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CANADA
LAW REPORTS

Supreme Court of Canada

REPORTERS
ARMAND GRENIER, K.C.
S. EDWARD BOLTON

PUBLISHED PURSUANT TO THE STATUTE BY
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1931

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Francis Alexander Anglin, C.J.C. P.C., G.C.St.G.
" " Lyman Poore Duff J., P.C.
" Edmund Leslie Newcombe J., C.M.G.
" Thibaudeau Rinfret J.
" John Henderson Lamont J.
" Robert Smith J.
" Lawrence Arthur Cannon J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Hugh Guthrie K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Maurice Dupré K.C.

38216—1½

MEMORANDUM

On the ninth day of December, 1931, the Honourable Edmund Leslie Newcombe, Puisne Judge of the Supreme Court of Canada, died.

ERRATA

Page 47, at the first line of the second paragraph of the head-note, Art. 389 should be Art. 359.

Page 278, at the fourth line, "to dismiss the accident" should be "to dismiss the action."

Page 420, at the nineteenth line, E. J. Murphy was counsel at the hearing and not M. Marcus.

Page 483, at the fourth line, R. L. Maitland K.C., was counsel at the hearing and not O. Bass K.C.

Page 714, at the twenty-seventh line, it should be "Fisher J." instead of "M. A. Macdonald J."

Page 717, at the eleventh line, it should be "Morrison C.J.S.C." instead of "Macdonald C.J."

ROBERTS *v.* THE KING

In this appeal, reported *ante,* p. 417, Mr. E. J. Murphy was counsel, at the hearing, for the appellant, and not Mr. M. Marcus, as stated in the report. Mr. Marcus was the solicitor on the record, but Mr. Murphy argued the appeal.

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

Canadian Pacific Railway Company v. *The King* ([1930] S.C.R. 574). Appeal allowed, 19th February, 1931.

Dunphy v. *Croft* ([1931] S.C.R. 531). Leave to appeal granted, 8th December, 1931.

Grissinger v. *Victor Talking Machine Co. of Canada Ltd.* ([1931] S.C.R. 144). Leave to appeal refused, 27th November, 1930.

King, The, v. *Carling Export Brewing and Malting Company* ([1930] S.C.R. 361). Appeal allowed, 19th February, 1931.

Sun Life Assur. Co. of Canada v. *Superintendent of Insurance* ([1931] S.C.R. 612). Leave to appeal granted, 22nd May, 1930.

A TABLE

OF THE

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FROM

DOMINION AND PROVINCIAL COURTS

THE PORT ALFRED PULP AND PAPER CORPORATION (DEFENDANT) ..... APPELLANT.

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* Feb. 24
* Apr. 10

AND

DAME M. L. LANGEVIN (PLAINTIFF) .... RESPONDENT.

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

Workmen's Compensation Act—Accident—Indemnity—Ascendant—Principal support—Time of the accident—Compensation—Computation as to wages—R.S.Q., 1925, c. 247, ss. 4, 9.

In order to decide whether the victim of an accident, during his work, was the "principal support" of the ascendant, who claims indemnity under the *Workmen's Compensation Act,* (R.S.Q., 1925, c. 274, s. 4), the courts are not bound to take into account any fixed period of time. The Act itself specifies the period to be considered as *"at the time of the accident"*. These words do not imply that a purely accidental or temporary situation of the victim, at that time, should alone be considered. While the courts should take into account an apparent character of permanency in the employment of the victim, on the other hand an arbitrary and artificial rule should not be adopted in determining the indemnity claimed under the Act, such as a period of twelve months before the accident. Every case should be determined according to its peculiar circumstances; the courts must weigh them, and, with regard to same, the law does not prescribe any special period of time.

Under the *Workmen's Compensation Act* (R.S.Q., 1925, c. 274, s. 4), "when the accident causes death, the compensation shall consist of a sum equal to four times the average yearly wages of the deceased at the time of the accident." The phrase "yearly wages" in this section has the same meaning as "the wages upon which the rent is based" in section 9. In the case of a workman not "engaged in the business during the twelve months next before the accident," whose kind of work was necessarily limited to the summer time, and where therefore there were no workmen of the same class engaged during the time necessary to complete the twelve months, the work of the de-

* PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

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ceased must be held to have been "not continuous"; and his yearly wages shall be calculated both according to the remuneration received while he worked for the employer and according to his earnings elsewhere during the rest of the year.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Tessier J. and maintaining the respondent's action for $2,726.96, under the *Workmen's Compensation Act*.

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

John T. Hackett K.C. for the appellant.

P. St. Germain K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J. — L'appelante a été condamnée par la Cour du Banc du Roi de la province de Québec à payer à l'intimée la somme de $2,726.96, à titre d'indemnité, en vertu de la loi des accidents du travail (S.R.Q., 1925, c. 274). Elle soulève deux objections à l'encontre du jugement qui a été rendu contre elle.

Premièrement. L'accident qui a donné lieu à l'action a causé la mort d'Armand Beaudet, le fils de l'intimée, alors qu'il était à l'emploi de l'appelante. La première question est de savoir si le défunt était le principal soutien de l'intimée au moment de cet accident (section 4 de la loi) et l'appelante prétend qu'il ne l'était pas.

Le sens de l'expression " le principal soutien " a été défini par cette cour dans la cause de *Laroche* v. *Wayagamac Pulp & Paper Company* (1). Cette définition a été acceptée par les tribunaux de Québec et n'est plus en discussion; mais le juge de première instance a jugé que

pour déterminer si la victime a contribué à l'entretien et au soutien de l'ascendant pour au delà de cinquante pour cent, il faut prendre comme base de calcul la période de douze mois précédant l'accident;

puis, appliquant ce principe aux faits de la cause, il en arrive à la conclusion que

lors de l'accident, la victime n'était pas le principal soutien de la demanderesse;

(1) (1923) S.C.R. 476.

et, en conséquence, il a débouté cette dernière des fins de son action.

La Cour du Banc du Roi a infirmé ce jugement, et nous sommes d'accord avec elle.

Pour décider si la victime d'un accident du travail était le principal soutien de l'ascendant qui poursuit en indemnité, on ne saurait s'en rapporter à une période de temps fixe et déterminée.

La loi indique l'époque où il faut se placer; " au moment de l'accident ". Cela ne veut pas dire qu'il faille se baser sur un état de choses passager et accidentel. Il faut sans doute tenir compte seulement d'une situation établie et qui a un certain caractère de durée; mais il ne faut pas, d'autre part, adopter une règle arbitraire et factice. Chaque cas doit être envisagé suivant ses circonstances particulières. Le tribunal doit les peser; et la loi, pour cela, ne l'assujetit à aucune limite de temps particulière.

Le cas actuel fournit un exemple du danger qu'il y aurait à adopter le principe rigide qui a été posé par la Cour Supérieure.

L'accident a eu lieu le 21 juin 1927. En remontant d'une année en arrière, on constate que depuis le 21 juin jusqu'au 26 octobre 1926 l'intimée demeurait avec ses enfants et son mari, à Donnelly, dans la province d'Alberta, et que celui-ci pourvoyait à leur entretien. Le 26 octobre 1926, l'intimée a dû laisser son mari pour cause de mauvais traitements. Depuis lors, elle n'a plus entendu parler de lui. Il ne lui a rien fourni pour sa subsistance; et elle ne sait même pas où il est.

Après le départ de Donnelly, il y a eu une période d'incertitude pendant laquelle l'intimée logea chez sa sœur, à Port-Alfred, avec son plus jeune fils. Ses deux filles, engagées comme servantes, lui fournissaient le peu qu'elles pouvaient économiser et l'aidaient à faire face aux besoins les plus nécessaires.

Mais dès que l'aîné des fils, Armand (qui fut plus tard la victime de l'accident dont il s'agit), se rendit compte des conditions qui résultaient de la séparation de son père et de sa mère, il comprit en même temps son devoir et il décida de le remplir.

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Il remit à sa mère l'argent dont elle avait besoin pour se rendre de Donnelly au Lac Saint-Jean; et il fut convenu qu'il irait la rejoindre " au plus tôt, pour prendre maison ". Il a envoyé quelque argent durant l'hiver; mais il était surtout préoccupé de garder son salaire pour se former le montant requis afin d'aller la retrouver. C'est ce qu'il fit au mois de mars 1927. A partir de son arrivée, il devient réellement le chef de la famille. Tout change. On loue une maison; on la meuble. Armand trouve rapidement de l'ouvrage; et, jusqu'à sa mort, il remet à sa mère tout son gain, soit: $179.12 depuis le 19 mars, date de son retour auprès de sa mère, jusqu'au 21 juin, date de sa mort.

Il est évident, d'après ce récit des faits, que l'année qui a précédé l'accident présente trois périodes distinctes: celle pendant laquelle l'intimée demeurait avec son mari et ce dernier la faisait vivre; la période intermédiaire d'installation à Port-Alfred; et celle qui a commencé lorsque Armand a rejoint sa mère dans ce dernier endroit.

De ce moment, une nouvelle situation s'est établie, toute différente de la première et de la seconde période. L'existence de l'intimée était complètement modifiée et n'avait plus rien de commun avec les circonstances qui l'entouraient avant son départ de Donnelly, ou avant l'arrivée de son fils auprès d'elle. La situation qui existait " au moment de l'accident " était celle qui lui avait été faite par son fils Armand à partir du 19 mars 1927. C'est donc celle-là seule qu'il fallait envisager pour rester dans l'esprit du statut. C'est ce qu'a fait la Cour du Banc du Roi, et nous approuvons son interprétation de la loi.

Pour le reste, il ne s'agit que de l'appréciation de la preuve. L'appréciation du tribunal de première instance a été à bon droit réformée parce qu'elle partait du principe erroné en droit qu'il fallait " prendre comme base de calcul la période de douze mois précédant l'accident ". Il nous paraît, au contraire, que l'appréciation de la Cour du Banc du Roi est conforme à l'intention du législateur et est justifiée par le dossier. Nous croirions même qu'elle est trop favorable à l'appelante, parce qu'elle suppose que les deux jeunes filles, Rollande et Anita, ont remis à leur mère des montants mensuels fixes jusqu'au moment de l'accident, alors que la part de contribution de Rollande est plutôt impré-

cise. Elle " donnait ce qu'elle pouvait ". Quant à Anita, elle n'a plus été en service après avoir laissé Monsieur et Madame Brenigan, c'est-à-dire depuis la fin d'avril ou le commencement de mai; plutôt depuis la fin d'avril, puisque l'intimée, dans son témoignage dit:

On a pris maison au mois d'avril, et elle (Anita) était chez nous dans le temps.

La preuve est qu'elle n'a pas travaillé depuis lors jusqu'au décès d'Armand et que, par conséquent, en mai et juin, elle n'a rien contribué à la subsistance de sa mère.

Comme la Cour du Banc du Roi, il faut donc décider que " au moment de l'accident " Armand, " le défunt était le principal soutien " de l'intimée.

Deuxièmement. L'appelante a prétendu que l'indemnité n'avait pas été calculée conformément à la loi. C'est encore la section 4 du statut qu'il faut interpréter sur ce point:

Lorsque l'accident a causé la mort, l'indemnité comprend une somme égale à quatre fois le salaire moyen annuel du défunt au moment de l'accident, ne devant, dans aucun cas, sauf le cas mentionné à l'article 6, être moindre que mille cinq cents dollars, ni excéder trois mille dollars.

L'article 6, auquel ce paragraphe réfère, a trait à la faute intentionnelle de la victime, ou à la faute inexcusable de l'ouvrier ou du patron. Il n'a donc aucune application ici.

Comme on le voit, il s'agit du sens des mots: " le salaire moyen annuel du défunt au moment de l'accident ".

La loi déclare dans la section 9 ce qu'elle entend par " le salaire servant de base à la fixation des rentes ". Aucun autre mode de calcul n'est indiqué pour établir le montant des indemnités, en cas de mort de la victime. D'autre part, il n'y a pas de raison pour qu'on adopte un mode différent (Voir: *Dallaire* vs. *Quebec Salvage Company* (1), confirmé par la Cour du Banc du Roi (2).

Voici comment se lit la section 9 de la loi (en omettant le quatrième paragraphe, qui ne peut entrer en ligne de compte dans la présente cause):

9. Le salaire servant de base à la fixation des rentes s'entend, pour l'ouvrier occupé dans l'entreprise pendant les douze mois écoulés avant l'accident, de la rémunération effective qui lui a été allouée pendant ce temps, soit en argent soit en nature.

Pour les ouvriers occupés pendant moins de douze mois avant l'accident, il doit s'entendre de la rémunération effective qu'ils ont reçue depuis leur entrée dans l'entreprise, augmentée de la rémunération moyenne qu'ont reçue pendant la période nécessaire pour compléter les douze mois, les ouvriers de la même catégorie.

(1) Q.R. 49 S.C. 503. (2) Q.R. 26 K.B. 253.

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Si le travail n'est pas continue, le salaire annuel est calculé tant d'après la rémunération reçue pendant la période d'activité que d'après le gain de l'ouvrier pendant le reste de l'année.

Armand Beaudet, au moment de l'accident, était employé au déchargement des barges qui transportaient le bois de pulpe à Port-Alfred. Il fut " occupé dans l'entreprise " seulement pendant le mois de juin, et il n'a pas été " occupé " à un autre travail que celui-là. Il ne tombe donc pas sous l'effet du premier paragraphe de la section 9.

D'autre part, de toute évidence, le déchargement des barges était forcément limité à la période de navigation dans la région de Port-Alfred. Les ouvriers employés à ce travail n'étaient pas occupés pendant les douze mois qui ont précédé l'accident et il ne pouvait donc y avoir dans l'entreprise des " ouvriers de la même catégorie ", dont " la rémunération moyenne * * * pendant la période nécessaire pour compléter les douze mois " pût être ajoutée à la " rémunération effective " recue par Armand Beaudet " depuis son entrée dans l'entreprise ". Par " ouvriers de la même catégorie, on doit entendre ceux qui dans un établissement industriel ont à peu près le même emploi et touchent le même salaire que la victime " (Sachet, *Accidents du travail*, 6ème éd. n° 854). Ici, par la force même des circonstances, il n'y avait aucun des ouvriers " de la même catégorie " que Armand Beaudet qui reçût de l'appelante un salaire annuel intégral. Il s'ensuit que le second paragraphe de la section 9, pas plus que le premier, ne peut être utile en l'espèce pour le calcul du salaire de base.

Nous pouvons supposer (quoique la preuve ne l'établisse pas) que l'exploitation de l'appelante ne chômait pas régulièrement pendant une partie de l'année, mais le seul travail auquel fût employé la victime n'était pas continu. Dans ce cas, c'est le paragraphe 3 de la section 9 qui s'applique.

Nous croyons donc que, pour les fins de la cause, " le " salaire moyen annuel du défunt " devait être " calculé " tant d'après la rémunération reçue pendant la période " d'activité que d'après le gain de l'ouvrier pendant le reste " de l'année ".

Comme l'a fait remarquer Monsieur le Juge Tellier dont les chiffres ont été acceptés par les autres juges de la Cour du Banc du Roi, en adoptant cette règle, l'indemnité excèderait le montant de $2,726.96 qui a été accordé à l'intimée. On est arrivé à cette somme en prenant le taux du salaire

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*Feb. 12, 13
*Apr. 10
*May 1

journalier le jour de l'accident et le nombre de jour de travail de la victime, à Port-Alfred; puis, en multipliant ce taux journalier par ce nombre de jours de travail. Le montant ainsi obtenu représentait le salaire reçu pendant trois mois. On a adopté cette base pour déterminer "le salaire "moyen annuel du défunt au moment de l'accident" à $669.24. L'indemnité allouée par la Cour du Banc du Roi comprend une somme égale à quatre fois le salaire moyen annuel ainsi établi, plus $50 pour les frais de médecin et de funérailles, suivant les prescriptions de la section 4 de la loi.

L'indemnité eût certainement été plus forte si on l'avait calculée conformément au paragraphe 3 de la section 9 de la loi. L'appelante n'a donc pas lieu de se plaindre.

Sur les deux points qu'elle a soulevés, nous sommes d'avis que son appel doit être rejeté et le jugement de la Cour du Banc du Roi est, en conséquence, confirmé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Foster, Place, Hackett, Mulvena, Hackett & Foster.*

Solicitors for the respondent: *Boulianne & Martel.*

J. R. LALIBERTE AND OTHERS (OPPOSANTS) ..... } APPELLANTS;

AND

LARUE, TRUDEL & PICHER (RESPONDENTS) ..... } RESPONDENTS

AND

LES APPARTEMENTS LAFONTAINE, LIMITEE (BANKRUPT)

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Rinfret J.

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

Joint stock company—Debentures—Trust deed—Hypothec—Pledge—Transfer of property—Whether absolute or as warranty—Bankruptcy—Ownership—Difference between civil and common laws as to "trust"—Joint Stock Companies Act, R.S.Q., 1909, s. 6119a; R.S.Q., 1925, c. 223—Special Corporate Powers Act, R.S.Q., 1925, c. 227, ss. 10, 11, 12, 13—4 Geo. V., c. 51, s. 1—10 Geo. V., c. 72, s. 1—14 Geo. V., c. 63, s. 1—Bankruptcy Act, s. 45 (3); rule 173—Arts. 94, 227 (10), 358, 944, 981a, 1966, 1967, 1968, 1969, 1970, 1972, 1983, 2016, 2022, 2037, 2053 C.C.—Art. 1185 C.C.P.

The words contained in a trust deed, to the effect that the debtor "*cède, transporte et donne en gage*" (cedes, transfers and gives in pledge) a certain property to the trustee, do not constitute an absolute trans-

*PRESENTS—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

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fer but indicate that the intention of the parties was to hypothecate the property as security for the bonds. The words "en gage" modify not only the word "donne," but also the words "cède" and "transporte", so that the instrument should be read as if "en gage" were after each word. Smith J. dissenting.

The words "to cede and transfer", in s. 13 of the *Special Corporate Powers Act*, R.S.Q., 1925, c. 227, do not imply an absolute transfer, but merely a transfer in warranty, in view of the addition of the words "for the same purposes", thus referring to the words "purposes therein set forth" immediately proceding, which purposes are to *secure* any bonds, etc. Anglin C.J.C. and Smith J. *contra*.

Per Duff, Newcombe, and Rinfret JJ.—The modification effected in the existing civil law, as to hypothec and pledge, by 4 Geo. V, c. 51, when it inserted articles 6119a, 6119b and 6119c into the *Joint Stock Companies Act* of 1909, has been merely to extend the principle of conventional hypothec to moveables and future property and to make future proporty susceptible of being pledged; but the main change was to enact that "the mortgagor or pledgor (will) be permitted by the trustee to remain in the possession and use of the property so mortgaged or pledged" (art. 6119b)—The translation of the words "nantir" and "nantissement" by "mortgage" and "mortgaging", in the English version of the statute, is not appropriate and may be misleading; there is no connection between the "nantissement" of the civil law and the "mortgaging" of the English common law. Therefore that statute should not be interpreted according to the rules governing "mortgage" of the English common law; and the power given to the debtor by the statute to hypothecate and pledge his property as security for the payment of the bonds does not constitute a "trust" within the meaning of the equity jurisprudence, the idea of "trust" never having found place in the civil law in Quebec.

Per Duff, Newcombe and Rinfret JJ.—The system of civil law in Quebec does not admit the notion of the English common law as to beneficial ownership residing in one person and legal title in another. In Quebec, both are invariably united upon the same head, the right of ownership being indivisible.

Per Smith J. (dissenting).—The words "cede and transfer" imply the passing of the ownership to the transferee, with power to take possession and sell, according to the ordinary meaning of the words. These words in Art. 6119a must be given the same interpretation; otherwise they do not add anything to the words, "hypothecate, mortgage and pledge" which immediately precede them.

Judgment of the Court of King's Bench Q.R. 48 K.B. 390) aff., Smith J. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, Province of Quebec (1) affirming the judgment of the Superior Court, Letellier J. and dismissing appellants' petition.

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

The appellants were granted special leave to appeal to this court on December 9, 1929, by

SMITH J.—The bankrupt company was authorized to make an issue of bonds on the security of its property, consisting mainly of land and an apartment building that it was about to construct on it. It made a deed to a trustee of this property, ceding and transferring the property, as provided in the statute, 14 Geo. V, c. 63, s. 1, on the strength of which bonds were sold to the amount of over $400,000.

The building was partly constructed, and a contractor, who was a director to whom a large amount was owing, applied to have the company declared bankrupt, and an order was made accordingly.

Certain of the bondholders, claiming to hold bonds to an amount exceeding twenty-five per cent., petitioned the trustee to take possession of the property, pursuant to a term in the trust deed imposing upon the trustee the duty of taking possession on presentation of such petition and the deposit of a sufficient amount to guarantee his costs and disbursements. No amount was deposited for this purpose, and the trustee took no action.

The liquidator in bankruptcy applied to the court for an order for sale of the property, which was granted. The appellants, a committee of bondholders acting for themselves and others in these proceedings, made to the Superior Court a request in the form of an opposition to the judgment for sale, which request was refused, and on an appeal to the Court of King's Bench in appeal, the judgment of the Superior Court was sustained, and the present application is for leave to appeal to this court.

The judgments below are put upon the sole ground that the appellants have no status in the matter, as any proceedings on their behalf should be taken by the trustee under the trust deed. It is contended before me on behalf of the appellants that there was no jurisdiction in the courts below to order a sale of the property in question, because, under the trust deed, the ownership of the property passed to the trustee for the bondholders, and that only the equity of redemption of the property passed to the liquidator in bankruptcy. The order for sale in question purports to deal with the whole interest in the property, that is, with the ownership or legal estate.

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Smith J.

On behalf of the liquidator it is argued that under the law of Quebec legal ownership under the trust deed remained in the bankrupt company, and that the trustee for the bondholders would have a right only to rank on the property in the hands of the liquidator according to the priority of the various creditors; and that the statute referred to above does not in fact alter this rule of the Quebec law. This is a question concerning which there may be considerable doubt, and it is one of very great importance. It is also a matter of doubt as to whether the holders of bonds would not have a direct interest to prevent the property which stands as their security, being sold and disposed of by an order of the court where, as alleged, there was no jurisdiction to make such order. This is a point quite different from the mere matter of the trustee taking possession, and may not come within the section of the trust deed referred to, which provides merely for what is to be done to oblige the trustee to take possession. It may be, if the legal estate and ownership of the property was vested in the trustee for the bondholders, that it was the duty of the trustee to oppose any attempt to dispose of the property so vested in him without his consent, and that failing in that duty the bondholders for whom it is his duty to act had a right to act on their own behalf, because of a direct interest in preventing the disposal of their property under an order of the court acting without jurisdiction.

In view of the large amount involved and the great importance of these questions to the bondholders, and in view of the importance to bondholders in general holding bonds under trust deeds made in Quebec in this form under the statute referred to, I think that leave to appeal should be given.

Terms, however, should be imposed because leave involves a stay of the sale, and considerable expense for the care and preservation of the property in the meantime. The building has not been completed, but is enclosed, and is provided with oil heating apparatus. The expense of a caretaker and of fuel will continue, and the extra expense caused by the delay of the sale should be paid by the applicants from the date of the postponement until a new date can be fixed after the disposal of the proposed appeal

or until possession is obtained on behalf of the bondholders.

The amount required as security for the appeal is $500, and an additional amount will be required for the purpose indicated, making a bond in all of $2,500. Upon supplying such bond to the satisfaction of the registrar, leave is given to appeal, and all further proceedings are stayed in the meantime.

The argument on the appeal was first heard before this court on the 12th and 13th of February, 1930; and, on April 10, 1930, the following judgment was rendered.

THE COURT.—The appellants contend that the trust deed executed by Les Appartements Lafontaine, Limitée, to the Sun Trust Company had the effect of transferring to the latter, as trustee for the bondholders, the ownership of the property described in the deed.

In the course of the consideration so far given to this appeal, it has become apparent that, should this court hold the view of the appellants to be correct, it might follow that the Superior Court sitting in bankruptcy had no jurisdiction to make the order now impeached and that the liquidators had no authority to sell; nor could such authority be vested in them by the assent of the trustee for the bondholders.

This would give the appellants a status to come into court to protect their security thus being surrendered contrary to their rights under the trust deed.

But we are satisfied that the adjudication upon the questions so raised would indirectly, if not directly, affect the position of the majority of the bondholders and of the trustee, The Sun Trust Company.

A judgment setting aside the order authorizing the sale by the liquidators on the ground that the trustee for the bondholders is the owner and thus defining his duties in the future should not, in our opinion, be rendered before he has been given an opportunity of being heard. On the other hand, such judgment, if given now, would not bind him, and, if the trustee should elect not to act according to it, would only lead to further litigation, without any immediate or practical advantage being secured.

It is important, in the interest of all concerned and to avoid further useless expense from the care and preserva-

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tion of the property, that the matter be finally disposed of with as little delay as possible.

Under the circumstances, before expressing any view upon the merits of the appeal now before us, and so that the judgment to be delivered by us may be more fully effective, we direct that this appeal shall stand over and that, at the instance of the appellants, The Sun Trust Company, Limited, in its capacity as trustee for the bondholders herein, be made an additional party to the appeal, as provided by Rule 50 of the Rules of the Supreme Court of Canada. Upon the necessary suggestion being entered by the appellants and notice thereof duly served, the appeal may be inscribed at the head of the Quebec list for the next term of the court, when The Sun Trust Company, Limited, may be heard to have the suggestion set aside, should it be so advised, and, in any event, upon the merits of the pending appeal.

The rehearing on the appeal took place on the 1st of May, 1930, the trustee for the bondholders being then represented by counsel.

L. G. Belley, K.C., and *R. V. Sinclair, K.C.*, for the appellants.

L. St. Laurent, K.C., for the respondents.

J. L. Perron, K.C., for the trustee.

ANGLIN C. J. C.—While I am entirely convinced by the reasoning of my brother Smith that it is impossible to disregard the presence of the words "*cède et transporte*" inserted in the statute, or to give to them any other effect than that of vesting in the trustee for bondholders where the trust instrument conforms precisely to the statute, as so amended, the properties to be held as security for payment of the bonds, I find myself unable to accept his view that the contract now in question has that effect. On the contrary, it seems to me that the addition to the words "*cède*" and "*transporte*" of the words "*et donne en gage, au même titre*", (clause 1, c. III, of the trust deed), makes it reasonably clear that the intention of the parties was merely to hypothecate the property as security for the bonds. I regard the word "*en gage*" as modifying not only the word "*donne*", but also the words "*cède*" and

"*transporte*" and that the instrument should be read as if "*en gage*" were after each word, viz., "*cède en gage, transporte en gage et donne en gage, au même titre.*"

For this reason I agree with my brother Rinfret that the appeal should be dismissed with costs.

DUFF J.—After much fluctuation of opinion, I have come to concur with my brother Rinfret. I desire to emphasize one point, and it is this. If my brother Smith's view of the statute be the right one, then it introduces into the law of Quebec a legal institution which is virtually a new one. If the intention had been to do that, which would be nothing short of a revolutionary proceeding, I think it would have been expressed in language quite unmistakeable, language to which no other meaning could be ascribed.

I ought, I think, to add this, that at the conclusion of the first argument, and indeed for some time after the second argument, I thought my brother Smith was right, and more than once expressed myself in that sense. But I have changed my opinion and to that opinion I must now give effect.

The judgments of Newcombe and Rinfret JJ. were delivered by

RINFRET J.—Les Appartements Lafontaine, Limitée, une compagnie incorporée en vertu de la loi des compagnies de Québec (S.R.Q. de 1925, c. 223), dans le but de construire une maison de rapport, a décidé de faire un emprunt de $900,000 au moyen d'une émission d'obligations.

A cette fin, un contrat, appelé acte de fiducie, fut consenti par la compagnie en faveur de The Sun Trust Company, Limited, qui fut choisie comme fiduciaire et à qui furent transférés les biens donnés en garantie de l'emprunt ainsi que les pouvoirs jugés nécessaires pour accomplir sa mission à l'égard des porteurs d'obligations.

La compagnie est tombée en faillite et les intimés ont été nommés syndics. Le seul actif était la maison de rapport, construite avec le produit de l'emprunt, qui était alors en la possession de la compagnie et apparemment affectée de plusieurs privilèges enregistrés par des ouvriers, des fournisseurs de matériaux et des constructeurs.

Les syndics obtinrent l'autorisation de vendre cette maison aux enchères, par jugement de la Cour Supérieure

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siégeant en matière de faillite rendu le 12 juin 1929. Cette autorisation fut accordée sur une requête, où il était allégué que la compagnie était propriétaire de l'immeuble, et basée sur l'article 45 de la *Loi de faillite* qui pourvoit à la vente par le syndic, dans la province de Québec, d'un bien immobilier sur lequel existe une hypothèque ou un privilège.

Les appelants, qui sont des porteurs d'obligations, ont prétendu que leurs intérêts étaient lésés par ce jugement dans une affaire où ni eux, ni le fiduciaire qui les représente n'ont été appelés. Ils ont formé tierce-opposition (Art. 1185 C.P.C.; *Loi de Faillite,* règle 173) concluant à ce que le jugement autorisant la vente soit cassé et annulé et à ce que la maison de rapport

sorte de la faillite et retombe entre les mains des porteurs de débentures en vertu de l'acte de fiducie et de la loi, pour qu'ils puissent en disposer suivant leurs droits.

Cette tierce-opposition a été rejetée par la Cour Supérieure et par la Cour de Banc du Roi (1) sur le motif que les appelants étaient sans intérêt comme sans droit d'intervenir pour empêcher la vente par les syndics, vu que cette initiative appartenait uniquement au fiduciare, excepté si vingt-cinq pour cent en valeur des porteurs d'obligations s'unissaient pour le requérir et avaient

au préalable indemnisé le fiduciaire, à sa satisfaction, pour tous les frais, déboursés et dommages qu'il pourra encourir à cette fin.

Ce sont là, en effet, deux conditions spécifiées dans le contrat de fiducie. Il n'est même pas allégué que les appelants représentent vingt-cinq pour cent en valeur des porteurs d'obligations et il est admis qu'ils n'ont pas indemnisé le fiduciaire. A moins de remplir ces conditions, nul porteur d'obligation ne peut contraindre le fiduciaire à agir ou ne peut agir individuellement. Ces restrictions se rencontrent d'habitude dans les contrats de ce genre. Elles ont pour but d'assurer au fiduciaire la discrétion convenue dans l'exercice de ses pouvoirs et surtout de concentrer entre ses mains l'institution des procédures et l'adoption contre la compagnie des recours exigés par les circonstances, afin d'éviter précisément que le bon fonctionnement de la fiducie ne soit compromis par les activités d'une petite minorité ou même d'un seul des porteurs d'obligations, dont le nombre et le personnel varient suivant le jeu des négociations. Il est reconnu que ces stipulations tendent à protéger l'intérêt

(1) Q.R. 48 K.B. 390

général. En pareille matière, la compagnie contracte avec le fiduciaire pour le compte des obligataires généralement et non pour chacun d'eux individuellement.

Ici, le fiduciaire—qui n'était pas partie aux procédures devant la Cour Supérieure ou la cour du Banc du Roi—a été mis en cause par cette cour. Il a déclaré qu'il ne croyait pas devoir s'opposer à la vente qui a été ordonnée. La raison en est que cette vente, faite par le syndic

en exécution des dispositions (de la *Loi de Faillite*) a le même effet qu'une vente faite par le shérif (art. 45-3)

et permettra donc de conférer à l'acheteur un titre absolument clair, tandis que le fiduciaire ne pourrait vendre que sujet aux privilèges enregistrés sur la propriété—ce qui affecterait sérieusement les enchères ou les offres d'achat et, par conséquent, les chances de disposer de l'immeuble. La décision du fiduciaire paraît procéder d'une sage discrétion.

Il faut donc dire que les jugements portés en appel sont justifiés par le contrat de fiducie et sont légalement bien fondés, à moins que les appelants n'aient raison de prétendre

que la propriété en question en cette cause n'est pas un bien cessible en vertu de la loi de faillite, vu qu'elle ne faisait pas partie des biens de la faillite.

Dans ce cas, la Cour Supérieure était sans juridiction pour en ordonner la vente sous l'empire de cette loi, et les appelants, dans les circonstances, devraient être admis à intervenir pour protéger leurs droits. C'est sur ce point que la permission d'appeler a été avec raison accordée et c'est celui qu'il nous reste maintenant à examiner.

La question de savoir si la maison de rapport dont il s'agit faisait partie des biens de la compagnie qui, lors de sa faillite, sont dévolus aux syndics, dépend évidemment des termes du contrat de fiducie. Sans doute, ce contrat a été passé en vertu de la Loi des pouvoirs spéciaux de certaines corporations (S.R.Q. 1925, c. 227), mais c'est le contrat, et non le statut, qui doit déterminer la nature des relations de la faillie, du fiduciaire et des porteurs d'obligations.

Il peut être utile toutefois de référer au statut pour mieux pénétrer le sens du contrat, car il est avéré que ce dernier est calqué sur le premier, et nul ne prétend que le contrat outrepasse les pouvoirs conférés par le statut.

Il faut bien préciser, dès l'abord, que nous n'avons pas ici à déclarer si le fiduciaire pouvait, après la déclaration de faillite, réclamer la possession de l'immeuble à l'encontre

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des syndics. Nous avons vu que le fiduciaire ne fait pas cette demande. Il affirme même qu'il n'est pas dans l'intérêt des porteurs d'obligations de la faire. C'est la situation opposée à celle qui fut jugée dans la cause de *Canadian Brass and Bedstead* v. *Duclos & La Société d'Administration Générale* (1), que les appelants nous ont citée. L'arrêt de la Cour du Banc du Roi dans *La Manufacture des Seaux de Trois-Rivières* v. *Bisson* (2), qu'ils ont également invoqué, ne s'applique pas davantage puisque, dans cette affaire, le fiduciaire avait pris possession avant la faillite.

Nous n'avons pas à trancher ici une question de possession, mais une question de propriété.

Or, il convient peut-être de souligner que le système de droit de la province de Québec ne comporte pas la conception de la *common law* qui reconnaît le *beneficial ownership* dans une personne et le *legal title* dans une autre. Dans le Québec, les deux sont invariablement réunis sur la même tête. La propriété est unique. L'usufruit, la substitution, la fiducie, le nantissement, le gage, l'hypothèque, le privilège confèrent sur la chose des droits plus ou moins étendus (Arts. 94, 944, 981a, 1966, 1968, 1983, 2016 C.C.) mais ne transmettent jamais la propriété. Pour nous limiter aux pouvoirs dont parle le statut: "hypothéquer, nantir ou mettre en gage" (Art. 227, s. 10), l'hypothèque n'accorde au créancier que le droit de

faire vendre (l'immeuble) en quelques mains qu'il soit, et d'être préféré sur le produit de la vente suivant l'ordre du temps, tel que fixé dans le code

(Art. 2016 C.C.). Le débiteur qui a consenti une hypothèque reste propriétaire et en possession. Le nantissement et le gage constituent un même contrat avec la seule différence que le premier s'adresse aux immeubles et le second, aux meubles (Arts. 1966, 1967, 1968 C.C.). Le débiteur qui donne en gage ou en nantissement demeure propriétaire (Art. 1972 C.C.), mais ne conserve pas la possession (Art. 1970 C.C.). En vertu du code, l'hypothèque, le gage ou le nantissement ne peuvent être créés que sur des biens présents; l'hypothèque ne s'applique qu'aux immeubles (Art. 2016 C.C.).

L'innovation apportée par le statut 4 Geo. v, c. 51, en introduisant dans les statuts refondus de 1909 les articles

(1) 18 P.R. 206. (2) Q.R. 30 K.B. 389.

6119a, 6119b et 6119c (maintenant les articles 10, 11 et 12 du c. 227 des Statuts Revisés de 1925) a donc été—et a été seulement:

(1) d'étendre l'hypothèque conventionnelle aux biens mobiliers et aux biens futurs;

(2) d'appliquer le nantissement ou le gage à des biens qui pouvaient également être futurs, mais surtout à des biens dont le débiteur " conservait la possession et l'usage ".

Pour le reste, ce dont parle le statut, c'est l'hypothèque telle qu'elle a toujours existé, ce sont le nantissement et le gage tels qu'ils ont toujours été conçus dans le droit français et dans le régime légal de la province de Québec. Il importe donc de noter que, dans la version anglaise du statut, les mots " mortgage " ou " mortgaging " comme équivalents de " nantir " ou " nantissement " de la version française sont: ou bien une impropriété de langage qui peut malheureusement prêter à confusion ou bien l'emploi d'un mot anglais dans une acception toute autre que celle qui lui est attribuée dans le système de droit prévalant dans les autres provinces du Canada. Il n'y a pas de connexité entre le " nantissement " du droit civil et le " mortgage " de la " common law ". Mais il est certain que le sens du statut est conforme à la conception du " nantissement " et opposé à celle du " mortgage ", puisque le statut lui-même le déclare:

Les droits que confèrent sur les immeubles l'hypothèque et le nantissement * * * sont déterminés dans le code civil etc.

(Voir tout l'article 12 du c. 227). Il faut donc bannir toute idée de " mortgage ", dans l'acception que lui donne la *common law,* de l'interprétation du statut et, par conséquent aussi, de l'interprétation d'un contrat basé sur ce statut.

De même (sauf à discuter l'article 13), le statut ne confère à la compagnie rien autre chose que le pouvoir d'hypothéquer, de nantir ou de mettre en gage les biens destinés à garantir le paiement des obligations. Comme nous venons de le voir, ces dénominations sont employées dans le sens qu'elles ont au code civil. Elles n'impliquent donc aucunement le " trust ", tel qu'on l'envisage en droit anglais. Le statut dit que l'hypothèque, le nantissement ou le gage " peuvent être constitués " par " acte de fidéicommis " et la version anglaise s'exprime: " by trust deed ". Il est à

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peine besoin d'insister pour démontrer que c'est seulement un nom ou une étiquette que l'on donne au contrat. Le " trust ", sauf dans la forme restreinte où on le trouve au chapitre de la fiducie (Code civil, livre troisième, titre deuxième, chapitre IVa), n'a jamais existé dans le système légal de la province de Québec, qui ne comprend d'ailleurs aucun mécanisme (machinery) pour le faire fonctionner. Il serait inconcevable que le législateur, par l'usage, non pas même du mot " trust ", mais de l'appellation " trust deed ", eût voulu introduire d'un seul coup le " trust " anglais avec sa complexité et ses multibles aspects si foncièrement étrangers à l'économie du droit de Québec. On ne crée pas, de façon aussi sommaire, une révolution aussi profonde. D'ailleurs, l'expression " trust deed " se rencontre dans l'article 11 en rapport, toujours et seulement, avec l'hypothèque, le nantissement ou le gage que la compagnie peut, d'après l'article 12, consentir suivant les règles du code civil. Cela est décisif. Ce n'est pas en l'appelant " trust deed " que l'on modifiera le caractère de l'acte par lequel la compagnie peut accorder une hypothèque, un nantissement ou un gage régis par les principes du droit civil.

De même que nous avons banni de notre interprétation le conception du " mortgage " de la *common law*, pour les raisons que nous venons de donner, il convient donc également d'en écarter la conception du " trust " anglais.

Nous en venons maintenant à l'article 13 du chapitre 227 (S.R.Q. 1925). Il a été inséré dans la loi en 1925, alors que les articles 10, 11 et 12 remontent à 1914. Il se lit comme suit:

13. Il est et il a toujours été loisible à une compagnie visée par les articles de la présente section, en sus de les hypothéquer, nantir et mettre en gage pour les fins mentionnées auxdits articles, de céder et transporter, pour les mêmes fins, lesdits biens au fidéicommissaire, avec pouvoir, au cas de défaut par la compagnie de remplir les conditions de l'acte de fidéicommis, de prendre possession des biens cédés et transportés, de les administrer et de les vendre pour le bénéfice des obligataires.

Nous ne voyons pas que cet article modifie la façon de voir que nous avons jusqu'ici exposée.

Les mots " céder et transporter " employés seuls comportent une aliénation absolue. Mais ils ne sont pas employés seuls dans cet article. Au point de vue légal, il y a la même différence qu'entre les expressions " donner " et " donner en gage ". La phrase se lit:

de céder et transporter, *pour les mêmes fins,* lesdits biens au fidéicommissaire, avec pouvoir * * * de prendre possession des biens cédés et transportés, de les administer et de les vendre pour le bénéfice des obligataires.

"*Pour les mêmes fins*" réfèrent aux "fins mentionnées auxdits articles", qui les précèdent immédiatement dans la même phrase. Or, "les fins mentionnées auxdits articles" et pour lesquelles la compagnie est autorisée à "hypothèquer, nantir et mettre en gage" sont (art. 10): "pour garantir le paiement des bons, obligations etc". Céder pour garantir, transporter pour garantir, c'est la même chose que céder ou transporter en garantie; et ce n'est pas céder et transporter d'une façon absolue. Une cession ou un transport pur et simple est final et constitue une aliénation définitive. Une cession ou un transport en garantie implique une idée de retour. Les mots "céder et transporter" ne sont donc pas employés ici dans leur sens intégral et ne signifient pas une aliénation de la propriété. Ils sont qualifiés par les mots

avec pouvoir * * * de prendre possession des biens cédés et transportés, de les administrer et de les vendre pour le bénéfice des obligataires,

qui seraient parfaitement inutiles si "céder et transporter" devaient être pris dans le sens d'aliéner. Il est clair qu'une aliénation de la propriété emporterait le pouvoir de prendre possession, d'administrer et de vendre. Il serait absolument oiseux de le dire. On ne peut supposer que le législateur a parlé pour ne rien dire. Les règles ordinaires d'interprétation exigent que tous les mots employés trouvent leur utilité. Ici, la raison d'être de ces mots est expliquée par le code civil. Une hypothèque, en droit civil, ne permet pas au créancier de prendre possession et de vendre lui-même. Il faut qu'il fasse saisir et vendre par l'autorité judiciaire. De même, un nantissement ou un gage, suivant le code, ne confère pas le droit de disposer du bien gagé (Art. 1971 C.C.), à moins d'une stipulation spéciale. C'est pour assurer au fidéicommissaire ces pouvoirs, que le code ne donnait pas, que l'amendement de 1924 (14 Geo. V, c. 63), devenu l'article 13, a été adopté. Le préambule du statut de 1924 le démontre. Il débute:

Attendu qu'il y a des doutes si, en vertu des articles 6119a et suivants des Statuts Refondus, 1909, etc. une compagnie peut céder et transporter à un fidéicommissaire, avec pouvoir * * * de prendre possession, d'administrer et de vendre les biens qu'elle est autorisée à hypothéquer, nantir et mettre en gage.

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Il n'entrerait jamais dans l'esprit d'un législateur du Québec de dire " qu'il y a des doutes " sur la question de savoir si le pouvoir " d'hypothéquer, nantir et mettre en gage " comprend le pouvoir de " céder et transporter " en pleine propriété. Nous avons vu que les deux pouvoirs sont distincts au point de se repousser l'un l'autre. Mais il pouvait certainement y avoir " des doutes " si une compagnie autorisée à " hypothéquer, nantir et mettre en gage " pouvait en même temps permettre au fidéicommissaire,

au cas de défaut par la compagnie de remplir les conditions de l'acte de fidéicommis, de prendre possession, d'administrer et de vendre les biens.

C'est ce doute que le statut de 1924 (maintenant l'art. 13 du c. 227) a voulu faire disparaître. Par là, il est devenu certain qu'un contrat de ce genre pouvait se faire. C'est un contrat particulier avec des stipulations spéciales, en dehors de celles prévues dans les chapitres du code relatifs au nantissement, au gage et à l'hypothèque, mais restant quand même subordonné aux règles du droit commun dans ses principes généraux et dans tout ce qui n'est pas déclaré y déroger expressément.

Bien entendu, ce n'est pas le " trust " dans le sens du *common law*. Le texte même de l'article 13 le prouve. Il est admis que jusque là le " trust " n'existait pas dans la loi de Québec. Or, l'article 13 est déclaratoire. Il spécifie qu'il n'institue aucun droit nouveau. Il dit que ce qui est permis par cet article " est et a toujours été loisible ". Ce ne peut dont être le " trust ".

Comme par une coïncidence assez curieuse, si elle n'est pas voulue, on trouve dans le code civil, au chapitre de la fiducie, le mot " transporter " employé dans un sens également restreint. L'article 981a permet à " toute personne capable de disposer librement de ses biens " de " *transporter* des propriétés mobilières ou immobilières à des fiduciaires * * * pour le bénéfice des personnes etc.". Dans ce texte, le mot " transporter " est moins qualifié qu'il ne l'est dans l'article 13 du statut. Cependant, il n'a pas pour effet de transmettre le titre de propriété aux fiduciaires. L'article suivant (981b) le dit:

Les fiduciaires, pour les fins de la fiducie, sont saisis, comme *dépositaires* et *administrateurs*, pour le bénéfice des donataires ou légataires des propriétés mobilières ou immobilières transportées en fiducie.

Il est impossible de ne pas voir l'analogie entre ces articles du code et le statut que nous étudions. Il est naturel et

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logique que nous en tenions compte. Sur ce point, il est intéressant de lire le jugement du Conseil Privé *re O'Meara* v. *Bennett* (1).

L'analyse que nous venons de faire du statut va nous aider à comprendre l'acte de fiducie que nous sommes appelés à interpréter et dont, nous le répétons, dépend la nature des droits respectifs de la faillie ou de ses syndics, d'une part, et du fiduciaire, d'autre part.

Ayant posé le principe que, suivant le droit de Québec, la maison de rapport doit être ou bien hypothéquée, nantie ou mise en gage, (et alors elle est encore dans le domaine de la faillite) ou bien aliénée (et alors c'est le fiduciaire qui doit en revendiquer la propriété); ayant reconnu qu'entre ces deux possibilités, il n'existe pas de régime intermédiaire semblable au *trust* de la *common law*, nous sommes d'avis que l'acte de fiducie qui est devant nous appartient à la première catégorie. Dans l'intention des parties, c'est un contrat de garantie et non un contrat d'aliénation; c'est un emprunt et non un transfert de propriété.

Cela ressort d'abord de la déclaration de la compagnie par laquelle débute l'acte de fiducie:

c. La Compagnie a besoin pour les fins de son entreprise de faire un emprunt de $900,000, au moyen d'une émission d'obligations garantie par hypothèque sur tous ses biens meubles et immeubles, présents et futurs.

Par toute la suite de l'acte, on ne réfère, en aucun cas, aux biens affectés par le contrat, autrement que comme biens hypothéqués:

Chapitre I, art. 2: "privilèges et hypothèques créés par le présent acte de fiducie".

Chapitre II, art. 7: "Ils jouiront des bénéfices de l'hypothèque que comporte le présent acte".

art. 19—(2e. sous-parag. a): "pouvant prendre rang avant l'inscription hypothécaire présentement donnée".

art. 19. (2e sous-parag. b): "aucune hypothèque prenant rang avant celle des présentes".

art. 19 (2e sous-parag. c. 3e alinéa): "pouvant passer antérieurement à l'hypothèque créée par le présent acte".

Chapitre IV.—La compagnie s'engage:

art. 3—"De maintenir et respecter les garanties créées par le présent acte etc."

art. 4—"De payer toutes taxes qui pourront affecter les biens hypothéqués".

art. 5.—"De ne faire aucune démolition ni changement aux immeubles hypothéqués".

art. 6a.—"De maintenir les biens hypothéqués".

(1) [1922] A.C. 80, at p. 85.

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Chapitre VII, art. 2: "devra prendre possession des biens hypothéqués". art. 3: "ni procéder à la vente forcée des biens hypothéqués". Chapitre VIII, art. 10: "prendre possession des biens hypothéqués" "pourra remettre à la Compagnie les biens hypothéqués".

Nous ne voulons pas attribuer trop d'importance aux mots, mais ce qui donne de la force à ceux-ci, c'est que nulle part dans le contrat les biens ne sont décrits sous une autre forme, sauf en deux endroits auxquels nous reviendrons.

Par ailleurs, les clauses de l'acte de fiducie sont celles d'un contrat d'hypothèque et de gage et non celles d'un contrat de cession. Il est passé

afin de garantir * * * le paiement des obligations (c. III, art. I). La compagnie * * * consent à ce que l'hypothèque, le gage et le transfert que comportent les présentes aient leur plein effet et garantissent par priorité * * * le paiement des obligations (Chapitre III, dernier paragraphe.)— La Compagnie pourra avec le consentement du fiduciaire, vendre pour le tout ou en partie, les biens meubles et immeubles dont elle n'aura plus besoin et le fiduciaire, advenant telle vente, devra donner quittance et décharger de l'hypothèque présentement établie sur ces biens (C. VI— art. I).

L'article 2 du chapitre VI est au même effet. Si, dans le cas de défaut de la compagnie, le fiduciaire prend possession des biens et les vend, il pourra

en donner bons titres, pour et au nom de la Compagnie. (C. VIII, art. 10). Les argents provenant de l'administration des biens hypothéqués (toujours la même désignation) ou de la vente d'iceux par le fiduciaire

seront d'abord imputés aux frais et déboursés, au paiement des intérêts et du principal des obligations, et "le surplus, s'il y en a, sera remis à la Compagnie" (c. X, art. 2). La clause 16e du chapitre IX prévoit le cas où l'ensemble des obligations permettra

à la Compagnie de créer et d'émettre d'autres obligations et valeurs prenant rang *pari passu* avec les obligations émises en vertu des présentes, ou avec priorité sur icelles.

Chacune de ces clauses n'est compatible qu'avec l'idée du titre de propriété reposant sur la tête de la compagnie. Aucune d'elle ne se concilie avec un droit de propriété appartenant au fiduciaire, surtout si l'on considère que par la sixième des clauses finales de l'acte, la Compagnie "constitue le fiduciaire son mandataire irrévocable".

Mais voici qui, à notre humble avis, est décisif. C'est la clause II du chapitre VIII, qui régit la manière dont la fiducie prend fin:

11. Sur preuve du paiement ou du rachat de toutes les obligations, ou sur preuve qu'il a été pourvu à leur paiement en la manière prescrite

aux présentes, et sur paiement de tous ses frais et déboursés ainsi que de sa rémunération, le fiduciaire devra à la réquisition de la Compagnie et aux dépens d'icelle, lui donner quittance finale et mainlevée de toutes les hypothèques prises en vertu des présentes.

Ainsi, le titre de propriété est bien resté entre les mains de la compagnie, puisque, sur paiement des obligations, on ne pourvoit pas à une rétrocession à la compagnie. Il suffit au fiduciaire de

donner quittance finale et mainlevée de toutes les hypothèques prises en vertu des présentes.

L'acte de fiducie, d'un bout à l'autre, ne confère au fiduciaire que les droits d'un créancier hypothécaire ou gagiste et non ceux d'un propriétaire. Le sens de l'acte, tant dans son texte que dans son esprit, est celui du contrat d'hypothèque et de nantissement. Il faut y ajouter le texte des obligations elles-mêmes, dont les appelants sont porteurs, et qui se lit

Elle est garantie *pari passu* par première hypothèque sur tous les biens de la Compagnie sujette à toutes les conditions et restrictions de l'acte de fiducie etc.

Si l'obligation donne à son porteur une hypothèque sur " tous les biens ", elle ne peut en même temps, par l'intermédiaire du fiduciaire, le constituer propriétaire d'aucun des biens.

Bref, dans tout ce long document de vingt-neuf pages imprimées, les seuls mots sur lesquels les appelants puissent s'appuyer pour leur prétention sont " cède et transporte " dans la phrase: " cède, transporte et donne en gage " de l'article I du chapitre III, et " cédés " dans la phrase: " hypothéqués, cédés et mis en gage " du chapitre V. Voici comment ils s'y rencontrent:

CHAPITRE III

Hypothèques

I. En considération du paiement de un dollar, ($1) que lui fait le fiduciaire, dont quittance, afin de garantir également et proportionnellement, "*pari passu*", le paiement des obligations à être émises en vertu des présentes, dont le principal s'élève à la somme de neuf cent mille piastres ($900,000), afin de garantir en outre le paiement d'une somme additionnelle de cinquante mille piastres ($50,000) pour couvrir, de préférence au capital des obligations, le montant des intérêts, frais, dépenses et autres accessoires, et pour assurer l'accomplissement de toutes les conditions et conventions du présent acte, la Compagnie hypothèque, grève et affecte, jusqu'à concurrence de la somme de neuf cent cinquante mille piastres ($950,000) en faveur du fiduciaire, acceptant, pour lui-même et pour les porteurs d'obligations, et lui *cède, transporte* et donne en gage, au même titre, tous ses biens meubles et immeubles, de quelque nature

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qu'ils soient, présents et futurs, situés dans la province de Québec, y compris ses entreprises, franchises, clientèle, achalandage, privilèges et contrats et plus spécialement les biens et l'actif ci-après au long décrits, savoir:

Cet immeuble connu comme étant les subdivisions numéros deux cent soixante-dix et trois cent trente-quatre du lot originaire numéro quatre mille trois cent quatre-vingt-un-A (4381-A-270 et 334) du cadastre officiel pour le quartier Montcalm de la cité de Québec, formant ensemble un emplacement borné en front au sud-est par la Grande Allée, en arrière au nord-ouest par les subdivisions numéros deux cent soixante-neuf et trois cent trente-trois du même lot, d'un côté au nord-est par l'Avenue Turnbull, et au sud-ouest par l'Avenue de la Tour, mesurant cent cinquante-six pieds de largeur par cent trente-deux pieds et six-dixièmes sur l'Avenue Turnbull, et cent trente-trois pieds et quatre dixièmes sur l'Avenue de la Tour, formant une superficie totale de vingt mille sept cent quarante-sept pieds carrés, plus ou moins, mesure anglaise, avec les bâtisses actuellement en construction, circonstances et dépendances.

Le susdit emplacement a été acquis par la Compagnie de M. Rodolphe E. MacKay, de la Cité de Québec, notaire, par un acte de vente passé devant Me Georges Michel Giroux, notaire à Québec, le vingt-six mai, mil neuf cent vingt-huit, et enregistré à Québec, le trente mai suivant sous le numéro 211,992.

Garantie de la Compagnie

La Compagnie déclare que les immeubles, biens, droits et franchises ci-dessus désignés lui appartiennent par bons titres et elle consent à ce que l'hypothèque, le gage et le transfert que comportent les présentes aient leur plein effet et garantissent par priorité d'abord le paiement des accessoires et en second lieu le paiement des obligations qui seront émises en vertu des dispositions du présent acte de fiducie.

CHAPITRE V.

Possession et usage des biens hypothéqués.

La Compagnie, à moins qu'elle ne soit en défaut, gardera pour les fins de son industrie et de son commerce, la possession et la jouissance de tous les biens présentement hypothéqués, *cédés* et mis en gage, avec droit d'en employer les loyers, profits et revenus comme elle l'entendra.

Après ce que nous avons dit au sujet de ces mêmes mots (" céder et transporter ") dans l'art. 13 du statut, *a fortiori* devons-nous conclure que, en vue du contexte et de l'ensemble de l'acte, ils doivent s'interpréter ici comme voulant dire " cède en gage, transporte en gage et donne en gage ", dans l'article I du chapitre III, et " cédés en gage ", dans le chapitre V. C'est, en effet, la seule manière d'empêcher qu'ils ne se trouvent en conflit avec tout le reste du contrat, comme nous l'avons vu; ou même de leur donner un sens qui soit logique. Autrement cette phraséologie signifierait que la compagnie aurait à la fois aliéné et mis en gage les mêmes biens, ce qui est légalement impossible. Il a été suggéré qu'on pourrait considérer la phrase comme " distributive ", c'est-à-dire que les mots " hypothèque, grève

et affecte" s'appliqueraient à certains biens, et les mots "cède et transporte" à d'autres biens. Mais, en outre qu'il n'y a rien dans tout le contrat, qui pourvoit à l'exercice par le fiduciaire des droits d'un propriétaire, la première des "clauses finales" rend les dispositions de l'acte applicables "à tous les biens dont la Compagnie fera subséquemment l'acquisition"; et surtout: il ne s'agit en cette cause que de la maison de rapport. L'immeuble qui la constitue (terrains et constructions) est le seul qui soit décrit dans l'acte parmi les biens que la compagnie "hypothèque, grève et affecte * * * cède, transporte et donne en gage". Or, dans le chapitre I des "définitions et interprétations" du contrat, on trouve:

10. "Biens hypothéqués" signifie les biens spécialement hypothéqués par les présentes et tous les autres biens présents et futurs de la compagnie.

La maison de rapport est le seul immeuble à qui les mots "les biens spécialement hypothéqués" puissent s'appliquer, conformément à l'article 2042 du Code civil.

En lisant, comme nous l'avons dit: "cède en gage, transporte en gage et donne en gage", tout se concilie. On ne fait aucune violence au texte et l'on a un sens qui se tient et qui est en harmonie à la fois avec l'ensemble de l'acte et avec le droit civil et la loi générale de la province de Québec.

Nous sommes, en conséquence, d'avis que la maison de rapport n'a jamais cessé d'être la propriété de la faillie. Comme telle elle est dévolue aux syndics, et la Cour Supérieure, siégeant en matière de faillite, avait juridiction pour en ordonner la vente ainsi qu'elle l'a fait.

