement relating to the use and hire of ships and relating to the Defendant Vessels and others) dated on or about the 19th day of August, A.D., 1958, and for costs, and the Plaintiff claims to have an account taken.

On the same day the defendant ships were arrested at the Port of Halifax pursuant to a warrant for arrest granted on the application of the appellant. Although the lease-purchase agreement referred to in the endorsement was a contract between Flota and Banco, the Republic of Cuba as the then owner of the ships entered an appearance under protest on August 11, 1960, raising the ground that the Admiralty Court had no jurisdiction to entertain the action, and this was followed on August 17 by notice of motion to set aside the writ of summons, the warrant for arrest and the service thereof on the following grounds:

> (*a*) That the endorsement of the Writ of Summons herein discloses no cause of action over which this Honourable Court has jurisdiction.
>
> (*b*) That this Honourable Court is wholly without jurisdiction to entertain this action.
>
> (*c*) That the said steamships and motor-vessels Defendants herein were at all material times owned by the Republic of Cuba.
>
> (*d*) That the said steamships and motor-vessels Defendants herein were and are public national property of and in the possession of and public use and service of the Government of the Republic of Cuba at all times relevant to these proceedings, and cannot be impleaded in this action.
>
> (*e*) That the Lease-Purchase Agreement referred to in the Statement of Claim herein as an Agreement relating to the use and hire of ships is an Agreement whereby the Plaintiff expressly submitted itself and all questions relating to the said Agreement to the jurisdiction of the competent Judges and Courts of the Republic of Cuba, renouncing their right to resort to any other jurisdiction by reason of nationality or of domicile or for any other cause whereby this Honourable Court is without jurisdiction, and the Plaintiff herein is estopped from resorting to the jurisdiction of this Honourable Court.

It is to be noted that the writ of summons recites the fact that the agreement is one "relating to the use and hire of ships and relating to the Defendant Vessels and others" and it is upon this allegation that the appellant bases its right to arrest the defendant vessels, alleging that

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Ritchie J.

the Nova Scotia Admiralty District of the Exchequer Court of Canada has jurisdiction in the premises by reason of the provisions of s. 22(xii)(1) of Schedule A to the *Admiralty Act*, R.S.C. 1952, c. 1, and s. 18(3) and (4) of the said Act, which latter section reads as follows:

> (3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine
>
> (*a*) any claim
>
> (i) arising out of an agreement relating to the use or hire of a ship,
>
> (ii) relating to the carriage of goods in a ship, or
>
> (iii) in tort in respect of goods carried in a ship,
>
> (*b*) any claim for necessaries supplied to a ship, or
>
> (*c*) any claim for general average contribution.
>
> (4) No action *in rem* in respect of any claim mentioned in paragraph (*a*) of subsection (3) is within the jurisdiction of the Court unless it is shown to the Court that at the time of the institution of the proceedings no owner or part owner of the ship was domiciled in Canada.

In the course of his reasons for judgment in the Exchequer Court, Cameron J. made the following comment:

> On these findings of fact, has the Court jurisdiction to entertain this action—a proceeding in which a Cuban Company claims damages for breach of a contract entered into with another Cuban corporation for the operation of the defendant vessels, and when the ownership, possession and control of the vessels has passed from the second corporation to the Republic of Cuba, or at least to one of its departments of state? It is difficult to see how any such claim could succeed if it went to trial since Flota turned over possession of the ships to Banco which had disposed of them by sale before this action was brought. That matter, however, was not one of the grounds on which this motion to set aside the proceedings was based and was not argued before me, and consequently it is unnecessary to consider that matter.

Before this Court Mr. McInnes, on behalf of the respondent, argued that the statutory provision quoted above

> . . . is not intended to give jurisdiction with respect to an agreement entered into between two parties relating to ships which at the date of the Writ were owned by and in the possession of a foreign power.

It is appreciated that the main question sought to be determined on this appeal is whether or not the doctrine of sovereign immunity extends to protect the defendant vessels from seizure and I propose to deal with the matter on that basis, but, like Mr. Justice Cameron, it is difficult for me to see how any such claim could succeed if it went to trial unless the *bona fides* of the transfer of the ships to

the Republic of Cuba could be successfully attacked because it appears from the material before this Court that at the time when the action was brought the defendant ships were no longer the property of the owner whose alleged breach of contract is the subject-matter of the Claim and the Republic of Cuba was not a party to the agreement for the use and hire of the ships out of which the claim arose. I am not prepared to hold that the provisions of s. 18(3)(a)(i) of the *Admiralty Act* or s. 22(xii)(1) of its Schedule are effective to create a true maritime lien such as that discussed in *Goodwin Johnson Ltd. v. The Ship (Scow) A. T. & B. No. 28 et al.*[1], attaching from the inception of the claim and travelling with the ships into whosoever's possession they may come, or indeed that those provisions create any kind of a *jus in rem* capable of being asserted against the ships in the hands of a purchaser for value in good faith whose title antedates the writ of summons and the arrest. (See *Goodwin Johnson Ltd. v. The Ship (Scow) A. T. & B. No. 28 et al., supra; Northcote v. Owners of The Henrich Björn*[2]; *The Piève Superiore*[3]; and Mayers' Admiralty Law and Practice in Canada, 1st ed., 1916, at p. 25.)

It is, however, not necessary for me to dispose of the present appeal on this ground because, as will hereafter appear, I have formed the opinion that the ships in question are to be treated for the purpose of this appeal as "public ships" owned by and in the possession of a foreign sovereign state and that they are, for this reason, immune from arrest in the Exchequer Court.

It has long been recognized that ships of war engaged in the service of a foreign state are to be treated as floating portions of the flag state and that as such in peacetime they are exempt from the jurisdiction of our Courts, and this principle has been extended to include the ships of a foreign state which are used for the public purposes of that state such as mail-carrying packets (*The Parlement Belge*[4]) and ships carrying coal for public purposes (*The Tervaete*[5]), but the proposition that trading vessels owned and

[1] [1954] S.C.R. 513, 4 D.L.R. 1.
[2] (1886), 11 App. Cas. 270.
[3] (1874), L.R. 5 P.C. 482, 43 L.J. Adm. 20.
[4] (1880), 5 P.D. 197.
[5] [1922] P. 259.

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operated by a foreign sovereign state are equally immune from the jurisdiction of our Courts rests in large measure upon the case of *The Porto Alexandre*[1], decided in the Court of Appeal in England in 1920, and upon the minority opinion of Lord Atkin in *Compania Naviera Vascongado v. S.S. Cristina*[2]. The law as to the immunity from the jurisdiction of our Courts of the property of a foreign sovereign state devoted to the public use of that state is fully discussed in the decisions of this Court in *Reference re Powers of the City of Ottawa and the Village of Rockcliffe Park to Levy Rates on Foreign Legations, etc.*[3], and *Municipality of Saint John et al. v. Fraser-Brace Overseas Corporation et al.*[4].

The material before us clearly indicates that at the time of their arrest the defendant ships, although lying idle in Halifax harbour and being equipped as trading or passenger ships, were nonetheless owned by and in possession of a foreign state and were being supervised by G. T. R. Campbell & Company which company was accounting for such supervision to "a division of the Ministry of Revolutionary Armed Forces, Republic of Cuba". Although the ships might ultimately be used by Cuba as trading or passenger ships, there is no evidence before us as to the use for which they were destined, and, with the greatest respect for the contrary view adopted by Mr. Justice Pottier who had the benefit of viewing the ships, I nevertheless do not feel that we are in a position to say that these ships are going to be used for ordinary trading purposes. All that can be said is that they are available to be used by the Republic of Cuba for any purpose which its government may select, and it seems to me that ships which are at the disposal of a foreign state and are being supervised for the account of a department of government of that state are to be regarded as "public ships of a sovereign state" at least until such time as some decision is made by the sovereign state in question as to the use to which they are to be put.

In the case of *The Cristina, supra,* which has been very fully reviewed in the Courts below, a ship which had been requisitioned by the Government of the Republic of Spain,

[1] [1920] P. 30.
[2] [1938] A.C. 485.
[3] [1943] S.C.R. 208, 2 D.L.R. 481.
[4] [1958] S.C.R. 263, *per* Locke J. at p. 278 *et seq.*

was arrested at Cardiff at the suit of its former owners and the Government of Spain entered a conditional appearance and moved to set aside the writ, the arrest and all subsequent proceedings on the ground that the *Cristina* was then the property of a foreign sovereign state. When the case came before the House of Lords it was the unanimous opinion of the Court that the ship was in the actual possession of the Spanish Republic "for public purposes" and that the Courts of England were without jurisdiction to arrest it. The majority of the judges in the House of Lords placed their judgments squarely on the ground that the ship was being employed for the public purposes of a sovereign state, and Lord Thankerton, Lord Macmillan and Lord Maugham expressly reserved their opinion on the question of whether such immunity from arrest would have attached to the ship if it had been engaged in trade. Lord Atkin, however, in the course of delivering his minority opinion, recited the following two propositions of international law at p. 490:

> The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control.

This statement of the law was approved by Viscount Simonds in *Rahimtoola v. Nizam of Hyderabad*[1], but Lord Atkin went on to say:

> There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.

These latter observations which were in accord with the decision of the Court of Appeal in *The Porto Alexandre, supra,* were not necessary to Lord Atkin's decision, were not approved by Viscount Simonds and, as will be seen, were expressly disowned by the majority of the Law Lords who sat in *The Cristina, supra.*

The opinions of Lord Thankerton, Lord Macmillan and Lord Maugham have been thoroughly examined in the careful decision in both Courts below and it is unnecessary

[1] [1958] A.C. 379 at p. 394.

for me to do more than refer to the analysis of the effect of that case made by Viscount Simon, speaking on behalf of the Privy Council, in *Sultan of Johore v. Abubakar Tunku Aris Bendahar*[1], where he said at p. 344:

> An action in rem against a ship impleads persons who are interested in the ship. That is settled law. There is even high authority for the view that such persons are, or may be, directly impleaded by such proceedings (see *The Cristina* case *per* Lord Atkin and *per* Lord Wright). If, however, it had been definitely determined that in no case could a foreign sovereign be impleaded without his consent, there could have been no justification for reserving the case of a sovereign's ship engaged in ordinary commerce—a reservation that was in fact made by the majority of the House of Lords in *The Cristina*. For a sovereign is impleaded by an action in rem against his ship, whether it is engaged in ordinary commerce or is employed for purposes that are more usually distinguished as public. The extent of the impleading is the same in the one case as in the other. Indeed, a great deal of the reasoning of the judgment in *The Parlement Belge*, 5 P.D. 197, would be inexplicable if there could be applied a universal rule without possible exception to the effect that, once the circumstance of a foreign sovereign being impleaded against his will can be established, a proceeding necessarily becomes defective by virtue of that circumstance alone.
>
> To say this is merely to disavow an alleged absolute and universal rule. It does nothing to throw doubt on the existence of the general principle.

Mr. Justice Cameron in the present case appears to have adopted Lord Atkin's view as to the doctrine of absolute sovereign immunity, saying:

> While the matter is perhaps not entirely free from doubt, I have come to the conclusion that I should follow the rule as laid down by Lord Atkin in *The Cristina* and which has been cited with approval by the well-known textbook writer to whom I have referred. It was also followed in a Canadian case, that of *Thomas White v. The Ship Frank Dale*, [1946] Ex. C.R. 555, by Sir Joseph Chisholm, D.D.J.A.

When reference is made to the decision of Sir Joseph Chisholm, it is found that that learned judge must have been misled by the head-note in *The Cristina, supra,* at p. 485 because he says:

> In the *Cristina* case the Courts held that the immunity claimed extended and applied to ships engaged in trade and belonging to a foreign sovereign State. The desirability of modifying the accepted rule so far as it concerned trading ships was pointed out by some of their Lordships and particularly by Lord Maugham, but the House was of opinion that in the case the immunity was properly claimed. That seems to be the principle applied in the United States: *Berizzi Bros. Co. v. S.S. Pesaro,* (1926) 271 U.S. 562, and until changed must be accepted by our Court.

The fact that the view so expressed by Sir Joseph Chisholm has not been accepted in this Court appears from what is said by Sir Lyman Duff C.J. in *Reference re Powers of the*

[1] [1952] A.C. 318.

City of Ottawa and the Village of Rockcliffe Park to Levy Rates on Foreign Legations, etc., supra, at p. 221, where he had occasion to say:

Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the property of a foreign state devoted to public use in the traditional sense. In *The Parlement Belge supra,* it was held that this immunity applies to a ship used by a foreign government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship, the property of a foreign sovereignty and employed by the foreign government for trading purposes. *Berizzi Brothers Co. v. S.S. Pesaro,* (1926) 271 U.S. 562. *It most certainly cannot be said that this is a settled doctrine, in view of the opinions expressed in the Cristina case,* although Lord Atkin, who delivered the judgment of the Judicial Committee in *Chung Chi Cheung v. The King,* [1939] A.C. 160 at p. 175 uses a general phrase:—

The sovereign himself, his envoy and his property, including his public armed ships, are not to be subjected to legal process. (The italics are mine.)

The implications involved in accepting the opinion which Lord Atkin expressed in *The Cristina, supra,* at p. 490 as "settled doctrine" applicable to state-owned trading ships appear to me to be indicated by the following excerpts from the works of recognized authors on international law.

In Oppenheim's International Law, 8th ed., 1955, vol. I, at p. 273, it is said:

. . . the vast expansion of activities of the modern State in the economic sphere has tended to render unworkable a rule which grants to the State operating as a trader a privileged position as compared with private traders. Most States, including the United States, have now abandoned or are in the process of abandoning the rule of absolute immunity of foreign States with regard to what is usually described as acts of a private law nature. The position, in this respect, in Great Britain must be regarded as fluid.

To this last sentence the author appends the following note:

This is so in particular with regard to foreign public vessels engaged in commerce. In *The Cristina* [1938] A.C. 485 the majority of the House of Lords expressed views not favourable to immunity from jurisdiction in such cases. . . .

Dr. Cheshire, who is not customarily addicted to violent language, makes this observation in his recent (6th) edition, 1961, of his work on Private International Law. He says at p. 96:

That Sovereign States which engage in the sea-carrying trade should be relieved of the obligations to which private shipowners are subject is unjust, if indeed not preposterous. Moreover, the injustice has been increased by the emergence of welfare and totalitarian States, for the activities of sovereign governments, originally mainly political, have now expanded immeasurably both in extent and scope.

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With the greatest respect for those who hold a different view, I do not find it necessary in the present case to adopt that part of Lord Atkin's judgment in *The Cristina, supra,* in which he expressed the opinion that property of a foreign sovereign state "only used for commercial purposes" is immune from seizure under the process of our Courts, and I would dispose of this appeal entirely on the basis that the defendant ships are to be treated as (to use the language of Sir Lyman Duff) "the property of a foreign state devoted to public use in the traditional sense", and that the Exchequer Court was, therefore, without jurisdiction to entertain this action.

I would, therefore, dismiss this appeal with costs.

The judgment of Locke and Judson JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of Cameron J., delivered in the Exchequer Court[1], allowing the appeal of the Republic of Cuba from the decision of Pottier J., District Judge in Admiralty for the Nova Scotia Admiralty District, which dismissed the motion by the Republic of Cuba to set aside the writ and warrant of arrest issued in this action and service thereof on the ground that the Court was without jurisdiction to entertain the action.

While Pottier J. made no express finding upon the question as to the ownership of the ships, it would appear, as pointed out by Cameron J., that it was his opinion that the claim to ownership by the Republic of Cuba had been established. Cameron J. found as a fact that, as of the time of the issue of the writ and the seizure of the vessels on August 4, 1960, they were the property of the Republic. The evidence, in my opinion, supports that finding.

It is not disputed that on August 4, 1960, the Republic of Cuba was a sovereign state recognized by Canada, each of the countries being represented by an ambassador in the other.

There is no evidence as to the use to which the Republic of Cuba intended to put the vessels which it had purchased on June 9, 1959, and which, since that time, had been anchored in the Harbour of Halifax. The Republic was in possession and control of the ships on August 4, 1960.

[1] [1962] Ex. C.R. 1.

In my opinion, the law applicable in these circumstances is as it is stated in *Compania Naviera Vascongado v. S.S. Cristina*[1], in the following terms:

> The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

In *Rahimtoola v. Nizam of Hyderabad*[2], Viscount Simonds adopted that statement as accurately stating these proceedings of international law.

The question as to whether the law extends to property only used for the commercial purposes of the sovereign does not arise in the present matter and I express no opinion as to it.

I respectfully agree with the reasons for judgment delivered in this matter by Cameron J. and I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: H. P. MacKeen, Halifax.

Solicitor for the respondent: Donald McInnes, Halifax.

CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) .... APPELLANT;

1962
*Apr. 24
June 25

AND

ONOFRIO ZAMBRI (*Informant*) ......RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour—Strike—Threat of dismissal—Refusal to employ—Whether strike a lawful one—Right to strike—The Labour Relations Act, R.S.O. 1960, c. 202, ss. 1(2), 3, 50.

A collective agreement between the appellant company and a union, the latter being the bargaining representative for a unit of employees in an hotel operated by the company, expired on August 16,

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

[1] [1938] A.C. 485 at p. 490. [2] [1958] A.C. 379 at p. 394.

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1960. The parties were unsuccessful in negotiating a new agreement and the matter was referred to a conciliation board. However, no settlement was reached and the union called a strike on April 24, 1961. In a letter dated June 24, 1961, the company informed the striking employees that unless they gave notice by July 15 of their intention either to return to work or to resign they would be dismissed as of July 16, 1961. The employees who refused to so notify the company were advised by a letter of July 18 that they were no longer employees of the hotel. Two complaints were laid by the union, one under ss. 50(a) and 69(1) and the other under ss. 50(c) and 69(1) of *The Labour Relations Act,* R.S.O. 1960, c. 202, charging the company with (1) unlawfully refusing to continue to employ certain of its employees because they were exercising a right under the Act and (2) unlawfully seeking by threat of dismissal to compel certain of its employees to cease their participation in a lawful strike. The magistrate who heard the case dismissed the two charges. This decision was set aside, on appeal, by the Chief Justice of the High Court, and by a unanimous decision of the Court of Appeal the order of the Chief Justice was affirmed with a variation. Pursuant to special leave, the company appealed to this Court.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Cartwright and Fauteux JJ.: The company's contention that the striking employees had to terminate their contracts of employment before they could engage in a lawful strike was rejected. The strike was lawful at common law and was not forbidden by the Act. That being so, the effect of s. 1 (2) was (i) to provide that while the strike continued the employees on strike did not cease to be employees of the appellant, and (ii) to prevent the employer from terminating that employer-employee relationship by reason only of the employee ceasing to work as the result of the strike.

The strike being a lawful activity of the union, it followed that by virtue of s. 3 of the Act, the striking employees, all of whom were members of the union, had the right to participate in that lawful activity. The participation in the strike by the employees was, therefore, the exercise of a right under the Act.

Per Locke J.: The case should be decided upon the assumption, as was found below, that the strike was lawful. By virtue of s. 1(2) of the Act each of the strikers was an employee within the meaning of that term in s. 50(c) and was entitled to the protection afforded by it.

The letters written by the appellant on June 26 and July 18, 1961, were properly construed as a refusal to continue to employ the employees in question from and after July 16, 1961, by reason of the fact that they continued on strike, and the letter of June 26 as a threat of dismissal if they continued such participation.

The contention that the right to strike was expressly given to employees by s. 3 of the Act was rejected. The statute, however, implicitly recognized that employees may lawfully strike by restricting that undoubted right during the period in which conciliation proceedings are being carried on and for a defined period after an award. While the right existed at common law at the time of the passing of *The Labour Relations Act,* that right was limited and controlled in the circumstances mentioned and was expressly recognized after the

expiration of these periods. Striking after complying with the requirements of the statute was exercising a right under the Act within the meaning of that expression in s. 50.

Per Abbott, Martland, Judson and Ritchie JJ.: The statutory requirements having been complied with, the strike was lawful under the Act. That being so, the letter of June 26 constituted an offence under s. 50(c) of the Act and that of July 18 constituted an offence against s. 50(a).

That the strikers must terminate their contracts of employment before there could be a lawful strike under the Act, as argued by the appellant, would make nonsense of an Act which authorizes a certain course of conduct after certain things have been done and which, in addition, expressly preserves the employer-employee relationship by s. 1 (2).

APPEAL from a decision of the Court of Appeal for Ontario, which affirmed with a variation an order of McRuer C.J.H.C.[1] setting aside a decision of Magistrate Elmore whereby he acquitted the appellant on two charges under *The Labour Relations Act.* Appeal dismissed.

W. R. Jackett, Q.C., and *G. P. Miller,* for the defendant, appellant.

David Lewis, Q.C., and *T. E. Armstrong,* for the informant, respondent.

The judgment of Kerwin C.J. and of Taschereau, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This appeal raises questions of importance as to the meaning and effect of certain provisions of *The Labour Relations Act,* R.S.O. 1960, c. 202, hereinafter referred to as "the Act".

The appeal is brought, pursuant to special leave granted by this Court, from a unanimous judgment of the Court of Appeal for Ontario which affirmed with a variation an order of McRuer C.J.H.C.[1] setting aside the decision of His Worship Magistrate Elmore whereby he acquitted the appellant on two charges, one of a breach of s. 50(*a*) and the other of a breach of s. 50(*c*) of the Act.

The order of McRuer C.J.H.C. directed that the matter be remitted to the magistrate to be dealt with according to the law as declared in the reasons for judgment. The Court of Appeal varied this direction to provide that the

[1] [1962] O.R. 108, 31 D.L.R. (2d) 209, *sub. nom. Regina v. Canadian Pacific Railway Co.*

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matter be remitted to the magistrate in order that he may register convictions against the appellant in respect of each of the charges and impose whatever lawful penalties he deems appropriate. No question was raised before us as to the propriety of this variation.

The charges against the appellant were as follows:

(*a*) That the Canadian Pacific Railway Company, on the 26th day of June in the year 1961 at the Municipality of Metropolitan Toronto, in the County of York, unlawfully did seek by threat of dismissal to compel certain of its employees, including Mrs. Laura Job, Mrs. Ann Todd, Robert Boyle, Albert Hetenyi, Raymond Seguin and Charles Ireton, to cease to exercise their right under The Labour Relations Act, R.S.O. 1960, c. 202, to wit: The right of such employees, including the said Mrs. Laura Job, Mrs. Ann Todd, Robert Boyle, Albert Hetenyi, Raymond Seguin and Charles Ireton to participate in a lawful strike at the Royal York Hotel conducted by Local 299, Hotel and Club Employees' Union, AFL-CIO-CLC, of the Hotel and Restaurant Employees' and Bartenders' International Union, contrary to Section 50 (*c*) and 69 (1) of the said Labour Relations Act;
and

(*b*) That the Canadian Pacific Railway Company, on the 16th day of July in the year 1961 at the Municipality of Metropolitan Toronto, in the County of York, unlawfully did refuse to continue to employ certain of its employees, including . . . (the same six persons as named in charge (*a*)) . . . because they were exercising a right under The Labour Relations Act, R.S.O. 1960, c. 202, to wit: The right . . . (the right is described in the same words as in charge (*a*)) . . ., contrary to Sections 50 (*a*) and 69 (1) of the said Labour Relations Act.

The appeal before McRuer C.J.H.C. was brought on a case stated by the magistrate from which the facts appear to be as follows. The appellant is the operator of the Royal York Hotel in the City of Toronto. The respondent is an officer of the trade union described in the charges. This union, as the bargaining representative for a unit of employees in the hotel, had made a collective agreement with the appellant, which expired on August 16, 1960. Within two months before the agreement expired the union gave notice pursuant to s. 40(1) of the Act of its desire to bargain with a view to the renewal of the agreement with modifications. After the appellant and the union had bargained unsuccessfully conciliation services were granted. The union received the report of the conciliation board between March 6 and March 8, 1961. Further meetings were held but no settlement was reached. The prohibition against striking contained in section 54(2) of the Act therefore ceased to operate at the latest on March 15, 1961.

On April 24, 1961, the union called a strike, which was still continuing at the time of the trial before the magistrate.

On June 26, 1961, the appellant sent to each of the six employees named in the charges a letter reciting that on the afternoon of April 24 the employee had withdrawn from the service of the hotel and had not reported for duty since that time, inviting him (or her) either to advise that he wished to return to work in the hotel or to resign, for which purpose appropriate forms were provided, and notifying him that, unless he returned one or other of the forms by July 15, he was "dismissed effective July 16th, 1961".

On July 14 the respondent wrote to the appellant a letter saying in part:

> Our members wish to make clear that they consider themselves employees of the Royal York Hotel who are on a lawful strike and that they will continue to consider themselves to be employees of the Hotel until and after the strike is settled and a collective agreement between the Hotel and the Union is entered into.

On July 17, the appellant wrote a letter to the respondent and, on July 18, the appellant wrote a letter to each of the six persons named in the charges taking the position that the persons to whom the letter of June 26 had been addressed who had not advised that they wished to return to work were no longer employees of the hotel.

On September 29, 1961, the two charges were laid.

At the trial the learned magistrate found the facts set out above and also, that the persons referred to in the charges were at all relevant times members of the union, that the strike was "under the general supervision of the negotiating committee of the Union, the striking members, in addition to the executive of the Union", that Charles Ireton, as vice-president of the union, was in charge of assigning picketers, that meetings of members of the union who were striking employees were held daily, and, latterly, twice a week, in halls and premises rented and paid for by the union, and that throughout the strike the picketers had displayed signs bearing the name of the union and the words "On Strike—Royal York Hotel".

The grounds on which it was submitted that the learned magistrate erred in law in acquitting the appellant are set out in the stated case as follows:

1. That I was wrong in law in holding that the right to strike is a common law right, and not a right under the Labour Relations Act, Revised Statutes of Ontario, 1960, Chapter 202.

2. That I was wrong in law in holding that no strike could have properly been called nor could the employees in question cease to work unless or until they terminated their individual contracts by proper notice.

3. That I was wrong in law in holding that the law required an employee to terminate his contract of employment for the purpose of participating in a strike.

4. That in the alternative, I was wrong in law in holding that the Labour Relations Act, Revised Statutes of Ontario, 1960, Chapter 202, has not in the circumstances to which these informations relate altered the requirement that an employee shall terminate his individual contract of employment before participating in a strike.

5. That I was wrong in law in holding that the persons referred to in the informations had no right to strike and to cease work as they did.

6. That I was wrong in law in holding that the persons referred to in the informations ceased to be employees of the accused by going on strike and ceasing to work as they did, or that in any event they subjected themselves to being discharged in the manner in which they were by going on strike and ceasing to work as they did.

7. That I was wrong in law in failing to hold that the strike in question in which the employees participated was a lawful activity of a trade union, namely, Local 299, Hotel and Club Employees' Union, AFL-CIO-CLC, of the Hotel and Restaurant Employees' and Bartenders' International Union.

The provisions of s. 50 of the Act under which the charges were laid 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;

* * *

(*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.

The learned Chief Justice of the High Court and the Court of Appeal have construed clause (*c*) of s. 50 as if the words "to cease" were inserted immediately before the concluding words "to exercise any other rights under this Act". In answer to a question from the Court Mr. Jackett said that while not agreeing with this construction he did not intend to address any argument against it. Consequently Mr. Lewis was not called upon to deal with the point and, for the purposes of this appeal, I propose to assume that this construction is correct.

In considering the question whether the right to strike which the six persons named in the charges claimed to be exercising is a right under the Act, it must first be decided whether the strike was a lawful one. That the purpose of the employees in going on strike was not to injure their employer but to achieve improvements in their working conditions and monetary benefits has not been questioned. The argument that the strike was unlawful is based on the submission that in ceasing to work each of the employees was committing a breach of contract.

There is the highest authority for the proposition that a strike which would otherwise be lawful at common law becomes unlawful if the cessation of work is a breach of contract. It will be sufficient to refer briefly to the following cases.

In *Denaby & Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*[1], it appears that the miners who went on strike were employed under contracts requiring them to give fourteen days' notice of termination. They went on strike without giving any notice. At p. 387 Lord Loreburn L.C. said:

> Inasmuch as the men were all working under contracts which could not be terminated except after fourteen days' notice, it is manifest that the abrupt cessation of work on June 29 involved a breach of contract and was unlawful.

All the other learned Lords agreed in this view.

In *South Wales Miners' Federation v. Glamorgan Coal Co.*[2], the judgment is to the same effect. At p. 253, Lord Lindley said:

> To break a contract is an unlawful act, or, in the language of Lord Watson in *Allen v. Flood,* "a breach of contract is in itself a legal wrong".

[1] [1906] A.C. 384, 75 L.J. K.B. 961.
[2] [1905] A.C. 239, 74 L.J. K.B. 525.

In *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*[1] the judgments emphasize the fact that the course of conduct of the defendants which was held not to be unlawful did not involve any breach of contract. Lord Wright said at p. 465:

> But there might be circumstances which rendered the action wrongful. The men might be called out in breach of their contracts with their employer, and that would be clearly a wrongful act as against the employer, an interference with his contractual right, for which damages could be claimed not only as against the contract-breaker, but against the person who counselled or procured or advised the breach.

I find nothing in the Act that renders lawful the calling of, or participation in, a strike where the cessation of work is in breach of a term in the contracts under which the employees are working requiring the giving of notice of a prescribed length before ceasing work; clear words in a statute would be required to bring about such an alteration in the law.

In the case at bar the record does not disclose the terms of the expired collective agreement or of the contracts under which the employees were working immediately before the commencement of the strike, nor does it show what notice, if any, was given by the union or by any of the employees of the time at which the employees would cease work. It, at first, occurred to me that the failure to have stated these facts might render it necessary to direct that the case be sent back to the learned magistrate for amendment pursuant to s. 740(1)(*b*) of the *Criminal Code*, but I have concluded that this is not necessary.

Mr. Jackett's real attack on the legality of the strike, if I have correctly apprehended his argument, is based not on the breach of a contractual provision requiring the employees to give a stated length of notice before ceasing work but rather on the view that, to remain within the law, each employee must before or at the moment of ceasing work terminate his contract of employment. It is said that so long as his contract is in existence it is his duty to work and failure to come to work is a breach of contract which

[1] [1942] A.C. 435, 1 All E.R. 142.

renders the strike unlawful. In support of this submission reliance is placed on statements an example of which is that of Lord Davey in the *Denaby* case, *supra,* at p. 398:

> My Lords, the appellants were perfectly within their right in electing to treat the absence of the men from work since June 29 as a rescission of their contracts and requiring them to enter into new contracts of service before resuming work.

That, undoubtedly, would be a correct statement of the position of the parties at common law; the employee cannot have it both ways; if he is still an employee it is his duty to work, and if he refuses to work he is in breach of the contract of employment and the employer can treat it as at an end. But, in my opinion, the position of the parties is altered by the relevant provisions of the Act.

Subsection (2) of s. 1 of the Act is as follows:

> (2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

It is not necessary to decide the exact nature of the relationship of employer and employee the existence of which this subsection preserves, or creates, during the continuance of a strike; two of the main features of the ordinary relationship are absent, the employee is not bound to work and the employer is not bound to pay wages. Whatever the relationship be, it is obvious that if the employer is entitled to terminate it on the sole ground that the employee refuses to work while the strike continues, the subsection is rendered nugatory.

The Act recognizes that strikes may be lawful or unlawful, (see *e.g.* s. 57); it forbids unlawful strikes, (see s. 55); it appears to me that it leaves it to be determined by the common law whether or not a strike is lawful; it forbids strikes which would otherwise be lawful at common law unless certain conditions have been complied with, (see particularly s. 54). In the case at bar those conditions had been fulfilled when the strike was called. The strike was, in my opinion, lawful at common law and not forbidden by the Act. That being so, it appears to me that the effect of s. 1(2) is (i) to provide that while the strike

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continues the employees on strike do not cease to be employees of the appellant, and (ii) to prevent the employer from terminating that employer-employee relationship by reason only of the employee ceasing to work as the result of the strike.

It is said that the Act does not in terms declare the right to strike, but I find myself in agreement with Mr. Lewis' argument that the right is conferred by s. 3 which reads:

> 3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

It is clear on the findings of fact made by the learned magistrate that the strike with which we are concerned was an activity of the union; I have already expressed my opinion that it was lawful; it follows that s. 3 confers upon the six employees, all of whom are members of the union, the right to participate in that lawful activity. I conclude therefore that the participation in the strike by the employees was the exercise of a right under the Act.

The letter of June 26, 1961, sent by the appellant to each of the six employees named in the charges, is unambiguous; it threatens each of them with dismissal unless by July 15 he has either applied to return to work or resigned; it also indicates a refusal to continue to employ them after the last mentioned date. It may be that the two charges are really alternative ways of describing the same offence so that a conviction might be properly registered on either but not on both, but that point does not appear to have been raised at any stage of the proceedings. It will be observed that the letter proceeds on the assumption that the six persons to whom it was sent are still employees of the appellant and it gives only one reason for the proposed dismissal, that is that the employees have not reported for duty since April 24; it is not based on any alleged failure on the part of the employee to give a notice required by the terms of his contract of employment; this circumstance serves to confirm the view which I have already expressed that it is unnecessary to send the case back to the learned magistrate for amendment.

For the above reasons it is my opinion that on the facts as found by the learned magistrate he erred in law in acquitting the appellant.

I would dismiss the appeal with costs.

LOCKE J.:—The facts disclosed by the stated case do not include any information as to the terms of the contracts of employment existing between the railway company and the six persons whose rights, it is charged, were infringed, either as of the date of the expiration of the collective agreements on August 16, 1960, or at the time of the commencement of the strike on April 24, 1961.

As the collective agreement was not made part of the record and there is no other information disclosed, we are not in a position to decide whether, at the relevant time, the employees in question committed a breach of contract when, in company with other members of their union, they ceased work on April 24.

In view of the length of time which elapsed between the date of the delivery of the report of the conciliation board and the date the strike commenced and the fact that the parties conducted abortive negotiations during that period, it should not, in my opinion, be assumed that the employer was not informed by the union of the intention of all of the employees to quit their employment. If the six persons in question were employed by the day or simply at an hourly rate, such a notice given at a reasonable time before they quit work would, in my opinion, be effective to terminate such a contract of employment. If it was in law necessary that the contract be terminated before these employees quit their work, such notice might properly be given on their behalf by the union if duly authorized.

In the absence of any further evidence than is afforded by the stated case, we cannot properly, in my opinion, find that taking part in the strike involved a breach of the contracts of employment of these six individuals.

I consider that the case should be decided upon the assumption that the strike of the members of the union, including these six persons, was lawful, as has been found by McRuer C.J.H.C., whose finding has been approved by the Court of Appeal.

The right which the complainants claim to have been infringed is their right to participate in a lawful strike and subs. (2) of s. 1 of *The Labour Relations Act* upon which they rely as defining their legal status must refer to such a strike. It would not, therefore, assist the respondents if their act of quitting work was unlawful.

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That subsection reads as follows:

> For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

This subsection does not, in my opinion, continue in force such employment contract as existed as of the date of a strike. It does no more than to declare that, for the purposes of the Act, the relationship of employer and employee continues despite the employee ceasing to work as the result of a strike. Accordingly, each of these six persons was an employee, within the meaning of that term in subs. (c) of s. 50, and entitled to the protection afforded by it.

The language of subsections (a) and (c) of s. 50 under which the two charges were laid, so far as it is relevant, reads:

> No employer
>
> (*a*) shall refuse 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;
>
> * * *
>
> (*c*) shall seek by threat of dismissal, or by any other kind of threat . . . to compel an employee to . . . cease to be a member or officer or representative of a trade union or to exercise any other rights under this Act.

The letters written by the appellant on June 26, 1961, and July 18, 1961, have been construed, properly in my opinion, as a refusal to continue to employ these six persons from and after July 16, 1961, by reason of the fact that they continued on strike, and the letter of June 26, 1961, as a threat of dismissal if they continued such participation.

I do not agree with the contention of the respondent that the right to strike is expressly given to employees by s. 3 of *The Labour Relations Act.* That section, saying that every person is free to join a trade union and to participate in its lawful activities, and s. 4 giving a similar right to persons to join an employer's organization, are equally meaningless. No statutory permission is necessary to participate in the *lawful activities* of any organization. Furthermore, it is not the union that strikes but the employees.

The statute, however, implicitly recognizes that employees may lawfully strike by restricting that undoubted right during the currency of collective agreements, during the period in which conciliation proceedings are being carried on and for a defined period after an award. Section 57(2) refers in terms to a lawful strike. The objections to the legality of strikes on the ground that they are unlawful conspiracies or in restraint of trade which might formerly be made the subject of criminal charges have long since disappeared by reason of the provisions of the *Criminal Code,* and combinations of workmen for their own reasonable protection as such are expressly declared to be lawful by s. 411 of the *Criminal Code* and the predecessors of that section.

While the right existed at common law at the time of the passing of *The Labour Relations Act,* that right was limited and controlled in the circumstances I have mentioned and it is expressly recognized after the expiration of these periods. Striking after complying with the requirements of the statute is, in my opinion, exercising a right under the Act within the meaning of that expression in s. 50.

While unnecessary for the disposition of this appeal, I wish to express my dissent from the opinion that has been stated that if a strike is never concluded by settlement the relationship declared by subs. (2) of s. 1 continues until the employee has either gone back to work, taken employment with other employers, died or become unemployable. When employers have endeavoured to come to an agreement with their employees and followed the procedure specified by *The Labour Relations Act,* they are at complete liberty if a strike then takes place to engage others to fill the places of the strikers. At the termination of the strike, employers are not obliged to continue to employ their former employees if they have no work for them to do, due to their positions being filled. I can find no support anywhere for the view that the effect of the subsection is to continue the relationship of employer and employee indefinitely, unless it is terminated in one of the manner suggested.

Subsection (2) of s. 1 appeared first in Ontario legislation in c. 34 of the Statutes of 1950. Legislation of this nature appeared at an earlier date in *The Strikes and Lockouts Prevention Act* of Manitoba, being c. 40 of the Statutes of

1937, and in the *Wartime Labour Regulations* prescribed by the Governor General in Council on February 17, 1944, which were adopted in Manitoba by c. 48 of the Statutes of 1944. Similar legislation was enacted thereafter in the *Industrial Conciliation and Arbitration Act* of British Columbia and *The Alberta Labour Act.*

The idea of creating this artificial relationship appears to have originated in the *National Labor Relations Act* of the United States, commonly referred to as the Wagner Act, passed by Congress on July 5, 1935, s. 2 of which declared that the term "employee" shall include any individual whose work had ceased as a result of a current labour dispute and who has not obtained any other regular and substantially equivalent employment.

I do not construe the decision in *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*[1], and *National Labor Relations Board v. Mackay Radio & Telegraph Co.*[2], as deciding that in the United States the relationship continues indefinitely unless that relationship has been abandoned, as has been said.

In the first of these cases, the employer had refused to bargain with the union which represented its employees on the ground that by striking they had ceased to be such and Parker J. held that this was an unfair labour practice since the strike did not in itself terminate the relationship either at common law or under the *Wagner Act.*

In the second case decided in the Supreme Court, the employer, following the settlement of the strike, had refused to employ five men on account of union activities during the strike, and the finding that this was an unfair labour practice was upheld, reversing the judgment of the Circuit Court of Appeals. Roberts J., who delivered the judgment of the court, said, *inter alia,* that it did not follow that an employer guilty of no act forbidden by the statute had lost the right to protect and continue his business by supplying places left vacant by the strikers and was not bound to discharge those he had thus hired upon the election of the strikers to resume their employment in order to create places for them. That is the law in Canada also, in my opinion.