L'appel doit être renvoyé avec dépens.

Le syndic est autorisé à effectuer la vente dans le même délai à partir du présent jugement que celui qui lui avait été accordé par le jugement de la Cour Supérieure.

SMITH J. (dissenting).—Les Appartements Lafontaine, Ltée. is a joint stock company that is in bankruptcy. Prior to the bankruptcy, it was the owner of a parcel of land in the city of Quebec on which it proposed to erect an apartment building.

By by-law of the 26th May, 1928, its shareholders authorized an issue of bonds aggregating $900,000 to be secured by a trust deed to a trustee, the proceeds to be used for the erection of the building.

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A trust deed was accordingly executed to the Sun Trust Company as trustee for the bondholders of the company's property and assets present and future, and bonds to the amount of $460,000 were sold to the public, and a contract was entered into with T. E. Rousseau, one of the directors of the company, for the construction of the apartment house. After the building had proceeded far enough to be enclosed, the contractor, claiming that there was $163,165 due to him and his sub-contractor, suspended operations and presented a petition in bankruptcy against the company, upon which it was declared bankrupt, and on the 12th of January, 1929, the respondents were appointed interim receivers, and took possession of the property. On the 30th April, 1929, the respondents were appointed trustees, with five inspectors, one of whom was the manager of the Sun Trust Company.

The trustee for the bondholders filed a claim under the trust deed for $463,000, declaring that the same was secured on the property of the bankrupt.

On the 11th June, 1929, the inspectors gave the trustees in bankruptcy permission in writing to sell the real estate of the bankrupt, in accordance with section 45 of the *Bankruptcy Act,* and on the 12th June, 1929, Chief Justice Lemieux made an order authorizing the trustees to sell accordingly.

The present appellants thereupon filed an opposition to this order, and on the presentation of the petition before Mr. Justice Letellier, the trustees in bankruptcy and the trustee for the bondholders appeared, by counsel, and opposed the objection. The learned judge held that the petitioning bondholders had no status, and that the trustee for the bondholders represented them.

An appeal was taken to the Court of King's Bench (appeal side), and was dismissed. There is no specific reference, either in the petition or in the reasons for judgment, to the effect of R.S.Q. (1909) s. 6119a, enacted by 4 Geo. V., and 14 Geo. V., c. 63, s. 1, now R.S.Q. (1925), c. 227, s. 10 and 14 inclusive, but Mr. Justice Létourneau, reading the judgment of the court, says:

Il est à peine nécessaire de dire qu'en cas de faillite et sauf les recours que la loi laisse au créancier garanti, les biens du failli passent au syndic.

It is doubtful if the learned judge had here in mind the effect of a trust deed of a corporation made to secure a bond issue in pursuance of the Acts referred to, which is the question here to be considered.

By the Civil Code, a hypothec does not pass the title and ownership of the property to the mortgagee as in the case of a mortgage at English common law, and only entitles the creditor to have the property sold and to have a preference on the proceeds. Arts. 2016, 2053 C.C.

Moveables are not ordinarily susceptible of hypothecation; Art. 2022 C.C.

Both immoveables and moveables may be pledged, and the pledge of immoveables is subject to the rules contained in the second chapter, relating to pawning, in so far as they can be made to apply. Art. 1967 C.C. The pledging of moveable property is called " pawning ", and the pawning of a thing gives to the creditor a right to be paid from it by privilege and preference before other creditors; and the privilege subsists only while the thing pawned remains in the hands of the creditor or the person appointed by the parties to hold it. Arts. 1968, 1969, 1970 C.C. Immoveable property, to be acquired, in future, cannot be hypothecated; Art. 2037 C.C.; and, as moveable property to be acquired cannot be given into possession, it cannot ordinarily be pledged. The ownership of things does not pass to the pledgee. Art. 1972 C.C.

By 4 Geo. V., c. 51, s. 1, there was introduced into the R.S.Q. (1909) the following articles:

6119a. Notwithstanding any existing law any joint stock company, incorporated under an Act of the legislature of the province of Quebec, or by letters-patent, or any company so incorporated outside the province, if empowered thereto by its charter or its letters-patent, may by authentic deed—for the purpose of securing any bonds, debentures or debenture stock which it is by law entitled to issue—hypothecate, mortgage or pledge any property, moveable or immoveable, present or future, which it may own in the province.

6119b. Such hypothecation, mortgage or pledging may be by trust deed to any trustee, and such security shall be good and valid, notwithstanding that the mortgagor or pledgor may be permitted by the trustee to remain in the possession and use of the property so mortgaged or pledged.

6119c. The rights which such hypothec and mortgage give upon immoveables, and the manner in which they must be registered, shall be governed by the provisions of the Civil Code in the title of *Privileges and Hypothecs* and that of *Registration of Real Rights*, and they shall be subject thereto.

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The mortgaging and pledge of moveables shall confer a privilege upon moveables present and future, ranking immediately after the other privileges on moveables enumerated in articles 1994, 1994a, 1994b and 1994c of the Civil Code. Such hypothec and such privilege shall take effect only from the date of the registration of the deed by which they are constituted, in the Registry office of the registration division in which the company has its head office in the province, and also in any other division in which it has a place of business.

The Registrar shall inscribe the trust deed creating a hypothec upon or a pledge of the moveables, in a register which he shall keep for that purpose, and which shall be at all times, during office hours, open to inspection by the public. The registrar may exact, for such registration and for such inspection, the fee which shall from time to time be fixed by the Lieutenant-Governor in Council.

By 10 Geo. V, c. 72, s. 1, new articles were substituted for articles 5957 to 6090 R.S.Q. (1909) inclusive, article 6009c of which provides that, if authorized by by-law, the directors may,

notwithstanding article 2017 of the Civil Code, hypothecate, mortgage, or pledge the moveable or immoveable property, present or future, of the company, to secure any such debentures, or other securities, or give part only of such guarantee for such purposes; and constitute the hypothec, mortgage or pledge mentioned in this subparagraph, by trust deed, in accordance with articles 6119b and 6119c, or in any other manner.

By 14 Geo. V., c. 63, it is enacted as follows:

Whereas doubts have arisen as to whether, under articles 6119a and following of the Revised Statutes, 1909, as enacted by the Act 4 George V, chapter 51, section 1, a company may cede and transfer to a trustee, with power, in the event of the failure of the company to fulfil the conditions of the trust deed, to take possession of, administer and sell the properties which it is authorized to hypothecate, mortgage and pledge:

Therefore, His Majesty, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:

1. It is and always has been lawful for a company falling under articles 6119a and following of the Revised Statutes 1909, besides hypothecating, mortgaging and pledging for the purposes set forth in the said articles, to cede and transfer, for the same purposes, the said properties to the trustee, with power in the event of the failure of the company to fulfil the conditions of the trust deed, to take possession of the properties ceded and transferred, to administer and sell them for the benefit of the bondholders.

Articles 6119a, 6119b and 6119c, and s. 1 of 14 Geo. V., c. 63, are now sections 10, 11, 12 and 13 of the *Special Corporate Powers Act*, R.S.Q. (1925), c. 227; and article 6009c of 10 Geo. V., c. 72, is now s. 67c of the *Quebec Companies Act*, c. 223, R.S.Q. (1925), slightly varied, the first lines reading, "Notwithstanding the provisions of the Civil Code", and the final part reading:

By trust deed in accordance with sections 11 and 12 of the *Special Corporate Powers Act* (c. 227).

A corporation may acquire, alienate and possess property, art. 358 C.C.; and it is suggested that a corporation has the right to cede and transfer its property to secure its bonds independently of these statutes. A joint stock company is a creature of statute law, and when it is given, by express statutory provision, power to secure its bonds on its property by a specific method, as here, it may be limited by implication to that method, and we must therefore determine what is authorized by these statutes dealing with the matter.

It is argued that a trust deed, made in terms authorized by this legislation, has not the effect of passing the ownership of the property to the trustee in derogation of articles 1972 and 2053 because article 6119c provides that the rights which such hypothec and mortgage give in immoveables shall be governed by the provisions of the Civil Code in the title of privileges and hypothecs; and the rights conferred by the mortgage and pledge of moveables are stated to be a privilege ranking after certain other privileges set out in the code.

We must first note the language at the beginning of article 6119a: "Notwithstanding any existing law", indicating that the very object of the article was to give to companies the right, by authority of this article, to do what it was thought could not otherwise be done by reason of existing law. It is, however, contended that the special rights, which the statute purports to give, are those set out in the article itself, namely, the right to hypothecate, mortgage and pledge immoveable and moveable property, present and future, and the power to make valid securities of the kind mentioned, though the mortgagor or pledgor be permitted to remain in possession.

There could be no doubt about the legislation going to this extent, expressly provided for, in derogation of the provisions of the Civil Code. The statute of 14 Geo. V., c. 63, however, recites that doubts had arisen as to whether, *under articles 6119a and following,* a company may cede and transfer to a trustee, with power, in the event of the failure of the company to fulfil the conditions of the trust deed, to take possession of, administer and sell the properties which it is authorized to hypothecate, mortgage and pledge. It is then enacted that it is and has always been

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lawful for a company, *falling under the articles* referred to, besides hypothecating, mortgaging and pledging for the purposes set forth in the articles, to cede and transfer, for the same purposes, the said properties, with the powers mentioned in the recital. This is a declaration by the legislature that these *special rights* are given by the articles in question, in addition to those expressly mentioned, *notwithstanding anything in the Civil Code and notwithstanding the provisions of art. 6119c.*

A deed that cedes and transfers property passes the ownership to the transferee, according to the ordinary meaning of the words. If this is not the intention of the Act, what do the words "cede and transfer the property" give in addition to what is given by the other words, "hypothecate, mortgage and pledge," already appearing in article 6119a?

It is argued that the question intended to be set at rest by 14 Geo. V., c. 63, was the right of the trustee to take possession of the properties, and to administer and sell them for the benefit of the bondholders. If that was all that was intended, it was only necessary to declare that it is and always has been lawful, under article 6119a, to hypothecate, mortgage and pledge, with power to the trustee to take possession, etc.

By the language of the statute, it is to a trust deed which cedes and transfers the property that the power to take possession and sell attaches. The construction contended for would attach the power to take possession and sell to every hypothec and pledge, and would give no effect to the words, "cede and transfer." It seems to me that the very object of the statute was to declare that it is and always has been lawful for the company under article 6119a to do something more than hypothecate, mortgage and pledge property to a trustee for the purposes named, namely, to cede and transfer the same; that is, to transfer the ownership of it to a trustee, with the powers mentioned. This is the right that a company has under the English common law, which gives to a trustee for bondholders higher rights than are given by hypothec and pledge under the Civil Code. The object, therefore, seems to be to extend to a trustee for bondholders of a company having property in Quebec the fuller rights over the property given in security that would

be given by a mortgage under the English common law, which transfers the ownership to the trustee.

Article 6119c was in the statute when 14 Geo. V., c. 63, was enacted, and, if I am right as to what was intended by the latter statute, the provisions of this article become subject to whatever modification is necessary to give full effect to article 6119a, according to the interpretation to be placed on it, as declared by the later statute of 14 Geo. V.

It remains to be determined whether or not we have in this case a trust deed made in pursuance of the power given by the statute in terms that transfer to the trustee the ownership in the property with the powers there mentioned. The language of the deed is:

* * * la companie hypothèque, grève et affecte, jusqu'à concurrence de la somme de neuf cent cinquante mille piastres ($950,000) en faveur du fiduciaire, acceptant, pour lui-même et pour les porteurs d'obligations, et lui cède, transporte et donne en gage, au même titre, tous ses biens meubles et immeubles * * *

It is contended that the later words of conveyance should be read "*cède en gage, transporte en gage et donne en gage*", which amount only to the creation of a "droit de gage", and leaves the ownership in the debtor company until the property has been appropriated by the trustee in satisfaction of his claim, after default, or has been sold for that purpose. It is pointed out that throughout the document it is described as "hypothec" and "garantie", and that many of its provisions have reference only to a document of that character. It has, however, the words "cede and transfer", and gives power to the trustee to take possession of the property and "administer the affairs of the company", and to sell the property. These powers are not connected with the words "cede and transfer", as in the statute, and they are not set out in the exact language of the statute where the power is to take possession of the property, "to administer and sell for the benefit of the bondholders". In the clause giving power to sell it is not stated to be for the benefit of the bondholders, and nothing is said as to what is to be done with the proceeds. On a sale by the trustee, he is empowered to deliver the property sold to the buyer on receipt of the price, and to give him "bons titres, pour et en nom de la Compagnie".

I think the words of the conveyance, "cède et transporte" found in the document, have the effect of transfer-

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ring the ownership, and the trustee, having thus become vested with the ownership, is bound to deal with the the property as provided in the deed. It may, I think, be implied that power given by the deed to the trustee to administer the affairs of the company and to sell, is for the benefit of the bondholders, and that, therefore, the trust deed, though badly drawn, comes within the description in the statute.

The property, therefore, became vested in the trustee for the bondholders, and all that passed to the liquidator was the right that the bankrupt had to get it back on payment of the bonds. The order in question, however, authorizes the liquidators to sell and convey this property in full ownership, though they are not possessed of the ownership.

The authority relied on for this is s. 45 of the *Bankruptcy Act*. That section relates only to hypothecs and pledges, and this being a security of a different character, having a different effect, that section does not apply. The sections of the *Bankruptcy Act* which give jurisdiction to the liquidator to sell property the ownership of which is vested in a creditor as security for his debt are those under the heading "Proof by Secured Creditors", commencing with s. 106. There were no proceedings taken to bring these sections into operation.

It was argued that the trustee for the bondholders had a right to represent them, and appeared by counsel to oppose the opposition and to express approval of the order.

It is quite clear, as has been held in the court below, that the appellants failed to establish default on the part of the trustee by failure to take possession of the property at the request of certain bondholders, because they did not fulfil the conditions set out in the trust deed required to be fulfilled before the trustee was under obligation to take possession. If, however, the view that I have expressed as to the effect of the trust deed is correct, the liquidators had no authority to sell, and the court no jurisdiction to authorize a sale, and the trustee could not by assent vest the liquidators with authority to sell. The trustee had the ownership of the property vested in it to hold for the bondholders, and, on the assertion by the liquidators of an adverse title to ownership, the trustee took the attitude, quite possibly in good faith under the impression that the

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trust deed is merely a hypothec, of abandoning its ownership to the adverse claimant. This gave the appellants a status to come into court to protect their security thus being voluntarily surrendered.

It appears that there are builders' liens registered against the property which, it is said, give the lienholders priority over the trustee for the bondholders on the increased value added to the property by the building, and that therefore the trustee will be unable to exercise its power of sale, and that a sale by direction of the court will be necessary in any case. We are, however, concerned only with the jurisdiction to make the particular order in question in the bankruptcy proceedings, and have nothing to do with what may be done by the trustee under whatever powers he may have, or with what the court may order in other proceedings.

Appeal dismissed with costs.

Solicitor for the appellants: *L. G. Belley.*

Solicitors for the respondents: *St. Laurent, Gagné, Devlin & Taschereau.*

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*Feb. 13, 14.
*June 10.

LA BANQUE CANADIENNE NATIONALE (DEFENDANT) ..... } APPELLANT;

AND

DAME BLANCHE CARETTE (PLAINTIFF) ..... } RESPONDENT.

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

Husband and wife—Life insurance policy—Wife as beneficiary—Transfer by husband and wife as security for debts of husband—Validity—Arts. 1265, 1301 C.C.—Act respecting life insurance by husbands and parents, R.S.Q., 1909, Art. 7405; R.S.Q., 1925, c. 244, s. 30.

The transfer of an insurance policy, issued on the life of the husband for the benefit of his wife at his death but also payable to him if living at a certain specified date, which transfer was made jointly by the husband and the wife to secure reimbursement of advances made to the husband by a bank, is illegal and void, as to the wife, such transfer being in contravention of the provisions of article 1301 C.C.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

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The legislature, in enacting article 7405 R.S.Q. 1909, now article 30 of R.S.Q. 1925, c. 244 (*An Act respecting life insurance by husbands and parents*), although authorising in general terms the transfer of a life insurance policy by the insured and the beneficiaries, did not intend to make any change as to the provisions of the Civil Code which deal with personal incapacities and contraventions of public order, and notably as to the prohibition contained in article 1301 C.C.

Laframboise v. *Vallières* ([1927] S.C.R. 193), *Klock* v. *Chamberlin* (15 Can. S.C.R. 325) and *Rodrigue* v. *Dostie* ([1927] S.C.R. 563) discussed.

Judgment of the Court of King's Bench (Q.R. 47 K.B. 104) affirmed in part.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Letellier J. and maintaining the respondent's action.

The material facts of the case are stated in the judgment now reported.

Alex. Gérin-Lajoie K.C. and *R. Taschereau K.C.* for the appellant.

J. A. Prévost K.C. and *A. Savard K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET, J.—L'époux de l'intimée a obtenu de The Ætna Life Insurance Company quatre polices d'assurance sur sa vie, de mille piastres ($1,000) chacune, portant les numéros 346132, 370928, 456653 et 456654.

La police n° 346132 est datée du 30 avril 1904. Elle stipule que,

at the end of the policy-year falling nearest to age eighty-four, if the insured is then living, or, on receipt and approval of the proofs of the death of the said insured,

la compagnie paiera la somme de mille piastres ($1,000) à l'assuré lui-même, si le terme de paiement échoit sa vie durant; à ses exécuteurs, administrateurs ou ayants cause, si le montant de la police devient payable par suite de son décès. Toute somme payable en vertu de la police, du vivant de l'assuré, soit à titre de " cash surrender value ", soit à titre de dividende, devra également appartenir à l'assuré lui-même. Le bénéficiaire de la police peut en

(1) (1929) Q.R. 47 K.B. 104.

tout temps être changé, " provided the policy is not then assigned ". La police est, en outre, subordonnée à certaines conditions qui sont imprimées au verso et dont nous n'avons pas besoin de nous occuper pour les fins de cette cause.

La police nº 370928 porte la date du 17 janvier 1906. Elle contient les mêmes stipulations que la police précédente, sauf que l'âge fixé pour l'échéance durant la vie de l'assuré est quatre-vingt-cinq ans, au lieu de quatre-vingt-quatre ans.

Le 25 mai 1910, l'assuré (comme chacune des polices lui en donnait le droit, et s'autorisant, en plus, de la loi relative à l'assurance " sur la vie des maris et parents " (S.R.Q. 1888, arts. 5580 et seq.; S.R.Q. 1909, arts. 7377 et seq.) attribua à son épouse, l'intimée, le bénéfice de ces deux polices

in case of my death previous to hers only, any value payable under this contract during my lifetime being payable to myself, to the exclusion of all other persons.

Les polices 456653 et 456654 stipulent que;

upon receipt of due proof of the death of Joseph E. Poulin (le mari) * * * during the continuance of this policy within the term of fifty-five years from the date hereof; or * * * at the end of said term, if the insured is then living,

la compagnie paiera la somme de $1,000 à l'assuré lui-même, si le terme échoit sa vie durant; et, si le montant de la police devient payable par suite du décès de l'assuré, la compagnie paiera à l'intimée, pourvu qu'elle survive à ce dernier, ou aux exécuteurs, administrateurs et ayants cause de l'assuré, si elle ne lui survit pas. Mais, dans le cas d'incapacité permanente absolue de l'assuré, les bénéfices ci-dessus sont remplacés par des montants mensuels payables à l'assuré lui-même. Il y a également des stipulations pour une " cash surrender value " et pour des attributions de dividendes en faveur de l'assuré.

Il est constaté au dossier que l'assuré a jusqu'ici acquitté toutes les primes dues sur chacune des quatre polices, et même que les polices nºs 346132 et 370928 sont maintenant en vigueur comme pleinement acquittées et ne requièrent plus aucun paiement subséquent de prime.

Le 3 août 1918, l'assuré et son épouse ont cédé à la Banque Nationale chacune des polices ci-dessus, au moyen

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d'un document qui est semblable dans chacun des cas et dont il suffira, par conséquent, de reproduire celui qui a trait à la police n° 346132:

Original Assignment

To be attached and retained with the policy.

For value received, we hereby transfer, assign and set over absolutely unto La Banque Nationale St. Roch's branch of Quebec, province of Quebec, all our right, title and interest in policy no. 346,132 issued by the Ætna Life Insurance Company, of Hartford, Conn., on the life of Joseph E. Poulin and all benefit and advantage to be derived therefrom, dividends included.

Each and every person executing this assignment represents to said company that, according to the laws of the province of domicile, he or she is legally capable of executing this form, that no proceedings in insolvency have been instituted by or against him (or her), and that said policy has been given to no one, by marriage contract or otherwise.

Witness our hand and seal at Quebec, province of Quebec, this 3rd day of August, 1918.

Witness: Oscar Morin.

Joseph E. Poulin.

Blanche Carette Poulin.

Plus de neuf ans après, l'intimée a intenté la présente action contre l'appelante qui, par acte du parlement du Canada, avait substitué son nom actuel, La Banque Canadienne Nationale, à celui de La Banque d'Hochelaga, et qui avait acquis les droits et obligations de la Banque Nationale.

Par son action, l'intimée conclut à ce que les quatre transports signés par elle et son mari à Québec, le 3 août 1918, en faveur de la Banque Nationale, soient déclarés illégaux et nuls;

(*a*) Parce qu'ils sont une contravention à l'article 1265 du code civil, qui interdit aux époux de s'avantager entre vifs; et que l'intimée s'est départie de ses droits en faveur de son mari, et pour son unique bénéfice et avantage;

(*b*) Parce qu'ils sont une contravention à l'art. 1301, qui frappe de nullité toute obligation assumée par la femme avec ou pour son mari, autrement qu'en qualité de commune; et qu'en les signant avec son mari, la demanderesse s'est portée garante sur ses biens conjointement avec son mari;

(*c*) Parce que la demanderesse n'a rien reçu de la banque comme considération des dits transports;

(*d*) Parce qu'ils ont été signés en garantie collatérale d'un billet de $10,000 de la compagnie Wedgerite Piston Ring, qui a été payé depuis longtemps, et qui serait, à tout événement, prescrit.

Elle demande donc que la banque reçoive l'ordre de lui remettre les quatre polices d'assurance, et qu'à défaut par

elle de ce faire elle soit condamnée à payer purement et simplement à l'intimée la somme de $4,000, valeur de ces polices.

La défense est que les polices

ont été transportées sans restriction pour les dettes de Joseph Poulin, qui, au moment du transport, étaient considérables et dépassaient de beaucoup le montant qu'elles représentent;

que l'intimée ne s'est pas obligée avec ou pour son mari; qu'il n'a été fait en l'occurrence aucun changement aux conventions matrimoniales; et qu'à tout événement le transport des polices était autorisé par la loi relative à l'assurance sur la vie des maris et parents.

La Cour Supérieure a débouté l'intimée des fins de son action, avec dépens. La majorité de la Cour du Banc du Roi a infirmé le jugement et a déclaré les transports nuls comme étant en contravention à l'article 1301 du code civil. Elle a condamné l'appelante à remettre à l'intimée les polices d'assurance dans les quinze jours de la signification du jugement; et, à défaut par elle de ce faire dans ce délai, à payer à l'intimée la somme de $4,000, avec dépens, tant de la Cour Supérieure que de la Cour du Banc du Roi; monsieur le juge Bernier étant dissident.

Nous pouvons, dès l'abord, disposer de trois des moyens soulevés dans l'action de l'intimée, c'est-à-dire de ceux que nous avons indiqués ci-dessus comme moyens (*a*), (*c*) et (*d*).

Il est acquis au dossier que la demanderesse n'a rien reçu personnellement de la banque comme considération du transport des polices d'assurance.

En outre, il n'est plus discuté que, nonobstant leurs termes qui comportent une cession des polices à la banque sans aucune restriction, les transports ont été signés seulement en garantie collatérale des dettes du mari. Il y avait divergence entre les parties sur le point de savoir si la garantie fut donnée uniquement à l'égard du billet de $10,000 de la compagnie Wedgerite, dont le mari était responsable, ou à l'égard de toutes les dettes du mari envers la banque. La Cour Supérieure a trouvé que la preuve ne permettait pas de décider que les polices avaient été données seulement en garantie du billet Wedgerite. La Cour du Banc du Roi a été du même avis. Sur ce point, nous

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sommes d'accord avec ces deux cours; et d'ailleurs, les termes généraux des transports en faveur de la banque nous paraissent décisifs.

D'autre part, M. Morency, qui était un des inspecteurs de la Banque Nationale à l'époque où elle a accepté les transports, a témoigné que les quatre polices étaient mentionnées dans son rapport d'inspection d'octobre 1919 comme étant détenues non pas en paiement *pro tanto,* mais en *garantie* générale du compte de Poulin, le mari de l'intimée. En plus, la banque, dans son factum, admet

que les polices d'assurance en question ont été données à la Banque Canadienne Nationale par J.-Ed. Poulin, le mari de l'intimé, pour *garantir* son compte général.

Il en résulte que le litige doit être envisagé du point de vue d'un transport par une femme mariée en garantie des dettes de son mari, et non pas, ainsi que la plaidoirie écrite l'avait d'abord soumis, comme un transport pur et simple d'une femme mariée en paiement des dettes de son mari.

Cette distinction est très importante; car, comme nous l'avons fait remarquer entre autres dans la cause de *Laframboise* v. *Vallières* (1),

l'on est d'accord, en effet, pour interpréter l'article 1301 du code civil comme une prohibition à la femme mariée de cautionner, de garantir, de s'engager pour l'avenir "avec ou pour son mari"; et il est admis que l'acte juridique ainsi proscrit par le législateur est le contrat de garantie ou de sûreté. Le mot "s'obliger", dans cet article, doit s'entendre comme indiquant seulement le contrat de cautionnement.

(*Lebel* v. *Bradin* (2)). Par conséquent, si l'intimée avait cédé purement et simplement ses droits dans les polices, la question de l'application de l'article 1301 C.C. se présenterait sous un jour tout différent. Nous tenons à bien définir ce point immédiatement pour éviter toute ambiguïté sur ce que nous pourrons dire au sujet de cet article par la suite de notre jugement.

Nous devons écarter également l'article 1265 du code civil. Le contrat de mariage entre les époux Poulin ne fait pas mention de ces polices d'assurance; et ces dernières n'ont pas été prises pour le bénéfice de l'épouse intimée en exécution des conventions matrimoniales. Dans ce contrat, il est fait don à la future épouse, à titre de donation entre vifs et irrévocable, d'une somme de $5,000 courant, qu'elle a droit d'exiger une fois pour toutes

(1) [1927] Can. S.C.R. 193, at p. 197. (2) (1913) 19 R.L.n.s. 16.

et ce par elle à prendre sur les plus clairs et apparents biens, tant mobiliers, immobiliers, polices d'assurance de vie que autres généralement quelconques du futur époux, soit de son vivant ou à la mort de ce dernier, au choix de la future épouse et sur sa première demande;

mais lorsque Poulin attribua à son épouse le bénéfice des polices d'assurance, il l'a fait, suivant son propre aveu, "pour protéger son épouse et ses enfants d'une façon générale". Il ne le fit pas en paiement de la donation contenue au contrat de mariage et cela ne fut pas accepté comme tel par l'intimée. En transportant ces polices à la banque, l'intimée n'a donc fait aucun changement aux conventions matrimoniales contenues au contrat de mariage. C'est ce que la Cour du Banc du Roi a unanimement décidé, d'accord en cela avec la Cour Supérieure; et l'intimée l'a si bien vu qu'elle a déclaré dans son factum qu'elle " n'insiste pas sur cette prétention devant cette honorable cour ".

Cependant, l'admission que les transports des polices d'assurance ont été faits par l'intimée non pas en cession pure et simple à la banque, mais seulement en garantie collatérale des dettes du mari, entraîne comme conséquence l'application de l'article 1301 du code civil en vertu duquel

la femme ne peut s'obliger avec ou pour son mari qu'en qualité de commune; toute autre obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet, sauf les droits des créanciers qui contractent de bonne foi.

La banque a prétendu que la prohibition contenue dans cet article ne visait que la garantie personnelle de la femme mariée et ne comprenait pas la garantie réelle. L'honorable juge LaFontaine, le présent juge-en-chef de la province de Québec, dans la cause de *Joubert et Turcotte* v. *Kieffer* (1) a fait de cette question une étude approfondie, à laquelle nous ne saurions rien ajouter, et où il a démontré que par le mot " s'obliger " il faut entendre

tout engagement quelconque par lequel une femme mariée prend à sa charge le paiement d'une dette de son mari, soit qu'elle contracte une obligation personnelle, comme dans le cautionnement, ou qu'elle engage ses biens seulement, comme dans le contrat d'hypothèque ou de gage.

C'est ce que cette cour a décidé dans la cause de *Klock* v. *Chamberlin* (2), et de nouveau dans la cause de *Rodrigue* v. *Dostie* (3). Nous croyons que la Cour du Banc du Roi a

(1) Q.R. 51 S.C. 152.
(2) (1887) 15 Can. S.C.R. 325.
(3) [1927] S.C.R. 563.

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eu raison d'appliquer ces arrêts; et nous approuvons à cet égard les raisons données par MM. les juges Dorion et Rivard.

L'on a pu voir, par l'analyse que nous en avons faite, comme d'ailleurs par les termes mêmes des transports à la banque, que tous les droits et avantages inhérents aux polices du vivant du mari vont à ce dernier et sont réservés en sa faveur. Le capital lui-même des polices appartiendra au mari, s'il écheoit pendant sa vie. Il en est ainsi des dividendes et de tout paiement de la valeur au comptant (" cash surrender value "), au cas où elle serait réclamée, à certaines périodes fixées, avant la mort de l'assuré. Les droits de l'épouse intimée se limitent au montant qui deviendrait dû par suite du décès du mari, et à la condition qu'elle lui survive. Ce sont là, il est vrai, des droits aléatoires et incertains; mais ce sont des droits tout de même. Ils font partie des biens éventuels de l'intimée. Elle n'y a pas renoncé, comme le prétend la banque. Cette prétention serait exacte si les transports devaient être pris à la lettre; mais nous avons vu que la véritable transaction entre la banque, l'intimée et son mari a été seulement une garantie donnée à la banque pour les dettes du mari.

Dans la cause de *Laframboise* v. *Vallières* (1), dont l'appelante s'est beaucoup réclamée, le mari, dans le contrat de mariage, avait donné à sa femme la jouissance et l'usufruit d'un immeuble, et en plus une somme de $1,800 garantie par hypothèque sur cet immeuble. Plus tard, lorsque le mari vendit l'immeuble à un tiers, l'épouse renonça

spécialement à tous droits qu'elle avait sur ledit immeuble, y compris ceux pouvant lui résulter de son contrat de mariage.

Elle renonçait donc à la jouissance et usufruit éventuels de l'immeuble, et à l'hypothèque qui garantissait le don de $1,800.

Cette cour a décidé que la donation de la jouissance et usufruit de l'immeuble, qui devait prendre effet après le décès du mari, était une donation à cause de mort, qui n'empêchait pas le mari d'aliéner l'immeuble " à titre onéreux et pour son propre avantage ", en vertu de l'article 823 du code civil. L'intervention de l'épouse dans l'acte de vente pour abandonner à l'acquéreur cette jouissance et usufruit n'avait donc rien ajouté au titre que le mari avait

(1) [1927] Can. S.C.R. 193.

le droit de conférer à cet acquéreur. D'autre part, la cour a également décidé que la renonciation en faveur du même acquéreur à l'hypothèque garantissant le don de $1,800, et qui laissait subsister l'obligation personnelle du mari, ne constituait pas une contravention à l'article 1265 du code civil. Mais c'est là tout l'effet de ce jugement.

L'appelante ne peut donc invoquer en sa faveur cet arrêt de *Laframboise* v. *Vallières* (1), avec lequel le présent litige n'a aucune analogie. Ici, d'ailleurs, il n'y a pas eu de renonciation de la part de l'épouse. Il n'y a eu ni abandon, ni cession de ses droits. Elle a engagé ses droits en garantie des dettes de son mari; elle s'est donc obligée sur ces biens; et, comme le fait remarquer M. le juge Dorion en Cour du Banc du Roi, l'obligation personnelle, dans l'évolution de notre droit, n'est rien autre chose, en définitive, qu'un " engagement sur les biens seulement ". La seule différence entre une promesse de payer et un transport en garantie est que, dans ce dernier cas, l'obligation se réduit à la valeur du bien donné en gage; mais il n'en constitue pas moins un engagement de payer. Dans le cas qui nous occupe, l'épouse a engagé ses biens avec l'idée de retour. Les biens qu'elle transportait à la banque devaient retourner à elle si les dettes du mari étaient payées et lorsqu'elles le seraient. Elle n'a pas aliéné. Elle a " engagé l'avenir ".

Il faut dire, par conséquent, que les transports d'assurance dont l'intimée demande la nullité tombent sous le coup de l'article 1301 du code civil; et, de tous les moyens soulevés devant la Cour Supérieure et la Cour du Banc du Roi, il ne reste donc que le suivant:

L'article 7405 des statuts refondus de Québec de 1909, qui était la loi en vigueur lorsque les transports furent effectués par l'intimée, a-t-il pour effet de les soustraire à l'application de l'article 1301 du code civil?

L'article 7405 fait partie de la loi dont nous avons déjà parlé, " De l'assurance sur la vie des maris et parents ", et se lit comme suit:

7405. Les polices d'assurance effectuées ou appliquées en vertu de la présente section, sont insaisissables pour les dettes des personnes assurées ou qui doivent en bénéficier.

Pendant qu'il est entre les mains de la compagnie, le montant de l'assurance est aussi insaisissable pour les dettes de l'assuré, ainsi que pour celles des bénéficiaires, et doit être payé en conformité de la police, de la déclaration d'application ou de toute révocation qui s'y rapportent.

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Cette insaisissabilité ne s'applique cependant pas à une police, en tout ou en partie, qui peut être retournée et appartenir à l'assuré. L'assuré et les parties avantagées peuvent de concert transférer la police.

Une règle fondamentale est que les statuts doivent être interprétés, autant que possible, en harmonie avec le droit commun. Le législateur n'est pas présumé avoir eu l'intention de modifier le droit commun au delà de ce qu'il en déclare expressément.

It is a sound rule to construe a statute in conformity with the common law rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. (*The Queen* v. *Morris* (1)).

L'article 1301 du code civil a pour but la protection de la femme mariée contre le danger d'engager ses biens ou sa responsabilité personnelle, où elle pourrait se laisser entraîner sous l'influence de son mari ou même par simple affection pour lui. La loi de l'assurance sur la vie des maris et parents procède également d'une idée de protection. Lorsqu'elle fut adoptée, en 1865, elle était intitulée: "Acte pour assurer aux femmes et aux enfants le bénéfice des assurances sur la vie de leurs maris et de leurs parents" (29 V., c. 17). Déjà à cette époque, lors du décès de l'assuré, le montant de l'assurance dû sur la police était payable au bénéficiaire sans qu'il pût être "réclamé par aucun créancier, ou créanciers, que ce soit" (art. 5).

Le principe de l'article 1301 du code civil existait dès lors dans la loi du Bas-Canada. Sans doute, l'origine en remonte au sénatus-consulte velléien; mais il a été exprimé, dans l'ancien droit antérieur au code civil, au statut 4 V., c. 30, art. 36 (1841), reproduit avec modifications dans les statuts refondus du Bas-Canada (1861, c. 37, art. 55) et plus tard dans le code, où il est demeuré jusqu'à ce jour.

La première loi d'assurance sur la vie des maris et parents ne contenait pas de clause d'incessibilité; mais il est évident que les avantages résultant de ces sortes d'assurances en faveur de la femme mariée restaient subordonnés à la prohibition qui lui défendait de les engager pour le compte de son mari. En d'autres termes, ces avantages étaient régis par la loi générale.

(1) L.R. 1 C.C.R. 90, at p. 95.

En 1869, par la loi 32 V., c. 39, il fut permis à

toute personne dont la vie est assurée * * * par acte notarié ou autre instrument par écrit, et sans aucun endossement sur la police (de) céder et transporter à titre de sûreté collatérale, pour toute somme de deniers ou autrement, aucune partie des droits qu'elle possède dans la dite police, pourvu qu'elle ne soit pas moindre que le quart du montant d'icelle.

Par là l'assuré était autorisé à transporter ses droits; mais ceux des bénéficiaires restaient intacts.

En 1870, par la loi 33 V., c. 21, le législateur permit à la personne assurée " d'emprunter, sous la garantie de la police, telle somme qui sera nécessaire " pour maintenir la dite police en vigueur ". Il fut décrété que les sommes ainsi empruntées constitueraient

la première charge sur les polices, nonobstant toute telle indication de paiement en faveur de la femme ou des enfants * * * pourvu que les sommes ainsi empruntées n'excèdent pas le montant de la prime d'une année.

Mais, en 1878 (41-42 V., c. 13), les lois antérieures furent abrogées. Le pouvoir de l'assuré d'emprunter sur la garantie de la police la somme nécessaire pour la maintenir en force fut accordé sous une forme nouvelle. Cependant, l'autorisation à l'assuré de céder ses droits à titre de sûreté collatérale pour toute autre somme de deniers (contenue dans la loi de 1869) ne fut pas conservée dans la nouvelle loi; et, au contraire, il y fut décrété (art. 26) que les polices d'assurance régies par la loi

ne seront pas saisissables pour dettes dues soit par le personne assurée, soit par les personnes devant bénéficier de la police, et seront incessibles par toutes telles personnes.

Cette insaisissabilité et cette incessibilité furent maintenues dans les statuts refondus de Québec de 1888 (art. 5604) et demeurèrent en vigueur jusqu'en 1898. Pendant tout ce temps, par conséquent, non seulement les avantages de la femme mariée résultant de ces polices d'assurance tombaient sous le coup de l'article 1301 du code civil, mais il était même défendu à toute personne intéressée dans ces polices, soit comme assurée, soit comme bénéficiaire, de les céder à qui que ce soit.

C'est alors que la législature, par la loi 61 V., c. 40 (1898), a fait disparaître de l'article 5604 des statuts refondus de 1888 les mots " et sont également incessibles par ces personnes ", et a ajouté, à la fin de l'article, l'alinéa suivant:

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Et c'est depuis ce temps que la loi existe telle qu'elle se lit dans l'article 7405 des statuts refondus de 1909 et encore maintenant dans l'article 30 du chapitre 244 des statuts refondus de 1925. Jusqu'à 1898, il n'est pas douteux que l'article 1301 du code civil s'appliquait à ce genre de transaction. La loi spéciale de l'assurance des maris allait même plus loin que cet article. En 1898, les polices qui étaient jusqu'alors incessibles sont devenues cessibles. C'est tout ce que le législateur a décrété. Il n'a pas changé le droit commun. Par exemple, on ne peut déduire de cette législation qu'on ait voulu autoriser un incapable, tel que le mineur ou l'interdit, à céder la police autrement que par les voies prévues dans le code civil et le code de procédure civile. On ne peut, non plus, en déduire que le législateur ait voulu priver la femme mariée de la protection édictée à l'article 1301, surtout dans une loi comme celle des assurances qui s'inspire essentiellement de l'idée de protection pour l'épouse et les enfants.

La Cour du Banc du Roi et le Conseil Privé dans la cause de *Trust & Loan* v. *Gauthier* (1) et la Cour Suprême du Canada dans la cause de *Klock* v. *Chamberlin* (2) et dans celle de *Rodrigue* v. *Dostie* (3) ont affirmé que l'article 1301 du code civil contient une règle d'ordre public. Il n'est pas possible de penser que si le législateur avait voulu mettre cette règle de côté, il ne l'eût pas fait d'une façon absolument expresse.

To alter any clearly established principle of law, a distinct and positive enactment is necessary. (Craies On Statute Law, 3rd Ed., p. 112.)

Le législateur, par l'amendement de 1898, n'a pas modifié la loi générale. Il a fait disparaître l'incessibilité des polices d'assurance qui existait jusque-là. Il a autorisé, entre autres, la femme mariée, de concert avec son mari, à transférer les polices d'assurance dont il s'agit; mais il n'a nullement déclaré qu'il entendait écarter la règle contenue dans l'article 1301 C.C.

(1) Q.R. 13 K.B. 281; [1904] A.C. 94.

(2) 15 Can. S.C.R. 325.

(3) [1927] Can. S.C.R. 563.

Et en l'absence d'une déclaration expresse à cet égard, surtout dans une matière d'ordre public comme celle-ci, il ne nous est pas permis de prêter aux termes du législateur une intention plus étendue que celle qui apparaît par le langage qu'il a employé. (*Vacher* v. *London Society of Compositors*) (1). Il ne faudrait rien moins qu'un texte bien positif pour y trouver une dérogation à un article que tous les tribunaux ont appliqué jusqu'ici avec un soin jaloux. La rédaction actuelle du statut autorise le transfert de la police par toutes les personnes avantagées agissant de concert. Elle permet au mari de céder ou engager ses droits dans la police. Elle permet à la femme mariée de céder ses droits conformément au droit commun; mais elle ne valide pas une infraction à l'article 1301 du code civil. La distinction signalée par Pothier subsiste. (*Laframboise* v. *Vallières* (2); *Rodrigue* v. *Dostie*) (3).

Toutefois, l'article 1301 du code civil ne contient de prohibition que contre la femme; il n'en contient pas contre le mari. Si les transports attaqués par l'intimée sont nuls quant à elle, ils valent pour les droits du mari. Nous avons vu que les polices d'assurance contenaient en faveur de ce dernier des bénéfices très appréciables. L'intimée, pour les raisons qu'elle a invoquées, pouvait conclure à l'annulation des transports seulement en ce qui la concerne. Le mari lui-même n'est partie dans la cause que pour autoriser son épouse. Il n'a pas pris de conclusions personnelles. Il n'est pas mis en cause. Les transports effectués par le mari en faveur de la banque conservent leur plein effet pour tous les avantages qui lui reviennent et pourraient même entraîner le paiement du capital des polices d'assurance, s'il écheoit du vivant du mari.

Le jugement de la Cour du Banc du Roi va trop loin en annulant ces transports dans leur entier et en ordonnant à la banque de livrer et remettre à l'intimée les polices dont il s'agit dans les quinze jours de la signification du jugement, ou, à défaut par elle de ce faire dans ce délai, en la condamnant à payer à l'intimée la somme de $4,000 avec dépens. Ce jugement doit être modifié.

(1) [1913] A.C. 107.

(2) [1927] Can. S.C.R. 193, at p. 197.

(3) [1927] Can. S.C.R. 563, at p. 570.

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Les transports sont annulés quant à l'intimée seulement. En conséquence, l'appelante a le droit de garder les polices d'assurance et ne peut être appelée à payer la somme de $4,000 si elle ne les remet pas à l'intimée. Nous ne voyons pas bien, d'ailleurs, la raison de cette condamnation alternative de $4,000. La possession d'une police d'assurance n'emporte pas en soi le droit au paiement du montant de l'assurance. Les polices, en l'espèce, ne sont que des documents qui prouvent les contrats. Le montant de l'assurance est payable à la personne que ces contrats désignent, quel que soit celui qui a les polices en sa possession. En vertu de ces contrats, c'est The Ætna Life Insurance Company qui doit payer la somme de $4,000. Au moyen des transports, les bénéficiaires lui avaient indiqué de payer à la Banque Nationale. Le résultat du présent jugement est tout simplement que cette indication de paiement est annulée quant à l'intimée. Les droits de cette dernière pourront être sauvegardés à l'égard de la compagnie d'assurance par la signification du jugement, si toutefois elle n'est pas suffisamment liée par suite du fait qu'elle est mise-en-cause.

Cette modification n'entraîne pas de changement dans l'adjudication des frais faite par la Cour du Banc du Roi; mais l'intimée devra payer les frais d'appel devant cette cour.

Appeal allowed in part with costs.

Solicitors for the appellant: *Taschereau, Parent, Taschereau & Cannon.*

Solicitors for the respondent: *Prévost, Taschereau & Bresse.*

LA CORPORATION D'AQUEDUC DE ST. CASIMIR (MISE-EN-CAUSE)..... APPELLANT;

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*April 30.
*June 10.

AND

THOMAS FERRON AND OTHERS (PLAINTIFFS) ..... RESPONDENTS;

AND

LA CORPORATION MUNICIPALE DU VILLAGE DE ST. CASIMIR... DEFENDANT.

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

Municipal corporation—By-law—Council—Majority of votes of members present—One member present but not voting—Notice of motion—Details—Action to annul by-law—Ultra vires—Effect of by-law, incorporating contract being passed at second meeting necessitated by refusal of mayor to sign at first meeting—Art. 50 C.P.C.—Arts. 107, 122, 359 M.C.

The provision of Art. 122 of the Municipal Code, enacting that "every disputed question is decided by a majority of the votes of the members present" ("toute question contestée est décidée par la majorité des membres présents"), means the majority of the votes cast at a meeting duly called. Therefore, a by-law passed by a meeting, presided over by the mayor, and at which all six councillors were present, will be held to be regularly adopted if carried by a vote of three in favour and two against, one councillor refusing to vote.

The notice of motion required by Art. 389 of the Municipal Code for the passing of a by-law, which merely mentions the object of the by-law without giving in detail its provisions and conditions, is good within the requirements of that article.

The allegation, that a by-law has not been adopted by a majority vote as required by the Municipal Code, raises a question of *ultra vires* sufficient to justify the party attacking it proceeding by action before the Superior Court under the provisions of Art. 50 C.P.C.

When a by-law and a contract are approved a second time by a municipal council, under art. 107 M.C., because the head of the council refused to sign them, they are, as a result of the second vote, legal and valid *ipso facto* as if they had been signed. Therefore, the fact that a notarial deed based on the by-law and incorporating the contract is closed immediately after the second meeting of the council and without awaiting fifteen days after the publication of the by-law, is immaterial and does not affect the validity of the contract.

Judgment of the Court of King's Bench (Q.R. 48 K.B. 549) rev.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

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APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Stein J. and maintaining the respondents' action to annul a by-law.

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

J. L. Perron K.C., A. Galipeault K.C. and *Maurice Boisvert* for the appellant.

J. A. Prévost K.C. and *G. Esnouf* for the respondents.

V. de Billy K.C. for the mise-en-cause.

The judgment of the court was delivered by

RINFRET, J.—Les intimés, en leur qualité de contribuables de la municipalité du village de St-Casimir, demandent l'annulation du règlement numéro 56 de cette corporation municipale par lequel elle a accordé à l'appelante une franchise de vingt-cinq années pour pourvoir à l'exploitation d'un aqueduc et à la fourniture de l'eau pour fins domestiques et publiques.

La corporation de St-Casimir est régie par le code municipal.

Les intimés ont attaqué le règlement au moyen d'une action ordinaire, en vertu de l'article 50 du code de procédure civile. Ils concluent également à la nullité d'un contrat basé sur ce règlement.

Ils ont allégué que le règlement est injuste, illégal, *ultra vires* et nul pour un bon nombre de raisons qui ont toutes été rejetées par la Cour Supérieure. Ils ont ajouté que le contrat intervenu à la suite du règlement est aussi illégal, nul et inexistant, comme conséquence de la nullité du règlement, et parce qu'il aurait été signé avant que le règlement ne fût en vigueur. La Cour Supérieure a maintenu le contrat, de même qu'elle avait refusé de mettre le règlement de côté.

La Cour du Banc du Roi a infirmé le jugement sur le motif principal que le règlement n'avait jamais été régulièrement adopté. Nous verrons par la suite en quoi consiste ce motif.

(1) (1929) Q.R. 48 K.B. 549.

La Cour Supérieure a décidé que les intimés n'avaient offert aucune preuve de quelques-unes de leurs allégations spéciales et généralement qu'ils n'avaient réussi à établir aucun acte d'injustice ou de manœuvre frauduleuse de la part du conseil municipal. Cette partie du jugement a été confirmée par la Cour du Banc du Roi, et il n'y a pas lieu de s'en occuper ici; d'autant plus qu'il n'en a pas été question devant cette cour. Cela fait disparaître l'argument que le prix fixé pour effectuer l'achat de l'aqueduc est exorbitant et constitue une exploitation des contribuables, celui que le règlement ne pourvoit pas à la protection du village contre l'incendie, et que l'aqueduc, même avec les améliorations projetées, sera insuffisant pour cette fin, et aussi celui qui a trait aux droits conférés à l'appelante de fermer les tuyaux de service des abonnés et de les priver d'eau dans un certain nombre de cas énumérés au règlement. Du moment, en effet, que l'accusation d'injustice est écartée, il ne reste plus, pour chacun de ces points, que la question du pouvoir de la corporation municipale; et les intimés ont été incapables de nous signaler un article du code qui prohibait, à cet égard, les conditions insérées dans le règlement et dans le contrat. La corporation mise-en-cause avait le droit de concéder le privilège exclusif que ces derniers comportent. Dès que les conditions qu'elle a acceptées n'étaient pas défendues par le code municipal et qu'elles n'étaient pas injustes, le conseil était souverain pour juger de leur opportunité. Il va de soi que les tribunaux ne pouvaient en faire un cas d'illégalité, ni intervenir dans la discrétion du conseil municipal.

Nous pouvons de même écarter tout de suite la prétention que l'avis qui a précédé le règlement était insuffisant. Cet avis se lisait comme suit:

> Avis de motion est donné par monsieur le conseiller * * * que le 20 juillet courant, à une séance spéciale de ce conseil, il sera proposé et passé un règlement décrétant soit l'achat de l'aqueduc de la Corporation d'Aqueduc de St-Casimir ou l'octroi d'une franchise à cette même compagnie pour l'approvisionnement d'eau aux contribuables de St-Casimir.

L'objection qui a été faite est que cet avis ne contient pas les détails de toutes les clauses et conditions du règlement. Nous croyons que, sous ce rapport, il est suffisant pour rencontrer les exigences de l'article 359 du Code Municipal. Il suffit qu'il fasse mention de l'objet du règlement qui doit

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être proposé. Il est de la même nature que l'avis de promulgation (art. 366 C.M.). En indiquant l'objet du règlement, l'avis de motion ou l'avis de promulgation informe tous les intéressés de la nature de l'ordonnance municipale projetée ou adoptée et constitue un avertissement qu'elle est susceptible de légiférer sur toutes les questions qui se rattachent à l'objet mentionné. L'avis n'a pas besoin d'aller au delà. Il est facile de voir qu'en poussant la prétention des intimés jusqu'à ses conséquences logiques, toute modification importante du projet de règlement serait prohibée lorsque ce projet viendrait devant le conseil. Les conseillers seraient contraints d'adopter ou de rejeter le règlement en bloc. Un amendement qui ne serait pas couvert en détail par l'avis de motion préalable se trouverait à l'encontre de l'art. 359 tel qu'interprété par l'argument qu'on nous a soumis; et le règlement ainsi amendé ne pourrait être adopté avant qu'un nouvel avis ne fût donné. Nous sommes d'accord avec la Cour Supérieure et la Cour du Banc du Roi pour dire que cela n'est jamais entré dans l'intention du législateur.

Il y a le fait que l'avis a été donné en la forme alternative:

> il sera proposé * * * un règlement décrétant soit l'achat de l'aqueduc * * * ou l'octroi d'une franchise, etc.

Ce moyen n'a été invoqué ni devant nous, ni devant les autres cours. Pour cette raison, nous évitons de nous prononcer là-dessus. Dans le cas actuel, tous les membres du conseil étaient présents lors de la séance convoquée par cet avis. Personne n'a alors soulevé d'objection à l'encontre de l'avis. On a procédé à la discussion en assumant que tout était régulier. Nous n'entendons pas émettre une opinion sur ce point. Nous constatons seulement qu'un avis a été donné; il comprenait l'octroi d'une franchise; le conseil au complet l'a accepté comme satisfaisant. Dans les circonstances, toute irrégularité résultant de cette forme alternative de l'avis serait au moins couverte par l'article 14 du Code Municipal.

Il nous reste à considérer le point sur lequel la Cour du Banc du Roi s'est appuyée pour infirmer le jugement et le moyen subsidiaire qui concerne seulement le contrat consenti après le règlement.

L'avis de motion que nous avons reproduit ci-dessus ayant été donné, le conseil s'assembla à une session spéciale le 20 juillet 1928. Tous les membres étaient présents, à savoir: six conseillers et le maire. L'adoption du règlement nº 56 et du projet du contrat qui y était annexé fut proposée. Le secrétaire en fit la lecture, puis voici comment le procès-verbal de la séance rapporte ce qui s'est passé:

On prend le vote sur la proposition de monsieur Gingras. Se prononcent pour l'adoption de ce règlement, MM. Eudore Gingras, Charles Tessier et Joseph Bourbeau.

Se prononcent contre: MM. Ovide Langlois et Xavier Frenette.

Le conseiller Napoléon Trottier déclare qu'il ne vote pas sur cette question, qu'il a des raisons légales qui l'en empêchent, vu qu'il a eu des menaces.

Le règlement nº 56 est donc adopté sur division. Le secrétaire demande à M. le maire de signer ce règlement, mais celui-ci refuse de le signer séance tenante.

L'article 107 du code municipal (paragraphes 3 et 4) est à l'effet que si le chef du conseil refuse d'approuver et signer un règlement et un contrat, le secrétaire-trésorier les soumet de nouveau à la considération du conseil à sa session générale suivante, ou, après avis, à une session spéciale. Si une majorité des membres du conseil approuve de nouveau le règlement et le contrat,

ils seront légaux et valides comme s'ils avaient été signés et approuvés par le chef du conseil et nonobstant son refus.

En conséquence, un avis de convocation fut signifié aux membres du conseil pour une session spéciale qui serait tenue le 30 juillet. Le motif de cet avis était ainsi rédigé:

1. Vu le refus de monsieur le maire de signer le règlement nº cinquante-six accordant une franchise à la Corporation d'Aqueduc de St-Casimir, le dit règlement adopté par le conseil à sa session du 20 juillet courant, ce règlement sera soumis au conseil pour être approuvé de nouveau.

2. Divers comptes approuvés à la session du 20 courant seront de nouveau soumis à l'approbation du conseil pour les mêmes raisons.

3. Le procès-verbal de la session du 20 juillet courant sera aussi soumis à l'approbation du conseil.

Cette session spéciale eut lieu; et, de nouveau, tous les membres du conseil étaient présents. Voici l'extrait du procès-verbal de l'assemblée:

Lecture est donnée de l'avis de convocation et du certificat de signification du secrétaire-trésorier attestant que le dit avis a été signifié à tous les membres du conseil.

Lecture est faite du règlement nº 56 de cette municipalité et du projet de contrat y annexé, et il est proposé par M. Eudore Gingras,

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secondé par M. Charles Tessier, tous deux conseillers, vu le refus de monsieur le maire de signer le règlement nº 56 adopté par le conseil à sa session du 20 juillet courant et octroyant une franchise à la Corporation d'Aqueduc de St-Casimir, que ledit règlement nº 56 et le projet de contrat y annexé soient approuvés tels que déjà approuvés pour leur donner force légale malgré le refus du maire de signer.

Le vote est pris. Se déclarent contre cette proposition MM. les conseillers Ovide Langlois et Xavier Frenette. Votent pour: MM. les conseillers Eudore Gingras, Charles Tessier, Joseph Bourbeau et Napoléon Trottier, cette résolution se trouvant donc adoptée à la majorité absolue des membres du conseil.

A la suite de cette séance, le maire refusa de nouveau de signer le règlement et le contrat, sur quoi, conformément au paragraphe 4 de l'article 107 du code municipal, ce règlement et ce contrat furent considérés

légaux et valides comme s'ils avaient été signés et approuvés par le chef du conseil, et nonobstant son refus.

Le jour même, le contrat fut clos devant Mtre Joseph Lacoursière, N.P. Le 4 août, le règlement fut publié; et, suivant la loi, il vint en vigueur 15 jours après sa promulgation, c'est-à-dire le 19 août 1928 (arts. 365 et 366 C.M.). Les demandeurs-intimés ont prétendu que le règlement

n'a pas été adopté à la session du 20 juillet 1928, étant donné qu'il n'a recueilli l'adhésion que de trois membres du conseil, alors que le conseil siégeait au complet;

que, tel que constaté le 30 juillet 1928, il a été frappé du véto du maire, qui a refusé de signer; que ce véto n'a jamais été purgé conformément à la loi, le règlement n'ayant pas été de nouveau soumis au conseil après le 30 juillet; et que, à la date où le contrat a été signé par les parties, il n'était autorisé de la part de la corporation municipale par aucun règlement régulièrement adopté par son conseil, vu que même le prétendu règlement du 30 juillet n'avait pas été publié et n'était pas encore en vigueur.

Il est évident que si l'adoption du règlement à la séance du 20 juillet a été régulière, celle du 30 juillet a rencontré toutes les exigences de la loi, malgré le refus du maire; et il s'ensuit que si nous partageons l'opinion de la Cour Supérieure, cela dispose de toutes les autres prétentions des demandeurs en ce qui concerne le règlement. L'allégation que les parties ont signé prématurément le 30 juillet n'affecte que la validité du contrat.

L'argument des intimés est basé sur l'article 122 du code municipal:

122. Toute question contestée est décidée par la majorité des membres présents, sauf dans les cas où les règlements ou une disposition de la loi exigent un plus grand nombre de voix concordantes.

Il est nécessaire de reproduire également la version anglaise, parce que le texte n'en est pas semblable:

122. Every disputed question is decided by a majority of the votes of the members present, excepting in cases where any by-law or provision of law requires a greater number of concordant votes.

On remarque qu'il n'y a pas dans la version française de mots correspondant à " of the votes " dans la version anglaise. Nous émettrons tout d'abord l'opinion que, malgré l'absence de ces mots, les deux versions ont le même sens et veulent dire la même chose; mais il n'y a pas à nier qu'il existe " une différence entre les textes français et anglais ". Dans ce cas, l'article 15 du code municipal édicte la règle qu'il faut suivre:

15. Lorsqu'il y a une différence entre les textes français et anglais du présent code, dans quelque article fondé sur les lois existantes à l'époque de sa promulgation, le texte le plus compatible avec les dispositions des lois existantes doit prévaloir.

Le code municipal actuel est entré en vigueur par proclamation le 1er novembre 1916. Il succédait au code de 1871, où les articles correspondants se lisaient comme suit:

133. Toute question contestée est décidée par la majorité des membres présents, sauf les cas où le vote des deux tiers des membres du conseil ou des membres présents est requis par les dispositions de ce code.

133. Every disputed question is decided by a majority of the votes of the members present, excepting in cases where in conformity with the provisions of this code, the votes of two-thirds of the members of the council or of the members present are required.

La même différence existait donc entre les deux articles. Là encore, le code de 1871 indique la règle à suivre (art. 18) et elle est la même que celle qui nous est donnée par l'article 15 du présent code. Il faut donc recourir aux " lois existantes " à l'époque de la promulgation du code de 1871; et c'est le texte le plus compatible avec ces lois qui doit prévaloir. C'était l'*Acte des Municipalités et des Chemins du Bas-Canada*, de 1855 (Statuts du Canada, 18 Victoria, c. 100). Au titre " Sessions des conseils municipaux, art, XII, parag. 6, on trouve ce qui suit:

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6. Toutes questions contestées seront décidées par la majorité des voix des membres présents, non compris le président; et, au cas de partage égal des voix, le président aura voix prépondérante.

Le texte angais est:

6. All disputed questions shall be decided by a majority of the votes of the members present, not including the chairman; and when the votes are equally divised, the chairman shall give the casting vote.

Conformément à la règle posée dans l'article 15 du présent code, c'est donc la version anglaise de l'article 122 qui doit prévaloir, si l'on croit que vraiment la version française doit recevoir une interprétation différente.

Cette constatation simplifie singulièrement la solution de la question soulevée par les demandeurs. Ils affirment que, en vertu de l'article 122 du code municipal, une question contestée ne peut être décidée que par la majorité absolue de tous les membres présents. En se bornant au texte français, les intimés prétendent que, à la séance du 20 juillet, il eût fallu dès lors quatre votes au moins pour constituer la majorité requise. La loi étant exprimée par la version anglaise, elle exige seulement " a majority of the votes of the members present ". Grammaticalement et littéralement, cela veut dire: la majorité de ceux qui votent. Or, le 20 juillet, le règlement n° 56 a obtenu cette majorité. Il a donc été adopté régulièrement.

C'est bien ainsi, d'ailleurs, que tout le conseil du village de St-Casimir l'a compris, tel que cela apparaît par les procès-verbaux des sessions des 20 et 30 juillet, et par l'avis de convocation à cette dernière séance. Le résultat auquel cette cour en arrive est exactement celui que le conseil de St-Casimir avait en vue lorsqu'il a tenu ses deux séances.

Le procès-verbal de la séance du 20 juillet déclare que le règlement a été adopté ce jour-là par le conseil. L'avis de convocation de la session du 30 juillet fait la même déclaration et est donné pour se conformer à la procédure prévue par l'article 107 C.M. Enfin, le procès-verbal de la session du 30 juillet démontre également que, à cette date, le conseil entendait suivre les prescriptions de cet article; et la résolution qui a été adoptée par la majorité absolue porte

que ledit règlement n° 56 et le projet de contrat y annexé sont approuvés tels que déjà approuvés pour leur donner force légale malgré le refus du maire de signer.

Nous soulignons ces faits simplement pour indiquer que, de la part du conseil et de la corporation de St-Casimir, on a bien considéré le règlement comme adopté dès la séance du 20 juillet, et l'on a tenu celle du 30 juillet uniquement pour purger le refus du maire.

Nous avons dit au commencement de cette discussion que, à notre avis, malgré la différence du texte, la version française ne devrait pas être interprétée dans un sens plus restreint que la version anglaise. Il y a des cas où le code exige pour la décision d'une question la majorité absolue de tous les membres du conseil. Il y en a d'autres où il requiert le concours des deux tiers de tous les membres. Même sans la disposition prévalente du texte anglais, nous aurions été disposés à envisager les mots " la majorité ", dans le texte français, comme ayant trait à la majorité des votes; et les mots " des membres présents " comme ayant pour but d'indiquer qu'il ne sera pas nécessaire que ce vote représente la majorité de tous les membres du conseil présents ou non.

La suite de l'article 122 C.M. l'indique, en ajoutant: " sauf dans le cas où les règlements ou une disposition de la loi exigent un plus grand nombre de voix concordantes ". Cela résulte également de l'article 123 C.M., qui dit que le chef du conseil ou le président ne peut voter qu'en cas de partage égal des voix.

Le chef du conseil ou le président sont des membres du conseil. Ils sont compris dans le terme " membres présents " de l'article 122 C.M. Il n'est pas plausible de penser que le législateur eût voulu que le maire ou le président comptât dans le nombre des membres présents pour former la majorité exigée, malgré que le code ne lui permît pas de voter.

Il existe une autre considération pour adopter cette interprétation. C'est l'importance de sauvegarder les intérêts et les droits des tiers. Il est désirable que ceux-ci, en recevant la copie certifiée d'une résolution d'un conseil municipal, puissent la considérer comme ayant la régularité nécessaire. Ils ne peuvent être appelés à procéder à une enquête pour savoir si l'un ou plusieurs des conseillers étaient intéressés dans le vote qui s'est donné ou s'ils se sont à bon droit abstenus de voter. Les questions de ce genre doivent être tranchées immédiatement à la séance

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même du conseil et par le conseil lui-même, afin que, une fois le vote donné, sa légalité sous ce rapport ne soit plus en doute. L'article 124 du Code municipal le démontre. Il défend à un membre du conseil de voter sur une question dans laquelle il a un " intérêt personnel distinct de l'intérêt général des autres contribuables "; mais si, à raison de cet intérêt, le droit de vote du conseiller ou du maire sont mis en doute, il faut qu'il y ait objection; et cette objection est décidée immédiatement par le conseil lors du vote. Cette décision du conseil est, dans un certain sens, finale (*Provost* v. *Corporation de la Paroisse de Sainte-Anne de Varennes*) (1). En effet, si le conseil décide que le membre a un intérêt personnel, il ne vote pas. S'il vote sans objection, malgré son intérêt personnel, il est passible d'une amende; mais

ce vote ne vicie pas les procédures du conseil à l'égard des tiers de bonne foi.

Ce souci de protéger les tiers, comme il est naturel, apparaît constamment dans le code municipal; et, pour en donner un exemple, on trouve dans le rapport des commissaires relatif au code de 1916, les passages suivants:

The amendment made by article 14 to article 16 of the old code tends to make it more difficult to annul municipal proceedings because of non-observance of formalities.

* * *

Article 124 amends article 135 of the old code in such a way as to protect third parties in good faith who negotiate with municipal corporations.

C'est la situation que nous avons ici. La corporation d'Aqueduc de St-Casimir, l'appelante, est un " tiers de bonne foi " qui a négocié avec une corporation municipale. Ces déclarations des commissaires, exprimées d'ailleurs dans le texte même de l'article 124 C.M., ont d'autant plus d'importance que c'est précisément cet article que la Cour Supérieure et la Cour du Banc du Roi ont discuté relativement au cas du conseiller Trottier et de sa déclaration qu'il s'abstiendrait de voter parce qu'il avait " des raisons légales qui l'en empêchent, vu qu'il a eu des menaces ".

Ici le conseiller Trottier a fait sa déclaration. Aucun membre du conseil n'a soulevé d'objection à ce qu'il s'abstienne de voter. Il n'y a donc pas eu d'enquête devant le

(1) (1890) M.L.R. 6 S.C. 489.

conseil pour savoir quelle était la portée des menaces qu'on lui avait faites. Tout le conseil a accepté sa déclaration, et l'on a procédé au vote sans tenir compte de sa présence. Nous ne sommes pas prêts à dire, en l'absence de preuve faite en cette cause sur la nature et le but des menaces qui avaient été faites, qu'il ne s'agissait pas là d'un cas prévu par l'article 124 (voir *Guay* v. *Corporation du Village de la Malbaie* (1); *Bélair* v. *Royal Electric Co.* (2). Apparemment le conseil fut de cet avis, comme le prouve le fait qu'il a accepté la déclaration. Rien dans le dossier n'est venu démontrer que Trottier avait eu tort de considérer qu'il ne devait pas voter, et que le conseil s'était trompé en se rangeant à son avis. Or, s'il ne devait pas voter, conformément à l'article 124 C.M., cela nous ramène de nouveau à l'interprétation de l'article 122, pour dire qu'en pareil cas, et même indépendamment de la version anglaise, il doit être évident qu'un conseiller qui n'a pas le droit de vote ne peut pas être inclus parmi les "membres présents", dont la majorité doit décider une question.

Pour ces raisons également, nous serions d'avis que le vote du 20 juillet était suffisant pour adopter le règlement n° 56. Comme la Cour Supérieure, nous ajouterions que, pour les fins de ce vote, Trottier devait être présumé absent. A vrai dire, d'ailleurs, cette solution est dans l'intérêt général, puisque de cette façon la présence de membres du conseil qui s'abstiennent de voter ne peut contribuer à former le quorum et empêche ainsi une question d'être décidée par un nombre de membres inférieur à celui qui est requis pour tenir une session du conseil et expédier les affaires.

Il suit de tout ce que nous venons de dire que nous sommes d'avis que le règlement numéro 56 a été régulièrement adopté à la séance du 20 juillet. Le maire ayant refusé de signer le règlement et le contrat après leur adoption par le conseil, nous avons vu qu'à une séance suivante régulièrement convoquée la majorité absolue des membres du conseil a de nouveau approuvé le règlement et le contrat. En pareil cas, suivant l'article 107 du code municipal, paragraphe 4,

(1) (1904) Q.R. 25 S.C. 263. (2) (1894) Q.R. 4 Q.B. 548.

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tels règlement et * * * contrat sont légaux et valides comme s'ils avaient été signés et approuvés par le chef du conseil et nonobstant son refus.

Cette disposition de la loi écarte l'objection soulevée par les demandeurs-intimés à l'encontre du contrat et basée sur le fait que ce dernier aurait été signé par les parties le jour même de l'adoption définitive du règlement, le 30 juillet, sans attendre l'expiration des quinze jours après l'avis de publication.

La franchise a été octroyée à l'appelante par la corporation du village de St-Casimir en vertu des pouvoirs accordés par le paragraphe 2 de l'article 408 du code municipal. Ces pouvoirs s'exercent par règlement. Le règlement était tout ce qu'il fallait pour accorder cette franchise. Il suffisait que l'appelante en acceptât les conditions pour que le contrat fût complet. Cette acceptation pouvait prendre n'importe quelle forme; et il n'était pas nécessaire de l'incorporer dans un document notarié, comme la chose a été faite. Celui qui a été reçu le 30 juillet par devant maître Joseph Lacoursière, N.P., reproduisait, pour ainsi dire, mot pour mot le texte du règlement n° 56. Ce contrat n'était donc pas nécessaire et il était surérogatoire. Les relations entre la Compagnie d'Aqueduc et la Corporation Municipale de St-Casimir eussent été exactement les mêmes si ce document n'eût pas existé, à la seule condition que la compagnie eût manifesté à la corporation municipale son acceptation des termes du règlement.

Dans les circonstances, l'attaque contre le contrat, dès que le règlement est maintenu, n'a plus aucune importance; et nous aurions pu lui appliquer ce passage du jugement de M. le Juge Rivard dans la cause de *Roy* v. *Corporation d'Aubert Gallion* (1):

> Tout paraît avoir été fait ouvertement à la connaissance du conseil et même du public, sans fraude et de bonne foi. Il n'en est, du reste, résulté rien dont les contribuables puissent se plaindre.

En vertu de l'article 107, la seconde approbation donnée par la majorité des membres du conseil le 30 juillet a eu pour effet de rendre le règlement numéro 56 et le contrat qui y était annexé *ipso facto*

> légaux et valides comme s'ils avaient été signés et approuvés par le chef du conseil et nonobstant son refus.

(1) (1928) Q.R. 46 K.B. 15, at p. 31.

En pareil cas, de la part de la corporation du village de St-Casimir, le contrat n'avait plus besoin d'être signé, puisque la résolution qui l'approuvait pour la seconde fois avait le même effet qu'une signature. Naturellement, le tout restait subordonné à ce que le règlement fût publié. Règlement et contrat n'ont eu force et effet que quinze jours après cette publication.

Il en résulte que nous sommes d'avis que le jugement de la Cour du Banc du Roi doit être infirmé, le jugement de la Cour Supérieure doit être rétabli, et l'action des demandeurs-intimés doit être rejeté avec dépens dans toutes les cours.

La conclusion à laquelle nous en sommes arrivés nous dispense de discuter le point qui a été soulevé de savoir si les demandeurs, en l'espèce, pouvaient se pourvoir au moyen de l'action directe devant la Cour Supérieure, en vertu de l'article 50 du Code de Procédure Civile, et s'ils n'auraient pas dû suivre la méthode pourvue par les articles 430 et suivants du Code municipal. Qu'il nous suffise de dire que, suivant nous, l'allégation que le règlement n° 56 n'aurait pas été adopté par la majorité requise en vertu du code soulevait un cas d'*ultra vires* qui justifiait la procédure adoptée en l'espèce, conformément à l'arrêt du Conseil Privé dans la cause de *Shannon Realties Co.* v. *Ville de St-Michel* (1), tel qu'il a été subséquemment appliqué par cette cour dans les causes de *Côté* v. *Corporation du Comté de Drummond* (2), et *Donohue* v. *Corporation of the Parish of St. Etienne de la Malbaie* (3). A cela vient s'ajouter le fait que les intimés demandaient l'annulation d'un contrat et qu'il n'y a pas ouverture à une action de ce genre en vertu de l'article 430 du code municipal.

Une objection plus sérieuse eût été que les demandeurs n'ont pas invoqué d'intérêt direct, immédiat, spécial et distinct des autres contribuables. Le seul des trois demandeurs qui a été entendu a déclaré: "Je suis intéressé comme tout contribuable." Si nous étions arrivés à la conclusion que l'action des demandeurs était bien fondée au mérite, il nous eût fallu examiner la question de savoir

(1) [1924] A.C. 185. (2) [1924] S.C.R. 186.
(3) [1924] S.C.R. 511.

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jusqu'à quel point, en leur seule qualité de contribuables et d'électeurs, ils avaient un status suffisant, et si cette action devant la Cour Supérieure se heurtait au jugement de cette cour dans la cause de *Robertson* v. *City of Montreal* and *Canadian Autobus Company* (1).

Appeal allowed with costs.

Solicitors for the appellant: *Galipeault, Boisvert & Galipeault.*

Solicitors for the respondents: *Esnouf, Cantin & Paquin.*

Solicitors for the mise-en-cause: *Bernier & de Billy.*

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*Oct. 15.
*Nov. 3.

ISAAC STANLEY (PLAINTIFF).....APPELLANT;

AND

THE NATIONAL FRUIT COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Contributory negligence—"Ultimate" negligence—Motor vehicles—Motor truck striking pedestrian—Restricted vision of driver by reason of car in front—Duty of driver in such case.

Plaintiff, a pedestrian, who had started to cross a street intersection diagonally, was struck by defendant's truck, which was making a left turn behind a sedan car. The trial judge found that the accident was caused by the truck driver's negligence and gave judgment to plaintiff for damages. This was reversed by the Court of Appeal, Sask., which held that, under all the circumstances, the accident was not attributable to negligence of the truck driver (24 Sask. L.R. 137). Plaintiff appealed.

Held (Anglin C.J.C. and Smith J. dissenting): The judgment at trial should be restored. An important finding by the trial judge, which had support in the evidence and should be accepted, was that plaintiff did not move from the moment he stood still to permit cars ahead of the truck to pass him to the moment he was struck. It was therefore obvious that the truck, in making the turn, did not follow the sedan's track but turned further to the right, that is, made a wider curve (towards the plaintiff); in doing so, the truck driver was driving over a portion of the street not shewn by the passing of the sedan to be clear of traffic, and (as he kept his truck only 6 or 8 feet behind the sedan) without having in view the portion of the street where plaintiff stood. There was a duty upon the truck driver

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

(1) (1915) 52 Can. S.C.R. p. 30.

not to drive over a portion of the street of which he had, by reason of keeping so close to the sedan, only a restricted vision, and on which he knew pedestrians were in the habit of crossing, except at a rate of speed which permitted him to stop within the limits of his restricted vision; and that duty he failed to observe. The trial judge's finding that plaintiff was not guilty of contributory negligence could not, on the evidence, be said to be wrong; and, even if his failure to look out for the truck's approach was negligence, it did not contribute to the accident except in the sense that it was a *sine qua non;* the real cause of the accident was the subsequent and severable negligence of the truck driver (*Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, referred to).

Per Anglin C.J.C. (with whose conclusion Smith J. concurred) (dissenting): The evidence in support of the trial judge's findings, that defendant's negligence was the sole cause of plaintiff's injuries and that plaintiff was not guilty of contributory negligence, leaves their accuracy doubtful, to say the least. His finding that, even if plaintiff was guilty of negligence, the defendant might, by the exercise of reasonable care, have avoided the consequences thereof (*Tuff* v. *Warmen,* 5 C.B.N.S., 573) was not warranted by the evidence. It appeared from the judgment of the trial judge that, while he took into account "ultimate" negligence of defendant in so far as defendant might *actually* have avoided the consequence of any contributory negligence of plaintiff, his mind had not been directed to an important aspect of the case, namely, that class of "ultimate" negligence considered in *B.C. Electric Ry. Co.* v. *Loach,* [1916] 1 A.C. 719, i.e., disabling negligence anterior in fact to plaintiff's contributory negligence, but of such a character that its effects endured and became operative after such contributory negligence had intervened. The Court of Appeal, while finding, on evidence which could not be said to be insufficient to justify it, that plaintiff was guilty of contributory negligence, did not consider or pass upon the question of "ultimate" negligence. A new trial was necessary in order that all the issues in the action might be fully considered and determined.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Bigelow J. in favour of the plaintiff in an action for damages for injuries sustained by the plaintiff as a result of being knocked down by the defendant's truck, which, at the time of the accident, was being driven by the defendant's servant in the course of his duties. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was allowed and the judgment of the trial judge restored (Anglin C.J.C. and Smith J. dissenting, who held that there should be a new trial.)

Russell Hartney for the appellant.

A. E. Bence K.C. for the respondent.

(1) (1929) 24 Sask. L.R. 137; [1929] 3 W.W.R. 522.

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The judgment of the majority of the court (Newcombe, Lamont and Cannon JJ.) was delivered by

LAMONT J.—This is an appeal from the judgment of the Court of Appeal of Saskatchewan (1), reversing the judgment of the trial judge in favour of the plaintiff in an action for damages for injuries sustained by the plaintiff as a result of being knocked down by the defendant's truck, which, at the time of the collision, was being driven by the defendant's servant. The learned trial judge found that the driver of the truck had been guilty of negligence causing the accident by (*a*) driving at a rate of speed and in a manner dangerous to the public on a public highway under the circumstances; (*b*) not keeping a proper look-out for pedestrians; (*c*) driving his truck too close to the car in front which obstructed his view. The relevant provisions of the *Vehicles Act* (1924, c. 42) are:—

26. No person shall drive a motor vehicle on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public having regard to all circumstances of the case, including the nature, condition and use of the highway, and the amount of traffic which actually is at the time, or might reasonably be expected to be on the highway.

43 (3). When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle, shall be upon such owner or driver.

The Court of Appeal (1) held that the defendant had discharged the onus resting on it under section 43, and had established that the damage suffered by the plaintiff was not the result of negligence or improper conduct on the part of its driver.

The scene of the accident was in the public street in Saskatoon at the intersection of 20th Street and Avenue A. Both streets are paved. Avenue A runs north and south and is 46 feet wide from curb to curb, while 20th Street runs east and west and is 56 feet wide from curb to curb. It does not, however, run farther east than Avenue A, so that any vehicle coming east on 20th Street must turn either north or south on Avenue A. The plaintiff, on the afternoon of the accident, had been walking north on the side-walk on the east side of Avenue A, about opposite the

(1) 24 Sask. L.R. 137; [1929] 3 W.W.R. 522.

south sidewalk of 20th Street. Being desirous of going to the King Edward Hotel on the north west corner of Avenue A and 20th Street, instead of crossing the avenue and then 20th Street at right angles, which crossings were marked on the pavement by yellow lines, he started to go diagonally across Avenue A. Having proceeded about 20 feet he saw an automobile coming along the avenue from the south, and also a Ford sedan, followed by a truck, coming along 20th Street from the west. He stood still to allow them to go by. To the northwest from where he stopped and in the general direction of the King Edward Hotel there was on the street a silent policeman around which, to the east, vehicles, coming off 20th Street and going north on Avenue A, had to pass.

The plaintiff's story is that when he saw the car coming from the south, and the sedan and the truck coming from the west, all these cars were travelling at about 15 miles per hour; that as the sedan came to the intersection it slackened its speed to permit the car from the south to pass, as it had the right of way; that the sedan fell in behind the car from the south—three or four feet behind it; that the car from the south passed between him and the silent policeman at a distance of about two feet from him; that the sedan following, likewise passed him but at a distance of about six feet. After that he has no recollection of the immediate subsequent events. The plaintiff was struck by the radiator of the truck and very severely injured. He says, when he was struck, he had not moved from the spot where he was standing when the first car went by. In this he was corroborated by an independent witness, Charles Leasch, and the learned trial judge found as a fact that he had not moved. When asked why he was not looking out for the truck, the plaintiff said:—

> I was watching the car ahead of the truck. The truck was behind that car, and the car was coming quite close to me then; it was coming quite close to the other car, and I was watching the two, the first one, and the other one coming quite close to it, and I was watching the first car, ahead of the truck, and it disappeared just as it was passing me.

The plaintiff was, therefore, aware that the truck was coming towards him behind the sedan.

The story of Harry Dunlop, the defendant's driver, is that he was driving a one ton truck 16 feet 8 inches long;

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that he followed a Ford sedan down 20th Street and around the turn at the intersection; that the moment the sedan had passed him the plaintiff again started on his way across the street and stepped in front of the truck; that the truck was proceeding around the intersection six or eight feet behind the sedan and at a speed of about 10 miles per hour; that he did not see the plaintiff until the sedan got out of the way; that the plaintiff was then about six feet in front of him and it was too late to avoid the accident; that the moment he saw the plaintiff he applied the brakes and stopped the truck. The truck, according to the tests made subsequent to the accident, could be stopped in 7 feet 10 inches, if going at ten miles per hour, and in 53 feet, if going twenty miles per hour. A policeman, at the scene of the accident almost immediately after it happened, measured the skid marks made by the wheel of the truck after the brakes were applied and stated that the wheel had skidded eight feet.

Dunlop further says that but for the sedan in front of him he could have seen the plaintiff whom he struck with his radiator but that at no time after he saw the plaintiff could he have done anything to avoid the accident. He admits, however, that he knew that pedestrians were in the habit of walking diagonally across Avenue A. The witness, Leasch, testified that when they were taking the plaintiff from under the truck Dunlop said: "God, I did not see that man," and the witness, Morley, testified that after the accident he got on the truck with Dunlop and asked him how the accident happened and that Dunlop replied that "he did not know how it happened, he never saw the man." Dunlop says these statements are not correct. These, in my opinion, constitute the material parts of the evidence given at the trial.

The plaintiff being injured by reason of a motor vehicle on the highway the statute places upon the defendant the burden of proving that his injuries did not arise through the negligence or improper conduct of its driver. As to the degree of care which a driver of a motor vehicle must exercise I agree entirely with what was laid down by Mr.

Justice Turgeon, in giving the judgment of the Court of Appeal, when he said (1):—

> He must exercise at all times the same measure of caution as might be expected, in like circumstances, of a reasonably prudent man. He must take proper precautions to guard against risks that might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care, and nothing more, is required of him, except in cases specially provided for, with which we are not concerned here.

The difficulty, however, is in determining what a reasonably prudent man would have done under the circumstances. That responsibility is placed in the first instance upon the tribunal whose duty it is to find the facts—in this case the trial judge.

The first act of negligence on the part of the defendant found by the trial judge was that its driver was proceeding at a rate of speed dangerous to the public, having regard to all the circumstances. The rate of speed was stated by Dunlop to be 10 miles per hour, and, by other witnesses, at varying rates between 10 and 20 miles—the highest being 20 miles. The trial judge made no finding as to the rate Dunlop was driving at the time of the accident. I do not think that the absence of a finding as to the rate is material in this case. What the learned judge in effect did find was that the rate at which the truck was being driven—whether it was 10 miles per hour or 20 miles—was too fast a rate to enable Dunlop to stop the truck between the time he was first able to see the plaintiff and the time when the accident happened. If there was a duty resting on the driver to have his truck so under control that he could stop it within the distance at which he could see pedestrians on a street on which he knew pedestrians were in the habit of crossing diagonally, his rate of speed prevented him from performing that duty and therefore may well be called dangerous. Whether or not there was such a duty I shall deal with later.

The second and third findings as to the driver's negligence are as follows:—

> (2) He was not keeping a proper lookout for pedestrians. Knowing that this was a busy intersection where there was a large pedestrian traffic, it seems to me that it was his duty to be on the look-out for pedestrians, and to operate his car so that he could stop immediately. This is not the case of a man stepping in front of a car. * * *

(1) 24 Sask. L.R., at 141-142.

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(3) The driver of the truck was following too close to the car in front. This obstructed his vision of the plaintiff, and he should have gone much more slowly, if he had done what an ordinary prudent and cautious man would do. I think he was negligent in not slacking his speed, so as to eliminate the possibility of danger to others, when his sight was interfered with by the car in front.

The only evidence as to the look-out kept by the defendant's driver was that of the driver himself. He says he was watching the car in front of him and keeping a look-out "for anything that came up," but that he could not see the plaintiff nor could the plaintiff see him until the sedan in front got out of the way.

In determining whose want of care was really responsible for the accident, there is one finding made by the trial judge which, in my opinion, is of the utmost importance. That is his finding that the plaintiff did not move from the moment he stood still on the street to permit the cars to pass him to the moment he was struck by the truck. That finding was based upon evidence which the trial judge was entitled to credit and, in my opinion, it cannot now be successfully assailed. Starting with the fact that the plaintiff did not alter his position on the street, it is not difficult to see what must actually have happened. Both the car from the south and the Ford sedan passed the plaintiff without injuring him, going between him and the silent policeman. Dunlop was following the sedan. If he had kept to the course taken by the sedan he too would have gone by the plaintiff without injuring him. He, however, struck the plaintiff with the centre of his radiator. To do that it is obvious that when the sedan turned to the left around the intersection Dunlop did not follow in the sedan's track but turned farther to the right, that is, he was making a wider curve than that made by the sedan. That he would do so is most probable seeing that he had a long heavy truck which, the evidence shews, ordinarily requires a wider space to make the turn than does a Ford sedan. In taking that wider curve Dunlop was driving his truck over a portion of the street not shewn by the passing of the sedan to be clear of traffic. Of the portion of the street on which the plaintiff was standing Dunlop had no view, as his line of vision was obstructed by the sedan in front of him. That he could not have a view of it will be readily understood when it is remembered that he was sitting on

the left hand side of the truck and that the sedan was only six or eight feet in front of him. The question then is, was there a duty resting upon Dunlop not to drive over a portion of the street of which he had only a restricted view, and on which he knew pedestrians were in the habit of crossing, except at a rate of speed which permitted him to stop his truck within the limits of his restricted vision? In my opinion such a duty rested on him. A one ton truck driven by gasoline is an instrumentality fraught with danger to pedestrians crossing the street unless care is taken by its driver. If Dunlop had permitted someone to bandage his eyes so that on making the turn at the intersection he could not see a pedestrian in front of him, and he struck and injured the pedestrian, who remained in the same place on the street, could it reasonably be contended that the driver was not guilty of negligence causing the accident? In my opinion it could not, for I do not think any reasonably prudent man would continue to drive his car when he could not see the portion of the street over which he was to pass. What is the difference between such a case and the present one where the driver was unable to see the plaintiff in time to stop his car before injuring him, by reason of the fact that he permitted his vision to be obstructed by the sedan, to which he kept too close, so close that he could not keep a proper lookout for pedestrians? I can see none. Dunlop's duty towards the plaintiff was to keep his truck so under control that, if the plaintiff should happen to be on that portion of the street which Dunlop could not see when making the turn, the truck could be stopped or turned aside without injuring the plaintiff. This duty he could have performed by allowing a greater distance to separate him from the sedan, or by reducing his speed. With great deference, therefore, I am unable to take the view of the Court of Appeal that the defendant disproved negligence on the part of its driver.

As to the sounding of the horn: the statute calls for it when "it is reasonably necessary to notify pedestrians or others of the approach of the vehicle." As the plaintiff was well aware of the near approach of the truck, I share the doubt of the trial judge and the Court of Appeal that any good purpose would have been served by sounding it.

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The learned trial judge found that there had been no negligence on the part of the plaintiff. The plaintiff started to walk diagonally across the street; he reached a point part way between the silent policeman and the curb, but a little east of the silent policeman, and there stopped in the line taken by traffic going north on Avenue A. He knew that the truck was following close to the sedan; he stood looking at the passing cars and paying no attention to the approaching truck, evidently assuming that as the car from the south and the sedan had passed between him and the silent policeman, the truck would do the same. Can it be said that a man who walks into the line of traffic knowing that several cars are approaching, and does not look to see if he is out of danger, is exercising that care and prudence to avoid accident which it is the duty of every person using the highway to exercise when others are likewise using it? In my opinion a failure, in certain circumstances, to watch out for an approaching car might properly be characterized as negligence by a tribunal whose duty it is to pass upon it. As long ago as the case of *Cotton* v. *Wood* (1), Erle C.J., laid down the duty of pedestrians in these words:—

> It is as much the duty of foot-passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot-passengers.

His Lordship was there dealing with horse-drawn vehicles. To-day we have the much more rapid and therefore much more dangerous motor cars, which, I cannot help thinking, imposes upon their drivers a greater duty to take care than was imposed upon the drivers of more slow going vehicles. The trial judge, however, held that the plaintiff's conduct did not amount to contributory negligence; and I am not prepared to say he was wrong; in fact, in this case, I think he was right. Even if we admit that the plaintiff's failure to look out for the approach of the truck was negligence on his part, the real question is, did that negligence contribute to the accident? Was the real cause of the accident the failure of the plaintiff to watch out for the truck or the failure of the defendant's driver to keep him-

(1) (1860) 8 C.B., N.S., 568, at 571.

self in a position to see the part of the street over which he was driving his truck in making the turn around the intersection?

In his classic judgment in *Admiralty Commissioners* v. *S.S. Volute* (1), Lord Chancellor Birkenhead said:—

> In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full: see among other cases *Spaight* v. *Tedcastle* (2) and *The Margaret* (3).
>
> At the other end of the chain, A.'s negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails. *The Bywell Castle* (4); *Stoomvaart Maatchappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (5).
>
> In between these two termini come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing, while in Admiralty damages are divided in some proportion or other.

After reviewing a great many of the cases on the subject the Lord Chancellor sums up the result in these words:—

> Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame * * * might, on the other hand, invoke the prior negligence as being part of the cause of the collision.

Assuming, for the purpose of what I am about to say, that the plaintiff was negligent, the situation, in my opinion, brought about by his negligence would not have resulted in damage to him but for the subsequent and severable negligence on the part of the defendant's driver, as is established, it seems to me, by the fact that both the other cars passed him without doing any damage. There is, I think, in this case a clear line to be drawn between the negligence of the plaintiff and that of the defendant. The plaintiff's conduct contributed to the accident only in the sense that it was a *sine qua non*. If he had not been on the street the accident, of course, would not have happened, but I cannot find anything in his conduct which

(1) [1922] 1 A.C. 129, at 136.
(2) (1881) 6 App. Cas. 217.
(3) (1884) 9 App. Cas. 873.
(4) (1879) 4 P.D. 219.
(5) (1880) 5 App. Cas. 876.

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Lamont J.

provoked, induced or in any way assisted in bringing about the negligence of the defendant's driver. Neither do I find that the negligence of the defendant's driver was so interwoven with the state of things brought about by the conduct of the plaintiff that the plaintiff should be held equally guilty of causing the accident. A driver who, in broad daylight, runs down a pedestrian standing still on a street on which he knows pedestrians are in the habit of walking and on which there is no opposing or crossing traffic, assumes a heavy burden when he seeks to shew that he was not guilty of the negligence or improper conduct which caused the accident. It is not, in my opinion, sufficient for the defendant to say—as in effect it says here: "True our driver ran down the plaintiff and injured him because he did not see him in time to stop the truck, but the plaintiff should have looked out for the truck and got out of the way."

I agree, therefore, with the trial judge that the defendant's negligence was the proximate cause of the plaintiff's injuries.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

ANGLIN C. J. C. (dissenting).—In this case the trial judge found negligence on the part of the defendant to have been the sole cause of the injuries sustained by the plaintiff. He negatived any contributory negligence on the part of the plaintiff. The evidence in support of both these findings leaves their accuracy, in my opinion, doubtful, to say the least. Towards the close of his judgment he said,

> But even if the plaintiff could be said to be negligent, in standing where he was, or otherwise, his negligence was not, in my opinion, the proximate cause of the accident. The old case of *Tuff* v. *Warman* (1), which is still good law, decides that his contributory negligence would not dis-entitle him to recover, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. The defendant could have avoided this accident by the use of the ordinary care of a reasonable man for the reasons I have given above, and I therefore conclude that the plaintiff is entitled to succeed.

The evidence does not warrant this finding.

No other allusion is made to "ultimate" negligence. It is reasonably obvious, from the passage quoted, that while the trial judge took into account "ultimate" negligence of the defendant, in so far as he might *actually* have avoided

(1) (1858) 5 C.B., N.S., 573.

the consequence of any contributory negligence of the plaintiff, he did not consider, and did not express any opinion upon, the question whether, when he did see, or should first have perceived, the plaintiff's danger, the defendant's servant could, but for some preceding disabling negligence on his part, have avoided running him down.

It is this latter class of " ultimate " negligence which the Privy Council considered in *B.C. Electric Ry. Co.* v. *Loach* (1), i.e., disabling negligence anterior in fact to the plaintiff's contributory negligence, but of such a character that its effects endured and became operative after such contributory negligence had intervened.

The Court of Appeal, on the other hand, found, upon evidence, which I am unable to say was insufficient to justify such finding, that the plaintiff was guilty of contributory negligence. They, however, did not consider or pass upon the question of " ultimate " negligence. We are, therefore, without any finding by either of the provincial courts upon the issue dealt with in the *Loach* case (1). We cannot tell what the finding of the learned trial judge upon this, not improbably, vital question, would have been had his mind been directed to that aspect of the case. In the absence of such a finding it is impossible to hold that this action was fully tried.

In my opinion, therefore, a new trial is necessary in order that all the issues in the action may be fully considered and determined. I, therefore, refrain from further comment upon the evidence.

The costs of the appeal to this Court must be borne by the respondent. The costs of the abortive trial and the appeal to the Court of Appeal should abide the event of the new trial.

SMITH J. (dissenting).—I would order a new trial in this action; costs of the appeal to this Court to be borne by the respondent; costs of the abortive trial and the appeal to the Court of Appeal to abide the event of a new trial.

Appeal allowed with costs.

Solicitor for the appellant: *Russell Hartney.*

Solicitors for the respondent: *Bence, Stevenson, McLorg & Yanda.*

(1) [1916] 1 A.C. 719.

1930
*Oct. 15.

CANADIAN UTILITIES LIMITED.....APPELLANT;

AND

THE TOWN OF STRASBOURG.....RESPONDENT.

ON APPEAL FROM THE ASSESSMENT COMMISSION FOR SASKATCHEWAN

Assessment and taxation—Assessment for "special franchise"—Town Act, Sask., 1927, c. 24, s. 413 (6).

Appellant had a special franchise for supply of electric light and power to respondent town. It had only a distribution system within the town, its generating plant being elsewhere. The town assessed the pole line and distribution system at $3,000 and the franchise at $7,000. Appellant contended that, as it had no property in the town except that assessed at $3,000 as aforesaid, the $7,000 assessment on the franchise was illegal, being contrary to s. 413 (6) of the *Town Act,* Sask., 1927, c. 24.

Held (Newcombe J. *dubitante*): The assessment did not violate s. 413 (6). Assessment must be made of the land and, "in addition," of the special franchise according to the method of determination laid down. Any argument that might otherwise be based on "double assessment" was met by the express statutory provision. There was nothing to shew that the assessment at $7,000 for the franchise was not correct or that the assessment had been made on a wrong basis.

APPEAL by the Canadian Utilities Limited from the decision of the Assessment Commission of Saskatchewan dismissing its appeal from the decision of the Court of Revision of the Town of Strasbourg confirming the assessment made by the assessor of said town of the appellant's property situate therein for the year 1929.

On 21st August, 1928, the respondent town, which owned an electric light and power generating plant and distribution system, by agreement sold to the appellant all its property used or acquired for or in connection with it (but excluding the power house building and land) for the price of $12,000, and by agreement on the same date granted to the appellant (subject to the terms and provisions of the agreement) an exclusive franchise for a period of 20 years for the supply of electric light and power to the town. (It was admitted that the franchise so granted was a special franchise within the meaning of the *Town Act,* Sask., 1927, c. 24). The total consideration paid by the appellant to

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

the respondent in respect of the sale and franchise agreements was the said sum of $12,000. The appellant supplies electric light and power to some forty cities, towns and villages in the province of Saskatchewan. Its method of operation is to establish a generating plant in a central town from which transmission lines are built to several towns and villages in which the appellant maintains a distribution system and which are thus supplied from the central plant. Since the said agreements the appellant has been supplying the respondent town with electric light and power from a generating plant situate at the town of Nokomis; it has not had any generating plant within the respondent town but has there a distribution system including poles, wires and transformers.

The assessor of the respondent town proceeded to assess the appellant in respect to its property and franchise within the town for the year 1929. He assessed the "pole line" at $3,000 and the "franchise" at $7,000, making in all $10,000. It is stated in the judgment of the Assessment Commission that "the assessor submitted that in making the assessment of $10,000 he proportioned the amounts as follows: $3,000 to land which represents pole line and distribution system, and $7,000 to the special franchise."

Appeals taken by the appellant to the Court of Revision and then to the Assessment Commission were dismissed. Special leave was granted by the Court of Appeal for Saskatchewan to appeal to the Supreme Court of Canada.

The *Town Act*, Sask., 1927, c. 24, enacts, by s. 410, that, subject to the other provisions of the Act, the municipal and school taxes of the town shall be levied upon (1) lands; (2) businesses; (3) income; and (4) special franchises. Sec. 413 provides the mode of assessing land and businesses, and also, by subsecs. 6 and 7, enacts as follows:

(6) The owner of a special franchise shall not be assessed in respect of business or income in respect of such franchise, but in addition to an assessment on land shall be assessed for the actual cost of the plant and apparatus less a reasonable deduction for depreciation.

(7) No person who is assessed in respect of any business or special franchise or of any income derived therefrom shall be liable to pay a licence fee to the town in respect of the same business or special franchise.

"Land" is defined in s. 2 (12) as follows:

"Land" includes lands, tenements and hereditaments and any estate or interest therein, or right or easement affecting the same; and

(*a*) buildings or parts of buildings, structures, machinery or fixtures, erected or placed upon, in, over, under, or affixed to, land; and

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CANADIAN UTILITIES LTD. v. TOWN OF STRASBOURG.

(b) structures or fixtures erected or placed upon, in, over, under, or affixed to, any highway, lane or public place or water, but not the rolling stock of a railway, electric railway, tramway or street railway;

"Special franchise" is defined in s. 2 (27) as follows:

"Special franchise" means every right, authority or permission to construct, maintain or operate within the town in, under, above, on or through any highway, road, street, lane, public place or public water within the jurisdiction of the town, any poles, wires, tracks, pipes, conduits, buildings, erections, structures or other things for the purposes of bridges, railways or tramways or for the purpose of conducting steam, heat, water, gas, oil, electricity or any property, substance or product capable of being transported, transmitted or conveyed for the supply of water and heat, power, transportation, telegraphic or other service;

"Income" is defined in s. 2 (10).

The appellant did not appeal against the assessment of the pole line at $3,000, and for the purposes of this appeal it was admitted that this was a proper assessment.

It was contended by the appellant that the legislature has laid down an arbitrary mode for the assessment of a special franchise; and the assessment must be restricted as provided in ss. 6 of s. 413; and, as the "pole line" (which, it was submitted, was "land" within the meaning of the Act, but whether treated as land or as plant and equipment was immaterial, as the result would be the same) was the only property which the appellant had within the town, and as this had been assessed at $3,000, the total assessment should have been $3,000 and no more.

E. C. Leslie for the appellant.

No one appeared for the respondent.

At the close of the argument of counsel for the appellant, the members of the Court retired for consultation, and on their returning to the Bench, the Court orally delivered judgment, dismissing the appeal without costs.

ANGLIN C. J. C.—The majority of the Court is of the opinion that this appeal fails.

In the first place, the appeal is confined to one ground only,—ground no. 2 in the appellant's appeal to the Assessment Commission, viz: that "the assessment of the franchise was not made in accordance with the provisions of the *Town Act*." Ground no. 3 (that "the value placed upon the franchise for assessment purposes was excessive"), was abandoned below and was not urged here.

As to ground no. 2, as we read the statute, assessment must be made both of the land and of the special franchise.

Then, as the majority of us think, the statute proceeds clearly to determine how the assessments are to be made; and, as to a "special franchise," it must be assessed at the actual cost of the plant and apparatus, less a reasonable deduction for depreciation. The fact that the poles (which apparently constitute the chief, but not necessarily the sole, plant and apparatus in the town) may have already been taken into account as part of the land assessed at $3,000 is beside the question, the statute directing that the special franchise shall be assessed "in addition" and that for the purpose of ascertaining its value the assessor shall take the actual cost price of the plant and apparatus less a reasonable deduction for depreciation. The express provision of the statute answers any argument which might otherwise be based on "double assessment." The actual cost of the plant and apparatus (including franchise) was $12,000, plus expenditures subsequently made by the company in replacements and renewals, etc. There is nothing to show that the assessment at $7,000 for the "special franchise" is not correct, or that that assessment has been made on a wrong basis.

That being so, the appeal fails, and must be dismissed.

NEWCOMBE J.—I am not satisfied that the statute has made clear how the assessment in respect of the franchise is to be ascertained. I think it improbable that it was intended that the cost of the land should figure twice in the assessment; and, with all due respect, I am not at all persuaded that the result which my Lord, the Chief Justice, has reached is borne out by the words of the Act. It is the duty of the authority which urges the tax to establish that it is imposed with reasonable clearness; and I am not satisfied—I shall not dissent, because the respondent has not been heard, and my learned brothers are in agreement with the opinion that has been expressed,—but I may say that I am very doubtful about it.

The other members of the Court concurred with Anglin, C. J. C.

ANGLIN C. J. C. (After discussing with counsel the matter of costs).—The appeal is dismissed without costs.

Appeal dismissed without costs.

Solicitors for the appellant: *MacPherson, Leslie & Paul.*
Solicitor for the respondent: *A. A. Peters.*

1930
*May 2.
*June 10.

JAMES RICHARDSON & SONS LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE STEAMER "BURLINGTON" (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Bill of lading—Law of United States—International law—Art. 8 C.C.

The appellant company contracted with the respondent ship for the carriage of a cargo of wheat from Buffalo to Montreal. The bills of lading were signed in the United States of America, both the shipper and the shipowner being American subjects. The respondent alleged that the bill of lading was issued subject to the *Harter Act* passed by the Congress of the United States in 1893, although no special reference was made to the exemptions mentioned in that Act, while the appellant alleged that that Act did not apply as it was not referred to or made part of the contract.

Held that the obligations of the parties under the contract were governed by the laws of the United States, the law of the flag in this case being the same as the *lex loci contractus*. *Lloyd* v. *Guibert* (L.R. 1 Q.B. 115) foll.

Per Anglin C.J.C. and Lamont, Smith and Cannon JJ.—The intention of the parties, unless it is clearly shown that they intended to apply the law of Canada, must be taken as accepting, to all intents and purposes, the law of the United States, to which they were both subject as American citizens when they contracted for the carriage of an American cargo, in an American ship, from an American port, especially since the loading, transhipment at Buffalo and most of the navigation was to take place in American territory. If a contract of carriage were to be governed by the law of the country of destination because the last act of the contract, the delivery, is to be performed there, then the contract of carriage would have to be governed by the laws of different countries when goods shipped together would have several destinations in such countries, which case is inconceivable.

Held, also, that the act of the oiler in removing by mistake the cover or bonnet of the sea-cock instead of the plates on the air-pump, thus causing damage to the cargo by water, was a fault in the "management" of the ship.

Per Duff J.—The rule governing the case is that enunciated by Willes J. in *Lloyd* v. *Guibert* cited above that, where the contract of affreightment does not provide otherwise, the law applicable is the law of the flag.

Judgment of the Exchequer Court of Canada ([1929] Ex. C.R. 196) aff.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Demers J. (1), dismissing with costs the appellant's action as consignee of

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

(1) [1929] Ex. C.R. 196.

certain cargo of grain against the respondent ship for loss and damage to the cargo whilst on the ship.

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

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

E. M. McDougall K.C. and *C. R. McKenzie* for the respondent.

The judgment of the majority of the Court (Anglin C.J.C. and Lamont, Smith and Cannon JJ.) was delivered by

CANNON J.—The appellant, in opening the case, declared that he accepted the facts as summarized in respondent's factum as follows:

A cargo of grain belonging to the appellant was shipped from Chicago, in the state of Illinois, U.S.A., under a through bill of lading dated August 1, 1927, destined for Montreal, P.Q., for transhipment at the port of Buffalo, N.Y., where it was loaded on the respondent ship on August 8, 1927, and consigned to the appellant at the port of Montreal, where the said ship arrived safely on the 11th day of August, 1927.

Shortly after the arrival of the said ship the chief engineer, in connection with the management thereof, instructed one of the oilers, named Montroy, to pump up the boilers, close the sea-cock valve off and to take certain covers off the air-pump.

The said Montroy by mistake removed the cover or bonnet off the sea-cock instead of the plates off the air-pump thus causing a sudden inrush of water into the engine room which could not be checked. In order to prevent the ship sinking at her berth in deep water, she was beached but with a bad list to port, submerging her hatches and bringing about the resultant damage to the appellant's cargo.

The *Harter Act,* which the trial judge has applied to this case, was passed by the Congress of the United States of America on the 13th February, 1893; the respondent was found to be entitled to the exemption set forth in section 3 thereof, which enacts that if the owner of any vessel transporting merchandise *to* or *from* any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the *management* of the said vessel.

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Cannon J.

The first and main question to be determined is whether or not the so called *Harter Act* governs this case.

The bills of lading were signed in the United States of America, both the shipper and the shipowner being American subjects. No special reference was made to the exemptions of the *Harter Act.* It was agreed however that the consignee or owner of the cargo would not be exempt from liability for contribution in general average, even if the owner of the ship had exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, or if the said owners were exempt for damage resulting from faults or neglect of the master, pilot or crew in the navigation or management of the ship. The wording of this clause is evidently inspired by the above section 3 of the *Harter Act.*

Scrutton, on charterparties and bills of lading, 12th edition, says at page 19:

> The general rule of English law is that a contract is to be construed according to the law by which the parties intend to be bound. If that intention is not expressed in the contract, the court must ascertain what is their implied intention. In the absence of other indications, in ordinary contracts, the implication will be that the parties intended to be bound by the *lex loci contractus.*
>
> In regard to charterparties and bills of lading the general rule as to contracts applies; they will be governed by the law by which the parties intend to be bound, and if that is not expressed, it must be ascertained as a matter of implication. But in the absence of other indications, as regards charterparties and bills of lading, the primary implication will be that the parties intended to be bound by the law of the ship's flag, and not, as in other contracts, by the *lex loci contractus.*

In this case, it is to be noted that the ss. *Burlington* is an American ship and that the law of the flag is the same as the *lex loci contractus. Lloyd* v. *Guibert et al* (1), laid down the rule that,

> where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect to sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.

The Cour de cassation in France, on December 5, 1910, *re American Trading Company* v. *Quebec Steamship Company,* held *inter alia:*

> Entre personnes de nationalités différentes, la loi du lieu où le contrat est intervenu est, en principe, celle à laquelle il faut s'attacher.
>
> Mais les parties peuvent, par une manifestation de volonté expresse ou tacite, adopter une autre loi, à laquelle leur contrat sera soumis.

(1) (1865) L.R. 1 Q.B. 115.

These principles, recognized in England and France, are also embodied in article 8 of the Civil Code of the province of Quebec:

> Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases, effect is given to such law, or such intention expressed or presumed.

In this instance, the intention of the parties, unless it is clearly shown that they intended to apply the law of Canada, must, in my opinion, be taken as accepting, to all intents and purposes, the law of the United States, to which they were both subject as American citizens when they contracted for the carriage of an American cargo, in an American ship, from an American port. An important feature is that the loading, transhipment at Buffalo, and most of the navigation was to take place in American territory.

If a contract of carriage were to be governed by the law of the country of destination because the last act of the contract, the delivery, is to be performed there, what would happen if goods were shipped together having several destinations to different countries? It is inconceivable that the contract of carriage must be governed by the laws of the several destinations. There must and can be only one law governing the carriage and clothing the contract once and for all with all the privileges, obligations and immunities belonging to that law.

I accept what was said in the case of *The Peninsular & Oriental Company* v. *Shand* (1), by Lord Justice Turner at p. 290:

> The general rule is, that the law of the country where a contract is made governs as to nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpretating or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations.

(1) 3 Moore P.C.N.S. 272.

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I note with interest what His Lordship adds at page 292:

> It is a satisfaction to their Lordships to find that in the year 1864 the Cour de Cassation in France pronounced a judgment to the same effect in a case under precisely the same circumstances, which arose between the appellants and a French officer who was returning with his baggage from Hong Kong in one of their ships, the *Alma,* and who lost his baggage in the wreck of that vessel in the Red Sea. The same question arose as here on the effect to be given to the stipulation in the ticket; two inferior courts, those of Marseilles and Aix, decided it in favour of the plaintiff on the provisions of the French law; the Supreme Court reversed these decisions, and held that the contract having been made at Hong Kong, an English possession, and with an English company, was to receive its interpretation and effect according to English law.

I therefore agree with the learned trial judge that the obligation of the parties are governed by the laws of the United States.

There remain then, in this case, two questions of fact:

1. Have the owners of the *Burlington* exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied?

2. Does the damage complained of by plaintiff result from faults or errors in navigation or in the management of the vessel?

The trial judge dealt with the first question of fact as follows:

> The defence has established that their vessel was duly classified as a first-class vessel to transport goods on the lakes, and that she had also been duly inspected by the proper inspectors, and it is proved that the owners had made the repairs asked for.
>
> To this evidence, which made a prima facie case in favour of the *Burlington,* the plaintiff objects, that the vessel was not seaworthy, specially because the bulkheads between the machinery and cargo were not water-tight to the spar deck.
>
> It is proved and it appears in exhibit D-13, that the bulkheads are required by the laws of the United States only on vessels carrying passengers, and it is also provided by these rules that the rules of the American Bureau of Shipping respecting the construction of hulls, boilers and machinery, and the certificate of classification referring thereto, shall be accepted as tendered by the inspectors of this service.
>
> There has been some controversy as to the rules of the American Bureau of Shipping, and it is doubtful if the old rules of the Great Lakes Register do apply, but even taking those rules, I see that the approval of a ship could be given, though not built in every respect according to the rules and tables of the register, article 4, section 1, p. 19.
>
> It is true that section 44 states that all water-tight bulkheads should extend to the upper deck, but it is added, in conformity with rule 4

already quoted, that when the construction is such that special arrangements are desired, plans for same must be submitted to the committee.

This shows that the committee can approve of a boat where the bulkhead is not water-tight to the spar-deck.

In this case, the bulkhead was water-tight up to the main deck which was seventeen feet six inches (17′ 6″) above the keel and inasmuch as the ship's draught was thirteen feet eleven inches (13′ 11″), the *Burlington* had a freeboard of three feet seven inches (3′ 7″) above the waterline.

It would then have been necessary to load down the *Burlington* three feet seven inches (3′ 7″) deeper before the water would have reached the top of the main deck, which could not have been done because the canal draught is only fourteen feet (14′).

There is no question that the removing of the boards of the spar deck could not, under the circumstances, have any effect on the seaworthiness of the ship.

The second objection made by the plaintiff is that the *Burlington* was not seaworthy because there were no extension control rods of the sluice valves.

It is proved that no such extension rod exists on any lake vessel. The only witness who has said the contrary is unable to name a single lake boat which has such extension rods, and even the witness Drake, for the plaintiff, says he never saw the requirement for one.

The third complaint was that the *Burlington* was not seaworthy because the boiler pan or flooring on which the boiler fitting rests was corroded.

This is contradicted and the same witness Drake, who pretends that the boiler pan was in a corroded condition, adds: "but not seriously to effect it," and in my opinion this disposes of that objection.

In short, the defendant has proved diligence, and more than that, it is proved that the *Burlington* was fit for the transportation of that cargo to Montreal.

I do not see any reason to decide, and the appellant's factum and argument do not show, that the trial judge had erred in reaching these findings of fact. The *Burlington* was fit to, and did, transport the cargo of grain to Montreal.

The learned trial judge states that he felt inclined to have grave doubts on the second question, to wit: does the damage or loss complained of result from faults or errors in navigation or in the management of the vessel?

Lord Justice Scrutton, in his book already quoted, said:

Much discussion has taken place * * * on the words "navigation" and "management" in section 3 of the *Harter Act*. This passage in the *Harter Act* has since been copied in the New Zealand Act of 1922, the Canadian Act of 1910, and in the *Carriage of Goods by Sea Act*, 1924. The authorities are not in a very satisfactory condition, but in view of the vagueness of the words to be construed this is hardly surprising. It seems that the exceptions in the contract of affreightment, unless otherwise worded, limit the shipowner's liability during the whole time in

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Cannon J.

which he is in possession of the goods as carrier (*Norman* v. *Binnington* (1), *The Carron Park* (2); *per* Wright J., in *De Clermont* v. *General Steam Navigation Co.* (3)). Accordingly an exception of negligence "during the voyage" was held by Sir J. Hannen to cover negligence during loading, and to apply to the whole time during which the vessel was engaged in performing the contract contained in the charter, and an exception of "damage in navigating the ship, or otherwise," was *held* to cover damage done during loading (*Norman* v. *Binnington* (1)). Cf. *The Glenochil* (4) in which an exception "faults in management" was held to cover putting water into the ballast tanks while the cargo was being discharged, without ascertaining that the pipes were in order. See also *Blackburn* v. *Liverpool Co.* (5); and *The Rodney* (6). So also in club policies of insurance. In *Good* v. *London Mutual Association* (7). In *The Warkworth* (8), leaving a sea-cock and bilge-cock open, whereby the water entered the hold, was held "improper navigation" within the policy; Willes J., defining the phrase as "something improperly done with the ship or part of the ship in the course of the voyage." In *Carmichael's Case* (*Carmichael* v. *Liverpool S.S. Association* (9)), a cargo of wheat was damaged through improper caulking of a cargo-port by the shipowner's servants before the voyage commenced: and it was held by the Court of Appeal that this was "improper navigation" within the policy. In *Canada Shipping Co.* v. *British Shipowners' Association* (10), a cargo of wheat was damaged by being stowed in a dirty hold, and this was held by the Court of Appeal not to be improper navigation. In *The Southgate* (11), where water entered through a valve improperly left open while the vessel was moored with cargo in her before starting, Barnes J., seems to have thought that the accident was one of "navigation," while he decided that it was clearly an "accident of the sea and other waters"; and in *The Glenochil* (4), where the engineer, while the cargo was being discharged, pumped water into the ballast tank to secure stability, without inspecting the pipes, and the water through a broken pipe damaged the cargo, the Divisional Court held that this was in the "management," even if it was not in the "navigation" of the vessel. Both in *The Rodney* (6), where the boatswain in trying to get water out of the forecastle by freeing a pipe with a rod broke the pipe so that the water got in the cargo; and in the *Rowson* v. *Atlantic Transport Co.* (12), where meat was damaged by the negligent working of refrigerating machinery, the casualty was held to be a "fault in the management."