[1] (1937), 91 F. (2d) 134. [2] (1938), 304 U.S. 333.

I would dismiss this appeal with costs.

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

JUDSON J.:—The issue in the present appeal is a simple one. The collective agreement between the company and the union had expired. Every procedure required by the Act had been resorted to and every time limit had passed. The case is within s. 54(2), which reads:

> 54. (2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until a trade union has become entitled to give and has given notice under section 11 or has given notice under section 40, on behalf of the employee to his employer, or in the case of a notice under section 40, has received such notice, and conciliation services have been granted and seven days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties or the Minister has informed the parties that he does not deem it advisable to appoint a conciliation board.

This subsection limits the right to strike until its requirements have been complied with. But once the statutory requirements have been complied with, the strike becomes lawful under the Act. The foundation of the right to strike is in the Act itself.

We are concerned in this appeal entirely with an alleged offence against this Act. Whether a common law cause of action exists against the union or the strikers makes no difference. Whatever the common law may say about strikes, this Act says that this strike is lawful because the statutory conditions have been complied with. That being so, the letter of June 26, 1961, constituted an offence under s. 50(c) of the Act and that of July 18, 1961, constituted an offence against s. 50(a). I therefore agree with Cartwright J. in his rejection of the appellant's argument that before there can be a lawful strike under the Act, the strikers must terminate their contracts of employment. Such a requirement would make nonsense of an Act which authorizes a certain course of conduct after certain things have been done and which, in addition, expressly preserves the employer-employee relationship by s. 1(2). I take this to be the ratio of the decision of Cartwright J. and I limit my agreement to that ratio.

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I put this limitation on my agreement because I have the greatest difficulty in understanding why *South Wales Miners' Federation v. Glamorgan Coal Co.*[1], and *Denaby & Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association*[2], entered into the argument of this appeal. In the first case, a union and its officers were found liable in damages for procuring breach of contracts of employment. In the second case, it was found that those who procured the strike in breach of contract were not authorized to act on behalf of the union with the result that there was no liability. There can be no dispute that breach of contract or inducing breach of contract gives a cause of action but these principles are not involved in this appeal and the extent to which these cases fit in with a *Labour Relations Act* or with collective agreements is better left untouched. When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship. Conversely, when there is a collective agreement in effect, it is difficult to see how there can be anything left outside, except possibly the act of hiring.

My conclusion in this case is that once it is made to appear that the statutory requirements have been complied with, a conviction as a result of these letters follows as a matter of course and that nothing else need be considered.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: G. P. Miller, Toronto.

Solicitors for the informant, respondent: Jolliffe, Lewis and Osler, Toronto.

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*Mar. 2
June 11

HER MAJESTY THE QUEEN .... APPELLANT;

AND

EDGAR LOISELLE .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Injurious affection to land—Garage and service station located on highway—Highway closed and diverted by St. Lawrence Seaway—Whether garage owner entitled to compensation—St. Lawrence Seaway Authority Act, R.S.C. 1952, c. 242, s. 18(3).

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

[1] [1905] A.C. 239, 74 L.J.K.B. 525. [2] [1906] A.C. 384, 75 L.J.K.B. 961.

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The respondent operated a garage and service station on highway no. 3 in the Province of Quebec. As a result of the construction of the St. Lawrence Seaway, the highway was closed some 80 feet beyond the respondent's property and diverted a distance of some 1500 feet. The respondent's property was now located on a dead-end highway. No portion of his property was taken for the purposes of the seaway. By a petition of right the respondent claimed compensation for injurious affection. It was argued by the Crown that the injurious affection had not been caused by the construction of the seaway, but by the decision of the provincial Government to change the location of the highway and that there was therefore no claim in law against the Crown in the right of Canada. The trial judge maintained the petition of right and the Crown appealed to this Court.

Held: The appeal should be dismissed.

It was clearly established in evidence that the diversion of the highway was made at the request of the Seaway Authority and largely at its expense; it was also clear that had the seaway not been built, the location of the highway would not have been changed.

It seemed obvious that had the Seaway Authority or any other person, without statutory authorization, constructed a canal and blocked the main highway adjacent to the respondent's property the latter—aside from any other remedies which might have been open to him—would have had a valid claim for damages under the general law. The statutory authority given to construct the works in question was however expressly made subject to the obligation to pay compensation for damage to lands injuriously affected. It seemed clear that there was a physical interference with a right which the owner was entitled to use in connection with his property, and that on the evidence such interference substantially diminished its value as a commercial property. The trial judge found that the construction of the canal and the diversion of the highway had adversely affected the respondent's land as a commercial property and there was ample evidence to support that finding. The amount awarded by the trial judge was not in issue in this appeal.

Autographic Register Systems Limited v. C.N.R., [1933] Ex. C.R. 152; *Metropolitan Board of Works v. McCarthy,* L.R. 7 H.L. 243; *C.P.R. v. Albin,* 59 S.C.R. 151, referred to.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], awarding damages for injurious affection. Appeal dismissed.

P. M. Ollivier, and *R. Tassé,* for the appellant.

François Dorval, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The Crown has appealed from a judgment of the Exchequer Court[1] awarding respondent an amount of $18,018.32 as indemnity for injurious affection caused

[1] [1961] Ex. C.R. 31.

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to respondent's property as a result of the construction of the St. Lawrence Seaway by the St. Lawrence Seaway Authority, a statutory corporation, acting as agent for the Crown in the right of Canada.

The facts are not in dispute. Since 1949 respondent had been operating a garage and service station on the outskirts of Melocheville in the Province of Quebec. This garage was located on provincial highway no. 3, which is the main Montreal-Valleyfield highway running along the south shore of the St. Lawrence River. In 1957, by reason of the construction of the seaway, this highway was closed some 80 feet beyond respondent's property and diverted a distance of some 1500 feet to the east, passing under the seaway canal by means of a tunnel. As a result of the works constructed by the Seaway Authority and the diversion of the highway, respondent's property was thereafter located in a cul-de-sac at the very end of a street, some 80 to 90 feet from one of the canals and some 1500 feet from the intersection of the re-located highway. No portion of the property of respondent was taken for the purposes of the seaway and his claim is entirely one for injurious affection.

Counsel for the Crown first argued that the injurious affection had not been caused by the construction of the seaway but by the decision of the provincial government to change the location of the highway and that there was therefore no claim in law against the Crown in the right of Canada. We were all of opinion at the hearing that this was not so and we did not hear the respondent on this point.

It was clearly established in evidence that the diversion of the highway was made at the request of the Seaway Authority and largely at its expense. It is also clear that had the seaway not been built the location of the highway would not have been changed. Decisions of the Quebec Courts in cases where damages have been claimed for injurious affection resulting from the closing or relocation of roads or streets under the *Municipal Code* or other relevant statutes are therefore of little assistance in the present case.

Respondent's claim was made under s. 18(3) of the *St. Lawrence Seaway Authority Act,* Statutes of Canada 1951 (2nd session), 15-16 Geo. VI, c. 24, which reads:

(3) The Authority shall pay compensation for lands taken or acquired under this section or for damage to lands injuriously affected by the construction of works erected by it and all claims against the Authority for such compensation may be heard and determined in the Exchequer Court of Canada in accordance with sections 46 to 49 of the Exchequer Court Act.

The conditions required to give rise to a claim for compensation for injurious affection to a property, when no land is taken, are now well established; *Autographic Register Systems Ltd. v. Canadian National Railway Company*[1]; Challies "The Law of Expropriation", p. 136. These conditions are:

(1) the damage must result from an act rendered lawful by statutory powers of the person performing such act;

(2) the damage must be such as would have been actionable under the commonlaw, but for the statutory powers;

(3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

(4) the damage must be occasioned by the construction of the public work, not by its user.

Mr. Ollivier for the Crown agreed that conditions 1 and 4 had been met in the present case but he argued that conditions 2 and 3 had not.

As to the second of the four conditions, it seems obvious that had the Seaway Authority or any other person, without statutory authorization constructed a canal and blocked the main highway adjacent to respondent's property, the latter—aside from any other remedies which might have been open to him—would have had a valid claim in damages under the general law. The learned trial judge so found and in my respectful opinion he was right in so doing. The statutory authority given to construct the works in question was however expressly made subject to the obligation to pay compensation for damage to lands injuriously affected.

[1] [1933] Ex. C.R. 152.

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As to the third condition it seems clear to me that there was "a physical interference with a right which the owner was entitled to use in connection with his property"—*Metropolitan Board of Works v. McCarthy*[1]; *C.P.R. v. Albin*[2];—and that on the evidence such interference substantially diminished its value as a commercial property.

Respondent carried on a general garage and service station business selling oil, gasoline and the like, and prior to the construction of the canal the property was well located for that purpose. The learned trial judge found that the construction of the canal and the diversion of the highway had adversely affected respondent's land as a commercial property and there is ample evidence to support that finding. He fixed the damages at $18,018.32. This amount included a sum of $5,280.90 for depreciation of respondent's residence on the basis that the garage building and residence were interdependent. Under ordinary circumstances, it would seem unlikely that the construction of the canal and the diversion of the highway would diminish the value of land for residential purposes. However we do not have to consider that aspect of the matter here, since counsel for appellant made no special point of the house and at the conclusion of the argument stated that in the event of the Crown being found liable the amount awarded was not now in issue.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitor for the respondent: F. Dorval, Beauharnois.

[1] (1874), L.R. 7 H.L. 243, 253.
[2] (1919), 59 S.C.R. 151 at 159.

HER MAJESTY THE QUEEN (*Plaintiff*) ..APPELLANT;

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*May 8, 9
June 11

AND

LEVIS FERRY LIMITED (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision—Loss of ice-breaker—Negligence—Apportionment of liability—Damages—Limitation of liability—Interest—The Canada Shipping Act, R.S.C. 1952, c. 29, ss. 657, 659—The Interest Act, R.S.C. 1952, c. 156, s. 3.

In this action, the Crown sought damages for the loss of the ice-breaker *Lady Grey* which sank in the St. Lawrence River when it collided with the defendant's ferry *Cité de Levis*. The collision occurred in very severe winter weather and in thick intermittent fog. The ice-breaker had gone to the assistance of the ferry which had become caught in ice floes. The Crown alleged that the collision was caused by the fault and negligence of the *Cité de Levis*. The defence contended that the collision was an inevitable accident or was due to the negligence of the navigators of the *Lady Grey*. The trial judge found that the collision was not due to an inevitable accident but was caused by the negligent operation of both vessels, and apportioned the liability of the defendant at 60 per cent and of the plaintiff at 40 per cent. The trial judge also held that the defendant was entitled to limit its liability under the *Canada Shipping Act*. The Crown appealed to this Court and the defendant cross-appealed.

Held: The appeal should be allowed and the cross-appeal dismissed.

The trial judge was justified in finding that the collision was not an inevitable accident, that it was not due solely to the fault and negligence of the navigators of the *Lady Grey*, and that the ferry had no look-out and had failed to sound the signals required by r. 15(*c*)(1) of the Regulations for Preventing Collisions at Sea.

However, although the defendant was entitled, as held by the trial judge, to limit its liability at $40,390, the trial judge had erred in taking 60 per cent. of that amount and giving judgment for $24,234. The trial judge had also erred in allowing interest only at the rate of 4 per cent. instead of at the rate of 5 per cent. as provided for by s. 3 of the *Interest Act*, R.S.C. 1952, c .156.

APPEAL and cross-appeal from a judgment of Fournier J. of the Exchequer Court of Canada[1]. Appeal allowed and cross-appeal dismissed.

R. C. Holden, Q.C., and *R. Tassé*, for the plaintiff, appellant.

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

The judgment of the Court was delivered by

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Abbott and Judson JJ.

[1] [1960] Ex. C.R. 243.

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v.
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THE CHIEF JUSTICE:—This is an appeal by Her Majesty the Queen and a cross-appeal by Levis Ferry Limited from a judgment of the Exchequer Court of Canada[1] in which the appellant was plaintiff and the cross-appellant was defendant. The proceedings were commenced by information and were not brought in Admiralty, although the Court and counsel proceeded as if they were.

The appellant was the owner of the Ship *Lady Grey,* a twin screw ice-breaker, and the respondent was the owner of the steam ferry *Cité de Levis.* On February 1, 1955, at the request of the respondent, the *Lady Grey* went to the assistance of the ferry which had become caught in ice floes and was unable to reach her berth at Quebec. Ultimately the ship and the ferry collided as a result of which the ship sank and was a total loss, for which the information claimed damages. There is no dispute as to the total amount of damages sustained, $310,775, and the appellant does not now question the trial judge's apportionment of liability, *i.e.,* 60 per cent. to the respondent and 40 per cent. to the appellant. The respondent, however, claims that the collision was an inevitable accident and that it should not be held liable for any amount or in any event for a less percentage than that found by the trial judge.

It will be convenient to deal first with the cross-appeal. On the argument questions were raised as to the correctness of some of the facts found by the trial judge. While there may be discrepancies in his reasons, on the whole there was no serious error and he came to the right conclusion as to the fault and liability for the collision. He had the assistance of two assessors and no objection was taken either to the forum or to the presence and use of these assessors. We agree with him that the collision was not an inevitable accident and that the collision was not due solely to the fault and negligence of those in charge of the navigation of the *Lady Grey.* The ferry had no lookout at the time of the collision and failed to sound the signals required by r. 15(*c*)(1) of the Regulations for Preventing Collisions at Sea. Indeed we are inclined to agree with the submission of counsel for the cross-respondent that the trial judge placed insufficient emphasis on the speed at which the ferry was manoeuvring just before the collision, but in any event the

[1] [1960] Ex. C.R. 243.

main ground upon which he proceeded as to the fault of those in charge of the navigation of the ferry is justified upon the evidence. The only other point raised by the cross-appeal was that in view of the result at which the trial judge arrived he should have given the appellant only part of the costs of the action but we see no reason to interfere with that disposition. The cross-appeal is, therefore, dismissed with costs.

The first branch of the appeal is really not disputed. The appellant agrees that the respondent was entitled to limit its liability at $40,390, but the cross-appellant also agrees that the trial judge was in error in taking 60 per cent. of that figure and giving judgment only for $24,234. The second point in the appeal is that the trial judge was in error in allowing interest only at 4 per cent. instead of 5 per cent. Apparently the trial judge followed a rule in England, but in Canada the point is covered by s. 3 of the *Interest Act*, R.S.C. 1952, c. 156. It is emphasized that counsel for the respondent admitted that interest should be allowed, but he contended that the trial judge was correct in fixing the rate at 4 per cent.

The appeal is therefore allowed with costs, the cross-appeal dismissed with costs and the judgment of the Exchequer Court set aside. Judgment is directed to be entered for the appellant against the respondent in the sum of $40,390 with interest at 5 per cent. per annum from February 1, 1955, to the date of payment. The appellant is entitled to her costs of the action.

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

Solicitor for the plaintiff, appellant: E. A. Driedger, Ottawa.

Solicitors for the defendant, respondent: Beauregard, Brisset & Reycraft, Montreal.

1962
*Feb. 26, 27
June 11

GEORGES EMILE LAROCQUE (*Defendant*) .... APPELLANT;

AND

GUY COTE (*Plaintiff*) .... RESPONDENT.

AND

THE BRITISH AMERICAN OIL COMPANY LTD. (*Defendant*)

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

Negligence—Responsibility—Delivery of gasoline to service station—Defective air vents in garage tank—Control valve at truck left unattended—Overflow—Fire caused by contact with stove—Knowledge of defects—Lack of attention—Whether contributory negligence—Civil Code, art. 1053.

The defendant L, the owner of tank trucks, was delivering gasoline to the plaintiff's service station by means of a hose from his delivery truck inserted into the plaintiff's storage tank which was situated under the gasoline pumps. The defendant knew that the air vents of the storage tanks were in a defective condition. After inserting the hose into one of the storage tanks, he left the vicinity to go inside the service station office from which he could not supervise the filling operations. A quantity of gasoline spilled over, flowed into the service station and came into contact with a heating stove which was in operation at the time. A fire broke out and the service station and all its contents were destroyed. The plaintiff had complained previously to British American Oil Limited, the owners of the pumps and storage tanks, about their defective conditions. The plaintiff instituted an action against L and British American Oil Ltd., but proceeded only against L. The trial judge maintained the action. This judgment was affirmed by a majority in the Court of Queen's Bench where the two dissenting judges found contributory negligence. The defendant L appealed to this Court.

Held: The appeal should be dismissed.

The defendant L was negligent in not watching over the filling operations when he knew that the air vents were not operating properly. If he had stayed at the scene he could have stopped the flow of gasoline and prevented the fire. There was no contributory negligence on the part of the plaintiff. Contributory negligence can only exist where both parties, the plaintiff and the defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this it is an irrelevant matter. In the present case, the fact that the plaintiff permitted the defendant to fill the storage tank although he knew that the air vents were defective, was not the effective cause of the accident.

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

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

G. A. Pouliot and *Luc Mercure,* for the defendant, appellant.

Evender Veilleux, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le demandeur allègue dans son action que dans le cours du mois d'octobre 1958, il était propriétaire et opérait un garage et station de gazoline à Sutton, district de Bedford. Il allègue en outre qu'il était propriétaire des bâtisses et du terrain, mais que les pompes à essence étaient la propriété, et étaient sous la garde et entretenues par la British American Oil Co. Ltd. Quant à Georges Emile Larocque, il était propriétaire de camions et faisait la distribution de la gazoline des réservoirs de la British American Oil Co. Ltd. aux réservoirs situés près du garage du demandeur et sur sa propriété.

Le 21 octobre, le défendeur Larocque fit une livraison de gazoline au demandeur, et le déchargement de la gazoline du camion se faisait par l'entremise de boyaux qui étaient reliés aux réservoirs situés sur la propriété du demandeur. Au cours de la livraison de la gazoline, celle-ci en grande quantité se répandit autour des réservoirs, pénétra dans le garage, et un incendie éclata qui consuma le garage et de la marchandise.

Le demandeur institua contre le défendeur Larocque et contre la British American Oil Co. Ltd une action au montant de $22,576.83. M. le Juge Mitchell de la Cour supérieure, siégeant à Sherbrooke, maintint l'action pour $20,796.83, et la Cour d'Appel[1] confirma ce jugement. MM. les Juges Bissonnette et André Taschereau, dissidents, auraient partagé la responsabilité entre le défendeur Larocque et le demandeur Côté. Pour une raison que je ne connais pas, le demandeur n'a procédé à l'enquête que contre le défendeur Larocque et n'a pas inscrit contre la British American Oil Co. Ltd., l'autre défenderesse.

Sur le terrain de l'intimé, en avant de son garage, il se trouvait trois pompes qui servent à la livraison de la gazoline aux clients. Elles sont reliées aux réservoirs enfoncés

[1] [1961] Que. Q.B. 583.

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—

sous le sol, qui peuvent contenir plusieurs centaines de gallons de gazoline. A cette date du 21 octobre 1958, Larocque qui avait été requis par Côté de livrer environ 700 gallons, commença à remplir le réservoir du centre. Ces réservoirs sont équipés d'évent-d'air afin de permettre à l'air de sortir à l'extérieur à mesure que pénètre la gazoline. Or, il ne fait pas de doute que l'évent-d'air de la pompe du centre ne fonctionnait pas. A l'extrémité du boyau dont se servait Larocque pour déverser la gazoline dans les réservoirs, se trouvait un ajutage destiné à régulariser et à interrompre de flot de la gazoline. Il suffit à l'opérateur de presser ou de relâcher une manette qui contrôle l'entrée de la gazoline dans les réservoirs.

Le juge au procès a trouvé que le défendeur appelant Larocque a été négligent en laissant l'ajutage dans l'orifice par où pénètre la gazoline, et en s'éloignant sans surveiller si tout fonctionnait normalement. L'appelant aurait dû rester près des réservoirs, afin d'interrompre le flot de gazoline s'il se produisait un débordement. C'est aussi la conclusion à laquelle est arrivée la Cour du banc de la reine. Je partage ces vues, et je crois que l'appelant, qui avait le contrôle de la livraison de la gazoline, a fait preuve de négligence. S'il avait été plus attentif, plus alerte dans l'exercise de ses fonctions, et s'il s'était tenu près de l'ajutage pour interrompre l'entrée de la gazoline, il n'y a pas de doute que ce sinistre ne se serait pas produit.

D'ailleurs, Larocque savait que les trois évents-d'air ne fonctionnaient pas normalement. Déjà, il avait constaté que la pompe de droite no. 1 était défectueuse, car quelques mois avant l'accident qui nous occupe, alors qu'il remplissait le réservoir, la gazoline avait jailli dans son visage et celui du père de l'intimé, et s'était répandue sur le sol avec profusion. L'appelant Larocque savait également que les *trois pompes* étaient défectueuses. En effect, l'intimé jure positivement qu'il s'est plaint plusieurs fois de l'état des pompes, et qu'il a demandé à Larocque de faire des représentations dans ce sens à la B.A. Oil. Dans son témoignage, ce dernier ne nie pas les affirmations de Côté. En outre, Côté jure que la gazoline a jailli à maintes reprises lors de livraisons antérieures, et Larocque se contente de dire qu'il ne s'en souvient pas.

La Cour du banc de la reine a eu raison de conclure que Larocque connaissait les défectuosités des trois évent-d'air; et le fait que Larocque dit que la gazoline n'a jailli antérieurement du réservoir qu'une fois seulement, ne signifie nullement qu'il ignorait les défauts des deux autres réservoirs. La preuve démontre le contraire.

Dans ces conditions, je crois que Larocque ne peut être excusé. Quand, vers midi, le 1er octobre 1958, il est arrivé au garage faire sa livraison, l'intimé et ses deux employés étaient à l'autre extrémité du garage, occupés à travailler. Sans leur dire quoi que ce soit, Larocque mit le moteur en mouvement, fixa l'ajutage à la pompe du centre, et pénétra dans le bureau de la comptabilité d'où il ne pouvoit voir les pompes, et d'où il lui était impossible de surveiller les opérations. Aussi, quand la gazoline a débordé, il lui a été impossible d'arriver à temps pour fermer l'ajutage et empêcher environ vingt-cinq gallons de gazoline de se répandre sur le sol, de se diriger vers le garage et de venir en contact avec un poèle chauffé situé au centre de l'unique pièce de 50 x 56 pieds. C'est sa connaissance des défectuosités des pompes et son défaut de surveillance, son éloignement des réservoirs l'empêchant ainsi de fermer l'ajutage, qui sont les causes déterminantes de cet accident.

L'appelant soutient qu'il ne doit pas supporter seul toute la responsabilité, et qu'il y a au moins faute contributive, parce que l'intimé l'aurait laissé emplir les réservoirs, et que son attitude passive constitue une faute. Pour qu'il y ait faute contributive, il faut qu'il y ait deux fautes, celle de la victime et celle de l'auteur du dommage, qui concourent à la réalisation du préjudice. En outre, il ne suffit pas qu'il y ait faute, mais il faut un rapport de causalité entre cette faute et le préjudice. Comme l'a dit le Comité Judiciaire du Conseil Privé dans *Fréchette v. C.P.R.*[1]:

> By the law which prevails in the Province of Quebec in actions for negligence where both parties have been in fault damages are awarded proportionate to the degree in which the respective parties are to blame; where, however, *the sole effective cause of an accident* is the plaintiff's own negligence he is not entitled to recover any damages.

[1] [1915] A.C. 871, 24 Que. K.B. 459, 18 C.R.C. 251, 22 D.L.R. 356.

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Une cause identique *Great Eastern Oil and Import Co. Ltd. v. Best Motor Accessories Co. Ltd.*[1] est venue devant cette Cour. Dans cette cause, le Juge en chef Kerwin, parlant au nom de tous les membres de la Cour, s'est exprimé de la façon suivante:

> It was held by this Court in *McLaughlin v. Long,* ....that to constitute contributory negligence it does not suffice that there be some fault on the part of a plaintiff without which the damage would not have been suffered and that the negligence charged must be proximate in the sense of an effective cause of the damages.

En règle générale, le droit commun anglais ne reconnait pas la faute contributive, dans le sens d'un partage de responsabilité, mais les provinces ont adopté des législations spéciales, qui permettent aux juges de diviser la responsabilité. C'est ce qui est arrivé dans la cause ci-dessus, qui venait de Terre-Neuve, et les principes applicables sont pratiquement les mêmes que ceux qui existent dans la province de Québec.

Récemment, dans une cause de *Édifice Continental Inc. v. W. H. Adam Limitée*[2], la Cour du banc de la reine a eu à juger une cause où les mêmes principes s'appliquaient. La Cour a décidé ce qui suit:

> A fuel oil dealer delivering oil is not responsible for damages resulting from sudden back flow and ejection of oil from the intake pipe of the receiving tank caused by blocking of the air vent. The tank was under the care of the building superintendent who had ordered the oil. The dealer had no reason to suspect that the tank was in a defective condition.

Dans cette cause, l'action a été rejetée car, comme on le voit, le préposé qui versait l'huile ne savait pas et n'avait pas de raison de savoir que les réservoirs étaient en mauvais ordre. Dans la cause qui nous occupe, c'est le contraire qui existe. L'appelant savait que les réservoirs étaient défectueux et n'a exercé aucune surveillance pour prévenir ce qu'il savait être de nature à se produire. C'est la faute de l'appelant qui est la *causa causans* de l'accident, le lien de causalité entre l'activité de Larocque et le préjudice causé.

Je suis donc d'opinion qu'ayant charge de la livraison de la gazoline, étant donné les conditions qui existaient et qui lui étaient bien connues, l'appelant devait entourer ses actes d'une très grande prudence, beaucoup plus grande que celle qu'il a démontrée, et qu'il doit porter seul la responsabilité

[1] [1962] S.C.R. 118, 31 D.L.R. (2d) 153.
[2] [1962] Que. Q.B. 231.

de cet accident. Quant à l'intimé, je ne crois pas que l'on puisse lui imputer une partie de la responsabilité. Sa passivité n'entre pas dans la causalité du dommage.

Dans l'arrêt de *Fréchette v. C.P.R.*, *supra*, p. 879, le Comité Judiciaire du Conseil Privé a bien établi le principe que la faute contributive ne peut exister que dans le cas "... where both parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this it is an irrelevant matter, an *incuria*, no doubt, but to use Lord Cairn's words, not an *incuria dans locum injuriae*".

Je suis donc d'opinion que l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Birtz, Pouliot, Mercure & Lebel, Montreal.

Attorney for the plaintiff, respondent: E. Veilleux, Sherbrooke.

RENE PLOURDE (*Plaintiff*) .... APPELLANT;

1962
*May 14, 15
June 11

AND

AGRICULTURAL INSURANCE COMPANY (*Defendant*) .... RESPONDENT;

AND

THE BANK OF MONTREAL .... MIS-EN-CAUSE.

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

Insurance—Theft—Interpretation of clause requiring keeping of inventory—Whether conditions of clause fulfilled.

The plaintiff's establishment, a jewellery store, was robbed of some merchandise and a sum of money. He claimed a loss of $25,643.40 from the defendant insurance company under a policy containing a clause requiring the assured to keep a detailed and itemized inventory.

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

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et al.

The trial judge concluded that such an inventory had been kept and maintained the action. The Court of Queen's Bench, by a majority judgment, reversed in part this finding of the trial judge and maintained the action for a sum of $11,144.82. The plaintiff appealed to this Court and the defendant cross-appealed.

Held: The appeal should be allowed and the cross-appeal dismissed.

A clause, such as the one in question here, should be interpreted reasonably, in accordance with common sense and having in mind the type of business insured. So long as the books, taken as a whole and properly kept, allow the determination of the value of the merchandise the condition is fulfilled. In the present case, the plaintiff has established his loss and has fulfilled the conditions of the clause respecting the inventory.

APPEAL and cross-appeal from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing in part a judgment of Demers J. Appeal allowed and cross-appeal dismissed.

J. M. Charbonneau, for the plaintiff, appellant.

L. P. de Grandpré, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—L'appelant est de son métier horloger-bijoutier, et exerçait son commerce au temps où se sont produits les faits qui ont donné naissance à ce litige, au numéro 623 Notre-Dame Ouest, Montréal. La compagnie intimée a émis, le 9 décembre 1954, une police d'assurance qui a été renouvelée en 1955 pour une période additionnelle d'une année.

A la date du renouvellement, cette police qui couvrait les pertes contre le vol et le vol avec effraction, a été augmentée du montant original à $30,000 sur la marchandise, et à $500 sur l'argent et les valeurs placés dans le coffre-fort dans le magasin de l'assuré.

Le demandeur allègue dans son action que le 26 décembre 1955, des voleurs sont entrés dans son magasin et se sont emparés de marchandises et d'argent, propriété de l'assuré, pour une valeur de $25,643.40. La force constabulaire de Montréal a été immédiatement notifiée, mais il n'apparaît pas que les bandits ni la marchandise volée aient été localisés. L'appelant a immédiatement produit sa réclamation pour le montant ci-dessus mentionné, mais la compagnie a toujours refusé de payer.

[1] [1962] Que. Q.B. 77.

Le 13 septembre 1956, par l'intermédiaire de ses procureurs, l'appelant a en conséquence institué des procédures légales pour réclamer cette somme de $25,643.40, et son action a été maintenue par M. le Juge Demers de la Cour supérieure, siégeant à Montréal, pour le montant réclamé. La Cour du banc de la reine[1] a maintenu en partie l'appel de la compagnie d'assurance, a condamné cette compagnie à payer au présent appelant la somme de $11,144.82. M. le Juge Taschereau, dissident, aurait rejeté l'action en totalité, et M. Le Juge Owen, dissident, aurait confirmé le jugement de première instance.

Devant cette Cour, l'assuré appelle du jugement de la Cour du banc de la reine afin de faire rétablir celui de la Cour supérieure, et la compagnie d'assurance, par contre-appel, demande que l'action soit rejetée avec dépens.

La détermination de cette cause repose sur l'interprétation de la clause 10 de la police, qui est rédigée dans les termes suivants:

> 10.—Warranted that the Assured keeps a detailed and itemized inventory of all property including traveling salesmen's stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company.

Le savant juge de première instance a conclu que le demandeur-appelant avait été la victime d'un vol avec effraction, qu'il tenait des livres permettant d'établir avec certitude le montant de la perte, et qu'il s'est conformé à toutes les obligation qu'il avait assumées par les termes de la police d'assurance. Au contraire, trois des Juges de la Cour du banc de la reine, les Juges Casey, Larouche (ad hoc) et Choquette, ont enlevé du jugement rendu l'item "assorted jewellery $7,994.55" et l'item de $11,265.00 pour les achats appelés "achats de rue". Ils ont conclu que quant à ces deux item, la comptabilité tenue par l'appelant ne répondait pas aux exigences de la clause 10, en ce sens qu'on n'y trouvait pas un inventaire "detailed and itemized" permettant de déterminer le montant exact des pertes subies par l'assuré. Quant à M. le Juge Taschereauu, il voit dans la clause 10 de la police une garantie que l'appelant tiendrait un inventaire de tous les biens assurés. Comme il aurait failli de le faire, la police doit être annulée, et tout recours doit être interdit au demandeur-appelant.

[1] [1962] Que. Q.B. 77.

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Taschereau J.

Une grande partie de la preuve a consisté dans les témoignages d'experts comptables, qui ont eu à apprécier les inventaires ainsi que les livres de l'appelant.

Le demandeur-appelant a fait entendre deux témoins experts, les comptables agréés L. Shatsky et G. Millman. Après leur étude de tous les livres, ces deux témoins ont trouvé que la comptabilité du demandeur est classifiée sous le nom de doubles entrées, et que l'inventaire tenu par le demandeur peut être considéré comme détaillé. Ces témoins sont d'avis que la tenue de livres, les entrées et dossiers du demandeur sont même plus détaillés que ceux que l'on trouve habituellement dans des commerces équivalant à celui du demandeur, qu'ils sont plus complets que ceux de commerces plus importants, et qu'ils permettent d'établir avec certitude la perte subie. Le témoin Salvas, comptable, entendu par l'intimée, a trouvé les inventaires insuffisants et est d'opinion qu'il n'était pas possible, avec les documents qu'il a examinés, de déterminer la perte résultant du vol.

Devant ce conflit d'opinions, l'honorable Juge Demers a nommé un expert indépendant, M. Romain Bédard comptable agréé, dont le témoignage n'a pas été accepté comme une «expertise» parce que le témoin n'avait pas été assermenté au préalable. Son témoignage a cependant été reçu de consentement et son rapport a été déposé au dossier, et fait partie de la preuve au procès.

Dans une lettre produite comme exhibit, adressée à M. le Juge André Demers, M. Bédard affirme qu'il en est venu à la conclusion qu'il est possible, dans son opinion, d'établir avec exactitude la perte subie par le demandeur à la suite du vol dont il est question. Pour lui, la détermination d'une perte d'inventaire à la suite d'un vol ou d'un incendie constitue un problème comptable. Ce problème peut se résoudre par l'application de certains principes comptables, et c'est l'application de ces principes qui lui a permis de déterminer avec exactitude la perte subie. Tous ces principes, de même que les détails de ses calculs, sont indiqués dans le rapport qu'il a fait le 8 janvier 1959, et qui a été déposé au dossier. Son rapport et son témoignage révèlent que la perte subie s'élève à $28,653.92.

M. Bédard s'est servi de l'ensemble des livres pour établir la valeur des marchandises en mains; on peut sûrement chercher dans ces livres ce qu'il faut pour compléter "l'inventaire", et établir grâce à eux la perte en cas de vol. Le juge au procès a accepté ce rapport de M. Bédard dont les conclusions sont presque identiques à celles de Shatsky et Millman. En effet, tous trois sont d'avis que la comptabilité de l'appelant est suffisante pour permettre d'établir l'inventaire des marchandises en mains au moment de la perte.

Une clause comme la clause 10 doit être raisonnablement interprétée, conformément au sens commun et en tenant compte du genre d'affaires qui étaient assurées. On a suggéré à l'enquête que l'appelant aurait dû tenir un inventaire perpétuel. Je ne crois pas que cette proposition puisse être sérieusement entretenue, à la lecture de la clause 10 qui n'exige même pas que l'inventaire qui doit être fait soit un inventaire annuel. Du moment que la totalité des livres convenablement tenus par l'appelant permet de déterminer la valeur de la marchandise, je crois que la condition est remplie. C'est d'ailleurs ce qu'ont trouvé les trois experts Shatsky, Millman et Bédard.

Comme j'en viens à la conclusion que l'appelant a établi sa perte et qu'il a satisfait aux conditions de la clause 10, il devient inutile de déterminer la proposition de M. le Juge Taschereau qui aurait rejeté l'action *in toto*, parce qu'une partie de l'inventaire n'aurait pas été détaillée.

Je suis d'opinion que l'appel doit être maintenu, le jugement du juge au procès rétabli avec dépens à la Cour du banc de la reine et devant cette Cour, et que le contre-appel doit être rejeté également avec dépens.

Appeal allowed and Cross-appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Roy, Charbonneau and Geoffrion, Montreal.

Attorneys for the defendant, respondent: Tansey, de Grandpré, de Grandpré, Bergeron and Monet, Montreal.

1962
*June 13, 14, 15
June 25

BRITISH COLUMBIA POWER CORPORATION, LIMITED (*Plaintiff*) ... APPELLANT;

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED, ATTORNEY-GENERAL OF BRITISH COLUMBIA and BRITISH COLUMBIA HYDRO AND POWER AUTHORITY (*Defendants*) .... RESPONDENTS;

AND

THE ROYAL TRUST COMPANY and C. JAMES COPITHORNE (*Defendants*) .... DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Crown—Receiver appointed of certain property—Crown's interest therein dependent on validity of legislation which it had itself passed—Validity of legislation open to doubt—Crown not immune from receivership order—Jurisdiction of Court to preserve assets whose title is dependent on impugned legislation.

Receiver—Limitation in certain respects of receiver's authority immaterial.

Pending the trial of an action brought by the plaintiff corporation against the defendant company, an order was made by McInnes J. appointing one P a receiver of the undertaking, property and interests in the defendant company. An appeal from this order by the defendant company and the Attorney-General of British Columbia was allowed by a majority of the Court of Appeal. Pursuant to leave granted by this Court, the plaintiff appealed from the judgment of the Court of Appeal.

Questions arose in the action as to the constitutionality of the *Power Development Act, 1961*, 1961 (B.C.), 2nd sess., c. 4, the British *Columbia Hydro and Power Authority Act*, 1962 (B.C.), c. 8, and *An Act to Amend the Power Development Act, 1961*, 1962 (B.C.), c. 50. At the time of the present appeal these points were before the Supreme Court of British Columbia on the trial of the action. The decision on the point as to the constitutional validity of these statutes automatically would determine whether the Crown had any title to the common shares of the defendant company, and whether the British Columbia Hydro and Power Authority had any right, title or interest in or to the assets of that company. It was contended that the Court had no jurisdiction to make a receivership order in order that the assets might be preserved pending the determination of those issues because, it was said, such an order cannot be made which would affect the property or interests of the Crown.

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

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BRITISH COLUMBIA POWER CORPORATION, LTD. v. BRITISH COLUMBIA ELECTRIC CO. LTD. *et al.*

Held (Abbott J. dissenting): The appeal should be allowed and the judgment of the chamber judge restored with certain amendments.

Per Kerwin C.J. and Taschereau, Cartwright, Fauteux, Martland and Ritchie JJ.: In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. In a federal system, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.

The objection that in view of the terms of the order P was not really a receiver failed. A receiver when appointed, is subject to the orders of the Court and the mere fact that his authority was limited could make no difference.

Per Abbott J., *dissenting:* For the reasons given by Davey J.A. in the Court below, the chamber judge was without jurisdiction to make the receivership order.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a receivership order made by McInnes J. Appeal allowed, Abbott J. dissenting.

J. J. Robinette, Q.C., and *D. M. Goldie,* for the plaintiff, appellant.

Hon. R. L. Kellock, Q.C., and *C. W. Brazier, Q.C.,* for the defendant, respondent: British Columbia Hydro and Power Authority.

M. M. McFarlane, Q.C., and *W. G. Burke-Robertson, Q.C.,* for the defendant, respondent: Attorney-General of British Columbia.

The judgment of Kerwin C.J. and of Taschereau, Cartwright, Fauteux, Martland and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the plaintiff in this action, British Columbia Power Corporation, Limited, from a judgment of the Court of Appeal for British Columbia[1], dated April 19, 1962, allowing the appeal of the defendants, British Columbia Electric Company Limited, and the Attorney-General of British Columbia, from the order of McInnes J., dated March 22, 1962, appointing Henry Leslie Purdy a receiver of the undertaking, property

[1] (1962), 38 W.W.R. 577.

1962

BRITISH COLUMBIA POWER CORPORATION, LTD.
v.
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Kerwin C.J.

and interests of the defendant, British Columbia Electric Company Limited, pending the trial of the action and until further order. Norris J.A. and Tysoe J.A. dissented.

On May 14, 1962, a motion made that day to this Court for leave to appeal was granted, whereupon counsel for the plaintiff immediately applied to the Court to hear the appeal at the present sittings. No objection was raised to this request and it was so ordered.

Questions arise in the action as to the constitutionality of the *Power Development Act, 1961* of British Columbia, 1961 (B.C.), 2nd sess., c. 4, the *British Columbia Hydro and Power Authority Act,* 1962 (B.C.), c. 8, and *An Act to Amend the Power Development Act, 1961,* 1962 (B.C.), c. 50. All these points are now before the Supreme Court of British Columbia on the trial of the action. Quite properly no extensive argument thereon was presented to us by counsel for any of the parties represented before us, but sufficient has been shown to indicate that substantial questions arise.

It is conceded by counsel for the Attorney-General of British Columbia that the Courts have the jurisdiction to determine the constitutional validity of each of the three statutes under attack in the present proceedings. In determining that issue, the Court automatically determines whether the Crown has any title to the common shares in British Columbia Electric Company Limited, and whether the British Columbia Hydro and Power Authority has any right, title or interest in or to the assets of that company. Counsel contends, however, that the Court has no jurisdiction to make a receivership order in order that the assets may be preserved pending the determination of those issues because, it is said, such an order cannot be made which would affect the property or interests of the Crown. In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as

to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.

I can find no substance in the objection raised on behalf of the respondents that, in view of the terms of the order made by McInnes J., Mr. Purdy is not really a receiver. A receiver, when appointed, is subject to the orders of the Court and the mere fact that his authority was limited in certain respects can make no difference.

The appeal should be allowed and the order of McInnes J. restored with the following amendments. The second clause of the operative part of the order directs that Mr. Purdy furnish a bond, etc., "within seven days of the entry of this Order". This should be changed to read "on or before July 3rd, 1962". The following words in the third operative clause "or constitute a default in the provisions of any Trust Deed" should be deleted in accordance with the submission of counsel for the appellant. The Royal Trust Company was an appellant before the Court of Appeal and was there represented by counsel who asked that the quoted words be deleted. The Royal Trust Company was not represented before us, but in a letter to the Registrar its counsel also asked that these words be omitted. The order of McInnes J. that the costs of the motion before him be reserved for the trial judge might stand. No order as to costs was made by the Court of Appeal. The appellant will have its costs in this Court, including the costs of the motion for leave to appeal.

Abbott J. (*dissenting*):—I regret that I am unable to share the view of the majority of the Court that this appeal should be allowed and the judgment of McInnes J. restored. I am in substantial agreement with the reasons delivered by Davey J.A. in the Court below and I share his opinion that the learned chambers judge was without jurisdiction

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to make the order which he did. In the circumstances, I see no useful purpose to be served by adding anything to what he has said.

I would dismiss the appeal with costs.

Appeal allowed with costs in this Court, including the costs of the motion for leave to appeal, Abbott J. *dissenting.*

Solicitor for the plaintiff, appellant: L. St. M. Du Moulin, Vancouver.

Solicitor for the defendant, respondent, British Columbia Electric Co. Ltd.: W. H. Q. Cameron, Vancouver.

Solicitor for the defendant, respondent, Attorney-General of British Columbia: M. M. McFarlane, Vancouver.

Solicitor for the defendant, respondent, British Columbia Hydro and Power Authority: A. T. R. Campbell, Vancouver.

1962 *Apr. 26 June 25

DIRECT LUMBER COMPANY LIMITED (*Plaintiff*) .... APPELLANT;

AND

WESTERN PLYWOOD COMPANY LIMITED (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Trade—Discriminatory practices—Discounts—Whether legislation gives civil cause of action for its breach—Criminal Code, 1953-54 (Can.), c. 51, ss. 411(1)(c) and 412(1)(a) and (2).

The plaintiff company sued the defendant, a distributor of building products, founding its cause of action upon an alleged breach by the defendant of two sections of the *Criminal Code*, s. 411(1)(*c*) and s. 412(1)(*a*) and (2), the first having to do with conspiracy to limit production or to enhance prices or to prevent or lessen competition, the second having to do with discrimination. A counter-claim was filed by the defendant claiming a sum of money—the balance owing for goods sold and delivered. The defendant pleaded that the statement of claim disclosed no cause of action and at the opening of the trial moved to

*PRESENT: Kerwin C.J. and Locke, Martland, Judson and Ritchie JJ.

have it struck out. The trial judge granted the motion to dismiss the action and allowed the counter-claim. This judgment was affirmed on appeal and the plaintiff then appealed to this Court.

Held: The appeal should be dismissed.

Neither s. 411(1)(*c*) nor s. 412(1)(*a*) and (2) of the Code gave a cause of action in damages to a person who alleged a breach of these sections by a defendant. This legislation creating a new crime was enacted solely for the protection of the public interest and did not create a civil cause of action. *Transport Oil Ltd. v. Imperial Oil Ltd. and Cities Service Oil Co.*, [1935] O.R. 215, discussed; *Cutler v. Wandsworth Stadium Ld.*, [1949] A.C. 398; *Orpen v. Roberts*, [1925] S.C.R. 364; *Philco Products Ltd. et al. v. Thermionics Ltd. et al.*, [1940] S.C.R. 501, referred to.

The defence to the counter-claim, *i.e.*, a plea that the sales in question were illegal transactions, the illegality being the violation of s. 412 of the Code, failed. The vendor sued only for the price of goods sold and delivered on a contract untainted by illegality. It was no defence to say that the vendor sold similar goods to another person for a lower price in breach of a statute. Assuming that the vendor did so, there was no connection between the illegality pleaded and the transaction in question.

The plaintiff's claim to commissions on sales made by the defendant to a third party also failed, the evidence not having established any contract to pay commissions on these sales.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Primrose J. Appeal dismissed.

G. Amerongen, for the plaintiff, appellant.

T. Mayson, for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant sued the respondent for damages, founding its cause of action upon an alleged breach by the respondent of two sections of the *Criminal Code*, s. 411(1)(*c*) and s. 412(1)(*a*) and (2), the first having to do with conspiracy to limit production or to enhance prices or to prevent or lessen competition, the second having to do with discrimination. The appellant is a lumber dealer and the respondent is a distributor of plywood and other building products. The precise claim was for $19,114.18 for price discrimination and $57,000 general damages for loss of sales. The respondent pleaded that this statement of claim disclosed no cause of action and at the opening of the trial moved to have it struck out. The learned trial judge did so and his judgment was affirmed on appeal[1].

[1] (1962), 37 W.W.R. 177, 32 D.L.R. (2d) 227.

It is apparent from the pleading and the course of the argument that the plaintiff's claim was really based upon price discrimination and not upon conspiracy. In any event, in my respectful opinion, the judgment under appeal is correct and neither section gives a cause of action in damages to a person who alleges a breach of these sections by a defendant.

The statement of claim simply pleads that during the years 1953 to 1959 the plaintiff bought from the defendant plywood and other materials for which it was charged $382,283.61, of which it paid $368,554.13. It says that in these transactions it was discriminated against to the extent of $19,114.18 because of discounts, allowances or price concessions granted by the defendant to other purchasers. It sues for this $19,114.18 and also for general damages.

The section relied upon reads:

> 412. (1) Every one engaged in trade, commerce or industry who
>
> (*a*) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of the purchaser, in that any discount, rebate, allowance, price concession or other advantage, is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage, available at the time of such sale to such competitors in respect of a sale of goods of like quality and quantity;
>
> is guilty of an indictable offence and is liable to imprisonment for two years.
>
> (2) It is not an offence under paragraph (*a*) of subsection (1) to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

I am satisfied, as was Johnson J.A. in the Court of Appeal after a full review of the cases culminating in *Cutler v. Wandsworth Stadium Ld.*[1], that this criminal legislation gives no civil cause of action for its breach and I would affirm the judgment under appeal for the reasons given by Johnson J.A. that this legislation creating a new crime was enacted solely for the protection of the public interest and that it does not create a civil cause of action. There is no new principle involved and in spite of repeated consideration of the problem, nothing has been added to what was said about it by Duff J. in *Orpen v. Roberts*[2]:

> But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable

[1] [1949] A.C. 398.

[2] [1925] S.C.R. 364 at 370.

by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty.

Although there is no prior decision on the civil consequences of this legislation, the problem was touched in the judgment of the Court of Appeal of Ontario in *Transport Oil Ltd. v. Imperial Oil Ltd. and Cities Service Oil Co.*[1], which held there can be no claim for damages for conspiracy based upon a breach of the *Combines Investigation Act*—a conspiracy closely related to that dealt with in the present s. 411 of the Code. The constitutionality of the legislation there in question was settled in *Proprietary Articles Trade Association v. Attorney-General for Canada*[2], and it followed as a natural consequence that when this legislation relating to price discrimination was challenged in *Attorney-General for British Columbia v. Attorney-General for Canada*[3], it was held to be a valid exercise of the power under s. 91, head 27, of the *British North America Act.*

The appellant's main submission to this Court on this branch of the case was that the *Transport Oil* case ought to be distinguished. This judgment was based on two grounds, the first being that as a matter of construction the legislation gave no civil cause of action, the second being the sweeping statement that under our dual legislative system, the Parliament of Canada in legislating in relation to criminal law intended to confine its legislation to crime and did not intend to interfere with provincial jurisdiction over property and civil rights. Some doubt has been expressed whether the second ground given by Middleton J.A. for supporting the legislation was really necessary to his decision. The first ground is clearly right and, in my opinion, as in that of Johnson J.A., ought to be adopted in this case.

I recognize that there may be a difference between a common law action for damages based on conspiracy and one based on price discrimination. The common law itself imposes liability for harm caused by combinations to injure by unlawful means but the common law never gave any cause of action for price discrimination unaccompanied by

[1] [1935] O.R. 215, 2 D.L.R. 500, 63 C.C.C. 108.
[2] [1931] A.C. 310, 100 L.J.P.C. 84.
[3] [1937] A.C. 368, 1 D.L.R. 688.

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conspiracy. To this extent some of the dicta in the *Transport Oil* case, which was a conspiracy case, may be open to question and it may well be doubted whether any constitutional principle is raised when dominion criminal legislation is silent upon the question whether a civil action arises upon breach of its terms. This doubt has been expressed by Wright in Cases on the Law of Torts, 2nd ed., 279; Laskin, Canadian Constitutional Law, 2nd ed., 863; and Finkelman, 13 Canadian Bar Review, 417, and it is probably the basis for the statement of Duff C.J. in *Philco Products Ltd. et al. v. Thermionics Ltd. et al.*[1], when he said:

> If B commits an indictable offence and the direct consequence of that indictable offence is that A suffers some special harm different from that of the rest of His Majesty's subjects, then, speaking generally, A has a right of action against B. As at present advised, I think it is not obvious that this well settled doctrine does not apply to indictable offences under section 498 of the *Criminal Code*; . . . .

I would reject in this case the existence of the cause of action for the sole reason given by Johnson J.A.

The second point in this appeal arises from the counter-claim of the respondent-vendor for the sum of $13,729.48, being the balance owing for goods sold and delivered. The appellant-purchaser's defence to this counter-claim was a plea that these sales were illegal transactions, the illegality being the violation of s. 412 of the *Criminal Code*. The appellant-purchaser admits that it bought the goods and that it contracted to pay the price demanded. Its defence in substance is that it should not have to pay anything for these goods because the vendor sold similar goods to other people at a lower price. When stated in this way it is at once apparent that the defence of illegality fails. There was no illegality in the transaction between the vendor and the purchaser and the vendor was not involved in any proof of illegality in order to establish its claim. The vendor sued only for the price of goods sold and delivered on a contract untainted by illegality. It is no defence to a claim of this kind to say that the vendor sold similar goods to another person for a lower price in breach of a statute. Assuming that the vendor did so, there is no connection between the illegality pleaded and the transaction in question. *Wilkinson v. Harwood and Cooper*[2], and *Philco Products Ltd. et al. v. Thermionics Ltd. et al., supra.*

[1] [1940] S.C.R. 501 at 504.
[2] [1931] S.C.R. 141, 2 D.L.R. 479.

The amount of the claim was not disputed. Judgment was correctly given for the vendor on its counter-claim and this branch of the appeal fails.

A third issue raised in this appeal is a claim by the appellant to commissions on sales made by the respondent to a third party. Evidence was heard on this claim and only on this claim. It appears that this third party had been buying goods from the appellant and that it told the respondent that unless it could purchase direct from the respondent it would look elsewhere for its supplies and that in no event would it deal with the appellant. Some evidence was given of a meeting between the officers of the two litigant companies at which it was said that the respondent would make things right and pay a three per cent commission on these direct sales. Only one commission was in fact ever paid, on March 23, 1956. The commission slip reads:

3% on Poplar to Alldritt
October 20th - End of 1955 .... 226.92

The question of commission was never raised again until this action was instituted, in spite of the fact that dealings continued between the two companies until 1959. Both the trial judge and the Court of Appeal have held that this agreement to pay commission, if there was such an agreement, offended the Statute of Frauds and I would not disagree with this finding. I think, however, that the evidence falls far short of establishing any contract to pay commission on these sales and that the payment on the one occasion was made by a volunteer under no legal obligation. The appeal also fails on this ground.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Amerongen & Burger, Edmonton.

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

1962 *May 16 June 11

CANADIAN PETROFINA LIMITED ...APPELLANT;

AND

SAMUEL BERGER ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Landlord and tenant—Lease—Option to purchase—Landlord's application for possession—Whether option validly exercised—The Landlord and Tenant Act, R.S.O. 1950, c. 199, s. 75.

Certain lands were leased to the appellant company for a term of 10 years to be computed from July 15, 1954. The lessee was given the option of purchasing the premises for a specified sum at any time during the first 5 years of the term, a condition of the option being that the lessee would give to the lessor 30 days' prior notice in writing of its intention so to purchase. On July 8, 1959, the lessee gave notice of its intention to purchase the leased premises pursuant to the option, and on the same day the lessor sent a letter to the lessee terminating the lease. This letter recited a failure to rectify what the lessor regarded was a breach of covenant. The landlord did not reply to the tenant's letter exercising the option but on July 23 served notice of an application for possession under s. 75 of *The Landlord and Tenant Act*, R.S.O. 1950, c. 199. The county judge made an order directing the issue of a writ of possession. The Court of Appeal dismissed an appeal from this order, and, subsequently, leave to appeal was granted by this Court.

Held: The appeal should be allowed, the judgments below set aside and the application of the respondent for possession of the lands dismissed.

The first 5 years of the lease expired at mid-night on July 14, 1959. The tenant's letter exercising the option was sent on July 8, 1959, and received on the following day. The option clause provided for a right exercisable *at any time,* within the first 5 years, which meant up to July 14, 1959. The provision for 30 day's prior notice in writing of the lessee's intention to purchase had reference to the lessor's obligation to deliver deeds and documents in his possession; it did not limit the right of the lessee to giving its notice 30 days prior to July 14, 1959. Accordingly, the option was validly exercised. At the time when the application was made before the county judge, the landlord and tenant relationship had ended and there was nothing for the county judge to decide. In assuming the subsistence of landlord and tenant relation, he was acting without jurisdiction.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from an order made by a Judge of the County Court of the County of Carleton directing the issue of a writ of possession. Appeal allowed.

W. B. Williston, Q.C., and *J. Sopinka,* for the appellant.

B. J. MacKinnon, Q.C., and *B. A. Kelsey,* for the respondent.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

The judgment of the Court was delivered by

JUDSON J.:—On July 15, 1954, Berger leased to Petrofina the lands in question for a term of 10 years to be computed from July 15, 1954. Clause 9 of the lease provided:

> 9. That it will operate or cause to be operated upon the leased premises a motor vehicle service station according to good accepted practice and will maintain the premises in safe, clean and sanitary conditions in accordance with the nature of its use.

In 1958, Petrofina sublet the premises to one Ouimet. Approximately 6 months after taking possession, Ouimet extended his business to include body work, spray painting and temporary storage of vehicles, in addition to the sale of gasoline and oil.

By letters dated May 14, 1959, and June 26, 1959, Berger notified Petrofina that he regarded this use of the premises as a breach of the covenant and demanded remedy of the specified breach before July 6, 1959. Following the receipt of these letters, Petrofina says that the matters complained of were remedied and other improvements to the building, such as painting, and levelling and paving of the station lot, were completed.

On July 8, 1959, Petrofina gave notice of its intention to purchase the leased premises pursuant to the option contained in clause 4 of the lease. On the same day, Berger sent a letter to Petrofina terminating the lease. This letter recites a failure to rectify the breach of covenant set out in the two previous letters.

Berger did not reply to Petrofina's letter exercising the option but on July 23, served notice of an application for possession under s. 75 of *The Landlord and Tenant Act*, R.S.O. 1950, c. 199. The county judge made an order directing the issue of a writ of possession. The Court of Appeal dismissed an appeal from this order. This Court granted leave to appeal on June 26, 1961.

The appellant submits that the Courts below were in error

(*a*) in failing to hold that the appellant had validly exercised its option to purchase the leased premises before the respondent's application for possession was commenced and that the learned trial judge was without jurisdiction to hear the application;

(*b*) in holding that the appellant was in breach of clause 9 of the lease in question.

Clause 4 reads:

4. That the Lessee shall have the irrevocable right at any time during the first five (5) years of the term hereof to purchase the leased premises in fee simple for the sum of Thirteen Thousand Dollars ($13,000.00). And that immediately upon the Lessee giving to the Lessor thirty (30) days' prior notice in writing of its intention so to purchase, the Lessor shall deliver to the Lessee such deeds and documents as he may have in his possession or under his control and relating to the leased premises. Upon delivery by the Lessee to the Lessor of said notice, there shall be concluded a valid and binding agreement for sale of the leased premises (together with all buildings, improvements, fixtures, facilities and equipment now or hereafter located thereon) the terms of which shall immediately be embodied in a deed of sale. It is understood and agreed between the parties hereto that this right of purchase for a fixed sum shall, if necessary, be exercisable notwithstanding the covenant of the Lessor contained in the immediately preceding paragraph.

The first 5 years of the lease expired at midnight on July 14, 1959. Petrofina's letter exercising the option was sent on July 8, 1959. It was received the following day.

The first sentence in the option gives an irrevocable right during the first 5 years to purchase in fee for $13,000. It says *at any time* during the first five years. Then follows the clause which has given rise to so much difficulty:

And that immediately upon the Lessee giving to the Lessor thirty (30) days' prior notice in writing of its intention so to purchase, the Lessor shall deliver to the Lessee such deeds and documents as he may have in his possession or under his control and relating to the leased premises.

What is the meaning of giving 30 days' prior notice in writing of its intention so to purchase? The Courts below have construed this as meaning 30 days before the expiration of the first 5 years. The clause does not say that in express terms. Counsel for Berger also contends that the purchase must be completed within the first 5 years and on 30 days' prior notice. On the other hand, counsel for Petrofina says that the provision for 30 days' prior notice in writing has reference to the respondent's obligation to deliver deeds and documents in his possession and that it was inserted for the respondent's benefit to give him time to prepare and deliver the said documents. The submission is that it was merely a matter of conveyancing and that Petrofina was not obliged to give notice of intention 30 days prior to the expiry of the first 5 years because this would be inconsistent with its irrevocable right to purchase at any time during the 5 years.

Parts 1 and 2 of the option clause must be read together and given some meaning. They must also be read along with the third part of the option clause, which reads:

Upon delivery by the Lessee to the Lessor of said notice, there shall be concluded a valid and binding agreement for sale of the leased premises . . .

There is no difficulty about this last-mentioned clause. The parties do not wait for the expiry of thirty days to have a binding agreement of sale and purchase. If the notice was valid, according to this clause, on July 9, 1959, Petrofina became the owner in equity. The contract could have been enforced on either side in an action for specific performance.

There are, therefore, 3 parts of the option clause. The first provides for a right exercisable at any time within the first 5 years. That means up to July 14, 1959. The second provides for the notice. I do not think that this limits the right of Petrofina to giving its notice 30 days prior to July 14, 1959. I think that Petrofina's submission is correct on this point and I am strengthened in this conclusion by the third part of the clause, which provides for a binding agreement coming into force on July 9, 1959, not thirty days after the giving of notice.

I would allow the appeal on this ground. The option was validly exercised. At the time when the application was made before the county judge, the landlord and tenant relationship had ended and there was nothing for the county judge to decide. In assuming the subsistence of landlord and tenant relation, he was acting without jurisdiction.

This makes an opinion unnecessary on the second branch of the appeal.

The appeal should be allowed. The judgments of the Court of Appeal for Ontario and of His Honour Judge P. J. MacDonald set aside and the application of the respondent for possession of the lands in question dismissed. The appellant is entitled to its costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitors for the respondent: Wright & McTaggart, Toronto.

1962
*May 16, 17
June 25

THE WHITEHOUSE PROPERTIES LIMITED (*Applicant*) .... APPELLANT;

AND

M. DIMITRI, Building Inspector, and THE CORPORATION OF THE TOWN OF LEASIDE .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Mandamus application to require issuing of building permit—By-law passed exempting property from provisions of certain previous by-laws—Approval of by-law refused by Municipal Board—By-law not effective until approved by Board—Refusal to issue permit justified.

The appellant sought an order of *mandamus* directed to the respondent D, building inspector of the Town of Leaside, requiring him to issue a permit for the construction of a building on certain lands in the municipality in accordance with plans and specifications complying with the requirements of by-laws 1550 and 1551 of the municipality. D refused to issue the permit on the grounds that the plans and specifications did not comply with by-law 1711, as amended by by-law 1740. Prior to the approval by the Ontario Municipal Board of by-laws 1711 and 1740, the municipality passed by-law 1748, as a result of negotiations between the appellant and officers of the municipality which took place after the enactment of by-laws 1711 and 1740 but prior to their approval by the Board. Subsequently, the Board refused to approve by-law 1748 and it was later repealed.

The appellant contended that the approval of by-laws 1711 and 1740 could not affect appellant's lands because prior to that approval those lands had been removed from the scope of by-laws 1711 and 1740 by by-law 1748 and that therefore its rights fell to be determined under by-laws 1550 and 1551. The application for a *mandamus* was dismissed by the chamber judge and an appeal from his judgment was dismissed by the Court of Appeal. The appellant then appealed to this Court.

Held: The appeal should be dismissed.

The words of clause 2 of by-law 1748 were clear and unambiguous and enacted that no part of the by-law should take effect until approved by the Board, an event which never happened. The conclusion that the by-law never took effect in whole or in part was sufficient to dispose of the appeal.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Wilson J. which dismissed the appellant's application for a *mandamus*. Appeal dismissed.

H. E. Manning, Q.C., for the appellant.

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*PRESENT: Kerwin C.J. and Cartwright, Abbott, Judson and Ritchie JJ.

[1] [1962] O.R. 390, 32 D.L.R. (2d) 417.

Royce H. Frith, for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] pronounced on January 31, 1962, affirming a judgment of Wilson J. dated October 16, 1961, which dismissed the appellant's application for a *mandamus*.

The appellant sought an order of *mandamus* directed to the respondent Dimitri, building inspector of the Town of Leaside, requiring him to issue a permit for the construction of an apartment house on certain lands situate on the east side of Bayview Avenue in the Town of Leaside in accordance with plans and specifications complying with the requirements of by-laws 1550 and 1551 of the Town of Leaside, which the appellant alleged were the by-laws governing such site.

The respondent Dimitri refused to issue the said permit on the ground that the plans and specifications did not comply with by-law 1711, as amended by by-law 1740 of the Town of Leaside, which had been approved on the 6th day of May, 1960, by the Ontario Municipal Board.

Prior to the approval of by-laws 1711 and 1740, the Council of the Town of Leaside had passed by-law 1748 on May 2, 1960, as a result of negotiations between the appellant and officers of the Town of Leaside which took place after the enactment of by-laws 1711 and 1740 but prior to their approval by the Ontario Municipal Board.

The appellant has contended throughout that the approval of by-laws 1711 and 1740 by the order of May 6, 1960, could not affect the appellant's lands because prior to that approval those lands had been removed from the scope of by-laws 1711 and 1740 by by-law 1748 and that therefore its rights fell to be determined under by-laws 1550 and 1551.

It is common ground that the plans submitted by the appellant do conform to the requirements of by-laws 1550 and 1551 but do not conform to those of by-laws 1711 and 1740.

[1] [1962] O.R. 390, 32 D.L.R. (2d) 417.

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Cartwright J.

It will be convenient to tabulate the dates of the relevant events.

June 4, 1956.	By-law 1550 was passed.
July 9, 1956.	By-law 1551 was passed.
	(Both of these by-laws were approved by the Ontario Municipal Board; the exact date of approval is not material.)
October 19, 1959.	By-law 1711 was passed.
March 7, 1960.	By-law 1740 was passed.
May 2, 1960.	By-law 1748 was passed.
May 6, 1960.	Order made by Ontario Municipal Board approving by-laws 1740 and 1711.
May 20, 1960.	Application for permit made by appellant.
July 12, 1960.	Ontario Municipal Board refused to approve by-law 1748.

On a date after July 12, 1960, which is not fixed in the record by-law 1748 was repealed.

Subsequent to July 12, 1960, further attempts were made by the appellant both before the Council and the Ontario Municipal Board to obtain a by-law or order requiring the granting of a permit; they were unsuccessful and do not affect the question before us.

By-law 1748 reads as follows:

The Council of the Corporation of the Town of Leaside enacts as follows:—

1. Notwithstanding the provisions of By-law 1711 as amended by By-law 1740, the provisions of the said by-law, as so amended, shall not apply to the following lands:—

Lots 606, 607, 608 and 609, Plan 3110, known as 903, 905 and 907 Bayview Avenue, Town of Leaside,
provided that any building or structure erected on the said lands complies with the plans on file with the Building Inspector identified by Plan No. 6021 dated March 1960, and initialled by E. J. Brisbois, Chairman of the Planning Board.

2. No part of this by-law shall take effect until approved by the Ontario Municipal Board but subject to such approval this by-law shall take effect from the date of passing thereof.

PASSED and ENACTED this 2nd day of May, A.D. 1960.

The lands described in paragraph 1 of the by-law are those of the appellant on which the building described in the application for permit was proposed to be erected. The application for permit submitted by the appellant complied with the plans mentioned in paragraph 1 of this by-law.

By-law 1711 and 1740 were passed pursuant to the powers conferred on the Council by s. 30 of *The Planning Act*, R.S.O. 1960, c. 296 (or its predecessor).

Subsections (9) and (10) of s. 30 read as follows:

> (9) No part of any by-law passed under this section comes into force without the approval of the Municipal Board, and such approval may be for a limited period of time only, and the Board may extend such period from time to time upon application made to it for such purpose.
>
> (10) No part of any by-law that repeals or amends a by-law passed under this section or a predecessor of this section and approved by the Municipal Board comes into force without the approval of the Municipal Board.

It is submitted for the appellant that on the date by-law 1748 was passed by-laws 1711 and 1740 had not been approved by the Board and the Council was free to amend them in any way it saw fit; reference is made to *The Interpretation Act*, R.S.O. 1960, c. 191, s. 27(*g*) which reads:

> (*g*) where power is conferred to make by-laws, regulations, rules or orders, it includes power to alter or revoke the same from time to time and make others;

There is no doubt that this is so. The argument proceeds, that, as prior to May 6, 1960, by-laws 1711 and 1740 had been further amended by by-law 1748 so as to exclude the lands of the appellant from their operation, the order of the Board purporting to approve them as they read prior to the enactment of by-law 1748 was ineffective either *in toto* or, at all events, as regards the appellant's lands.

The first point to be considered in the examination of this argument is whether by-law No. 1748 came into force in whole or in part prior to the approval of by-laws 1711 and 1740 on May 6, 1960, and the question whether it did so is one of construction. It is argued for the appellant that the first part of clause 1, reading as follows:

> Notwithstanding the provisions of By-law 1711 as amended by By-law 1740 the provisions of the said by-law, as so amended, shall not apply to the following lands:
>
> Lots 606, 607, 608 and 609, Plan 3110, known as 903, 905 and 907 Bayview Avenue Town of Leaside

is severable from the remainder of the by-law and should be regarded as unaffected by clause 2. It is pointed out that the portion of clause 1 reading as follows:

> provided that any building or structure erected on the said lands complies with the plans on file with the Building Inspector identified by Plan No. 6021 dated March 1960, and initialled by E. J. Brisbois, Chairman of the Planning Board.

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Cartwright J.

while in form a proviso is in substance an enacting clause which would require the Board's approval and it is suggested that the draftsman inserted clause 2 of the by-law to cover this clause but not to cover the first part of clause 1 and that accordingly clause 2 should be construed as being limited in its operation to that part of clause 1 last quoted.

I find myself unable to agree with this argument. The words of clause 2 of the by-law appear to me to be clear and unambiguous and to enact that no part of the by-law shall take effect until approved by the Board, an event which never happened. On this matter of construction I agree with Wilson J. and with Laidlaw J.A. who delivered the unanimous reasons of the Court of Appeal. It is unnecessary to consider whether the Council was required by law to so provide as it appears to me that it saw fit to do so.

The Ontario Municipal Board Act contemplates a municipality making voluntary applications to the Board for approval of its by-laws. Section 53(1)(*b*) provides:

53(1) The Board has jurisdiction and power in relation to municipal affairs, . . .

(*b*) to approve any by-law or proposed by-law of a municipality, which approval the municipality voluntarily applies for or is required by law to obtain;

The conclusion that by-law 1748 never took effect in whole or in part is sufficient to dispose of the appeal.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Manning, Bruce, Paterson & Ridout, Toronto.

Solicitors for the respondents: Magwood, Frith & Casey, Toronto.

XENOPHON KOUTSOGIANNOPOULOS ALIAS PULOS (*Plaintiff*) ... APPELLANT;

1962 *May 3 June 11

AND

DAME MARY SPEROS PRAHALES ALIAS PANOS ET AL. (*Defendants*) .... RESPONDENTS.

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

Accounts—Action for accounting—Order made for accounting only—Court of Appeal reversing order—Appeal to Supreme Court—Motion to quash for lack of jurisdiction—Verbal application for leave to appeal—Code of civil Procedure, arts. 566 et seq.

In this action, the plaintiff asked that the defendants be ordered to render an accounting and that in default of rendering the account the defendants be ordered to pay certain sums of money. The trial judge ordered the rendering of an account, but did not order the payment of any sum of money. He came to the conclusion that the Court was not in a position to determine whether the plaintiff was entitled to any. The Court of Queen's Bench dismissed the action as it came to the conclusion that the defendants owed no accounting. The plaintiff appealed to this Court. The defendants moved to quash for lack of jurisdiction, and it was ordered that the motion to quash be heard at the same time as the merits of the case. During the hearing the plaintiff applied for leave to appeal in the event that it was decided that there was no appeal as of right.

Held: The motion to quash should be allowed and the application for leave to appeal dismissed.

There are two very distinct phases in an action for accounting. The first is to determine the right of the plaintiff to obtain an accounting, and the second is to apply arts. 567 et seq. if that right exists. Then if the defendant fails to render an account when he is condemned, the plaintiff may proceed to have such accounting made. But he cannot on the first phase be entitled to any sum of money unless the plaintiff and the defendant have both agreed to the contestations of accounts before the trial judge. In the present case, the trial judge and the Court of Appeal have pronounced themselves only on the right of the plaintiff to obtain an account. There was, therefore, no amount of money involved at this stage of the proceedings, and, consequently, this Court was without jurisdiction to hear the appeal. There was no valid reason to grant leave to appeal.

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

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

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

[1] [1961] Que. Q.B. 811.

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KOUTSOGIANNOPOULOS ALIAS PULOS *v.* PRAHALES ALIAS PANOS *et al.*

N. A. Levitsky, for the defendants, respondents.

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

TASCHEREAU J.:—Haralampos Basilian Koutsogiannopoulos alias Harry Pulos, executive, of the City and District of Montreal, sued and asked in his action that the following defendants Dame Mary Speros Prahales alias Panos, wife contractually separate as to property of Haralampos, (known as Harry), Vacilikes alias Kay Speros Prahales alias Panos, and George Speros Prahales Panos, the last three Panos's in their quality of Executors and Trustees of the estate of the late Speros Theodore Prahales alias Panos; and the said George Speros Prahales Panos personally be ordered to render Plaintiff a detailed account, under art. 566 and following of the *Code of Civil Procedure,* and that in default of rendering the account within the delay fixed by the judgment, the defendants es-qualité be ordered to pay to the plaintiff the sum of $15,000, and the defendant George Panos the sum of $30,000 plus interest and costs.

Mr. Justice Côté of the Superior Court of Montreal rendered the following judgment:

FOR THESE REASONS, the Court DOTH ORDER the Defendants es qualite to render Plaintiff, within 30 days from these presents, a detailed account under oath, of the revenues belonging to Plaintiff which they have drawn, received and taken from the joint property as referred to and from System Theatre Company Limited and which should have been credited to Plaintiff, and to produce with said account all justification vouchers at the office of the Prothonotary of this Court; DOTH ORDER Defendant George Panos personally to render to Plaintiff, within 30 days, an accounting of his operation of the Candy and Refreshment Department administered by him for the period extending from 1937 to 1948, and to produce said account under oath with vouchers connected therewith at the office of the Prothonotary of this Court; the whole with costs against the Defendants including the costs of Exhibits.

The learned trial judge merely ordered the rendering of an account by the defendant-respondents, but did not order the payment of any sum of money. He came to the conclusion that the Court was not in a position to determine whether the plaintiff was entitled to anything, and the judgment therefore only concerns the rights of the appellant to an accounting. The Court of Queen's Bench (Appeal Side)[1]

[1] [1961] Que. Q.B. 811.

allowed the appeal, Rinfret J. dissenting, and reached the conclusion that the respondents owed no accounting to the appellant, and dismissed the action with costs.

In an action for accounting, there are two very distinct phases. The first to be determined is the right of the plaintiff to obtain an accounting (566 C.C.P.), and secondly, if that right does exist, then the dispositions of 567 C.C.P. and following have to be applied. If the defendant fails to render an account when he is condemned, the plaintiff may proceed to have such accounting made in the manner mentioned in art. 568 (578 C.C.P.). He cannot on the first issue, that is on the right to an accounting, be entitled to any sum of money, unless the plaintiff and the defendant have both agreed to the contestations of the accounts before the trial judge. See *Racine v. Barry*[1]; *Chartrand v. Tremblay*[2]; *Cousineau v. Cousineau*[3].

Here, this is not the case. The trial judge and the Court of Appeal have pronounced themselves only on the right of the plaintiff to obtain an accounting. There is, therefore, no amount of money involved at this stage of the proceedings.

On February 19, 1962, the respondents filed a motion to quash on the ground that this Court had no jurisdiction to hear this appeal, but it was ordered that the motion be heard at the same time as the merits of the case, which was then on the roll, so that the Court be in a better position, in the light of all the facts, to determine whether or not it had jurisdiction.

In view of what I have previously said, I believe that this Court is without jurisdiction to hear this appeal, and that the motion to quash should be granted with costs of such a motion.

At the hearing, a verbal application was made by counsel for the appellant asking for leave to appeal, but I see no valid reason why this request should be granted. This motion should be dismissed without costs.

The judgment of Fauteux and Martland JJ. was delivered by

MARTLAND J.:—The respondents in this appeal applied to quash the appeal on the ground that this Court did not have jurisdiction to hear it because there was no money amount

[1] [1957] S.C.R. 92. [2] [1958] S.C.R. 99.
[3] [1949] S.C.R. 694.

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Martland J.

involved in the matter. Following argument on that application, it was ordered that the motion be heard at the same time that the appeal was argued on the merits. The main issue was fully argued and counsel for the appellant applied for leave to appeal in the event that it was decided that there was not an appeal as of right. Having heard full argument on the merits of the appeal, I would have been inclined to grant that application. However, in view of the conclusions reached by the majority of the Court, there is no point in expressing any final view on this point.

Motion to quash granted with costs; Motion for leave to appeal dismissed without costs.

Attorneys for the plaintiff, appellant: Hyde & Ahern, Montreal.

Attorney for the defendant, respondent: N. A. Levitsky, Montreal.

1962
*April 26
June 25

WILBERT L. FALCONER ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Transfer of syndicate's interest in farmout agreement to company for share consideration—Allotment of shares to syndicate members—When right to shares arose—Valuation of shares—Whether income.

The appellant was one of a syndicate of four persons who, in May 1951, acquired a farmout agreement in respect of certain oil lands on which there was already a producing well. In order to spread the risk involved, 75 per cent of the farmout interest was sold. The syndicate members decided to form a company to take over the remaining quarter interest and, in consequence, Ponder Oils Ltd. was incorporated, as a private company, on June 15, 1951. The members agreed at that time that the consideration for the transfer of their rights under the farmout to Ponder should be 748,000 fully paid shares of the company, and of this number the appellant was to receive 166,000 shares. By a formal agreement of September 25, 1951, stated to be effective from June 15, 1951, the syndicate's interest in the farmout was transferred to Ponder in consideration of the issue of 748,000 fully paid shares.

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

The appellant was assessed on an additional $33,200 of income for 1951, on the basis that the Ponder shares which he received represented income in his hands for that year from an adventure in the nature of trade. This assessment was based on the proposition that the appellant did not acquire any right to his shares until after the successful completion of a second well on September 3, 1951, and at a time when, as a result of that successful completion the value of the Ponder shares had increased. The appellant's contention was that the agreement for the transfer of the farmout to Ponder for a share consideration was actually made before the drilling of the well had been commenced and that the shares to be received by the syndicate for the transfer, at that time, could have no value greater than the value of the actual asset which the syndicate was conveying to Ponder.

Appeals by the appellant to the Tax Appeal Board and the Exchequer Court were dismissed. An appeal was then brought to this Court.

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

Per Locke, Cartwright and Martland JJ.: On June 15, 1951, by agreement among the syndicate members, possession of their asset passed to a private company, which had no other assets, pursuant to an undertaking that they would receive 748,000 of its shares. These shares at that time could have a value no more and no less than the value of the asset turned over to the company. No profit could, at that time, accrue to the appellant in respect of the 166,000 shares to which he was then entitled.

The agreement of September 25 did no more than to evidence, in writing, an agreement which already existed. Consequently, it was not proper to attribute as income to the appellant the value placed upon his shares as of September 25, 1951.

Per Abbott and Judson JJ., *dissenting*: It was not until the intention of the syndicate promoters was expressed in the formal agreement of September 25, 1951, that the appellant became entitled to receive the shares allotted to him. The shares were then worth substantially more than the appellant's interest in the syndicate on June 15, 1951. The result was that the appellant was properly assessed on the basis that the receipt by him as a syndicate member of the shares of Ponder was a receipt of income from a venture in the nature of trade.

Doughty v. Commissioner of Taxes, [1927] A.C. 327, referred to.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], dismissing an appeal from a decision of the Tax Appeal Board. Appeal allowed, Abbott and Judson JJ. dissenting.

J. H. Laycraft, for the appellant.

M. Bancroft and *G. W. Ainslie,* for the respondent.

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

MARTLAND J.:—In the year 1951 the appellant, along with three other persons, decided to acquire from Imperial Oil Limited (hereinafter called "Imperial") a farmout in

[1] [1961] Ex. C.R. 353, [1961] C.T.C. 306, 61 D.T.C. 1176.

respect of certain lands, the subject-matter of a petroleum and natural gas lease held by Imperial as lessee. The farm-out was granted by Imperial by an agreement, in writing, dated May 25, 1951, to one of the members of the syndicate, Paul Moseson, who acted as representative for the group. There was already, at that time, a producing well on the lands. The agreement required the payment to Imperial of $40,000. Moseson undertook certain drilling commitments on the land. There was also provision for the delivery of specified quantities of any oil produced from any wells which were so drilled.