Lord Scrutton, since the 12th edition of his work, has rendered in the Court of Appeal, on the 25th November, 1927, a very interesting judgment *re Grosse Millerd, Ltd. & Another* v. *Canadian Government Merchant Marine, Ltd.* (13), in which he sheds more light on the question:

It is difficult to reconcile the decisions of the United States courts with themselves or with the English decisions; and the *Harter Act* itself

(1) (1890) 25 Q.B.D. at p. 478.
(2) (1890) 15 P.D. 203.
(3) (1891) 7 T.L.R. at p. 188.
(4) (1896) P. 10.
(5) (1902) 1 K.B. 290.
(6) (1900) P. 112.
(7) (1871) L.R. 6 C.P. 563.
(8) (1884) 9 P.D. 20, 145.
(9) (1887) 19 Q.B.D. 242.
(10) (1889) 23 Q.B.D. 342.
(11) (1893) P. 329.
(12) (1903) 2 K.B. 666.
(13) (1927) 29 Lloyd's L.L. Rep. 190.

differs widely from the English Act. This arises partly from the fact that the United States courts treated all negligence clauses in contracts of affreightment as contrary to public policy, and the *Harter Act* was therefore an allowance of clauses contrary to public policy, and as such to be restricted, while the English courts allowed freedom of contract, and limited provisions which restricted that freedom. From this point of view sects. 1 and 2 of the *Harter Act* were treated as the fundamental purpose of the Act, and as Holmes J., said in the *Germanic* (1), remove matters which would otherwise be within the exceptions of sect. 3 from its operation. The English Act on the other hand, expressly makes the obligations of arts. II and III subject to the immunities and exceptions of art. IV. In the *Germanic* (1), a combined operation of loading coal for ship's use and discharging cargo was conducted so negligently that the ship lost her trim and capsized. This was held not "management of the ship." I should have thought it clearly was such management, just as provision of ballast would be. The United States courts have held management of the ship not to include: Insufficient covering of the hatches (*The Jeanie* (2)); failure to open hatches to ventilate cargo (the *Jean Bart* (3)); failure to close hatches during rough weather, which had been opened to ventilate cargo (*Andean Trading Company* v. *Pacific Steam Navigation Company* (4)); negligent management of refrigerating machinery (the *Samland* (5)). I, says His Lordship, should have decided all these cases differently. They have held management of the ship to include: failure to pump water out of bilges, causing damages to cargo (the *Merida* (6) and other cases); *mismanagement of seacocks whereby cargo is damaged* (*American Sugar Refining Company* v. *Rickinson* (7)); failure to cover ventilators or sounding pipes or to close port holes (the *Hudson* (8)); the *Newport News* (9); the *Carisbrook* (10); the *Silvia* (11).

The House of Lords, on November 16, 1928 (12), reversed this decision on the facts of the case (negligence in dealing with tarpaulins covering cargo hatches during repairs), but Lord Chancellor Hailsham said at page 93:

> My Lord, in my judgment, the principle laid down in the *Glenochil* (13) and accepted by the Supreme Court of the United States in cases arising under the American *Harter Act,* and affirmed and applied by the Court of Appeal in the *Hourani* case under the present English Statute is the correct one to apply.

The question might arise whether or not we should, in this case, apply the American decisions in interpreting the word "management," as used in the *Harter Act,* in preference to English cases; but I believe, with the trial judge, and from the above synopsis of American judgments, that

(1) (1905) 196 U.S. 589, at p. 597.
(2) (1916) 236 Fed. 463.
(3) (1911) 197 Fed. 1002.
(4) (1920) 263 Fed. 559.
(5) (1925) 7 Fed. 2nd Ser. 155.
(6) (1901) 107 Fed. 146.
(7) (1903) 124 Fed. 188.
(8) (1909) 172 Fed. 1005.
(9) (1912) 199 Fed. 968.
(10) (1917) 247 Fed. 583.
(11) (1898) 171 U.S. 462.
(12) (1928) 32 Lloyd's L.L. Rep. 91.
(13) [1896] P. 10.

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Cannon J.

the jurisprudence applicable to the facts of the present case is well settled in favour of the defendant and that, in the United States, the act of the oiler Montroy, in removing the cover or bonnet of the sea-cock, would be considered as a fault in the "management" of the ship during the voyage, as the cargo had not yet been delivered.

On the whole, I think that the appeal should be dismissed with costs.

DUFF J.—The facts as summarized in the respondent's factum are accepted by the appellants. They are in these words:

> A cargo of grain belonging to the appellant was shipped from Chicago in the state of Illinois, U.S.A., under a through bill of lading dated August 1, 1927, destined for Montreal, P.Q., for transhipment at the port of Buffalo, N.Y., where it was loaded on the respondent ship on August 8, 1927, and consigned to the appellant at the port of Montreal, where the said ship arrived safely on the 11th day of August, 1927.
>
> Shortly after the arrival of the said ship the chief engineer, in connection with the management thereof, instructed one of the oilers, named Montroy, to pump up the boilers, close the sea-cock valve off and to take certain covers off the air-pump.
>
> The said Montroy by mistake removed the cover or bonnet off the sea-cock instead of the plates on the air-pump thus causing a sudden inrush of water into the engine room which could not be checked. In order to prevent the ship sinking at her berth in deep water, she was beached but with a bad list to port, submerging her hatches and bringing about the resultant damage to the appellant's cargo.

The rule as to the law applicable was laid down in the famous judgment of Mr. Justice Willes, speaking for the Court of Exchequer Chamber in *Lloyd* v. *Guibert* (1), in these words:

> Where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.

This law, as far as I know, has never been questioned in any relevant sense, and it is to be observed that the Court of Appeal had no power to over-rule a decision of the Court of Exchequer Chamber. Furthermore, these observations of Chitty J. are to the purpose, quoted from the *Missouri* case (2). He declared that the principle of *Lloyd* v. *Guibert* (1), that is to say, the principle on which the case proceeded (the law of the flag)

(1) (1865) L.R. 1 Q.B. 115. (2) (1889) 42 Ch. D. 321.

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is not confined to the particular facts of that case, but is applicable and ought to be applied not merely to questions of construction, and the rights incidental to and arising out of the contract of affreightment, but to questions as to the validity of the stipulations in the contract itself * * *. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, that of the flag; and so to hold is to adopt a simple natural and consistent rule.

I am not myself, treating the subject as a pure question of fact, able to reach the conclusion that the negligence charged against the *Burlington* could be held to be a fault in navigation as distinguished from a fault in management. It seems to me that the principle laid down by the House of Lords in the *Glenochil* (1) and accepted by the Supreme Court of the United States is the sound principle. Sir Frances Jeune says:

It seems to me clear that management goes beyond navigation and far enough to take in this class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel itself.

With this the House of Lords (2), agree.

I know it is easy to criticise by analysis the distinction between the primary object and the indirect effect of acts done in order to accomplish that object, but though there may be cases in which the distinction is fine and difficult, as a rule there is not much difficulty in applying such a principle. It seems to me what was done in this case was an act directly affecting the ship and the cargo, and only indirectly the sailing of the ship, and was therefore an act of management. I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Meredith, Holden, Heward & Holden.*

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

(1) [1896] P. 10.

(2) (1928) 32 Lloyd's Reports 94.

1930
*Oct. 28.
*Nov. 3.

DUFRESNE CONSTRUCTION COMPANY (DEFENDANT) ..... APPELLANT;

AND

J. PRUDENT MORIN (PLAINTIFF) ..... RESPONDENT.

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

Workmen's Compensation Act—Inexcusable fault—Ordinary meaning—Liability of master and employer—Work with risk of injury—Duty of the employer—Art. 105 C.C.—Workmen's Compensation, R.S.Q., 1925, c. 274, s. 6.

When a workman is employed at work which subjects him to risk of injury, it is the imperative duty of the employer to impart instruction to him as to the proper preventive measures to be taken, and as to the best means of seeking medical aid immediately after the accident. The failure of the employer to do so is a fault, and a fault without excuse.

In the statutory phrase "inexcusable fault" contained in section 6 of the Quebec *Workmen's Compensation Act*, the word "inexcusable" is not a juridical term of art or a word to which any special technical significance can attach. It must therefore be applied in its ordinary sense as determined by the common usage, in light, of course, of the context in which it occurs, and of the subject matter of the statute. It is no part of the function of the courts to restrict or fix its meaning by paraphrases derived from text writers or other sources. "Each case must be judged from its own facts." *Montreal Tramways Co.* v. *Savignac* ([1920] A.C. 408).

The general rule as to the employer's responsibility, laid down by article 1054 C.C., governs the application of section 6: the "inexcusable fault" of a servant or workman, "in the performance of the work in which he is employed," within the meaning of article 1054, is imputable to the employer. *Montreal Tramways Co.* v. *Savignac* ([1920] A.C. 408) foll.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Desaulniers J. and maintaining the incidental demand of the respondent.

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

J. C. H. Dussault K.C. for the appellant.

L. A. Pouliot K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Cannon JJ

The judgment of the court was delivered by

DUFF J.—On the 11th of October, 1926, the respondent was engaged by the appellants to work in a compressed air caisson. He was quite without experience in such work; but after undergoing the usual medical examination by the appellants' doctor, he was set to work with a gang of caisson men and continued to work through the whole of an eight hour shift, from four o'clock in the afternoon till twelve midnight, minus an interval of about half an hour. At the end of this shift, on coming into the open air, he felt ill and made the comparatively short journey to his home with a good deal of difficulty. His illness became progressively more distressing during the night, and in the morning he called in the appellants' doctor, who placed him in hospital and applied the treatment usual in such cases, but with little or no beneficial effect. The respondent is a man of thirty-four and it has been found by the courts below that his illness produced a permanent total disability.

The action was based upon the *Workmen's Compensation Act,* in force at the time, R.S.Q., 1925, c. 274. By that statute, persons suffering injuries in consequence of accident happening by reason of or in the course of their work as workmen or employees engaged in certain specified occupations (which include that in which the plaintiff was employed), are entitled to compensation according to the provisions of the statute. The maximum capital of the grant or annuity, to which a person is entitled under the Act, is, save in one case, $3,000. The exceptional case is provided for in section 6 in these words:—

> The court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it, if it was due to the inexcusable fault of the employer.

At the trial the appellants admitted their liability for the maximum sum of $3,000; but denied their responsibility under section 6, as for "inexcusable fault." The court of first instance rejected the claim of the respondent under this latter head, and this judgment was reversed by the Court of King's Bench, which maintained the larger claim, and, upon that basis, awarded an additional indemnity of $7,000.

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The question of substance is whether or not "inexcusable fault" has been established. It is not disputed that the respondent's disability is the result of "caisson disease," a term applied to groups of morbid changes met with among caisson workers, and divers working in diving dress. Compressed air caissons are employed in the construction of bridge foundations, and the foundations of other structures in water bearing strata. A shaft and air lock afford access and exit for men and materials; and the air pressure is varied according to the head of water. In order to exclude water, this pressure, in subaqueous work, is increased by one atmosphere (or 15 lbs. per square inch) for every thirty feet or so (or $\frac{1}{2}$ lb. for every foot) of submergence below the surface. Exposure to such pressures may be followed by symptoms of various kinds, including pains in muscles and joints ("bends"), deafness, embarrassed breathing, vomiting, by paralysis and even by death. These symptoms do not appear while the pressure continues, but only after it has been removed; the generally accepted theory being that they are due to the effervescence of gases absorbed in the body fluids during exposure to pressure. When the pressure is suddenly released, gas is liberated in bubbles throughout the body. Set free in the spinal cord, these bubbles may give rise to partial paralysis, or, in the heart, to stoppage of the circulation. But if the pressure is relieved gradually, they are not formed as a rule, because the gas comes out of solution slowly, and is removed by the lungs. The evidence shews that some people are not fit subjects for these experiences, and any condition of body which may seriously impede the activity of the organs in eliminating, during the process of decompression, the gases absorbed, constitutes a disqualification. Where, on decompression, any symptom occurs indicating that elimination has not been completely effected, the subject ought to be immediately recompressed and the pressure withdrawn at a more gradual rate. If applied immediately on the appearance of the symptoms, this treatment is commonly effectual.

The respondent charged "inexcusable fault" in two respects. First, he alleged that decompression was effected too rapidly. Secondly, he averred that the appellants had

been grossly negligent in failing to instruct him as to the risks attendant upon the work he was employed to do, and as to the necessity, in the event of untoward symptoms supervening, of resorting immediately to medical assistance; and moreover, that provision was not made at the works themselves for prompt medical attention.

As to the first of these allegations, the Court of King's Bench found in favour of the respondent, and undeniably there is much to be adduced, in support of that finding, from the evidence. On the other hand, the learned trial judge did not reach the same conclusion. His opinion is expressed in these words:—

Considérant que la preuve ne démontre pas, de toute évidence, que le demandeur soit sorti de la chambre d'air comprimé en moins de cinq minutes, le soir de l'accident;

Considérant que la sortie des travailleurs de la chambre à décompression semble bien s'être faite le soir de l'accident, dans les mêmes conditions préalablement établies par les ingénieurs de la compagnie défenderesse.

It is not necessary, as will appear, to pass upon the question whether or not, in view of these findings, the decision on this point of the Court of King's Bench ought to be disturbed.

As to the second charge, the learned trial judge has found as follows:—

Considérant que bien que la défenderesse ait commis une faute en ne donnant pas au demandeur des instructions complètes sur les moyens de diminuer autant que possible, les risques inhérents à son genre de travail, cette faute n'est cependant pas inexcusable au sens de la loi et de la jurisprudence.

The pertinent *considérants* in the judgment of the Court of King's Bench are these:—

Considérant qu'il appert par la preuve que l'appelant récemment venu de la campagne pour avoir de l'ouvrage, n'avait aucune connaissance du travail qui lui a été assigné; que l'intimée s'est complètement chargée de l'appelant qui a été entre ses mains un automate se laissant entièrement conduire par elle; que pour se rendre à la chambre de travail du caisson où il y avait une pression atmosphérique de 19 à 20 livres, l'appelant passait par une pièce appelée chambre d'équilibre où l'intimée faisait la compression pour préparer l'appelant à la pression de la chambre de travail et que pour en revenir, il passait dans la même pièce où se faisait la décompression, avant de rendre l'appelant à l'air libre; que l'appelant ne soupçonnait en aucune façon la nécessité de cette préparation physique nécessaire pour faire son travail ou pouvoir le quitter sans danger; qu'il ne connaissait rien des conséquences que ces procédés de compression et de décompression et des inconvénients et dangers qui pouvaient en résulter, ni du traitement auquel il fallait recourir au cas qu'il en résulterait quelque lésion; que le jour même qu'il a commencé le travail en quittant

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le chantier, l'appelant sentit un malaise qui est allé s'accentuant et que c'est avec peine qu'il a pu gagner son domicile; qu'il a passé la nuit dans des souffrances atroces et que ce n'est que le matin vers 7 heures qu'un camarade ayant notifié la compagnie de l'état de l'appelant, le médecin est venu chercher l'appelant pour le mettre à l'hôpital où il a subi le traitement de la récompression mais, sans succès, parce qu'il était tardif;

Considérant que le travail assigné à l'appelant se faisait dans des conditions anormales dans un caisson, à une profondeur de 40 pieds sous l'eau et sous une pression atmosphérique de 19 à 20 livres; que ce travail, par sa nature, présentait un danger considérable et continu aussi bien durant le trajet pour parvenir à la chambre de travail que pour en revenir par suite de la transition de l'air libre à l'air comprimé par le procédé de la compression et surtout de l'air comprimé à l'air libre par le procédé de la décompression.

Considérant que le seul traitement connu pour les maladies engendrées par l'air comprimé et les lésions qui peuvent en résulter est la recompression suivie d'une lente décompression, qu'une condition essentielle du succès est le recours immédiat à ce traitement et qu'à cette fin, l'intimée avait sur son chantier un hôpital sous la surveillance continuelle d'un médecin; qu'elle prétend avoir mis dans une salle réservée aux ouvriers un avis que l'appelant n'a pu connaître, les avertissant que lorsqu'ils sentiraient un malaise même en dehors de l'ouvrage, d'appeler le médecin de la compagnie et de prendre une voiture à ses dépens.

Considérant que c'était l'impérieux devoir de l'intimée de prendre tous les moyens que la science et l'expérience pourvaient suggérer pour protéger l'appelant contre tout accident possible, qu'il lui incombait de mettre l'appelant au courant des conditions dans lesquelles son travail se faisait, des conséquences possibles de ce travail sur la santé et surtout du traitement immédiat auquel il fallait recourir, que l'intimée s'est volontairement abstenue de l'accomplissement de ce devoir sans justification ni excuse et qu'il apparaît aussi par la preuve que la décompression au sortir du travail de l'appelant s'est faite trop rapidement et qu'il y a lieu de croire qu'en recourant au traitement approprié en temps opportun la marche du mal aurait été arrêtée et que l'appelant eut été guéri;

Considérant que, dans les circonstances, l'intimée a commis une faute inexcusable.

The reasons given by the majority of the Court of King's Bench shew that in their view both faults charged were proved, and that each of the faults, so established, constituted, in itself, "une faute inexcusable," within the statute.

The evidence shews that the risk of injury depends upon a number of factors: the intensity of the pressure, the duration of the exposure, the age of the workman and his physical condition in a variety of respects. By the practice of the appellants, each workman undergoes a medical examination before he is accepted as an employee. Nevertheless, there is evidence, which I regard as satisfactory, that no such examination can be considered an entirely reliable test of the fitness of the subject. Therefore, it is

not surprising to find that, at all events, in some quarters, a practice prevails by which a workman is not accepted as qualified, until his suitability has been proved by experience. Sometimes, the workman is subjected to a compression test in a hospital lock; and this it appears was at one time the practice of the appellants, a practice which was abandoned, because, according to the doctor's evidence, it frightened the men. In other works it is the rule not to permit an inexperienced hand to serve more than half a full shift without a second medical examination. No such precautions were observed by the appellants.

It was not disputed that no workman should be subjected to the risks attending caisson workers, in ignorance of the nature of those risks, or of the necessity of seeking medical aid immediately on the appearance of unpromising symptoms. Nor can it be successfully disputed that no instruction in these matters was given to the respondent or that he was ignorant in respect of them; nor again, that, had he been properly instructed, the character of his symptoms must have apprised him of the necessity of seeking medical aid immediately; nor, once more, if he had applied to the appellants' doctor and the usual procedure had been followed, that his chances of escaping the injuries from which he now suffers, would have been greatly increased; the evidence establishes in my view the probability that he would have escaped.

Dr. Riopelle attempted to account for the absence of instructions and to justify his failure to give any, on the ground that they were unnecessary; because, he said, all the workmen were fully informed as to these matters; knowledge of them was, so to speak, in the air.

This unfortunately is an excuse which cannot be accepted. As I have said, the evidence leaves no doubt that there are cases where the weakness or idiosyncrasy of the workman unfitting him for exposure to the ordinary risks of such work, is not revealed upon the preliminary examination. No further test is provided for by the practice of the appellants. The necessity ought therefore to have been apparent of making sure that proper preventive measures would be applied in cases which should prove to be exceptional; and, since the practice of the appellants was to

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leave it to each workman to take care of himself, it was imperative that he should know what to do and when to do it. There was therefore a rigorous duty to impart instruction. To trust to the chance of this knowledge being gained from some fellow workman was simply to leave the duty unperformed. The evidence, indeed, does not leave us in doubt upon this point; the only fellow workman, who became aware of the respondent's condition, made light of it.

Unnecessarily and knowingly to expose the respondent, as the appellants did, to the risks adverted to above, without putting him in possession of the knowledge that would have enabled him to take effectual prophylactic measures, was a fault, and a fault without excuse. It is difficult, short of conduct involving deliberate intention to injure, to think of a plainer case.

The answer of the appellants, the answer in point of substance, to the case thus made against them, is twofold.

First, it is said that the respondent and his wife were informed by a fellow workman, at half-past two in the morning of the necessity of having the respondent sent to the appellants' hospital; but that there was unnecessary delay in calling a taxi, and that, in consequence, he did not reach the hospital until after seven. The evidence makes it clear beyond dispute that the workman in question, Cadorette, did not at all appreciate the gravity of the risk the respondent was running in not having him taken immediately to the hospital. Cadorette says most explicitly that he made light of the respondent's sufferings, as I have mentioned above. Indeed, the attitude of Cadorette is significant as indicating that the appellants' workmen did not realize the necessity of resorting promptly to preventive measures on the appearance of suspicious symptoms.

Secondly, it is said that the phrase "inexcusable fault" connotes, not indeed an intention to commit a wrong, but an element of intention, of voluntary conduct, as well as an appreciation of the danger which such conduct may entrain. Without expressing any opinion upon the point whether, applying such a standard, the appellants have succeeded in this court in acquitting themselves of "inexcusable fault," it seems necessary to observe that in the

statutory phrase the word " inexcusable " is not a juridical term of art or a word to which any special technical significance can attach. It must therefore be applied in its ordinary sense as determined by the common usage, in light, of course, of the context in which it occurs, and of the subject matter of the statute. It is no part of the function of the courts to restrict or fix its meaning by paraphrases derived from text writers or other sources. In *Montreal Tramways Co.* v. *Savignac* (1), Lord Cave, delivering the judgment of the Privy Council, said:

> It is unnecessary and probably undesirable to attempt a definition of the expression " inexcusable fault." Each case must be judged from its own facts.

It is perhaps desirable to take notice of an argument addressed to us touching the responsibility of the appellants under section 6 in respect of an " inexcusable fault " of an employee. The decision of the Privy Council above referred to (see especially the observations of Lord Cave at pages 413 to 415), precludes controversy upon this point. The general rule of responsibility laid down by article 1054 C.C. governs the application of section 6:

> Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work in which they are employed.

The " inexcusable fault " of a servant or workman " in the performance of the work in which he is employed," within the meaning of article 1054 C.C., is imputable to the employer.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Godin, Dussault & Cadotte.*

Solicitors for the respondent: *Pouliot & Nadeau.*

(1) [1920] A.C. 408, at 413.

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*Oct. 7.
*Oct. 27.

PEARL WALKER (PETITIONER).....APPELLANT;

AND

IDA McDERMOTT (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Testator's Family Maintenance Act—Will—Whole estate bequeathed to widow—Petition by married daughter—Interpretation of Act—R.S.B.C. 1294, c. 256, s. 3.

Under the *Testator's Family Maintenance Act* (R.S.B.C. 1924, c. 256), the provision, which the court is authorized to make in the circumstances stated in section 3, is "such provision as the court thinks adequate, just and equitable." The conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, and has not made, by that will, in the opinion of the judge, adequate provision for the "proper maintenance and support" of the wife, husband or children, as the case may be, on whose behalf the application is made. 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 the 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. Applying these principles to the circumstances of this case, where the only daughter of the deceased brought an application under the Act for an order directed against his second wife, sole beneficiary under the will, *held* that the trial judge was right in deciding that the widow should be called upon to forego part of her annual income in order to make some provision for the applicant. Rinfret J. dissenting.

Per Rinfret J. (dissenting).—Although the *Testator's Family Maintenance Act* leaves to "the judge before whom the application is made" a wide discretion to pronounce both upon the adequacy of the provision for "proper maintenance and support" already existing at the time of the application and upon the "adequate, just and equitable order" which ought to be made under the circumstances, such discretion, although perhaps elastic, must be exercised judicially and according to legal rules. The "opinion of the judge before whom the application

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

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is made" is not in every respect to be held final and conclusive. There are cases when a court of appeal may and should intervene. Failure on the part of the judge of first instance to take the proper view of the scope and application of the Act would be one of those cases.—Upon the circumstances of this case, the appellant has failed to make out a case for the application of the Act, the purview or intent of which is that the husband, the wife or the children should not be left without "proper maintenance and support", while the testator disposes of an estate sufficient to provide for it.

Judgment of the Court of Appeal (42 B.C. Rep. 184) rev.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial court, Morrison C.J.S.C. and dismissing the appellant's petition for an order for proper maintenance under the *Testator's Family Maintenance Act.*

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

J. A. Ritchie K.C. for the appellant.

A. H. Macdonald K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Lamont JJ.) was delivered by

DUFF J.—The pertinent enactments of the *Testator's Family Maintenance Act* of British Columbia, c. 256, R.S.B.C., 1924, are these:

3. 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.

4. The court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the court to disentitle him or her to the benefit of an order under this Act.

5. In making an order the court may, if it thinks fit, order that the provision shall consist of a lump sum or a periodical or other payment.

The provision which the court is authorized to make in the circumstances stated in the section, is, "such provision as the court thinks adequate, just and equitable." The

(1) (1930) 42 B.C. Rep. 184; [1930] 1 W.W.R. 332.

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conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, and has not made, by that will, in the opinion of the judge, adequate provision for the "proper maintenance and support" of the wife, husband or children, as the case may be, on whose behalf the application is made.

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 the 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.

The net value of the testator's estate was $25,000. The testator's widow became, on the death of the testator, entitled to $3,000, as insurance, and she was the owner of real estate valued at $2,000. The testator had one daughter by a former wife, the appellant. Before the testator's death, she had married, and since the order made by Mr. Justice Morrison to which I am coming immediately, she has had two children, twins. Her husband is employed in a clerical capacity in Kimberley and receives a salary of $150 a month, and of this $25 a month is required for rent. He has some shares of Big Missouri stock for which he is said to have paid $380; but, apart from this and the furniture in their residence, he has no assets.

By his will, the whole of the testator's estate was left to his widow. No provision was made for his daughter, who, for some years prior to her marriage, had been earning her

own living as a stenographer. Mr. Justice Morrison thought that, in these circumstances, an allowance of $6,000 should be made, but that from this should be deducted a sum of $1,000 that had been voluntarily paid to the applicant by the widow. The Court of Appeal reversed this judgment, and held that the applicant was entitled to nothing in addition to the $1,000 she had already received.

The view of the learned judges in the Court of Appeal seems to have been that no further allowance would be "just and equitable" within the meaning of the statute. This view was very largely based upon considerations touching the claims of the wife on account of her services in the husband's business, in which the greater part of the assets left by him had been acquired.

The widow was married to the testator in 1914; she then possessed the sum of $1,500, profits derived from the keeping of a "rooming-house" somewhere in the State of Idaho. The testator was then a bartender; later he bought the Crown Point Hotel in Trail, British Columbia, the first instalment money ($1,000) being paid by his wife. With the exception of this instalment, the whole of the purchase money was paid out of the profits of the business. The evidence makes it pretty clear that the business was far from prosperous until 1923 or 1924, when the testator obtained a beer licence under the amendment of the *Liquor Act* of 1923. It was during the three and one-half years, in which he enjoyed the benefit of this licence, that the means were acquired from which outlays in repairs and improvements to the hotel were provided for, mortgages were paid off, and the unpaid instalments of the purchase price liquidated.

Shortly before his death, he gave an option on the hotel for $30,000, which was exercised after his death. This sum constitutes the only considerable asset of the estate. It is not disputed that the value of the hotel had its principal source in the enhancement of prices of real estate in Trail, consequent upon the expansion of the business of the Consolidated Smelters.

There is a good deal of evidence that the testator, especially in the years before he obtained the beer licence, drank

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very heavily; and that a considerable share of the burden of carrying on the hotel, both in responsibility and in labour, fell upon the widow. On the other hand, there is little doubt that during the prosperous time following the obtaining of the licence, when the business had become profitable from the selling of beer, the testator managed this part of the business, and the evidence quite fails to establish that the profits accruing therefrom were not due, chiefly at all events, to his exertions.

The testator, no doubt, felt himself under great obligations to his wife, and justly so. But I can see nothing in all this to lead to the conclusion that the testator, if properly alive to his responsibilities, as father no less than as husband, ought to have felt himself under an obligation to hand over all his estate to his wife and leave his only child without provision. Twenty-five thousand dollars, the net value of the testator's estate, would purchase a life annuity of $1,875 for the widow, while the $5,000 she possessed in her own right would purchase her an additional annuity of $375. I do not think the learned trial judge was wrong in thinking that the widow should be called upon to forego $450 of this annual sum, in order to make some provision for the applicant, nor do I think that a father in the position of the testator, and justly appreciating the situation of his daughter, a young married woman, and the possibilities attaching to her situation, would, in the circumstances which I have outlined above, have considered that adequate provision existed for her "proper maintenance and support"; nor, weighing the competing claims of his wife and daughter, that he would have thought such provision as that made under the order of Morrison J. either unjust or inequitable.

Mrs. McDermott's affidavit contains this paragraph:

> That out of the sale price of the said property I received $10,000 cash the balance being payable in annual instalments over a period of seven years.

No point was made on the argument of the facts stated in this paragraph, and, consequently, I have assumed, that the deferred payments under the sale have either been paid or secured in a manner equivalent to payment.

The appeal should be allowed with costs in the Court of Appeal and in this court, and the judgment of Morrison J. restored.

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RINFRET J. (dissenting).—Under the *Testators' Family Maintenance Act* of British Columbia (c. 256 of R.S.B.C.), if any person 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 (his) wife, husband or children, the court may * * * order that such provision as the court thinks adequate, just and equitable in the circumstances shall be made out of the estate, etc.

The appeal is from a judgment of the Court of Appeal of British Columbia reversing an order of the Supreme Court of that province granting an application under that statute made by the present appellant.

The statute leaves to "the judge before whom the application is made" a wide discretion to pronounce both upon the adequacy of the provision for "proper maintenance and support" already existing at the time of the application and upon the "adequate, just and equitable order" which ought to be made under the circumstances. It need not be said, however, that such discretion, although perhaps elastic, must be exercised judicially and according to legal rules. The "opinion of the judge before whom the application is made" is not in every respect to be held final and conclusive. There are cases when a court of appeal may and should intervene. Failure on the part of the judge of first instance to take the proper view of the scope and application of the Act would be one of those cases.

With the greatest deference, I think the Court of Appeal of British Columbia was right in applying these considerations to the order under review. Here, the testator made no provision for his child, the petitioner. But I cannot construe the Act to mean that in every case where no provision is made, the section above quoted is mandatory and the court must make an order. In my judgment, the intention of the legislature was that the husband, the wife or the children should not be left without "proper maintenance and support," while the testator disposed of an estate sufficient to provide for it; and to that extent only, in order to carry out such intention, is the court permitted to interfere with the liberty of any person to bequeath his property as he pleases.

The first inquiry therefore must be whether, at the death of the testator, the petitioner lacked those means of maintenance and support which would be proper, having regard

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to her ordinary circumstances in life. For that purpose, the court should consider how she has been maintained in the past and what were, when the testator died, the means of support available to her. So far as the evidence shews, the appellant petitioner was raised in very humble circumstances. When, in 1914, her father purchased an undivided one-half interest in the Crown Point Hotel, at Trail, he did not own any real or personal property whatsoever, and the first cash instalment paid by him on the purchase price had to come out of money supplied by the respondent. For some years following, business was very dull and there was little to do. It was not until 1923, when the *Liquor Control Act* was amended to permit the sale of beer by the glass, that the appellant's father having obtained a bar licence, the hotel began to reap substantial profits. The appellant was then working as a stenographer in the Bank of Montreal at a salary of $60 a month. She continued as such until her marriage, save for two months in another situation and a small yearly increase. She had her room free at the hotel, but was paying for her meals, took care of her room and provided her own linen and laundry service.

In 1927, the petitioner was married to a clerk employed at the office of the Consolidated Mining and Smelting Company of Canada, Limited. At the time of the petition, she and her husband were residing at Kimberley. He was in charge of the office part of the general store of the company, receiving a salary of $150 per month. Upon his marriage, the husband was given by his father a piece of ground in the city of Trail upon which he erected a house. He has since sold it and his equity was $774.81. When the purchaser has completed all payments, there will be a further sum of $500 due them. In Kimberley, they pay a rent of $25 a month for the house in which they live. They own their household furniture, the value of which is placed by them at $500 (exclusive of wedding presents) and by the respondent at $1,000. The petitioner never has been dependent on her father since she got her employment in the Bank of Montreal, in 1923, and certainly not since her marriage. She has never been since then and is not now

in need of maintenance and support out of the estate and is adequately maintained and supported by her husband, who is a young man with a good income, a permanent employment, a reasonable opportunity of advancement and fully capable of supporting her in the future. In fact, from all appearances derived from the record, she lives now more comfortably than during the years prior to her marriage. She does not state that she is in need of maintenance, nor that her husband and herself are unable to meet their necessary household and incidental expenses of living. All she says is that they "are unable to save any money whatsoever." Even that is not borne out by the facts, since they own and maintain a Chevrolet motor car; and when the respondent made them a present of $1,000, they invested part of it in the purchase of Big Missouri stock and the appellant took a trip to Seattle, which cost her $100.

The appellant complains that the judgment of the Court of Appeal does "not take into account not only the chances of dismissal of the ordinary kind, but also the necessarily precarious business in which (the husband) is employed." These and other contingencies are possibilities in every case whatever. A young husband may die prematurely. A widow or a child now rich may lose everything through adverse circumstances. There would be no limit to considerations of that character, and it would mean that, unless provision such as is suggested by the appellant is made in every will, the latter should be recast and some order must be made in all cases. I would not think that, when considering the applicability of the statute, these possibilities should be taken into account. But suffice it to say that, in the present instance, the probabilities lead in a direction contrary to the contention and the claim of the appellant. It is much more likely than otherwise and much more in accordance with ordinary and reasonable expectation that the appellant's present condition will go on improving as years go by and, at all events, that both herself and her husband will be fully capable of maintaining themselves in the future.

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In my view, the appellant has failed to make out a case for the application of *The Testators' Family Maintenance Act*. She does not come within the purview or intent of the Act, and I would dismiss her appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *R. J. Clegg.*

Solicitors for the respondent: *McDonald & Prenter.*

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*Apr. 30.
*May 1.
*June 10.

SIMÉON GRONDIN (PETITIONER).....APPELLANT;

AND

R. ERNEST LEFAIVRE (TRUSTEE).....RESPONDENT;

AND

NEUVILLE BELLEAU (INSOLVENT).

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

Stock broker—Orders on New York exchange to Canadian broker—Certificates of stock—Endorsement in blank—Recovery from trustee in bankruptcy—Right to follow proceeds of sale—Not existing in Quebec—Arts. 1017, 1705, 1709, 1713, 1723, 1730, 1735, 1976, 1985, 1994, 2005a C.C.

Orders to sell or to buy shares negotiated on the New York stock exchange, given to a Canadian broker who has no seat on that foreign exchange, must be taken to have been given upon the assumption that the Canadian broker would deal with those shares through New York brokers; and it is an implied condition of the orders that the transactions will be carried out under the rules and customs of the New York Stock Exchange.

The endorsement in blank by the customer of the certificates of stock is sufficient to confer to the stock broker an apparent authorization to make use of the certificates for all purposes (C.C. 1730).

A customer who, upon giving such orders to a Canadian broker, delivered to the latter his certificates of stock endorsed in blank, has no right to revendicate them from the trustee in bankruptcy, after the Canadian broker became bankrupt, unless the certificates can still be identified in the hands of the trustee; and then, only upon paying the trustee all sums due and disbursed on behalf of the customer.

More particularly has the customer no right to revendicate the certificates when it is shown that they were merged in a credit and debit account between the Canadian broker and the New York stock

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

brokers, in which all transactions on behalf of the Canadian broker's customers were dealt with in the sole name of the Canadian broker. Under those circumstances, the customer's stock became security for the whole of the New York brokers' account; and, upon that account being liquidated, if there should remain a surplus standing to the credit of the bankrupt Canadian broker, no individual customer may claim, out of this surplus, an amount alleged to represent his stock; but such surplus must be distributed between the customers of the Canadian broker *pro rata* and according to bankruptcy rules.

In Quebec, there exists no right to follow (droit de suivre) the proceeds of the sale of a thing, except under art. 2005a C.C., which deals with a special case.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Sir F. X. Lemieux C.J., and dismissing the appellant's petition to recover from the respondent, as trustee in the bankruptcy of one Belleau, stock broker, certificates of stock.

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

Robert Taschereau and *Antoine Rivard* for the appellant.

J. L. Perron K.C. and *Ls. St-Laurent K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET, J.—Nous allons tâcher d'analyser les faits essentiels de cette cause aussi minutieusement que possible, car—ainsi que déjà le laissait entendre l'honorable juge-en-chef de cette cour en autorisant le pourvoi en appel—il semble bien que les divergences d'opinions qui se sont rencontrées en Cour Supérieure et en Cour du Banc du Roi proviennent d'interprétations différentes de la preuve plutôt que de points de vue opposés sur les questions de droit.

M. Neuville Belleau était, à Québec, un agent de change ou un courtier. L'appelant était son client depuis quelques années.

Le 8 septembre 1926, l'appelant remit à Belleau des certificats représentant 100 actions de Union Pacific, 50 actions de New York Central et 200 actions de Wabash. Que les certificats des autres actions aient été déposés en même temps que ceux du Wabash est un fait certain. Il est

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établi par Belleau et son employé Dion, et il est contrôlé par les entrées dans les livres.

En passant, nous signalerons donc que la cause de l'appelant ne pouvait être présentée comme si la transaction, ce jour-là, avait été restreinte aux seules actions du Wabash. Ainsi que nous le verrons, elle embrassait tous les certificats apportés en même temps et il en résulte qu'elle n'a pas tout à fait l'aspect auquel Grondin a voulu la limiter dans ses procédures.

Les instructions étaient de vendre à certains prix fixés les valeurs ainsi remises et d'acheter d'autres valeurs. "Ce n'était pas avec le Wabash particulièrement, c'était avec toutes les valeurs", dit l'appelant, marquant ainsi lui-même la nature collective de la transaction. Et, dans son témoignage, il caractérise le rôle que jouaient les valeurs qui devaient être vendues à l'égard de celles qui devaient être achetées:

Q. Votre compte était suffisamment protégé?

R. Il était plus que protégé. De tout l'argent que j'ai donné, j'ai reçu cent cinquante (150) parts de St-Louis & San Francisco qui représentaient à peu près—à cent un (101)—je pense, ç'a été vendu quinze mille piastres ($15,000), et puis j'ai dû lui donner pour vingt-cinq mille piastres à trente mille piastres ($25,000 à $30,000), je ne peux pas dire exactement.

Q. En argent?

R. En valeurs qu'il a vendues ou devait acheter.

Q. Il appliquait cela à votre compte spéculatif?

R. Non, ce n'était pas mon compte spéculatif. Je lui donnais de l'argent pour acheter telle, telle chose, telle valeur...

Q. (Par Me A. Galipeault, C.R.) De l'argent ou des valeurs?

R. Des valeurs qu'il a converties en argent.

* * *

R. Je payais avec les valeurs qu'il a vendues.

Q. Mais cela c'est une autre transaction, à part de la transaction du Wabash?

R. Cela n'avait rien à voir avec cela.

Q. Vous aviez des valeurs suffisamment pour payer toutes les valeurs que vous aviez achetées, à part du montant du Wabash. C'est-à-dire que le produit de la vente du Wabash n'était pas nécessaire pour acheter les autres valeurs que vous avez achetées?

R. Cela, je ne suis pas capable de dire cela. Parce que j'achetais * * * J'aurais dû recevoir les choses, mais je ne les ai pas reçues.

On remarque la tentative, dont nous parlions plus haut, de séparer les actions Wabash d'avec les autres valeurs déposées le 8 septembre, mais, dès la suite de l'interrogatoire, les choses sont rétablies:

Q. En résumé, toutes les valeurs qu'il (Belleau) avait en mains venant de vous devaient être vendues par lui, n'est-ce pas, pour en acheter d'autres?

R. Oui.

La signification de cette admission est que, entre les mains de Belleau, les certificats devenaient de l'argent avec lequel il devait faire l'acquisition des autres valeurs qu'il avait reçu instructions d'acheter, à la seule restriction que ces certificats seraient comptés à un prix respectivement fixé pour chacun d'eux.

Les valeurs que l'appelant donnait ordre d'acheter pour lui étaient: 125 actions de Pan-American Petroleum, 300 actions Royal Dutch Petroleum et 150 actions de St-Louis et San Francisco. En prenant le prix exact du coût d'achat chargé à Grondin dans les livres—car, dès les 8, 9 et 10 septembre, tout l'ordre d'achat était exécuté—ces valeurs représentaient une somme de $39,568.75. "Il n'y a pas de doute"—comme le dit M. Dion—"qu'il y aurait eu un certain montant de demandé, en argent, pour couvrir ou pour payer les valeurs", si en même temps que Grondin donnait ses instructions d'acheter, il n'avait pas remis les actions d'Union Pacific, de New York Central et de Wabash. Ces actions constituaient le fonds avec lequel Belleau était chargé d'acheter. Converties en argent par la vente au prix indiqué, elles le remboursaient des avances faites pour les achats effectués. En attendant d'être ainsi converties, elles pouvaient être traitées comme de l'argent et, à tout événement, restaient garantes pour les avances ainsi faites sur la foi des actions ainsi déposées. Suivant l'expression de Belleau: "Ça servait de garantie collatérale en attendant." Cela est conforme aux "usages bien connus de la Bourse", tels qu'ils sont établis dans la cause. Nous ajouterons: c'est là la nature de la transaction du 8 septembre entre Grondin et Belleau, telle qu'elle se déduit de ce qui s'est dit et de ce qui s'est fait.

Aussi, les certificats remis par Grondin—et qui étaient des titres nominatifs—furent-ils par lui endossés généralement, "pour qu'ils soient négociables", admet Grondin lui-même.

Les valeurs dont il fut question le 8 septembre—celles qu'il s'agissait d'acheter comme celles qu'il s'agissait de vendre—se négociaient exclusivement sur les marchés des Etats-Unis. Il est raisonnable d'affirmer que les parties

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pour leurs transactions avaient en vue la bourse de New-York. Belleau n'étant pas un agent de change accrédité à cette bourse, il s'ensuivait que, à la connaissance de Grondin et comme conséquence du mandat confié à Belleau, ce dernier emploierait des courtiers de New-York, et les relations d'affaires entre ces courtiers et le mandataire Belleau seraient régies par les règles et les usages de la bourse de New-York. On peut dire que c'était là une condition implicite de la convention (art. 1017 C.C.).

Il y a, au dossier, une preuve de ces règles et usages. Elle est à l'effet que les courtiers de New-York, en recevant les certificats endossés généralement, comme l'étaient ceux du Dr Grondin, les envoient aux agents de transfert pour les faire mettre à leur nom ou au nom d'une autre maison de New-York, et qu'il est d'habitude de s'en servir dans leur finance jusqu'à ce que la transaction ait été complétée et terminée avec leur client.

Rien dans la preuve que nous avons devant nous ne laisse présumer qu'il en a été autrement dans le cas qui nous occupe, mais (bien que toutes les circonstances nous justifieraient de l'assumer) nous n'en tiendrons pas compte dans notre décision.

Il reste acquis que Grondin savait que Belleau serait forcé d'employer des courtiers de New-York et, en lui confiant son mandat, il l'investissait, sans les spécifier, de tous les pouvoirs qui, dans le cours ordinaire des affaires, s'inféraient de la nature même de ce mandat (art. 1705 C.C.).

Les courtiers de Belleau, à New-York, étaient MM. Post & Flagg. Belleau avait avec eux un arrangement au moyen duquel il négociait sur les marchés des Etats-Unis toutes les affaires de ses clients. Un seul compte était ouvert au nom de N. Belleau & Co., qui seuls étaient connus de Post & Flagg. Toutes les transactions de bourse aux Etats-Unis confiées à la maison Belleau étaient transigées par l'intermédiaire de Post & Flagg, qui achetaient et vendaient au propre nom et pour le compte de Belleau uniquement.

Ce compte est produit depuis le 1er septembre 1926 jusqu'à sa clôture après la faillite. On y voit les achats, les ventes, les crédits, les débits, les titres reçus, les titres en mains, les titres délivrés, les avances, les paiements, etc., etc., tous entrés chronologiquement, en traitant Belleau

comme le seul et unique client, sans aucune référence à aucun des mandants de Belleau et sans la moindre marque d'identité de ceux qui avaient confié les titres à Belleau. Cela constituait un compte général d'avoir et de débit qui, en droit, ne pouvait se liquider autrement que par une reddition de compte, pour établir la balance qui reviendrait à l'un ou à l'autre des intéressés.

Post & Flagg, recevant des titres ou valeurs de la maison Belleau, endossés en blanc, ne savaient pas et n'avaient pas à savoir à qui ils appartenaient. L'endos général était suffisant pour conférer une autorisation apparente à toutes fins (art. 1730 C.C.). Et de même que les achats ou les titres délivrés ou les avances de fonds ou les chèques expédiés étaient débités au compte de Belleau; de même les ventes, les titres reçus, ou l'argent déposé lui étaient crédités. Tout ce compte formait un ensemble dont chaque opération répondait l'une pour l'autre, les titres et les fonds en mains constituant la garantie collatérale pour les avances, les achats et les remises d'argent.

C'est ainsi que Belleau décrit la nature de ses relations avec Post & Flagg. Mais le compte lui-même est là et il est facile de constater que cela est exact.

Les ordres d'achat et de vente de Grondin furent immédiatement transmis à Post & Flagg par la maison Belleau, pas au nom de Grondin mais au nom de Belleau, suivant le cours ordinaire des affaires. Le même jour (8 septembre), les 50 actions de New-York Central étaient vendues et 100 actions de St. Louis & San Francisco étaient achetées par Post & Flagg. Le lendemain, tous les autres ordres d'achat de Grondin étaient exécutés, sauf 70 actions de Royal Dutch Petroleum qui ne furent achetées que le 11 septembre. Dans les livres de la maison Belleau, cette vente et ces achats furent, dès leurs dates, entrés au compte de Grondin. A la suite de ces transactions, et en autant qu'il s'agissait des affaires entre Grondin et Belleau, ce dernier apparaissait comme créancier pour un montant de $25,128.13 et comme débiteur de Grondin pour 100 actions Barnsdall, 100 Union Pacific, 200 Wabash, 125 Pan American Petroleum, 300 Royal Dutch et 150 St. Louis & San Francisco. C'était là de la tenue de livres.

Les faits révélés par la preuve sont que les certificats ou titres que Grondin avait endossés généralement le 8 sep-

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tembre furent, le soir même et dans le cours ordinaire des affaires, expédiés à Post & Flagg, à New-York, au nom et pour le compte de la maison Belleau et sans en aucune façon dévoiler le nom de Grondin. Et si maintenant nous nous reportons à New-York, en envisageant cette fois les affaires entre la maison Belleau et Post & Flagg, nous constatons (sans nous occuper, comme nous le pourrions, des règlements et usages de la bourse de New-York; mais uniquement en tenant compte des conventions prouvées entre Belleau et Post & Flagg) que, à ces dates, Post & Flagg achetèrent pour le compte de N. Belleau & Co. les actions St. Louis & San Francisco, et les Pan American et les Royal Dutch dont il a été question, et qu'ils vendirent 50 actions New York Central, et qu'ils reçurent les certificats de New York Central, de Wabash et de Union Pacific.

Dans leurs livres, Post & Flagg débitèrent Belleau pour les achats faits et les créditèrent pour les ventes ou pour les certificats déposés. De cette façon et conformément aux conventions existant entre Belleau et Post & Flagg, les 100 actions de Union Pacific et les 200 actions de Wabash devinrent englobées dans le compte général de N. Belleau & Co. (les 50 actions de New York Central ayant déjà été vendues). En effet, à la date du 11 septembre, on trouve les entrées qui correspondent à ces transactions. Il est possible—il est même probable, d'après la coutume établie —que Post & Flagg firent transférer les certificats en leur nom. Il est suffisant de dire que, entre ces courtiers de New-York et la maison Belleau, ces certificats furent depuis ce moment détenus en garantie collatérale du compte de Belleau et qu'il devint dès lors le droit absolu de Post & Flagg d'en rendre compte non plus comme d'une transaction isolée et détachée mais comme d'une transaction faisant partie de l'ensemble des opérations entre les deux maisons. C'est là une situation de fait prouvée par Dion et admise par Belleau. Grondin peut contester le droit qu'avait Belleau d'en agir ainsi, mais il ne peut nier le fait que c'est ainsi que les choses se sont passées.

Pour tout ce qui va suivre, même pour les relations entre Post & Flagg et Belleau et leur effet en vertu des lois de New-York ou des Etats-Unis, nous pouvons nous guider sur la loi de la province de Québec, car il n'y a au dossier aucune preuve de la loi étrangère. Belleau a conféré à

Post & Flagg un gage valide sur les actions de Grondin, en supposant toujours que les certificats eux-mêmes n'aient pas été transférés au nom de Post & Flagg. Comme nous l'avons indiqué plus haut, ce pouvoir était implicitement compris dans son mandat (art. 1705 C.C.). Mais, écartant au besoin cette première raison, ce pouvoir lui avait été ostensiblement octroyé par Grondin en endossant les certificats généralement (art. 1730 C.C.). De plus, nous sommes d'accord avec la majorité de la Cour du Banc du Roi pour dire que cette mise en gage était valable en vertu des articles du code civil concernant les courtiers, facteurs et autres agents de commerce (arts. 1735 et suivants).

Telle était donc la situation à la date du 11 septembre 1926; et telle elle est restée jusqu'à la faillite de Belleau, le 27 novembre 1926. Dans l'intervalle, les 100 actions de Union Pacific avaient été vendues et crédit en fut donné à Grondin; mais cela n'affecte pas le présent litige. Cette situation, on le remarque, a été créée par Grondin lui-même, et elle résulte de la nature même de ses relations avec Belleau. Elle existait avant la faillite. Elle n'a pas été amenée par cette dernière; au contraire, la faillite en a hérité. Le syndic intimé n'y a en rien participé: c'est un état de choses qui lui est dévolu avec tous les droits et les obligations qu'il pouvait comporter.

Le syndic n'a donc pas eu la possession des actions Wabash et encore moins celle des certificats déposés le 8 septembre par Grondin et qui font l'objet de sa requête en revendication. Il a été saisi des droits que Belleau lui-même aurait pu exercer et, vis-à-vis de Grondin, il est devenu responsable des obligations ou des dettes de Belleau, mais dans la mesure seulement où l'état de faillite survenu depuis et la loi de faillite lui permettaient de les satisfaire.

Quels sont donc les droits qui, de cette situation, découlaient en faveur de l'appelant?

Il aurait pu avant la faillite exiger de Belleau, son mandataire, une reddition de compte et obtenir un jugement pour le reliquat établi en sa faveur, s'il y en avait un. Même pendant que Belleau avait encore le certificat du Wabash en sa possession, Grondin pouvait en exiger la remise, mais à la condition de rembourser à Belleau " ses déboursés et son dû à raison de l'exécution du mandat "

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(arts. 1713, 1723 C.C.). A la date de la faillite, le montant en était de $8,378.28. Antérieurement à la vente des actions Union Pacific, ce montant avait atteint environ $25,000.

Après que le certificat du Wabash eût été transféré à Post & Flagg, Grondin ne pouvait plus le revendiquer de ces derniers purement et simplement, car ils avaient acquis une possession légale et qu'ils pouvaient valablement lui opposer. Exerçant peut-être les droits de Belleau, Grondin eût pu obtenir de Post & Flagg la remise de son certificat, s'il était encore susceptible d'identification entre leurs mains, mais toujours à la condition de payer à ces derniers le montant de leurs déboursés et avances à la maison Belleau (arts. 1713, 1723 C.C.). Et cela voulait dire le montant du compte total, car le gage est indivisible (art. 1976 C.C.). Du 8 septembre au 26 novembre, ce montant a oscillé entre $434,730.39 et $353,315.23. Il suffit de mentionner la chose pour démontrer combien elle était hors de question.

Grondin pouvait encore tenter une action en dommages contre Belleau, s'il prétendait que celui-ci avait excédé son mandat et avait illégalement engagé les actions Wabash (art. 1709 C.C.).

Ce sont là, croyons-nous, les seuls recours qu'il avait à sa disposition. Il n'en a adopté aucun; mais ce qu'il est surtout important de constater, c'est que aucun de ces recours ne correspond à celui qu'il veut maintenant faire accueillir contre le syndic.

En plus, il ne faut pas oublier que ces recours ont depuis été modifiés, et que l'efficacité en a été diminuée par suite de l'état de faillite qui est survenu. Toutefois, il est certain que Grondin n'a pas plus de droit contre le syndic qu'il n'en avait contre Belleau. Il s'ensuit que sa requête actuelle, qui n'aurait pu réussir contre Belleau, peut encore moins être maintenue contre le syndic, et que la Cour d'Appel a eu raison de la rejeter.

Le syndic n'a jamais eu la possession du certificat de Wabash. Par la faillite de Belleau, il a été saisi des droits de ce dernier contre Post & Flagg. Ces droits consistaient à obtenir une reddition de compte à l'amiable ou en justice. La première était la plus désirable et la plus pratique. C'est celle qui été sanctionnée par l'ordonnance du

Registraire en date du 3 décembre 1926. Il n'y a pas eu d'appel de cette ordonnance (Loi de faillite—art. 159-3, Règle 67) et la régularité ou l'honnêteté de la reddition de compte faite au syndic par Post & Flagg ne sont pas attaquées, ni mises en doute. Bien au contraire, l'appelant adopte le montant de $14,800 auquel ses actions Wabash sont supposées avoir été vendues. La liquidation qui a été effectuée de cette façon a produit un surplus qui a été remis au syndic. Ce surplus constitue un fonds commun. Il est certain que Grondin n'a pas droit à une partie spécifiée de ce fonds. Aucune portion spéciale du reliquat de compte versé par Post & Flagg entre les mains du syndic n'est directement attribuable à la vente des actions Wabash qui appartenaient à Grondin. Pour revendiquer ses certificats, même en remboursant Post & Flagg, il était essentiel que l'appelant pût les retracer et les identifier. Nous ne croyons pas que cette identification soit évidente dans le dossier que nous avons devant nous.

D'autre part, les 200 actions Wabash de Grondin ne sont pas les seules actions de cette compagnie que Post & Flagg aient reçues de Belleau ou qui aient fait l'objet de transactions entre les deux maisons. On en trouve d'autres dans l'état de compte qui est produit. La veille du jour où figure l'entrée qui paraît se rapporter aux actions de l'appelant, on voit (10 sept.) une autre entrée pour 100 Wabash reçues. Mais, à tout événement, les valeurs qui ont été successivement vendues pour liquider le compte appartenaient indifféremment à tous les clients de Belleau, au même titre que les Wabash appartenaient à Grondin. " C'étaient toutes des valeurs de clients qu'il y avait là ", affirme le syndic. Ces valeurs, la preuve l'établit, avaient été transmises à Post & Flagg au moyen d'une " transaction identique à celle qui a été faite dans le cas du Wabash, les parts du Dr Grondin ". C'est le produit global de la vente de toutes ces valeurs qui a servi à les dégager et à établir le fonds commun dont le syndic dispose, après avoir liquidé définitivement le compte de Post & Flagg. D'après les principes généraux de la loi de la province de Québec, il n'existe pas de droit réel ou droit de suite sur l'argent ou le prix provenant de l'aliénation d'une chose. Exceptionnellement,

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le propriétaire de la chose qui l'a prêtée, louée ou donnée en gage, et qui n'en a pas empêché la vente, a droit d'en toucher le produit après collocation des créances énoncées aux articles 1995 et 1996, et de ce qui est dû au locateur (art. 1994 C.C., parag. 8a; art. 2005a C.C.).

Ici, le moins qu'on puisse dire c'est que ce droit appartient à tous les clients de Belleau dont les valeurs ont été vendues dans les mêmes conditions que celles de l'appelant et dont le produit a contribué à former le fonds commun et indivis (art. 1985 C.C.). Nous ne voulons pas nous prononcer là-dessus, car il ne serait pas équitable que, dans cette cause où les seuls droits de Grondin ont été discutés, le jugement décide des questions dans lesquelles tous les autres créanciers de Belleau peuvent avoir un intérêt.

Il est au moins un fait acquis, c'est que le fonds venant de Post & Flagg est insuffisant pour payer tous les créanciers qui sont dans le même cas que l'appelant. Reconnaître, comme il le demande par sa requête, son droit d'être payé à même ce fonds du plein montant de sa créance, ce serait le traiter par préférence alors que ses co-créanciers ne pourraient plus recevoir qu'une partie de ce qui leur est dû. En d'autres termes, ce serait autoriser précisément ce que la *Loi de Faillite* a pour but d'empêcher. L'appelant se heurte au fait matériel que son débiteur est en faillite et que tous ceux qui sont dans son cas doivent être traités sur le même pied. A cette fin, la procédure indiquée par la loi est le bordereau de distribution. (*Loi de Faillite*, art. 37.) Comme chacun des créanciers aura le droit de contester ce bordereau de distribution, et qu'aucun d'eux n'a eu l'occasion en cette cause de faire valoir ses prétentions individuelles, nous devons nous abstenir d'exprimer une opinion sur la façon dont la distribution devra se faire. Toutes ces questions restent ouvertes. Ce que nous en avons dit était simplement pour démontrer que la requête de l'appelant ne pouvait être accordée. Ses droits sont réservés pour discussion sur le bordereau de distribution; et l'appel est rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Chauveau, Rivard & Blais.*

Solicitors for the respondent: *Galipeault, Boisvert & Galipeault.*

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THE TOWN OF MONTREAL WEST (DEFENDANT) ..... } APPELLANT;

*Nov. 4.
*Dec. 23.