In order to spread the risk involved, agreements were made by Moseson with two companies, Central Explorers Limited (hereinafter called "Central") and Banff Oil Limited (hereinafter called "Banff"), whereby, in consideration of $30,000 paid by the former and $15,000 paid by the latter, together with their agreements to contribute toward the drilling costs involved in the drilling of the wells pursuant to the farmout, these two companies acquired between them a 75 per cent interest in the producing well and specified percentage interests in the wells subsequently to be drilled, toward the cost of which they were required to contribute.

The members of the syndicate agreed to incorporate a company to take over their interests under the farmout and, in consequence, Ponder Oils Ltd. (hereinafter called "Ponder") was incorporated, as a private company, on June 15, 1951, with an authorized capital consisting of 1,000,000 shares without nominal or par value. Out of the funds obtained as a result of the agreements with Central and Banff, $40,000 was paid to Imperial pursuant to the farmout agreement. The remaining $5,000 was placed in a special trust account and, subsequent to its incorporation, was turned over to Ponder.

Pursuant to the agreement with Imperial, production from the producing well on the property began to accrue for the benefit of the syndicate on May 26, 1951. The moneys thus received were also held in the same trust account which, after its incorporation, became the bank account of Ponder.

The drilling of a well on the lands, the subject-matter of the farmout, was commenced by Ponder on July 27, 1951. Drilling proceeded and calls were made from time to time

upon Central and Banff for their contributions toward the drilling costs. The well was completed on September 3, 1951, and proved to be a successful producer of oil.

Ponder had been incorporated at the instance of the four members of the syndicate, who were the only persons beneficially interested in it until after the completion of the well. Until August 23, 1951, its directors were Moseson, the company's solicitor, and the solicitor's secretary. On that date the latter was replaced on the board of directors by the appellant.

The members of the syndicate had agreed, at the time Ponder was incorporated, as to the amount of their share interest in the company, to be received as consideration for the transfer to Ponder of all their rights under the farmout agreement. It had been agreed that 748,000 shares should be issued, fully paid, of which Moseson should receive 250,000 and each of the other three members 166,000. Moseson agreed to convey to Ponder certain other properties in which he, alone, was interested.

The formal documentation of some of these transactions lagged substantially behind the actual events. For example, although the payment of $15,000 had been promptly made by Banff and it had contributed its share of the cost of drilling the well, the written contract evidencing its interest was not actually executed until October 2, 1951. Similarly, the written agreement to evidence the transfer by Moseson to Ponder of the interest of the syndicate in the farmout agreement was not executed until September 25, 1951. That agreement recited the payment which had been made by Moseson to Ponder of the sum of $5,000. It provided for the issue of 748,000 fully paid shares of Ponder to Moseson and his nominees.

It was provided in this agreement that: "This Indenture shall be effective as and from the 15th day of June, 1951, as if the same had been executed and delivered on that date."

On the same date a written agreement was executed by the four members of the syndicate, whereby Moseson agreed to cause the shares to be issued and allotted by Ponder as to 250,000 shares to himself and 166,000 shares to each of the other three members of the syndicate, who, in turn,

agreed to accept such shares in full satisfaction of any claims and demands which they might have against Moseson in respect of the properties.

Subsequent to the execution of these agreements, shares were allotted. Up to the time of the trial, the appellant had not disposed of any of his 166,000 shares.

Before these written agreements had been executed, Ponder had issued and allotted 251,997 of its shares at a price of 40 cents cash per share. Subsequent to that issue, on September 12, 1951, Ponder had been converted into a public company and its share capital had been increased by the creation of an additional 3,000,000 shares without nominal or par value.

The appellant has been assessed for income tax for the year 1951 on an additional $33,200 of income for that year, on the basis that the 166,000 shares of the capital stock of Ponder which he received represent income in his hands for that year from an adventure in the nature of trade. In determining this figure, the shares were valued at 20 cents each by a comparison with the price paid of 40 cents per share for the 251,997 shares issued in September, subject to a 50 per cent discount owing to the fact that the shares received by the appellant were subject to an escrow agreement.

This assessment is based on the proposition that the appellant did not acquire any right to his 166,000 shares until after the successful completion of the well on September 3, 1951, and at a time when, as a result of that successful completion, the value of Ponder's shares had increased.

The appellant's contention is that the agreement for the transfer of the farmout to Ponder for a share consideration was actually made before the drilling of the well had been commenced and that the shares to be received by the syndicate for the transfer, at that time, could have had no value greater than the value of the actual asset which the syndicate was conveying to Ponder. He relies on the authority of *Doughty v. Commissioner of Taxes*[1].

[1] [1927] A.C. 327.

At p. 336, Lord Phillimore, who delivered the judgment of the Privy Council, said:

The other ground on which the appellant's case may rest is that the transaction which led to the claim for tax was not a sale whereby any profit accrued to the two partners. The case of Craig (Kilmarnock) (1914 S.C. 338) just referred to is an authority for saying that the Crown is not entitled to take a mere bookkeeping entry as conclusive evidence of the existence of a profit. The two partners made no money by the mere process of having their stock in trade valued at a high rate when they transferred to a company consisting of their two selves.

If they overestimated the value of the stock the value of the several shares became less. The capital of the company would be to this extent watered. As already observed, they could not, by overestimating the value of the assets, make them more.

The appellant's appeal to the Tax Appeal Board was dismissed and his appeal from that decision was, in turn, dismissed by the Exchequer Court[1]. The basis of the decision in that Court is contained in the following extract from the reasons for judgment:

Now Ponder Oils Limited came into existence on June 15, 1951, and from its inception or shortly afterwards appears to have obtained possession of the assets and rights of the syndicate and to have discharged the syndicate's obligations under the farmout contract. But it did not pay for the assets immediately, nor does the consideration for them appear to have been agreed upon between the syndicate and the company. Since Ponder was then a private corporation in which no one but the members of the syndicate was beneficially interested, it may be assumed that the syndicate could have dictated as the consideration to be paid by Ponder whatever they wished, whether in terms of money or shares. It might have been a very high consideration or a very low one or a reasonable one in either money or shares, but whatever it might be, to my mind it could at that time be worth no more than the value of what Ponder had. But while the members of the syndicate had in fact agreed among themselves, even before the incorporation of Ponder, to take a particular number of shares as the consideration, on the evidence I can discover nothing prior to the contract of September 25, 1951 from which any obligation of the company to issue such shares or any right of the syndicate or the members to demand them of the company can be held to have arisen. And even adopting the appellant's contentions to the point that the company was between June 15 and September 25 under an enforceable obligation to pay for what it had acquired from the syndicate, I am unable to find on its part any undertaking to pay in shares. If a contract between the company and the syndicate is to be inferred from the circumstances, including the receipt by Ponder of the production from the well, the carrying on by Ponder of the drilling and the collection by Ponder of the contributions of the participants, the inference I would draw is that Ponder took over the contract in circumstances from which a promise to pay would be implied, but to pay a reasonable sum rather than to issue shares, for I see nothing in what the company did from which a promise to issue shares may be inferred. And even if the receipt of $5,000 in cash as part of what was transferred be regarded as inconsistent with a contract to pay in money and, therefore,

[1] [1961] Ex. C.R. 353, [1961] C.T.C. 306, 61 D.T.C. 1176.

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Martland J.

suggestive that the consideration was to be something else and probably shares, there was still no promise by the company to pay in shares to the exclusion of any other kind of payment. In my view, the syndicate's right to be paid by Ponder in shares arose for the first time on September 25, when their right to payment for what Ponder had acquired from them was converted from a right to be paid in some form to a definite right to shares.

There is, in this passage, at the very outset, a finding of fact that, from the inception of Ponder or shortly afterwards, that company obtained possession of the assets and rights of the syndicate and discharged the syndicate's obligations under the farmout agreement. This finding is, in my opinion, of great importance. Ponder had, with the consent of the members of the syndicate, taken over possession of the syndicate's asset, the farmout agreement, and, in turn, Ponder received the production from the completed well on the farmout property from and after May 26, 1951. The acquisition of that possession must have been by virtue of some agreement with the syndicate and, that being so, if the syndicate had sought against Ponder a direction for specific performance, the principle stated by Turner L.J. in *Wilson v. West Hartlepool Railway Company*[1], adopted by Kay J. in *Howard v. Patent Ivory Manufacturing Company*[2], would be applicable:

> Where possession has been given upon the faith of an agreement, it is I think the duty of the Court, as far as it is possible to do so, to ascertain the terms of the agreement and to give effect to it.

What were the terms of the agreement by virtue of which Ponder had become possessed of the assets of the syndicate? It is clear, on the evidence, that all members of the syndicate understood that there would be an issue of fully paid shares by Ponder to the syndicate members in consideration for the asset. The four members of the syndicate had agreed upon that consideration. They were the sole beneficial owners of Ponder, which, at that time, had issued only three qualifying shares, which were subject to the control of the syndicate members. One of the members of the syndicate, Moseson, was a director of Ponder and the other two directors were his nominees. This being so, it appears to me that when Ponder took possession of the asset the

[1] (1865), 2 De G. J. & Sm. 475 at 494.

[2] (1888), 38 Ch. D. 156 at 163.

consideration which it was to pay had been agreed upon by everyone who was in a position to determine the intent of that company as to the consideration which it should pay. In my view, had he desired so to do, the appellant was in a position, once Moseson had turned over to Ponder possession of the syndicate assets in which he had an interest, to compel Moseson, as his trustee, to take the steps necessary to obtain the issuance to him of his 166,000 shares in the capital stock of Ponder.

That there was an agreement in existence before the execution of the written agreement between Moseson and Ponder on September 25 is recognized specifically in that document, in the clause which has been quoted earlier.

The reason why there had not been a written agreement at an earlier date is explained by the appellant in his evidence:

BY MR. LAYCRAFT:

....

Q. That document is dated September 25, 1951. When was the arrangement made? A. The arrangement was made in May, 1951.

Q. Was the arrangement in fact carried out from the incorporation of Ponder Oils Limited? A. It was.

Q. Why then is the document dated so much later? A. Mainly because Ponder Oils had no personnel to press on to get the documentation up-to-date until after the 1st of September, and they got this out as quickly as possible.

Q. Do you continue to blame lawyers—

BY HIS LORDSHIP:

Q. The arrangement was made in May, 1951, but it was in fact carried out from the time of incorporation? A. Yes, Your Lordship.

Q. You said something else. It is dated later because Ponder Oils had not—what? A. They had no one to press on with the documentation or arrangements that had been made until after the 1st of September.

BY MR. LAYCRAFT:

Q. Do you continue to blame lawyers? A. Yes.

The position is, therefore, that by agreement among the syndicate members, possession of their asset passed to a private company, which had no other assets, pursuant to an understanding that they would receive 748,000 of its shares, fully paid, of which the appellant should receive 166,000. At that time Ponder had no issued shares other than the three qualifying shares held by its first directors. The 748,000 shares agreed to be issued to the syndicate

members at that time could have a value no more and no less than the value of the asset which had been turned over to it. No profit could, at that time, accrue to the appellant in respect of the 166,000 shares to which he was then entitled.

In my opinion, the agreements of September 25 did no more than to evidence, in writing, agreements which already existed and, consequently, it is not proper to attribute as income to the appellant the value placed upon his 166,000 shares as of September 25.

In my opinion, the appeal should be allowed, with costs both in this Court and in the Exchequer Court, and the reassessment, dated December 17, 1956, as varied by the Minister, should be vacated.

The judgment of Abbott and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—The appellant is one of a syndicate of four persons who, in May of 1951, acquired a farmout agreement from Imperial Oil Limited. On June 15, 1951, the syndicate caused to be incorporated Ponder Oils Limited for the purpose of transferring to that company the asset to be exploited. The question at issue in this appeal is whether the company was bound by agreement to issue shares for the asset on June 15, 1951, or whether that obligation arose for the first time on September 25, 1951. The importance of the date is that in the interval the property had proved to be valuable and Falconer had made a substantial profit as a member of the syndicate.

The Exchequer Court, after a careful and detailed review of the dealings among the syndicate members and between them and the company, concluded that there was no agreement for the issue of shares until September 25, 1951, and that consequently, tax was payable.

The syndicate acquired the farmout agreement by an agreement in writing dated May 25, 1951. There was probably a prior oral agreement because on May 17, 1951, it sold a half interest in the farmout agreement for $30,000. By an agreement in writing dated October 2, 1951, the syndicate also sold a quarter interest for $15,000. This $15,000 was paid by the purchaser of the quarter interest long before the formal date of the agreement. I say this

because as a result of the two sales comprising the three-quarter interest, the syndicate received $45,000 in cash, of which it paid $40,000 to Imperial Oil. This $40,000 was the purchase price under the farmout agreement. These two purchasers of the half interest and quarter interest respectively agreed to contribute to the drilling costs in the proportions of their interest.

On June 15, 1951, Ponder Oils Limited came into being as a private company with an authorized capital stock of one million shares n.p.v. Drilling began in July of 1951 and by September 3, 1951, there was a well in production. On September 12, 1951, Ponder Oils Limited was converted into a public company and its authorized capital was increased by the creation of an additional three million shares n.p.v. Shortly before this happened, the company had sold 251,997 shares privately at 40 cents per share. In addition, there were three qualifying shares outstanding.

The next step was the execution of the formal agreement between Paul Moseson, the syndicate manager, and Ponder Oils Limited. It was dated September 25, 1951, and it provided that it should be effective from June 15, 1951, as if it had been executed and delivered on that date. It recites the following facts:

(a) The acquisition of the farmout agreement from Imperial Oil Limited by agreement dated May 25, 1951.

(b) The sale of the half interest by agreement dated May 17, 1951.

(c) The agreement to sell the quarter interest. (This is the agreement which was not put in writing until October 2, 1951.)

(d) The existence of a lease known as the Berube lease held by Moseson and at that time the subject-matter of litigation in the Supreme Court of Alberta.

(e) Moseson's holding of four units in the Kavanagh Oil syndicate.

Moseson then transfers to the company the remaining one-quarter interest in the Imperial farmout agreement in consideration of the issue of 748,000 fully paid shares n.p.v. The company also acknowledges receipt of $5,000 from Moseson. This is the balance of $5,000 remaining from the

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proceeds of the sale of the half interest and the quarter interest. This money appears to have been turned over to Ponder immediately on its receipt.

Moseson agrees to prosecute the action to establish the Berube lease and to assign it to the company if the action is successful. Moseson also transfers his interest in the Kavanagh certificate, Ponder to assume Moseson's liability of $1,000 in respect of this.

In addition to issuing the shares, Ponder agrees to indemnify Moseson against all his liabilities under the Imperial farmout agreement, also to indemnify him if the purchaser of the quarter interest took a certain course of action.

This is obviously an elaborate agreement defining the relations between the syndicate and the company. The 748,000 shares were issued in escrow and were divided as follows:

P. E. Moseson	250,000 shares
W. L. Falconer	166,000 shares
T. A. Link	166,000 shares
A. W. Nauss	166,000 shares

Moseson received 84,000 more shares than each of the others because he alone was interested in the Berube lease and the Kavanagh syndicate. As stated above, the problem is whether the appellant Falconer realized a profit on September 25, 1951, from the receipt of these shares.

The findings of the learned trial judge are as follows:

In my view, the syndicate's right to be paid by Ponder in shares arose for the first time on September 25, when their right to payment for what Ponder had acquired from them was converted from a right to be paid in some form to a definite right to shares.

The material fact, in my opinion, is that through carrying out their scheme, the syndicate became entitled to shares on September 25, but not until then, and thereby realized profit from their scheme in the form of a right to shares. September 25, in my opinion, is accordingly the date at which the right to the shares to which the appellant became entitled should be valued.

In addition, the evidence shows, although not very clearly, that it was Ponder that actually conducted the drilling operations. How Ponder was financed during this interval to enable it to operate does not appear. The evidence also seems to show that from the moment of the acquisition of the property the syndicate members intended

to incorporate Ponder and to turn over the property to the company for a certain number of shares. I am not satisfied on the evidence that the Berube lease and the Kavanagh syndicate interest were ever intended to be included in the deal until the written agreement came to be executed.

But these were merely the intentions of the promoters. No corporate action whatever was taken along these lines until September 25, 1951. There were no meetings of directors to approve of any agreement with the syndicate. The company appears to have done nothing in a corporate way beyond holding the formal meetings to get itself organized. It did not agree to issue any shares. It received no transfer of the farmout agreement. It did receive the $5,000 from Moseson and it did spend money for the development of the property. It seems to me quite impossible to hold that on June 15, 1951, there was a contract between the company and the syndicate for the transfer of these property interests mentioned in the agreement of September 25 in consideration of the allotment by the company of the 748,000 shares. Until the date of the formal agreement everything depended upon the intention of the syndicate promoters. Neither party could, on June 15, 1951, have proved the existence of a concluded contract on these terms and an action for specific performance by either party to enforce such terms would have failed. This contract is a bilateral matter. What the promoters intended to do when they had time to attend to the business does not establish a contract. The position between the two dates is that the company was apparently in possession of the property, developing the property at its own expense on the money from some unknown source. It is possible that the company might have established a right to acquire the property on payment of a reasonable price, although I am doubtful of that, but I am in complete agreement with the finding of the learned trial judge that it was not until September 25, 1951, that the company came under any obligation to issue a defined number of shares for the property, including the Berube lease and the Kavanagh syndicate interest. The appellant's right to receive the shares thus arose for the first time on September 25, 1951. The shares were then worth substantially more than the appellant's interest in the syndicate on June 15, 1951. The result is that the appellant was properly assessed on the basis that the receipt by him as a syndicate member

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of the shares of Ponder was a receipt of income from a venture in the nature of trade. The case is not within the principle of *Doughty v. Commissioner of Taxes*[1].

The remaining question is whether the shares were properly valued for the purpose of computing the tax. After reviewing the evidence of dealings in the shares and after discounting the value of these shares because they were subject to escrow, the learned trial judge affirmed the Minister's valuation at 20 cents per share. I can find no reason for disturbing this assessment.

I would dismiss the appeal with costs.

Appeal allowed, ABBOTT *and* JUDSON JJ. *dissenting.*

Solicitors for the appellant: Chambers, Might, Saucier, Peacock, Jones, Black & Gain, Calgary.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

1962 *Feb. 22 June 11

IN THE BANKRUPTCY OF GINGRAS AUTOMOBILE LTEE.

LES PRODUITS DE CAOUTCHOUC MARQUIS INC. (*Petitioner*) ...... APPELLANT;

AND

ANDRE TROTTIER (*Trustee*) ....RESPONDENT.

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

Bankruptcy—Landlord and tenant—Claim for arrears of rent and for costs of repairs—Whether landlord a secured creditor—Whether both claims preferred—The Bankruptcy Act, R.S.C. 1952, c. 14, ss. 95, 100, 105—Civil Code, arts. 1619, 1624, 1628, 1994, 2005.

The petitioner, as landlord of the premises occupied by the bankrupt, filed with the trustee a preferred claim in respect of three months arrears of rent due by the bankrupt and also in respect of costs of certain repairs for which the bankrupt was liable under the terms of the lease. The trustee allowed the amount claimed for arrears of rent as a preferred claim, but refused to consider the claim for repairs as a preferred claim. The trial judge held that the petitioner was entitled to rank by preference for both claims. That judgment was reversed

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

[1] [1927] A.C. 327.

by the Court of Queen's Bench and the decision of the trustee was restored. The petitioner obtained leave to appeal to this Court. The petitioner contended that s. 95 of *The Bankruptcy Act* dealt merely with the order in which a landlord was entitled to be collocated by preference, and that the extent of that preference under the provincial law was preserved by s. 105.

Held: Only the claim for arrears of rent was entitled to priority.

Subject to priority of ranking under s. 95 of *The Bankruptcy Act,* by virtue of s. 105 the nature and extent of the landlord's claim for rent or damages and any other rights he may have arising out of the contract of lease are determined by the law of the province in which the leased premises are situated. However, in the event of bankruptcy, the right of the landlord to be collocated and paid by preference, and the extent of that preference, are clearly provided for in s. 95. That preference ranks sixth in order of priority and is limited as provided for by s. 95. Furthermore, by the combined effect of ss. 95, 100 and 105, the landlord is entitled to rank only as an unsecured creditor for any balance to which he may be entitled under provincial law.

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

A. Denis, Q.C., for the petitioner, appellant.

J. P. Bergeron, Q.C., and *P. E. Blain,* for the trustee, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant is a creditor of Gingras Automobile Ltée, a bankrupt, and respondent is the trustee of the estate of the said bankrupt. At the date of the receiving order a valid lease existed between the debtor and appellant covering premises occupied by the debtor and with respect to which three months' arrears of rent amounting to $1,800 were outstanding. In addition, appellant was entitled to claim from the debtor a sum of $1,398.22 representing the cost of certain repairs for which the debtor was liable under the terms of its lease. Appellant's total claim against the debtor amounted therefore to $3,198.22, for which it filed a claim with respondent, alleging that it was entitled to be paid its entire claim by preference.

It is conceded that at the date of the receiving order sufficient moveable property was located upon the leased premises to secure payment of the full amount claimed.

The trustee allowed the amount claimed for arrears of rent as a preferred claim but disallowed the balance. On appeal to the Superior Court that decision was reversed and

[1] [1961] Que. Q.B. 827, (1962), 3 C.B.R. (N.S.) 55

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appellant held entitled to rank by preference for the whole amount of its claim. On appeal to the Court of Queen's Bench[1], that judgment was reversed and the decision of the trustee restored. The present appeal, by leave, is from that judgment.

The facts are not in dispute and the sole questions in issue on this appeal are ones of law. Under the provincial law, appellant was entitled to be paid a sum of $3,198.22 and payment of that claim was secured by privilege on the moveable property located on the leased premises: arts. 1619 *et seq.* and 2005 of the *Civil Code.* That privilege consisted in the right to seize and sell such moveable property and to be paid by preference out of the proceeds: Faribault, Traité de Droit civil, t. 2, p. 112. In the event of competing claims, under the law of Quebec the landlord's privilege ranks eighth in order of preference: art. 1994 of the *Civil Code.*

The legal question in issue here is, to what extent if any the provincial law has been abrogated by the provisions of the *Bankruptcy Act,* R.S.C. 1952, c. 14.

In 1949 all existing bankruptcy legislation was repealed and a new *Bankruptcy Act* enacted, 13 Geo. VI, c. 7, now R.S.C. 1952, c. 14. The previously existing statute was completely re-cast and many important changes made including changes in the preferential right of the landlord.

The present Act, like its predecessor acts, provides that subject to the Act all debts proved in bankruptcy shall be paid *pari passu.* To that rule of absolute equality, certain exceptions are made including those provided for by s. 95. The exclusive authority given to Parliament by s. 91(21) of the *British North America Act* to deal with all matters arising within the domain of bankruptcy and insolvency, enables Parliament to determine the relative priorities of creditors under a bankruptcy: *Royal Bank v. Larue*[2]. To the extent that such priorities may be in conflict with provincial law, the federal statute must prevail. In his argument before us Mr. Denis did not of course challenge that proposition. He contended, however, that s. 95 of the Act dealt merely with the order in which a landlord was entitled to be collocated by preference, and that the extent of that preference

[1] [1961] Que. Q.B. 827, (1962), 3 C.B.R. (N.S.) 55.
[2] [1928] A.C. 187, 8 C.B.R. 579, 1 W.W.R. 534.

under the provincial law was preserved by s. 105. With deference I am unable to agree with that submission. The relevant portions of s. 95 and s. 105 are as follows:

95. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: . . .

(*f*) the landlord for arrears of rent for a period of three months next preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent: . . .

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due to him.

105. Except as to priority of ranking as provided by section ninety-five, and subject to the provisions of subsection four of section forty-two, the rights of landlords shall be determined according to the laws of the province in which the leased premises are situate.

"Secured creditor" is defined by s. 2(*r*) as follows:

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable; . . .

The interpretation and effect of these sections were considered by the Court of Appeal of Saskatchewan in *Canadian Credit Men's Trust Association Ltd. v. Carman Block Ltd.*[1].

In my respectful opinion, Gordon J.A. accurately stated the law when he said at p. 162:

With every deference I do not think a landlord with a claim for arrears of rent falls within the definition of a "secured creditor". He has no lien on the property seized but must give it up to the trustee and file his claim in the usual way. He has no security to value within the provisions of ss. 87-92 of *The Bankruptcy Act*. Further, I do not think that any such inference should be drawn in the face of the explicit directions contained in s. 95 of the Act. So far as I can see the Act deprives the landlord of his right of lien and merely uses the value of the property seized as a gauge to fix the amount for which he is allowed a preferred claim but does not make him a "secured creditor".

[1] (1957), 36 C.B.R. 158, 8 D.L.R. (2d) 647, 22 W.W.R 180.

Subject to priority of ranking under s. 95 (and to s. 42(4) which has no relevance here) in virtue of s. 105 the nature and extent of the landlord's claim for rent or damages and any other rights he may have arising out of the contract of lease are determined by the law of the province in which the leased premises are situated.

In my opinion however, in the event of bankruptcy, the right of the landlord to be collocated and paid by preference, and the extent of that preference, are clearly provided for in s. 95. Shortly stated, such preference ranks sixth in order of priority. It is limited to three months' arrears of rent prior to the bankruptcy and to accelerated rent for a period not exceeding three months following the bankruptcy. Any amount payable by preference is limited to the amount realized from property on the lease premises, and any payment on account of accelerated rent must be credited against any amount due by the Trustee for occupation rent.

I am further of opinion that by the combined effect of ss. 95, 100 and 105 of the Act the landlord is entitled to rank only as an unsecured creditor for any balance to which he may be entitled under provincial law.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorney for the petitioner, appellant: A. Denis, Sherbrooke.

Attorneys for the trustee, respondent: Blain, Piché, Bergeron, Godbout & Emery, Montreal.

LARRY BRODIE ....APPELLANT;

1961 *Nov. 15

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

1962 Mar. 15

JOSEPH R. DANSKY ....APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

GEORGE RUBIN ....APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

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

Criminal law—Obscenity—Lady Chatterley's Lover—Whether obscene publication—Whether definition of obscenity in s. 150(8) of the Code exhaustive—Dominant characteristic undue exploitation of sex—Whether test in R. v. Hicklin still applicable—Evidence by experts as to purpose of author and as to literary and artistic merits of book—Whether admissible—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 laid under s. 150A of the *Criminal Code*, copies of a book entitled "Lady Chatterley's Lover" by D. H. Lawrence, were seized on the accused's premises on the allegation that the book was an obscene publication under s. 150(8) of the *Criminal Code*. The trial judge found the book to be obscene and ordered its confiscation. This judgment was unanimously affirmed by the Court of Queen's Bench, Appeal Side. The accused were granted leave to appeal to this Court.

Held (Kerwin C.J. and Taschereau, Locke and Fauteux JJ. dissenting): The book "Lady Chatterley's Lover" was not an obscene publication.

Per Cartwright J.: Assuming, without deciding the point, that the definition of the word "obscene" contained in s. 150(8) of the Code is exhaustive, as was contended by counsel for the accused and conceded by counsel for the Crown, for the reasons given by Judson J., the book in question was not obscene.

Per Abbott, Martland and Judson JJ.: The definition of "obscenity" introduced in 1959 by s. 150(8), enacted for the purposes of proceedings under the Code, precludes the application of any other test. Consequently, the test in *R. v. Hicklin*, L.R. 3 Q.B. 360, and all the jurisprudence thereunder was rendered obsolete by the enactment of

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

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BRODIE, DANSKY AND RUBIN *v.* THE QUEEN

this new and exhaustive definition. Under the definition, there must be a characteristic which is dominant and this dominant characteristic must amount to an exploitation of sex which is undue. The search for such a dominant characteristic involves the reading of the whole book and also involves an inquiry into the purpose of the author. One cannot ascertain a dominant characteristic of a book without an examination of its literary or artistic merit, and this renders admissible the evidence of the author and others on this point. There was real unanimity in the opinions of the witnesses that the book was a true and sincere representation of an aspect of life as it appeared to the author. The phrase "undue exploitation" is aimed at excessive emphasis on the theme of sex for a base purpose. Measured by the internal necessities of the novel, there was no such undue exploitation. There was no more emphasis on the theme of sex than was required in the treatment of such a serious work of fiction. No matter whether "undue exploitation" is to be measured by the internal necessities of the novel itself or by offence against community standards, this novel does not offend.

Per Ritchie J.: The language of s. 150(8) does not constitute an exclusive definition of "obscenity" for the purposes of the *Criminal Code.* That language cannot be construed as meaning that no publication can be obscene for the purpose of the Code unless it has undue exploitation of sex as a dominant characteristic. Section 150(8) has the effect of expanding the meaning of "obscene" to include all publications which have undue exploitation of sex as a dominant characteristic whether or not they can be shown to have a tendency to corrupt and deprave. The word "undue" carried the meaning of "undue having regard to the existing standards of decency in the community". The inquiry as to whether a publication is likely to corrupt a significant segment of the population and as to what is or what is not "undue" so as to offend community standards, involves the reading and consideration of the publication as a whole. It is not only relevant but desirable to consider evidence of the opinions of qualified experts as to the artistic and literary qualities of the publication. Although sex is a dominant characteristic of the book and although there are isolated passages which, when read alone, unduly exploit sex, it does not follow that these passages, read as a part of the whole book, have the effect of making the undue exploitation which they contain a dominant characteristic of the publication so as to bring it within s. 150(8). Furthermore, no significant segment of the population was likely to be depraved or corrupted by reading the book as a whole. In any event, the defence of the public good was available under s. 150A so that any harmful effect which these objectionable passages might have is counterbalanced by the desirability of preserving intact the work of a writer who, on the evidence in this case, was regarded as a great artist by respectable teachers, authors and critics.

Per Kerwin C.J., dissenting: It was unnecessary to deal with the argument that the Crown having cross-examined the witnesses, could not now say that their evidence was inadmissible, because Parliament has prescribed that under s. 150(8) an objective test be applied. The rule in *R. v. Hicklin* is not the one to be followed in applying s. 150(8) of the Code. Under that subsection, a publication is deemed to be obscene if (a) a dominant characteristic of the publication is (b) the undue

exploitation (c) of sex. The claim of the witnesses and of the judgments in the Courts of England and the United States that the dominant characteristic of the book is to show the evils of industrialism in England and the damage it does to the human soul, is not substantiated by a careful reading of the book. The use of "four-letter words" by itself might or might not make a book one in which sex was exploited unduly so as to make that feature a dominant characteristic, but they could not be treated in isolation from the scenes depicted in which they were used. The witnesses called on behalf of the accused have not succeeded in showing that this is a work of art in which there is no undue exploitation of sex and that that is not the dominant characteristic of the book. Although the evidence was competent to show the merits of the book as a work of art, the tribunals would still have to determine whether a dominant characteristic of the book was the undue exploitation of sex. In the present case, the answer must be in the affirmative.

Per Taschereau J., dissenting: The decision of *R. v. Hicklin* is no longer the law of the land. It is unnecessary to determine whether s. 150(8) is exhaustive or not, since if there is to be found in the book *a* dominant characteristic which is the undue exploitation of sex, the book must be banned. Without deciding as to its legality or illegality, too much weight has been attached to the expert evidence adduced. A more objective legal aspect of the question has to be considered. The author relies on sex and adultery to dissolve the clouds of social evils that he believes are hanging over the skies of England. In doing so, he violates s. 150(8) of the Code. "Undue" means "unreasonable", "unjustifiable". The book comes clearly within the ban of the Code as there is an undue exploitation of sex which is "a dominant" characteristic of the work. Even if the book were a work of art, art can co-exist with obscenity and does not exclude it.

Per Locke J., dissenting: The book is an obscene publication within the definition of s. 150(8) of the *Criminal Code*.

Per Fauteux J., dissenting: While s. 150(8) of the Code is effective to expand the meaning of "obscenity" so as to include a publication *a* dominant characteristic of which is exploitation of sex, it does not purport to be an exhaustive definition of obscenity excluding the test found in *R. v. Hicklin* and all the Canadian and English jurisprudence in application of that case. The evidence of experts in literature has always been excluded under the *Hicklin* jurisprudence as irrelevant to the test and there does not appear to be any valid reason why this rule should be varied with respect to the test under s. 158(8) whether, having regard to the existing standards of decency in the community, the exploitation of sex has been carried to a shocking and disgusting point. The book in question can be accurately described as replete with descriptions in minute detail of sexual acts with the use of filthy, offensive and degrading words and terms. Whether admissible or not, expert evidence as to the literary merit of the book is clearly ineffective to change this view. Whether one applies the law as it stood prior to or as expanded by the 1959 amendments, "Lady Chatterley's Lover" is an obscene publication under the *Criminal Code* of Canada.

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Brodie, Dansky and Rubin v. The Queen

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Fontaine J. Appeals allowed, Kerwin C.J. and Taschereau, Locke and Fauteux JJ. dissenting.

F. B. Scott, Q.C., and *M. Shacter*, for the appellants.

C. Wagner, André Tessier, Q.C., and *Gabriel Houde, Q.C.*, for the respondents.

The Chief Justice (*dissenting*):—By leave of this Court Brodie, Dansky and Rubin appeal from judgments of the Court of Queen's Bench of the Province of Quebec[1] dismissing their appeals from judgments of the Court of Sessions of the Peace for the District of Montreal declaring a certain book "Lady Chatterley's Lover", by D. H. Lawrence, to be obscene and forfeited to Her Majesty in accordance with the provisions of s. 150A of the *Criminal Code* of Canada. The three appeals raise the same question and it is sufficient to deal with the case of Brodie.

Section 150 of the *Criminal Code* including subs. 8 which was enacted July 18, 1959, by 7-8 Eliz. II, c. 41, and s. 150A of the Code enacted at the same time by the same chapter read as follows:

150. (1) Every one commits an offence who

(*a*) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or

(*b*) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(*a*) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

(*b*) publicly exhibits a disgusting object or an indecent show,

(*c*) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of preventing conception or causing abortion or miscarriage, or

(*d*) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

[1] [1961] Que. Q.B. 610, 36 C.R. 200.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(*a*) the commission of crimes, real or fictitious, or

(*b*) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

150A. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be obscene or a crime comic may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is obscene or a crime comic, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene or a crime comic, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsecion (4) or (5) by any person who appeared in the proceedings

(*a*) on any ground of appeal that involves a question of law alone,

(*b*) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XVIII and sections 581 to 601 apply *mutatis mutandis*.

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or continued in that province under section 150 with respect to those or other copies of the same publication without the consent of the Attorney General.

(8) In this section,

(a) "court" means a county or district court or, in the Province of Quebec

(i) the court of the sessions of the peace, or

(ii) where an application has been made to a district magistrate for a warrant under subsection (1), that district magistrate,

(b) "crime comic" has the same meaning as it has in section 150, and

(c) "judge" means a judge of a court or, in the Province of Quebec, a district magistrate.

It was under the provisions of s. 150A that an information was laid and a summons issued to Brodie as the occupant of premises within the jurisdiction of the Court of the Sessions of the Peace. A copy of the book seized was put in evidence. Under reserve by the judge of counsel's right so to do, witnesses were called on behalf of Brodie and were cross-examined to some extent. It has been contended on behalf of the appellant that having cross-examined the witnesses the Crown cannot now be heard to say that their evidence was inadmissible. There is a good deal to be said for this argument but it is unnecessary to deal with the point because, in my view, by subs. 8 of s. 150 Parliament has prescribed that an objective test be applied. Before the enactment of subs. 8 the rule laid down by Chief Justice Cockburn in *R. v. Hicklin*[1] had been applied in England and in various Courts in Canada. This was to the effect that the test of obscenity was whether the tendency of the matter charged is "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall". I agree with counsel for the appellant that this is not the rule to be followed in applying the amendment and that the judge of first instance was in error in so doing. It was argued that notwithstanding statements of intention to the contrary

[1] (1868), L.R. 3 Q.B. 360.

the judges in the Court of Queen's Bench applied the *Hicklin* rule. I am unable so to read their reasons, but, in any event, I desire to make it clear that I do not apply it.

So far as relevant to this appeal, under subs. 8 of s. 150 of the Code, a publication is to be deemed obscene if (a) a dominant characteristic of the publication is (b) the undue exploitation (c) of sex. The witnesses called on behalf of the appellant and some, if not all, of the judgments in Courts in England and the United States, put in by his counsel, claim that the dominant characteristic of the book is to show the evils of industrialism in England and the damage it does to the human soul. A careful reading of the book satisfies me that this is not so. This view is based not merely on the comparatively short space allotted to any such thing as compared with that taken up with sex, but on a comprehensive view of the publication. Another matter relied on is the alleged preeminence of "blood knowledge" over "mind knowledge" in the lives of human beings. These terms were invented by Lawrence, it is said, to show that the animal state of man's nature should be in better balance with mind knowledge.

The use of "four-letter words" by itself might or might not make a book one in which sex was exploited unduly so as to make that feature a dominant characteristic, but they cannot be treated in isolation from the scenes depicted in which they are used. The witnesses called on behalf of the appellant have not succeeded in showing that this is a work of art in which there is no undue exploitation of sex and that that is not the dominant characteristic of the book. I pay no attention to the price charged for the book but it is not without significance that on the cover above the title "Lady Chatterley's Lover—D. H. Lawrence" appears: "Complete Unexpurgated Authentic Authorized Edition" and that below the title appears the following: " 'This Signet Edition is the only complete unexpurgated version of LADY CHATTERLEY'S LOVER authorized by the estate of Frieda Lawrence for United States publication' Laurence Pollinger Literary Executor to the estate of the late Mrs. Frieda Lawrence". By themselves these matters might appear insignificant but notwithstanding the protestations of the representative of the publishers they lend weight to the conclusion arrived at.

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By reason of war wounds, the husband of Lady Chatterley was rendered impotent and, in order, as in substance the author puts it, that the wife should not be frustrated, she approached Mellors, her husband's gamekeeper, who was separated from his wife. In fact, she led him to the relationship that is afterwards set out in such great detail. There is not merely a description of one episode only, but of several, and it is sufficient to state that all of them are set forth in great detail that might have been expected in the Greece and Rome of ancient times.

The evidence for the defence was competent in order to give the opinion of the witnesses as to the merits of the book as a work of art, but in some parts it is made clear that opinions may differ. That would entail a comparison of any evidence that might be adduced in any particular instance and even then the answers on the point would not determine whether a dominant characteristic of the publication was the undue exploitation of sex. That would still have to be determined by the tribunals before which the matter came and in the present case the answers must be in the affirmative.

The appeals should be dismissed.

TASCHEREAU J. (*dissenting*):—I have had the advantage of reading the reasons written by the Chief Justice and I substantially agree with his reasons, and concur in the conclusions that he has reached. I wish to add only a few personal observations.

The original edition of Lady Chatterley's Lover was first published in Italy in 1928. The other editions that were published were expurgated and what was thought to be objectionable was removed from the book. About thirty years later an unexpurgated edition was published, and in November 1959, several copies of this last edition were seized on the strength of a complaint laid under s. 150A of the *Criminal Code* as amended. His Honour Judge Fontaine of the Court of the Sessions of the Peace sitting in Montreal, ordered these books to be forfeited as being obscene, and the Court of Queen's Bench[1] unanimously upheld the decision of the trial judge and dismissed the appeal.

[1] [1961] Que. Q.B. 610, 36 C.R. 200.

The main section of art. 150 of the *Criminal Code* with which we are concerned is s. 150(8) which was enacted in 1959 and which reads as follows:

> (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Before the enactment of this section the law was far from being clear and left the door open to subtle distinctions, to fine niceties, that too often allowed publishers to continue a wide diffusion of obscene and immoral literature. It is common knowledge that the 1959 amendment was to eliminate the distribution of obscene material and to call a halt to what may be rightly termed legalized assault against morality. The aim of the Act was without doubt to clean up all news stands of this lewd, filthy literature, published surely not to serve the public good but merely for pecuniary gain. I give a cold reception to the suggestion that, if the book is banned, our Courts will be the only ones to hold in such a way. This Court does not make the law but its duty is to apply it as enacted by Parliament. The decisions rendered in England, France and the United States are entirely immaterial for the determination of the case at bar. Our law enacted in 1959 is substantially different, and the decision of *R. v. Hicklin*[1] which was formerly applied in England and Canada is no longer, for the purpose of this case, the law of the land.

The question which is to be solved is the following: Do we find that there is in this publication a *dominant characteristic* which is the *undue exploitation of sex?* If so, the book is *deemed to be obscene.* I find it unnecessary to determine whether s. 150(8) is exhaustive or not. It is sufficient, I think, to say that if we find in the book a dominant characteristic which is the undue exploitation of sex, it must be banned. The law says *a* dominant and not *the* dominant characteristic. Moreover I believe that, without deciding as to its legality or illegality, too much weight has been attached to the expert evidence which has been adduced. The lawful or unlawful circulation of a book cannot be conditioned by the subjective tastes or propensities of witnesses, whatever may be their literary aptitudes. A more objective legal aspect of the question has to be considered.

[1] (1868), L.R. 3 Q.B. 360.

This book is the story of an upper class Englishman who came back paralyzed from the first world war. He operated his coal mines and occasionally wrote novels particularly noteworthy for their mediocrity. His wife, Constance, is dissatisfied and frustrated. After having refused the suggestion of her husband to have a child with one of his friends, which he would recognize as his own, she meets Mellors, the game keeper, who, in Lawrence's mind, is the archetype of the "natural man". He is an offspring of the labour class and is quite intellectually independent. Constance and Mellors then start an intimate relationship, and when she becomes pregnant, she decides to divorce Chatterley and marry the game keeper.

The author then minutely describes with unholy satisfaction more than fifteen adulterous scenes in the hen-house, the brush wood of the nearby fields, or the living quarters of the game keeper. Nothing is left even to the most vivid imagination. All the episodes are brutally described, and the conversation between the two lovers is of a low and vulgar character. Words are used that no decent person would dare speak without, in my view, offending the moral sense of anyone who believes in the ordinary standards of decency, self-respect and dignity.

It is said on behalf of the book that there are three principal characteristics which distinguish this novel:

1. That it is an attack on industrialism and its evils in England;

2. The emphasis on "blood knowledge" rather than "mind knowledge";

3. The redeeming power of love when sex is treated as something beautiful and holy.

It has also been argued that this novel is placed in a setting which emphasizes its literary qualities and it is praised as a significant work of a major English novelist. I must say that I believe that this book has been overglorified. Lawrence may have given many fine contributions to English literature; he may have been stamped as a classic of our modern times, but all the beautiful things that he may have written cannot legalize what the law forbids. He has, of course, a great gift for description, for setting forth in words what is the product of his fertile imagination, but

all the art he unfolds does not change the nature of "Lady Chatterley's Lover". I never thought that the frame could make the picture.

Even if, as argued, this book were a work of art, I think that art can co-exist with obscenity and does not exclude it. A nudity is not an obscenity. The great museums of the world are filled with paintings of the human body, and it would be a nonsense to hold the view that Rembrandt, Leonardo de Vinci, Michel-Ange, Raphaël or Renoir have painted obscenities. There is nothing in those masterpieces which is offensive to modesty or decency, or that expresses or suggests lewd thoughts, as "Lady Chatterley's Lover" does.

It is my view, that if any industrial ills have existed or do exist now in England, and that if there are conflicts between capital and labour, the solution of the problem cannot be found in Lawrence's book. The evidence does not reveal the results obtained by the publication of the book, and there is nothing to indicate that this so-called palliative has even momentarily relieved the ills that Lawrence thought affected the British Isles. In order to improve the social conditions in England, if they have to be improved, I have more faith and hope in sound legislation enacted by Parliament, than in the adulterous scenes described by Lawrence in his book.

Whether the emphasis should be placed on "blood knowledge" or "mind knowledge", in order to purify the social atmosphere of England, or whether sex should be treated as something beautiful and holy in order to become the redeeming power of love, are ideologies that may possibly be the guides of future generations. The diffusion of these patriotic ideas, cherished by Lawrence, are surely not forbidden by law. What in my view is objectionable, is not the aim pursued by the author, although I find it an illusory promise of future happiness, but the means employed for the demonstration of his thesis.

He relies on sex and adultery to dissolve the clouds of social evils that he believes are hanging over the skies of England. In doing so, he violates, I think, s. 150(8) of the *Criminal Code,* and I am convinced that we must necessarily find in the book "an undue exploitation of sex", which is *"a dominant"* characteristic of the work. "Undue" in the ordinary English language means of course "unreasonable",

"unjustifiable". It conveys the idea that what is said goes beyond what is appropriate or necessary to prove the proposition that one endeavours to demonstrate to the public. I know of no one capable of finding words or imagining scenes that could be added to this publication to make it more obscene. Over three-quarters of the book, or 250 pages deal with filthy, obscene descriptions that are offensive to decency, and entirely unnecessary for what we have been told is the purpose of the book. Nobody would seriously think that this novel could be shown on television or that any respectable publisher would make available to the public in a newspaper or a magazine the complete story of "Lady Chatterley's Lover", without shocking the feelings of normal citizens. I am not aware that obscenity is, under the law, the exclusive prerogative of novelists, whatever may be their outstanding talent.

I have no hesitation in reaching the conclusion that the book comes clearly within the ban of the Act, and that the three appeals should be dismissed.

LOCKE J. (*dissenting*):—In my opinion this book is an obscene publication, as that term is defined in subs. (8) of s. 150 of the *Criminal Code.*

I would, therefore, dismiss these appeals.

CARTWRIGHT J.:—The course of the proceedings in the courts below is set out in the reasons of other members of the Court.

In opening the appeals in this Court counsel for the appellants submitted that subs. (8) of s. 150 of the *Criminal Code* now contains an exhaustive definition of the word "obscene" for all purposes of the *Criminal Code* and that a publication cannot be held to be obscene unless it falls within the terms of that subsection. Counsel for the Crown in answer to a question from the bench stated that he agreed with this submission and consequently counsel for the appellants was not required to deal further with it in reply.

The orders of forfeiture made by the learned Judge of first instance are analogous to convictions of a criminal offence and I do not think that this Court should inquire whether those orders might be supported on a view of the law which counsel for the Crown expressly disclaimed. We should, I think, dispose of the appeals on the basis upon which they were presented to us by all counsel and treat the definition

of the word "obscene" contained in s. 150(8) as exhaustive. I wish, however, to reserve my opinion as to the true construction of that subsection in case it should be called in question in the future.

On the assumption that the definition is exhaustive, for the reasons given by my brother Judson I agree with his conclusion that the book in question is not obscene.

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

FAUTEUX J. (*dissenting*):—This appeal calls for the determination of two questions. The first, one of law, being what constitutes an obscene publication under the *Criminal Code* of Canada and the other, one of fact, whether the publication here impeached is obscene under the Code.

Until at least the 1959 amendments, hereafter considered, the *Criminal Code* did not give any definition of "obscenity" and for nearly a hundred years, from 1868 to 1959, the Canadian Courts, following the Courts in England, have been guided by the rule laid down in *R. v. Hicklin*[1]. On this century-old case, the test of obscenity is "whether the tendency of the matter charged with obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." *R. v. Stroll*[2]; *R. v. National News*[3]; and *R. v. American News*[4] are, prior to 1959, the more recent applications of this test by the Canadian Courts.

In 1959, the provisions of the *Criminal Code*, appearing under the sub-heading "Offences Tending to Corrupt Morals", were amended by 7-8 Elizabeth II, c. 41, by the addition of subs. (8) to s. 150 and the further addition of a new section, namely, 150A, providing the latter, as is the case under the English law, a preventive measure forestalling the dissemination of obscene publications. While the proceedings leading to this appeal are taken under the

1 (1868), L.R. 3 Q.B. 360 at 371.
2 (1951), 100 C.C.C. 171.
3 [1953] O.R. 533, 16 C.R. 369, 106 C.C.C. 26.
4 [1957] O.R. 145, 25 C.R. 374, 118 C.C.C. 152.

preventive provisions, the substantive law as to obscenity appears in s. 150 which, as amended and applicable to this case, reads as follows:

150. (1) Every one commits an offence who

(*a*) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or

(*b*) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(*a*) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

(*b*) publicly exhibits a disgusting object or an indecent show,

(*c*) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of preventing conception or causing abortion or miscarriage, or

(*d*) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(*a*) the commission of crimes, real or fictitious, or

(*b*) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

The primary question to be determined as to the law is whether, as contended for on behalf of appellants and conceded by Crown counsel in answer to a question from the Bench, the provisions of subs. (8) purport to be a definition and an exhaustive definition of obscene publication. If this be the case, henceforth the *Hicklin* test and all the Canadian and English jurisprudence thereunder are rendered obsolete and subs. (8) becomes the only remaining provision where the constituent elements of obscene publication may possibly be found and determined. With deference, I may immediately say that I do not think this Court should rest the decision of a question of law on an admission of counsel. This is specially so in a case where, as here, the particular question assumes in this Court, as it did in the Courts below, a primary influence in the disposition of the case and where the same question has already been judicially considered and negatively answered by a provincial Court of Appeal. In *R. v. Munster*[1], the five members of the Supreme Court of Nova Scotia *in banco* were unanimously of the opinion that subs. (8) does not purport to be a definition of "obscenity" and that matters not included in its provisions may yet become obscene under the *Hicklin* test.

The purport of the various amendments successively made in recent years to the law related to obscenity manifests the well publicized and commonly known intention of Parliament to strike more effectively at the corruption of public morals by obscene publications. Evincing such an intent are particularly the provisions of subs. (8) of the 1959 amendments enacting that:

> (8) For the purposes of this Act, any publication *a dominant characteristic* of which is the *undue exploitation of sex,* or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, *shall be deemed* to be obscene.

The true significance of the terms here italicized must of necessity be ascertained.

Generally, the predominant characteristic of a publication is accepted as the determining feature of its nature. It is also, in certain jurisdictions, only the predominant characteristic of a publication which is relevant to the determination of the specific question whether or not a publication is obscene. If that was a possible view of the law in this

[1] (1960), 45 M.P.R. 157, 34 C.R. 47, 129 C.C.C. 277.

country prior to the enactment of subs. (8), no longer can this view obtain under the *Criminal Code* of Canada. The expression "*a* dominant characteristic" does not have a meaning equating to that of the expression "*the* dominant characteristic". Henceforth, sufficient it will be that one of the prominent features of a publication be that described in subs. (8) to make it an obscene publication under the Code.

The ascertainment of the true meaning of the terms "undue exploitation of sex", in the context of the subsection and in the broader context of the whole section, is not free from difficulties. Standing alone, the word "undue" and the word "exploitation" are thus defined in The Shorter Oxford English Dictionary, the first:

> Not appropriate or suitable; improper; unseasonable. Unjustifiable, illegal. Going beyond what is appropriate, warranted or natural; excessive.

and the second:

> The action of turning to account; the action of utilizing for selfish purposes.

Read together, the first qualifying the second, these words indicate that Parliament recognizes that, within some limits, exploitation of sex in a publication is by no means illegal and never was indeed so considered. Common in literature, moving pictures and other forms of entertainment, and even in commercial publications, exploitation of sex, within or beyond these limits, would entirely be banned by subs. (8) were it not for the presence of the word "undue" in the provision. The word "undue" is thus effective and given full scope if the prevention of such a result is truly the intended purpose and purport of the word. That this may well be its true significance is suggested by its otherwise unbounded vagueness and consequential ineffectiveness to indicate *per se* with any degree of the certainty required in criminal matters, the limits beyond which exploitation of sex in a publication is prohibited. On this view, "undue" is synonymous to "illegal", one of the dictionary meanings ascribed thereto, and one then must and only has to refer to the other provisions of s. 150, which exhaustively states the substantive law of obscenity, to ascertain the limits beyond which exploitation of sex in a publication becomes illegal. Thus construed, the subsection still has scope to bar the defence based on the contention that only *the* predominant characteristic of a publication is to be considered

and has also scope to import in the concept of obscenity new subjects, namely, "crime, horror, cruelty and violence". On this construction, exploitation of sex is illegal or undue if it has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall, unless it is shown (i) that the public good is served by the publication and (ii) that the exploitation of sex does not extend beyond what serves the public good.

Another view of the matter, with which I am in agreement, is that the enactment of subs. (8) is effective to expand the meaning of "obscenity" so as to include a publication a dominant characteristic of which is exploitation of sex, if, having regard to the existing standards of decency in the community, such an exploitation is shocking and disgusting, though not necessarily shown to have the tendency to corrupt or deprave.

I am unable, however, to accept the submission made on behalf of appellants that subs. (8) purports to be an exhaustive definition of an obscene publication. The merit of this contention is conditioned by the true significance, in the context, of the words "shall be deemed to be obscene". The expression "shall be deemed to be" does not necessarily purport to define. The word "deemed" is not inflexible. In *R. v. Norfolk County Council*[1], Cave J. said at page 380:

> Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless . . . . it is to be deemed to be that thing.

Our *Criminal Code* offers many illustrations of a like significance being given by Parliament to the word "deemed" or the expression "shall be deemed". One example will suffice. A person who, with intent to commit an indictable offence, obtains entrance in a building by threat or artifice or by collusion with a person within, does not, in any sense, break and enter. Yet, by force of a legal fiction introduced in s. 294(*b*)(i), a person entering a building by either one of the means therein mentioned, "shall be deemed to have broken and entered" for the purposes of s. 292. It has never been nor can it be suggested that these provisions of s. 294 purport to define breaking and entering in the true

[1] (1891), 60 L.J.Q.B. 379.

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sense or in a manner excluding the ordinary meaning attending breaking and entering under s. 292; they simply provide that entrance in either one of the circumstances above shall be considered to be breaking and entering. Likewise, Parliament in enacting the provisions of subs. (8), for the purposes of criminal law, resorted to a legal fiction by the force of which (i) the nature of a publication is no longer to be determined exclusively by its predominant characteristic, and (ii) subjects hitherto foreign to the colloquial or legal meaning of obscenity, namely, "crime, horror, cruelty and violence", are henceforth, when associated with sex, made subjects relevant to the legal concept of obscenity as related to publication. Clearly, with respect to these new matters, the expression "shall be deemed" has a like significance to the one attending the same expression in s. 294 Cr. C. Qualifying as it does the whole and only phrase of the subsection, under no rule of construction can this expression be held to have one significance with respect to some of and another with respect to the other matters dealt with in the provision. I find it impossible to hold that Parliament intended, by this enactment, to put beyond the reach of the law a publication having, because of exploitation of sex, the tendency described under the *Hicklin* test. In my respectful opinion, the subsection does not, either in expressed terms or by clear implication, evince any intention of Parliament to alter the century-old law of obscenity—with which Parliament is presumed to have been acquainted at the time of the enactment—otherwise than by specifically adding thereto that when the particular circumstances described in this amendment are present in a publication, such publication "shall be deemed to be obscene".

For all these reasons, I would say that, while subs. (8) is effective to expand the law of obscenity, it does not purport to be a definition of obscenity excluding the definition of the *Hicklin* test and all the Canadian and English jurisprudence in application of that case.

In the consideration of the book here impeached, one is naturally conscious that criminal law is not meant to operate in the abstract field of speculation but in the field

of concrete factual realities. One is also particularly reminded that, as stated by Lord Goddard C.J. in *Reiter, Carter, Gaywood Press Limited et al.*[1]:

> When it is being considered whether books have a tendency to deprave and corrupt, naturally every body's mind turns to the depraving and corrupting of young people into whose hands they may fall.

Allured by the conspicuous indication on the cover of this book that the particular edition thereof is unexpurgated, juveniles buying pocket-books thus advertised—it is not unreasonable to think—have a dim interest in the literary merits, motives or purposes of the writer. Whether the reading of this book will have upon them or other classes of juveniles the tendency to deprave or corrupt them cannot be determined by the minute process of analysis which experts in the art of literature may adopt to lift out of the book the motives, purposes and literary qualities of its author. An ultimate consideration of substance is the impact which the reading of this book may exert upon their mind and whether depravation and corruption, against which Parliament intends to protect them, may ensue therefrom. This edition of the book contains no less than fifteen pornographic and adulterous episodes which decency has always forbidden ministerial or judicial officers to recite textually in the written opinion they gave as to its character. This edition is accurately described in the following excerpt from the interdiction pronounced in respect thereto by the United States Postmaster-General:

> The book is replete with descriptions in minute detail of sexual acts engaged in or discussed by the book's principal characters. These descriptions utilize filthy, offensive and degrading words and terms. Any literary merit the book may have is far outweighed by the pornographic and smutty passages and words, so that the book, taken as a whole, is an obscene and filthy work.

Whether admissible or not, expert evidence, so much relied on by appellants, as to the literary merit of Lawrence's works, is clearly ineffective to change this view of the book. The unexpurgated edition speaks for itself. While, generally, evidence of experts in literature is relevant to the literary merit of a publication, it has been excluded under the *Hicklin* jurisprudence as irrelevant to the question whether a publication has a tendency to deprave or corrupt. There does not appear to be any valid reason why this rule should

[1] (1954), 38 Cr. App. R. 62.

vary with respect to the question whether, having regard to the existing standards of decency in the community, the exploitation of sex, which is here a dominant characteristic of the publication, has been carried to a shocking and disgusting point. Whatever be the outstanding position held by Lawrence as a writer, this book offers no evidence that an expert in literature necessarily qualifies, for that reason, as a *custos mores*.

Whether one applies the law as it stood prior to or as expanded by the 1959 amendments, I am in respectful agreement with the unanimous conclusion reached in the two Courts below that this unexpurgated edition of Lady Chatterley's Lover is an obscene publication under the *Criminal Code* of Canada.

I would dismiss the appeal.

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

JUDSON J.:—The proceedings against this book, Lady Chatterley's Lover, by D. H. Lawrence, were taken under s. 150A of the *Criminal Code* enacted in 1959. A Judge, on an information laid by a police officer, issued a warrant of seizure for copies of the book on certain premises and then issued a summons to the occupiers requiring them to appear before the Court and show cause why the matter seized should not be forfeited to Her Majesty. The owners of the premises appeared at the trial to show cause in the Court of Sessions of the Peace for the District of Montreal. This Court, on June 10, 1960, declared that the publication was obscene and made an order directing the forfeiture of the seized copies in accordance with s. 150A, subs. (4), of the Code. This judgment was unanimously affirmed on appeal to the Court of Queen's Bench[1] on April 7, 1961. On May 29, 1961, this Court granted leave to appeal and declared that the leave was granted at large.

In 1959 a new definition of "obscenity' was introduced into the *Criminal Code* of Canada by the enactment of subs. (8) of s. 150. This reads:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence, shall be deemed to be obscene.

[1] [1961] Que. Q.B. 610, 36 C.R. 200.

This section is before this Court for the first time. It is enacted for the purposes of the Act not merely for the purposes of the section in which it appears, which is s. 150. It applies to proceedings for the seizure of a book under s. 150A and, in my opinion, in which I am in agreement with Casey J. in the Court of Queen's Bench, it precludes the application of any other test and specifically the one that had been applied in *R. v. Hicklin*[1], and followed in *R. v. American News*[2]; *R. v. National News*[3]; and *R. v. Stroll*[4]. The *Hicklin* test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." All the jurisprudence under the *Hicklin* definition is rendered obsolete by the enactment of the new and exclusive definition of obscenity contained in subs. (8) of s. 150. Under this definition it must be found that all four elements of obscenity are present before there can be a condemnation of the book. There must be a characteristic which is dominant and this dominant characteristic must amount to an exploitation of sex which is undue. If any of these elements is missing, the charge fails.

The matter is, of course, one of great importance. A writer who faces a charge of obscenity is entitled to know by what standard his work is to be judged and what defence, if any, he is called upon to make. Under the *Criminal Code,* as amended in 1959, there is no double standard, that is to say (1) the statutory definition intended to strike down the obvious, and (2), the *Hicklin* test still in the background, although unstated in the Code, for those works that are not within the statutory definition. If there is to be a double standard, it must be expressly set out in the Code and I would disapprove of *R. v. Munster*[5], where, in sending the case back for a new trial, the Supreme Court of Nova Scotia *in banco* held that there was error when the magistrate directed himself exclusively according to s. 158(8) on the ground that the subsection does not purport to be a definition of what is obscene and because matter not included with its provisions may be obscene under the *Hicklin* test.

[1] (1868), L.R. 3 Q.B. 360 at 371.
[2] [1957] O.R. 145, 25 C.R. 374, 118 C.C.C. 152.
[3] [1953] O.R. 533, 16 C.R. 369, 106 C.C.C. 26.
[4] (1951), 100 C.C.C. 171.
[5] (1960), 45 M.P.R. 157, 34 C.R. 47, 129 C.C.C. 277.

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If a result such as this is to be brought about the legislation must define the two standards of obscenity and tell the Court that the charge is proved if the work offends either standard. I note that this is the way that the New Zealand legislation is framed, *Re Lolita*[1], and also the Australian legislation, although not so clearly, as considered in *Wavish v. Associated Newspapers Ltd.*[2]; *MacKay v. Gordon & Gotch (Australasia) Ltd.*[3]; and *Kyte-Powell v. Heinemann Ltd.*[4]. Otherwise, why define obscenity for the purposes of the Act, if it is still permissible for the Court to take a definition of the crime formulated 100 years ago and one that has proved to be vague, difficult and unsatisfactory to apply?

In contrast, I think that the new statutory definition does give the Court an opportunity to apply tests which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury. We are now concerned with a Canadian statute which is exclusive of all others.

The inquiry then must begin with a search for a dominant characteristic of the book. The book may have other dominant characteristics. It is only necessary to prove that the undue exploitation of sex is a dominant characteristic. Such an inquiry necessarily involves a reading of the whole book with the passages and words to which objection is taken read in the context of the whole book. Of that now there can be no doubt. No reader can find a dominant characteristic on a consideration of isolated passages and isolated words. Under this definition the book now must be taken as a whole. It is not the particular passages and words in a certain context that are before the Court for judgment but the book as a complete work. The question is whether the book as a whole is obscene not whether certain passages and certain words, part of a larger work, are obscene.

A search for a dominant characteristic of the book also involves an inquiry into the purpose of the author. What was he trying to do, actually doing, and intending to do? Had he a serious literary purpose or was his purpose one

[1] [1961] N.Z.L.R. 542.
[2] [1959] V.R. 57.
[3] [1959] V.R. 420.
[4] [1960] V.R. 425.

of base exploitation? There is no doubt that English jurisprudence has rejected under the *Hicklin* test any evidence that the author or others may wish to give of a book's literary or artistic merit as distinct from scientific value. One cannot ascertain a dominant characteristic of a book without an examination of its literary or artistic merit and this, in my opinion, renders admissible the evidence of the author and others on this point. Evidence concerning literary and artistic merit has been excluded in England on the ground of irrelevancy and a supposed rule excluding evidence of opinion on the very fact which is before the Court for decision. Wigmore's opinion is that there never was any basis for such a general rule (3rd ed., s. 1921).

The test of the admissibility of this kind of opinion evidence under the present definition in the Code must be whether it is relevant to the determination of a dominant characteristic in the book. I can well understand that some judges and juries might think that such evidence would not help them to a decision and that others might be of the opposite opinion. I would join the second group. I can read and understand but at the same time I recognize that my training and experience have been, not in literature, but in law and I readily acknowledge that the evidence of the witnesses who gave evidence in this case is of real assistance to me in reaching a conclusion.

The evidence in this case is all one way. The Crown rested its case on the mere production of the book. Oral evidence was given by Mr. Hugh MacLennan and Mr. Morley Callaghan on the literary and artistic merit of the book and the position of Lawrence in the world of English literature. A third witness who gave oral evidence was Mr. Harry T. Moore, a teacher and critic. Many reviews were also filed written by outstanding literary critics in the United States. There is real unanimity in their opinions that the book is a true and sincere representation of an aspect of life as it appeared to the author. No objection was taken to the admissibility of this evidence. The Crown asked for two or three adjournments for the purpose of refuting it but produced no such evidence. It was then that objection was taken to its admissibility. Even if objection had been taken at the time of its tender, I would hold that it was admissible for the purposes that I have stated.

Lawrence had certain opinions about the organization of modern industrial society and its effect upon the relations between man and woman. He chose to express these opinions in a work of imagination, written about an adulterous relationship between the wife of an impotent man of property and that man's servant. Whether his choice of medium was a good choice for the preaching of his ideas and whether the ideas themselves were foolish and wrong-headed are matters upon which there may be a difference of opinion. But a theme of adultery, and what to some readers—and there must be many of these—appears to be a stilted assertion that there exists an important connection between the organization of an industrial society and the sexual relations between man and woman, do not, in themselves, give the book a dominant characteristic condemned by the section of the Code.

This novel is a complex piece of writing. It is, in part, but only in part, the story of the development of the relationship between the man and the woman and an outspoken description of their sexual relations. This could be described as a dominant characteristic of the book although such a description could be criticized as an over-simplification. The objectionable characteristic is, of course, to be found in the explicit description and the four letter words. With these qualities, the question is, as I have already stated, whether the book as a whole has a dominant characteristic of undue exploitation of sex.

The phrase "undue exploitation" suggests, at first sight, an element of tautology but I do not think that this is a sound view. There is a difference between a statute which condemns a book a dominant characteristic of which is the exploitation of sex and one which condemns the undue exploitation of the theme. The use of the word "undue" recognizes that some exploitation of the theme is of common occurrence. What I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness. That the work under attack is a serious work of fiction is to me beyond question. It has none of the characteristics that are often described in judgments dealing with obscenity—dirt for dirt's sake, the leer of the sensualist, depravity in the

mind of an author with an obsession for dirt, pornography, an appeal to a prurient interest, etc. The section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work, as the witnesses point out and common sense indicates, must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation. I agree with the submission of counsel for the appellant that measured by the internal necessities of the novel itself, there is no undue exploitation.

Counsel for the appellant also submits that if "undueness" is to be measured by the usages of contemporary novelists and writers, then this book cannot be condemned. Mr. Callaghan and Mr. MacLennan both gave evidence on this point, which is really directed to standards of acceptance prevailing in the community. No matter what form of words may be used, I doubt whether any tribunal, whether judge or jury, can get very far in an obscenity case without being influenced, either consciously or unconsciously, by considerations such as these. The only judicial examination of "undue exploitation" or "undue emphasis" that I have found is in Australia and New Zealand. As I have already stated the New Zealand legislation begins by telling the court what matters are to be taken into consideration in determining whether a publication is indecent. Then four standards are set out, some of which undoubtedly suggest the *Hicklin* test. Finally, the next section says: "Subject to the provisions of the last preceding section any document or matter which unduly emphasizes matters of sex, horror, crime, cruelty or violence shall be deemed to be indecent within the meaning of this Act."

The first consideration of "undue emphasis" appears in the judgment of Fullagar J. in *R. v. Close*[1]. To me it is very impressive. He said at p. 465:

> There does exist in any community at all times—however the standard may vary from time to time—a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that today there is any better tribunal than a jury to draw it. . . . I am very far from attempting to lay down a model direction, but a judge might perhaps, in the case of a

[1] [1948] V.L.R. 445.

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novel, say something like this: "It would not be true to say that any publication dealing with sexual relations is obscene. The relations of the sexes are, of course, legitimate matters for discussion everywhere. . . . There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards. What is obscene is something which offends against those standards."

Offence against the standards of the community as a test of "undueness" as outlined by Fullagar J. seems to have been accepted in subsequent cases in Australia and New Zealand although it has not been considered by the High Court of Australia. The principle has not escaped criticism as judicial legislation (24 Mod. L.R. 768). I am not satisfied that the criticism is altogether valid. Surely the choice of courses is clear-cut. Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion—and even that must be subject to some influence from contemporary standards—or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think that the second is the better choice.

But no matter whether the question of "undue exploitation" is to be measured by the internal necessities of the novel itself or by offence against community standards, my opinion is firm that this novel does not offend. I would allow the appeals and dismiss the charge and direct that the seized copies of the book be returned to their owners.

RITCHIE J.:—The course of these proceedings in the Courts below is set out in the reasons of other members of the Court and the relevant sections of the *Criminal Code* are reproduced in full in the reasons of the Chief Justice so that it would be superfluous for me to reiterate them.

While I agree that this appeal should be disposed of in the manner proposed by my brother Judson, I do not share his opinion that the language of s. 150(8) constitutes an exclusive definition of "obscenity" for the purposes of the *Criminal Code* and in spite of the fact that Crown counsel argued the appeal on this basis I find it necessary to express the contrary view.

In finding this publication to be obscene, the learned trial judge did not consider himself to be confined to the test of obscenity provided by s. 150(8) and felt free to consider also the standard set by Cockburn C.J. in *R. v. Hicklin*[1], when he said:

> . . . the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall

While affirming the decision at trial, Mr. Justice Casey in the Court of Queen's Bench[2] stated himself to be convinced of the soundness of the appellants' argument to the effect that the provisions of s. 150(8) exclude all other tests of obscenity formerly used, and, as has been indicated, it was on this basis that the present appeal was argued by counsel for both parties before this Court.

Section 150(8) provides that:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

With the greatest respect for those who hold a different view, I am unable to construe the language of this section as meaning that no publication can be obscene for the purpose of the *Criminal Code* unless it has undue exploitation of sex as a dominant characteristic. On the contrary, I share the opinion expressed by Ilsley C.J. in *R. v. Munster*[3], when he said of this section at p. 159: "It does not purport to be a definition of 'obscene'. Matter not included in its provisions may be obscene."

The words "shall be deemed" have a variable meaning depending upon the context in which they occur, but although they are employed in more than thirty separate instances in the *Criminal Code* and are used in many other statutes, I have been unable to find any case holding that when it is provided that a given set of circumstances "shall be deemed" for the purposes of the Act in question to fall into a certain category, Parliament is to be taken to have intended to exclude from that category all circumstances which would otherwise have been included in it.

[1] (1868), L.R. 3 Q.B. 360.
[2] [1961] Que. Q.B. 610, 36 C.R. 200.
[3] (1960), 45 M.P.R. 157, 34 C.R. 47, 129 C.C.C. 277.

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In the *Criminal Code* the expression "shall be deemed" is frequently used to extend the meaning of a word or phrase so that it is to be treated for the purposes of the Act or a section of the Act as connoting matters which would not otherwise necessarily be considered as coming within its ordinary and accepted meaning (e.g., ss. 3(2), 5A(4), 38(2), 41(2), 42(3), 269(5), 294(b) and 371(1) and as to the extension of territorial jurisdiction, s. 419). In my view, it is in this sense that the expression is used in s. 150(8).

Sections 150 and 150A are found in Part IV of the *Criminal Code* which bears the heading "*SEXUAL OFFENCES, PUBLIC MORALS AND DISORDERLY CONDUCT*" and the sub-heading directly preceding s. 150 reads "*OFFENCES TENDING TO CORRUPT MORALS*". These headings afford some indication of the fact that this legislation was initially enacted for the purpose of protecting society against the corruption of public morals by the publication of obscene material, and before the enactment of s. 150(8) the *Hicklin* test was widely accepted as the only yardstick by which obscenity was to be measured. But corruption of morals is only one harmful aspect of the publication of obscene material, and the *Hicklin* test leaves out of account publications which are obscene in the sense of being offensive and shocking to the community standards of decency unless they can also be said to have a tendency to deprave and corrupt. Under that test Stable J. in my opinion correctly instructed the jury in *R. v. Martin Secker Warburg, Limited*[1], when he said:

> The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. The charge is that the tendency of the book is to corrupt and deprave.

In my opinion the enactment of s. 150(8) had the effect of expanding the meaning of "obscene" for the purposes of the *Criminal Code* to include all publications which have undue exploitation of sex as a dominant characteristic whether or not they can be shown to have a tendency to corrupt and deprave and thus of protecting the public against the shocking and disgusting in addition to the depraving and corrupting aspects of obscenity. In my view it is in this sense that the word "undue" is employed in s. 150(8) and it carries the meaning of "undue having regard to the existing standards of decency in the community."

[1] [1954] 2 All E.R. 683 at 686.

I do not think that this Court is bound by, nor would I follow, those authorities which have tended to construe the *Hicklin* definition as meaning that literature available to the community is to be limited by the standard of what is considered to be suitable reading material for adolescents, but I do think that in discharging his duty under s. 150A if a judge is satisfied that the publication before him is likely to have a lowering effect on the moral fibre of adolescent boys and girls or of any other significant segment of the community he would be justified in declaring such a publication to be "obscene" even if it did not contain all the ingredients specified in s. 150(8). On the other hand, if the judge is satisfied that the publication contains all those ingredients, that is an end of the matter as far as he is concerned and he must make an order "declaring it to be forfeited to Her Majesty in the Right of the Province in which the proceedings take place." (s. 150A(4)).

Under s. 150A the burden of deciding whether the publication is likely to corrupt a significant segment of the population and the burden of determining what is or what is not "undue" so as to offend community standards is placed upon the judge before whom the publication is brought, and while it is true that his decision in either case must be a subjective one and will of necessity be coloured in some degree by his own predispositions on such questions, this is not a unique position for a judge under our system of law, and under the *Criminal Code* it is he and he alone who must be "satisfied that the publication is obscene . . . ." if it is to be forfeited. It should be remembered, however, that these sections of the *Criminal Code* are enacted for the protection of the public and obscenity is not to be determined by the fact that a publication may offend the prude or excite the frustrated; it must be offensive to community standards or be likely to deprave or corrupt a recognizable segment of the public.

I agree with Mr. Justice Judson that this inquiry necessarily involves the reading and consideration of the publication as a whole and that it is not only relevant but desirable to consider evidence of the opinions of qualified experts as to the artistic and literary qualities of the publication.

Having read the publication which is now before us as a whole and having considered the evidence of the experts called for the defence and the extensive, critical and other material having to do with the book which has been filed, I have little doubt that D. H. Lawrence deliberately selected sex as a dominant characteristic of "Lady Chatterley's Lover" and that one of the chief messages which he sought to convey was that there is nothing shameful or dirty about the natural functions of the body and that the ultimate physical fulfilment of love between the sexes is a thing of tenderness and beauty having no aspects of obscenity or pornography. It may be said with justice that the author has, in several isolated passages, employed language and depicted scenes which, standing alone, unduly exploit sex, but the opinion is widely held by men of high literary qualifications that this book as a whole constitutes an outstanding contribution to 20th-century English literature and the passages to which I refer must be regarded as an integral part of the wider theme. Although sex is a dominant characteristic of the book and although there are isolated passages which, when read alone, unduly exploit sex, it does not appear to me to follow that these passages, read as a part of the whole book, have the effect of making the undue exploitation which they contain a dominant characteristic of the publication so as to bring it within the provisions of s. 150(8) of the *Criminal Code*. Nor do I think that any significant segment of the population is likely to be depraved or corrupted by reading the book as a whole.

I agree with counsel for the appellant that the defence of the public good is available under s. 150A and while we are not required to pass judgment on the literary or artistic qualities of the book or its author, it nevertheless seems to me that any harmful effect which these objectionable passages might have upon those who seek them out for separate reading is counterbalanced by the desirability of preserving intact the work of a writer who, according to the only evidence before us, is regarded as a great artist by teachers, authors and critics whose opinion is entitled to respect.

I would allow these appeals.

Appeals allowed, KERWIN C.J. *and* TASCHEREAU, LOCKE *and* FAUTEUX JJ. *dissenting.*

Attorneys for the appellants: Mendelsohn, Rosentzveig & Shacter, Montreal.

Attorney for the respondent: J. E. St. Laurent, Montreal.

THE CANADA PERMANENT TRUST COMPANY, ALEXANDER MUTCHMOR SMITH, ALLAN FINDLAY SMITH, WILLIAM BOWMAN, JEAN HILLYARD, ALEXANDER C. SMITH, DUNCAN BOWMAN, PHYLLIS SMITH, MARJORIE SMITH, THE PUBLIC TRUSTEE for the Province of Alberta, Guardian *ad litem* of the estate of ROBERT A. SMITH, an infant (*Defendants*) ....APPELLANTS;

1962
*Feb. 15
Apr. 24

AND

LAURA FRAZER BOWMAN and BARBARA JEAN BOWMAN (*Plaintiffs*) ....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Wills—Document wholly in handwriting of deceased—Whether intended by deceased to be a testamentary instrument—Whether a valid holograph will—The Wills Act, R.S.A. 1955, c. 369, s. 5(b).

Following the death of the deceased and a search of her effects, no will had been found and letters of administration were granted to a trust company as attorney for the next-of-kin. Subsequently, a document, admittedly wholly in the handwriting of the deceased, was discovered. In this document, which contained some deletions and alterations, the deceased had stated her wishes respecting the disposal of her property. The trial judge, without giving written reasons, found that the document was not intended by the deceased to be a testamentary instrument. The Appellate Division of the Supreme Court of Alberta, by a majority, reversed that judgment and an appeal was then brought to this Court.

Held: The appeal should be dismissed.

On a consideration of the contents of the document itself and the evidence, the judgment of the Appellate Division of the Supreme Court of Alberta was right in holding that the document did contain a deliberate, fixed and final expression as to the disposition of the property of the deceased on her death and that it was a valid holograph will within the meaning of s. 5(*b*) of *The Wills Act,* R.S.A. 1955, c. 369.

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

1962
CANADA PERMANENT TRUST CO. *et al.* *v.* BOWMAN *et al.*

Re Gray; Bennett et al. v. Toronto General Trusts Corp. et al., [1958] S.C.R. 392, applied; *Re Snowball,* [1941] O.R. 269, referred to.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, reversing a judgment of Primrose J. holding that a certain document was not intended to be a testamentary instrument. Appeal dismissed.

M. E. Moscovich, Q.C., for the defendants, appellants, A. M. Smith and A. F. Smith.

D. C. McDonald, for the defendant, appellant, Canada Permanent Trust Co.

G. E. Trott, for the plaintiffs, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The question in issue in this appeal is as to whether a document dated April 22, 1953, admittedly wholly in the handwriting of Ann Cameron Smith, deceased, is a valid holograph will. Wills in holograph form are recognized as being valid under s. 5(*b*) of c. 369, R.S.A. 1955, which provides:

5. A will is not valid unless it is made in one of the forms hereafter in this section permitted, that is to say, unless

* * *

(*b*) It is a holograph will, wholly in the handwriting of the testator and signed by him, whether made or acknowledged in the presence of any witness or not.