AND

DAME SARAH HOUGH (PLAINTIFF)..... RESPONDENT.

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

Illegitimate child—Right of father or mother to maintain action for damages occasioned by his death—Art. 1056 C.C.

The father or the mother of an illegitimate child is not within the class of persons who are entitled under art. 1056 C.C. to maintain an action for "damages occasioned by (the) death" of the child.

Judgment of the Court of King's Bench (Q.R. 48 K.B. 456) rev.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming, except as to the *quantum* of damages, the judgment of the trial court, Weir J. (2), and maintaining the respondent's action for damages occasioned to her by the death of her natural son.

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

John T. Hackett K.C. for the appellant.

Thomas E. Walsh K.C. and *George Gogo K.C.* for the respondent.

The judgment of Anglin C.J.C. and Lamont J. was delivered by

ANGLIN C.J.C.—The defendant appeals from the judgment of the majority of the Court of King's Bench modifying, but only as to the amount allowed, the judgment of Weir J. upholding the plaintiff's claim.

The action was brought by the natural mother of David Hough, who was killed, as the plaintiff alleged, by the negligence of the defendant. In the view we take of the matter, the existence or non-existence of negligence is of little consequence. Upon that point, however, as at present advised, we should not be prepared to disturb the

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

(1) (1930) Q.R. 48 K.B. 456. (2) (1929) Q.R. 67 S.C. 322.

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judgment of the Superior Court, affirmed, as it has been, by the majority (4-1) of the Court of King's Bench.

The principal grounds of appeal to this court are:

(1) that the respondent had no legal claim for alimentary support upon the late David Hough as her natural son; and

(2) that the death of David Hough was not due to any negligence on the part of the appellant, but was due to his own fault.

Upon the second ground, as already stated, we will not interfere. The true question upon this branch of the case is not as to the weight of evidence in support of the judgment maintaining liability, but rather as to whether there is any evidence to justify the finding of negligence against the defendant and the inferences on which that finding rests. The appellant undertakes an almost impossible task when he seeks to convince us, in the face of opinions to the contrary already expressed by the learned trial judge and four judges of the Court of King's Bench, that there is no such evidence. In our opinion, there is evidence which, if believed, was sufficient to justify the inferences drawn by the trial judge on which he based his finding of negligence; and there is also enough to warrant his having acquitted the victim of the accident of any contributory negligence. Nor is the balance of the testimony so clearly and overwhelmingly against the plaintiff that we would be justified on that ground in setting aside the concurrent judgments below. These questions really depend on the appreciation of the evidence, both as to its veracity and as to the inferences of fact to which it gives rise. They were eminently matters for the consideration of the trial judge in the first instance; and, his views upon them having been affirmed on appeal, error therein must be demonstrated to our satisfaction in order to justify interference. This is the settled jurisprudence of this court. Such error has not been demonstrated; interference, therefore, on this aspect of the case is out of the question.

In regard to the quantum of damages allowed—$4,500 at the trial, reduced to $2,500 in the Court of King's Bench, there was in the latter court considerable divergence of views. Guerin J. would affirm the judgment as it was; Al-

lard J. would reduce the damages to the amount allowed by the Court of King's Bench, $2,500; Lafontaine C.J. did not discuss the matter, but probably agreed with one or the other of these two; Létourneau J., on the other hand, would reduce the recovery to $500; and Hall J. would dismiss the action, or, if compelled to allow damages, would make a reduction to $750. The practice of this court is not to interfere in the quantum of damages fixed by a provincial court of appeal, unless error in regard to the principle on which they have been assessed is shewn, or there is really no evidence to warrant the allowance. Here no error in principle is established; and the matter is merely one of appreciation of the sufficiency of the evidence, i.e., whether its weight was adequate to sustain the amount of the award. Following our usual practice in such matters, although, were the matter *res integra,* we would probably have given a smaller sum, we should, we think, decline to interfere with the amount allowed for damages.

As to the first ground of appeal, it was suggested from the bench to counsel for the appellant that the real basis of attack on the judgment against his client is not the alleged lack of legal right on the part of the plaintiff to alimentary support from her natural son, but the fact that, as merely his natural mother, she is not within the purview of art. 1056 C.C., on which she must base her right of action.

As was stated to counsel for the respondent in the course of the argument, it seems abundantly clear that the only right of action which the respondent can have must be based on that article, and that, under art. 1053 C.C., she can have no claim for " damages occasioned by the death " of her son. It may well be that, were there no art. 1056 C.C., the terms of art. 1053 C.C. would be deemed *in se* sufficiently wide to cover a claim for damages caused by the death of one killed through fault of the defendant, as has been held in France (where they have no provision corresponding to art. 1056 C.C.) in regard to the scope of arts. 1382-3 C.N., which cover substantially the same field as art. 1053 C.C. But the presence in the Civil Code of Quebec of art. 1056, providing expressly for the case of " damages occasioned by death " and directing that there shall

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be but one action, which is to embrace *all* the damages caused by such death, makes it clear that the intention of the legislature was to restrict claims for "damages occasioned by death" to cases within the purview of that article and to preclude actions under art. 1053 C.C. for such claims. (*Robinson* v. *Canadian Pacific Ry. Co.* (1)). So far, at all events, the matter may be regarded as settled in this court by the views to that effect unanimously expressed in *Regent Taxi & Transport Co., Ltd.* v. *Congrégation des Petits Frères de Marie* (2).

Moreover, the plaintiff's claim being under art. 1056 C.C., of which Lord Campbell's Act was the prototype (*Robinson* v. *Canadian Pacific Ry. Co.* (3)), *prima facie* at least, the basis for estimating the damages recoverable in this action (common fault having been excluded) should be the same as under the English statute (*City Bank* v. *Barrow* (4)). Of course, as was pointed out in *Miller* v. *Grand Trunk Ry. Co.* (5), *Canadian Pacific Ry. Co.* v. *Parent* (6) and elsewhere, there are, in other respects, noteworthy differences between the provisions of art. 1056 C.C. and those of Lord Campbell's Act (*Regent Taxi & Transport Co., Ltd.* v. *Congrégation des Petits Frères de Marie* (7); but we do not find anything in art. 1056 C.C. to justify our treating it as affording, to a plaintiff in Quebec, only some basis on which his damages must be estimated less liberal than that afforded by Lord Campbell's Act. Under that statute in England, and as adopted in Ontario, it is well settled that, while there can be no recovery for anything except actual loss susceptible of pecuniary appraisal sustained by the plaintiff and those whom he represents (*Jennings* v. *Grand Trunk Ry. Co.*) (8), "a reasonable expectation of pecuniary benefit" from the continued life of the deceased is all that a plaintiff need show in order to found a claim for damages, a legal right on his part against the deceased to alimentary support or otherwise, being unnecessary. (Mayne on Damages (10th ed.), p. 516, note (*b*)).

(1) (1887) 14 Can. S.C.R. 105, at 120.
(2) [1929] Can. S.C.R. 650.
(3) [1892] A.C. 481, at 486.
(4) (1880) 5 A.C. 664, at 679.
(5) (1906) 75 L.J.P.C. 45.
(6) [1917] A.C. 195, at 200.
(7) [1929] Can. S.C.R. 650, at 659.
(8) (1888) 13 A.C. 800.

The jurisprudence under art. 1056 C.C. is to the same effect. Thus, it was early settled that damages recoverable under that article do not include anything by way of compensation for *solatium doloris* as distinct from pecuniary loss (*Montreal* v. *Labelle* (1); *Jeannotte* v. *Couillard* (2); *Bouchard* v. *Gauthier* (3); and it is equally well established that a reasonable expectation, on the part of the plaintiff, of advantage from the deceased, the worth of which is estimable in money, suffices in an action against a wrongdoer responsible for the death of the victim of his fault (*Canadian Pacific Ry. Co.* v. *Lachance* (4); *Canadian Pacific Ry. Co.* v. *Robinson* (5); *Bernard* v. *Grand Trunk Ry. Co.* (6); *Hunter* v. *Gingras* (7); *Dumphy* v. *Montreal L.H. & P. Co.* (8).

We find Mr. Justice Duff, with the concurrence of Mr. Justice Girouard, in *Canadian Pacific Ry. Co.* v. *Lachance* (9), at p. 208, after alluding to the question of the right to *solatium*, saying,

> The jury may unquestionably take into consideration every other loss and every other disadvantage which are in the natural and ordinary course attributable to the death out of which the action arises and can fairly be appraised in money.

And I added, with the concurrence of Mr. Justice Idington, (p. 209),

> If the only element for consideration in estimating the damages in this case were the actual wages or earnings of the deceased, the task of the appellants in impeaching the verdict would be less difficult. But for loss of his services at home—of his care and protection of his wife and family—of his assistance in husbanding the family resources—for the loss of these and other kindred and substantial benefits and advantages, of which the death of the husband and father has deprived them, the plaintiffs were justified in asking compensation from the jury under art. 1056 C.C., which declares them entitled to recover "all damages occasioned by such death."

We are accordingly of the opinion that upon the first ground of appeal, as stated, the appeal cannot succeed.

It may be that, under the common law of Quebec, compensation in the case of death might have included an al-

(1) (1888) 14 Can. S.C.R. 741.
(2) (1894) Q.R. 3 K.B. 461, at 495-8.
(3) (1911) 17 R.L., N.S. 244.
(4) (1909) 42 Can. S.C.R. 205.
(5) (1887) 14 Can. S.C.R. 105.
(6) (1896) Q.R. 11 S.C. 69.
(7) (1921) Q.R. 33 K.B. 403, at 409, 412.
(8) (1905) Q.R. 28 S.C. 18, at 27.
(9) (1909) 42 Can. 8 S.C.R. 205.

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lowance for *solatium doloris* (*Ravary* v. *Grand Trunk Ry. Co.* (1); *Hunter* v. *Gingras* (2). It is also possible that a legal right to alimentary support, or something of the kind, from the deceased victim of the defendant's fault was essential to enable the plaintiff to sue.

But, under the common law of Scotland, which, we are assured by Mr. Justice Aylwin in the *Ravary* case (3), was, in these matters, "identical with" that of Quebec, the right to *solatium* was not recognized (or, in other words, the law did not recognize the supposed feeling of affection on the assumed injury to which that right to *solatium* was founded), except in the case of husband and wife, or ascendants and descendants. It did not recognize the right of collaterals to pursue an action for reparation of wrong done them on the ground of *solatium,* even though they were, as sisters, dependent upon their deceased brother for patrimonial support, since that dependence and that interest are quite irrespective of relationship and may exist where there is no relationship at all (*Eisten* v. *North British Ry. Co.* (4).

As the Lord President (Inglis) observed in that case,

> It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that a person standing in one of these relations (i.e., husband, wife, father, mother or lawful child) to the deceased may sue an action like this for *solatium,* where he can qualify no real damage, and for pecuniary loss in addition, where such loss can be proved.

This passage was cited with approval by Lord Young in *Weir* v. *Coltness Iron Co., Ltd.* (5).

Quebec, however, is, in this matter, no longer under the regime of the common law, but is under a statutory provision, viz., art. 1056 C.C.; and it is on the construction of that article that the right of the plaintiff to maintain the present action must depend.

We have dwelt at considerable length upon the two grounds of appeal taken and discussed at bar to make it clear that neither of them affords a reason for setting aside

(1) (1857) L.C.J. 280; (1860) 6 L.C.J. 49.
(2) (1922) Q.R. 33 K.B. 403.
(3) (1860) 6 L.C.J. 49 at 50.
(4) (1870) 8 Ct. Sess. Cas. (3rd Series) 980, at 986.
(5) (1889) 16 Ct. Sess. Cas. (4th Series) 614, at 616.

the judgment appealed against and that it is, accordingly, necessary (Art. 10 C.C.), in order to dispose of this appeal, to consider the broader question suggested from the Bench (the negative of which counsel for the appellant tacitly declined to argue), viz., whether a natural mother is a "*mère*," or, an "ascendant relation," within the meaning of those terms as used in art. 1056 C.C., and its converse, whether an illegitimate son is an "*enfant*," or a "descendant relation," within the purview of the same article. This attitude of counsel probably accounts for the status of the plaintiff having apparently been taken for granted in the provincial courts (Mignault, Droit Civil, vol. 1, p. 108; but see Japiot, Proc. Civ. et Com., (1929 ed.) no. 160; *McFarran* v. *The Montreal Park and Island Railway Co.* (1). The learned judges in the Court of King's Bench appear to have devoted their attention largely to a consideration of the question whether or not the plaintiff had a legal claim for alimentary support upon the deceased, her natural son, the majority concluding that she had such a claim; and, on that ground, they maintained her status to sue. Mr. Justice Hall, who dissented, took the opposite view of this point and based his conclusion that the plaintiff had no status chiefly, if not solely, upon that ground, But it seems immaterial whether the plaintiff had, or had not, a legal claim for alimentary support, since she had, in fact, a reasonable expectation of receiving support in future from her deceased natural son.

The amendment of 1930 (20 Geo. V, c. 98, s. 1) not being retroactive, it is still advisable, in cases such as this arising before that date, to consider both the English and the French versions of art. 1056 C.C. in dealing with this question.

In this connection it is necessary to bear in mind that the statute, as originally enacted (Can. 10-11 Vic., c. 6; C.S.C. 1859, c. 78), which was applicable to both Upper Canada and Lower Canada and was the predecessor of art. 1056 C.C., contained a definition (s. 6), which gave the word "parent" there used a meaning that included "father and mother, grandfather and grandmother, stepfather and step-mother," and to the word "child" a mean-

(1) (1900) 30 Can. S.C.R. 410.

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ing that included " son and daughter, grandson and granddaughter, step-son and step-daughter." This corresponded to s. 5 of the original Lord Campbell's Act (9-10 Vic. Imp., c. 63). Indeed, the Canadian Act of 1847 is practically a verbatim copy of the Imperial Act of 1846, except that the latter did not contain anything equivalent to s. 3 of the Canadian Act, which had to do with duels, etc. But the interpretation clause has now disappeared and we are left to deal with the words of art. 1056 C.C. without its aid.

In England it was early decided, in *Dickenson* v. *North Eastern Ry. Co.* (1), that an illegitimate child is not within the statute (9-10 Vic., c. 93), Pollock C.B., saying,

I am of opinion that no rule should be granted, for I do not entertain any doubt that the word " child " in the Act means legitimate child.

Bramwell B., Channel B., and Pigott B., concurred.

This decision was in accordance with the well established rule of English law that, where the word " child " is used, either in a private document or in an Act of Parliament, it connotes, as a rule, a legitimate child only; and, conversely, where the words " father " and " mother " are used they signify lawful parents only. (*R.* v. *Totley* (2); *R.* v. *Birmingham* (3); *R.* v. *Maude* (4); *Hill* v. *Crook* (5); *Dorin* v. *Dorin* (6). In *Helton* v. *Lidlynch* (7), Lee C.J. said,

I know of no case that considers bastards as the children of anyone.

and Chapple J. concurring, said,

The word " children " in this Act (8-9 Wm. III, c. 30) must mean legitimate children.

and Wright J. added that

In the case of *New Windsor* v. *White Waltham* (8), the court declared that " illegitimate children were nobody's children."

The same idea prevailed in France (Ferrière, Dict. de Dr., vbo. " Enfants ") S. 52, 2, 35; P. 51, 1,660.

We can conceive of no reason why a different intention should be imputed to the legislature of Quebec. It would be a libel on that province to suggest that (except, perhaps, in the particular covered by art. 237, discussed below,) illegitimacy is there less disfavoured by law than it is in

(1) (1863) 33 L.J. Exch. N.S. 91; 2 H. & C. 735.
(2) (1845) 7 Q.B. 596.
(3) (1846) 8 Q.B. 410.
(4) (1842) 65 R.R. 753.
(5) L.R. 6 E. & I. App. 265.
(6) (1875) L.R. 7 E. & I. App. 568.
(7) (1742) Burr. S.C. (2nd Ed.) 187-190).
(8) 1 Str. 186.

England, or in any province of Canada whose legal system is based on the English common law. Moreover, as Lord Sumner observed in *Quebec Light, Heat & Power Co.* v. *Vandry* (1), speaking of arts. 1053 and 1054 C.C.,

the statutory character of the Civil Code of Lower Canada must always be borne in mind * * *, (It) is and always must be remembered to be the language of a legislature established within the British Empire.

And, to adapt and apply language used of Art. 1056 C.C. by Viscount Haldane, in *Canadian Pacific Ry. Co.* v. *Parent* (2),

*The presumption to be made is that in enacting art. 1056 the Quebec Legislature meant, as an act of the Imperial Parliament would be construed as meaning, to confine the special remedy conferred to cases of (claims by legitimate parents and children). There is, in their Lordships' opinion, nothing in the context of the chapter of the Code in which the article occurs which displaces this presumption of its construction. The rule of interpretation is a natural one where law, as in the case of both Quebec and England (is based upon fundamental Christian morality). No doubt the Quebec legislature could impose many obligations in respect of (illegitimate children and natural parents); but, in the case of art. 1056 there does not appear to exist any sufficient reason for holding that it has intended to do so, and by so doing to place claims for torts committed (against illegitimates) in Quebec on a footing differing from that on which the general rule of (fundamental morality observed in the Imperial Parliament) would place them.

When, therefore, the legislature of Quebec speaks of father, mother and children ("père, mère et enfants") it must be taken to mean thereby, in the absence of clear indication to the contrary, lawful father, lawful mother and legitimate children, i.e., father and mother joined in lawful wedlock and the children of such a union. Indeed, the code itself suggests that this view prevailed with the legislature in enacting it. Thus, amongst the *obligations arising from marriage,* we find, by art. 166 C.C., that

Children are bound to maintain their father, mother and other ascendants, who are in want.

And, by art. 168 C.C., it is declared that

The obligations which result from these provisions are reciprocal.

Nevertheless, in order to extend their application, even partially, to illegitimate children, it was thought necessary to provide, as was done by art. 240 C.C., that

The forced or voluntary acknowledgment by the father or mother of their illegitimate child, gives the latter the right to demand maintenance from each of them according to circumstances.

(1) [1920] A.C. 662, at 671-2. (2) [1917] A.C. 195, at 205-6.

*(Passages in brackets indicate adaptations).

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So, it is seen that when the Code deals with illegitimate children it does so specifically and does not include them under the general description of children. There is no counterpart of art. 168 C.C. applicable to art. 240 C.C. Moreover, it will be noted that, whereas art. 166 C.C. declares the obligations of lawful children towards their parents, art. 240, conversely, declares the obligations of parents to their illegitimate children. If it were material, we would have to consider whether the dissenting opinion of Hall J., that no legal obligation for alimentary support of natural parents is imposed on their illegitimate children, should not prevail.

That the common law of Scotland also excluded from its description of "father" and "mother" persons not joined in matrimony who had children, and from the term "children" their bastard progeny, is also abundantly clear. It was so decided in *Weir* v. *Coltness Iron Co.* (1), above cited, it being there held that

the mother of a bastard child has no title to sue an action of reparation in respect of his death.

This view was confirmed by the House of Lords in *Clarke* v. *Carfin Coal Co.* (2), where it was held that

a parent of an illegitimate child has, by the law of Scotland, no right of action against a person whose negligence has caused its death.

I quote this significant passage from the judgment of Lord Watson (p. 418),

As matter of fact, it cannot be disputed that, although for a century past actions for *solatium* and damages have been sustained at the instance of husband, wife, or legitimate child, in respect of the death of a spouse, a child, or a parent, a similar action at the instance of a natural parent or child had never (with one exception, which appears to me to be of no moment) been heard of in the law of Scotland. In my opinion, the rule which admits the former class of suits does not rest upon any definite principle, capable of extension to other cases which may seem to be analagous; but constitutes an arbitrary exception from the general law which excludes all such actions founded in inveterate custom, and having no other ratio to support it. I venture to think that the Lord President in *Eisten* v. *North British Rly. Co.* did not mean to suggest that the rule (or rather the exception) was capable of being extended to cases other than those in which it had already been received. To my mind, it is evident that by "nearness of relationship" his lordship meant legal relationship; because he treats as an essential element of the pursuer's claim the right to demand *solatium*, which is a right to reparation for disruption of the family tie, and therefore impossible in the case of natural parent

(1) (1889) 16 Ct. Sess. 614. (2) [1891] A.C. 412.

and child; and also because his lordship subsequently describes the connection between a bastard and his putative father as "one which the law cannot recognize."

In *Wood* v. *Gray & Son* (1), Lord Watson, speaking of *Clarke* v. *Carfin Coal Co.* (2), said

> The practical effect of your Lordships' decision was to limit the class to persons standing in the legitimate relation of husband, father, wife, mother or child, to the deceased. In *Eisten v. North British Ry. Co.* (3), which is the leading authority upon this branch of the law, the Lord President (Inglis) observed: "As the existence of such claims in our common law is a peculiarity of our system, it is not desirable to extend this class of actions, unless they can be justified on some principle which has already been established." In that observation, which has been repeatedly made, in different terms, by other judges of the Court of Session, I entirely concur.

It is, therefore, abundantly clear that, by the common law of Scotland (and by the common law of Quebec, if they be identical, as Mr. Justice Aylwin in *Ravary's* case (4), assures us that, in these matters, they are), the mother of an illegitimate child was not within the class of persons who were entitled to maintain actions for "damages occasioned by death."

That art. 1056 C.C. was intended to restrict, rather than to enlarge, the class of persons entitled to maintain such actions has been the basis of more than one judgment in Quebec. Thus in *Hunter* v. *Gingras* (5), we find that the head-note reads, in part, as follows:

> L'article 1056 C. civ., tiré du chapitre 78 S. ref. du Canada, reproduisant la loi 10-11 Victoria, ch. 6, n'a pas créé un recours légal qui n'existait pas auparavant; il a simplement modifié ce recours qui existait en France depuis des siècles, en le restreignant aux plus proches parents, en donnant à ceux-ci une seule action, en établissant la prescription d'un an, et en refusant le recours lorsque le défunt lui-même a obtenu compensation. * * *

Again, in *St. Laurent* v. *La Cie de Telephone de Kamouraska* (6), it was held that the action under art. 1056 C.C. belongs exclusively to the persons mentioned in the article qui est restrictif et doit être interprété à la lettre.

The court there decided that the stepfather had no cause of action under art. 1056 C.C. in his own right; but, being in community with his wife, he could, as head of the community, maintain an action on behalf of the community in

(1) [1892] A.C. 576, at 581.
(2) [1891] A.C. 412.
(3) 8 Ct. Sess. Cas. (3d. Series) 980, at 984.
(4) (1860) 6 L.C.J. 49, at 50.
(5) (1921) Q.R. 33 K.B. 403.
(6) (1905) 7 Q.P.R. 293.

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her right. See too *Bonin* v. *The King* (1). And, in *Dionne* v. *La Compagnie des Chars Urbains* (2), we find it held that an adopted child, not being recognized by the Civil Code, the adopting father could not claim damages for his death under art. 1056 C.C.

Again, in *Gohier* v. *Allan* (3), it was held that

> By the terms of art. 1056 C.C. the only persons who have a right of action for the death of a person resulting from a quasi-delict, are his consort, and ascendant or descendant relatives; the brothers and sisters have no such right of action.

The plaintiffs failed in that case because they were not included within the enumeration of the persons entitled to maintain an action. (See, too, *Ruest* v. *Grand Trunk Ry. Co.* (4), and *Tessier* v. *Grand Trunk Ry. Co.* (5).

In *Ruest* v. *Grand Trunk Ry. Co.*, we find Mr. Justice McCord saying,

> But no such action lies except under the terms of article 1056, the express inclusiveness of which excludes the right of any other persons than those therein mentioned. According to the terms of this article the "consort and ascendant and descendant relations" can alone have the right to claim damages for death occasioned by quasi-offence.

This passage is explicitly approved by that great civilian, Strong J., in *Robinson* v. *Canadian Pacific Ry. Co.* (6).

While there is a marked dearth of direct authority in the Quebec courts on the question at issue, there is, at least, one case in the Court of Queen's Bench (*Provost* v. *Jackson* (7)), decided three years after the code was enacted, but upon the law as it stood before the code (as contained in C.S.C., c. 78), in which it was held, affirming the Superior Court *in banco,* which had agreed with the learned trial judge, that legal proof of the marriage of parents suing to recover damages for the death of their son was a *sine qua non* of the right to recover in the action. The point is put in these words by Johnson J. *ad hoc* (p. 170), with the concurrance of Duval C.J., Mackay A.J. and Torrance J. *ad hoc,*

> The ground on which the Court goes is this: The statute gives a right of action to surviving parents in certain cases. Now, in the present case, the parents have not proved their relationship; therefore there is no right of action.

(1) (1918) 18 Can. Ex. C.R. 150, at 158.
(2) (1895) Q.R. 7 S.C. 449.
(3) (1906) 8 Q.P.R. 129.
(4) (1878) 4 Q.L.R. 181.
(5) (1898) 5 R. de J. 1.
(6) (1887) 14 Can. S.C.R. 105, at 119-120.
(7) (1869) 13 L.C.J. 170.

and, as explained by Mackay A.J.,

> It was absolutely necessary on the part of Provost and his wife to prove their marriage, and establish that the boy killed was their son . . . The judge who tried the case was, therefore, right in saying that the defendants need not enter on their case as the marriage of the parents and birth of the son had not been proved.

This means that a valid marriage was essential to the plaintiff's right of action.

Caron J., who alone dissented, appears to rest his opinion chiefly on the grounds that the general denial in the defendant's plea of the allegations of the plaintiffs (which included the facts of their own lawful marriage and of the filiation of the deceased victim) did not suffice to put those facts in issue (See *Royal Institution* v. *Picard* (1); and that they were, in any event, sufficiently established in the case.

Nor is there any difference in substance between the enacting language of the statute (C.S.C., c. 78, s. 2) (excluding from consideration s. 6), which required that

> every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused,

and the terms of art. 1056 C.C., which enacts that

> dans tous les cas où la partie contre qui le délit ou quasi-délit a été commis décède en conséquence, * * * son conjoint, ses père, mère et enfants ont * * * droit de poursuivre, etc.

There can be no reason whatever for holding that, while the father and mother bringing the action as "parents," under s. 2 of C.S.C., c. 78, must have established that they were the lawful parents of the deceased victim by legal proof of their marriage, the like proof may be dispensed with where the right of action is given to the father and mother ("père et mère"), as it is in the terms of art. 1056 C.C. (French version).

Provost v. *Jackson* (2), must therefore, be regarded as a distinct authority supporting a negative answer to the question under consideration. It is cited without any adverse comment by Strong J., at p. 109, and by Taschereau J., at p. 126, in *Canadian Pacific Ry. Co.* v. *Robinson* (3).

The following observation of Lord Watson, in *Clarke* v. *Carfin Coal Co.* (4), already quoted, seems to me to

(1) (1898) Q.R. 14 S.C. 281.
(2) (1869) 13 L.C.J. 170.
(3) (1887) 14 Can. S.C.R. 105.
(4) [1891] A.C. 412, at 418.

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apply to the local situation, if the last word thereof be changed from "Scotland" to "Quebec."

As matter of fact, it cannot be disputed that, although for a century past actions for *solatium* and damages have been sustained at the instance of husband, wife, or legitimate child, in respect of the death of a spouse, a child, or a parent, a similar action at the instance of a natural parent or child had never (with one exception, which appears to me to be of no moment) been heard of in the law of Scotland.

Indeed, the recorded jurisprudence of the province of Quebec, as well under art. 1056 C.C. as under the statute which prevailed before it, and under the common law, which preceded the statute, presents no parallel to *Renton* v. *North British Railway Company* (1), the solitary case (of first instance) in the Scottish reports so slightingly alluded to by Lord Watson.

Nor is the plight of the plaintiff better if regard be had to the terms of the English version of art. 1056 C.C., which gives the right of action to "ascendant and descendant relations." The words "relations" and "relatives" are, for the present purpose, synonymous and interchangeable (Murray's Oxford Dictionary, pp. 398-9); both *prima facie*, import the idea of legal or lawful relationship.

When people speak of man or woman as brother or sister, son or daughter, unless they say something to the contrary, I think the meaning is legitimate son or daughter, brother or sister. (*Smith* v. *Tebbitt* (2), per Sir J. P. Wilde.)

Either word, "relations" or "relatives," may, if the circumstances or context necessarily imply that intention, include connections by blood only, i.e., illegitimate relations or relatives. Thus, we find Lord Herschell saying in *Seale-Hayne* v. *Jodrell* (3), where, with the other members of the court, he found that there was enough clearly to indicate such intention,

It is of course not open to dispute that the word "relatives" according to its natural interpretation, if there were nothing to show that another meaning was to be attributed to it, would not include those who were what may be termed natural blood relations, but whose parents or grandparents were not born in wedlock, and who therefore were not in the eye of the law related to the testator.

(1) (1869) 6 Sc. L.R. 255.

(2) (1867) L.R. 1 P. & D. 354, at 358.

(3) [1891] A.C. 304.

A like view was taken *In re Wood* (1), where the difficulty of importing such an intention is dealt with by Vaughan Williams L.J.; and *In re Corsellis* (2).

As illustrative of the strictness with which American courts construe the term "relations" when found in statutes dealing with their rights, reference may be had to *Kimball* v. *Story* (3), and *Horton* v. *Earl* (4). In the former a step-son was held not to be a child or relation, within the meaning of Gen. Stats., c. 92, s. 28, which saved from lapsing, by predecease of the devisee or legatee, any devise or bequest made "to a child or other relation" of a testator; in the latter, a brother-in-law was held not to be a "relation" within a like provision of the Pub. Sts., c. 127, s. 23; and in both instances the bequests were held to have lapsed. (See also *In re Renton's Estate* (5); and *Smith* v. *Knights of Maccabees* (6).

It would seem, therefore, equally clear, whether we take the French or the English version of art. 1056 C.C., that neither natural parents nor illegitimate children are within its purview.

A somewhat ingenious suggestion was made in the course of consideration of this case, viz., that the plaintiff might invoke arts. 237 and 239 C.C. in aid of her status. These articles read as follows:

237. Children born out of marriage, other than the issue of an incestuous or adulterous connection, are legitimated by the subsequent marriage of their father and mother.

239. Children legitimated by a subsequent marriage have the same rights as if they were born of such marriage.

But there is here no evidence whatever to indicate that John Barnes, whom the plaintiff married some nine years after the birth of her natural son David Hough (to wit, on the 15th October, 1883), was his father. Had that been the case, the plaintiff would certainly have said so when obliged, in the course of her examination on commission, to admit that David Hough was her natural son. Moreover, in addition to the most significant fact that the deceased David Hough never took the name of Barnes but always adhered to his mother's maiden name, Hough, we

(1) [1902] 2 Ch. D. 542.
(2) [1906] 2 Ch. D. 316.
(3) (1871) 108 Mass. 382.
(4) (1894) 162 Mass. 448.
(5) (1895) 10 Wash. 533.
(6) (1905) 127 Iowa 115.

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have the testimony of George Barnes, a son born of the marriage of John Barnes with the plaintiff, and a witness for her, that David Hough was his half-brother, thus indicating that, although born of the same mother, they had been begotten by different fathers. There can be no presumption in favour of the paternity of John Barnes; and the burden of proving it rested on the plaintiff. (*Provost* v. *Jackson* (1); see, too, art. 241 C.C.). The essential basis, therefore, for the application of art. 237 (*Lahay* v. *Lahay* (2)), viz., that David Hough was the son of John Barnes and Sarah Hough, is entirely lacking. In fact, the only fair inference from the evidence in the record is that John Barnes was not his father.

It was strongly urged at bar that a construction of art. 1056 C.C. excluding natural parents and illegitimate children savours of barbarism and would shock the sensibilities of persons holding enlightened views, and that, accordingly, the courts should give to it a construction more consistent with humane and liberal ideas. The short answer to this contention is that the courts must await the action of the legislature, whose exclusive province it is to determine what should be the law. Whatever may occur elsewhere (1929, Canadian Bar Review, vol. VII, p. 617) it would seem to be the plan of this " Court of Law and Equity " (R.S.C. (1927), c. 35, s. 3), to give effect to the intention of the legislature as expressed, not to make the law as they think it should be. *Judicis est jur dicere, non dare.*

The appeal will, therefore, be allowed, but without costs throughout.

DUFF J.—I have had the privilege of reading the judgment of the Chief Justice, as well as those of Mr. Justice Rinfret and Mr. Justice Cannon. I have no doubt that the rule of interpretation which the law of Quebec requires us to apply to art. 1056 limits " mother " to women who stand towards a victim in a maternal relation recognized by the law. To put it more pointedly, the article does not admit the claim of a mother in respect of the death of an illegitimate child.

(1) (1869) 13 L.C.J. 170.

(2) (1894) Q.R. 6 S.C. 366.

One additional observation I feel obliged to make. We have before us a dry question of law, and I do not think it incumbent upon me to express either approval or condemnation of the well known traditional attitude of the common law, of England as well as of France, towards illegitimacy.

We are, in consequence, constrained to allow the appeal, but I agree with my brother Rinfret that the plaintiff should not be required to pay costs here or below.

RINFRET J.—L'intimée, qui était la demanderesse en Cour Supérieure, a poursuivi l'appelante, la ville de Montréal-Ouest, pour lui réclamer les dommages-intérêts résultant du décès de David Hough. Dans sa déclaration, elle a allégué que David Hough était son fils et que la mort de ce dernier était attribuable à la faute et à la négligence de la ville et de ses employés.

La Cour Supérieure a jugé que le décès de Hough était dû à la négligence des employés de la ville et a accordé à l'intimée une somme de $4,500 de dommages.

La majorité de la Cour du Banc du Roi a confirmé ce jugement sur la question de responsabilité; mais elle a réduit le montant de la condamnation à $2,500.

Deux juges furent dissidents. Tous deux, d'après leur appréciation de la preuve, eussent fixé les dommages-intérêts à un montant moindre que celui qui fut accordé par la majorité de la cour. En outre, l'un d'eux était d'avis qu'il y avait eu faute contributoire de la victime; et, de ce chef, il eût fait une réduction additionnelle. L'autre eût rejeté l'action *in toto* pour la raison suivante:

La preuve a démontré que la victime était le fils naturel de l'intimée, or, disait-il, l'enfant naturel ne doit pas d'aliments à ses père et mère, parce que l'obligation alimentaire, qui est réciproque lorsqu'elle résulte des liens de parenté légitime, ne l'est pas dans les cas de filiation naturelle.

La reconnaissance volontaire ou forcée par le père ou la mère de leur enfant naturel, donne à ce dernier le droit de réclamer des aliments contre chacun d'eux, suivant les circonstances. (Art. 240 C.C.);

mais la loi n'accorde pas ce droit au père ou à la mère contre leur enfant naturel. Les dommages-intérêts que peut obtenir un père ou une mère, comme résultat du décès de son enfant, consistent uniquement dans la perte maté-

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rielle, c'est-à-dire dans la privation du secours alimentaire. Il s'ensuit que, le droit à ce secours n'existant pas dans l'espèce, la réclamation de l'intimée manque de base légale.

Devant cette cour, l'appelante nous a soumis de nouveau qu'elle n'était pas responsable de l'accident qui a causé la mort du fils de l'intimée; et, subsidiairement, que le montant des dommages accordés avait été calculé sur une base erronée. A l'appui de cette dernière prétention, elle invoquait cette théorie que, dans les cas de filiation naturelle, la réciprocité de l'obligation alimentaire n'existe pas en faveur du père ou de la mère.

Mais, au cours de l'argument, il a surgi une question qui n'avait été soulevée ni devant la Cour Supérieure, ni devant la Cour du Banc du Roi. Cette question est de nature telle que, si elle est tranchée à l'encontre de l'intimée, elle met fin à son action et il devient inutile de juger les autres points. C'est donc là que nous devons porter d'abord notre attention.

L'action est basée sur l'article 1056 du code civil. Dans la cause de *Regent Taxi & Transport Company* v. *La Congrégation des Petits Frères de Marie* (1), les juges de cette cour ont exprimé l'opinion que le recours auquel cet article pourvoit appartient exclusivement aux personnes qui y sont mentionnées. Cette opinion était conforme à un certain nombre d'arrêts de la jurisprudence de la province de Québec: *St-Laurent* v. *Compagnie de Téléphone de Kamouraska* (2), *Gohier* v. *Allan* (3), *Ruest* v. *Grand Trunk Co.* (4), *Dionne* v. *Compagnie des Chars Urbains* (5), *Tessier* v. *Grand Trunk Co.* (6).

C'est aussi ce qui ressort du jugement de monsieur le juge-en-chef Lamothe dans la cause de *Hunter* v. *Gingras* (7).

La question qui se pose dès l'abord est donc celle-ci:

La mère d'un enfant naturel est-elle une des personnes énumérées dans l'article 1056 du code civil?

Si la réponse est dans la négative, l'appel doit être maintenu et l'intimée doit être déboutée des fins de son action. Ce moyen de défense, comme nous l'avons dit, n'a pas été

(1) [1929] S.C.R. 650.
(2) (1905) 7 Q.P.R. 293.
(3) (1906) Q.P.R. 129.
(4) (1878) 4 Q.L.R. 181.
(5) (1895) Q.R. 7 C.S. 449.
(6) (1898) 5 R. de J. 1.
(7) (1921) Q.R. 33 K.B. 403, at 405.

invoqué par l'appelante, et il ne paraît pas avoir été discuté avant l'audition à la Cour Suprême. Je crois que nous devons quand même en tenir compte parce qu'il affecte le droit même de l'intimée de recouvrer une indemnité. Avant de passer à l'étude de la défense, la cour doit nécessairement se demander si le droit d'action a été établi. Or, le point de droit qui nous occupe, s'il est fondé, entraîne le rejet de l'action; et ce résultat s'imposerait même s'il n'y avait pas de défense au dossier.

En plus, par sa nature même, la question revêt un caractère d'ordre public qui empêcherait de l'écarter pour la simple raison qu'elle n'aurait pas été alléguée dans la défense, ni débattue au cours du procès. Nous croyons de notre devoir d'entrer dans l'examen de cette question.

Dans cette cause-ci, il faut accepter le fait que l'intimée est la mère de la victime. Les deux cours qui ont précédé l'ont décidé; et l'appelante ne nous a pas demandé de reviser les jugements sur ce point. Mais il est également admis de part et d'autre qu'elle est la mère d'un enfant naturel. Peut-elle, dans ce cas, réclamer le bénéfice de l'article 1056 du code civil?

Il ne suffit pas, pour répondre, de se borner au texte de l'article; il faut l'envisager dans son sens et dans son esprit; et, suivant l'expression de Baudry-Lacantinerie, *Des personnes,* vol. 1, 3 éd., n° 258, il faut " reconstituer la pensée du législateur ".

Nous sommes contraints d'admettre cependant que, en ce qui concerne l'article 1056 du code civil, nous manquons de plusieurs des procédés habituels d'investigation auxiliaire. Il n'y a pas dans le code Napoléon d'article correspondant à l'article 1056, et nous n'avons pas l'avantage de pouvoir référer à la jurisprudence des tribunaux français —excepté peut-être dans son application à un système de droit qui est semblable dans son ensemble. On ne nous a cité aucun jugement de la province de Québec où la question soit discutée. La cause de *Provost* v. *Jackson* (1), qu'on nous signale, ne me semble pas, en tout respect, constituer un *précédent.* D'abord, c'est une cause antérieure au code. Ensuite, il n'apparaît nulle part, dans le rapport de cette cause, que la légitimité de la filiation ait

(1) (1869) 13 L.C.J. 170.

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été mise en question. La déclaration alléguait

que du légitime mariage des demandeurs est né Joseph Provost * * * laissant pour ses héritiers naturels et légitimes et ses plus proches parents, ses père et mère etc.

A l'enquête, les demandeurs négligèrent de prouver leur mariage et la filiation du défunt, soit par la production d'actes de l'état civil, soit autrement. L'un des moyens des défendeurs en appel était que

les demandeurs n'ont pas produit la meilleure preuve de leurs qualités prises en l'action, savoir qu'ils étaient le père et la mère du défunt.

Dans les circonstances, mon humble opinion est que lorsque M. le juge MacKay dit:

In this case, it was absolutely necessary on the part of Provost and his wife to prove their marriage and establish that the boy killed was their son;

lorsque M. le juge Johnson dit:

Now, in the present case, the parents have not proved their relationship; therefore there is no right of action,

ni l'un ni l'autre n'ont présente à l'esprit la question de filiation légitime; mais ces passages de leurs jugements équivalent tout simplement à constater que les demandeurs n'ont pas prouvé l'allégation de leur déclaration telle que faite.

De même qu'il paraît y avoir dans la province de Québec absence totale de jurisprudence sur le point que nous discutons, nous sommes également privés, pour pénétrer la pensée du législateur dans l'article 1056, d'un autre moyen d'investigation, qui est de référer au rapport des codificateurs. Ainsi que le faisait remarquer monsieur le juge Mignault, dans la cause de *Regent Taxi* (1), à la page 683:

L'article 1056 est entré au code sans avoir passé par les rapports des codificateurs, et sans avoir figuré parmi les amendements que la législature fit au projet du code par la loi 29 Vict. c. 41.

Il n'est pas douteux que cet article tire son origine des statuts refondus du Canada de 1859, c. 78, qui reproduisent le statut 10-11 Vict., c. 6 (1847).

Et Lord Watson, dans la cause de *Robinson* v. *Canadian Pacific Ry. Co.* (2), signalait que ces statuts,

though not identical in expression, were the same in substance with the enactment of the English statute (9 & 10 Vict., c. 93) commonly known as Lord Campbell's Act.

Cela peut justifier de donner aux expressions qui se trouvent à la fois dans l'article 1056 du code civil et dans le

(1) [1929] S.C.R. 650. (2) [1892] A.C. 481.

Lord Campbell's Act le sens qui leur a été attribué dans la jurisprudence anglaise. Il paraît évident que, en vertu de cette jurisprudence, la mère d'un enfant naturel n'aurait pas de recours en l'espèce.

Mais, dans *Robinson* v. *Canadian Pacific Ry. Co.* (1), au passage que nous venons de citer, Lord Watson ajoutait (p. 487) que, sous certains rapports,

the terms of section 1056 appear to their Lordships to differ substantially from the provisions of the Lord Campbell's Act and of the provisions of the statute of 1859.

Les observations de Lord Davey, dans la cause de *Miller* v. *Grand Trunk Ry. Co.* (2) vont encore plus loin et considèrent qu'on ne serait pas en droit

in assuming this (i.e., une action en vertu de l'article 1056) to be a proceeding to be governed by the law applicable to actions under Lord Campbell's Act (p. 48).

Je préfère donc appuyer mon jugement sur l'interprétation interne de la loi. (Voir Geny, *Méthode d'interprétation*, 2e éd., vol. 1, p. 25.)

En insérant dans le code un principe inspiré d'un système de droit différent, il est raisonnable de croire que les termes dont le législateur s'est servi doivent être entendus suivant la signification qu'ils ont généralement dans la tradition doctrinale et dans le langage juridique du pays. Les mots " père ", " mère " et " enfants " dans l'article 1056 ne peuvent pas avoir pris dans la pensée du législateur du Québec un sens différent de celui qu'ils ont dans les autres articles du code.

Or, nous pouvons affirmer, croyons-nous, que chaque fois que ces mots sont employés seuls dans le code, excepté lorsque le texte impose une interprétation différente, ils réfèrent exclusivement à la paternité, à la maternité et à la filiation légitimes. Si le mot " enfant ", par exemple, dans l'article 54 du code civil, doit sans doute comprendre à la fois les enfants légitimes et les enfants naturels, à cause de la nature même de la prescription qu'il contient, il nous paraît certain que dans tous les autres cas où il se trouve seul dans le code, et, en particulier, dans le chapitre des successions, il signifie exclusivement les enfants légitimes. Comme conséquence, les mots " père " et " mère " signifient exclusivement le père ou la mère d'un enfant légitime.

(1) [1892] A.C. 481. (2) [1906] 75 L.J. Rep. 45.

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Cette intention du législateur est spécialement marquée dans le contraste entre le chapitre du code qui traite des obligations qui naissent du mariage et celui qui traite des enfants naturels. L'article 166 dit que

les enfants doivent des aliments à leurs père et mère et autres ascendants qui sont dans le besoin.

Si les mots " enfants ", " père " et " mère " employés dans cet article visaient à la fois la parenté légitime et la parenté naturelle, l'article 240 n'aurait plus sa raison d'être. Il est à remarquer, au contraire, que le législateur, dans le but d'étendre à l'enfant naturel le droit de réclamer des aliments, a cru devoir édicter cet article spécial et, de plus, qu'il y a désigné l'enfant illégitime par les mots " enfant naturel ", indiquant bien par là que ce dernier n'est pas compris par l'emploi du mot " enfant " seul. L'article 239 vient compléter cet argument en édictant que seuls les enfants légitimés par le mariage subséquent ont les mêmes droits que les enfants nés du mariage. Toute l'économie du code civil est édifiée sur le principe de la légitimité de la filiation; et les droits résultant de la filiation naturelle, ou des relations entre les père, mère et enfants naturels sont traités à part dans des articles distincts.

Cette observation, d'ailleurs, ne s'applique pas seulement au code civil. Il est très important de noter que dans la loi des Accidents du travail (S.R.Q. 1925, c. 274) qui traite d'un sujet connexe aux articles 1053 et 1056 du code civil, lorsque le législateur parle de l'indemnité, il s'exprime comme suit (art. 4):

L'indemnité est payable de la manière suivante:

* * * * *

2. aux enfants légitimes ou aux enfants naturels reconnus avant l'accident, de manière à aider à pourvoir à leurs besoins jusqu'à l'âge de seize ans révolus, ou plus s'ils sont invalides.

On voit donc que lorsque l'intention est d'inclure les enfants naturels dans une disposition de la loi dans la province de Québec, cette intention est manifestée d'une façon expresse.

La conséquence qu'il faut déduire généralement de cette constatation est qu'il en est de même lorsque le législateur emploie les mots " père " ou " mère " seuls.

Par surcroît, cette interprétation est conforme à la tradition historique et doctrinale. C'est ainsi que l'envisagent Ferrière et Merlin.

Pothier (édition Bugnet, vol. 8, *Substitutions,* n° 67) dit:

67. Ce terme "enfants", soit dans la disposition, soit dans la condition, ne comprend que les enfants légitimes et ceux qui jouissent de l'état civil. Les bâtards n'y sont pas compris etc.

Laurent, dans ses *Principes de droit civil,* au volume 4, conclut dans le même sens que Pothier. Il se demande s'il y a une analogie entre la filiation naturelle et la filiation légitime. Il répond que là où les principes sont contraires il ne peut pas y avoir d'analogie. Les textes diffèrent, et l'esprit de la loi encore bien plus (p. 7). L'enfant naturel a une filiation aussi bien que l'enfant légitime; mais cette filiation n'est reconnue par la loi que dans la limite fixée par elle (p. 11). "L'esprit qui anime le code", ajoute-il, "est un esprit moral", et le code traite les enfants naturels différemment afin d'honorer le mariage. Plus loin (p. 43), il parle de la défaveur dont la loi frappe la filiation illégitime et la restreint dans les limites les plus étroites "parce qu'il en résulte une espèce de tache".

Cette constatation elle-même conduit au principe d'interprétation très ancien que toute législation a pour base principale "l'honnêteté et l'utile" et qu'on s'écarte de la volonté du législateur chaque fois qu'entre diverses significations possibles on admet celle qui n'est pas conforme à ce principe (Delisle, Principes de l'interprétation des lois, vol. 1, p. 10).

Pour les raisons que je viens d'exposer, j'en arrive à la conclusion que la mère d'un enfant naturel n'est pas comprise dans l'énumération des personnes qui peuvent recouvrer en vertu de l'article 1056 du code civil. Il s'ensuit que, dans l'espèce, l'appel doit être maintenu et l'action de la demanderesse-intimée doit être rejetée.

Mais l'appelante réussit par suite d'un moyen qu'elle n'a pas invoqué et qui eût mis fin à la cause dès le début des procédures, s'il eût été soulevé en temps utile. Dans les circonstances, je serais d'avis de n'accorder de frais à l'appelante dans aucune des cours.

CANNON J.—Sans qu'il soit nécessaire de décider si la mère qui, hors mariage, a porté et mis au monde un enfant qu'elle a reconnu peut réclamer des aliments de ce fils naturel, le jugement en cette cause dépend du sens que comportent les mots "mère" et "enfants" dans la version

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française de l'article 1056 du code civil, tel qu'il se lisait avant la modification apportée par 20 Geo. V., c. 98. Cet article 1056 n'avait pas été incorporé dans le rapport des codificateurs chargés de codifier les lois du Bas-Canada.

Le préambule du chapitre II des Statuts Refondus du Bas-Canada (concernant la codification des lois du Bas-Canada qui se rapportent aux matière civiles et à procédure) constate, en 1865, que les lois du Bas-Canada, en matière civile, étaient celles qui, à l'époque de la cession du pays à la Couronne d'Angleterre, étaient suivies dans cette partie de la France régie par la Coutume de Paris; que ces lois et coutumes avaient été modifiées en France et réduites à un code général, de manière que les anciennes lois encore suivies dans le Bas-Canada n'étaient plus ni réimprimées ni commentées en France, et qu'il devenait de plus en plus difficile d'en obtenir des exemplaires et des commentaires. Ce préambule constate de plus que nos lois civiles avaient aussi été modifiées par l'introduction de certaines parties des lois d'Angleterre dans des cas spéciaux.

Le paragraphe 6 ordonnait aux commissaires, en rédigeant le code civil, de n'y incorporer que les dispositions qu'ils tiendront pour être alors réellement en force et de citer les autorités sur lesquelles ils s'appuieraient pour juger qu'elles l'étaient.

Comme je l'ai dit plus haut, le rapport des commissaires ne contenant pas cet article 1056, nous devons nous contenter de constater qu'il fait partie de l'acte 29 Vict., c. 41, " concernant le code civil du Bas-Canada ", dont le préambule déclare que les commissaires se sont en tout point conformés aux exigences de la loi précitée, et que le projet, tel qu'amendé par la législature ayant été finalement adopté par les deux chambres, le code tel que contenu dans le rôle déposé au bureau du greffier du conseil législatif aura force de loi au Canada du jour plus tard fixé par proclamation, savoir, le 1er août 1866.

Le savant juge-en-chef de cette cour a démontré de quelle façon les tribunaux de l'Angleterre, dès avant et depuis cette date, avaient appliqué le Lord Campbell's Act, qui est certainement un statut anglais introduit substantiellement dans la législation civile du Bas-Canada par le parlement des provinces unies.

J'ai cru bon cependant de constater quelle interprétation on donnait aux mots "mère" et "enfant" dans l'ancien droit français, avant les changements introduits par la Révolution et le Code Napoléon.

Ferrière, *Dictionnaire de Droit,* vbo. "enfants", dit:

On n'entend ordinairement par le nom d'enfants que ceux qui sont légitimes, car ce qui caractérise un enfant, c'est d'être né d'un père et d'une mère unis par un mariage public: *Filius est qui ex viro & uxore nascitur simul commorantibus, scientibus vicinis, aut qui legitimatus est subsequenti matrimonio.*

A l'égard des bâtards, on ne leur donne le nom d'enfants qu'en ajoutant quelque qualification, comme celle d'enfants naturels ou autre qui distingue leur condition de celle des enfants légitimes, surtout quand il s'agit de succession *ab intestat:* comme ils n'y ont aucune part, ils ne sont pas compris sous le nom d'enfants, non plus que quand il s'agit d'autres droits inhérents à la famille.

Il suffit de lire les articles de notre code civil pour constater que, lorsqu'on veut y parler des bâtards, on a ajouté, comme le dit Ferrière, la qualification d'enfants naturels, ou autre expression distinctive:

121. L'enfant naturel qui n'a pas atteint l'âge de vingt et un ans révolus, doit, pour se marier, y être autorisé par un tuteur *ad hoc* qui lui est nommé à cet effet.

218. L'enfant conçu pendant le mariage est légitime et a pour père le mari * * *.

237. Les enfants nés hors mariage, autres que ceux nés d'un commerce incestueux ou adultérin, sont légitimés par le mariage subséquent de leurs père et mère.

240. La reconnaissance volontaire ou forcée par le père ou la mère de leur enfant naturel, donne à ce dernier le droit de réclamer des aliments contre chacun d'eux, suivant les circonstances.

768. Les donations entrevifs faites par le donataire à celui ou à celle avec qui il a vécu en concubinage, et à ses enfants incestueux ou adultérins, sont limitées à des aliments.

(Cette prohibition ne s'applique pas aux donations faites par contrat de mariage intervenu entre les concubinaires.

Les autres enfants illégitimes peuvent recevoir des donations entrevifs comme toutes autres personnes).

Ferrière, *dito,* vbo. "Légitime":

Se dit de celui qui est né en légitime mariage.

Dito, vbo. "Illégitime":

On appelle celui qui est né d'une conjonction réprouvée, ou non autorisée par les lois, un enfant illégitime.

D'après moi, cet article 1056 a eu pour effet de limiter à certains membres de la parenté de la victime le recours qui, d'après 1053, aurait pu être exercé par tous ceux souffrant des dommages à la suite d'un délit ou quasi-délit causant la mort. Aussi longtemps que notre législation conservera le christianisme et sa morale comme base

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et réprouvera l'union libre, je suis d'avis qu'il faudra limiter aux pères et mères d'enfants légitimes le recours de 1056.

Je cite Merlin, *Répertoire de jurisprudence,* vbo. bâtard:

> Dans l'ordre de la nature, la condition des bâtards et des enfants légitimes est la même, puisqu'ils sont tous enfants du même sang; mais elle est inégale dans le droit civil qui prononce contre les bâtards, non seulement l'incapacité de succéder à leur père, mais même de recevoir de lui des dons et legs considérables: on regarde ces sortes de personnes comme n'étant d'aucune famille et n'ayant point de parents: c'est la loi civile qui établit cette différence entre les bâtards et les légitimes: c'est elle seule qui leur impose une peine à cause de la faute de leur père.

N'oublions pas, en cette matière, ce que disent Planiol et Ripert, II Droit civil, 1926, p. 6:

> Enfin il n'y a pas de partie du droit qui touche d'aussi près à la morale: l'organisation de la famille n'est solide que si elle est fondée sur une morale rigoureuse. Les règles qui gouvernent la famille constituent autant, et quelquefois plus, des préceptes de morale que des règles de droit.
>
> Par là le droit de famille touche de très près aux préceptes religieux eux-mêmes. De fait, il fut régi en France pendant de longs siècles par le droit canonique; si la Révolution l'a sécularisé, elle n'a pu en changer le caractère, et, dans la mesure où les lois révolutionnaires et les lois modernes se sont écartées des principes sur lesquels la famille avait été établie, elles ont affaibli la solidité de l'institution.

Partout dans le code, le mot "enfants", lorsqu'il est employé seul, n'a et ne peut avoir d'autre signification que celle d'enfants légitimes, sauf aux articles 54, 55 et 56, concernant les actes de naissance, où l'on prévoit le cas où un *enfant,* dont le père, ou la mère, ou tous deux, sont inconnus, est présenté au fonctionnaire public. D'ailleurs, notre législature a entendu maintenir le droit établi par la Coutume de Paris et par S.R.C. c. 78 (1859) codifiant les dispositions du statut 10-11 Vict., c. 6, dont le but, dit Mignault (5 C.C. 339) était de reproduire le statut impérial mieux connu sous le nom de "Lord Campbell's Act".

L'article 1056 doit recevoir l'interprétation et l'application qui lui étaient données sous l'empire de la loi qu'il a remplacée; chez nous, contrairement à ce qui a lieu en France, la position des enfants naturels ne diffère pas substantiellement aujourd'hui de celle qui leur était faite par le droit existant au temps de la cession du pays.

Je suis donc disposé à dire, adaptant le langage de la Cour d'Appel de Bordeaux, dans son arrêt du 4 décembre

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1851, *re Masson* v. *Hostein* (1), que, dans le langage de l'homme, comme dans le langage de la loi française, ancienne et moderne, le mot " enfants " ne peut s'entendre que des descendants légitimes, car la législature, à moins de dire clairement le contraire, n'est censée prévoir que ce qui est honnête et légitime et n'est pas présumée supposer, comme faisant partie de la famille, des enfants naturels qui ne peuvent naître que d'une union réprouvée par la morale.

Je suis d'avis de renverser le jugement des cours inférieures et de renvoyer l'action sans frais en première instance, en appel et devant cette cour.

Appeal allowed without costs.

Solicitors for the appellant: *Foster, Place, Hackett, Mulvena, Hackett & Foster.*

Solicitors for the respondent: *Walsh & Walsh.*

ATHONAS *v.* THE OTTAWA ELECTRIC RAILWAY COMPANY

1930

*NOV. 4.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Negligence—Plaintiff struck by automobile which had collided with street car—Jury finding negligence in street car company, causing the accident—Reversal of finding by Appellate Division—Judgment at trial in plaintiff's favour against street car company restored by Supreme Court of Canada—Evidence to support jury's finding.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (2) allowing the defendant company's appeal from the judgment of Kelly J. in plaintiff's favour against the defendant company on the findings of a jury.