The document in question reads as follows:

April 22, 1953

I would like Laura to have this property—house and lots.
Barbie the money in ~~Continental~~ Canada Permanent Mortgage Co.
Ena $1,000.00 in National Trust
Bill ~~Continental~~ Champion Savings Corporation deposits.
Allan choice of pictures
Jean lace table cloth
Barbie Little Chieftan (Lithograph) and other things I designated.
Sandy Bowling Bowls and choice of books.
Duncan choice of books pictures ornaments and furniture and half war bonds.
Bobby half war bonds
Allan $2000.00 National Trust
Alex $X200.00 National Trust

Balance in National Trust after those bequests and expenses attended to to be divided among my two nieces and four nephews.

Duncan Silver tea service and candlesticks.

Phyllis Gross Smith to choose silver and dishes

Marjorie Brodie Smith to choose silver and dishes.

Nieces including Phyllis (A.C.) Smith to choose trinkets.

Ann C. Smith

Laura—fur coat.

In addition to the two places in this document in which the word "Continental" has been deleted, there were two other changes which appear on the face of the document. Immediately following the word "Ena" it appears that some figure other than "$1,000.00" had originally been included and that a portion of the first figure had been scratched out, with the apparent intention thereafter of leaving the figure "1". Also, after the word "Alex", initially some figure other than "$200.00" had appeared and what had been written immediately prior to the figure "2" had been obliterated.

The learned trial judge, without giving reasons, found that this document was not intended by the deceased to be a testamentary instrument. The Appellate Division of the Supreme Court of Alberta, by a majority of two to one, was "of the firm opinion that the document in question is a holograph will and it contains a deliberate and fixed and final expression as to the disposal of property upon death."

The deceased, a retired school teacher who resided in Edmonton, died on April 26, 1958. Following her death and a search of her effects, no will had been found and letters of administration were granted to The Canada Permanent Trust Company as attorney for the two brothers of the deceased, Allan Findlay Smith and Alexander Mutchmor Smith, and her sister Laura Frazer Bowman. Another sister of the deceased, Christina Smith (known to the deceased as "Ena"), died on September 24, 1958.

In September 1959, Barbara Jean Bowman, the daughter of Laura Frazer Bowman, while looking through some letters which had belonged to the father of the deceased and which were in a small cardboard box at Mrs. Bowman's house in Calgary, discovered the document above quoted.

Prior to the death of the deceased this box had been located in a cupboard in her bedroom. The letters related to the preparation of a family tree.

Allan Findlay Smith testified that in April 1958, prior to the funeral of the deceased, he had searched her house for a will and that he had seen there the box containing the letters regarding the family tree. He also saw the box there in December 1958, when he was making an inventory of the contents of the house. He stated that he examined the contents of the box, but did not see the document now in question.

The deceased had a strong box which was unlocked. Following her death, it was found to contain various documents of hers, including the title to her house, insurance policies, share certificates and Canadian Government bonds. In it was an envelope, marked with the words "Last Will and Testament", which was empty.

The requisites required to make a holograph paper a valid holograph will were stated in the judgment of Fauteux J., delivering the judgment of the majority of this Court in *Re Gray; Bennett et al. v. Toronto General Trusts Corp. et al.*[1]

> There is no controversy, either in the reasons for judgment in the Courts below, or between the parties, that under the authorities, a holographic paper is not testamentary unless it contains a *deliberate or fixed and final expression of intention* as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature: *Whyte et al. v. Pollok,* (1882), 7 App. Cas. 400; *Godman v. Godman,* [1920] P. 261; *Theakston v. Marson,* (1832), 4 Hag. Ecc. 290, 162 E.R. 1452.

In my opinion the contents of the paper in question here do contain the evidence to show the kind of intent to which he refers in this passage. The wording of the document is a statement of the wishes of the deceased respecting the disposal of her property and it is implicit in the document read as a whole that she wished such disposition to be made following her death. In addition, the word "bequests", which she used following reference to various dispositions previously mentioned in the document, is a term which is ordinarily applicable to property taken by will (see *Re Snowball*[2]).

[1] [1958] S.C.R. 392 at 396.

[2] [1941] O.R. 269 at 272.

The document does not appoint executors, nor does it refer to the disposition of the residue of the estate. However, so far as the latter point is concerned, it appears from the evidence that the document did dispose of all the assets which the deceased owned at the date it was made and that the only subsequent additional assets which she acquired prior to her death consisted of twenty shares of the capital stock of the Alberta Gas Trunk Line Limited.

With respect to the extrinsic evidence, it appears that the deceased retired in 1952 and that in January or February, 1953, she expressed to her niece, Barbara Jean Bowman, her intention to make a will. It also appears from the evidence that the persons named in the document included all of the brothers and sisters, nephews and nieces of the deceased.

The appellants Allan Findlay Smith and Alexander Mutchmor Smith contend that the form of the document is not testamentary and they point out that it had words struck out and numbers blotched. They urged that it was not the kind of a document which the deceased, who, the evidence indicated, was a tidy woman, would have intended as a will. Emphasis was also laid on the fact that the document was not placed by the deceased in her strong box with her other documents, but had been left in the cardboard carton.

After considering the contents of the document itself and after examining the evidence, it is my opinion that the judgment of the Appellate Division of the Supreme Court of Alberta was right in holding that the document did contain a deliberate, fixed and final expression as to the disposition of the property of the deceased on her death and that it is a valid holograph will.

I would dismiss the appeal, the costs of the parties involved to be paid out of the estate.

Appeal dismissed with costs payable out of the estate.

Solicitors for the defendants, appellants, A. F. Smith and A. M. Smith: Moscovich, Moscovich, Spanos, Matisz & Yanosik, Lethbridge.

Solicitors for the defendant, appellant, Canada Permanent Trust Company: McCuaig, McCuaig, Desrochers, Beckingham & McDonald, Edmonton.

Solicitors for the plaintiffs, respondents: White, Trott & White, Edmonton.

1962
*May 24
June 25

HOBBS MANUFACTURING COMPANY (*Defendant*) .... APPELLANT;

AND

MARGARET SHIELDS, Administratrix of the Estate of John Shields, Deceased (*Plaintiff*) ...... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Sale by manufacturer of electrical machine containing defective wiring—Failure of purchaser's employee to ground equipment before turning on current—Accidental death of employee by electrocution—Whether manufacturer liable.

L Co. representing the defendant company sold a machine manufactured by the latter to M. Co., where the plaintiff's husband S was employed as plant electrician. In the course of his duties S undertook to connect the machine with an electrical current and in so doing he neglected to ground the equipment. The result of introducing the current through an exposed wire in the switch box was that the ungrounded part of the equipment became highly charged and S was killed when he came in contact with it. The plaintiff, as executrix of her husband's estate, brought an action for damages under *The Fatal Accidents Act,* R.S.O. 1950, c. 132. The trial judge decided that the negligence on the part of S in failing to ground the equipment before turning on the current and of the defendant in wiring the switch box as it did contributed to the accident, and holding that it was not practicable to determine the respective degrees of fault, he gave judgment in favour of the plaintiff for one-half of the agreed amount of damages. The judgment of the trial judge was approved by the Court of Appeal, and the defendant then appealed to this Court.

Held (Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Martland and Judson JJ.: S was one to whom the defendant owed a duty to take care. *Donoghue v. Stevenson,* [1932] A.C. 562, *Dominion Natural Gas Co. Ltd. v. Collins & Perkins,* [1909] A.C. 640, referred to. There was no apparent reason for any person from the time the machine left the manufacturer to the time of the accident to open and examine the switch box and there was no duty upon S to examine every part of the machine to find possible defects

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

in the manufacture of it. Nor was the deceased's negligence severable from the fault of the defendant. *Great Eastern Oil and Import Co. Ltd. & Oakley v. Frederick E. Best Motor Accessories Co. Ltd.*, [1962] S.C.R. 118, distinguished. Accordingly, the conclusion arrived at by both Courts below was correct.

Per Cartwright and Ritchie JJ., *dissenting:* It is the absence of a reasonable probability that any defects or concealed dangers in his products will be discovered before use by such examination as ought reasonably to be anticipated which gives rise to the duty owed by a manufacturer to the ultimate user who suffers damage as the result of neglect in the manufacture or preparation of such products or as the result of dangerous qualities inherent in them, but where such reasonable probability exists, the subsequent negligence of the ultimate user cannot be coupled with the initial neglect of the manufacturer so as to permit the application of the doctrine of contributory negligence. Here there was a reasonable probability that any defect in the wiring of the machine would be discovered before use by a form of examination (the test afforded by "grounding"), which ought reasonably to have been anticipated by the defendant. The circumstances were not such as to bring the manufacturer into direct relationship with S, and there was, therefore, no duty owed by the defendant to him. *Donoghue v. Stevenson, supra; Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85; *Paine v. Colne Valley Electricity Supply Co., Ltd. et al.*, [1938] 4 All E.R. 803; *London Graving Dock Co. Ltd. v. Horton,* [1951] A.C. 737; *Woods v. Duncan et al.*, [1946] A.C. 401, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Smily J. Appeal dismissed, Cartwright and Ritchie JJ. dissenting.

D. A. Keith, Q.C., and *C. A. Keith,* for the defendant, appellant.

J. D. Arnup, Q.C., and *J. J. Carthy,* for the plaintiff, respondent.

The judgment of Kerwin C.J. and of Martland and Judson JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the defendant, Hobbs Manufacturing Company, from a judgment of the Court of Appeal for Ontario[1] affirming the judgment of Smily J., after a trial without a jury. The respondent as administratrix of the estate of her husband, John Shields, brought action pursuant to *The Fatal Accidents Act,* R.S.O. 1950, c. 132, for damages for the death of her husband, on May 6, 1959, by electrocution while installing a turret winder used for the winding of plastic. The winder had been sold to Shields' employer, Monsanto Oakville Limited,

[1] [1962] O.R. 355, 32 D.L.R. (2d) 273, *sub nom. Shields v. E. V. Larson Co. Ltd. and Hobbs Manufacturing Co.*

by the appellant's representative, E. V. Larson Company Limited, f.o.b. the appellant's factory at Worcester, Massachusetts, U.S.A. The Larson Company was a co-defendant but the present respondent did not object to the trial judge dismissing the action as against it without costs. It was agreed that the total amount of damages should be assessed at $30,000.

While evidence was given that the appellant had made a special examination and test inspection of the winder at its plant and had issued a special inspection report certifying as to the proper functioning of the machine, the trial judge found: (1) that there was defective wiring in the winder, because one of the wire "leads" in the switch box, known as a stop and start switch, showed bare copper (instead of being insulated) at the point where it was connected with the switch; (2) that this defect existed at the time the winder was delivered to the Monsanto Company; (3) that it was a defect which would not reasonably be expected to be ascertained or known by that company or by Shields. He also found that Shields, who was a qualified and experienced electrician, should have grounded the machine before proceeding to connect it with Monsanto's electric power supply, that he should have known the importance of this and that he was negligent in not so doing. He decided that the negligence on the part of Shields and of the appellant contributed to the accident, and, holding that it was not practicable to determine the respective degrees of fault, gave judgment in favour of the respondent for one-half of the agreed amount of damages. The Court of Appeal agreed with the findings of the trial judge.

Counsel for the appellant contended that the Court of Appeal was in error in deciding that any duty such as is mentioned in *Donoghue v. Stevenson*[1] rested upon the appellant with respect to Shields. It is well known that the headnote in *Donoghue v. Stevenson* is not quite correct, and, in any event, in an earlier case, *Dominion Natural Gas Co. Ltd. v. Collins and Perkins*[2], the liability of the gas company to third parties was upheld by the Privy Council. It is clear that Shields was one to whom the appellant owed a duty to take care.

[1] [1932] A.C. 562. [2] [1909] A.C. 640.

Counsel for the appellant also contended that even assuming negligence on its part the real cause of the accident was the failure of Shields to ground the machine. He relied upon Regulation No. 428(1) made by the Hydro-Electric Power Commission under *The Power Commission Act*, R.S.O. 1950, c. 281:

> 428 (1) The exposed non-current-carrying metal parts of fixed electrical equipment shall be grounded where the equipment
>
> * * *
>
> (*g*) operates with any terminal at more than 150 volts to ground.

He also argued that as an experienced electrician Shields knew or ought to have known the danger of putting a temporary connection from the machine to the 550-volt power outlet in the Monsanto plant and referred to the type of footwear worn by Shields. The evidence as to the footwear is unsatisfactory but taking it most favourably to the appellant, Shields' shoes, as described, constituted merely a contributory cause of the accident.

Counsel for the appellant pointed out that this machine contained what he called a "built-in" system of inspection. By this he meant that if the electrician had properly grounded the machine before turning on the power, the fusebox would have shown that there was a defect in the wiring. The respondent's answer is that when Shields began to connect this machine to the source of power, he was justified in assuming that it was properly wired and that no inspection to check this fact was necessary; that admitting that Shields was negligent when he connected the machine without first grounding it, that negligence would not have injured him if Shields had not justifiably assumed that he was working on a properly wired machine; that both causes were operating at the time of death—the negligence of the manufacturer and the negligence of the electrician; and that in these circumstances, the trial judge and the Court of Appeal were right in dividing responsibility.

I agree with the statement of Chief Justice Porter speaking on behalf of the Court of Appeal, that there was no apparent reason for any person from the time that the machine left the manufacturer to the time of the accident to open and examine the box and that there was no duty upon Shields to examine every part of the machine to find possible defects in the manufacture of it. The matter may be put as a paraphrase of what is stated in the 13th edition

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of Salmond on Torts, p. 569: Whether the appellant should reasonably have expected Shields to use the opportunity for inspection in such a way as to give him warning of the risk.

The decision of this Court in *Great Eastern Oil and Import Company Limited and Angus Oakley v. Frederick E. Best Motor Accessories Company Limited*[1], relied upon by counsel for the appellant, is quite distinguishable as there it was held that the negligence of Oakley, who had been in charge on behalf of the appellant company in making a delivery of gasoline to the premises of the respondent, was clearly severable from any act or omission of the plaintiff, even if such act or omission could be considered a fault. Reference was there made to the discussions that had occurred in the Courts and elsewhere as to proximate cause, *causa causans* and the last clear chance.

Each case must be decided upon its own particular facts and in the present appeal I agree with the conclusion arrived at by both Courts below. The appeal must be dismissed with costs.

The judgment of Cartwright and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—In the month of March 1959, the appellant, a Massachusetts company engaged in the manufacture of heavy machinery, undertook to supply an electrically-operated heavy duty machine encased in metal for installation by Monsanto Oakville Limited at its plant at Oakville, Ontario, in which province there were then, as there are now, in force regulations made under *The Power Commission Act* requiring, *inter alia,* that the exposed non-current-carrying metal parts of fixed electrical equipment shall be grounded where the equipment operates with any terminal at more than 150 volts to ground. (Regulation 428.)

Before the machine left the appellant's plant it was subjected to extensive tests which indicated that it was in safe running order, but it is apparent that owing to the manner in which the appellant had introduced the "lead wires" into the "stop and start switch box" attached to the machine, the insulation on one of such wires had worn thin so that

[1] [1962] S.C.R. 118, 31 D.L.R. (2d) 153.

by the time of installation at the Monsanto Oakville Limited plant bare copper wire was exposed at the point where it was connected with the switch.

Pursuant to the regulations made under *The Power Commission Act*, it is provided that an annual permit may be issued to the owner of any manufacturing, mercantile or other building where electrical installation work in connection with the plant is required to be performed, provided that the owner or occupant employs his own electrician for that purpose, and it was for this, amongst other purposes, that Mr. Shields was employed by the Monsanto Company.

In the course of his duties Mr. Shields, who was an electrician of great experience, undertook to connect the machine in question which had then been bolted to the factory floor with an electrical current of 550 volts, and in so doing he neglected to ground the equipment although there was apparently ample opportunity to do so. The result of introducing this current through the exposed wire in the switch box was that the ungrounded exposed metal part of the equipment became highly charged and that the unfortunate engineer was killed when he came in contact with it some one-half to one hour after the current had been turned on.

This was a machine designed by the manufacturer as being required to be grounded as can be seen by the evidence of the president of Hobbs Manufacturing Company who stated in reference to these products of that company that "a machine must be grounded before it is started up".

It is plain also from the evidence of the plant superintendent of Monsanto Oakville Limited that provision had been made at that company's plant for the grounding of the machine, and that both he and the plant electrician knew the provisions of Reg. 428 and, therefore, knew that the machine was one which was required to be grounded before use. After agreeing that he was familiar with Reg. 428, the plant superintendent went on to say on cross-examination:

> Q. You are familiar with that regulation. That is regulation 428 . . . I take it that, as the plant electrician, Mr. Shields, even more than you, would be familiar with such regulation?
>
> A. Yes.

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The same witness had given the following evidence on direct examination:

Q. What type of permanent grounding was contemplated so far as this machine was concerned?
A. Well, it would have been grounded through conduits when it was put in, when it was finished.

and he later gave this evidence:

Q. Was the Hobbs machine actually running at the time of the accident?
A. No, not to my knowledge, the power was on.
Q. What would be the purpose of the machine having been on at all?
A. Well, it was not supposed to have been turned on.

The Courts below have found that the death was caused by a combination of the negligence of the appellant in wiring the switch box as it did and the negligence of Shields in failing to ground the equipment before turning on the current, and that as both causes were operating at the time when Shields was killed, and as it is not possible to assess the varying degrees of responsibility, the fault should be equally divided. The respondent and the persons on whose behalf this action was brought were accordingly adjudged entitled to recover $15,000 against the appellant, being one-half of the agreed amount of the damage sustained as a result of the death.

The question raised by this appeal is whether, under the circumstances outlined above, the appellant manufacturer owed any duty to Shields giving rise to liability at law.

Chief Justice Porter, speaking on behalf of the Court of Appeal in the present case, stated the crux of the problem in these words:

Does then the duty defined in *Donoghue v. Stevenson* [[1932] A.C. 562] extend to the circumstances before us? Did the manufacturer bring itself into direct relationship with the skilled electrician who was killed as the result of the combined carelessness of the manufacturer and the electrician? If there were no duty, there would be no negligence. The Negligence Act adds nothing to the duty. It merely eliminates contributory negligence as a complete defence, and provides for apportionment of the damages.

Since the decision in *Grant v. Australian Knitting Mills, Ltd.*[1], it has been generally accepted that the principle of the decision in *Donoghue v. Stevenson, supra,* is summed up in the words of Lord Atkin at p. 599 where he said:

. . . a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate

[1] [1936] A.C. 85.

examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

In commenting on this passage in the case of *Paine v. Colne Valley Electricity Supply Co., Ltd., et al.*[1], Lord Goddard observed at pp. 808-9:

It seems clear that, in speaking of the prevention, or of the reasonable possibility, of examination, LORD ATKIN meant prevention or no possibility in a business sense. A person who buys 100 cases of tinned salmon from the packers has a physical opportunity of examining each tin. Commercially speaking, it would be impossible for him to do so, nor would anyone expect it, as by opening the tins he would spoil the contents before they could be sold. Perhaps, therefore, without disrespect, the word "probability" may be substituted for "possibility". If there be such a probability, the relationship between manufacturer and ultimate user or consumer will not be proximate. Something is interposed which prevents the forging of a link between the two.

Although *London Graving Dock Co. Ltd. v. Horton*[2] was a case of an invitor, the following comment made by Lord Porter at p. 750 appears to me to have particular relevance to the present case:

Your Lordships' House held that . . . the manufacturer would have escaped if it was natural to expect that the intermediate vendor would take care to see that the contents were in order. The pursuer, however, could recover from the manufacturer because such an examination was not to be expected. The law required the latter to be careful not to run the risk of injuring a person whom he contemplates or ought to contemplate as likely to be injured by his negligence, but an examination by the retail vendor, if rightly expected, could be relied upon by the manufacturer and would have been a complete answer to the claim. Still more so would knowledge by the purchaser of the true position, whether such knowledge was actual or such as the circumstances would warrant the manufacturer to assume.

It is to be observed that in the case of *Woods v. Duncan et al.*[3], Lord Simonds made the following general comments:

But at this stage the question is whether the assumed negligent actor ought reasonably to have foreseen the intervening act and, having foreseen it, to have provided for it or ignored it at his peril. It is, I think, essentially the same question as that which your Lordships resolved in *Donoghue v. Stevenson,* [1932] A.C. 562. For to ask, who is the neighbour to whom I owe a duty in respect of my act, may be in part answered by saying that he at least is not my neighbour who cannot be affected by my act, unless there is some intervening event which I cannot reasonably foresee.

[1] [1938] 4 All E.R. 803.
[2] [1951] A.C. 737.
[3] [1946] A.C. 401 at 442.

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And later by the same judge at p. 443 where he says of the *Donoghue* case:

> There the manufacturer was held to owe a duty to the consumer just because the intervening act of examination was not reasonably contemplated as possible or probable—I do not pause to consider which. That, I suggest, is one aspect of a wider proposition, namely, that the nature of the duty (if any) owed by an actor to a third party depends upon the existence and nature of the acts which should in the actor's contemplation be regarded as reasonably likely to intervene.

It is the absence of a reasonable probability that any defects or concealed dangers in his products will be discovered before use by such examination as ought reasonably to be anticipated which gives rise to the duty owed by a manufacturer to the ultimate user who suffers damage as the result of neglect in the manufacture or preparation of such products or as the result of dangerous qualities inherent in them, but where such reasonable probability exists, the subsequent negligence of the ultimate user cannot be coupled with the initial neglect of the manufacturer so as to permit the application of the doctrine of contributory negligence. As Porter C.J.O. had so clearly stated, "The Negligence Act adds nothing to the duty."

I do not think that the word "inspection" as used by Lord Atkin in the *Donoghue* case necessarily connotes "physical inspection" but rather that it embraces all means by which the defects or dangers might reasonably be expected to be detected before use. In this regard it is to be observed that in *Grant v. Australian Knitting Mills, Ltd., supra,* when Lord Wright was describing the opaque ginger-beer bottle which gave rise to the litigation in *Donoghue's* case, he referred to it as an

> . . . article issued to the world, and . . . used . . . in the state in which it was prepared and issued without it being changed in any way and without there being any warning of or *means of detecting the hidden danger.* (The italics are mine.)

No manufacturer of heavy electrically-operated machinery can, in my opinion, be expected to contemplate the probability that the ultimate user will dismantle a machine and examine every part of it for possible dangers or defects, but if there is a known procedure which will disclose such dangers and defects without physical inspection it becomes a question of whether the manufacturer was justified in assuming it to be reasonably probable that such procedure would be followed in the particular case, or to put it another

way, whether the manufacturer ought reasonably to anticipate that the procedure would not be followed. The fact that such a procedure is required to be followed by the law of the place where the machine is to be installed is, in my opinion, a factor to be considered in determining this issue.

The regulations made under *The Power Commission Act* of Ontario, include the following:

> 428 (1) The exposed non-current-carrying metal parts of fixed electrical equipment shall be grounded where the equipment
>
> * * *
>
> (*g*) operates with any terminal at more than 150 volts to ground.

After his attention had been called to this regulation, one of the electrical inspectors for the Ontario Hydro who gave evidence on behalf of the plaintiff at this trial gave the following answers on cross-examination:

> Q. And you agree with me that where a machine such as the one in question is connected up to a voltage in excess of 150 volts, it must be grounded?
>
> A. Yes.
>
> Q. That is a Hydro requirement, a regulation, is it not?
>
> A. Right.
>
> Q. Now, what is the object of grounding?
>
> A. Well, to make the machine safe in case of a breakdown or a defect.
>
> Q. To make the machine safe in case of a breakdown or a defect. Now, would that kind of defect include a short circuit induced by a conductor coming in touch with another part of the metal?
>
> A. I would say yes.
>
> Q. Such as what you suspect happened in this case?
>
> A. Yes.
>
> Q. And the grounding is for the express purpose of making the machine safe in the event of such a defect?
>
> A. Yes.

The same witness later said:

> Q. As you have explained it, so that there can be no doubt about it, the purpose of grounding is to prevent just the thing that happened in this case?
>
> A. Right.
>
> Q. Will you go this far with me, that in your best opinion, had this machine been grounded this accident would not have happened.
>
> A. Yes, I would have to say yes to that.

The general application of Reg. 428 to all fixed electrical equipment with exposed non-current-carrying metal parts operating with a terminal at more than 150 volts indicates that the potential danger lurking in all such equipment is

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recognized by the Hydro-Electric Power Commission of Ontario and it does not seem to me to have been unreasonable to assume that both the potential danger and the regulation itself were known to the very competent electrician who had been working for just under 4 years as assistant plant electrician and subsequently plant electrician in a plant where other such electrical equipment was installed and who was effecting the installation under a permit issued under the authority of the same regulations.

Counsel for the appellant suggested that the machine was so constructed that when properly grounded it contained its own "built-in" system of inspection, and while this is perhaps something of an exaggeration, it is nevertheless apparent that the effect of such grounding on the machine in the condition in which it was at the time of installation would have been to cause a fuse to blow when the power was turned on, thus eliminating the danger and indicating the defect in the wiring of the machine. This, in my opinion, is the equivalent of an "inspection" as that word is employed in *Donoghue v. Stevenson, supra.*

The president of the appellant company described the matter thus:

> Q. Mr. Oakes, assuming that the power supply is correctly connected to the machine by the electrician and the machine grounded through some part of its exterior casing by means of the wire illustrated in Exhibit 18F, and there is a short circuit in the machine, for instance, as is suggested in this case that a bare wire is touching the exterior of the switch box: are you in a position to say what happens when the power is turned on to that machine in that condition?
>
> A. Well, provided the grounding is a good ground, I would say the fuses would blow in the disconnecting switch or somewhere on the machine.
>
> Q. That is, a fuse would blow and what does that result in?
>
> A. Eliminating the power from the machine.
>
> Q. So that with the blowing of a fuse there is no power, no current in the machine?
>
> A. That is correct.
>
> Q. Is there current in any part of the machine?
>
> A. No, if the—
>
> Q. Of course, if the fuse which is at the disconnect box blows, there will be no power at any part of the machine?
>
> A. That is correct.
>
> Q. And if the fuse happened to be in the type "E" box that blew, what circuit goes out?
>
> A. The circuit to the switches and to the motor.

It is to be remembered that although the manufacturer had adapted the switch box attached to this machine for use in a manner for which it was not originally intended and although that method of adaptation resulted in the insulation wearing off one of the wires in the box after it had been tested at the manufacturer's plant, the defect was nevertheless one of a character against which the Ontario Hydro Commission had provided protective regulations applicable to all such machines indicating, in my view, a recognition by that Board of the reasonable possibility of such a defect existing in any such machine no matter how carefully it may have been manufactured and tested at the factory.

It appears to me that the interpretation placed on Lord Atkin's decision in *Donoghue's* case by the learned editor of the Law Quarterly Review (Dr. A. L. Goodhart) in (1938), 54 L.Q.R. at p. 63 is particularly apposite to the circumstances here disclosed. He there says:

> Lord Atkin twice stated that the manufacturer will be liable if the goods sold are to be "used at once before a reasonable opportunity of inspection". He explained this on the ground that "this is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed". What is meant by the two phrases "reasonable opportunity of inspection" and inspection which "may reasonably be interposed"? By what test are we to judge whether the purchaser's inspection "may reasonably be interposed"? It is submitted that such an inspection is *reasonably interposed* when the purchaser, *instead of being entitled to rely on the manufacturer's skill, ought to make an inspection of his own.* An opportunity is reasonable not merely because a sufficient length of time has been afforded to the purchaser: *it is reasonable because under the circumstances the purchaser ought to make an inspection.* (The italics are mine.)

The fact that the machine was designed to be grounded, that the plant superintendent and plant electrician knew that it should be grounded, that the regulations required it to be grounded and that grounding before use would have had the effect of isolating the danger and disclosing the defect all indicate to me that it was recognized by all concerned (the manufacturer, the purchaser, the electrician and the Commission) that it was not safe "to rely on the manufacturer's skill" without "grounding" this type of machine before using it as it was used in this case.

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In the same article in 54 L.Q.R. at pp. 66-67, the learned author adopts the test of whether the defect was discoverable by "such a reasonable examination as ought to be anticipated" as expressing the principle for which he is contending. I agree with this reasoning and consider that the answer to this question is decisive of the present case. In my view, for the reasons which I have stated, the "test" afforded by "grounding" constituted "reasonable examination" in the present case, and it seems to me that for the reasons hereinbefore set forth the appellant was amply justified in anticipating that it would be carried out as the regulation required and ordinary caution dictated.

I am, accordingly, of opinion that there was a reasonable probability in this case that any defect in the wiring of the machine would be discovered before use by a form of examination which ought reasonably to have been anticipated by the appellant, or to put the matter in another way, that it was not unreasonable for the appellant to anticipate that the electrician installing this machine would take advantage of the recognized means of protection from and detection of any concealed and undisclosed dangers or defects which such grounding would afford.

In view of all the above, I have reached the conclusion that the circumstances here disclosed are not such as to bring the manufacturer into direct relationship with the skilled electrician who was killed, and that there was, therefore, no duty owed by the appellant to the late Mr. Shields.

I would allow this appeal and direct that judgment be entered dismissing the action with costs throughout.

Appeal dismissed with costs, CARTWRIGHT *and* RITCHIE JJ. *dissenting.*

Solicitors for the defendant, appellant: Keith, Ganong, Du Vernet & Carruthers, Toronto.

Solicitors for the plaintiff, respondent: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

THE CANADIAN BANK OF COMMERCE (*Plaintiff*) .... APPELLANT;

1962
*May 17, 18
June 25

AND

THE ATTORNEY GENERAL OF CANADA (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Requirement by Minister for information and production of documents relating to accounts of bank's customer—Whether bank obliged to comply with requirement—Whether Minister's action subject to review—Income Tax Act, R.S.C. 1952, c. 148, s. 126(2).

The Assistant Deputy Minister of National Revenue for Taxation, acting on behalf of the Minister, addressed a requirement to the plaintiff bank under s. 126(2) of the *Income Tax Act* for information and production of documents relating to the accounts of its customer, the Union Bank of Switzerland. The plaintiff applied for a declaration that it was not under any obligation to furnish the information or produce the documents called for by the requirement and that it was not subject to the penalty provided for failure to comply therewith. By agreement between the parties a special case was stated for the opinion of the Court. It was agreed that the requirement did not relate in any way to the administration or enforcement of the Act in respect to the liability for tax of the plaintiff, and that the information to be furnished to comply with the requirement would include a great deal of private information in respect of the business and affairs of many corporations and individuals, some resident and some not resident in Canada. It was admitted that the Minister was acting in good faith, that the requirement related to a genuine and serious inquiry into the tax liability of some specific person or persons and that the Minister had reason to believe that such person or persons was or were among those referred to in the special case. The trial judge gave judgment against the plaintiff; this judgment was affirmed by the Court of Appeal, and with leave obtained from that Court the plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Abbott and Judson JJ.: The wording of subs. (2) of s. 126 of the *Income Tax Act* was very broad and comprehensive since the Minister "may, for any purpose related to the administration or enforcement of this Act," proceed in the manner indicated. So far as the Union Bank of Switzerland was concerned, if it carried on business in Canada, it was liable to tax under the Act and it was part of the administration or enforcement of the Act to discover if the Union Bank was subject to taxation.

The wording of the subsection was in such general terms that it could not be restricted to information as to the tax liability of the plaintiff itself. The fact that the information sought would disclose private transactions in which a number of persons were involved who were not

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

under investigation and might not be liable to tax, did not affect the Minister's power. Nor could the power be restricted to an inquiry for definite and limited particular information.

Per Locke, Cartwright, Fauteux, Martland and Ritchie JJ.: The purpose of the Minister's requirement was to obtain information relevant to the tax liability of some specific person or persons whose liability to tax was under investigation; this was a purpose related to the administration or enforcement of the Act.

On the question whether the test to be applied in determining the validity of a requirement is subjective or objective, here the condition was objective, and the question whether the Minister was acting for the purpose specified in the Act was subject to review, even though he might be acting in an administrative capacity. The question involved an interpretation of the Act and its application to the circumstances disclosed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Morand J. Appeal dismissed.

Hon. R. L. Kellock, Q.C., and *J. B. Tinker*, for the plaintiff, appellant.

D. Guthrie, Q.C., and *J. D. Lambert*, for the defendant, respondent.

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

THE CHIEF JUSTICE:—By leave of the Court of Appeal for Ontario the Canadian Bank of Commerce appeals from a judgment of that Court[1] affirming the order of Morand J. That order answered the question asked in the special case in the negative; directed that the appellant furnish the information and produce the documents requested in a certain requirement of the Minister of National Revenue, dated August 17, 1960; and directed that the time for invoking the penalty for failure to comply with the requirement should commence from the date of the order, May 1, 1961.

The dispute hinges upon the proper construction of subs. (2) of s. 126 of the *Income Tax Act*, R.S.C. 1952, c. 148:

126. (2) The Minister may, for any purpose related to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any person

(*a*) any information or additional information, including a return of income or a supplementary return, or

[1] [1962] D.T.C. 1014, [1962] C.T.C. 39, 31 D.L.R. (2d) 625.

(b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents,

within such reasonable time as may be stipulated therein.

The requirement reads as follows:

Special Investigations Section,
J. M. Fell

Department of National Revenue
Canada
Taxation Division

CONFIDENTIAL

REQUIREMENT FOR INFORMATION AND PRODUCTION OF DOCUMENTS

Ottawa, 17th August, 1960.

The General Manager,
The Canadian Bank of Commerce,
25 King Street West,
Toronto, Ontario.

Dear Sir,

The Union Bank of Switzerland

1. For purposes related to the administration or enforcement of the Income Tax Act, pursuant to the provisions of Section 126(2) of the said Act, I require from you on or before 19th September, 1960, information and production of documents as follows:

(a) A statement setting out all entries in all accounts that are known to be or to have been operated or controlled by, for, or on behalf of the persons named above or any of them and all entries that are known to be or to have been related to the affairs of those persons or any of them in all other accounts including Casual, Manager's, Sundry and similar accounts for the period beginning 1st January 1955 and ending 31st December 1959, both dates inclusive.

(b) A statment setting out particulars of all transactions, including loans and discounts and collateral thereto, safety deposit box rentals and security dealings with, for, or on behalf of the persons named above or any of them, or any person or persons known to be or to have been acting on behalf of those persons or any of them for the period beginning 1st January 1955 and ending 31st December 1959, both dates inclusive.

(c) Production of all documents, including authorizations, powers of attorney, mail and telegraphic transfers, accounts, vouchers, letters, contracts, letters of credit and statements that are known to be or to have been related to the entries or transactions set out in the statements required under (a) and (b) above, for the period beginning 1st January 1955 and ending 31st December 1959, both dates inclusive.

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2. To comply with this requirement you should forward the information and documents hereby required to the Deputy Minister of National Revenue for Taxation, 444 Sussex Drive, Ottawa, Ontario, by registered mail, within the time specified in paragraph 1. Photostatic or certified copies of the documents will be sufficient.

3. If you so request in your acknowledgment of this requirement, arrangements will be made for an officer of the Taxation Division to attend at your office to receive the information and inspect the documents required. Provision of the information and production of the documents to that officer at the time of his attendance at your office will be considered as compliance with this requirement if your acknowledgment is received on or before 19th September 1960.

4. Your attention is directed to the penalty provided in subsection 2 of section 131 of the Income Tax Act for default in complying with this requirement.

Yours truly,

"D. Sheppard"

Assistant Deputy Minister of
National Revenue for Taxation

REGISTERED

Although there are various references in this requirement to "the persons named above", the Union Bank of Switzerland is the only party named, and it is important to emphasize at the outset that from a consideration of the entire document the Union Bank of Switzerland is under investigation. The requirement is signed by the Assistant Deputy Minister of National Revenue for Taxation but it is admitted that under the power conferred upon the Governor in Council by s. 117(1)(*f*) of the *Income Tax Act*, R.S.C. 1952, c. 148:

117. (1) The Governor in Council may make regulations

* * *

(*f*) authorizing a designated officer or class of officers to exercise powers or perform duties of the Minister under this Act.

the Assistant Deputy Minister of National Revenue for Taxation was authorized by Reg. 900 to exercise all the powers and perform all the duties of the Minister under the Act. It is convenient at this point, because of an argument advanced on behalf of the appellant, to note that under subs. (2) of the same regulation an official holding a position of "Director-Taxation" in a District Office of the Taxation Division of the Department of National Revenue may exercise the powers and perform the duties of the Minister under subs. (2) of s. 126 of the Act.

On September 15, 1960, the appellant issued a writ of summons in the Supreme Court of Ontario claiming "a declaration that it is not under any obligation to furnish the information or produce the documents relating to the accounts of its customer, The Union Bank of Switzerland, called for by the Requirement for Information and Production of Documents hereinafter described, that the said Requirement is unauthorized and is of no force or effect and that the Plaintiff is not subject to the penalty threatened therein for failure to comply therewith".

On March 15, 1961, the solicitors for the parties agreed upon a special case for the opinion of the Court which is set out *in extenso* in the reasons for judgment in the Court of Appeal. It is sufficient to state that it is thereby agreed that the appellant is a large bank of Canada and a taxpayer under the *Income Tax Act* of Canada; the requirement does not relate in any way to the administration or enforcement of the Act as respects the liability for tax of the appellant; the Union Bank of Switzerland is one of the major banks in Switzerland and is a customer of the plaintiff; the requirement was duly received by the appellant which had failed to comply in whole or in part with it. The special case also shows that the appellant has numerous branches throughout Canada, twelve in the West Indies, five branches or agencies in the United States and two branches in London, England, and that it would require a great amount of clerical work to comply with the requirement. Paragraph 11 referred to particularly by counsel for the appellant reads as follows:

> 11. The information to be gathered together and produced to comply with the said Requirement includes a great deal of private information in respect of the business and affairs of the Union Bank of Switzerland and of many other corporations and individuals, some resident in Canada and some not resident in Canada.

Before Morand J. it was admitted that the Minister was acting in good faith and that the requirement relates to a genuine and serious inquiry into the tax liability of some specific person or persons; that the Minister had good reason to believe that such person or persons is or are among those referred to in the special case. The Minister refused to state who the person or persons was or were or to designate the person or persons in any way, shape or form.

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At the hearing before the Court of Appeal counsel for the bank submitted that certain inferences of fact should be drawn from the special case as follows:

(a) The Minister is proceeding in good faith in the sense that he honestly believes he is proceeding in accordance with his powers.

(b) The said Requirement relates to a genuine and serious inquiry into the tax liability of some specific person or persons.

(c) The Minister has reason to believe that such person or persons under investigation are among those referred to in the Special Case.

(d) Neither the Union Bank of Switzerland nor many of the persons referred to in the Special Case, para. 11 are among the person or persons under investigation.

Counsel for the Attorney-General agreed as to (a), (b) and (c) but not as to (d). I, therefore, proceed upon the basis that the first three are in the same position as if they were included in the special case.

The argument of counsel for both parties covered a wide field and submitted propositions with which it is unnecessary to deal because, as has already been pointed out, by the very terms of the requirement the Union Bank of Switzerland is under investigation. The wording of subs. (2) of s. 126 of the *Income Tax Act* is very broad and comprehensive since the Minister "may, for any purpose related to the administration or enforcement of this Act," proceed in the manner indicated. Section 2 of the Act enacts:

2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.

(2) Where a person who is not taxable under subsection (1) for a taxation year

(*a*) was employed in Canada at any time in the year, or

(*b*) carried on business in Canada at any time in the year,

an income tax shall be paid as hereinafter required upon his taxable income earned in Canada for the year determined in accordance with Division D.

(3) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

Therefore, so far as the Union Bank of Switzerland is concerned, if it carried on business in Canada, it is liable to tax and it is part of the administration or enforcement of the Act to discover if the Union Bank was subject to taxation.

The wording of s. 126(2) is in such general terms that it cannot be restricted, as counsel for the appellant argued, to information as to the tax liability of the appellant itself. He also contended that the words in subs. (2) of s. 126

"including a return of income or a supplementary return" indicated that the requirement could only be directed to the question of liability to taxation of the appellant. The words italicized do not restrict the generality of the opening words in subs. (2). Although para. 11 of the special case shows that the information to be gathered together and produced to comply with the requirement includes a great deal of private information in respect of the business and affairs of the Union Bank of Switzerland and of many other corporations and individuals, some resident in Canada and some not resident in Canada, I agree with Chief Justice Porter that the fact that the information sought will disclose private transactions in which a number of persons were involved who are not under investigation and may not be liable to tax, does not affect the power. As the Chief Justice points out, much of the information obtained will turn out to be irrelevant. Neither of these probabilities take the case out of a purpose related to the administration or enforcement of the Act.

Subsections (1) and (3) of s. 126 provide:

126. (1) Any person thereunto authorized by the Minister for any purpose related to the administration or enforcement of this Act may, at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are, or should be, kept pursuant to this Act, and

(*a*) audit or examine the books and records and any account, voucher, letter, telegram or other document which relates or may relate to the information that is or should be in the books or records or the amount of tax payable under this Act,

(*b*) examine property described by an inventory or any property, process or matter an examination of which may, in his opinion, assist him in determining the accuracy of an inventory or in ascertaining the information that is or should be in the books or records or the amount of any tax payable under this Act,

(*c*) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance with his audit or examination and to answer all proper questions relating to the audit or examination either orally or, if he so requires, in writing, on oath or by statutory declaration and, for that purpose, require the owner or manager to attend at the premises or place with him, and

(*d*) if, during the course of an audit or examination, it appears to him that there has been a violation of this Act or a regulation, seize and take away any of the records, books, accounts, vouchers, letters, telegrams and other documents and retain them until they are produced in any court proceedings.

* * *

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(3) The Minister may, for any purpose related to the administration or enforcement of this Act, with the approval of a judge of the Exchequer Court of Canada or of a superior or county court, which approval the judge is hereby empowered to give upon *ex parte* application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things which may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

Certainly, those powers are stringent as well as the powers contained in s. 126A dealing with a solicitor-client privilege and the powers of a judge of a Superior Court or of the Exchequer Court of Canada but it is unnecessary to determine their exact limits.

The power conferred upon the Minister or Assistant Deputy Minister of National Revenue for Taxation cannot be restricted to an inquiry for definite and limited particular information; and the mere fact that by subs. (2) of Reg. 900 an official holding the position of "Director-Taxation" in a District Office of the Taxation Division of the Department of National Revenue might exercise the powers and perform the duties of the Minister under subs. (2) of s. 126 does not derogate from the wide powers conferred by this last-mentioned subsection. The cases cited by counsel for the appellant are quite distinguishable and I find it unnecessary to go over them in detail.

The final argument was that the Assistant Deputy Minister of National Revenue for Taxation is not authorized to act on his opinion, belief or decision, but must in fact have a purpose related to the administration or enforcement of the Act. I have already expressed the opinion, that, in view of the contents of the special case and the admissions of counsel, the Assistant Deputy Minister was in fact acting for a purpose related to the administration or enforcement of the Act. The decision of the Judicial Committee in *Nakkuda Ali v. Jayaratne*[1], relied upon by counsel for the appellant, is not applicable. In that case power to cancel a licence was conferred upon the Controller of Textiles where he "has reasonable cause to believe that any dealer is unfit to

[1] [1951] A.C. 66.

be allowed to continue as a dealer". The decision was that the requirement of the regulation there in question that the Controller must have reasonable grounds of belief was insufficient to oblige him to act judicially and that there was nothing else in the context or conditions of his jurisdiction which suggested that he must regulate his action by analogy to judicial rules. It was held that the respondent was not amenable to a mandate in the nature of *certiorari* in respect of his action under the regulation. Much that followed that holding was *obiter* and has since given rise to considerable discussion as to its validity.

The appeal is dismissed, but counsel for the respondent suggested that a new time should be fixed for invoking the penalty for failure to comply with the requirement, which was dated August 17, 1960, and required the information and production of documents on or before September 19, 1960. The trial judge directed that the time for invoking the penalty should commence from the date of his order, May 1, 1961. During the course of the proceedings there was of course no attempt to proceed by the respondent. It would appear to be reasonable to fix August 1, 1962, as the date for compliance.

No order as to costs was made by Morand J., or by the Court of Appeal. The appellant might well have been satisfied that it had done all that it should in appealing to the Court of Appeal, but it applied for and obtained leave from that Court to appeal to this Court. The appellant must pay the costs of this appeal.

The judgment of Locke, Cartwright, Fauteux, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J.:—The course of the proceedings in the Courts below and the relevant portions of the record are set out in the reasons of the Chief Justice.

I agree that the appeal fails.

I do not find it necessary to deal with all the arguments which were addressed to us as I have reached the conclusion that on the facts set out in the stated case read with the admissions of counsel as to the inferences which should be drawn therefrom it has been shewn that in addressing the requirement to the appellant the Minister was acting for purposes related to the administration or enforcement of the *Income Tax Act*.

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I do not base my judgment on the view that it has been established that the liability to tax of the Union Bank of Switzerland is under investigation, a view which I understood counsel for the respondent to reject; on the record it appears to me that the liability of that bank may or may not be under investigation.

Paragraphs 2 and 11 of the stated case are as follows:

> 2. The Requirement mentioned in the Writ of Summons herein does not relate in any way to the administration or enforcement of the Income Tax Act as respects the liability for tax of the plaintiff itself.
>
> * * *
>
> 11. The information to be gathered together and produced to comply with the said Requirement includes a great deal of private information in respect of the business and affairs of the Union Bank of Switzerland and of many other corporations and individuals, some resident in Canada and some not resident in Canada.

Inferences (*b*) and (*c*) which counsel agreed should be drawn are as follows:

> (*b*) The said Requirement relates to a genuine and serious inquiry into the tax liability of some specific person or persons.
>
> (*c*) The Minister has reason to believe that such person or persons under investigation are among those referred to in the Special Case.

When these are read together it appears to be common ground, (i) that the requirement addressed to the appellant relates to a genuine and serious inquiry into the tax liability of some specific person or persons, (ii) that the Minister has reason to believe that such person or persons are among those referred to in the special case, (iii) that the persons referred to in the special case are those mentioned in paragraph 11, "the Union Bank of Switzerland and many other corporations and individuals some resident in Canada and some not resident in Canada" and (iv) that the answer to the requirement will provide a great deal of private information in respect of the business and affairs of the persons referred to in item (iii) and therefore in respect of the business and affairs of the person or persons into whose liability to tax inquiry is being made.

I agree with the Chief Justice and with Porter C.J.O. that the circumstance that the answer to the requirement will disclose private transactions involving a number of persons who are not under investigation and may not be liable to tax does not invalidate the requirement.

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The purpose of the requirement, then, is to obtain information relevant to the tax liability of some specific person or persons whose liability to tax is under investigation; this is a purpose related to the administration or enforcement of the Act. As I have reached the conclusion that the existence of this purpose is established by the material in the record, I do not find it necessary to examine the arguments addressed to us on the question of the incidence of the burden of proof.

On the question, fully argued before us, whether the test to be applied in determining the validity of a requirement is subjective or objective, I agree with and desire to adopt the following passage in the reasons of Porter C.J.O.

> In the present case the condition is objective, and the question whether he (i.e. the Minister) is acting for the purpose specified in the Act is subject to review, even though he may be acting in an administrative capacity. This question involves an interpretation of the Act and its application to the circumstances disclosed. However, once it is established as in this case that the Minister is acting for the purposes specified in the Act, his acts within this scope are administrative and not judicial, and as such are not subject to review.

For these reasons I would dispose of the appeal as proposed by the Chief Justice.

Appeal dismissed.

Solicitors for the plaintiff, appellant: Blake, Cassels & Graydon, Toronto.

Solicitors for the defendant, respondent: Cassels, Brock & Kelley, Toronto.

HER MAJESTY THE QUEEN ....APPELLANT;

AND

ROBERT JAMES McGRATH ....RESPONDENT.

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*May 24, 25
June 25

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Notice of preventive detention—Whether certificate of previous convictions adequate—Whether accused's testimony at trial of substantive offence admissible on hearing for preventive detention—Criminal Code, 1953-54 (Can.), c. 51, ss. 574, 660, 662.

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

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The accused was charged with an offence under ss. 24 and 292 of the *Criminal Code* of attempting to break and enter a shop with intent to steal. Prior to the trial, he was served with a notice in writing under s. 662(1)(*a*)(ii) of the Code stating that if he were convicted of this offence an application would be made to the Court to find that he was an habitual criminal and to impose on him a sentence of preventive detention. In due course he was convicted on the substantive offence. At the hearing on the application to impose a sentence of preventive detention, the trial judge heard evidence in support of the allegations contained in the notice, and also took into consideration evidence concerning the accused's previous convictions and past habits which had been given by the accused himself under cross-examination at the trial of the substantive offence. The accused was sentenced to preventive detention as an habitual criminal. The Court of Appeal quashed and set aside the finding that the accused was an habitual criminal. The Crown was granted leave to appeal to this Court.

Held: The appeal should be allowed and the sentence of preventive detention restored.

The form of the certificates filed by the prosecutor appeared to sufficiently identify the judge who presided at the time of both the convictions and the sentences mentioned therein, and the fact that the convictions mentioned in the certificates and those mentioned in the notice were identical as to the name of the person convicted, the offences committed and the date and nature of the sentences imposed was enough to show that the convictions referred to therein were the same as those referred to in the notice. In any event, the form of the certificates satisfied the provisions of s. 574 of the Code requiring that the conviction be set out with "reasonable particularity".

The judge presiding at the hearing on the application for imposition of a sentence of preventive detention was entitled to take into consideration the evidence taken at the trial of the substantive offence, and was justified in accepting the accused's own admission of previous convictions as serving to identify him as the person who was convicted. An accused person who elects to go on the witness stand at his own trial has the benefit of all the safeguards referred to in the case of *Parkes v. The Queen*, [1956] S.C.R. 768, and the evidence elicited from such an accused is admissible and does not violate the provisions of s. 662(2) of the Code.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], quashing and setting aside a finding that the appellant was an habitual criminal. Appeal allowed.

J. J. Urie, Q.C., for the appellant.

H. Rankin, 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 British Columbia[1] quashing and setting aside the finding of His

[1] (1961-62), 36 W.W.R. 553, 36 C.R. 375, 132 C.C.C. 49.

Honour Judge Remnant of the County Court of the County of Vancouver that the respondent was an habitual criminal and the consequent imposition of a sentence of preventive detention pursuant to the provisions of s. 660 of the *Criminal Code*. It is to be noted that the provisions of ss. 660 and 662 of the *Criminal Code* were substantially amended by c. 43 of the Statutes of Canada (1960-61) which was not in force at the time of the finding and sentence in the present case, and wherever reference is herein made to either of those sections it relates to the *Criminal Code* as it existed immediately before the said amendment came into force.

The respondent, having been charged with an offence under ss. 24 and 292 of the *Criminal Code* of attempting to break and enter a shop with intent to steal, was, on December 7, 1960, served with a notice in writing in compliance with s. 662(1)(*a*)(ii) of the *Criminal Code* stating that if he were convicted of this offence an application would be made to the Court to find that he was an habitual criminal and also to sentence him to preventive detention in addition to any sentence in respect of the said offence. In due course, on December 21, 1960, the respondent was convicted of the said offence before the aforesaid County Court judge who, on January 23, 1961, conducted a hearing in respect of the application to impose a sentence of preventive detention and who, having heard evidence in support of the allegations contained in the said notice and having taken into consideration evidence concerning his previous convictions and his past habits given by the respondent himself under cross-examination at the trial of the substantive offence, proceeded to sentence the respondent to preventive detention as an habitual criminal.

The notice given by a prosecutor under the provisions of s. 662(1)(*a*)(ii) is required to specify "the previous convictions and the other circumstances, if any, upon which it is intended to found the application . . . ." and the notice given in the present case recited, *inter alia,* that the accused was convicted in the Supreme Court of Alberta at Edmonton before Mr. Justice Clinton J. Ford on the 4th and 8th of October, 1946 of two separate offences, one of "breaking and entering" and the other of "breaking, entering and theft" for which he was sentenced to terms of five and eight years' imprisonment to run concurrently. The same notice went

on to specify that certain other named persons were convicted of the same offences and to describe the premises broken into, and in the theft case the nature and amount of the property stolen.

A certificate purporting to be signed by the clerk of the Court "setting out with reasonable particularity the conviction in Canada of an accused for an indictable offence" is, upon proof of the identity of the accused, *prima facie* evidence of that conviction by virtue of the provisions of s. 574 of the *Criminal Code.*

In the present case the certificates of conviction produced by the prosecution in proof of the offences above referred to purport to be signed by the clerk of the Court and are in the following form:

> I, the undersigned, do hereby certify that at a Sitting of the Supreme Criminal Court held at the Court House in the City of Edmonton, the following prisoner, having been duly convicted of the crime set opposite his name, was sentenced as hereunder stated BEFORE THE HONOURABLE MR. JUSTICE CLINTON J. FORD.

The body of the two certificates contains the following information:

NAME OF PRISONER	*CRIME*	*DATE OF SENTENCE*	*SENTENCE*
ROBERT McGRATH	Break, enter and theft	October 4th, 1946	Eight (8) years imprisonment in the Saskatchewan Penitentiary at Prince Albert, in the Province of Saskatchewan.
ROBERT McGRATH	Break, enter	October 8th, 1946	Five (5) years imprisonment in the Saskatchewan Penitentiary at Prince Albert, in the Province of Saskatchewan, to run concurrent with previous sentence.

In the course of the reasons delivered by Bird J.A. on behalf of the Court of Appeal, that learned judge found that these certificates were insufficient to satisfy the requirements of s. 574(*a*) of the *Criminal Code* on the ground that:

> . . . neither document contains more than a sketchy reference to the conviction alleged and omits the names of the confederates of the convicted

man, the description of the premises broken and of the property stolen as well as the name of the learned Judge presiding at the time when the conviction was entered, all of which are set out in detail in paragraphs (*c*) and (*d*) of the notice.

With the greatest respect, I must say that the form of the certificates filed by the prosecutor appears to me to sufficiently identify Mr. Justice Clinton J. Ford as the judge who presided at the time of both the convictions and the sentences therein referred to and the fact that the convictions mentioned in the certificates and those mentioned in paras. (*c*) and (*d*) of the notice are identical as to the name of the person convicted, the offences committed and the date and nature of the sentences imposed is enough to satisfy me that the convictions referred to therein are the same as those referred to in the notice.

In any event, in my view the provisions of s. 574 requiring that the conviction be set out with "reasonable particularity" are satisfied by the form of the certificates above referred to, and I am of opinion that the "reasonable particularity" required by the section is in no way controlled by the manner in which the offences are described in the notice filed under s. 662 provided that it is apparent that the certificates refer to convictions described in that notice.

Mr. Justice Bird, however, considered that there was no sufficient proof to identify the respondent as the person named in certain of the convictions set out in the certificates and the notice because the only evidence to this effect was elicited from the respondent on cross-examination at the trial of the substantive offence when it was admitted for the sole purpose of testing the respondent's credibility. As will hereafter appear, I am of opinion that the judge presiding at the hearing of the application for imposition of a sentence of preventive detention is entitled to take into consideration the evidence taken at the trial of the substantive offence, and in so doing he is, in my opinion, justified in accepting the accused's own admission of previous convictions as serving to identify him as the person who was convicted.

A strong argument was made on behalf of the respondent in support of Mr. Justice Bird's further finding that admissions made by him at the trial of the substantive offence as to his past conduct and associations should not have been considered in determining the issue of whether or not he was

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an habitual criminal. Mr. Justice Bird rested this finding on the ground that consideration of such evidence constituted a violation of the provisions of s. 662(2) of the *Criminal Code* which reads as follows:

> 662. (2) An application under this Part shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

It is contended that the circumstances are governed by the decision of this Court in *Parkes v. The Queen*[1], in which case highly damaging information concerning the previous career of the convicted person was introduced, directly after his conviction and before the opening of the hearing of the application for imposition of a sentence of preventive detention, in the form of an unsworn "Probation Officer Pre-Sentence Report". In commenting on the effect of this information on the mind of the judge at the preventive detention hearing, Mr. Justice Fauteux said at p. 779:

> However, prior to such hearing, the judge, for the purpose of determining what sentence he should impose, received from the prosecution and exacted from the defence, in a most exhaustive manner, information of a character highly damaging to the accused. In the result, when the subsequent hearing of the issue related to preventive detention commenced, his mind was no longer free, in the measure it should have been, had the provisions of s. 662(2) been complied with, and the effective exercise of the right which the appellant had, on the hearing of such issue, to remain silent and hold the prosecution strictly to its obligation to prove its case according to rules of procedure and rules of evidence, was henceforward jeopardized.

Mr. Justice Bird adopted this reasoning as applying "with equal force in the present circumstances", and in so doing it seems to me with all respect that he failed to appreciate that Mr. Justice Fauteux was addressing himself to the special circumstances of the *Parkes* case in which the mind of the judge at the commencement of the preventive detention hearing "was no longer free in the measure it should have been" had the damaging information tendered before him been subjected to the "rules of procedure and rules of evidence" which normally attend the trial of any issue.

The accepted practice concerning the material which a judge may properly consider before sentencing a convicted

[1] [1956] S.C.R. 768, 24 C.R. 279, 116 C.C.C. 86.

person in respect of the offence for which he has been convicted is well described in Crankshaw's Criminal Code of Canada, 7 ed., p. 912, as follows:

> After conviction, accurate information should be given as to the general character and other material circumstances of the prisoner *even though such information is not available in the form of evidence proper,* and such information when given can rightly be taken into consideration by the judge in determining the *quantum* of punishment, unless it is challenged and contradicted by or on behalf of the prisoner, in which case the judge should either direct proper proof to be given or should ignore the information. There should be precision and accuracy in any such information: .... (The italics are mine.)

In the *Parkes* case, *supra,* it was held that the introduction of such information between the time of conviction and the opening of the preventive detention hearing constituted a violation of the provisions of s. 662(2) of which section Mr. Justice Fauteux observed at p. 779:

> Under the imperative provisions of s. 662(2) of the *Criminal Code,* the hearing and determination of this issue must take place before sentence is passed for the offence of which the accused is convicted. The reason for this order of precedence established in the procedure is *to assure the effective operation of all the safeguards which, both by the method of inquiry and by the rules of evidence, attend the trial of any issue* and, more particularly to exclude definitely any possibility that the judge entrusted with the matter be, until it is finally determined, adversely influenced in any degree by facts or representations of which, once an accused is convicted, he may, without the same safeguards, be apprised for passing a sentence. (The italics are mine.)

An accused person who, like the respondent, elects to go on the witness stand at his own trial has the benefit of all the safeguards to which Mr. Justice Fauteux refers in this passage, and evidence elicited from such an accused on cross-examination is, in my opinion, in an entirely different category from the kind of information with which this Court was concerned in *Parkes v. The Queen, supra.*

It has been pointed out in this Court in the cases of *Kirkland v. The Queen*[1], and *Harnish v. The Queen*[2], that the proceedings at the trial of the substantive offence are relevant material for the consideration of a court in determining the issues raised by an application under ss. 660 and 662, but it was seriously contended on behalf of the respondent that His Honour Judge Remnant, when he presided at the preventive detention hearing, was precluded from considering the sworn evidence given at the trial on the ground

[1] [1957] S.C.R. 3, 25 C.R. 101, 117 C.C.C. 1.
[2] [1961] S.C.R. 511, 35 C.R. 1, 130 C.C.C. 97.

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that a transcript of that evidence was not introduced at the hearing under the oath of the Court reporter. It appears to me to be altogether unrealistic to suggest that in enacting Part XXI of the *Criminal Code* Parliament intended to provide for a hearing to be interposed between conviction and sentence on the substantive offence at which the trial judge is required to close his mind to relevant evidence adduced before him at the trial which led to the conviction unless and until a transcript of such evidence has been introduced before him at the hearing under the oath of the Court reporter.

In my view His Honour Judge Remnant, when he presided at the hearing of the application for imposition of a sentence of preventive detention, was fully justified in taking into consideration the evidence as to his identity and his past life and habits which was given by the accused at his trial, and I am, therefore, with great respect, unable to agree with the Court of Appeal that there was any violation of the provisions of s. 662(2) in the conduct of these proceedings.

I would allow this appeal and restore the finding of the learned trial judge that the respondent is an habitual criminal and the consequent imposition of a sentence of preventive detention.

Appeal allowed.

Solicitor for the appellant: G. L. Murray, Vancouver.

Solicitor for the respondent: H. Rankin, Vancouver.

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*Mar. 15, 16
June 25

HER MAJESTY THE QUEEN ....APPELLANT;

AND

GRANT E. KING ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Driving motor vehicle while ability impaired by drug—Drug administered as anaesthetic by dentist—Accused warned not to drive until his head was perfectly clear—Whether driver guilty—Whether mens rea a necessary element of the offence—Criminal Code, 1953-54 (Can.), c. 51, ss. 222, 223.

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

The accused went to his dentist by appointment to have two teeth extracted. He was injected with a drug known as sodium pentothal, a quick-acting anaesthetic. Earlier, he had been required to sign a printed form containing a warning not to drive after the anaesthetic until his head had cleared. After he regained consciousness, the nurse in attendance, to whom he appeared to be normal, warned him not to drive until his head was "perfectly clear". He replied that he intended to walk. The accused said that he heard no such warning and did not remember signing any form containing a warning. He remembered getting into his car and that while driving he became unconscious. His car ran into the rear of a parked vehicle. Medical evidence was given that his mental and physical condition (he was staggering and his co-ordination was poor) was consistent with the after-effects of the drug in question which may induce a state of amnesia accompanied by a period during which the subject may feel competent to drive a car and in the next second be in a condition in which he would not know what was happening. The accused stated that he did not know anything about this drug.

He was charged and convicted of the offence of driving a motor vehicle while his ability to do so was impaired by a drug, contrary to s. 223 of the *Criminal Code*. After a trial *de novo* before a County Court judge under s. 720 of the Code, his conviction was affirmed. The Court of Appeal granted him leave to appeal and quashed the conviction. The Crown was granted leave to appeal to this Court on the question as to whether *mens rea* relating to both the act of driving and to the state of being impaired was an essential element of the offence.

Held: The appeal should be dismissed.

Per Taschereau J.: There can be no *actus reus* unless there is a will-power to do an act whether the person knows or not that it is prohibited by law. In the présent case, intention was not to be confused with *mens rea*. Intention is an element of the offence in question only when the offender voluntarily takes liquor or a drug. There must be an act proceeding from a free will which may bring about the mental condition necessary to meet the requirements of s. 223. When a doctor has given an injection of a drug to a patient, who is not aware of the state of mind it may produce, there is no volitive act done by the patient and he could not be convicted under s. 223.

Per Locke and Judson JJ.: The question of law propounded did not arise upon the facts found at the trial *de novo* by the County Court judge who found as a fact that the accused knew that he had had a drug and that he was warned not to drive after the anaesthetic, but did not find that the accused's condition was such that he could not appreciate the warnings given to him. The Court of Appeal found that the accused believed that the drug did not possess properties which would impair or were likely to impair his ability to drive or that he was led to believe and honestly believed that the drug could not have the effect of impairing such ability. These findings were directly in conflict with those of the trial judge. However, as the Crown did not ask leave to appeal on the ground that the Court of Appeal had exceeded its jurisdiction and that question was not argued, the proper course was to dismiss the appeal.

Per Martland and Ritchie JJ.: The enactment of s. 223 of the *Criminal Code* added a new crime to the general criminal law, and neither the language in which it was enacted nor the evil which it was intended to

prevent are such as to give rise to a necessary implication that Parliament intended to rule out *mens rea* as an essential ingredient of the crime therein described. When it has been proved that a driver was driving while his ability was impaired by alcohol or a drug, a rebuttable presumption arises that his condition was voluntarily induced. But if it appears that the impairment was produced as a result of using a drug in the form of medicine on a doctor's order or recommendation and that its effect was unknown to the patient, the presumption is rebutted. *Mens rea* need not necessarily be present in relation both to the act of driving and to the state of being impaired in order to make the offence complete. The defence that the accused became impaired through no act of his own will and could not reasonably be expected to have known that his ability was impaired or might thereafter become impaired when he undertook to drive and drove his motor vehicle, was a good defence in this case.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing the conviction of the accused. Appeal dismissed.

W. C. Bowman, Q.C., for the appellant.

Irving Himel, Q.C., for the respondent.

TASCHEREAU J.:—I substantially agree with the reasons of my brother Ritchie, and I only wish to add a few personal observations.

In his judgment the trial judge, His Honour Judge Timmins, came to the conclusion that s. 223 of the *Criminal Code* is an express prohibition in respect to driving a motor car when the driver had a drug impairing his driving, and that the defence set up by the accused that this was all involuntary, was not a defence against this section. The Court of Appeal of Ontario[1] reached a different conclusion and held that no moral fault could be imputed to the accused and that the act committed in the circumstances of this case must be regarded as involuntary. It held also that the undertaking of the accused to drive the motor car was not a conscious act of the respondent's volition.

The trial judge found the accused guilty, but the Court of Appeal directed a verdict of acquittal. In this Court, special leave to appeal was granted on the following question:

> Whether the Court of Appeal erred in law in holding that mens rea relating to both the act of driving and to the state of being impaired by *alcohol or drug* is an essential element of the offence of driving while impaired contrary to section 223 of the Criminal Code.

[1] [1961] O.W.N. 37, 34 C.R. 264, 129 C.C.C. 391.

This section 223 Cr. C., under which the respondent was charged, reads as follows:

> 223. DRIVING WHILE ABILITY TO DRIVE IS IMPAIRED. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable. . . .

The Crown's contention is that under s. 223 Cr. C., the driver of an automobile, whether conscious or not, if he has imbibed liquor or drugs, is guilty of driving while impaired. The result is, as found by the trial judge, that although involuntarily impaired, the accused cannot be absolved.

The Crown did not appeal to this Court that part of the judgment of the Court of Appeal dealing with the mental capacity of the respondent. Therefore, the question of jurisdiction of the Court of Appeal to deal with the mental capacity of the respondent is not before this Court. The real question arises from the statement of the trial judge (trial *de novo*) who said in his judgment: "The defence set by the accused that this was all involuntary is not a defence as against this section." The majority of the Court of Appeal took the opposite view.

I entirely disagree with the proposition of the Crown that whether the accused knew he was impaired or not he must be found guilty, and that under s. 223 Cr. C., no mental element has to be considered, and that the mere fact of impairment is sufficient to create the offence.

It is my view that there can be no *actus reus* unless it is the result of a willing mind at liberty to make a definite choice or decision, or in other words, there must be a will-power to do an act whether the accused knew or not that it was prohibited by law.

These words *mens rea,* though they are in common use, are, as Stephen J. said in *The Queen v. Tolson*[1], most unfortunate and not only likely to mislead but actually misleading. In the present case, intention must not be confused with *mens rea.* Intention is not an element of the offence of driving while impaired by liquor or drugs, when the offender voluntarily takes liquor or drugs, and then drives a motor vehicle or takes the care or control of it. There must be an

[1] (1889), 23 Q.B.D. 168, 60 L.T. 899, 16 Cox C.C. 629.

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act proceeding from a free will that may bring about the mental condition necessary to meet the requirements of s. 223 Cr. C.

When a doctor has given an injection of a drug to a patient, who is not aware of the state of mind it may produce, there is no volitive act done by the driver and he cannot be convicted.

I would dismiss the appeal.

The judgment of Locke and Judson JJ. was delivered by

LOCKE J.:—The charge laid against the respondent and which was tried by a magistrate in Toronto was that he did on October 8, 1959, at the Municipality of Metropolitan Toronto, unlawfully:

> While his ability to drive a motor vehicle was impaired by a drug, drive a motor vehicle License No. 94,547 for the year 1959, at about 3.35 p.m. on Indian Grove near Dundas St. W., contrary to the Criminal Code, section 223.

Section 223 reads in part:

> Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction . . .

The Crown elected to proceed by asking for a summary conviction and the matter was so dealt with by the police magistrate who found the respondent guilty and imposed a fine.

The respondent appealed from this conviction to a County Court judge of the County of York, under the provisions of s. 720 of the *Criminal Code*. After a trial *de novo*, as required by s. 727, before His Honour Judge Timmins, the conviction was affirmed and the appeal dismissed. The learned County Court judge gave reasons for his judgment and made findings of fact upon which he based his conclusion.

The appeal to the Court of Appeal was taken under the provisions of s. 743 of the *Criminal Code* with leave of that Court. The section, so far as relevant, reads:

> An appeal to the Court of Appeal as defined in section 581 may with leave of that court be taken on any ground that involves a question of law alone, against
>
> (*a*) a decision of a court in respect of an appeal under section 727.

The application for leave to appeal to the Court of Appeal was made upon various grounds and, while leave was granted, the question of law in respect of which the leave was granted is not stated in the judgment of that Court.

The Crown applied to this Court for leave to appeal from the judgment of the Court of Appeal[1] and that leave was granted on the following question of law:

> Whether the Court of Appeal erred in law in holding that *mens rea* relating to both the act of driving and to the state of being impaired by alcohol or drug is an essential element of the offence of driving while impaired, contrary to section 223 of the Criminal Code.

At the outset of this appeal there lies the question as to whether this question of law arises upon the facts which are to be considered. This is an appeal and not a reference and, unless the question arises upon the facts as found by the learned County Court judge, it should not, in my opinion, be answered.

The judgment of the majority of the Court of Appeal, to which I will hereafter refer, disagreed with the findings made by the learned County Court judge but, as to this, and with the greatest respect, it is upon the facts as found by the County Court judge alone that we can deal with this matter.

The findings of the learned County Court judge were, so far as they need be considered, expressed as follows:

> The accused King had gone to see an oral surgeon and had made an appointment to have two teeth extracted on the 8th of October 1959. He attended at the office, the dentist office around two o'clock in the afternoon and he was asked to fill out a form to give the dentist certain written instructions and he says that he filled out the form and then he says that the dentist gave him a needle. The teeth were then extracted and he was taken into the recovery room where he remained for, I believe, half an hour and after that when he came to there was a nurse who had conversation with him, gave him certain instructions and asked him how he was going home and warned him about driving a motor vehicle and then she gave him a receipt and then he left. He walked over to where he had his motor car parked and he proceeded to drive away. He hadn't gone very far when he said he became unconscious and had a slight accident with another car. Now in a general way that is the evidence.

After referring to the statement of the accused that he did not know anything about sodium pentothal or what its effect would be and that he remembered signing a form but did not admit that there was any warning on the form in respect

[1] [1961] O.W.N. 37, 34 C.R. 264, 129 C.C.C. 391.

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of the drug and that he did not deny the conversation with the nurse, merely saying that he did not remember it, the learned judge said:

> He says at the time that he was leaving the office he was not asked if his head was clear although he says that his head was clear. Now the serious defence of the accused is that he had no knowledge of the drug, he did not know anything about the effect of the drug on him and that there was nothing voluntary on his part in respect to driving of the motor car because he was unconscious at the time of the accident and that he cannot be responsible for something that he did involuntarily. The next thing is that he did not know what effect the drug would have therefore he did not know that when he got into his motor car that he might not be subject to further effects of the drug. In other words he says I had no knowledge that it was this drug that was administered to me, I had not knowledge of what the effect would be on me and I have no recollection of this warning that was said to have been given to me and if I did anything that was wrong it was involuntary.

After referring to s. 223 of the Code, the reasons proceed:

> Now having regard to the evidence of the accused, he knew that he had a drug and he was given a warning, with respect to not driving a motor car. The section is an express prohibition in respect to driving a motor car when you have had a drug which will impair your driving and that the defence set up by the accused that this was all involuntary is not a defence as against this section. There were certain warnings that we have heard in evidence here today and I have got to pay some attention to. First is that he was expected to sign a form, and that form contained a warning,—"Patient is cautioned not to drive after anaesthetic until head clears." I would have thought that that warning in itself was sufficient and the accused does not admit that he signed this form, he admits he signed some form.
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> * * *
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> Now the other warning was that Nurse Childs saw him when he regained consciousness in the recovery room and that she talked with him, she gave him some instructions, his account was paid and she asked him how he was going home and he said that he was walking, she told him you can't drive until your head is perfectly clear, he said that he was walking and he left.
>
> * * *
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> This young man apparently had his motor car in the district to drive home. He knew that he was going to get some treatment, some injection or he was going to be given something in the doctor's office in order to have his teeth extracted. He was given a drug intravenously and a certain state of amnesia was produced. He was given a warning I find by the dental nurse. I find as a fact that he was given that warning but whether he deliberately lied to the nurse or whether he unconsciously lied to her the fact of the matter is that he did misinform the nurse that he was walking. He took the responsibility of going to the car, he took the responsibility of driving his car knowing that he had had a drug, he was driving his car and the charge is that he was in charge of a motor vehicle when his ability was impaired. There is no doubt that on all the evidence that he was impaired. In argument by counsel for the accused there were reflections cast upon the dental profession that they should never allow persons who have had this drug in respect to extractions of teeth to leave their office unless he

is accompanied by some other adult person so that he cannot get into trouble. In this case there were warnings and the accused paid no attention to them.

The judgment of the majority of the Court of Appeal was given by Schroeder J.A. and it is upon the facts as found by him that the case for the respondent has been argued before us. In the reasons delivered by that learned judge the following appears:

The learned County Court judge reached the conclusion upon the evidence that the appellant was or should have been aware that his ability to drive a motor car might be impaired by the use of this drug and accordingly he held that he was bound to uphold the conviction. In my respectful opinion the evidence falls far short of supporting that conclusion. On the contrary, the evidence indicates at most that the accused was advised by the nurse and at a time when his mind was probably in a muddled or confused state (undetected mental impairment as described by Dr. Lucas) that he should not drive "until his head was perfectly clear." It is highly probable that, as he stated, he did not observe the caution on the printed form mentioned by Dr. Richards. The evidence of Dr. Lucas suggests rather forcibly that the appellant would not have been fully restored to normalcy for at least eight hours, yet he was told that he should not drive until "his head was perfectly clear." This was left to the judgment of a man who, at that time, was probably in a state of "undetected mental impairment." In that condition, he would unwittingly delude both the nurse and himself. The evidence overwhelmingly supports the view that when the appellant undertook to drive his motor car he did not know and could not reasonably be expected to have known that his ability to drive was then or might thereafter become impaired, and in a criminal case any contrary view would, in my opinion, be untenable.

The question to be determined is whether the absence of such knowledge on the part of the appellant in the particular circumstances is sufficient to exculpate him.

Later the reasons continue:

The problem thus presented is this: If A attends at the office of a duly qualified surgeon where a drug is administered to him, and he honestly believes that such drug does not possess properties which will impair or are likely to impair his ability to drive a motor car; or to fit the case at bar more precisely—if he is led to believe and honestly believes that when his head is perfectly clear the drug cannot then have the effect of impairing his ability to drive and he, in good faith, believes that advice and acts upon it, would A, in the supposed circumstances, be guilty of the crime of driving a motor car while his ability to drive was impaired if that condition should develop unexpectedly after he had entered his motor car and had commenced to operate it?

And again:

Where, therefore, a person is given a drug by his physician who does not warn him that it is likely to affect his ability to drive, and the patient not being negligent in failing to realize that fact, the drug takes sudden effect while he is driving he would not, in my view, be guilty of an offence against section 223. The facts must be viewed as a whole commencing at

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the point when the drug was first administered by the doctor. The conclusion cannot be avoided that in that case the patient was not even negligent.

* * *

Here the appellant had no reason to anticipate that the drug administered to him would impair his ability to drive a motor car "after his head had cleared." His undertaking to drive or his driving of the motor car was not, in the circumstances, a conscious act of the appellant's volition.

* * *

Unless the appellant knew or ought to have known that when he undertook to drive, the effect of the drug would incapacitate him within the meaning of section 223, he could not have entertained the will to drive while his ability to do so was impaired or was likely to become impaired.

McKay J.A., who dissented and would have dismissed the appeal, agreed with the findings of fact made by the learned trial judge but pointed out that the form signed by the respondent which contained the warning against driving was signed on Tuesday October 6th, two days in advance of the extraction of his teeth, at which time there is no suggestion that he was under the influence of any drug, and the further fact that when he was apprehended by the police officer he told him that he had been to the dentist and been given sodium pentothal, which is at variance with the respondent's evidence that he did not know what drug had been given to him, and that this fact was stated by him as his explanation for the accident.

It will be seen from the foregoing that the trial judge found as a fact that the respondent knew that he had had a drug and that he was warned not to drive after the anaesthetic. In referring to the warning on the form, the learned judge said that he would have thought that warning was sufficient and found further as a fact that the respondent had been warned by the nurse and that he had made the statement to her that he was walking after leaving the dentist's office, which was untrue, and that his action in driving the car in these circumstances was deliberate. The learned judge did not find that the condition of the respondent was such that he could not appreciate the warnings given to him.

Schroeder J.A. did not proceed upon the footing that there was no evidence to support these findings but, upon his own view of the evidence, he considered that at the time the warning was given by the nurse the respondent was in a muddled or confused state and that it was highly probable

that he did not observe the caution on the printed form and that, in the condition he was, "he would unwittingly delude both the nurse and himself." It was said further that the evidence overwhelmingly supported the view that he "did not know and could not reasonably be expected to have known that his ability to drive was then or might thereafter become impaired." The statement thereafter made as to the question to be determined is based upon the premise that the respondent honestly believed that the drug did not possess properties which would impair or were likely to impair his ability to drive or that he was led to believe and honestly believed that the drug could not have the effect of impairing such ability. These findings directly conflict with those of the judge at the trial.

In my view, the question of law upon which leave to appeal was granted upon the application of the Crown does not arise upon the facts found by the learned County Court judge and these are the facts upon which the appeal must be determined. Upon those findings of fact, in agreement with McKay J.A. I consider that the accused was properly found guilty and the judgment should not have been set aside.

While the findings of fact made in the majority judgment in the Court of Appeal do raise the question propounded, since this is not a reference I do not consider that we should answer the question since it is unnecessary for the disposition of the appeal. Had the respondent been successful in obtaining a finding of fact from the learned County Court judge that he was unaware of the probable effect of the drug and had not been warned as to this, issues which were matters of defence, the situation would be otherwise, but there are no such findings.