There was a collision between the defendant company's street car and an automobile owned and driven by one Glover, and the automobile then struck and injured the plaintiff, who sued, for damages, the defendant company

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Cannon JJ.

(1) (1851) S. 1852.2.35.

(2) (1930) 38 Ont. W.N. 20.

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and Glover. The jury found that there was no negligence in Glover causing plaintiff's injuries, but that there was negligence in defendant company's motorman causing plaintiff's injuries; and that there was no negligence on the part of the plaintiff. On the jury's findings, Kelly J. dismissed the action as against Glover, and gave judgment in plaintiff's favour against the defendant company for $8,500, and ordered that defendant company pay the costs of plaintiff and of defendant Glover.

The defendant company appealed to the Appellate Division. The plaintiff did not appeal from the dismissal of the action against Glover.

The Appellate Division (1) held, on the evidence, that the sole and effective cause of the accident was due to the gross negligence of the defendant Glover; that, while fully recognizing that a jury's findings on the facts are not to be lightly interfered with, the jury's findings in this case could not be supported on the evidence; and it allowed the defendant company's appeal and dismissed the action as against it, with costs.

The plaintiff appealed to the Supreme Court of Canada.

After hearing counsel for the appellant (plaintiff) and for the respondent (defendant company), and without calling on counsel for the appellant in reply, the Court delivered judgment orally, allowing the appeal with costs, on the ground that there was evidence to support the jury's finding of negligence by the respondent causing the appellant's injuries, in the respondent's motorman not bringing his car to a stop; that, on the evidence, the motorman must have realized the danger of a collision, and he should have brought the speed of his car down to such a rate as would have enabled him to stop in time to avoid the accident. The appeal was allowed with costs and the judgment of the trial judge restored, except that portion thereof dealing with the Glover costs, there being no appeal in this Court by Glover against the judgment of the Appellate Division which denied him his costs as against defendant company.

Appeal allowed with costs.

J. A. Ritchie K.C. and *H. J. Burns* for the appellant.

Redmond Quain and *J. T. Wilson* for the respondent.

(1) (1930) 38 Ont. W.N. 20.

WILKINSON *v.* HARWOOD AND COOPER

1930

*May 5.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Contract—Evidence—Action to recover on mortgage covenants—Defence that the moneys were advanced by mortgagee for illegal purpose—No connection shewn between claims sued upon and alleged illegal transactions—Refusal to answer questions on discovery as ground for dismissal of action at trial.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing the plaintiffs' appeal from the judgment of Raney J. (2) dismissing the action, which was brought upon the covenants for payment contained in two mortgages executed by the defendant to the plaintiff Cooper. The trial judge's grounds for dismissal of the action were that the moneys advanced by Cooper to the defendant and sought to be recovered in the action were advanced for an illegal purpose; and also that plaintiff Cooper had refused to answer certain relevant questions put to him on his examination for discovery. The Appellate Division reversed the judgment on the grounds that there was no evidence of any illegality in connection with the mortgage transactions; that in any case the plaintiff's cause of action was established without relying on any illegal transaction; and that the refusal to answer questions on the examination for discovery, no substantive motion grounded on such refusal having been launched by defendant before the trial, could not be a ground for dismissal of the action at the trial.

On the appeal to this Court, on the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondents, the Court delivered judgment dismissing the appeal with costs, the Chief Justice stating that the members of the Court were in accord with the views expressed by the Appellate Division and in agreement with the judgment delivered therein by Orde J.A.; with that learned judge they were of the view that defendant failed to adduce any evidence in support of his plea of illegality; he was bound to prove, not only the illegal-

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1929) 64 Ont. L.R. 658. (2) (1929) 64 Ont. L.R. 392.

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ity (as to the existence of which the Court passed no opinion), but also its connection with the transactions in question; the signatures of defendant to the mortgages being admitted and the advance of the money not being contested, the plaintiff established a *prima facie* case by showing non-payment; he was not obliged to invoke in any wise the alleged illegal transactions in support of his claim; the burden of establishing these and their connection with the claim sued upon remained upon defendant, and that burden he failed to discharge.

Appeal dismissed with costs.

F. D. Davis K.C. for the appellant.
Bernard Furlong for the respondents.

1930
*May 7.

LOVERIDGE *v.* GROSCH
LOVERIDGE *v.* SMITH

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Purchase of land for re-sale—Joint adventure—Non-disclosure of facts—Withdrawal of co-adventurers—Right to share in profits.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which, allowing the plaintiffs' appeals from the judgment of McEvoy J. (1), held that the plaintiffs were each entitled to a one-third share of the net profits which the defendant made on the purchase and re-sale of certain lands.

On conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondents, the Court orally delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

J. H. Rodd K.C. and A. W. R. Sinclair for the appellant.
R. S. Robertson K.C. for the respondent Smith.
W. P. Harvie for the respondent Grosch.

*PRESENT:—Duff, Newcombe, Lamont, Smith and Cannon JJ.

(1) 64 Ont. L.R. 465.

1930

*Oct. 13.

MELYNIUK AND HUMENIUK *v.* THE KING

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Criminal law—Charge of robbery with violence—Sufficiency of evidence to justify conviction—Alleged misdirection in charge to jury.

APPEAL by the accused from the judgment of the Appellate Division of the Supreme Court of Alberta (1) dismissing (Hyndman J.A. dissenting) their appeal from their conviction, at a trial before Tweedie J. and a jury, of the crime charged against them, namely, robbery with violence.

The grounds urged on behalf of the appellants on the appeal to the Supreme Court of Canada were: (1) that there was no evidence to justify the conviction of the accused for the crime charged; and (2) that the trial judge did not properly charge the jury with regard to the evidence of Eva Rosychuk.

On conclusion of the argument of counsel for the appellants, and without calling on counsel for the respondent, the Court orally delivered judgment dismissing the appeal; being of opinion that there was evidence sufficient to warrant the jury in inferring that the accused were guilty of the crime charged; and that there was no misdirection by the trial judge with regard to the evidence of the witness Eva Rosychuk; that, while perhaps he did not go into that evidence as fully as he might have done, yet he went into it quite as fully as was necessary and described it fairly in what he said of it; that no wrong was done the accused in this connection.

Appeal dismissed.

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

W. S. Gray K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

(1) 24 Alta. L.R. 545; [1930] 2 W.W.R. 179.

1929
*Nov. 6, 7, 8.
1930
*June 11.

GRISSINGER *v.* VICTOR TALKING MACHINE CO. OF CANADA LTD.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Action for alleged infringement—Utility of plaintiff's device—Lack of the improvement alleged to have been achieved—Anticipation.

APPEAL by the plaintiff from the judgment of Audette J. in the Exchequer Court of Canada (1) dismissing his action, which was brought for an injunction, damages, etc., by reason of the alleged infringement of letters patent issued to the plaintiff for an invention relating to sound projecting apparatus and methods.

After hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs. Written reasons were delivered by Duff J., with whom the other members of the Court concurred. After dealing with the evidence at length, he concluded that the advantages, the plaintiff alleged, found in the invention described in claim 2, were not to be found in a horn constructed according to the description contained in his patent, nor were they to be found in other horns closely resembling his, nor in the horns produced by the defendant which the plaintiff said were infringements on his invention; it did not appear, therefore, that in the plaintiff's invention there was the improvement which he alleged he had achieved. As to plaintiff's contention that his horn as described in claim 2 presented advantages in the reduction of expense and facility of packing, the attainment of which amounted to invention in the pertinent sense, his Lordship was "unable to perceive, in view of the Catucci and Gustafson produced, anything in the nature of invention here."

Appeal dismissed with costs.

G. Wilkie K.C. and *T. D. Delamere* for the appellant.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondent.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1929] Ex. C.R. 24.

LOUIS HÉBERT (DEFENDANT).....APPELLANT;

AND

JOSEPH MARTIN AND OTHERS (PLAINTIFFS).....RESPONDENTS.

1930

*Feb. 14.
*Apr. 22.

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

Riot — Mob — Disturbance — Revolver shooting — Unlawful assembly — Peace officer — Discharge of duty — Person injured — Liability.

The necessity of dispersing a riotous crowd, which would become dangerous unless dispersed, and which threatens serious injury to persons and property, justifies a peace officer in using firearms to prevent violent and felonious outrage to persons and property. A ringleader who, under such conditions and while assaulting a peace officer, is shot dead, dies by justifiable homicide; and the peace officer who fired is free from any liability in damages.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Letellier J. and maintaining the respondents' action in damages.

The respondents were tutors to the minor children of one Médéric Martin and brought action for damages against the appellant, a police officer of a mining town, arising from the death of their father under the following circumstances: At a circus in Thetford Mines, one Alcide Martin, brother of the deceased, during discussion with one Dufresne and his wife, fortune tellers, was struck in the face by Dufresne. It is admitted that Alcide Martin stirred up *(ameuta)* his friends who took up his defence and pulled down Dufresne's tent. A general disturbance thereupon ensued having all the appearances of a riot. The appellant went home to get his revolver and returned with it to establish order. He mounted a box and commanded the crowd to keep the peace: failing by this method to restore order, he discharged his revolver, first into the air and then into the ground. Médéric Martin, a powerful man, approached the appellant and assaulted him, whereupon Hébert, with the probable intention of wounding his assailant and thereby preventing further aggression by him, discharged his revolver and killed him. The evidence established the existence of an unlawful assembly within

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

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the definition of section 87 Cr. C. at the time and place of the shooting and that this unlawful assembly had already become a riot within the definition of section 88 Cr. C. The evidence showed also that the appellant had reason to believe, and did in fact believe, that his own safety, as well as that of Dufresne, was seriously menaced by the conduct of the crowd by which he was surrounded.

R. Beaudoin K.C. for the appellant.

L. Morin K.C. for the respondent.

The judgment of Anglin C.J.C. and Lamont and Smith JJ. was delivered by

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Cannon and I agree in his conclusion.

The evidence abundantly establishes the existence of an unlawful assembly, within the definition of s. 87 of the Criminal Code, at the time and place of the shooting of Médéric Martin. Indeed, it justifies the conclusion that this unlawful assembly had already become a riot within the definition of s. 88, Cr. C.

As a peace officer, it was the imperative duty of constable Hébert, under s. 94 of the Criminal Code, to endeavour to suppress this riotous assembly and he would have rendered himself liable to a penalty of two years' imprisonment had he failed to do so.

By s. 125 of the code, a peace officer is authorized

to carry loaded pistols or other usual arms or offensive weapons in the discharge of his duty,

and, by s. 48, he is

justified in using such force as he, in good faith, and on reasonable and probable grounds, believes to be necessary to suppress a riot, and as is not disproportioned to the danger which he, on reasonable and probable grounds, believes to be apprehended from the continuance of the riot.

The questions, therefore, for our consideration would appear to be, whether the evidence supports the finding of the trial judge that the circumstances were such as to justify a reasonable belief in the mind of the constable, and whether he in fact entertained the belief, that the riotous assembly would continue, and would probably result in serious injury to Dufresne and also to himself unless immediate steps were taken to suppress it; and, whether he was likewise justified in believing that the use

of his fire-arm was, under the circumstances, a means necessary to suppress the riot, and

not disproportioned to the danger which he * * * believed to be apprehended * * *.

Having read the evidence through with great care, and considered it in all its aspects, I am of the opinion that this case clearly falls within these statutory provisions and that the conduct of constable Hébert was not only justifiable, but should probably be regarded as unavoidable, in the discharge of the duty imposed upon him by s. 94 of the Code. It would be highly dangerous and most discouraging to peace officers to hold them liable, either criminally or civilly, under circumstances such as those before us, for injuries sustained by one of the ringleaders of a semi-drunken mob of blackguards such as Hébert was called upon to deal with.

The evidence satisfies me that Hébert had reason to believe, and did in fact believe, that his own safety, as well as that of Dufresne, was seriously menaced by the conduct of the crowd by which he was surrounded, and that he was within his rights, as a peace officer, in using his fire-arm as he did, not with the intention of killing Médéric Martin, but possibly of wounding him, and thus putting an end to the danger of further aggression by him. That the danger was imminent, and the necessity for protecting persons and property urgent, the evidence clearly establishes.

In my opinion, with great respect, the Court of King's Bench should not have disturbed the findings made by the trial judge on evidence which quite sufficiently justified them. I would allow this appeal and would restore the findings of the trial judge and dismiss the action.

The judgment of Rinfret J. and Cannon J. was delivered by

CANNON J.—Joseph Martin, en sa qualité de tuteur aux enfants mineurs de feu Médéric Martin et de feue Alfréda St-Pierre, et dame Marie-Ange Lessard, veuve dudit Médéric Martin, tant en sa qualité de tutrice aux enfants mineurs issus de son mariage que personnellement, ont adressé à la corporation du village d'Amiante et à Louis Hébert, constable du même endroit, un avis qu'à l'expira-

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tion d'un mois une poursuite serait prise contre la corporation et le constable conjointement et solidairement pour une somme de $20,000, dont $10,000 pour lesdits mineurs et $10,000 pour la veuve Marie-Ange Lessard, résultant des circonstances suivantes, savoir:

Le ou vers le 17 juillet 1927, dans un parc d'amusements, dans le village d'Amiante, alors qu'il s'y donnait certaines représentations d'amusements, ledit Louis Hébert, votre employé comme constable, alors en fonctions pour votre corporation, a déchargé une arme à feu (revolver) appartenant à votre corporation et a tué Médéric Martin, père desdits mineurs et époux de ladite dame Marie Lessard, alors qu'il se trouvait dans ledit parc un grand nombre de personnes entourant le constable et sa victime, et que ledit constable ne se trouvait aucunement dans une situation périlleuse ni dangereuse pour sa personne ni pour sa vie.

Les faits et incidents ci-dessus sont arrivés par la faute de votre corporation d'une manière générale et spécialement pour ne pas avoir mis le nombre de constables requis, en pareille circonstance, pour y maintenir l'ordre; et aussi par le mauvais jugement dudit Louis Hébert, votre constable agissant sous votre responsabilité et que vous avez vous-mêmes armé, tel que dit ci-dessus en lui fournissant un revolver dont il a fait usage sans nécessité, ledit constable n'étant pas compétent et ayant reçu des ordres illégaux.

Le tout causant auxdits mineurs et à leur mère, dame Marie Lessard, les dommages susmentionnés.

Cet avis fut donné à deux reprises, le 2 août et le 26 septembre 1927.

La déclaration, en date du 23 novembre 1927, relate plus en détail les griefs contre la corporation et son constable et conclut à une condamnation conjointe et solidaire contre les défendeurs au montant de $20,000 à être partagés également entre la veuve et les enfants.

La corporation et Hébert ont plaidé séparément, alléguant que le défunt Médéric Martin et ses amis, dans la circonstance en question, ont troublé la paix publique en menaçant de mort un nommé Dufresne et le constable lui-même, qui cherchait à protéger ce dernier, que le constable n'avait fait que son devoir et était justifiable de prendre les moyens qu'il avait adopté pour protéger sa vie et celle du public et que la victime Médéric Martin avait été lui-même, avec ses amis, la cause du trouble qui avait amené sa mort.

Après une longue enquête, le juge de première instance a renvoyé l'action avec dépens, considérant que l'acte du constable était justifiable non seulement au point de vue criminel mais au point de vue civil, et qu'il n'existait

aucun recours en dommages-intérêts pour les conséquences fatales de son acte.

Le conseil de famille s'étant réuni a autorisé à inscrire en appel,

si opportun, sur l'issue contre Louis Hébert, et à se désister, si opportun, d'une partie seulement de la demande et à ne réclamer en appel que la somme de $9,950 et, alternativement, à inscrire et plaider en appel contre les deux défendeurs, si opportun.

Par leur inscription, les appelants déclarent qu'ils n'appellent que sur l'issue avec le défendeur Louis Hébert et réduisent leur réclamation en dommages à une somme de $9,950 et consentent à l'exécution des frais de la Cour Supérieure.

Par un jugement unanime, la Cour du Banc du Roi, le 28 février 1929, a donné raison à la demande, considérant que " sans cause, ni raison, ni excuse, ni justification, le défendeur a tué brutalement feu Médéric Martin ". Hébert a été condamné à payer aux demandeurs la somme de $9,950

par toutes voies que de droit et même par corps, à être partagée dans la proportion suivante: moitié à la demanderesse, le quart aux enfants du premier mariage de Méderic Martin et le quart aux enfants

de son second mariage. L'honorable Juge Howard, dissident, aurait maintenu l'appel et l'action jusqu'à concurrence de $5,000.

Les griefs d'appel de l'appelant Hébert devant la Cour Suprême sont les suivants:

1° Le jugement de la Cour du Banc du Roi décrète la contrainte par corps contre le constable Hébert, ce qui est contraire à la loi et *ultra petita.*

A l'audition, le procureur des intimés a admis le bien-fondé de ce grief. Le jugement devrait donc être modifié à tout événement de façon à faire disparaître du dispositif la condamnation de Hébert à la contrainte par corps. La déclaration ne l'a jamais demandée; et c'est un moyen d'exécution qui ne peut être obtenu que d'après une procédure spéciale subséquente au jugement dans la cause.

2° Voici comment l'appelant exprime son deuxième grief d'appel:

L'obligation est éteinte. Les intimés n'ont pas de recours contre le constable, et il y a chose jugée sur ce point.

Voici maintenant les faits qui ont donné lieu à cette prétention de l'appelant:

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L'action a été prise à la fois contre l'appelant et contre la corporation du village d'Amiante, qu'on a voulu tenir conjointement et solidairement responsable pour l'acte de son constable.

Le juge de première instance a décidé que l'action était mal fondée en fait et en droit.

Les demandeurs ont accepté cette décision quant à la municipalité; et sur ce point le jugement de la Cour Supérieure a acquis l'autorité de la chose jugée entre la corporation et eux. Ils ont porté la cause en appel contre le constable Hébert seulement. La question qui se pose est donc: Le fait d'avoir accepté le jugement qui libérait la corporation municipale, en déclarant justifiable l'acte de son constable, empêche-t-il les demandeurs de continuer leur appel contre le constable lui-même? Lorsque l'employé et le patron sont poursuivis solidairement pour l'acte de l'employé, dans la même action, et que cette action est rejetée en vertu d'une décision qui déclare que l'acte de l'employé n'était pas répréhensible, un demandeur peut-il accepter ce jugement quant au patron et tenter de le faire infirmer quant à l'employé seulement, sans s'exposer à l'exception de chose jugée? Il y a là une question de droit qu'il n'est pas cependant nécessaire de résoudre, si cette cour donne raison à l'appelant sur le troisième grief qui nous est soumis comme suit:

3° En fait et en droit, l'action telle qu'originairement intentée est mal fondée, comme l'a jugé l'honorable juge Letellier en première instance, parce que le constable pouvait et devait agir comme il l'a fait.

L'intimé, dans son factum, prétend que le nommé Dufresne, par sa conduite en attaquant brutalement et sans justification Alcide Martin, frère du défunt, *ameuta* les amis de ce dernier qui prirent fait et cause pour lui et jetèrent bas la tente de Dufresne, et il cite le témoignage d'Albert Drouin:

Combien voulaient battre le père Dufresne?—R. A peu près quatre ou cinq.

Cette admission serait suffisante pour nous justifier d'appliquer les articles 87 et 88 du code criminel concernant les attroupements illégaux.

87. Un attroupement illégal est la réunion de trois personnes ou de plus qui, dans l'intention d'atteindre un but commun, se réunissent ou se conduisent, une fois réunis, de manière à faire craindre aux personnes qui

se trouvent dans le voisinage de cet attroupement, pour des motifs plausibles, que les personnes ainsi réunies vont troubler la paix publique tumultueusement, etc.

88. Une émeute est un attroupement illégal qui a commencé à troubler tumultueusement la paix publique.

Sur ce point, je citerai quelques témoignages:.

Hébert:

Q. Qu'est-ce que ça criait? Est-ce que vous avez compris?—R. Ils voulaient le tuer.

Q. Ils le disaient?—R. Oui. Ils étaient vingt-cinq à trente, le moins, qui criaient, qui voulaient le tuer.

* * *

Q. Sacraient-ils?—R. Oui, ils sacraient; ça criait. J'ai embarqué debout sur la boîte, j'ai tiré un coup en haut en disant de se tenir tranquilles. J'ai tiré un coup en haut en disant de se tenir tranquilles. J'ai tiré en bas; ça n'arrêtait pas. J'ai tiré un deuxième coup en bas, en disant de se tenir tranquilles.

Q. En disant de se tenir tranquilles?—R. Oui. Là, Médéric était à peu près à cinquante pieds plus loin. Il dit: "Toi, mon christ d'Hébert, tu vas mourir." Là, j'ai sauté en bas, j'avais mon revolver à la main, comme de raison, dans le dos, j'ai envoyé mon revolver dans le dos.

Q. Pointé vers la terre?—R. Oui.

Q. Qu'est-ce que Médéric a fait?—R. Il était avec moi, je lui ai dit de se tenir tranquille.

Q. Vous touchait-il?—R. Oui, il me tenait et me secouait. J'ai dit: "Tiens-toi tranquille, c'est tout ce qu'on te demande." Il continuait toujours la même chose. La troisième fois qu'il m'a poigné j'ai pointé mon revolver pour le blesser à la jambe. Comme de raison, il m'a poussé comme ça, la main m'a manqué de même * * *

* * *

Q. Martin, tout le temps, vous tenait-il?—R. Oui.

Q. Et il sacrait?—R. Il sacrait: "Mon christ, tu vas mourir."

Q. Lui-même, Martin?—R. Oui, monsieur.

* * *

R. Il y en avait d'autres en arrière, de l'autre côté de la roue, qui criaient: "Tue-le, ce vieux christ-là."

Q. Il y avait beaucoup de monde?—R. Ah! oui.

Q. Dans ceux qui criaient et faisaient le train, étaient excités, étaient-ils nombreux?—R. Dans les vingt-cinq à trente; ils entouraient la roue.

Q. Vous étiez tout seul?—R. Oui.

Q. Ces gens-là avaient-ils l'air d'être en boisson?—R. Ils n'avaient pas toute leur tête, c'est bien mon idée.

Q. Avez-vous eu peur?—R. Oui, j'ai eu peur.

Q. Peur de quoi?—R. J'ai eu peur de me faire tuer. C'est tout juste.

Q. Vous connaissiez Martin avant ça?—R. Oui.

Q. Il vous connaissait?—R. Oui, il me connaissait et je le connaissais.

Q. C'est un gars qui était plus gros que vous?—R. Oui.

Q. Plus fort?—R. Oui, il pouvait en battre deux comme moi.

Q. Il était beaucoup plus jeune que vous?—R. Oui, il était plus jeune que moi.

Q. Qu'est-ce qui, sous votre serment, monsieur Hébert, qu'est-ce qui vous a fait craindre de vous faire tuer? Qu'est-ce qui vous a fait penser

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que vous étiez exposé à la mort?—R. S'il m'avait frappé là et que les autres seraient venus, toute la gang qu'ils étaient là.

Q. Est-ce que ces gens avaient l'air de vouloir se ranger contre vous? —R. Comme de raison, du moment qu'ils ont venu me bâdrer, M. Dufresne a débarqué de la roue, ils l'ont poigné cinq ou six et lui ont noirci les deux yeux. * * *

* * *

Q. Vous ne savez pas qui a fait arrêter la roue?—R. Non, je ne sais pas.

Q. Pendant qu'il était dans la roue, le père Dufresne, et que la roue tournait, est-ce que ces gens-là faisaient des menaces?—R. Ils lui criaient.

Q. Quoi?—R. "Amène-le qu'on le tue."

Q. Avez-vous déjà vu des bagarres, des grosses batailles, avant celle-là?—R. Non, je n'en ai jamais vu.

Q. Celle-là vous a paru considérable?—R. Oui.

Q. Vous avez dit tout à l'heure, monsieur Hébert, que vous étiez à l'emploi de la municipalité. Comme question de fait, vous n'avez pas de salaire de la municipalité?—R. Non.

Q. Ils vous paient quand ils ont besoin de vous?—R. Oui, monsieur.

Q. Dans cette affaire-là, vous étiez employé par les "Bosco"?—R. Oui.

Q. C'est Bosco qui vous payait?—R. Oui.

Q. Vous n'aviez pas de compte à rendre à la corporation de ce temps-là?—R. Non, rien du tout.

Q. Aucun échevin, ni le maire, ni le secrétaire, pas un vous a dit de vous servir de votre revolver?—R. Non.

Q. Vous avez agi d'après votre propre jugement?—R. Oui, monsieur.

Q. Maintenant, quel âge avez-vous, monsieur Hébert?—R. Cinquante-six ans.

* * *

Q. Pouvez-vous donner un fait arrivé à votre connaissance, qui pourrait démontrer que la populace vous en voulait?—R. Dans une émeute semblable, des fois ça ne prend pas de temps de se virer sur une personne et la battre. On ne connaît pas tout le monde qui arrive dans une émeute, ça ne prend pas de temps à se soulever, à sauter sur un homme; c'est ça.

J'ai cité abondamment la version du constable pour démontrer que ce dernier avait lieu de s'alarmer de la situation, en présence d'une foule avinée et ameutée, alors qu'il était seul pour remplir le devoir que lui imposait l'article 94 du code criminel qui dit:

Est coupable d'un acte criminel et passible de deux ans d'emprisonnement celui qui * * * étant agent de la paix * * * est notifié de l'existence d'une émeute dans la localité où il a juridiction et s'abstient, sans excuse raisonnable, de remplir son devoir en réprimant cette émeute.

Et voici maintenant le témoignage de Dufresne:

Q. Y avait-il bien du tapage?—R. Oui, il y avait bien du tapage: des lions, c'était comme des lions, une gang de lions.

Q. Qu'est-ce que ç'a paru?—R. Une guerre.

Q. Par conséquent quelque chose de dangereux?

Objecté de la part du demandeur à cette preuve.

Q. Avez-vous eu peur?—R. J'ai eu peur, pour le sûr que j'ai eu peur.

Q. Avez-vous été menacé?—R. Oui, j'ai été menacé.

Q. Beaucoup?—R. Bien * * *

Q. Qu'est-ce qu'ils vous ont dit?—R. "Si tu peux débarquer, on va t'en donner une bonne." Quand j'ai débarqué ils m'ont poigné et amené en arrière, ils m'ont tapoché tant qu'ils ont pu.

* * *

Q. Ils avaient peut-être un petit coup de trop?—R. Oui.

Q. Avaient-ils l'air d'en avoir pris?—R. Oui; je leur en ai vu prendre moi-même.

Q. Plusieurs?—R. Non, seulement un; je l'ai remarqué.

Q. Où c'était?—R. Droit en face, lorsque j'étais près de la roue.

Q. A travers tout le monde?—R. Oui.

Q. C'était une grosse bagarre?—R. Oui.

Ce témoignage est confirmé par celui de Mme Dufresne, par Robert Roy, mécanicien, et Paul-Emile Lafontaine. Le témoignage de ce dernier doit être cité, je crois:

Q. Quand êtes-vous arrivé là?—R. Je suis arrivé là quand le défunt Martin est arrivé. Quand je suis arrivé là, Martin arrivait de East Broughton, en automobile, avec M. Vachon.

Q. Etait-il chaud?—R. Je ne pourrais pas dire qu'il était chaud; il m'a paru chaud.

Q. Qu'est-ce qui s'est passé, quand il est arrivé?—R. Quand il est arrivé, son frère lui a dit...

Q. Quel frère?—R. Alcide a dit à Médéric: "Le vieux m'a battu." Il dit: "On va arranger ça." Ils sont allés à la cabane, en fin de compte, le cabane est tombée à terre. Ils se sont mis à chanter et se sont payé la traite.

Q. Etaient-ils plusieurs?—R. Ils paraissaient être une dizaine.

Q. Vous les avez vus prendre un coup?—R. Oui.

Q. Médéric aussi?—R. Tous.

Q. Les avez-vous vus jeter la tente à terre?—R. La tente, elle a été jetée par en arrière, ces gars-là étaient de côté.

Q. Après ça, qu'est-ce qui est arrivé?—R. Ils ont demandé si M. Dufresne était sorti d'en dessous la tente. Il était sorti et se sauvait dans la roue. Là, il y a quelqu'un qui a crié: "Le bonhomme se sauve!" Ils sont partis après.

* * *

R. Oui. J'ai resté avec lui; on est allé voir M. Marcotte. Il lui a dit que ça regardait bien mal. Il a demandé de l'aide à la ville. Il m'a dit que ça faisait deux fois qu'il demandait de l'aide, il ne pouvait pas en avoir, ils n'étaient pas assignés par le village. Il a dit: "Cet homme-là est sur nos charges, il faut le protéger." Je suis parti avec M. Hébert; quand il est revenu, ils ont crié: "Dépêchez-vous!" La roue était arrêtée, M. Dufresne, ils commençaient à le tirer par les jambes.

Q. Qui?—R. Je ne peux pas dire qui, il y en avait deux.

Q. C'était-il deux qui étaient dans le groupe?—R. Oui; le groupe qui était dans le bout de la roue. On ne comprenait rien.

Q. Ça criait beaucoup?—R. Pas mal. Là, M. Hébert, il y a quelqu'un—je crois que c'est M. Beaudoin—a dit: "Tirez en l'air pour apaiser les choses." L'effet que ça fait: ça les a enragés, ça criait plus fort.

Q. Qu'est-ce que ça criait?—R. Après le bonhomme: "Poignez-le! poignez-le! poignez-le!" M. Dufresne criait: "Défendez-moi, tirez,

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tirez!" M. Hébert a tiré un coup à terre, je crois qu'il en a frappé un au pied, que j'ai su après.

Q. S'est-il reculé?—R. Je crois. Et puis, quand il a vu ça, le défunt Martin a sauté sur les "crêtes", M. Hébert était monté dessus. Il a dit à M. Hébert: "T'as pas d'affaire ici à nous bâdrer, va t'en." M. Hébert a sauté à terre; là, ils se sont poignés par les bras, le revolver était en l'air, au bout du bras.

Q. Au bout du bras d'Hébert?—R. Oui, le bras était en l'air.

Q. Puis?—R. M. Martin a lâché M. Hébert. J'ai pris M. Martin par le bras en disant: "Fais pas de folie, il vient pour mettre la paix." Il m'a donné un coup et il est retourné trouver M. Hébert, il lui a mis une main à l'épaule et l'autre au collet. Le revolver était pointé vers la terre, au bout du bras. Je n'ai pas resté là parce que je trouvais que c'était dangereux pour moi, je me suis tiré de côté. La première chose que j'ai sue, le revolver était levé et le coup est parti.

Q. Au moment où le coup est parti, dans quelle position étaient Hébert et Martin?—R. La distance?

Q. De quelle manière se tenaient-ils?—R. La distance à peu près au bout des bras.

Q. Martin le tenait-il encore?—R. Par le bras et par l'épaule.

Q. Puis?—R. Quand le coup a été tiré, Martin a porté sa main ici.

Q. A la plaie?—R. Oui.

Q. Y a-t-il eu une bousculade générale, des sacres?—R. C'était en arrière, à la roue.

Q. Le défunt sacrait-il?—R. Le défunt sacrait dans le temps après M. Hébert, en voulant l'envoyer.

Q. Qu'est-ce qu'il disait?—R. Mon christ d'Hébert, va t'en chez vous, t'as pas d'affaire à venir nous bâdrer.

* * *

Q. Hébert était exposé lui-même?—R. Pareil; si le revolver avait tourné, il l'aurait eu pareil.

Q. Y avait-il rien que cela de dangereux sur le terrain, le danger du revolver?—R. Non; il y avait les menaces qui étaient dangereuses.

Q. Y en avait-il plusieurs qui menaçaient?—R. Pour le moins, ils étaient toujours une vingtaine.

J'attache aussi beaucoup d'importance au témoignage du notaire Côté:

J'ai approché du trouble qu'il y avait—il y avait du trouble, il y avait un groupe qui était réuni vers une tente qui était installée vers le bord du terrain, je suppose. Là, j'ai rencontré l'avocat Beaudoin qui m'a dit: "Tantôt, il va y avoir du trouble, c'est évident." J'ai circulé sur le terrain. Après, je me suis aperçu que la tente occupée par M. Dufresne était tombée. Là, je suis allé vers la tente qui était tombée par terre; je m'occupais de la lever pour sortir de dessous M. Dufresne dans le temps je ne savais pas son nom,—M. Dufresne et sa femme. A un moment donné, la tente a été soulevée de quelque manière et M. Dufresne est disparu; je l'ai revu dans la roue, ce qu'ils appelaient le "fairway". Au bout de quelques minutes, j'ai été vers cette grande roue du côté droit, la face dirigée vers la personne du côté droit de la roue. A ce moment, il y a un groupe d'individus que je ne connaissais pas du tout, qui criaient, qui vociféraient, etc., qui paraissaient vouloir faire un mauvais parti à l'homme qui était dans la roue, M. Dufresne.

* * *

Il y a eu une mêlée, je sais qu'il y en a un qui est parti et qui a foncé sur M. Hébert—pour dire lequel, je ne peux pas le dire. Dans le temps je ne connaissais pas les gens, j'étais trop nouveau.

Q. Avez-vous entendu les paroles que cet individu-là a prononcées; qui a sauté sur Hébert?—R. J'ai entendu quelque chose comme ceci: "Mon christ, tu veux nous tuer, ça va être toi qui vas y passer", quelque chose dans ce sens-là.

Q. Des menaces?—R. Des menaces.

Q. Qu'est-ce que les émeutiers faisaient pendant ce temps-là?—R. Pendant ce temps-là et avant ce temps-là, ça vociférait, ça hurlait. Ils en voulaient à celui dans la roue, c'était évident.

Q. Avez-vous entendu un seul coup de revolver?—R. Au moins trois coups—je n'ai pas compté, ça peut être plus—pas moins.

Q. Avant de tirer du revolver, avez-vous dit que Hébert avait demandé la paix?—R. Oui, monsieur, certainement qu'il l'a demandée, je le jure positivement.

Q. Ces gens-là paraissaient-ils chauds?—R. Il y en avait certainement de chauds.

Q. En avez-vous vu de ces gens-là prendre de la boisson?—R. Oui, monsieur, j'en ai vu, il y en avait qui avait une bouteille, je ne sais pas ce qu'il y avait dedans, ça ne devait pas être de l'eau bénite. Je dis de la boisson, je ne sais pas.

Q. A Thetford, ce n'est pas la coutume que des gens sortent avec des bouteilles pleines d'eau?—R. Ça n'a pas coutume.

Q. Qu'est-ce que vous avez conclu de ce que vous avez vu? Qu'est-ce que vous avez conclu par rapport à Hébert et au père Dufresne?—R. C'est que la position de M. Dufresne était dangereuse, très dangereuse même; et M. Hébert, étant donné qu'il était en autorité dans le moment, comme police, et qu'il n'était pas écouté, ça devenait un désordre et que partout où il y a désordre, il y a danger.

Q. Avez-vous trouvé que c'était une émeute qu'il y avait là?—R. Certainement.

Q. Sérieuse?—R. Sérieuse, à mon point de vue.

Q. Pouvant inspirer des craintes?—R. Certainement.

Le témoin Louis Deshaies décrit la scène et nous dit qu'apparemment la foule voulait prendre le contrôle de tout ce qu'il y avait là, que c'était même prémédité et que de bonne heure ce soir-là on rencontrait des gens qui, si on les regardait de travers une fois, disaient: "Tu me regardes, je vais te sacrer une claque. Laisse-moi." "Ils avaient l'air chauds", et, d'après lui, le défunt et ses amis menaçaient Hébert.

Un autre témoin désintéressé, Dickenson, qui assistait à la scène de sa galerie, nous dit:

Q. What did the general appearance look like, at that distance?—R. It looked bad for a while.

Q. Why?—R. I saw a tent fall down. That is all I could see.

Q. Could you see who was making the row?—R. No. They were shouting.

Q. Could you see if there was a crowd?—R. There seemed to be a crowd.

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Q. You say they were shouting?—R. Yes.

Q. Could you hear what they said?—R. No. I saw constable Huard in an automobile.

Q. You could not hear whether there were threats?—R. No. I was about at two hundred feet.

Q. Did the whole affair look dangerous?—R. Yes, at that time it did, in my own opinion.

* * *

R. I was asked to telephone.

Q. By whom?—R. Mr. Devault; he came to my house and asked me to telephone to the police, because the situation looked dangerous. I telephoned, the reply was: "I have no business there."

Q. Hébert was left alone?—R. Yes.

Wilfrid Drouin nous dit qu'il y avait une trentaine d'individus qui menaçaient, qui criaient, dont plusieurs étaient " chauds ".

Les témoins des demandeurs disent de même. Odilon Desrosiers admet qu'il y avait pas mal de monde de " chauds " dans la " gang ", d'après ce qu'il a pu voir.

Robert Mercier nous dit qu'il a eu connaissance de la *bagarre* et il admet que ça avait l'air bien dangereux pour le père Dufresne.

Albert Drouin admet qu'il y avait beaucoup de batailleurs, que c'était menaçant, que c'était une bagarre pas mal considérable.

Je crois donc, en présence de ces témoignages, que le juge de première instance a eu raison de constater comme un fait l'existence d'un attroupement illégal ayant commencé et continuant à troubler la paix publique. Nous avons donc les éléments essentiels de l'émeute, telle que définie dans notre code criminel. Il nous suffit de nous en tenir à cette définition, sans la rechercher dans les rapports de décisions rendues en Angleterre ou ailleurs. Comme les intimés l'ont dit dans leur avis d'action, la situation était tellement grave que la présence de plus d'un constable était requise pour maintenir la paix. Il était peut-être difficile de prévoir qu'une émeute éclaterait soudainement à propos d'un incident assez insignifiant. Quoi qu'on puisse penser de la responsabilité de la corporation sur ce point, elle a été mise hors de cause par l'acceptation du jugement de première instance quant à elle par les intimées. Il reste acquis que Hébert se trouvait seul pour faire face à cette foule ameutée. Certains des honorables juges de la Cour du Banc du Roi semblent attacher beaucoup d'importance au fait, et lui reprochent fortement d'être

allé, au cours de la soirée et après s'être consulté avec le secrétaire-trésorier de la municipalité, chercher son revolver à la maison. Le port d'armes ne saurait lui être reproché, puisque l'article 125 du code criminel fait une exception en faveur des agents de la paix, qui peuvent sans contravention "porter des pistolets chargés * * * dans l'exercice de leurs fonctions". La section 48 du même code nous dit que tout agent de la paix est justifiable d'employer la force qu'il croit, de "bonne foi et pour des motifs raisonnables et plausibles, nécessaire pour la répression d'une émeute, et qui n'est pas hors de proportion avec le danger qu'il peut, pour des motifs raisonnables et plausibles, appréhender de la continuation de cette émeute".

Le plaidoyer de Hébert équivaut à invoquer cet article pour justifier son acte et le mettre à couvert des conséquences et des dommages encourus. C'est de ce point de vue que, en tout respect, la Cour du Banc du Roi ne semble pas avoir suffisamment tenu compte. Elle a traité la cause comme celle d'un particulier qui aurait tué et invoquerait le cas de légitime défense. Mais, comme le dit la Cour Supérieure,

> l'appelant était en autorité et avait le droit et le devoir de tenir l'ordre sur le terrain et de protéger le propriétaire et les personnes qui faisaient partie de ce cirque.

Il était "dans l'exercice de (ses) fonctions"; et nous devons nous demander si Hébert s'est trouvé dans les circonstances prévues par l'article 48 du code criminel que l'appelant peut invoquer pour sa justification, alors qu'il se pourrait que ce moyen de défense ne fût pas à la disposition du citoyen ordinaire.

Après avoir lu attentivement la preuve, je crois devoir adopter les constatations et les conclusions du juge de première instance. Je ne crois pas qu'il y ait beaucoup de contradictions dans les témoignages quant au nombre de personnes qui troublaient la paix, ni quant aux menaces adressées à Hébert, et qui devaient lui faire craindre des blessures sérieuses. Médéric Martin, son agresseur, qui non seulement troublait la paix mais voulait empêcher le constable de remplir son devoir et probablement lui enlever son arme, a été victime de sa propre conduite. Il ne s'agit pas de juger après coup, froidement, les mesures que

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Hébert a cru devoir prendre. Nous devons nous demander s'il a eu raison de croire et s'il a cru que la situation était assez sérieuse pour lui permettre de se servir de son arme à feu en tirant d'abord en l'air pour demander la paix et en cherchant à blesser Médéric Martin, un colosse beaucoup plus fort que lui, qui essayait par violence d'expulser du terrain le représentant de l'autorité publique.

On nous a dit que Hébert aurait dû se contenter de se servir de son bâton et qu'il n'était pas nécessaire de recourir au pistolet. L'argument ne me convainc pas. Si en se servant du pistolet à deux reprises avant de tirer sur Médéric Martin, ce dernier et la foule n'ont pas été intimidés, il semble difficile de croire qu'un bâton de policier aurait été suffisant pour rétablir l'ordre.

Nous avons une décision déjà ancienne dans la cause de *Stevenson* v. *Wilson* (1), dans laquelle les honorables juges Day, Smith et Mondelet ont décidé:

A magistrate charged with the preservation of the peace in a city, who causes the military to fire upon a person, whereby the latter is wounded, is not liable in an action of damages at the suit of the injured party, if it be made to appear that though there was no necessity for firing, yet the circumstances were such that a person might have been reasonably mistaken in his judgment as to the necessity for such firing.

Et j'attire l'attention sur les remarques suivantes des juges:

Day, J.—It is true that when calmly reviewing the occurrence by the light of subsequent information, we are inclined to think that no serious riot existed at the time the order was given; but the question was not what was the true state of affairs at that time, but whether a magistrate acting in exercise of his discretion at a time of great difficulty had reasonable grounds for doing what he did.

Smith, J., said the position of the magistrate in this case was one of peculiar difficulty, and he was entitled to claim the protection of the law when acting in the exercise of his discretion. Unless there could be shown such an absolute want of discretion on his part as almost amount to malice, the court would not hold him responsible for the consequences of what occurred. The evidence on this point must be strong and conclusive.

L'on peut voir, en lisant le rapport de cette cause, que la cour a semblé arriver à la conclusion que le maire de Montréal, lors de ces émeutes, avait commis une erreur de jugement en ordonnant ou en demandant à la troupe de faire feu sur la foule, mais n'était pas tout de même res-

(1) (1857) 2 L.C.J. 254.

ponsable en dommages pour cette erreur de jugement, qui était excusable dans les circonstances.

Je crois que Hébert était plus sérieusement menacé dans l'exercice de ses fonctions que le maire de Montréal ne l'était par l'émeute Gavazzi et qu'il avait parfaitement raison, dans les circonstances, d'avoir recours à son pistolet pour affirmer son autorité et se débarrasser de Médéric Martin, son agresseur. Il est parfaitement établi que ce dernier était un homme très fort, beaucoup plus jeune que le constable, et que ce dernier ne pouvait pas en avoir raison sans avoir recours à son arme. Il n'a certainement pas voulu le tuer; sur ce point son témoignage est accepté de part et d'autre; il avait simplement l'intention de le blesser pour le mettre hors de combat. Est-ce un mouvement de la victime qui lui tenait le poignet à ce moment-là qui a fait dévier l'arme et la direction de la balle? Nous ne pouvons que faire des conjectures à ce sujet. Une chose certaine, c'est que les autorités publiques n'y ont vu aucun acte criminel, et que ni le coroner, ni le procureur général n'ont cru que la responsabilité de Hébert était engagée au point de vue criminel.

M'inspirant du rapport du comité parlementaire sur l'émeute de Featherstone (Parl. Papers Imp. 1893-94, c. 7234), je dirais:

> The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed. * * *

Dans l'espèce actuelle, nous avons aussi

> a crowd which threatened serious injury, amounting to felony, to property and persons, and it became the duty of all peaceable subjects to assist in preventing this. The necessary prevention of such outrage on persons and property justifies the guardians of the peace in the employment against a riotous crowd of even deadly weapons.
>
> A guilty ringleader who under such conditions is shot dead dies by justifiable homicide * * * The reason is that the soldier who fired had done nothing except what was his strict legal duty.

Je crois, comme le juge de premième instance, que Hébert s'est justifié, qu'il n'a commis, eu égard aux circonstances et à sa position de constable, aucun acte illicite, partant aucun délit, ni quasi-délit; et sa responsabilité n'a jamais été engagée envers les représentants légaux de feu Médéric Martin.

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Je crois que l'appel d'Hébert devrait être acueilli favorablement et le jugement de la Cour Supérieure rétabli quant à lui, avec dépens en Cour Supérieure, en Cour du Banc du Roi et devant cette cour contre les intimés.

Appeal allowed with costs.

Solicitor for the appellant: *R. Beaudoin.*
Solicitor for the respondents: *L. Morin.*

1930
*May 6.
*June 11.

GREEN AND RIDDELL *v.* FRASER

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Trusts and trustees—Disposition of mining claims held in trust for sale—Trustee acting upon decision of majority of interests—Objection by minority interests—Conditions of trust agreement.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1) allowing the defendant's appeal from the judgment of Fisher J.A. (1) holding that the plaintiffs were each entitled to recover from the defendant the sum of $4,956.20 claimed against the defendant as the plaintiffs' trustee under a certain agreement. By the judgment of the Appellate Division (1) the plaintiffs' action was dismissed.

After hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs. Written reasons were delivered by Duff J., with whom the other members of the Court concurred, in which he expressed entire concurrence with the view of Middleton J.A. (2) as to the effect of the conditions subject to which the defendant was to have full power to deal with the claims, and agreed with Middleton J.A. that the defendant "was well advised" that his duty was to act upon the decision of the majority of interests to accept the offer made by the holders of the option.

Appeal dismissed with costs.

R. S. Robertson K.C. and *J. J. O'Connor* for the appellants.

T. N. Phelan K.C. for the respondent.

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

(1) 65 Ont. L.R. 90.

(2) 65 Ont. L.R. 90, at 108-110.

1930
*Oct. 14
*Oct. 27.

THOMAS RICHARDS (PLAINTIFF).....APPELLANT;

AND

BOARD OF TRUSTEES OF THE ATHABASCA SCHOOL DISTRICT No. 839, OF THE PROVINCE OF ALBERTA (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Schools—Termination by board of school trustees of teacher's employment—Alleged wrongful termination—Terms of agreement—Teacher's remedy—School Act, Alta., R.S.A., 1922, c. 51 (as amended 1923, c. 35), ss. 196, 199 (2), 137 (1) (o).

The defendant board of school trustees employed plaintiff as teacher. Under the agreement of employment, either party might terminate it by giving 30 days' written notice, "provided that no such notice shall be given by the board until the teacher has been given the privilege of attending a meeting of the board (of which five clear days' notice in writing shall be given to the teacher) to hear and to discuss its reasons for proposing to terminate the agreement." In terminating plaintiff's employment, said proviso was not observed, nor, as found by this Court on the evidence, was there any effective waiver by plaintiff of his privilege thereunder. Plaintiff sued for damages for wrongful termination.

Held (1): S. 196 of the *School Act* (R.S.A., 1922, c. 51, as amended 1923, c. 35, s. 8), which provided for an appeal to the Minister by "any teacher who has been suspended or dismissed by the board," had no application to deprive plaintiff of his right of action. S. 196† should be read as relating to a suspension or dismissal under s. 137 (1) (*o*), and not to a decision to terminate an agreement under s. 199 (2). Further, moreover, s. 196 contemplated a re-hearing on the merits by the Minister of the matter on which the board's decision was given; and, whether in the case of a dismissal or suspension under s. 137 (1) (*o*), or in the case of termination under a provision such as that in the agreement in question (if s. 196 applied in such case), there was contemplated, before appeal to the Minister, a consideration of the matter by the board after giving the teacher a full opportunity to be heard; and where no such opportunity was given, the board's right to dismiss or suspend under s. 137 (1) (*o*), or to terminate under such a provision in the agreement, did not come into operation; and s. 196 did not contemplate the supersession of the ordinary jurisdiction of the courts where the sole question was whether or not the

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

†Reporter's Note: Sec. 196 is dealt with, in this case, as it stood before the amendment of 1930, c. 39, s. 2, which brings the express wording of the section into conformity with the construction given in the present judgment.

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board had taken the necessary steps to put itself in the position to give an effective decision, and did not concern the merits of the decision itself.

Murray v. *Ponoka School District*, 24 Alta. L.R. 205, in effect overruled.

(2): In all the circumstances, the failure by the board to observe the terms of the agreement was a technical breach only; had they been followed, there was no doubt the agreement would have been terminated conformably thereto; plaintiff was entitled to recover as damages the wages to which he would have been entitled during the period required to make effective the stipulated proceedings for its termination (less amount earned during that period elsewhere). (He was not entitled to expenses incurred in moving: *French* v. *Brookes*, 6 Bing., 354).

APPEAL by the plaintiff (by special leave granted by the Supreme Court of Canada) from the judgment of the Appellate Division of the Supreme Court of Alberta dismissing his appeal from the judgment of Ives J. dismissing his action, which was brought to recover damages for alleged wrongful termination of his agreement of employment as school teacher by the defendant board of school trustees. The material facts of the case and questions in issue are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

O. M. Biggar, K.C., for the appellant.

H. G. Nolan for the respondent.

The judgment of the court was delivered by

DUFF J.—This appeal concerns the claim of the appellant for salary as school teacher in the respondents' District, under an agreement dated the 27th of July, 1927.

The pertinent provisions of the agreement are these:

2. The salary to be paid said teacher shall be at the rate of Sixteen Hundred Dollars per year, such salary to be increased annually as follows:

3. The said Board further binds and obliges itself and its successors in office to pay the said Teacher during the continuance of this Agreement the sum or sums for which it hereby becomes bound in accordance with the provisions of The School Act.

The salary earned shall be estimated as provided in Section 199 of The School Act, which is in part as follows:

"The salary of a Teacher shall be estimated by dividing the rate of salary for the year by 200 and multiplying the result obtained by the number of actual teaching days within the period of his engagement;

"Provided that if the salary stated in the Teacher's contract is given at a monthly rate, the rate of salary for the year shall be deemed to be a sum equal to twelve times the said monthly rate."

6. This agreement shall continue in force from year to year, unless it is terminated as hereinafter provided, or unless the Certificate of the Teacher has been revoked in the meantime.

Either party hereto may terminate the agreement by giving thirty (30) days' notice in writing to the other party:

Provided that no such notice shall be given by the Board until the Teacher has been given the privilege of attending a meeting of the Board (of which five clear days' notice in writing shall be given to the Teacher) to hear and to discuss its reasons for proposing to terminate the agreement.

8. All amendments to this agreement are subject to the provisions of The School Act and to the approval of the Minister of Education.

The appellant was present at a meeting of the respondents on the 20th of June, 1928. At that meeting there was some criticism by the secretary of the board directed against the conduct of the school by the appellant. Among other things, the sufficiency of the preparation of pupils for the forthcoming provincial examinations was adverted to. And after some discussion, one of the trustees, Mr. McLeod, suggested that it would be better to defer action until the results of the examinations were known. The appellant then asked the board, if they had any intention of terminating his agreement, to inform him of it, so that he might make arrangements for another position before the expiry of the summer vacation. Thereupon the chairman of the board appears to have said, (although there is some conflict of evidence upon this) that the matter would be further considered when the results of the examinations became known and the appellant would be communicated with. After the transpiry of the results of the examinations, a meeting of the board was held on the 4th of August, at which it was decided that a change should be made, and that the appellant should be given " the customary thirty days' notice " of the termination of his contract, and that applications for the vacant post should be advertised for. Notice in writing was accordingly sent by the secretary, but apparently the appellant did not receive it, and on his return to Athabasca on the 1st of September, it was read to him by one of the trustees in the presence of the secretary. It is stated in the respondents' factum that a meeting of the respondents was held on the 5th of September, at which the appellant was present with a representative of the Teachers' Alliance, and that the situation then was discussed, but apparently with no result.

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Admittedly the proviso of clause 6 of the agreement was not observed, and the contention on behalf of the respondents that there was an effective waiver by the appellant of his right under the proviso, is without support in the evidence.

The substantive defence of the respondents is that by force of section 196 of *The School Act,* the appellant's only remedy is by way of appeal to the Minister of Education. The courts in Alberta, following their previous decision in *Murray* v. *Ponoka School District* (1), gave effect to this defence.

Section 196* is in these words:

196. Any teacher who has been suspended or dismissed by the board may appeal to the Minister, who may take evidence and confirm or reverse the decision of the board and in the case of reversal he may order the reinstatement of such teacher;

Provided that if the teacher does not appeal from the decision of the board, or is not reinstated, the teacher shall not be entitled to salary from and after the date of his suspension or dismissal.

Before considering the argument founded upon this section, it is desirable to call attention to the terms of two other provisions of the statute.

By sec. 137 (1) of *The School Act* the powers of a school board are enumerated and it is (*inter alia*) provided that,

It shall be the duty of the board of every district, and it shall have power,

(*o*) to suspend or dismiss any teacher for gross misconduct, neglect of duty, or for refusal or neglect to obey any lawful order of the board and to forthwith transmit a written statement of the facts to the Department.

The other section is in these words:

199 (2) Unless otherwise provided for in the contract either party thereto may terminate the agreement for teaching between the teacher and the board of trustees by giving thirty days' notice in writing to the other party of his or its intention so to do.

It will be noticed that in article 6, the agreement reproduces, as one of its stipulations, the enactment of section 199 (2) with the addition of a proviso permitted by the section and sanctioned by the Minister.

The point in controversy, as touching the application of this section, is, whether or not, the phrase "any teacher who has been suspended or dismissed by the board" applies

(1) 24 Alta. L.R. 205; [1929] 2 W.W.R. 439.

*As it stood in R.S.A., 1922, c. 51, as amended 1923, c. 35, s. 8. See now later amendment, 1930, c. 39, s. 2 (Reporter's note).

to the appellant in the circumstances of this case. It is contended on behalf of the appellant that section 196 has no application to a decision by a board to effect the termination of an agreement under section 199 (2) or under a clause in the agreement embodying it.

I am unable to agree with the conclusion of the Alberta courts for two reasons. First, I think that, regarding the provisions above quoted as a whole, the more natural construction is to read section 196 as relating to a suspension or dismissal under section 137 (1) (*o*), and not to a decision to terminate an agreement under section 199 (2).

Then it appears to me that section 196 contemplates a re-hearing on the merits by the Minister of the matter in which the decision of the board is given. In the case of a dismissal or suspension under section 137 (1) (*o*), the Minister would have to consider whether any of the statutory causes had in fact arisen. In the case of the termination of an agreement under clause 6 (if I am wrong in thinking that section 196 does not apply to such a case), the question for the Minister would be whether the board had adequate reasons for terminating the agreement. In either case, it seems to me, the statute contemplates, before appeal to the Minister, a consideration of the matter by the board after giving the teacher a full opportunity to be heard. The appellant's agreement provides for this in express terms, but the law would attach an analogous condition to the exercise of the powers of a board in proceedings under section 137 (1) (*o*).

Where no such opportunity is given to the teacher, the board's right to dismiss or suspend under section 137 (1) (*o*), or to terminate the agreement under cause 6 of the agreement before us, does not come into operation. The board has in such circumstances no title in point of law to give a decision under the statute or the agreement, and any decision in fact given would be simply inoperative. An appeal to the Minister would be a most inappropriate remedy in such a case; and, in my opinion, section 196 does not contemplate the supersession of the ordinary jurisdiction of the courts, where the sole question is, whether or not the trustees have taken the necessary steps to put themselves in a position to give an effective decision, and does not concern the merits of the decision itself.

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The question of damages remains. The plaintiff is entitled to reparation in respect of the loss incurred by reason of the wrongful termination of his contract. Had the contract (art. 6) been complied with, there appears to be no probability that notice of termination of the contract would not have been given.

Indeed, there is no doubt as to the dissatisfaction of the board at the end of the term, or that action was postponed solely with a view to ascertaining the results of the examinations. There is no room for a suggestion that the board were actuated by any sort of personal feeling, or by any motive other than a desire to secure efficiency in the conduct of the school. In this, the board were simply doing their duty. They may have erred in judgment, there is always a possibility of that, but it was their duty to give effect to their judgment and there is no ground for supposing that the appellant could have invoked any consideration which would have altered their view. In all the circumstances, the failure to observe the terms of the proviso was a technical breach of contract only, in the sense that the observance of it would not, I am entirely convinced, have helped the appellant in any material way.

The appellant is entitled to be placed in the same position (so far as that can reasonably be done by pecuniary reparation) as if the contract had been performed; but if the strict terms of the engagement had been followed, there can be no doubt that the contract would have been brought to an end in conformity with its terms. As I have said, in my opinion, there would have been no appeal to the Minister under section 196. Therefore, the appellant is entitled to recover as damages, the wages to which he would have been entitled during the period required to make effective the stipulated proceedings for its termination. He is not entitled to the expenses incurred in moving. *French* v. *Brookes* (1). On the whole, I think it would be fair to calculate this period from the 5th of September; and therefore the period of five days, from the 1st to the 5th of September, must be taken into account In the result, the appellant is entitled to wages for forty-one days, computed in the manner directed by the contract, less the amount received from the Celtic School District, that is to say, to $207.50.