The Crown, however, did not ask leave to appeal on the ground that the Court of Appeal had exceeded its jurisdiction and the question was not argued before us. In these circumstances, the proper course to be pursued, in my opinion, is to dismiss this appeal.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal by the Crown at the instance of the Attorney-General for Ontario from a judgment rendered by the majority of the Court of Appeal of

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that province[1] (MacKay J.A. dissenting) which allowed the respondent's appeal from a conviction entered against him after a trial *de novo* held before Judge Timmins of the County Court of the County of York for the offence of driving a motor vehicle while his ability to do so was impaired by a drug contrary to s. 223 of the *Criminal Code.*

The circumstances giving rise to this appeal are that on October 8, 1959, the respondent went to his dentist's office, by appointment, for the purpose of having two teeth extracted, and that he was there injected with a drug known as sodium pentothal, a quick-acting anaesthetic which produces unconsciousness, removes pain and gives a certain amount of relaxation during the period of an operation, and before using which the dentist stated that it was the practice of his office to have patients sign a printed form containing the following warning: "Patients are cautioned not to drive after anaesthetic until head clears." After he had regained consciousness, the respondent paid his bill by cheque to a nurse who was in attendance and who states that at this time he appeared "perfectly normal" and that she warned him not to drive his car until his head was "perfectly clear" to which he replied that he intended to walk. The respondent says that he heard no such warning and remembers signing no form containing any warning, but he does remember getting into his car which he had parked about a block away and proceeding across an intersection, after which he became unconscious, and his car ran into the left rear portion of a parked vehicle, whereafter the police appeared to find that he was staggering and that his physical co-ordination was poor. This was later verified by a sergeant at the police station where the respondent was submitted to certain tests. Medical evidence was given to the effect that this mental and physical condition was consistent with the after-effects of being injected with sodium pentothal and that this drug may induce a state of amnesia accompanied by a period during which the subject may feel perfectly competent to get in a car and drive and in the next second or so be in a condition in which he would not know what was happening. The respondent stated that he did not know anything about the drug which was administered to him.

[1] [1961] O.W.N. 37, 34 C.R. 264, 129 C.C.C. 391.

The learned County Court judge convicted the respondent on the ground that "he knew that he had a drug and he was given a warning with respect to driving a motor car" and also that "he took the responsibility of going to the car, he took the responsibility of driving his car knowing that he had had a drug".

The respondent's sole defence was that he had no knowledge of the effect of the drug which resulted in his being unaware of any warning and unaware of the fact that he was impaired when he took the responsibility to drive and did drive his car.

The County Court judge expressed the following view of the evidence as to the effect of the drug:

> Evidence seems to point out that this would produce amnesia and that the patient would go unconscious and that this may last for some considerable time or it might last just for a short time.

If the County Court judge had found that the respondent knew of the possible effects of the drug before he took it or that he was capable of being aware of the fact that he was impaired when he started to drive and drove his car, then the question now before this Court would not have arisen in this case, but the judge made no such finding but disposed of the respondent's only defence in accordance with his view of the legal effect of s. 223 of the *Criminal Code* which he expressed as follows:

> The section is an express prohibition in respect to driving a motor car when you have had a drug which would impair your driving and that *the defence set up by the accused that this was all involuntary is not a defence against this section.* (The italics are mine.)

Expressing the same opinion in slightly different language, he later said: "There is nothing in Section 223 of the Code about an involuntary act. The section is specific."

The question of law so determined was made a ground of appeal and for leave to appeal to the Court of Appeal of Ontario, and Mr. Justice MacKay, in the course of his dissenting opinion, stated the issue before that Court in the clearest terms, saying: "I think all these grounds of appeal raise only one issue, that is, to what extent, if at all, does the doctrine of *mens rea* apply to this offence."

Just as the learned County Court judge dealt with this issue in the concluding paragraph of his reasons by saying: "In this case the accused was impaired by reason of a drug.

I cannot hold anything else, *and, therefore, the conviction will be affirmed* ....", so Mr. Justice MacKay expressed the same conclusion rather more fully by saying:

> For these reasons I have come to the conclusion that the offence here charged is one of strict liability in which proof of *actus reus* alone is required, that is, proof that the defendant drove his car and was in fact impaired. In this particular case the defendant knew he had been given a drug and he intentionally drove his car. Even if it was a fact that he did not know or did not believe that he was impaired such knowledge or belief is not material and is not a defence.

On the other hand, Mr. Justice Schroeder, speaking for the majority of the Court, stated the exactly opposite view in these words:

> Even in the case of statutory crimes, therefore, the offender should not be condemned if his conduct was not voluntary, save in cases where such exception is expressly or by necessary implication excluded in the Act creating the offence. . . .
>
> Unless the appellant knew or ought to have known that when he undertook to drive, the effect of the drug would incapacitate him within the meaning of section 223, he could not have entertained the will to drive while his ability to do so was impaired or was likely to become impaired. This is a true case of *ignorantia facti* which should have been held to have excused the *actus reus* prohibited by the statute.

These quotations are sufficient to indicate the sharp difference of opinion which existed in the Courts below as to a decisive question of law, and although it may be said, with all respect, that the judges in the Court of Appeal strayed into the making of some unnecessary observations on the facts, it is nonetheless the question of law which gave rise to this difference which has been made the subject of the sole ground upon which leave to appeal to this Court has been granted under the provisions of s. 41(3) of the *Supreme Court Act*. That question is expressed in the order by which leave to appeal was granted as follows:

> Whether the Court of Appeal erred in law in holding that mens rea relating to both the act of driving and to the state of being impaired by alcohol or drug is an essential element of the offence of driving while impaired contrary to Section 223 of the Criminal Code.

The provisions of s. 223 of the Code are as follows:

> 223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable

(a) for a first offence, to a fine of not more than five hundred dollars and not less than fifty dollars or to imprisonment for three months or to both,
(b) for a second offence, to imprisonment for not more than three months and not less than fourteen days, and
(c) for each subsequent offence, to imprisonment for not more than one year and not less than three months.

The cases in England and Australia which have been so fully reviewed by the Court of Appeal indicate that there have been differences in approach in determining the extent to which "knowledge of the wrongfulness of the act" is to be regarded as a constituent in statutory offences.

In the decision of Wright J. in *Sherras v. De Rutzen*[1], that learned judge stated:

> There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered.

On the other hand, in the case of *Hobbs v. Winchester Corporation*[2], which involved the sale of tainted meat contrary to the *Public Health Act*, Kennedy L.J. concluded that "there is a clear balance of authority that in construing a modern statute this presumption as to *mens rea* does not exist".

The weight of opinion, however, clearly favours the view expressed by Wright J. and the rule has been forcefully stated on more than one occasion by Lord Goddard C.J. who expressed himself in the following language in *Harding v. Price*[3]:

> The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in *Brend v. Wood*, (1946) 62 T.L.R. 462, 463: "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind".

(See also *Younghusband v. Luftig*[4], and the decision of the Supreme Court of Nova Scotia in *Regina v. Jollimore*[5] per Mr. Justice V. C. MacDonald at p. 306 *et seq.*)

[1] [1895] 1 Q.B. 918 at 921.
[2] [1910] 2 K.B. 471.
[3] [1948] 1 K.B. 697 at 700, 1 All E.R. 283.
[4] [1949] 2 All E.R. 72 at 80, 2 K.B. 354.
[5] (1961), 36 C.R. 300, 131 C.C.C. 319.

This view has been adopted by this Court in unmistakable terms in *Beaver v. The Queen*[1], where Cartwright J., speaking for the majority of the Court at p. 538, adopted the following statement made by Estey J. in *Watts and Gaunt v. The Queen*[2]:

> While an offence of which *mens rea* is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention.

As there is no express language in s. 223 of the *Criminal Code* disclosing the intention of Parliament to rule out *mens rea* as an essential ingredient of the crime therein described, it becomes necessary to determine whether it can be said that such an intention is disclosed by necessary implication.

In classifying the types of statute in which such an intention has been implied, the learned authors, writing under the title "Criminal Law and Procedure" in vol. 10 of Halsbury's Laws of England, 3rd ed., at p. 275, adopt the three exceptions to the general rule which are suggested by Wright J. in *Sherras v. De Rutzen, supra,* at p. 921 and state:

> Most statutes creating a strict liability fall under three heads. First, where the acts are not criminal in any real sense, but are prohibited under a penalty in the public interest. Secondly, where the acts are public nuisances; thus, an employer has been held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders. Thirdly, where, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right.

Mr. Justice MacKay concluded that s. 223 of the *Criminal Code* comes within the first exception to the general rule in that it is "an act perhaps not criminal in any real sense but which is in the public interest prohibited". He finds that:

> A person whose ability to drive is impaired by alcohol or drugs, driving on the highway, is a danger to the general public and in my view the offence falls within the first classification referred to by Wright J. in the *Sherras* case. It is an act perhaps not criminal in any real sense but which is in the public interest prohibited.

I am, with respect, unable to agree that the offence created by s. 223 is "perhaps not criminal in any real sense". On the contrary, it appears to me that if a person takes charge of a motor vehicle on the highways of this country knowing that his ability to do so is impaired by alcohol or

[1] [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129.

[2] [1953] 1 S.C.R. 505 at 511, 16 C.R. 290, 105 C.C.C. 193, 3 D.L.R. 152.

a drug, he is doing an act which is not only criminal in the sense of being punishable by the *Criminal Code* but which is also criminal in the "real sense" as those words were used by Wright J. because such a driver must be taken to be aware that his impaired condition constitutes a danger to the life, limb and safety of other users of the highway, and the question of whether he acted knowingly or not, therefore, seems to me to be all the more important.

It is to be observed also that when Wright J. was referring to acts "which . . . are not criminal in any real sense, ..." he was referring to such things as the possession of liquorice by a beer retailer, the possession of adulterated tobacco, the possession of game by a carrier and such like matters, all of which are far removed from the offence of driving a potentially highly dangerous machine when your ability to do so is impaired.

In my view the seriousness of the offence created by s. 223 removes it entirely from the categories referred to by Wright J. and this will be seen to be recognized by the mandatory provisions in s. 223(*b*) and (*c*) which provide for imprisonment for a second or subsequent offence.

In the course of his decision in *Beaver v. The Queen, supra,* at p. 542, Cartwright J. had occasion to observe that in that case:

> Counsel informed us that they have found no other statutory provision which has been held to create a crime of strict responsibility, that is to say, one in which the necessity for *mens rea* is excluded, on conviction for which a sentence of imprisonment is mandatory.

No such statute has been referred to us in the present case, and it appears to me that the nature of the penalty imposed by s. 223(*b*) and (*c*) affords an indication that Parliament did not intend to exclude *mens rea* as an essential ingredient of the offence which it created.

It is, however, submitted on behalf of the appellant that s. 223 ought to be construed to create an offence of absolute liability on the ground that "the object of the legislation is patently to protect the public from danger", but I am unable to agree that the legislative intention to protect the public from harm or danger can, of itself, provide an exception to the general rule as to the existence of *mens rea.* If

this were so, it would indeed encompass a wide variety of criminal acts, for as Rand J. said in *Lord's Day Alliance v. Attorney-General for British Columbia*[1]:

> Undoubtedly criminal acts are those forbidden by law, ordinarily at least if not necessarily accompanied by penal sanctions, *enacted to serve what is considered a public interest or to interdict what is deemed a public harm or evil.* (The italics are mine.)

In the course of his most interesting dissenting opinion, MacKay J.A. refers to the decision of Dixon J. of the High Court of Australia in *Proudman v. Dayman*[2]. The learned judge in that case was dealing with an offence against the *Road Traffic Act* of South Australia which is a jurisdiction where no code of criminal law exists, and he had occasion to say of the presumption as to the existence of *mens rea* as an essential ingredient of crime:

> The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced.

In my view the enactment of s. 223 of the *Criminal Code* added a new crime to the general criminal law, and neither the language in which it was enacted nor the evil which it was intended to prevent are such as to give rise to a necessary implication that Parliament intended to impose absolute liability unless the impaired condition which the section prohibits was brought about by some conscious act of the will or intention.

Consideration of this phase of the question should not be concluded without noting the decision in *Armstrong v. Clark*[3], in which the Queen's Bench Division had to consider the question of

> . . . whether the taking of insulin by the respondent was, in the circumstances which occurred, to be regarded as taking a drug which would make him liable to be found guilty of an offence under s. 15(1) . . . .

of the *Road Traffic Act,* and in which Lord Goddard said:

> This case must go back with a direction that the justices may take into account a great many things, but they must remember, and everyone must remember, that this section was designed for the protection of the

[1] [1959] S.C.R. 497 at 508, 30 C.R. 193, 123 C.C.C. 81, 19 D.L.R. (2d) 97.
[2] (1941), 67 C.L.R. 536 at 540.
[3] [1957] 1 All E.R. 433, 2 Q.B. 391.

public, and if people happen to be in a condition of health that renders them subject to going into a coma, or forces them to take remedies which may send them into a coma, the answer is that they must not drive because they are a danger to the rest of Her Majesty's subjects.

I do not think that anything that was said by Lord Goddard in that case can be taken as changing the law with respect to *mens rea* in statutory offences as it was stated by the same learned judge and adopted by this Court in the cases hereinbefore referred to. It is noteworthy, however, that in the course of this decision, Lord Goddard does make the observation with respect to the statutory offence with which he was dealing: "The penalty, I need hardly say, is entirely at the discretion of the bench."

The existence of *mens rea* as an essential ingredient of an offence and the method of proving the existence of that ingredient are two different things, and I am of opinion that when it has been proved that a driver was driving a motor vehicle while his ability to do so was impaired by alcohol or a drug, then a rebuttable presumption arises that his condition was voluntarily induced and that he is guilty of the offence created by s. 223 and must be convicted unless other evidence is adduced which raises a reasonable doubt as to whether he was, through no fault of his own, disabled when he undertook to drive and drove, from being able to appreciate and know that he was or might become impaired.

If the driver's lack of appreciation when he undertook to drive was induced by voluntary consumption of alcohol or of a drug which he knew or had any reasonable ground for believing might cause him to be impaired, then he cannot, of course, avoid the consequences of the impairment which results by saying that he did not intend to get into such a condition, but if the impairment has been brought about without any act of his own will, then, in my view, the offence created by s. 223 cannot be said to have been committed.

The existence of a rebuttable presumption that a man intends the natural consequences of his own conduct is a part of our law, but its application to any particular situation involves a consideration of what consequences a man might be reasonably expected to foresee under the circumstances.

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THE QUEEN v. KING

Ritchie J.

In the course of the lecture on "The Criminal Law" which is contained in the well-known work by O. W. Holmes Jr. on the "Common Law", that learned author says:

> As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law.

It seems to me that it can be taken as a matter of "common experience" that the consumption of alcohol may produce intoxication and, therefore, "impairment" in the sense in which that word is used in s. 223, and I think it is also to be similarly taken to be known that the use of narcotics may have the same effect, but if it appears that the impairment was produced as a result of using a drug in the form of medicine on a doctor's order or recommendation and that its effect was unknown to the patient, then the presumption is, in my view, rebutted.

For all the above reasons, I do not think that the Court of Appeal erred in holding that *mens rea* was an essential element of the offence of driving while impaired contrary to s. 223 of the *Criminal Code,* but I am of opinion that that element need not necessarily be present in relation both to the act of driving and to the state of being impaired in order to make the offence complete. That is to say, that a man who becomes impaired as the result of taking a drug on medical advice without knowing its effect cannot escape liability if he became aware of his impaired condition before he started to drive his car just as a man who did not appreciate his impaired condition when he started to drive cannot escape liability on the ground that his lack of appreciation was brought about by voluntary consumption of liquor or drug. The defence in the present case was that the respondent became impaired through no act of his own will and could not reasonably be expected to have known that his ability was impaired or might thereafter become impaired when he undertook to drive and drove his motor vehicle.

I would dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: W. C. Bowman, Toronto.

Solicitor for the respondent: I. Himel, Toronto.

THE HOSPITAL FOR SICK CHILDREN, THE TRUSTEES OF THE TORONTO GENERAL HOSPITAL AND THE PUBLIC TRUSTEE ..APPLICANTS;

1962
*Jun. 4
Jun. 11

AND

MARY ELIZABETH O'BRIEN, LINDA HAMBLY, DONALD BLACKWELL, CANADA PERMANENT TORONTO GENERAL TRUST COMPANY AND THE OFFICIAL GUARDIAN ....RESPONDENTS.

MOTION FOR LEAVE TO APPEAL

Appeals—Jurisdiction—Practice and procedure—Motion for leave to appeal—Application for extension of time to appeal to Court of Appeal—The Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

The applicants were seeking, pursuant to s. 41 of the *Supreme Court Act*, to appeal from a judgment of the Court of Appeal for Ontario which had refused an application, made on April 11, 1962, to extend the time for appealing to that Court from a judgment of the High Court pronounced on May 12, 1959.

Held: The application should be dismissed.

Assuming, without deciding, that this Court had jurisdiction to grant the leave asked for, this was not a case in which leave ought to be granted.

MOTION for leave to appeal from a judgment of the Court of Appeal for Ontario refusing to extend time to appeal to that Court. Motion dismissed.

C. F. H. Carson, Q.C., for the applicants.

J. D. Arnup, Q.C., for the respondents.

F. T. Watson, Q.C., for the Official Guardian.

M. Johnston, for the Public Trustee.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is a motion brought pursuant to s. 41 of the *Supreme Court Act* for leave to appeal to this Court from the orders of the Court of Appeal for Ontario, dated May 7, 1962, dismissing the applications of the applicants for orders extending the time for appealing to the Court of Appeal for Ontario from a judgment of the Honourable the Chief Justice of the High Court pronounced on May 12, 1959.

We are all of opinion that leave to appeal should be refused.

*PRESENT: Cartwright, Martland and Judson JJ.

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HOSPITAL FOR SICK CHILDREN *et al.* *v.* O'BRIEN *et al.*
Cartwright J.

It is not customary for the Court to give extended reasons for allowing or refusing leave to appeal except where questions of our jurisdiction arise. In this case it was submitted that we have no jurisdiction to grant leave to appeal from an order of the Court of Appeal granting or refusing an extension of time for appealing to that Court. The question was fully argued, reference being made to the decision of the House of Lords in *Lane v. Esdaile*[1] and to other authorities.

We have not found it necessary to deal with this question. For the purposes of this motion we have assumed, without deciding, that we have jurisdiction to grant the leave asked for and on that assumption we are all of opinion that this is not a case in which leave ought to be granted.

The application is dismissed with costs.

Application dismissed.

1962
*Feb. 19, 20
Jun. 25

REJEAN TETREAULT AND LEO LUSSIER (*Defendants*) .... APPELLANTS;

AND

MAURICE GAGNON (*Plaintiff*) .... RESPONDENT.

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

Contracts—Real property—Execution of deed—Onerous contract—Right of habitation—Sale of house to take effect after death—Whether gift inter vivos—Whether commutative contract.

A spinster, whose health was failing, offered to give rent-free accommodation to her former employee and friend, and the latter's husband and family, on condition that during her lifetime she would be looked after by the former employee. She also gave a promise of sale of the house where she was living, and if the conditions were fulfilled, on her death, the former employee and her husband would become proprietors of the house by virtue of a deed that her legatees would execute. The spinster died a few days after the signature of the document which was not registered. The defendants, as executors, contended that the agreement was in the nature of a gift *inter vivos* of real property and void for lack of registration during the donor's lifetime. The trial judge dis-

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

[1] [1891] A.C. 210, 64 L.T. 666

missed the action on that ground. This judgment was reversed by the Court of Queen's Bench where the majority held that it was not a gift *inter vivos* but an onerous contract. The executors appealed to this Court.

Held: The appeal should be dismissed. Even though the plaintiffs took the attributes of donees by reason of the fact that due to the sudden death they did not have to give anything in return, this should not affect the consideration of the question. There can be no gift without an *animus donandi* and a transmission of values without the receipt of something equivalent. Equivalence does not mean equality. The solution of the question could not depend solely on a purely mathematical comparison between the value of what was given and the value of the obligations assumed, as this would entirely disregard the factor of intention. The Court of Appeal had correctly held that the agreement was not a gift but a commutative contract. Each of the parties in this case expected to receive a benefit from the other equivalent to the benefit it was to bestow on the other.

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

Roch Pinard, Q.C., for the defendants, appellants.

Gérard Beaupré and *Marcel Trudeau*, for the plaintiff, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Les appelants, ès-qualité d'exécuteurs testamentaires de feu Marie-Anne Martel, appellent d'une décision majoritaire de la Cour du banc de la reine[1] infirmant le jugement de la Cour supérieure qui avait rejeté l'action en passation de titres intentée contre eux par l'intimé, tant personnellement qu'en sa qualité de chef de la communauté existant entre lui et son épouse.

Voici sommairement les circonstances donnant lieu à ce litige. Mademoiselle Martel résidait à Montréal et, de 1941 à 1947, y exploitait un restaurant avec l'assistance de son employée et amie, Dame Gagnon, épouse de l'intimé, qui était alors célibataire. Les deux vivaient ensemble à l'arrière de l'établissement. Advenant 1947, Mademoiselle Martel dut, sur l'avis de son médecin, abandonner cette exploitation. Elle se fit construire une maison à appartements où elle et son amie allèrent continuer de vivre en commun jusqu'au jour où, en décembre 1948, cette dernière épousa l'intimé. Les époux Gagnon s'installèrent dans un logement contigu à celui de Mademoiselle Martel et y demeurèrent

[1] [1961] Que. Q.B. 195.

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jusqu'en 1954 alors qu'en raison de la naissance d'un nouvel enfant, ils durent aller loger dans un appartement moins exigu. Après, comme avant le mariage, Dame Gagnon continua de prodiguer à Mademoiselle Martel son amitié et son assistance. Durant l'été de 1955, Mademoiselle Martel fit une thrombose cérébrale ou une nouvelle hémiplégie. Alors âgée de 57 ans, sans aucun parent à Montréal et ne pouvant aucunement se suffire à elle-même, elle songea qu'en offrant des compensations appropriées, elle pourrait peut-être persuader Dame Gagnon à venir, avec sa famille, vivre avec elle jusqu'à la fin de ses jours et qu'elle pourrait ainsi s'assurer, jusqu'à son décès, la sécurité, l'attention et tous les soins impérieusement nécessaires à son état. Elle fit part de ce projet aux Gagnon. Ces derniers acceptèrent d'y donner suite aux termes et conditions arrêtés dans une convention notariée, faite et signée par les parties le 1er septembre 1955. C'est sur ce contrat que se fonde l'action en passation de titres faisant l'objet du litige.

Il suffit de donner la substance des obligations réciproquement assumées par les parties aux fins ci-dessus. Mademoiselle Martel s'engagea à partager son appartement avec les Gagnon et à faire faire les travaux nécessaires à l'aménagement du sous-sol de l'immeuble pour l'usage exclusif de leur famille, et ce, sans charge de loyer. Elle leur consentit, de plus, une promesse de vente de son immeuble pour un dollar et en considération des obligations assumées par ceux-ci à son endroit; convenant, les parties, que l'acte de vente serait différé à la mort de Mademoiselle Martel pour être alors exécuté par ses héritiers ou représentants légaux, et que les Gagnon y assumeraient les charges ou toute hypothèque affectant l'immeuble et respecteraient les baux existants. Il fut entendu que Mademoiselle Martel ne pourrait vendre ou autrement disposer de sa propriété, gardant cependant le droit de renouveler ou remplacer l'hypothèque l'affectant, conservant tous droits et pouvoirs d'administration tel que le droit de louer, percevoir les loyers et revenus de l'immeuble, ainsi que les obligations du propriétaire, jusqu'à son décès. Les Gagnon, d'autre part, s'obligèrent à vivre avec Mademoiselle Martel, à prendre soin de sa personne, à lui fournir le logement, la nourrir et l'entretenir à leurs frais— sauf les frais médicaux et autres dépenses extraordinaires

dépendant de son état—jusqu'à sa mort. Les parties stipulèrent que cette convention prendrait fin soit par consentement mutuel, soit par la volonté unilatérale des Gagnon ou à leur défaut de remplir fidèlement leurs obligations, soit enfin dans le cas où Dame Gagnon prédécéderait Mademoiselle Martel.

A la date même de cette convention, Mademoiselle Martel fit son testament, disposant de ses biens en faveur des personnes désignées et assignées en la présente action comme mises-en-cause.

Onze jours plus tard, soit le 12 septembre 1955, Mademoiselle Martel décédait.

L'intimé requit alors les appelants de lui signer le contrat de vente et, sur leur refus, institua contre eux la présente action.

En défense, les exécuteurs testamentaires plaidèrent, *inter alia,* que cette convention du 1er septembre 1955 constitue une *donation entre vifs* de biens immobiliers, frappée de nullité par défaut d'enregistrement du vivant de la donatrice, et qu'en conséquence l'immeuble en question était dévolu aux héritiers testamentaires de Mademoiselle Martel.

Dans un jugement fort élaboré, M. le Juge Brossard, de la Cour supérieure, analyse tous les moyens de défense, retenant comme étant le seul fondé le moyen ci-dessus spécifié. Pour ce motif, la Cour déclare que la convention est sans valeur et sans effet quant aux exécuteurs testamentaires et aux héritiers mis-en-cause, et rejette l'action.

Ce jugement fut infirmé par une décision majoritaire de la Cour d'Appel. M. le Juge en chef Galipeault et MM. les Juges Hyde, Rinfret et Owen, de la majorité, étant d'opinion que la convention du 1er septembre 1955 n'est pas une donation mais bien un contrat onéreux, accueillent l'action de l'intimé et condamnent les appelants à lui passer titres. Dissident, M. le Juge Bissonnette exprime l'avis que les parties à cette convention ont, consciemment ou non, formé une *donation à cause de mort* et, partant, un contrat prohibé par la loi. Pour ce motif, différent de celui retenu en Cour de première instance, il confirme le dispositif du jugement de la Cour supérieure.

De là l'appel des exécuteurs testamentaires à cette Cour.

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Fauteux J.

La question fondamentale à déterminer est de savoir si, comme le prétendent les appelants, Mademoiselle Martel, dans une intention libérale et sans contre-partie équivalente, s'est, dans les circonstances, irrévocablement dépouillée de son immeuble en faveur des Gagnon ou si, comme ces derniers le soumettent, cette convention du 1er septembre 1955 constitue un acte commutatif et non pas un acte de libéralité.

Si, pour résoudre la question, il fallait s'en tenir au sens littéral de certains termes utilisés à l'acte, on ne saurait y voir de donation. C'est à la commune intention des parties contractantes qu'il faut, cependant, s'attacher en se reportant au temps de l'exécution de la convention. Et doit être écarté de la considération le fait qu'en raison de la soudaineté imprévue du décès subséquent de Mademoiselle Martel,—dont les expectatives de vie étaient de dix ans, suivant l'opinion de son médecin,—les Gagnon, recevant tout sans avoir eu rien à donner encore, prennent, en fait, vraiment figure de donataires.

Il n'y a pas de libéralité sans la présence de l'élément intellectuel ou psychologique, l'*animus donandi,* et sans la présence de l'élément matériel, la transmission de valeurs sans contre-partie équivalente. Planiol et Ripert (1933), tome 5, pp. 327 *et seq*. Dans le cas où celui qui reçoit reçoit subordonnément à l'exécution de certaines charges, on considère, particulièrement, pour déterminer la nature de l'acte, si ces charges sont stipulées au profit de celui qui donne, ou au profit d'un tiers, et si elles sont équivalentes ou non à la valeur de ce qui est donné. Il s'agit d'équivalence et non d'égalité. En toute déférence, la solution ne saurait dépendre uniquement d'une comparaison purement mathématique entre la valeur des biens donnés et la valeur des charges imposées; ce serait ne tenir aucun compte du facteur intentionnel. Le contrat sera tenu comme un contrat commutatif et non comme une donation «s'il réunit des parties qui ne se sont engagées qu'à raison de ce fait que chacune d'elles estime recevoir de l'autre un avantage correspondant à celui qu'elle lui procure. Alors seulement on peut dire qu'il y a équivalence entre les prestations des parties.» Baudry-Lacantinerie, Droit Civil, tome 10, p. 515, n° 1136. Voilà le critère qui doit nous guider et qui, à mon avis, a été appliqué à l'espèce par les Juges de la majorité en Cour du banc de la reine, pour conclure, à bon droit je crois, que la convention

du 1er septembre 1955 n'est pas une donation mais un contrat commutatif. Si l'on considère, d'une part, que Mademoiselle Martel vivait seule, sans proches à Montréal, impotente et dans l'urgente nécessité d'avoir et de s'assurer des soins jusqu'à son décès, et son désir que cette sécurité et ces soins lui fussent donnés par une personne qu'elle connaissait bien, son amie, dame Gagnon, et que, d'autre part, les Gagnon s'engageaient à sacrifier l'intimité de leur vie familiale pour vivre en commun avec Mademoiselle Martel, prendre soin de sa personne, la nourrir et l'entretenir à leurs frais jusqu'à sa mort, et si, de plus, l'on tient compte du fait que les Gagnon ont obtenu le droit de reviser, en aucun temps, leur position et remettre en balance, au regard les uns des autres, les droits et obligations leur résultant de cette convention, il apparaît, à mon avis, qu'en signant le contrat, chacune des parties a estimé recevoir de l'autre un avantage correspondant à celui qu'elle lui procurait.

Pour ces motifs, qui sont en substance ceux des Juges de la majorité en Cour du banc de la reine, je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Attorneys for the defendants, appellants: Pinard, Pigeon, Paré & Lejour, Montreal.

Attorneys for the plaintiff, respondent: Beaupré & Trudeau, Montreal.

1962
*May 7
May 14

G. A. FALLIS AND D. M. DEACON ......APPELLANTS;

AND

UNITED FUEL INVESTMENTS LIMITED .... RESPONDENT.

MOTION TO QUASH

Appeals—Jurisdiction—Practice and procedure—Appeal to Supreme Court of Canada under s. 108 of the Winding-up Act—Motion to quash—Whether necessary amount involved—The Winding-up Act, R.S.C. 1952, c. 296.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Ritchie JJ.

1962
FALLIS *et al.* *v.* UNITED FUEL INVESTMENTS LTD.

The petitioner company was incorporated under *The Companies Act*, R.S.C. 1927, c. 27. The capital of the company was declared to consist, *inter alia*, of a number of non-cumulative class "B" preference shares of a par value of $25 each, and which were not redeemable. It was provided that on the voluntary winding-up of the company, the holders of the class "B" shares would be entitled to the repayment of the amount paid up on such shares and an additional $5 per share. The company petitioned for a winding-up order under s. 10(*b*) of the *Winding-up Act*, R.S.C. 1952, c. 296. The trial judge dismissed the petition. The Court of Appeal reversed this judgment and ordered the winding-up of the company. The appellants, as owners of class "B" shares, were granted leave to appeal to this Court. The company moved to quash the appeal on the ground that there was no amount involved as required by s. 108 of the *Winding-up Act*.

Held: The motion to quash should be dismissed.

The test to be applied in determining whether there is an amount involved in a proposed appeal exceeding $2,000 as required by s. 108, is that set out in the case of *Orpen v. Roberts et al.*, [1925] S.C.R. 364. Applying that test to the present case, the evidence showed that if the winding-up proceeds, the loss for the appellants will be greatly in excess of $2,000. There was, therefore, involved in this appeal an amount exceeding $2,000.

MOTION to quash an appeal from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of McLennan J. and ordering the winding-up of the respondent company. Motion dismissed.

Hon. R. L. Kellock, Q.C., and *D. J. Wright*, for the motion.

J. T. Weir, Q.C., contra.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is a motion on behalf of United Fuel Investments Limited, hereinafter referred to as "the Company", to quash an appeal to this Court brought by George Arthur Fallis and Donald Mackay Deacon from an order of the Court of Appeal for Ontario[1], made on December 14, 1961, setting aside an order of McLennan J., made on July 31, 1961, and ordering that the Company be wound up under the provisions of the *Winding-up Act*. The appeal is brought pursuant to leave granted by my brother Judson on March 16, 1962.

The application before McLennan J. was made on the petition of the company pursuant to s. 10(*b*) of the *Winding-up Act* which reads:

10. The Court may make a winding-up order,

* * *

[1] [1962] O.R. 162, 31 D.L.R. (2d) 331.

(b) where the company at a special meeting of share-holders called for the purpose has passed a resolution requiring the company to be wound up;

McLennan J. ordered that the petition be dismissed with costs.

The order granting leave to appeal was made pursuant to s. 108 of the *Winding-up Act* which reads:

108. An appeal, if the amount involved therein exceeds two thousand dollars, lies by leave of a judge of the Supreme Court of Canada to that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

The sole ground on which the motion to quash is based is set out in the notice of motion as follows:

that the Court has no jurisdiction to hear the appeal because there is no amount involved therein as required by Section 108 of the Winding-up Act.

The company was incorporated by Letters Patent issued under the *Companies Act*, R.S.C. 1927, c. 27, on March 30, 1928. By Supplementary Letters Patent issued on February 7, 1939, an arrangement made between the company and the holders of its preferred shares and the holders of its common shares was confirmed and the capital of the company was declared to consist of 90,000 cumulative Redeemable Class "A" Preference shares of the par value of $50 each, 90,000 non-cumulative Class "B" Preference shares of the par value of $25 each and 90,000 common shares without nominal or par value. The class "B" shares are not redeemable.

It is provided that subject to the rights of the holders of Class "A" Preference shares, the moneys of the company properly applicable to the payment of dividends which the directors may determine to distribute in any fiscal year of the company by way of dividends shall be distributed among the holders of the Class "B" Preference shares and the Common shares pro rata according to the number of shares held.

It is further provided that on the liquidation, dissolution or winding-up of the company the holders of Class "B" shares shall be entitled to the repayment of the amount paid up on such shares and if the winding-up be voluntary to an adidtional $5 per share.

The appellant Fallis has made an affidavit shewing that he is the owner of more than 1200 of the Class "B" Preference shares and expressing the opinion that but for the

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order winding-up the company the market price of the Class "B" shares would now exceed $80 per share. There is no contradiction of this evidence.

If the winding-up is carried out the holders of Class "B" Preference shares will receive $30 per share, as the winding-up is voluntary.

In my opinion the test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen v. Roberts et al.*[1], upholding the judgment of the Registrar affirming jurisdiction. The action was for an injunction to restrain the defendant from erecting a building nearer to the street line than 25 feet and to restrain the municipality from granting a permit for the erection of the proposed building. The report at page 367 reads as follows:

> The Court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss—and therefore the amount or value in controversy—exceeds $2,000.

Applying this test to the facts of the case at bar, the evidence shows that if the winding-up proceeds the appellant Fallis will suffer a loss greatly in excess of $2000. Indeed this would still be so if for Mr. Fallis' estimated figure of $80 were substituted that of $42 which was the lowest price at which the class "B" shares sold on the Toronto Stock Exchange during 1959, the year prior to the one in which the proceedings looking to the winding-up of the company were commenced.

Amongst other cases, counsel for the applicant relied on *Cushing Sulphite-Fibre Co. v. Cushing*[2], the head-note of which reads as follows:

> *Held,* that a judgment refusing to set aside a winding-up order does not involve any amount and leave to appeal therefrom cannot be granted.

As is pointed out in the judgment of the learned Registrar in *Orpen v. Roberts, supra,* cases on this point decided prior to the passing, in 1913, of 3-4 Geo. V., c. 51, s. 5, must be reconsidered in the light of that amendment, by which the predecessor of what is now s. 43 of the *Supreme Court Act* was first enacted.

[1] [1925] S.C.R. 364, 1 D.L.R. 1101. [2] (1906), 37 S.C.R. 427.

The head-note quoted above reads as if the judgment lays down a general rule applicable to all appeals from a winding-up order; on reading the judgment, which was delivered by Sedgewick J., it is not clear whether that was the intention of the Court. At page 428 Sedgewick J. says:

> We are, I think all of opinion that in the present case there is no *amount* involved.

The reasons are short; no mention is made of an affidavit made by Mr. Mariner Teed, of counsel for the appellant company, which is among the original papers on the files of the Court in which he deposes that the amount involved in the said winding-up order and in the appeal sought to be taken to the Supreme Court of Canada "exceeds two thousand dollars and exceeds one hundred thousand dollars".

This affidavit does not give any particulars or say who stands to gain or lose any monetary amount from the result of the appeal, although the material in the appeal case would suggest that it was argued that the making of the winding-up order would cause a loss to the company and therefore to its creditors.

This case was, of course, decided prior to the 1913 amendment and in so far as it appears to lay down any principle contrary to that enunciated in *Orpen v. Roberts, supra,* it ought not to be followed.

In my opinion the material in the case at bar establishes that there is involved in the appeal an amount exceeding $2000.

I would dismiss the motion with costs payable by the respondent to the appellants in any event of the appeal.

Motion dismissed with costs.

Solicitors for the appellants: Wright & McTaggart, Toronto.

Solicitors for the respondent: Blake, Cassels & Graydon, Toronto.

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*May 28
May 28

BUILDING SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 298 (*Defendant*) .... APPELLANT;

AND

L'HOPITAL SAINT-LUC AND JEWISH GENERAL HOSPITAL (*Plaintiffs*) . RESPONDENTS.

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

Labour—Arbitration—Objection to clause in award—Whether arbitrators exceeded jurisdiction—The Public Services Employees' Disputes Act, R.S.Q. 1941, c. 169—The Quebec Trade Disputes Act, R.S.Q. 1941, c. 167.

When the plaintiff hospitals and the defendant union found themselves unable to agree upon a new contract, the matter was referred to a council of arbitration under *The Public Service Employees' Disputes Act*, R.S.Q. 1941, c. 169, and according to the provisions of *The Quebec Trade Disputes Act*, R.S.Q. 1941, c. 167. The council of arbitration rendered its decision which included a formula consisting of the following three clauses:

A partir de la date de ce contrat, l'employeur consent d'engager comme employé seulement les personnes qui donnent volontairement leur autorisation écrite et dûment signée, pour retenir sur leur salaire la cotisation syndicale qui est fixée au montant de $2.50 par mois, pour la durée de la convention.

Il est entendu que cette autorisation ne sera pas demandée comme condition d'emploi, mais sera simplement la modalité pour défrayer le maintien de l'agence négociatrice collective dûment certifiée en vertu de la Loi des relations ouvrières de la province de Québec.

Si l'employeur désire engager une personne qui ne consent pas, pour des raisons personnelles, à donner l'autorisation écrite dont il est question au premier paragraphe, l'employeur pourra engager tel employé, mais dans ce cas l'employeur sera tenu de payer lesdites cotisations en ajoutant le montant de ces cotisations aux argents perçus sous l'article 2, parag. 3.

The hospitals sought the annulment of these three clauses. The trial judge held that the council of arbitration had exceeded its jurisdiction and that the three clauses were therefore illegal and null. This judgment was affirmed by the Court of Queen's Bench. The union appealed to this Court.

Held: The appeal should be dismissed.

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

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

[1] [1960] Que. Q.B. 875.

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BUILDING EMPLOYEES' INT. UNION, LOCAL 298 *v.* HÔPITAL SAINT-LUC *et al.*

J. Gazdik, for the defendant, appellant.

J. Filion, Q.C., for the plaintiffs, respondents.

At the conclusion of the argument of counsel for the defendant union, the following judgment was delivered

THE CHIEF JUSTICE (orally, for the Court):—We are all of opinion that the appeal fails and must be dismissed with costs. The decision in *Paquet*[1] is quite distinguishable. It is sufficient to state that in the present case clause 3 of the formula is not a condition of employment; that neither of the other two clauses may be severed and treated in isolation, and that therefore the whole of the formula falls.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Cutler, Lachapelle & Gazdik, Montreal.

Attorneys for the plaintiffs, respondents: Badeaux, Filion, Badeaux & Beland, Montreal.

[1] *Syndicat Catholique des Employées de Magasins de Québec v. Cie. Paquet Ltée,* [1959] S.C.R. 206, 18 D.L.R. (2d) 346.

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