(1) (1830) 6 Bing. 354.

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RICHARDS v. ATHABASCA SCHOOL DISTRICT.

Duff J.

The appeal is allowed with costs in this Court and the Court of Appeal, and judgment will be entered for the appellant for the sum mentioned, with the costs of the action. The costs in the Alberta courts will be calculated according to the appropriate scale.

Appeal allowed with costs.

Solicitor for the appellant: *G. H. Van Allen.*

Solicitor for the respondent: *P. G. Thomson.*

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*May 7.

TATISICH (DEFENDANT) .....APPELLANT;

AND

HARDING ET AL. (PLAINTIFFS).....APPELLANTS;

AND

EDWARDS (DEFENDANT) .....RESPONDENT.

TATISICH (DEFENDANT) .....APPELLANT;

AND

EDWARDS (PLAINTIFF) .....RESPONDENT;

TATISICH (DEFENDANT) .....APPELLANT;

AND

GALL (PLAINTIFF) .....APPELLANT;

AND

EDWARDS (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Negligence—Motor vehicles—Driver of motor car swerving off pavement to avoid collision threatened through negligence of driver of another car, and on regaining pavement colliding with other cars—Question as to which driver was responsible for injuries caused by the collision.

APPEAL by the defendant Tatisich from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing her appeal from the judgment of Wright J. in the above mentioned actions, which were tried together.

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

(1) (1929) 64 Ont. L.R. 98.

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TATISICH v. EDWARDS.

Mrs. Tatisich (defendant in the three actions) was driving her motor car westerly, and Edwards (defendant in two of the actions and plaintiff in the other) was driving his car easterly, on the highway between Hamilton and Niagara, on August 12, 1928. It was alleged that Mrs. Tatisich turned out to pass a car ahead of her and that Edwards (coming in the opposite direction), in order to avoid a head-on collision with her car, swerved to his right off the pavement, and on returning to the pavement his car collided with others, causing injuries or loss to the plaintiffs.

Wright J. held that the accident was caused by the negligence of Mrs. Tatisich, and that Edwards was not chargeable with any negligence causing the accident, and gave judgment in all actions in favour of the plaintiffs against Mrs. Tatisich, and dismissed the actions against Edwards. This judgment was affirmed by the Appellate Division (1). Mrs. Tatisich appealed to the Supreme Court of Canada. The plaintiffs Harding et al. and Gall also appealed, in so far as their claims against Edwards were dismissed, and asked that, in the event of the appeal of Mrs. Tatisich being allowed, they be awarded judgment against Edwards. Leave to all said appellants to appeal to the Supreme Court of Canada was given by the Appellate Division.

After hearing argument by counsel for the appellant Tatisich, and counsel for the appellants Harding et al. and Gall having stated that they were satisfied to have the judgment below (as given against the appellant Tatisich) sustained as it stands, the members of the Court retired to consider the case, and on their return to the Bench, the Court, without calling on counsel for respondents, delivered judgment dismissing the appeal of the appellant Tatisich with costs. The Chief Justice stated that the Court was of opinion that the question involved was purely a question of fact on which the Court had the explicit finding of the trial judge, confirmed by the majority of the Appellate Division; that question of fact being whether Edwards had recovered sufficiently from the condition of nervous excitement, into which the rash act of the appellant Tatisich had thrown him, to be held responsible for

(1) (1929) 64 Ont. L.R. 98.

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what subsequently occurred, or, whether he should be regarded as still acting involuntarily under the influence of that condition; the Court took the view, notwithstanding Mr. Hellmuth's very able presentation of the appeal, that nothing had been shewn which would entitle it to determine the question before it otherwise than as the Appellate Division had done.

(The appeals of Harding et al. and of Gall, against Edwards, were, on counsel for the parties concurring, dismissed without costs.)

Appeal dismissed with costs.

I. F. Hellmuth K.C. and *G. C. Elgie* for the appellant Tatisich.

H. J. McKenna and *T. McCombs* for the appellants Harding et al.

L. W. Gay for the appellant Gall.

C. W. R. Bowlby for the respondent Edwards.

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*Feb. 26, 27, 28.
*Dec. 15.

THE HONOURABLE THE SECRETARY OF STATE OF CANADA AND CUSTODIAN (PLAINTIFF) APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY

AND

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA (DEFENDANTS) RESPONDENTS.

THE HONOURABLE THE SECRETARY OF STATE OF CANADA AND CUSTODIAN (PLAINTIFF) APPELLANT;

AND

IMPERIAL OIL, LIMITED

AND

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA (DEFENDANTS) RESPONDENTS.

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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SECRETARY OF STATE OF CANADA AND CUSTODIAN v. ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES.

THE HONOURABLE THE SECRETARY OF STATE OF CANADA AND CUSTODIAN (PLAINTIFF) APPELLANT;

AND

TORONTO POWER COMPANY, LIMITED

AND

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA (DEFENDANTS) RESPONDENTS.

THE HONOURABLE THE SECRETARY OF STATE OF CANADA AND CUSTODIAN (PLAINTIFF) APPELLANT;

AND

THE CITY OF MONTREAL

AND

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Companies and corporations—Ownership of shares or stock—State of war—War legislation—Canada and United States allied Powers—Seizure by Alien Property Custodian of United States of certificates of shares or stock, physically situate in United States, but issued by Canadian companies or corporations, and beneficially owned by alien enemies—Vesting orders obtained in Canada by Canadian Custodian—Conflicting claims between Canadian Custodian and United States Custodian—Consolidated Orders respecting Trading with the Enemy, 1916 (Can.)—Treaty of Peace (Germany) Order, 1920 (Can.).

The United States Alien Property Custodian, under powers conferred by Act of Congress, seized, between March 27, 1918, and April 27, 1919, certain share or stock certificates, then physically situate in New York, but issued by Canadian companies or corporations. The securities were, at the seizure dates, beneficially owned by alien enemies. The said certificates were: (1) share certificates and special investment note certificates issued by C.P.R. Co., the securities being registered in its branch registry office in New York and transferable there only; (2) bearer share warrants issued by I. Co. and transferable by delivery without anything further having to be done to perfect title; (3) certificates for City of Montreal debenture stock, transferable only on the City's books by the registered holder or by attorney duly constituted; (the certificate stated that it "shall not constitute the title to the stock, which title shall consist exclusively in registry in the Debenture Stock Register of the City"); (4) certificates for debenture stock issued by T. Co. and transferable on its books either in London (Eng.) or in Canada; the stock in question was on the Toronto

register. All said certificates (except the bearer share warrants) were transferable by assignment in writing in common form, and the registered owner had executed the usual assignment and power of attorney, in most cases in blank. The securities were listed and dealt in on recognized stock exchanges. The said Custodian had the assigned certificates presented to the issuing companies and himself or his nominee registered as owner; as to the T. Co. securities, this was not done until a time later than the vesting orders hereinafter mentioned. The Canadian Custodian, in October, 1919, under the authority of s. 28 of the Consolidated Orders respecting Trading with the Enemy, 1916 (put into force under the *War Measures Act, 1914*, Can.) obtained Canadian court orders (except as to the City of Montreal stock) purporting to vest in himself the shares and stock in question. He brought the present actions in 1926, and the question in issue was, which of the two custodians was entitled to the securities.

Held (affirming judgment of Maclean J., President of the Exchequer Court of Canada, [1930] Ex. C.R. 75), that the United States Custodian was entitled to the securities.

Per Rinfret, Lamont and Smith JJ.: The Canadian Consolidated Orders, 1916, did not intend or effect prevention of an allied Power from validly seizing shares of Canadian companies the certificates for which were physically situate in the allied country. The seizures by the United States Custodian (having regard to the terms of the authorizing U.S. law) vested in him, as against the enemy nationals, not only the possession of the paper certificates, but every property right and interest to which the beneficial owners thereof would have been entitled had a state of war not existed. Both by Canadian and by United States law, share certificates endorsed in blank by the registered owner give the right to the lawful holder thereof to be registered as owner (*Colonial Bank* v. *Cady*, 15 App. Cas., 267, at 277; *Disconto-Gesellschaft* v. *U.S. Steel Corp.*, 267 U.S. 22, affirming 300 Fed., 751); and this right existed in the United States Custodian (*Disconto* case, *supra*) and was, prior to and at the time of the Canadian court vesting orders, a "property, right or interest" in him, to the exclusion of any such in an enemy, in respect of the securities in question. (The C.P.R. Co. shares and notes, registered in the company's New York office in the name of his nominee, and the I. Co. bearer share warrants, were also property in the United States; *quaere* as to the other securities in this regard). His right to have himself or his nominee registered as the owner of the securities was subject to any assertion by Canada of her paramount legislative power over the companies which had issued the certificates. Canada did assert this power when the shares were vested in the Canadian Custodian by the courts under the Consolidated Orders, but she relinquishes her claim to all vested property which was not enemy property at the time of the vesting (Canadian Consolidated Orders, 1916, ss. 28, 33, 36 (1), and Treaty of Peace (Germany) Order, 1920, ss. 33, 34, 42 (2) (3), particularly considered in this regard).

Per Duff and Newcombe JJ.: The Canadian Consolidated Orders, 1916, had no intention or effect of nullifying in Canada proceedings taken by an allied Power to reduce into possession such securities so situated as those in question. The principle of the *Disconto* case (*supra*) applied, and the proceedings taken by the American Custodian had the effect of investing him with the rights of a transferee of the securi-

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ties, including the right to demand registration. Therefore Order 28, which authorized only the vesting of property "belonging to or held or managed for or on behalf of an enemy," had no application to any of the properties in question. Ss. 33 and 34 of the Treaty of Peace (Germany) Order, 1920, which Order was passed pursuant to the *Treaties of Peace Act, 1919*, and was for the purpose of carrying out the Treaty of Peace and giving effect to its provisions, must be read in the light, and within the limitation, of that purpose; the Treaty, while ratifying the administrative orders of Canada acting within her proper sphere, also contemplated ratification of the administrative orders of the United States acting within her proper sphere; and said s. 34 could not be read as giving such an effect to a vesting order purporting to have been made under the Consolidated Orders as would interefere with the operation of an administrative act by the United States properly done within her sphere. As to the T. Co. securities, assuming that the bare legal title of the enemy owner had not been completely extinguished at the time the Canadian court vesting order was made, yet that bare legal title, vested under the vesting order in the Canadian Custodian, was subject to be devested by the exercise of the rights which the American Custodian had acquired under his proceedings; the effect of the Treaty was that the rights so acquired became properly exercisable notwithstanding the existence of the vesting order.

APPEAL by the plaintiff (the Honourable the Secretary of State of Canada and Custodian under the provisions of the Treaty of Peace (Germany) Order, 1920) from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that on the 10th day of January, 1920, the right, title, property or interest in the securities in question was not vested in an enemy or in the plaintiff but was vested in the defendant, the Alien Property Custodian of the United States of America.

The material facts and the issues in question are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal was dismissed with costs.

W. N. Tilley K.C., A. Geoffrion K.C., and *Thomas Mulvey K.C.* for the appellant.

N. W. Rowell K.C., G. H. Montgomery K.C. and *W. F. Chipman, K.C.* for the respondent the Alien Property Custodian of the United States.

The judgment of Rinfret, Lamont and Smith JJ. was delivered by

(1) [1930] Ex. C.R. 75.

LAMONT J.—These are four appeals from judgments delivered by the President of the Exchequer Court in four cases tried together (1). They all contain conflicting claims to jurisdiction between the Canadian Custodian of Alien Enemy Property and the Alien Property Custodian of the United States of America.

The four cases are very similar although each in some respect differs from the others. They are test cases and they have to do with the seizure in New York by the Alien Property Custodian of certain securities issued by Canadian companies, which securities, at the date of the seizure, were beneficially owned by alien enemies. The facts are not in dispute and, as far as material in the view I take of the rights of the parties, may be stated as follows:—

On May 2, 1916, after the outbreak of the Great War, the Governor General of Canada in Council, acting under the authority of the *War Measures Act, 1914,* put into force the Consolidated Orders respecting Trading with the Enemy, section 6 of which reads:—

> 6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette,* (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection) by or on behalf of an enemy of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such a transfer.

Securities were defined as including stocks, shares, annuities, bonds, debentures or debenture stock, or other obligations issued by or on behalf of any government, municipality or other authority, or any corporation or company within or without Canada.

Section 28 of the Orders provided that any superior court of record within Canada or any judge thereof may, on the application of the Canadian Custodian, vest in him any real or personal property belonging to or held or managed for or on behalf of an enemy.

On April 6, 1917, the United States entered the war on the same side as Canada and the two countries were thereafter allies. After the United States entered the war, Congress enacted and the President approved of the *Trading with the Enemy Act.* That Act provided that:—

(1) [1930] Ex. C.R. 75.

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If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a licence granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred * * * or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * * (Sec. 7 (c)).

Acting under the authority vested in him the Alien Property Custodian (hereinafter called the United States Custodian) demanded the property represented by the certificates in question, then physically situate in New York, all of which had been issued by Canadian companies existing under Canadian law with their respective head offices in Canada.

The certificates delivered in response to the demand were certain specified,

(1) Common Stock Certificates and Special Investment Note Certificates issued by the Canadian Pacific Railway Company. Both classes of certificates were transferable only on the books of the company, but the company under its general powers maintained a registry in New York and these securities were on that register, where alone they could be transferred.

(2) Bearer Share Warrants issued by the Imperial Oil Company and transferable by delivery without anything further having to be done, either in Canada or the United States, to perfect title.

(3) Certificates for Debenture Stock issued by the City of Montreal. These were transferable only on the books of the city by the registered holder or by attorney duly authorized.

(4) Certificates for Debenture Stock issued by the Toronto Power Company and transferable on the books of the company either in London, England, or in Canada. The stock in question was on the Toronto register.

These certificates were seized, that is demanded and received, between March 27, 1918, and April 27, 1919.

As pointed out by the learned President of the Exchequer Court in his judgment (1), all these securities, except the bearer share warrants, were transferable by assignment in writing in common form either upon the certificate

(1) [1930] Ex. C.R. 75, at 84.

itself or by another separate instrument, and, in practically every case, the registered owner had executed the usual assignment and power of attorney, though in most cases in blank. After the seizure of these certificates the United States Custodian caused the assigned certificates to be presented to the companies issuing them, and had himself or his nominee registered as the owner thereof.

By an order of a superior court in Canada, dated October 14, 1919, the Canadian Custodian had vested in himself the shares of the Toronto Power Company and of the Imperial Oil Company, the certificates for which had been seized by the United States Custodian. By a similar order, dated October 17, 1919, he had likewise vested in himself the shares and notes of the Canadian Pacific Railway Company. These shares and notes at the time the vesting order was made were registered in the books of the company in the name of the nominee of the United States Custodian. No vesting order was obtained for the debenture stock of the City of Montreal.

In the early part of 1926 the Canadian Custodian brought an action against each of the said companies and made the United States Custodian a party defendant. The statement of claim alleged that the securities in question therein were, on the 10th day of January, 1920 (the date of the coming into force of the *Treaty of Versailles*), property belonging to an enemy; that the paper certificates for the securities had been seized, after war had broken out between the United States and Germany, by the "Alien Property Custodian for the United States"; that such seizure was without legal justification; that the securities were, at all material times, property within Canada, and that the plaintiff was entitled to them. The defendant companies in effect submitted their rights to the court.

The United States Custodian in his plea alleged that at the time the securities were seized they were the property in the United States of alien enemies, and that the seizure was in accordance with the law of the United States. He also set up that at the time the Canadian Custodian obtained the court orders vesting the securities in himself they had ceased to be enemy property.

The President of the Exchequer Court, in each case, held that the United States Custodian was entitled to

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the securities the certificates for which he had seized (1). The plaintiff now appeals to this court.

In view of the fact that the United States Custodian was the first to take any action to deprive the enemy nationals of their interest in the securities, it is convenient to inquire, in the first place, what right or interest he secured by his seizure as against the enemy beneficially entitled thereto? The securities stood in the books of the respective companies in the names of persons or corporations not shewn to have been enemies, but it is admitted that, in each case, they were held on behalf of an enemy.

In a statement of fact agreed to by all parties it is stated that, except as regards the question of jurisdiction between the United States and Canada, the formal regularity under United States law of the steps taken by the United States Custodian to obtain title to the securities is not contested by the appellant.

By an executive order made by the President of the United States, under the *Trading with the Enemy Act,* and bearing date February 26, 1918, it is declared that the Alien Property Custodian may make a demand for any money or other property in the United States belonging to, or held for, by or on account of, an enemy not holding a licence under the Act; that such demand, unless expressly qualified or limited, shall be deemed to include every right, title, interest and estate of the enemy in the money or other property so demanded, as well as every power and authority of the enemy thereover; that notice of such demand may be given to any person who, alone or jointly with others, may have the custody or control of, or may be exercising any power or authority over the money or other property, and that when such demand shall be made, and notice thereof given, such " demand and notice shall vest in the Alien Property Custodian all the estate and interest of the enemy." This estate and interest is defined as including not only that which actually existed, but also that which might or would exist if the existing state of war had not occurred.

(1) [1930] Ex. C.R. 75.

The war between Great Britain and Germany was brought to an end by the *Treaty of Versailles*. Art. 297 (*d*) of that treaty reads as follows:—

As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

By paragraph 1 of the Annex the validity of all vesting orders and of all other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, in pursuance of war legislation with regard to enemy property, rights and interests, was confirmed, and it was there provided that no question should be raised as to the regularity of a transfer of any property dealt with in pursuance of such order, direction, decision or instruction.

It is true that the United States Government did not directly ratify the *Treaty of Versailles*, but, by the *Treaty of Berlin*, which ended the war between Germany and the United States, Germany gave to the United States, and the United States accepted, all the benefits which the *Treaty of Versailles* gave to the Allied Powers or their nationals. The seizure of the certificates and the agreements which put an end to the war between Germany and the United States, therefore, vested in and confirmed to the United States Custodian, as against the German nationals, not only the possession of the paper certificates, but every property right and interest to which the beneficial owners thereof would have been entitled had a state of war not existed.

For the appellant it was contended that, apart from the confirmation of the Canadian vesting orders by the *Treaty of Versailles*, the seizures of the securities by the United States Custodian, and confirmation thereof by Germany, did not in any way affect the appellant's right to the securities and that for two reasons:

(1) Because the Canadian Consolidated Orders, which were in force prior to the dates on which the seizures were made, "froze," so to speak, in the hands of the German nationals all property rights which they had in the securities and prevented any rights therein passing from them

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either by their own acquiescence or by seizure by one of the Allied Powers, and

(2) Because the paper certificates were not themselves property in the United States, but only the evidence of property situate in Canada.

The first of the above cententions cannot, in my opinion, be supported in so far as it claims that it was either the effect or intention of the Consolidated Orders to prevent an allied power from validly seizing shares of Canadian companies the certificates for which were physically situate in the allied country.

The object of the Consolidated Orders was, broadly speaking, to curtail the commercial resources of the enemy and to prevent unregulated intercourse with him altogether. It was sought to secure these objects by depriving an enemy owner of property in Canada of all beneficial interest therein during the war. It was recognized that under modern economic conditions property rights had come to consist, to a considerable extent, of intangible choses in action, evidenced by debentures, bonds, and share certificates, many of which found their way into countries other than that in which the company was domiciled. When duly assigned in blank these securities were traded on the international exchanges, and passed from one person to another as property. As in the present case the shares might be standing in the books of the companies issuing them in the names of persons who were not, or were not known to be, enemies. In such cases the only mode of ascertaining what shares were enemy held, was for the Government of the country, in which the share certificates were physically situate, to require all persons holding any such certificates to furnish a list thereof. Under these circumstances it cannot, in my opinion, be held that the Consolidated Orders, which were directed solely against the enemy, were intended to prevent the only allied country which could discover what shares were in reality enemy owned, from taking the steps necessary to effectively deprive the enemy of the power to dispose of them. By his action the United States Custodian brought about the very state of affairs which the Consolidated Orders were intended to secure.

Again, that which is prohibited by the Consolidated Orders is the transfer of enemy property. A "transfer" within the meaning of this prohibition, in my opinion, implies an act plus an intention to pass the property, something done with acquiescence of the enemy owner, or for his benefit. A seizure of enemy property by the United States Custodian against the enemy's will and contrary to his interests, does not, as I read the Orders, come within the mischief which it was the purpose of the Orders to prevent. A reference to the definition of "securities" shews that the framers of the Orders considered that shares in a company or corporation *without Canada* would, if the certificates therefor were in Canada, be considered enemy property here.

The next question is, were the certificates seized property rights or interests in the United States? It has been said that the law of the place where the certificates actually are, determines who shall be the owner thereof, while the law of the company's domicile determines what interest in the company's stock the possession of these certificates confers upon a holder who has lawfully acquired them. *Colonial Bank* v. *Cady* (1). Under United States law the United States Custodian became, by his seizure, the lawful owner of the certificates and of the entire beneficial interest of the enemy in the shares they represented, and he became such owner before the Canadian Custodian had applied to the court for an order vesting the securities in himself. It is pertinent, therefore, to inquire if, on October 14 and October 17, 1919, when the Canadian Custodian applied to the courts for vesting orders, there was any property, right or interest in an enemy in respect of the securities in question. Under section 28 of the Consolidated Orders, all the court was authorized to vest was the property real or personal (including legal and equitable rights arising therefrom) "belonging to or held or managed for or on behalf of an enemy." If section 28 stood alone it would seem reasonably clear that when the vesting orders were obtained there was no property right or interest belonging to an enemy which could be vested in the Canadian Cus-

(1) (1890) 15 App. Cas. 267.

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todian. With section 28, however, must be read section 33 of the same Orders:—

33. Where a vesting order has been made under these orders and regulations as respects any property belonging to or held or managed for or on behalf of a person who appeared to the Court making the order to be an enemy or enemy subject, the order shall not nor shall any proceedings thereunder or in consequence thereof be invalidated or affected by reason only of such person having prior to the date of the order, died or ceased to be an enemy or enemy subject or subsequently dying or ceasing to be an enemy or enemy subject, or by reason of its being subsequently ascertained that he was not an enemy or an enemy subject as the case may be.

This section envisages the probability of vesting orders being made covering property belonging to a person not in fact an enemy although appearing to the court making the order to be so, and provides that such an order shall be valid and the property vested in the Canadian Custodian, notwithstanding that it was not in fact enemy property at the time of the vesting.

Then section 36 reads:—

36 (1). The Custodian shall, subject to all other provisions of these orders and regulations, hold any money paid to and any property vested in him under authority of any of these orders and regulations until the termination of the present war, and shall thereafter deal with the same as the Governor General in Council may by Order in Council direct.

* * *

In view of these provisions the intention, in my opinion, was that the title of all property covered by the vesting orders should remain in the Canadian Custodian until after the close of the war when the rights of non-enemy owners would be provided for and justice done by an Order in Council. That Order in Council was passed and is known as the Treaty of Peace (Germany) Order, 1920. Section 33 of that Order is as follows:

33. All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or heretofore belonging to enemies, and in the possession or control of the Custodian at the date of this Order, are hereby vested in and subject to the control of the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy, such property, right or interest shall be vested in and subject to the control of the Custodian, who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

and the material part of section 34 reads:—

34. All vesting orders * * * and all other orders, directions, decisions and instructions of any Court in Canada or any Department of the Government of Canada made or given or purporting to be made or

given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to the property, rights and interests of enemies, * * * are hereby validated and confirmed and shall be considered as final and binding upon all persons, subject to the provisions of Sections 33 and 41.

By this section the vesting orders of October 14 and October 17, 1919, which covered all the securities in question (except the debenture stock of the City of Montreal) were validated and confirmed and made binding upon all persons, subject to section 41.

Section 41 (2) and (3) reads as follows:—

(2) In case of dispute or question whether any property, right or interest belonged on the tenth day of January, 1920, or theretofore to an enemy, the Custodian * * * may proceed in the Exchequer Court of Canada for a declaration as to the ownership thereof, notwithstanding that the property, right or interest has been vested in the Custodian by an order heretofore made * * *.

(3) If the Exchequer Court declares that the property, right or interest did not belong to an enemy as in the last preceding subsection mentioned, the Custodian shall relinquish the same * * *.

It does not seem to me to be material whether we consider all the securities vested in the appellant by the orders of the court as being property heretofore belonging to enemies and in the possession of the Custodian at the date the Treaty of Peace (Germany) Order came into force (April 14, 1920), under section 33, or as coming within the vesting orders mentioned in section 34. If the former they come expressly within the language of section 41; if the latter the vesting was confirmed subject to section 41. In either case section 41 (2) and (3) applies.

The position taken by the Canadian authorities in enacting section 41 appears to me to be this: They say: "The war is now over, there are certain properties vested in our Custodian by orders of the court, which, it is claimed, were not enemy properties in Canada either when the vesting orders were made or when the Treaty of Peace (Germany) Order, 1920, came into force, we will, therefore, leave it to the Exchequer Court to say whether or not such is the case. If it is, our Custodian will relinquish all his claims to these properties." Leaving the determination of these disputes to the Exchequer Court necessarily implies that the court would determine the rights of the parties in cases in which vesting orders were made as of the date of the vesting and in cases in which no vesting order was made, as of the 14th of April, 1920.

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As section 41 was enacted for the purpose of doing full justice to any person, not an enemy, whose property had been vested in the appellant, the intention, in my opinion, was that the rights of the contending parties were to be determined as though the vesting orders had not been made and, in light of those considerations which should, and undoubtedly would, have guided the superior courts in making the vesting orders had all the facts relevant to the ownership of the securities, which are now before us, been before those courts. There would be no object in referring the question to the Exchequer Court if that court was bound to maintain the vesting orders.

What were the rights of the parties when the applications for the vesting orders were made? Would the securities have been recognized by Canadian law as property rights or interests in the United States if the facts had all been before the Canadian courts? In so far as the Canadian Pacific Railway shares and notes are concerned there can, in my opinion, be no doubt. At the time of the application to vest these shares and notes in the Canadian Custodian the nominee of the United States Custodian had already been registered as the owner thereof in the books of the company in the United States. They were, therefore, property in the United States. The share warrants of the Imperial Oil Company, being payable to bearer, were property wherever they were physically situate, for they could be effectively dealt with there. *Brassard* v. *Smith* (1). The debenture stocks of the Toronto Power Company and of the City of Montreal stand in a somewhat different position, as the transfers of these stocks were required to be registered in Canada. In my opinion, however, we do not in this appeal have to resort to rules more or less artificial in character which have been adopted to determine the local situation to be attributed to the various assets of a deceased person, in order to determine who would be entitled under Canadian law to be registered as owner of the securities. I think the question may be determined as to all the securities on the ground that, both by Canadian law and the law of the United States, share certificates indorsed in blank by the registered owner are,

(1) [1925] A.C. 371.

in the hands of a lawful holder, recognized as "property, rights, or interests" which entitles the possessor to be registered as owner. In *Colonial Bank* v. *Cady* (1), Lord Watson used this language:—

> When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour.

His Lordship goes on to point out that "delivery" does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right, and farther on he says:—

> It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner.

The demand of the United States Custodian for the certificates, and their delivery to him by the agent or trustee of the enemy, although in pursuance of a compelling statute, was, in my opinion, "delivery" within the meaning of Lord Watson's judgment. *Disconto-Gesellschaft* v. *U.S. Steel Corporation* (2), affirmed by the Supreme Court of the United States (3).

In this latter case the Public Trustee as English Custodian had seized in England certificates indorsed in blank representing certain shares in the United States Steel Co., a New Jersey corporation, which were beneficially owned by German companies. After the close of the war these enemy companies brought an action in the United States, against the U.S. Steel Co. and the Public Trustee, claiming that the seizure of certificates in England did not constitute a seizure of the shares of the New Jersey corporation represented thereby. It was held that the seizure in England transferred the title to the certificates to the Public Trustee by English law, and, by the law of New Jersey and the law of England the owner of such certificates may

(1) (1890) 15 App. Cas. 267, at 277. (2) 300 Fed. 751.
(3) (1925) 267 U.S.R. 22.

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write a name in the blank indorsement and thus entitle the nominee to become registered as owner of the shares; the Trustee was, therefore, entitled to the securities. In giving the judgment of the Supreme Court of the United States, Mr. Justice Holmes said:—

> Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the property to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books.

But for the existence of war conditions the beneficial owners of the shares could have demanded the certificates representing the shares from their trustees in the United States who were the registered owners and, if the trustees failed to deliver them duly endorsed, to the beneficial owners, these latter could have obtained from the American courts an order declaring the registered owners to be trustees for them and directing that the certificates be delivered up. With such a declaratory order and the certificates the beneficial owners would, on an application to Canadian courts, have been entitled to an order directing the respective companies issuing the shares to register them in the name of the beneficial owners. This right to compel title passed to the United States Custodian on the seizure of the certificates. Even if this right could not be termed property in its strictest sense, it is, in my opinion, a right or interest in property which, under both Canadian and United States war legislation, was intended to be dealt with as property of which the beneficial enemy owner was to be deprived.

The United States Custodian having vested in him all the interest of the enemy owner in the securities in question and having in his possession the certificates representing these securities duly indorsed, was entitled, under both Canadian and United States law, to have himself or his nominee registered as the owner thereof, provided there was no assertion by Canada of her paramount legislative power over the companies which had issued the certificates. Canada, in my opinion, did assert her paramount power

when the shares were vested in the appellant by the courts under the Consolidated Orders but, as one would expect from a civilized country, she relinquishes her claim to all vested property which was not enemy property at the time of the vesting. As all the securities in question had ceased to be enemy property when vested in the appellant, the Exchequer Court, in my opinion, was right in awarding them to the United States Custodian. I would, therefore, dismiss the appeal with costs.

The judgment of Duff and Newcombe JJ. was delivered by

DUFF J.—These appeals severally concern: (1) shares and special note certificates of the Canadian Pacific Railway Company, (2) bearer share warrants of the Imperial Oil Limited, (3) debenture stock of the Toronto Power Company Limited, and (4) consolidated stock of the City of Montreal; to which the appellant claims to be entitled as Canadian Custodian of Alien Property, as against the respondent, the Alien Property Custodian for the United States of America.

The facts out of which the controversy arises can be stated very briefly. The Canadian Pacific Railway Company's securities were, at the material time, represented by certificates in the name, as to the shares, of one Lowitz, and as to the note certificates, in the name of Lowitz and others. Transfers in blank, executed by the holders named in the certificates, were endorsed upon them. The certificates were in the possession of Speyer & Company in New York. The registered holders of the shares, as well as Speyer and Company, who were the depositaries of the certificates, held them in all respects on account of the Deutsche Bank, a German national. These shares and note certificates were registered in New York in the company's branch registry office there, and were transferable there and there only. The legal title to the security was in each case in the registered owner, but the securities were regularly dealt with on the recognized stock exchanges, by means of the certificates which, with the transfers endorsed were transferable by delivery; the owner of such a certificate, so endorsed, being recognized by the company as entitled to insert a name in the

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blank transfer, and to have the person so named registered as owner. On the 28th March, 1918, the respondent, the American Custodian, acting under powers conferred upon him by Acts of Congress, determined that these securities were enemy property, and required, accordingly, delivery of the certificates to his nominee, and subsequently caused the shares and certificates to be registered in the proper registry in the name of his nominee. Subsequently, on the 17th of October, 1919, a vesting order purporting to be made under Order 28 of the Canadian Consolidated Orders of 1916, respecting trading with the enemy, was obtained by the appellant, vesting the shares and note certificates in him.

The bearer share warrants of the Imperial Oil Company are warrants declaring that the bearer is entitled to a specified number of shares in the capital stock of the Imperial Oil Company.

The Supplementary Letters Patent of the Company provide (paragraph 7): "The bearer of a share warrant shall be deemed to be a shareholder of the Company for all purposes and to the full extent, subject always to the provisions of the Companies Act and of these Supplementary Letters Patent in that behalf."

On the 14th of September, 1918, the warrants were in the custody of the Guarantee Trust Company in New York, who held them for account of one Heideman, an alien enemy; and on that date they were, pursuant to the demand of the American Custodian, delivered to his nominee as enemy property. Subsequently, on the 14th of October, 1919, the appellant obtained a vesting order, vesting these warrants in him as Custodian.

The consolidated debenture stock of the Toronto Power Company was registered in the name of one Wallach, who held it on behalf of the Verdeutch Bank, an enemy alien. The stock was represented by certificates with blank transfers endorsed executed by Wallach which, on the 13th of May, 1918, were in possession of Kuhn, Loeb & Company, in New York; on that date these certificates were, on demand of the American Custodian, delivered into the possession of his nominee as enemy property. These certificates entitled the registered holder of them to participate in the benefit of certain sums (principal and interest) pay-

able to the British Empire Trust Company of London, England, under a certain trust deed. The registry was in Toronto, and the legal title to the stock was vested in the person there registered as owner, and was transferable on the books there, but the certificates were dealt with on recognized stock exchanges, and passed, with the endorsed transfer executed in blank, by delivery; and the company recognized such transferees of certificates as entitled to be registered as the legal owners of the stock.

The consolidated stock of the City of Montreal was registered in the name of the Hartford Trust Company, a trustee for the South German Reinsurance Company, the last mentioned company being an alien enemy. On the 26th day of April, 1919, the American Custodian demanded the certificates, and on a later date the stock was transferred into the name of his nominee. In this case no vesting order was obtained. A condition governing the transfer of this stock is expressed in these words:

> This stock can be transferred on the books of the City only by the registered holder or by attorney duly constituted, and the capital thereof will be paid to whoever is the registered holder at its maturity, but this certificate shall not constitute the title to the stock, which title shall consist exclusively in registry in the Debenture Stock Register of the City.

The learned President of the Exchequer Court, before whom the action was tried, dismissed the claim of the appellant on the ground (to state it very summarily) that the respondent, the American Custodian, had, by the proceedings outlined above, acquired a title to the securities in dispute (1).

The judgment is attacked in two ways: first, it is said that the Consolidated Orders of 1916 made absolutely inoperative any transfer of any security issued or managed by any Canadian "company or municipal authority, or other body" after the publication of these Orders, and that consequently, the American Custodian could not by the proceedings mentioned acquire the securities in question. Second, it is said that these securities were, within the meaning of s. 33 of the Treaty of Peace Order, 1920, "property" or "rights" or "interests," "in Canada" which, prior to the date of the Order, 14th April, 1920, belonged to enemies, and, at the date of the Order, were in "pos-

(1) [1930] Ex. C.R. 75.

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session or control of the Canadian Custodian," and that by force of s. 33, they became "vested in and subject to the control of the Custodian"; and furthermore, that, by force of s. 34 of the same Order, the vesting orders which had been obtained in respect of three of the groups of securities, as above explained, are, in point of law, "final and binding upon all persons," and that the designation "all persons," includes the respondent, the American Custodian. These contentions can most conveniently be considered in the order in which I have stated them.

And first, of the effect of the Consolidated Orders of 1916. There can be no doubt that Order 6 of the Consolidated Orders, which deals specifically with securities of the kind we are concerned with, is sweeping in its scope, and is absolute in its terms. It applies to securities issued by all Canadian companies, municipal and other corporations and bodies, and, read literally, it nullifies any unlicensed transfer of any such security "by or on behalf of an enemy" made after the publication of the Consolidated Orders, and prohibits all such companies, corporations and other bodies taking notice of any such transfer. No exception is made in favour of securities transferable by delivery or in favour of persons acquiring such securities for value, without notice of the enemy interest. The point in controversy is whether or not this Order, as well as other Orders dealing with other phases of trading with the enemy, had the effect of nullifying, in Canada, proceedings taken by allied and associated powers for the purpose of reducing into possession securities of the character here in question. If the contention of the appellant is right, then, quite independently of the intervention of the appellant, it was the duty of the companies and corporations concerned to refuse to recognize the application of the alien custodian of the United States to be registered as the holder of the securities, of which he had taken possession. Not only was it the duty of the company or corporation so to refuse, but, by taking notice of and acceding to such an application, the company or corporation which did so exposed itself to the penalties of Orders 45 and 46.

The learned President of the Exchequer Court has decided this point adversely to the appellant upon his con-

struction of the Consolidated Orders as well as upon the authority of the decision of the Supreme Court of the United States, in *Disconto-Gesellschaft* v. *U. S. Steel Corp.* (1). The issues there concerned the right of the Public Trustee of the United Kingdom, as Custodian of Alien Property, to be registered as the owner of certain shares of the United States Steel Company, which were represented by certificates in the name of a broker domiciled in England with a transfer endorsed executed in blank by the broker, and held by the appellants, a German corporation and an alien enemy; which certificates, together with the right of the appellant to the shares, had been vested in the Public Trustee by an order of the Board of Trade. As regards certificates of the character described, the court said:

> Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner any one to whom the person declared by the paper to be owner has transferred by the endorsement provided for, wherever it takes place. It allows an endorsement in blank, and by its law as well as by the law of England an endorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books.

This statement applies *mutatis mutandis* to the securities in question here, with the exception of the bearer share warrants, the ownership to which passes by delivery, without registration.

I must here advert to an argument advanced regarding the City of Montreal consolidated stock and the Toronto Power Company stock. There can be no doubt that in both these cases the legal title to the stock could be transferred only upon the books of the corporation; but in that respect the securities adverted to do not differ from the securities under discussion in the judgment just quoted, or from those which are the subject of Lord Watson's observation in *Colonial Bank* v. *Cady* (2):

> The original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the Company as entitled to vote and draw dividends in respect of the shares.

The important point is that, in the case of the securities of the City of Montreal and of the Toronto Power Com-

(1) (1925) 267 U.S. R. 22. (2) (1890) 15 App. Cas. 267, at 277.

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pany as in other cases (including the case of the Canadian Pacific Railway Company), the corporation, having presented to it a certificate bearing the name of the registered owner, together with a transfer executed by him, will register, and is bound by law to register as owner the transferee named in the transfer, notwithstanding the fact that the transfer may have been originally executed in blank, and may have passed through numerous hands before the name of the transferee was inserted. The law of this country as applicable to the corporations with which we are concerned, recognizes that shares, and particularly those which are regularly the subjects of trading on stock exchanges, are sold and bought by the delivery of a certificate accompanied by a transfer executed in blank, and that the market price of the shares is paid upon delivery, which is treated as the execution of the sale, because it confers upon the person receiving the document a title, as Lord Watson says, in the case already cited (1), "legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner."

There is no doubt, I repeat, that the terms of Order 6 are quite comprehensive enough to reach any such transfer of the securities of a Canadian corporation made by or on behalf of an alien enemy, and, if effect be given to the *ex facie* sense of its terms, to "strike it with sterility." But the Supreme Court of the United States, in the *Disconto* case (2), took the view that scrip and certificates, which, in the degree manifested by the practice described, stand for the securities which they evidence, may be subject, not only as pieces of paper, but as representing those securities, to appropriation in time of war by a sovereign power exercising its right to appropriate enemy property, and that such appropriation will invest such sovereign power with the title legal and equitable against the corporation which has issued the security, which in ordinary times would have passed to a transferee by delivery. That is the view which the Supreme Court of the United States took in the *Disconto* case (2) of an appropriation

(1) *Colonial Bank* v. *Cady*, (1890) 15 App. Cas. 267, at 277-278.
(2) (1925) 267 U.S.R. 22.

by the Public Trustee in England of certificates of shares in an American company. The rule was applied in favour of the Public Trustee, that the law of the place where the certificate was must determine whether or not the transaction had the effect of investing the Public Trustee with the rights of a transferee of the shares, including the right to demand registration.

The question we have to consider is whether the Consolidated Orders, as the appellant contends, displace this principle, or rather whether, in the system set up by the Consolidated Orders, there is room for the operation of this principle. We must not overlook the fact, I think, that this method of dealing with enemy securities, by seizing, that is to say, the document of title, was practised freely, and, we may assume, wherever possible. Obviously, a security which can be transferred by delivery of a document in such a way as to leave no trace of the hands through which it passes, can be most effectively immobilized by taking possession of the document. It was, no doubt, within the power of Canada, and, it may be assumed that such is the effect of Order 6, to nullify transfers so effected of the securities of Canadian companies at whatever undeserved injury to innocent and friendly persons, by prohibiting the recognition by Canadian companies of any claim originating or depending upon a transfer by or on behalf of an alien enemy to a transferee however innocent, after the publication of the Consolidated Orders. But this would offer no sure guarantee against the alien enemy, whose interest was concealed under the name of an agent or trustee, realizing upon his security to the disadvantage of the subjects of the British Empire or of friendly powers, and the more direct procedure was plainly the preferable one. The Consolidated Orders themselves recognize it, and it was, no doubt, but into practice whenever the opportunity occurred in the countries engaged in the war.

The primary object of these Orders, as sufficiently appears from them, was to cripple the enemy, by depriving him of the benefit of property which could be taken possession of. Primarily that was the purpose of these Orders, and I do not find in them any evidence of an intent to repudiate proceedings taken by other governments associated with us in

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the prosecution of the war to take possession of the class of property in which German investments would most likely be found, namely, corporation securities. The argument as put on behalf of the appellant would lead to the rather singular result that a proceeding by the Public Trustee in England, which would be recognized in the United States as effective to entitle him to be registered as a shareholder in a New Jersey company, would be ineffective in the case of a Canadian company. It is true that the provisions of the Consolidated Orders as to the licensing of particular transactions are not entirely free from obscurity, but the exception in Order 6, "unless upon licence duly granted exempting the particular transaction from the provisions of this section," could hardly apply to the statutory provisions under which the Public Trustee acted in the United Kingdom; and it seems clear that this exception does not contemplate something done under public authority in any other part of the British Empire. Indeed, it seems beyond question that the very words of Order 6 themselves "by or on behalf of an enemy," exclude such compulsory proceedings from the scope of the Order.

My conclusion is that compulsory proceedings by the public authorities of a country associated with Canada in the prosecution of the war are not within the contemplation of Orders 2, 3, 4 and 6. It follows from this, that Order 28, which authorizes only the vesting of property "belonging to or held or managed for or on behalf of an enemy," had no application to any of the properties in question here. The validating Orders, 32 and 33, do not appear to affect the matter. Indeed, it is expressly stated in the supplementary memorandum filed on behalf of the appellant that, except in cases under Order 17, which does not concern us, "the evident purpose of the Consolidated Orders and the vesting orders issued under authority thereof was to deal only with enemy interest in property," and again, "the vesting order as such, aside from identifying the property interest involved, had nothing to do with fixing the status of the property as enemy owned, but was merely an administrative measure to be used to reduce such property to possession when deemed 'expedient for the purposes of these orders and regulations'". The memorandum, I

think, in this sentence admirably states the true view of the vesting orders.

I now come to the consideration of the second ground of attack, which has its basis in sections 33 and 34 of the Treaty of Peace Order of April, 1920. In the view I take of the considerations governing this phase of the controversy, it is not necessary to analyze strictly the language of these sections. It may, however, conduce to lucidity to reproduce them textually in so far as they are pertinent. The material parts of them are as follows:

33. All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or heretofore belonging to enemies, and in the possession or control of the Custodian at the date of this Order, are hereby vested in and subject to the control of the Custodian. (P.C. 267, 1924).

34. All vesting orders and all orders for the winding up of businesses or companies, and all other orders, directions, decisions and instructions of any Court in Canada or any Department of the Government of Canada made or given or purporting to be made or given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to the property, rights and interests of enemies, and all actions taken with regard to any property, business or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever in pursuance of any such order, direction, decision or instruction, and in general all exceptional war measures or measures of transfer or acts done or to be done in the execution of any such measures are hereby validated and confirmed and shall be considered as final and binding upon all persons, subject to the provisions of Sections 33 and 41.

(2) The interests of all persons shall be regarded as having been effectively dealt with by any such order, direction, decision or instruction dealing with property, rights or interests in which they may be interested, whether or not their interests are specifically mentioned therein;

(3) No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction.

(4) The provisions of this section shall not be held to prejudice any title to property heretofore acquired in good faith and for value and in accordance with the Canadian law by a British subject or by a national of any of the Powers allied or associated during the war with His Majesty.

Order 33, in the view advanced by the appellant, applies to the groups of securities in controversy for two reasons. First, they were at the critical date, the 10th of January, 1920, property in Canada, and had always been property in Canada. In each case, it is said, every interest in the unit of intangible property described as a share or deben-

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ture stock, had its situs where the head office of the corporation was, which must be regarded as the centre of the mass of its assets, and consequently, no order made under the authority of the United States, and no proceeding taken by the respondent, the American Custodian, could affect prejudicially to the government of this country, in other words, prejudicially to the appellant, the enemy character or status of any such interest. Such being the case, it follows, the argument proceeds, that the property became by force of s. 33 vested in, and subject to the control of, the Custodian. That argument, presented with a great deal of ability by counsel on behalf of the appellant, is answered mainly by invoking the doctrine above indicated as the doctrine in the *Disconto* case (1), and nothing, as far as I can see, can usefully be added to what I have said on that point.

A supplementary argument is put forward in relation to the City of Montreal securities, as to which counsel insist that, owing to the terms of conditions attached to the certificates quoted above, the property in the Montreal consolidated stock must be held to have its seat in Montreal. This argument I have really dealt with, but there is perhaps an additional point which ought to be mentioned. This debenture stock stood in the name of the Hartford Trust Company, an American corporation, as trustee for the German company. Now it is quite clear that the trust would not be recognized by the City of Montreal, and it is, I think, also clear that as a trust it would not be recognized by the law of Quebec. The Hartford company might under that law be under a personal obligation, and possibly stand in the relation of mandatary to the German company, but the German company would possess according to the law of Quebec no *jus in re*. On the other hand, the Hartford company in its own domicile, would be under the obligations of a trustee, and there is much, I think, to be said for the view that the seat of the equity, as well as of the personal obligation, would be at the Hartford company's domicile. If that is so, then the United States was the proper sovereignty to appropriate the enemy rights.

(1) (1925) 267 U.S.R. 22.

On the question of the situs of two other groups of securities, those of the Canadian Pacific Railway Company and of the Imperial Oil Limited, special points are made which are not without their weight. As to the Imperial Oil Limited, the provision quoted from the Supplementary Letters Patent makes it perfectly clear that the benefit of the obligation passes with the delivery of the instrument. The analogy of negotiable instruments, strictly so called, is pertinent, and indeed, seems to be almost, if not quite, complete. Such instruments have their situs where they are physically situated. There also is the situs of the obligation.

As to the Canadian Pacific Railway shares, it is pointed out that by the law of the province of Quebec, which is the law of the head office of the Canadian Pacific Railway Company, these shares, for the purpose of determining the incidence of succession duty, have their situs at the branch office at which they are registered and can only be validly transferred; *Brassard* v. *Smith* (1). The litigation there related to shares in a bank, but there is no pertinent distinction. True it is, that the considerations determining the situs of an intangible item of property, for one purpose, may not be conclusive where it may be necessary to ascribe to it a constructive situs in some other connection, or for some other purpose, but in the judgment just referred to, Lord Dunedin proceeded upon the view that for the purposes of succession duty and probate, the determining factor must be the answer to the question, where can the subjects be effectively dealt with? In addition to everything that has been said as to the importance for the purposes of war measures of getting at the document, which in ignorance of its enemy character could itself be circulated as a valuable asset, there is the circumstance that, in the case of the Canadian Pacific Railway Company's shares, the place for perfecting the legal title and thereby completing the disposition was New York. This also is not without its application to the Imperial Oil securities. The place of effective disposition was the place where the warrant was.

(1) [1925] A.C. 371.

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The appellant, however, in this branch of his argument does not rest entirely upon this. As regards three of the groups of securities, namely, those for which vesting orders were obtained by him, he invokes s. 34 and affirms that under that section the vesting orders were valid and binding on all persons, which he says includes the respondent, the American Custodian, and these groups of securities, he says, therefore, were under his control by virtue of the vesting orders, and since they fall within the category of "property, rights and interests in Canada * * * heretofore belonging to enemies," they became by force of s. 33 vested in him subject to his control. The argument is that, recognizing to the fullest extent the doctrine of the *Disconto* case (1), first, legislative authority over all these securities rested in Canada by virtue of the fact that the corporations were here, and that this fact in itself is sufficient to establish the existence of an interest having a situs here; then secondly, or rather, perhaps, in the alternative, it is said that since in every case except in the case of the Canadian Pacific Railway Company's shares, the legal title to the shares could only be transferred in Canada, there was in respect of these securities, an interest having a constructive situs in Canada, prior to the passing of the Treaty of Peace Order, over which the appellant had acquired control by virtue of the vesting orders, the validity of which, by reason of s. 34, could not be impugned.

To all this, the answer, I think, rests upon broad considerations. The Treaty of Peace Order was passed pursuant to the *Treaties of Peace Act, 1919,* by which it was provided that the Governor in Council might make such Orders in Council as might appear to him to be necessary to carry out the Treaty and for giving effect to any of the provisions of the Treaty. That is the purpose of the Treaty of Peace Order with which we are concerned. By the Treaty, it was provided that all property rights and interests belonging to German nationals at the date of the coming into force of the Treaty might be detained by the allied and associated powers within their territory. And it was also provided that, as between Germany and German nationals and the governments of allied and associ-

(1) (1925) 267 U.S.R. 22.

ated powers, all vesting orders and other administrative acts by the several powers dealing with the property of German nationals should be ratified and confirmed. Order 34 is obviously intended to give effect in Canada to this ratifying provision. Indeed, the Governor in Council under the statute had no authority to go beyond the Treaty. The Orders in Council authorized were Orders in Council framed for the purpose of carrying into effect the provisions of the Treaty. The scope of ss. 33 and 34 must be limited by the scope of that purpose. The Treaty, while ratifying the administrative orders of Canada acting within her proper sphere, also contemplated ratification of the administrative orders of the United States acting within her proper sphere. S. 34 therefore cannot be read as giving such an effect to a vesting order purporting to have been made under the Consolidated Orders as would interfere with the operation of an administrative act by the United States properly done within her sphere. The function of the section is not to determine the respective spheres of Canada and the United States as between themselves. This follows from a consideration of the genesis and purpose of the Order. The language of the Order also comports with this view. The words of s. 34 are not the words one would expect to find in an Order in Council dealing with competing claims between Canada and a sovereign power which had been associated with us in waging the war. The phrase "all persons" in s. 34 does not include the United States of America as a nation.

The controversy, therefore, must be determined by reference to the principles indicated above in the consideration of the Consolidated Orders. In none of the groups of securities, it follows, was there anything on which a vesting order could take effect except in the case of the securities of the Toronto Power Company. There it may be assumed, for the purpose of the argument, that the legal title, that is to say, the bare legal title, of the enemy owner, had not been completely extinguished at the time the Canadian vesting order was made, but the bare legal title, vested under the vesting order in the Canadian Custodian, was subject to be devested by the exercise of the rights which the American Custodian had acquired under his

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proceedings. The effect of the Treaty would appear to be that the right so acquired became properly exercisable notwithstanding the existence of the Canadian vesting order. The Treaty, it is to be observed, being a Treaty of Peace, had the effect of law quite independently of legislation.

One or two points have been made on behalf of the appellant, which require separate notice.

It is said that the Orders must be construed in such a way as to apply to transactions in neutral countries in the same manner as to transactions in the countries of the allied and associated powers. The point has really no significance here, because the real issue now before us is whether or not a proceeding by which the government of an allied or associated power acquires an enemy property is, for the purpose of the Consolidated Orders or the Treaty of Peace Order, to be regarded as in the same category as a voluntary transaction by an alien enemy for his own benefit.

The compulsory proceedings of the American Custodian which are in question could in purpose and substance have no proper analogue in a neutral country.

Then, an important argument is advanced to the effect that, allowing full play to the principle of the *Disconto* case (1), in cases where the Canadian Custodian has not intervened, the doctrine of that decision stops short at that point, and does not apply here, because the contest is one between the Canadian Custodian and the American Custodian. The difficulty confronting the appellant under this head is this: The core of his argument, as his supplementary memorandum demonstrates, consists in denying the applicability of the principle of the *Disconto* case (1) to public proceedings in the United States or in other allied countries in respect of enemy owned securities of Canadian companies. If he is wrong in this, his argument necessarily fails, and in truth, the appellant does not represent the "paramount power" of Canada, to quote the phrase of the *Disconto* case (1), except in so far as the Consolidated Orders and the Peace Treaty Order permit him to do so. The doctrine of that case gives legal force to a practice necessary for the effectual immobilization of enemy securities of the character here in question, and,

(1) (1925) 267 U.S.R. 22.

for the reasons already given, the Orders do not contemplate a repudiation of that doctrine.

For these reasons, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Aimé Geoffrion.*

Solicitors for the respondent, the Alien Property Custodian for the United States: *Brown, Montgomery & McMichael.*

Solicitor for the respondent, Canadian Pacific Railway Company: *Rodolphe Paradis.*

Solicitors for the respondent, Imperial Oil, Limited: *Osler, Hoskin & Harcourt.*

Solicitor for the respondent, Toronto Power Company, Limited: *I. B. Lucas.*

Solicitors for the respondent, the City of Montreal: *Damphousse, Butler & Saint Pierre.*

R. P. BAKER (PLAINTIFF).....APPELLANT;

AND

GUARANTY SAVINGS & LOAN ASSOCIATION (DEFENDANT) ..... } RESPONDENT.

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*Oct. 10.
*Dec. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Consensus ad idem—Application for shares in association operating under Savings and Loan Associations Act, B.C., 1926-1927, c. 62—Issue of certificate for shares—Class of shares—Representations to applicant as to shareholder's rights—Materiality—Inducement—Onus of proof.

The defendant association, under the *Savings and Loan Associations Act*, B.C., could issue four classes of shares, including "instalment shares" and "savings shares." Its agent, C., obtained from plaintiff an application, on defendant's printed form, for an "instalment savings certificate," and defendant issued to plaintiff a certificate for "instalment shares." It had no power to issue an "instalment savings certificate." Plaintiff, after ascertaining his rights and obligations under the certificate issued to him, sued for cancellation of the application and certificate and for return of moneys paid, on the grounds, (1) that the application was a nullity; (2) that it was for a savings certificate, and, in view of the kind of certificate issued, was not accepted; and (3) misrepresentation by C.

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

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Held: The application should be declared null and void unless it was clearly established that by "instalment savings certificate" both plaintiff and C. meant a certificate for a certain specific kind of share which defendant could issue; and the onus of establishing that their minds were *ad idem* as to this rested on defendant. The evidence established that the contract offered by C. to plaintiff was one allowing plaintiff to mature his shares in five years, and, according to the defendant association's rules, he would have such right only as a holder of savings shares; the class of shares, therefore, which plaintiff and C. had in mind when the application was signed was savings shares. There was no consent by defendant's directors to a right in plaintiff to mature his shares in five years. The right was important; and, although plaintiff had not complained with respect to it before bringing action, his immediate quarrel being with respect to other privileges alleged to have been represented, this did not justify the inference that such right was not one of the causes inducing him to sign the application or that he did not rely upon it; the onus of showing that the representation was not relied on rested on defendant; and there was no evidence that it was not relied on or was waived. Defendant had failed to establish that plaintiff intended to subscribe for instalment shares, and, as defendant had no intention of accepting, and did not accept, an application for savings shares, their minds were never *ad idem,* there was no contract, and plaintiff was entitled to recover his moneys paid.

APPEAL by the plaintiff from the judgment of the Court of Appeal of British Columbia affirming the judgment of Fisher J., dismissing his action, in which he asked that the application made by him for shares in the defendant association and the certificate for shares issued to him be cancelled or declared null and void, and that he recover the moneys ($1,500) paid by him to defendant in respect thereof. Fisher J. held that there was an actual concluded contract between the parties for 700 Class "E" Instalment Shares of the defendant association (Class "E" to be substituted for Class "F" by rectification); and he also dismissed the claims of plaintiff based on alleged misrepresentations.

The material facts of the case and issues in question are sufficiently stated in the judgment now reported. The appeal to this Court was allowed, and it was directed that judgment be entered for the plaintiff for $1,500 and costs throughout.

W. N. Tilley K.C. for the appellant.

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

The judgment of the court was delivered by

LAMONT J.—In this action the appellant seeks to recover the sum of $1,500, being the amount of three payments of $500 each made by him to the respondent, hereinafter called the "Association," under a supposed contract between himself and the Association.

The Association is a corporation under the *Savings and Loan Associations Act* of British Columbia (ch. 62, Statutes of 1926-1927) formed for the purpose of raising a fund by the sale of its shares and making loans to its shareholders upon the security of real estate in British Columbia or upon the security of shares in the Association other than guarantee shares. The Association, under the Act, was permitted to issue four classes of shares: guarantee shares, investment shares, instalment shares and savings shares. The first two of the above classes had to be paid for in full at the time of subscription; the last two were payable by instalments. On or about November 28, 1927, an agent of the Association, one Christie, who had previously had one or two conversations on the street with the appellant, called upon him in his office and asked him if he would open a savings account with the Association. The appellant expressed his willingness to do so. After matters in reference thereto had been discussed between them for a short time, Christie handed the appellant an application form which the appellant signed and handed back to Christie with his cheque for $500. The application reads as follows:—

GUARANTY SAVINGS & LOAN ASSOCIATION 7748
543 Pender Street West,
Vancouver, B.C.

Initial payment $500.00. Certificate No. 3264
Date Nov. 28, 1927.

I, R. P. Baker, hereby make application for a $70,000.00 Class "F" Instalment Savings Certificate of the GUARANTY SAVINGS & LOAN ASSOCIATION payable in 114 months at $490.00 per month, commencing the 15th day of November, 1927.

It is understood that I am to have withdrawal privileges plus interest in accordance with the Rules of the Association and the Charter granted under the "Savings and Loan Associations Act" of the Province of British Columbia.

I hereby appoint Geo. S. Harrison, the Managing Director for the time being of the Association, as my proxy to vote for me at all annual and special meetings of the Association hereafter held at which I may not be present.

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On November 29 the application went before the directors of the Association and, according to the evidence of one of them, was accepted, although the minutes of the meeting do not shew any resolution to that effect. On the following day the Association forwarded to the appellant by mail a pass book together with a certificate, under the corporate seal of the Association, which certificate reads as follows:—

INSTALMENT INVESTMENT CERTIFICATE 3264 GUARANTY SAVINGS & LOAN ASSOCIATION

Vancouver, B.C.

This certifies that in consideration of the payment to the Association of Four Hundred and Ninety Dollars, payable on or before the 15th day of each month for the full term of one hundred and fourteen months, unless sooner matured, R. P. Baker, of 522 Pender Street West, Vancouver, B.C., is the owner of seven hundred Class "F" Instalment Shares numbered 61414 to 62113 inclusive of the GUARANTY SAVINGS & LOAN ASSOCIATION of the par value of One Hundred Dollars ($100.00) each, transferable only upon the books of the Association upon the surrender of this Certificate properly assigned.

UPON all payments having been made the GUARANTY SAVINGS & LOAN ASSOCIATION will pay at its office, Vancouver, B.C., on the 15th day of May, 1937, unless matured at an earlier date, the sum of Seventy Thousand Dollars, together with the surplus then apportioned to the shares represented by this Certificate to the then legal holder upon the surrender thereof.

THIS Certificate is issued and accepted by the holder hereof subject to the conditions contained in the application and those endorsed hereon, and the Rules of the Association.

On the back of the above the following among other conditions were indorsed:—

2. Payments are to be made on the 15th day of each month, provided that any proportion or the entire amount of the instalment required may be paid in advance until with interest thereon to be compounded semi-annually at Five per cent. (5%) per annum on the amount paid up thereon the shares have reached the matured value of One Hundred Dollars ($100.00) per share.

4. There shall be no withdrawals other than the advance payments within one (1) year of this contract, and until twelve (12) monthly payments have been made.

6. This contract shall mature as soon as the payments, together with accrued interest, shall total the maturity value of the contract.

The appellant says that when he got the pass book he just looked to see if he had been credited with the $500 and then put it in the drawer of his desk. On December 4, 1927, and January 9, 1928, the appellant made two more payments of $500 each. Then he went to Honolulu with

his family and did not return until March, when he received a letter from the Association stating that it had not yet received "the February deposit on your savings account." The appellant did not make any further payments, giving as a reason that either he overlooked the matter or else did not have the money. In June he wrote the Association stating that when he opened the account he had been told by the Association's representative that the funds he deposited would be available for his use at any time provided he left a balance of $200; that he desired to temporarily use $1,200, and to let him have that amount. The Association refused to allow him to withdraw the money, claiming that, under his contract and the rules of the Association, such right of withdrawal did not then exist. He then consulted his solicitor, and got for him the pass book, and it was then that he discovered the certificate in the back of the pass book. This certificate when folded is just the size of the leaves of the pass book. Up to that time the appellant says he had not read the certificate. After ascertaining the rights granted to him and the obligations imposed upon him by the application and its acceptance in the terms of the certificate, the appellant brought this action and asked for the cancellation of the application and the certificate, and a return to him of the money paid, on the grounds: (1) that the application was a nullity inasmuch as the Association had no power to issue the "Instalment Savings Certificate" applied for; (2) that his application was for a Savings Certificate which the directors did not accept but, in pretended acceptance thereof, issued to him an Instalment Investment Certificate, and (3) if the application and certificate constituted a contract, he was induced to sign the application by the misrepresentation of the Association's representative, Christie. The trial judge gave judgment in favour of the Association which was confirmed on appeal.

Referring to the contention that the application was a nullity, as being an application for an Instalment Savings Certificate, the learned trial judge held that the Association had not the power to issue such a Certificate if each of the words "Instalment" and "Savings" was to be given the special and technical meaning imparted to it by the rules and interpretive sections of the Act when used with

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the word "share." He, however, denied the appellant relief for the reason which he states as follows:—

> I do not think, therefore, that in negotiations preliminary to or amounting to a contract even with regard to shares the word "Savings," when used, as here, in conjunction with the word "account" or "certificate" and not with the word "share" should be interpreted as having the special or technical meaning imparted to it, when used in immediate conjunction with the word "share," by statutory or constitution definitions which neither party might have in mind and which would make the expression used in the written application self-contradictory. I think it is a fair inference that the word "Savings" was used with its ordinary rather than with any such special or technical meaning. I find therefore that both parties understood that the application was for Instalment Shares.

The application signed was a formal printed one placed by the Association in the hands of its agents for the express purpose of enabling them to obtain thereby subscriptions for shares in the Association. This application with its acceptance was intended by the Association to constitute a binding contract. The certificate which the Association intended should be issued pursuant to the acceptance of the application was a certificate that the appellant was the holder of 700 of the Association's shares. As the Association considered the application for a certificate to be an application for shares, the word "Savings" in the application must, in our opinion, be given the same meaning as it would have borne if the word "Shares" had been substituted therein for the word "Certificate." The language of the application was the language of the Association and, in case of ambiguity arising from the use of particular words, these must be construed most strongly against it. It is admitted that the Association had no power to issue an "Instalment Savings Certificate." The application, therefore, must be declared null and void, unless it is clearly established that by the phrase "Instalment Savings Certificate" both the appellant and Christie understood and meant a certificate for a certain specific kind of share which the Association had power to issue. The onus of establishing that their minds were *ad idem* as to this, rests on the Association.

The real contest in this case is as to the kind of share the appellant was applying for. As a business man of large affairs, desirous of establishing with the Association a fund of $70,000, he must, in our opinion, be held to have contemplated depositing that sum under some contract

which it was in the power of the Association to make. As the fund was to be accumulated by monthly payments, his choice of contracts was limited to two classes: a contract for Instalment Shares and a contract for Savings Shares. In the Act these are defined as follows:—

"Instalment Share" means a share in an association on which payments of a like amount are required to be periodically made as specified in the rules.

"Savings Share" means a share in an association on which any payment of not less than 25 cents may be made at any time.

Turning to the rules, however, we find in Clause 3, sub-clauses 4 and 5, the following:—

4. Instalment shares shall be payable as follows: * * * Class "E", in monthly instalments of Seventy cents ($0.70) per month per share for one hundred and fourteen (114) months; * * * provided that with the consent of the Directors any proportion or the entire amount of the instalments required may be paid in advance.

5. Savings shares shall be payable as follows: Payments may be made thereon at any time and in any amounts of not less than twenty-five cents ($0.25) per share; provided that the holder of savings shares must maintain an average payment per share per month according to the class of share for which he subscribes as follows: * * * Class "E", Seventy cents ($0.70) per month per share for one hundred and fourteen (114) months; * * *

By Clause 4, sub-clauses 7 and 8, both classes of shares entitle the holder to a dividend of 5 per cent. per annum compounded semi-annually.

Sub-clauses 10 and 11 in part read:—

10. Instalment shares shall mature upon the required number of monthly payments being made as required by the investment certificate * * * In the event of the Directors allowing any instalment shareholder to make payments in advance, such payments shall not mature the shares with respect to which they are made before their regular maturity, except with the consent of the Directors.

11. Savings shares shall mature when the payments made thereon, together with the interest credited thereon, compounded semi-annually at Five per cent. (5%) per annum, shall reach the sum of One Hundred dollars ($100.00) per share * * *.

Clause 5, sub-clause 3, sets out the holder's right of withdrawal thus:—

3. Instalment and savings shares shall have no withdrawal or loan value until after One (1) year from the 15th day of the month for which the first payment applied, and until One (1) full year's payments have been made; provided that the said term of One (1) year may in the discretion of the Directors be reduced to a period not less than Three (3) months from the date of issue of the said shares.

and sub-clause 5 reads:—

5. In the event of the withdrawal of instalment or savings shares before maturity, the owner shall only be entitled to receive the annual

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amount paid in, less membership fees, plus interest at the rate of Four per cent. (4%) per annum compounded semi-annually.

From these rules it will be seen that the differences between "instalment shares" and "savings shares" are: (1) With respect to instalment shares the unpaid balance may be paid up only with the consent of the directors, whereas on savings shares such payment may be made as a matter of right, for although the proviso in Clause 3, sub-clause 5, states that the holder of a savings share must maintain an average payment per share per month, such requirement cannot be read as interfering with the holder's statutory right to make thereon, at any time, any payment of not less than twenty-five cents. (2) Payments in advance on instalment shares, when allowed by the directors, do not mature the shares so as to enable the certificate holder to obtain the return of his money before the maturity date of his shares, unless the directors so consent. In the case of savings shares, if the unpaid balance is paid in advance the shares automatically mature when the sums paid, together with the interest credited thereon, amount to $100 per share. The certificate holder may then withdraw the full maturity value of his shares.

The question then is, on the material before us, has the Association established that the appellant intended to contract for instalment shares as it alleges? The contention of the appellant is that he had no intention of contracting for instalment shares, and that the representations made to him by Christie establish that Christie had no intention of selling him such shares. The representations relied on are: (*a*) that he could deposit as much as he wished at any time; (*b*) that the policy could be matured in five years, and (*c*) that he could withdraw moneys from time to time so long as he kept a balance with the Association of $200. The appellant testifies that each of these representations was made to him by Christie and points out that the rules in force shew that such representations were wholly untrue as applied to instalment shares. With reference to these representations Christie gave the following testimony:—

Q. * * * You told Mr. Baker he could deposit as much as he liked at any time and when the deposits with the interest reached $70,000 although it took less than 114 months, but not less than five years the policy would mature?—A. Yes.

Q. You told him that?—A. Yes.

Q. There is no question about that. Now, I think you have told me, Mr. Christie, that you asked Mr. Baker if he wanted to open a savings account. Did you make that statement?—A. Open a savings account?

Q. Or an account for himself?—A. Yes, sir.

Q. And that he could deposit as much as he liked at any time. You have told me that?—A. Yes.

Q. And in the event of withdrawals his interest would decrease from 5 to 4 per cent. Did you tell him that?—A. I don't recollect whether I did or not.

* * *

Q. You do not dispute that was said, do you?—A. No.

With reference to the right to withdraw sums deposited, Christie said:—

I told him there was no withdrawal privilege for a year and then down to 2 per cent. of the maturity value of the account.

He also gave this testimony:—

Q. Did you or did you not familiarize yourself with the rules and constitutions?—A. No, I didn't read over the rules and constitution.

Q. You didn't read them over?—A. No.

Q. How did you explain matters to prospective clients?—A. Took what we were told at the office and what there was on the savings certificate itself.

* * *

Q. So you got all your information from the officers of the Association and from the certificates?—A. Quite.

This evidence establishes beyond question that the contract which Christie was offering the appellant was one which permitted him, as a matter of right, to deposit as much as he wished at any time and that, if the sums he paid plus the interest amounted to $100 per share, he could, at the expiration of five years, withdraw the whole deposit. Such right the appellant would have only under a certificate for savings shares, as the rules above quoted shew.

The learned trial judge held that, although the right to pay instalments in advance under the certificate issued by the Association could only be exercised with the consent of the directors, yet, as the Association did accept $10 in addition to the $490 specified in the application on each of the occasions on which payments were made, he thought the representation could be considered "true for all practical purposes as the directors had apparently given their required consent to the payment of instalment shares in advance." This conclusion, in our opinion, is not consistent with the attitude taken by the directors when they were considering whether or not they would accept the application, as appears from the evidence of Mr. Allen, the

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manager of the Association. Mr. Allen, in answer to a request to tell just what had occurred, said:—

> The application was read by Mr. Harrison to the directors, and they discussed whether or not to accept the application, due to the amount of it. It was finally pointed out by one of the directors that inasmuch as this application would require our paying $70,000 on a specific date, we would have a period of time in which to prepare for the payment of this sum, and we could plan sometime before the maturity date.

This statement shews that the directors not only had not consented but also that they had no intention of consenting to any payments in advance which would enable the appellant to obtain his money before the date specified in the contract. Even if the Association accepted an advance payment of $10 on the three occasions on which money was paid, that would not give the appellant a right to demand its acceptance on any other occasion. No payment of any kind had been made when Christie made the representation. To a business man accumulating as large a sum as $70,000, it is easy to understand how important it might be for him, after the expiration of five years, to have a right to pay in the amount of the unpaid instalments and then be able to draw out at once the whole fund, and, from the evidence of Mr. Allen quoted above, it appears to have been likewise a matter of importance to the Association that, in the case of so large a sum, the contract holder should not have the right to call upon it to pay over the fund before its maturity date. On behalf of the Association it is said that the right to mature the shares in five years was not a matter of which the appellant had complained. It is true he had not said anything about it before action brought. His immediate quarrel with the Association was in respect of their refusal to allow him the withdrawal privileges which he claimed he had been told his contract would give him. The fact that up to the time he brought his action he had complained only in respect of the withdrawal privileges, does not justify the inference that the right to mature the shares in five years was not one of the causes inducing him to sign the application, or that he did not rely upon it.

Where such an untrue representation has been made, the onus of shewing that it was not relied on rests upon the party who made it. In view of the importance which it might have for the appellant to be able, by paying up the

unpaid instalments, to withdraw his investment at the expiration of five years, we are of opinion that it cannot be said that this was an unimportant representation. There is no evidence that it had been waived, or was not relied on.

We find it unnecessary to express an opinion as to the effect of the alleged representation that the appellant would have the right, under his contract, to withdraw all sums deposited down to $200, or the effect of describing, in the application, the shares applied for as Class "F" shares, when the rules shew that a share payable in 114 months was a Class "E" share. As to the materiality of the latter there may be room for doubt.

We are, therefore, of opinion that, as the rights which Christie admitted he stated would flow from the acceptance of the appellant's application would belong to the appellant only in case he became a holder of savings shares, the class of shares which both the appellant and Christie had in mind when the application was signed was savings shares. The Association has, therefore, failed to establish that the appellant intended to subscribe for instalment shares and, as it had no intention of accepting, and did not accept, an application for savings shares, there was no contract between them. The minds of the parties were never *ad idem.*

The appeal should be allowed, the judgment below set set aside and judgment entered for the plaintiff for $1,500 with costs in all courts.

Appeal allowed with costs.

Solicitors for the appellant: *Fraser & Murphy.*

Solicitors for the respondent: *Burns, Walkem & Thomson.*

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*Nov. 4.
*Dec. 15.

FRANCIS N. EASTERBROOK (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Indian lands—Lease to private person from Indian chiefs—Action by Crown for possession, against occupant claiming under lessee's title—Invalidity of lease—Claim by occupant to compensation for improvements—Claim by Crown to payment for occupation after demand for possession.

By a document dated March 10, 1821, "the British Indian Chiefs of St. Regis," "for themselves and on behalf of their tribe (whom they represent)" purported to lease to C., his heirs and assigns, certain land (part of Crown land reserved for the Indians, and not ceded or surrendered to the Crown by the Indians) on Cornwall Island in the river St. Lawrence, for 99 years, "and at the expiration thereof for another and further like period of 99 years and so on until the full end and term of 999 years shall be fully ended and completed." The Chiefs covenanted "that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right" to make the lease. The consideration was $100 cash and a yearly rent of $10. C. entered into possession on March 10, 1821, and possession was continued in successive assignees, and it was admitted in this action that defendant was in possession as assignee of whatever rights C. had under the lease. The rent was paid yearly to March 10, 1920, when the Crown refused to accept further rents. From about 1875 the rent was paid to the Department of Indian Affairs, for the benefit of the Indians. The lease was registered at the Department of Indian Affairs in 1875. There was in evidence a letter of February 26, 1875, from an official of the Department to one B., an Indian, (in reply to a letter from B., not produced) in terms apparently recognizing rights of C. under the lease. The Crown notified defendant to give up possession at the expiration (March 10, 1920) of the term of 99 years; and, defendant not complying, it took proceedings to recover possession of the land, as ungranted Crown lands reserved for the Indians.

Held (1) The Crown was entitled to possession. The lease was invalid in law; the chiefs had no power to make it (*St. Catherines Milling & Lumber Co.* v. *The Queen*, 14 App. Cas. 46); and the taking of it violated the Proclamation of 1763 respecting Indians and Indian lands, and subsequent enactments (Reference to Order in Council of Lieutenant-Governor of Upper Canada of November 10, 1802, in evidence; to C.S.U.C., 1859, c. 81, ss. 21 *et seq.*; and to the *Indian Act*, R.S.C., 1886, c. 43, ss. 38-41, and subsequent revisions). The receipt of rent

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Cannon JJ.

at the Department could not serve to validate the lease; nor had anything done created any obligation on the Crown to recognize the right to possession claimed by defendant.

(2) The defendant was not entitled to compensation for improvements. There was no statutory liability on the Crown; and defendant had not established any act or representation for which the Crown was responsible whereby he was misled to believe that he had a title which could be vindicated in competition with that of the Crown, or whereby the Crown had incurred any equitable obligation to recognize a right to compensation; defendant and his predecessors knew that there had been no surrender, and that they had no grant from the Crown; and all the circumstances justified the conclusion that they were not, at any time, in ignorance of the infirmity of their title. (*Ramsden* v. *Dyson*, L.R. 1 E. & I. Ap., 129, at 168, cited).

(3) The finding in the Exchequer Court that the Crown should recover $400 per annum for defendant's use and occupation from March 10, 1920, should, on the evidence as to value, be sustained.

Judgment of the Exchequer Court (Audette J.), [1929] Ex. C.R. 28, affirmed.

APPEAL by the defendant from the judgment of Audette J. in the Exchequer Court of Canada (1) holding: that the lease in question, bearing date March 10, 1821, between the British Indian Chiefs of St. Regis and one Chesley (under which the defendant claimed title) was null and void *ab initio;* that the Crown (plaintiff) was entitled to recover possession forthwith from the defendant of the land in question, with the appurtenances; that the Crown recover from the defendant, for the use and occupation of the land and appurtenances by him, the sum of $400 per annum, to be computed from March 10, 1920, until the delivery of possession by him to the Crown; and that defendant's claim for compensation for improvements made, by him or his predecessors in occupation, upon the land, be dismissed.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

G. I. Gogo K.C. for the appellant.

W. C. McCarthy for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The Attorney-General of Canada, by Information filed in the Exchequer Court of Canada, seeks to recover, as ungranted Crown lands reserved for the In-

(1) [1929] Ex. C.R. 28.

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dians, the possession of the lands hereinafter described, situate on Cornwall Island, in the River St. Lawrence, opposite the town of Cornwall. The island is said to be five miles long; to average in width three-quarters of a mile, and to comprise 3,500 acres. There is in proof a report of Mr. Davidson, an Indian Agent, dated 3rd June, 1878, wherein it is stated that this island is exclusively occupied by Indians, except the Chesley farm (the subject of this action), containing about 200 acres, and that there are thirty-seven houses on the island, inhabited by about forty families. It is shewn elsewhere that the farm extends across the island from one side to the other, thus dividing into two sections the lands which remain in the possession of the Indians. The dichotomy is explained by the circumstances in which the claim has its origin.

There is in evidence a document, dated 10th March, 1821, executed at Cornwall

by and between the British Indian Chiefs of St. Regis, in the Province of Lower Canada, of the first part and Solomon Youmans Chesley, of the said Town of Cornwall, gentleman, of the second part;

Whereby the said Indian Chiefs, for themselves and on behalf of their tribe (whom they represent) for and in consideration of the sum of One Hundred Dollars to them in hand paid by the said Soloman Youmans Chesley, before the signing, sealing and delivering of these presents as well as the rents and covenants hereinafter mentioned do by these presents lease, convey and to farm let unto the said Solomon Y. Chesley, his heirs and assigns all and singular that certain parcel of land and premises situated on Cornwall Island in the River St. Lawrence and being composed of that portion of it which lies immediately south and in front of the said Town of Cornwall containing by admeasurement one hundred and ninety-six acres more or less which piece or parcel of land and tenement is butted and bounded as follows, viz:—Commencing at the water's edge on the north side of said Cornwall Island nearly opposite to the Court House in said Town and at the mouth of a ravine or gully immediately below Nett Point where a white ash post is planted and running south ten degrees east fifty-two chains more or less across said Island to the south bank thereof, thence following the water's edge downwards a distance at a right angle from the base line of forty-five chains to a white oak post, thence northward on a line parallel to said base line across said Island to the water's edge on the north side thereof, thence following the water's edge upward or against the current to the place of beginning. To have and to hold the said land and premises with all and singular its appurtenances unto him the said Solomon Y. Chesley, his heirs and assigns for and during the full end and term of ninety-nine years to be fully ended and completed and at the expiration thereof for another and further like period of ninety-nine years and so on until the full end and term of nine hundred and ninety-nine years shall be fully ended and completed. He, the said Solomon Y. Chesley, his heirs and assigns yielding and paying therefor to the said Chiefs of St. Regis and their successors yearly and every year on the tenth day of February, the

sum or rent of ten dollars of lawful money of Canada, and the said Chiefs do hereby covenant with the said Solomon Y. Chesley, his heirs and assigns, that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right to make, execute and deliver this lease in good faith upon the terms and conditions herein already expressed.

And there are covenants on the part of Mr. Chesley with the Indian Chiefs, expressed as follows:

And the said Solomon Youmans Chesley, for himself, his heirs and assigns doth hereby covenant and agree to and with the said Indian Chiefs of St. Regis and with their successors in manner and form following, that is to say: that he the said Solomon Y. Chesley being put into peaceable and quiet possession of aforesaid described lands and premises shall and will on the tenth day of February, one thousand eight hundred and twenty-two, pay unto the said Indian Chiefs or their successors, the sum or rent of ten dollars, at the Town of Cornwall aforesaid and in like manner, so long as he the said Solomon Y. Chesley, his heirs and assigns shall be kept and assured in peaceable and undisturbed possession of said lands and premises, so long as he, his heirs and assigns continue to pay the said annual sum at rent of ten dollars on the tenth day of February in each succeeding year to the end and term of nine hundred and ninety-nine years.

And further that should he the said Solomon Y. Chesley, his heirs and assigns allow the said rent of ten dollars to remain unpaid by the space of one month after the same shall have been due in any year to come and after the same may have been legally demanded, he and they shall renounce the said land and premises and return the same to the said Indian Chiefs or their successors.

The original document is not produced upon this appeal; but it purports, so it is said, to be executed under seal, on behalf of the parties of the first part, by nine individuals, said to be Indian Chiefs, and by Mr. Chesley, the party of the second part. There is no evidence whatever as to what were the powers or authority of the British Indian Chiefs of St. Regis, but it is admitted that the premises, being Crown Lands, had not been ceded or surrendered to the Crown by the Indians; and, therefore, as a matter of law, the Chiefs could not dispose of the reserve or any part of it, or of any estate therein. *St. Catherines Milling and Lumber Company* v. *The Queen* (1). And there is an additional reason in this case why the alleged lease, in the absence of proof to the contrary, should be regarded as invalid, seeing that the Chiefs, whatever powers they may have possessed during their tenure of office, profess to grant an estate in the land, to commence at a time ninety-nine years after the date of the instrument. It is very carefully stated that the term is to endure for

(1) (1888) 14 App. Cas. 46.

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ninety-nine years to be fully ended and completed and at the expiration thereof for another and further like period of ninety-nine years and so on until the full end and term of nine hundred and ninety-nine years shall be ended and completed.

Strong J., who certainly did not speak without information as to the facts, tells us in his dissenting judgment in the *St. Catherines Milling* case (1), that

the control of the Indians and of the lands occupied by the Indians had, until a comparatively recent period, been retained in the hands of the Imperial Government; for some fifteen years after local self government had been accorded to the Province of Canada the management of Indian Affairs remained in the hands of an Imperial officer, subject only to the personal direction of the Governor General, and entirely independent of the local government, and it was only about the year 1855, during the administration of Sir Edmund Head and after the new system of Government had been successfully established, that the direction of Indian affairs was handed over to the Executive authorities of the late Province of Canada.

There is no evidence that either the Imperial Superintendent of Indian Affairs or the local government was, at the time, consulted or became in anywise party to or concerned in, or even informed as to the transaction of 1821 between the Chiefs and Mr. Chesley, which certainly was brought about in breach of the prohibition expressed, and repeated more than once by the proclamation of 1763, as essential to the interest of the British Crown and the security of its colonies. The governors and commanders-in-chief in America are forbidden to grant warrants of survey, or to pass any patents upon any lands whatever which, not having been ceded to or purchased by the Crown, are reserved to the Indians, or any of them; and all British subjects are strictly forbidden, on pain of the royal displeasure, from making any purchases or settlements whatsoever, or taking possession of any of the lands above reserved (which include the lands now in question), without our special leave and licence for that purpose first obtained.

Also, it is provided that:

And We do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

Moreover the policy of the Crown is further emphasized by the following injunction:

And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of Our interests

(1) (1887) 13 Can. S.C.R. 577, at 614.

and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of Our Justice and determined resolution to remove all reasonable cause of discontent, We do, with the advice of Our Privy Council, strictly enjoin and require that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of Our colonies where We have thought proper to allow settlement; but that, if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for Us, in Our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or Commander-in-Chief of Our colony respectively, within which they shall lie.

These provisions have persisted, both under British and Colonial administration; and there is in evidence an Order in Council of the Lieutenant-Governor of Upper Canada, dated 10th November, 1802, and certified for publication, which comes out of the custody of the Dominion Archives, and reads as follows:

> His Excellency the Lieutenant-Governor in Council hereby gives notice, to all whom it may concern, That no leases which have been, or shall be Granted, or pretended to be Granted, by or under the authority of any Indian Nation, will be admitted or allowed—And this Public Notice is given in order that No person may pretend ignorance of the same.

See the clauses relating to Indian lands in the Consolidated Statutes of Upper Canada, 1859, chap. 81, secs. 21 *et seq.;* also the *Indian Act* as enacted by the Dominion, R.S.C., 1886, chap. 43, secs. 38-41 inclusive, and in the subsequent revisions.

Looking at the provisions of the lease itself, which have been fully quoted above, it is difficult to avoid a reasonable inference that Mr. Chesley was fully aware of the precarious nature of the estates evidenced by the instrument of 10th March, 1821. It will be perceived that he paid the chiefs $100 in hand; and, beyond that, the consideration on his part for the valuable concession which he stipulated for consists only of the annual rent of $10. It is not suggested that there was any meeting of the band to authorize or approve the grant; and Mr. Chesley's security, *quantum valeat,* consists in the covenant of the chiefs, "that they are the representatives of the said tribe of St. Regis as well as trustees of their estate and as such that they have a perfect right to make, execute and deliver this lease in good faith upon the terms and conditions herein already expressed." Mr. Chesley, upon his part, covenants for payment of the rent to the chiefs at Cornwall "so long as he

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the said Solomon Y. Chesley, his heirs and assigns shall be kept and assured in peaceable and undisturbed possession of said lands and premises"; and, finally, it is provided that if he, Mr. Chesley, his heirs and assigns, "allow the said rent of ten dollars to remain unpaid by the space of one month after the same shall have been due in any year to come and after the same may have been legally demanded, he and they shall renounce the said land and premises and return the same to the said Indian Chiefs or their successors."

It would seem not improbable that the lease first came to the knowledge of the Department of Indian Affairs when, on 18th February, 1875, Mitchell Benedict, an Indian of the St. Regis settlement, wrote to the Superintendent General, or the Deputy Superintendent General, presumably making enquiries about the validity of Mr. Chesley's title. Immediately following this letter, on 24th February, 1875, the lease was registered at the Department, as certified by the initials of Mr. Van Koughnet, the Assistant Superintendent General; and a letter was written to Benedict on 26th *idem,* signed, as I infer, by Mr. Van Koughnet, and saying:

> I have to state in reply to your letter of the 18th inst., that the lease to Mr. Chesley of 196 acres of land on Cornwall Island in the St. Lawrence River is dated March 10th, 1821, and is for 99 years, renewable at the end of each such period until the full term of 999 years has expired on payment of the annual rental of $10.00. Mr. Chesley has complied with the terms of his lease, and has a right to sublet the land as he has been in the habit of doing for years.

A memorandum, written by Mr. Chesley, is also introduced by the defendant, which reads as follows:

> In reply to a letter from Mitchell Benedict an Indian of Cornwall Island addressed to the Indian Department under date the 18th February, 1875, enquiring whether the ownership and possession of a farm on Cornwall Island by Solomon Y. Chesley was known to me and recognized by the said Department. A letter was addressed to the said Benedict by direction of Mr. Laird the Superintendent General, under date the 24th February, 1875, stating that Mr. Chesley held a lease for 196 acres of land on Cornwall Island dated 10th March, 1821, to run 999 years from date at a rental of $10 per annum. That Mr. Chesley having fulfilled his engagements under said Lease he had a right to said land and to sublet same as heretofore.
>
> The said lease is registered in the Book of the office of the Indian Department on the 24th February, 1875, as appears indorsed on the back thereof. Certified by the initials of Lawrence Van Koughnet, Asst. Supt. Genl.

But there seems to be some confusion about the minutes relating to this subject, because it is stated by counsel for the defendant, and admitted by counsel for the Crown, that

> the endorsement upon our original lease at Cornwall shows that the late Mr. Van Koughnet made a memorandum on the back of the lease that it was originally in the Department on the 24th September, 1875.

It is admitted, in the following terms, that Mr. Chesley entered into possession on or about 10th March, 1821, and that

> the present defendant is in possession as assignee of whatever rights Solomon Y. Chesley had under that original lease. There is a chain of assignments but they admit that they have been in possession.

Then, immediately following,

> The Crown admits that during that period rents were paid by the occupant and received by the Crown, or the Department of Indian Affairs, for the benefit of the Indians.

And this, as I interpret it, is intended to mean that during the period of the defendant's possession, the rent, instead of being paid directly to the Indian Chiefs, as it was at the beginning, was paid to the Department for the benefit of the Indians, although there is evidence in another place that the first payment of rent to the Department was made in 1877, three years before the defendant was born.

The defendant continued to pay the rent until the expiry of the term of ninety-nine years provided for by the lease; and there are Admissions:

> That all rents provided by the lease in question herein have been paid by the original lessee and successive occupants to 10th March, 1920, since which time the Respondent (the Crown) has refused to accept further rents.
>
> That the Respondent served Appellant with Notice to Quit and demand for possession in due time prior to the expiration of the first 99 year period of the lease in question herein.
>
> That the Appellant has remained in possession of the lands described in said lease since the 10th March, 1920, and is still in possession of same.
>
> That the Appellant is the successor in title to such rights as the original lessee from the Indian Chiefs may have had and has been in continuous possession thereof since on or about the 28th October, 1904.

The facts are not set out or introduced in a very orderly fashion and the reader is left in some perplexity to ascertain precisely the order of events and what the truth is; but nevertheless, it seems to be clear enough that although the lease was ineffective and void at law, by reason of the absence of any authority on the part of the grantors to make it, and for non-compliance with the peremptory requirements of the proclamation, which have the force of

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statute, an officer of the Department, constituted after the union of the provinces in 1867 for the administration of Indian Affairs, registered the lease, not earlier than 1875; and, from that time until the expiration in 1920 of the demised term of ninety-nine years, received, for the Indians, the annual rent of $10, as it accrued from year to year. But the Department then ceased to tolerate the defendant's possession and gave notice to quit in a manner which, it is admitted, satisfied the requisites, as in the case of a tenant from year to year; refusing to receive any further rent, or in any manner to recognize a tenancy. And so the case passed to the Attorney-General, who filed his Information on 18th October, 1921; but the defendant remained in possession, and, pending the litigation, has enjoyed the benefit of the use and occupation.

The defendant alleges four grounds of appeal: first, that the alleged lease was not void *ab initio;* secondly, that the learned judge erred in holding " that the appellant was not entitled as of right to compensation for permanent improvements "; thirdly, he denies that the proclamation of 1763 affects the transaction; and, fourthly, he denies that the Crown is entitled to $400 a year for the occupation of the premises after 10th March, 1920.

The learned judge found no difficulty in disposing of the case, and I have no doubt that his conclusions must be maintained. By the formal judgment he declared that the lease of 10th March, 1821, was and is null and void *ab initio,* and that the King was entitled to recover forthwith the possession of the lands described with their appurtenances. He found the value of the defendant's use and occupation, computed from 10th March, 1920, until delivery of the possession, to be at the rate of $400 per annum; and, moreover, he held that the defendant's claim for compensation for improvements made by him or his predecessors should be dismissed.

There is some conflict of opinion as to the annual value of the premises, but the evidence certainly preponderates in favour of an estimate not less than that found by the learned judge; and, therefore, his finding in that particular ought not to be disturbed.

As to the defendant's claim for compensation for the improvements to which he asserts a right, there is no statu-

tory liability upon the Crown; and I agree with the learned judge that the defendant has entirely failed to establish any act or representation, for which the Crown is responsible, whereby he was misled to believe that he had a title which could be vindicated in competition with that of the Crown. There is no claim to recover compensation for the use of the premises during the period of the first term, which, in the words of the instrument, is "fully ended and completed"; and, to that extent, the defendant has profited by the unauthorized and illegal transaction. The learned judge refers to the leading case of *Ramsden* v. *Dyson* (1); and I cannot avoid the conclusion that the defendant and his predecessors were not, at any time, in ignorance of the infirmity of the title which they claim to have derived from the Indians; and, certainly, they knew that there had been no surrender, and that they had no grant from the Crown. The law, as applicable in such cases, is very aptly stated by Lord Wensleydale at page 168, where he says:

> If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

The letter from the Indian, Mitchell Benedict, is not produced, and without it one cannot interpret the reply with certainty; moreover the introduction of secondary evidence by Mr. Chesley's memorandum, admitted to be inaccurate in a material particular, does not add to the proof. Whether Mr. Laird or Mr. Van Koughnet was the writer, he was evidently under an utter misapprehension if he intended to assure the Indian of the validity of the Chesley lease, and these gentlemen should have sought the advice of the law officers; but, anyhow, Mr. Chesley was not a party to the correspondence, and it contains no representation by which the Crown is bound to him. If he were looking for an assurance from the Indian Department to strengthen his title, why did he not approach the competent authorities in a straightforward manner? Neither

(1) (1866) L.R. 1 E. & I. Ap. 129.

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the Crown, as to its title, nor the Indians, as to their burden upon the lands, are to suffer deprivation by the facts which this incident discloses or suggests.

It is true that, during the latter part of the term of ninety-nine years, the annual rent of $10 was received at the Department of Indian Affairs, and presumably distributed as belonging to the income of the band or the Indians of the reserve; but that circumstance could not serve to validate a lease which was void at law, nor even to create a tenancy from year to year under conditions which the law prohibited. In any event, the defendant and his predecessors have had the full benefit of possession for the term during which the rent was paid; and, for the period which has since elapsed, and for the future, the Crown has not, so far as I can perceive, incurred any obligation, legal or equitable, to recognize the defendant's possession or right to compensation.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *George I. Gogo.*

Solicitor for the respondent: *William C. McCarthy.*

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*April 23.

DALLAS ET AL. (PLAINTIFFS).....APPELLANTS;

AND

DALLAS OIL CO. LTD. (DEFENDANT);

AND

WEBSTER (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Agreement for sale of shares—Findings against alleged abandonment by purchaser

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing their appeal from the judgment of Ives J., dismissing their action, which asked for a declaration that the

*PRESENT:—Newcombe, Rinfret, Lamont, Smith and Cannon JJ.

(1) 24 Alta. L.R. 445; [1930] 2 W.W.R. 301.

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plaintiff Dallas was the owner of certain shares of the capital stock of the defendant company, standing in the name of the defendant (respondent) Webster, and for an order directing the defendant (respondent) Webster (who, so plaintiffs alleged, had abandoned his purchase of the shares from Dallas) to transfer the shares.

At the conclusion of the argument of counsel for the appellants, and without calling on counsel for the respondent, the Court delivered judgment, dismissing the appeal with costs.

Appeal dismissed with costs.

A. Macleod Sinclair K.C. for the appellants.
G. H. Ross K.C. for the respondent.

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*Oct. 20.
*Dec. 15.

HEDLEY T. FULTON, MINNIE PATTERSON AND MABEL FULTON (PLAINTIFFS) ..... APPELLANTS;

AND

WILLIAM P. CREELMAN (DEFENDANT) .. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Trespass—Highways—Alleged existence of public right of way—Sufficiency of evidence to justify finding of dedication—Inference from circumstances—Admissibility in evidence of ancient book.

In an action of trespass, defendant alleged a public right of way across plaintiffs' land.

Held, that the evidence as to uninterrupted public user of the alleged road for a period coextensive with the memory of witnesses, along with other circumstances in evidence, justified a finding of dedication (*Folkestone Corporation* v. *Brockman,* [1914] A.C. 338, at 368, cited); and that the judgment of the Supreme Court of Nova Scotia *en banc,* 1 M.P.R. 556, holding (by a majority, reversing judgment of Paton J., *ibid*) that the alleged public road exists, and dismissing plaintiffs' action for trespass, should be affirmed.

Anglin C.J.C. and Lamont J. dissented, holding that there was not sufficient evidence of dedication of the alleged highway (the only ground relied on at bar) to prove that fact; that the locus of the highway claimed to have been dedicated was left quite uncertain; and that the acts of user were wholly consistent with there having been merely a private right of way, or personal understandings for use of a way, and, while circumstances may warrant an inference of dedica-

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Cannon JJ.

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tion, just as they may prove any other fact, that inference must be the only one that can reasonably be drawn from them.

The admissibility in evidence of an ancient book, being a record of meetings of the proprietors under the original settlers' grant from the Crown, was discussed, but not decided; the majority basing their judgment on evidence apart from it, and the dissenting judges, while much inclined in opinion against its admissibility, yet assuming its admissibility in dealing with the case.

APPEAL by the plaintiffs (by special leave granted by the Supreme Court of Nova Scotia *en banc*) from the judgment of the Supreme Court of Nova Scotia *en banc* (1) which, by a majority (reversing judgment of Paton J. (1)) held that a public road exists across plaintiffs' lands in question; that defendant as one of the public had the right to use the road; and that the plaintiffs' action, which was for damages for trespass and for an injunction, should be dismissed.

The material facts of the case are sufficiently stated in the judgments now reported. The appeal to this Court was dismissed with costs, Anglin C.J.C. and Lamont J. dissenting.

C. J. Burchell K.C. for the appellants.

C. B. Smith K.C. for the respondent.

The judgment of the majority of the court (Duff, Newcombe and Cannon JJ.) was delivered by

NEWCOMBE J.—The defendant alleges a public right of way across the plaintiffs' lands, which he had been accustomed to exercise, and which, in 1929, the plaintiff, Hedley T. Fulton, obstructed by a fence. The plaintiffs are proprietors of a parcel of land in the eastern part of the peninsula of Nova Scotia, contiguous to the river Stewiacke on its southern bank and opposite to the village of Upper Stewiacke, which is situated on the other side of the river. The highway leading easterly to Musquodoboit passes through the village. The Meadowvale Road, at this place going northerly, crosses the river by a bridge below the plaintiffs' lot and, just beyond the bridge, joins the Musquodoboit highway. A little farther up, to the eastward, the Stewart Hill Road, running in this stretch nearly parallel to the Meadowvale Road, crosses the river by another bridge, and likewise opens into the Musquodoboit high-

(1) 1 M.P.R. 556.

way. The distance between the upper and the lower bridge is about half a mile. The riparian area between the Meadowvale Road and the Stewart Hill Road is taken up by four lots belonging, respectively, to James D. Cox, the plaintiff Hedley T. Fulton, Ross Johnson and Henry Cox, in the order mentioned; James D. Cox abutting upon the Meadowvale Road and Henry Cox upon the Stewart Hill Road; Fulton and Johnson thus come between. All these four lots terminate southerly at a gully, and neither the plaintiffs' lot nor that of Johnson is reached by any public road, unless the way in issue be a public road.

The appellants, introducing the "Brief of Argument" in their factum, very frankly state that "the sole question for consideration in this action is whether the evidence adduced established the existence of the public highway across the appellants' lands"; and, it thus becomes, in reality, a question of fact, depending upon the inferences which may be drawn from the testimony and exhibits in proof, to establish a presumption of dedication. There is a considerable body of evidence, substantially uncontradicted, of long, continuous and uninterrupted user by the public of a way from the Meadowvale Road to the Stewart Hill Road through these lots, along the riverside. It is shewn that there is an undisputed road from a point on the Meadowvale Road just to the south of the lower bridge and known as the "Oak Island Road," leading down, along the river, to Oak Island and the settlement at South Branch. This road, in fact, crosses the Meadowvale Road on to the lot of James D. Cox, and the defendant maintains that it is thence prolonged in a direct course, deflected slightly to the north, across the lots of the plaintiffs, Johnson and Henry Cox, where it opens into the Stewart Hill Road; thereby affording immediate access to the public road running along the riverside from the Stewart Hill Road, at the southern end of the upper bridge, easterly, to the grist mill and settlements above.

It is not disputed that if the travelled road across these four lots had its origin in dedication, or otherwise became a public road, it so remains, for it was never closed according to law, and our attention was directed to sec. 47 (1) of

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The Public Highways Act of Nova Scotia, R.S.N.S., 1923, cap. 75, as follows:

47. (1) Except in so far as they have been closed according to law, all allowances for highways made by surveyors for the Crown, all highways laid out or established under the authority of any statute, all roads on which public money has been expended for opening them, or on which statute labour has heretofore been performed, all roads passing through Indian lands, all roads dedicated by the owners of the land to public use, every public road now used as such, and all alterations and deviations of, and all bridges on or along any road or highway, shall be common and public highways vested in the Crown until the contrary be shown.

It was on 28th October, 1783, that the government of Nova Scotia granted to John Harris, Joseph Brewster and fifty-two others, named as grantees, a tract of land on the river Stewiacke, then called Wilmot River,

containing in the whole, by estimation 20,250 acres more or less, allowance being made for all such roads as may hereafter be deemed necessary to pass through the same, according to the plan annexed, being wilderness land withal, and all manner of mines unopened (excepting mines of gold and silver, lead, copper and coal).

By the habendum, the grantees were to have and to hold the premises "in the following proportions"; the number of acres for each grantee being specified, and varying from 750 acres to 250 acres each, respectively. There is no record in evidence of the partition. Apparently, the settlement of the district was consequent upon this grant and took place at that time; there is a book which was admitted in evidence shewing that the proprietors were holding meetings upon the ground as early as October, 1786. This was a settlers' grant, and the grantees came under obligation gradually to clear and work, erect dwelling houses, etc.

The case was tried before Paton J., who thus disposes of the defendant's case, upon the main question of public highway; the learned judge says (1):

The defendant's chief contention was that there was once and therefore still is a public highway where the present wheel ruts now are over the Henry Cox lot and the James Cox lot, and that the road necessarily continued over the two intervening lots of Ross Johnson and the plaintiff. There was no evidence to support that contention. Any occasional passage over the land by defendant was not sufficient to create an easement;

and, accordingly, he granted the plaintiffs an injunction and assessed nominal damages.

(1) 1 M.P.R. 556, at 557.

Upon the appeal to the Supreme Court of Nova Scotia (1), the Chief Justice and Chisholm J., for the reasons stated by the former, would have maintained the judgment; but the other judges, Mellish, Graham and Ross JJ., each of whom stated his reasons, were for the defendant; and, upon the discussion of fact, I have come to the conclusion, after careful consideration of the case, that I cannot usefully add anything to the reasoning which is so clearly set out by Graham J., and the other learned judges who upheld the defendant's appeal in the court below. The defendant might, of course, have encountered serious difficulty to overcome the trial judgment if it could be held to have proceeded upon the weight or credibility of the evidence; but this, with due respect to the learned judge, is a plain case of misdirection; and, in the result, instead of considering the probabilities of the case and the inferences which it legitimately suggests, he founds his judgment upon a denial of the evidential quality or value of the facts upon which the defendant relies. The learned judge, having stated the defendant's chief contention, that the road in question is a public highway, finds that there was no evidence to support that contention. Now the defendant had called a number of witnesses, living in the neighbourhood, two of them very old men, who had been familiar with the locality all their lives, and who testified to the uninterrupted use of the road for highway purposes, so long as they could remember; not only this, but they pointed to the existence of cellars along that road, some between the Stewart Hill Road and the Meadowvale Road, and some farther down, as marking the situations upon which settlers had formerly lived. Also, there was evidence introduced of an ancient bridge crossing the river opposite the line between the plaintiff's property and that of James D. Cox, to the westward. This position coincides very well with that described in the order of the Colchester Court of Sessions, of July, 1800, which the defendant put in evidence, subject to the objection that "it has no reference to the part where the trespasses were committed," and whereby it was

Ordered upon the memo of Thomas Pearson, Esquire, and Samuel Kent, that £8 be paid them out of the money now in the licence fund for

(1) 1 M.P.R. 556.

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repairing the Stewiacke Bridge. Ordered upon the presentment of the Grand Jury that the sum of £8 be assessed upon the settlement of Stewiacke for repairing the bridge over the river at William Fulton's house, and for other necessary repairs of highways where Robert Gamiel, Commissioner, shall find it necessary.

It seems perhaps remarkable that, at a time before living memory, the village of Upper Stewiacke should have had two bridges crossing the river within half a mile of each other; but no doubt is suggested of the fact, and there is no explanation of it. Certainly, however, there must have been one bridge before there were two, and, in 1800, when the place was a mere pioneer settlement, if that bridge were, as there is evidence independent of the Colchester minute to signify, located between the points which subsequently became the sites of the two bridges now in use, it suggests the existence of public roads communicating with its approaches on both sides. Moreover, it was shewn that the schoolhouse of the district had been at or about the point of junction between the road in dispute and the Stewart Hill Road, which, as I have shewn, itself unites with the public road leading easterly from the upper bridge along the southern bank of the river. These are material facts which should not have been disregarded, and they cannot, consistently with the justice of the case, be rejected upon the holding that they afford no evidence.

There is, among the exhibits before the court, the registry book of the proprietors under the grant. It is bound in parchment, now worn and shattered, and inscribed, "Proprietors' Registry Book, 1786." Its authenticity as an original record is not denied. Nobody assails the verity of the book; the learned Chief Justice, who dissents and would have excluded the entries, says (1):

> It is an ancient looking book, and I have no doubt of its genuineness and that it is what it purports to be, a record of certain meetings of the proprietors under the old grant of 1784;

evidently meaning the Settlers' Grant of 28th October, 1783, the only grant in the case. The truth of the entries thus seems out of question, and not the less so because, out of the exigencies of their situation, the proprietors would seem to have proceeded voluntarily, under a *de facto* organization. In the book the minutes of the proprietors' meetings are recorded, the first entry being on 10th Octo-

(1) 1 M.P.R. at 562.

ber, 1786, and relating to a reservation of intervale on the south side of the river for a glebe. The granted lands were held in common and the minutes relate generally to matters of common interest to the proprietors, who, in the years immediately succeeding the grant, were presumably the only persons concerned; they were signed usually by the clerk and "moderator," as the chairman of the meetings was called, and refer, among other things, to the appointment of surveyors of roads and the expenditure of public money on the roads and the bridge. The last entry recording minutes of a meeting is of 15th November, 1796. From that time forward the book was used only for the inscription of the earmarks for identification of the proprietors' cattle and sheep; the first of such entries bearing date 26th June, 1794, and the last 17th September, 1853; and it is interesting to recall in this connection that by chap. 1, sec. 6, of the Nova Scotia Acts of 1765, entitled, "An Act for the choice of town officers and the regulating of townships," it was provided that

> Whereas many inconveniences have arisen for want of cattle being branded or otherways marked, that run in common, Be it enacted, That all and every owner of any horse or horses, neat cattle, sheep, or swine, shall brand or otherways mark such horse or horses, neat cattle, sheep or swine, in such manner as that the same may be clearly known, and shall enter such mark or brand with the Town Clerk, in a book to be kept by him for that purpose, and the said Town Clerk shall receive for recording the said mark or brand the sum of six pence.

There are some minutes in this book that, subject to doubt suggested as to the identity of the localities to which they relate, afford information as to the public roads of the district; and the matters of record generally are of such a character that the book naturally would be kept in the custody of the clerk for public access and information.

The decision in the House of Lords of *Bullen* v. *Michel,* with respect to the vicarage of Sturminster Newton (1), is thus in part summarized in the headnote:

> Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage, (whether perfect or not) are good evidence (*quantum valeant*) of their subject-matter; although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*. And being admitted, they may be read throughout, for the purpose of proving any thing which is material to the issue, provided it is relevant, although it go to affect third persons who were not privy to it, and could have had no cognizance of the matters to which it relates.—Wood, Baron, *dissentiente.*

(1) (1816) 2 Price, 399.

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As to the actual custody from which the book comes, the evidence of James D. Cox, the postmaster, called by the defendant to lay a foundation of admissibility, is that "probably ten years ago, eight or ten years, perhaps more," the Town Clerk of Upper Stewiacke handed it to him (the witness), who kept it for a number of years and then sent it to the Dominion archives building at Halifax for safe-keeping.

Q. And you got it back from them the other day?—A. Yes.

Q. And handed it to us (the defendant's counsel)?—A. Yes.

There was no cross-examination, nor was any objection to the admission of the book subsequently raised at the trial; but, on the appeal to the court below, and also in this court, it was objected that the book, as a public document, does not come from proper custody, and does not shew anything admissible by way of reputation. The rules against secondary or hearsay evidence must, of course, be observed; and, if the book be not admissible consistently with the established practice, it should, upon objection properly stated, have been rejected. At the hearing I was not disinclined to the view that the admission of the book would not offend the principles which have been enunciated in the cases; but that is not so clear as I had expected to find, and I do not think it is necessary to solve the question in this case, for, whatever the rule may be as to the strict admissibility of the evidence, assuming the plaintiffs are entitled now to raise it, I am, for my part, like Mellish J., content to rely upon the proof which remains, assuming the rejection of the book; and, whether it be received or rejected, the appeal ought, I think, to be dismissed.

It is not without some misgiving that I have reached this conclusion, in view of the dissent; but, with great respect, I think the learned Chief Justice of Nova Scotia has failed to address his mind to the inference to be drawn from the indubitable fact in evidence of the public and uninterrupted use of the road for the period coextensive with the memory of witnesses. This is a fact which, considered along with the evidence of the ancient cellars and the abandoned bridge, seems amply to justify a finding of dedication; and, in *Folkestone Corporation* v. *Brockman* (1), Lord Atkinson, at page 368, affirmed the view ex-

(1) [1914] A.C., 338.

pressed by Taylor on Evidence, 9th ed., paragraph 131, saying that the statement contained in the paragraph is perfectly correct and is supported by the six authorities mentioned in the notes. "It is to this effect, that the uninterrupted user of a road justifies a presumption in favour of the original *animus dedicandi* even against the Crown." He adds, that the rule "as to the unrebutted presumption of dedication is a good working rule for all judges of fact to act upon. It is a rule which juries should be instructed to act upon, and which they ought to act upon." Moreover, I am persuaded that the learned Chief Justice has allowed his mind to be unduly affected by the absence of evidence of compliance with the statutory procedure for the lay out and the establishment of the road. These settlers were evidently proceeding voluntarily, and that is what might naturally have been anticipated.

The judgment of Anglin C.J.C. and Lamont J., dissenting, was delivered by

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Newcombe, but regret to find myself not in accord with his conclusions.

In my opinion the convincing judgment of the Chief Justice of Nova Scotia (1), in which Mr. Justice Chisholm concurs, and which affirms that of the learned trial judge, establishes

(1) that there is not sufficient evidence of dedication of the alleged highway (the only ground relied on at bar) to prove that fact;

(2) that the locus of the highway claimed to have been dedicated is left quite uncertain;

(3) that the acts of user proven are wholly consistent with there having been merely a private right-of-way in existence for the benefit of the lands lying between the Stewart Hill and Meadowvale roads, or with an understanding, tacit or express, of the persons, who, from time to time, for their convenience, made use of the alleged roadway, with the owners of the properties so traversed, which would fall far short of the clear and convincing proof requisite to establish dedication of the land as a highway.

(1) 1 M.P.R. 556, at 558-565.

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The very full analysis of all the testimony made by the learned Chief Justice of Nova Scotia renders it unnecessary to discuss it here in detail. Like him, I deal with the case on the assumption that the book, so much in question below, was properly received in evidence—although I deem its admissibility, to say the least, extremely doubtful, having regard to the facts that it is not, and does not purport to be, an official record, or one required by law to be kept, but, rather, memoranda of transactions of a group of private landowners, and that there is no evidence of anyone having been, at any time, officially designated to keep such a book. But, assuming its admissibility, it falls far short of showing facts sufficient to justify the conclusion of dedication for highway purposes of any particular portion of the lands now owned by the plaintiffs. As the learned Chief Justice says of the entries in the book,

> Most if not all of the entries relied upon are ambiguous to say the least of it. Many of them are clearly not understandable without local knowledge of the conditions existing more than a hundred years ago, and that is not available at this time.

Circumstances may, of course, warrant an inference of dedication, just as they may prove any other fact; but that inference must be the only one that can reasonably be drawn from them. The defendant, upon whom the burden of proof lay (the plaintiffs' paper title having been admitted), failed to suggest the person by whom, or the precise time when the alleged dedication was made, or to show what particular land was the subject of it. For aught that appears in the evidence, the way, which was apparently traversed at various times, either may have lain comparatively close to, and have followed generally the contour of, the bank of the stream, or it may have run in a straight line farther south across what is now the plaintiffs' property. Equally suggestive wagon tracks on both lines now appear on the property, as is evidenced by the surveyor's plan produced by the plaintiffs, the accuracy of which is duly vouched; and such user as was shown may be accounted for on the assumption of the existence of a private roadway or of an understanding such as suggested above.

There is no evidence of there having been any municipal or parish organization whatever. The entries in the old book show no expenditure on the alleged highway of monies raised by public taxation. At the most, they indi-

cate that some community funds belonging to the group of property owners in question were spent in repairs on some road or right-of-way lying south of the river under the supervision of men named by that group. To give to the presence of some stones or rocks in the river bed, said to indicate that a bridge formerly crossed the river at some point about midway between two bridges now existing on the respective lines of the Stewart Hill and Meadowvale side-roads, the significance claimed for them, requires an exercise of imagination which no court should be called upon to make. The same observation may be made in regard to the supposed remains of foundations of houses along the route of the alleged highway. As to the school house, said to have been located to the east of the Stewart Hill road, a private right-of-way would have served all the needs of the school children of any residents on the lots lying south of the river between the Meadowvale and Stewart Hill roads; and, for others, there was always available the main road running on the north side of the river.

Under all the circumstances, the absence of any mention of the highway, now claimed to have been dedicated, from the records of the Court of General Sessions in the District of Colchester, commented on so forcibly by Harris C.J., seems to me to be so significant as to be practically conclusive of the non-existence of the alleged highway at any early date; and, if dedication took place, it must have been at some very early date—about 1790 is the time suggested.

I should, perhaps, add that there is no evidence of any search having been made in the Registry Office, where one would expect to find a record of the alleged highway, if it, in fact, existed. In the absence of any plan being produced from the Registry Office showing such a highway it is fair to assume that there is none there. There is no suggestion of any grant having been made bordering upon such highway, or of the land which the highway would have occupied having been, at any time, excepted out of the grants of the property owned by the plaintiffs, or their predecessors in title—property which, admittedly, extends from a line well to the south of any possible location of the highway in question northerly to the water's edge.

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However, it would be idle and foolish to contend, in view of the contrary opinions expressed by three of the learned judges in Nova Scotia, and by my brother Newcombe, and more especially of the review of the testimony made by Graham and Ross JJ. in the court below, that there is nothing in the evidence suggestive of there having been a highway. No doubt, there are several circumstances quite consistent with, and, perhaps, even more readily explained by, the assumption that there was such a highway; but they do not, in my opinion, suffice to justify the reversal of the judgment to the contrary of the learned trial judge.

I am, for these reasons, of the opinion that the action was rightly dismissed in the trial court for lack of evidence to prove dedication and I would, accordingly, with the utmost respect for those who have thought otherwise, allow this appeal with costs here and in the Court of Appeal and restore the judgment of Mr. Justice Paton.

Appeal dismissed with costs.

Solicitor for the appellants: *S. D. McLellan.*

Solicitor for the respondent: *James A. Sedgewick.*

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*Feb. 7.
*Apr. 10.

GILLESPIE *v.* SHEADY

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Sale of shares in company—Offer and acceptance—Whether contract established

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Tweedie J., and maintaining the respondents' action.

The action was brought by the respondents asking for specific performance by the appellant of an alleged agreement for the sale and delivery by the appellant to the respondents of three thousand shares of the capital stock of the Associated Oil & Gas Company, Limited, or in the

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

(1) (1929) 24 Alta. L.R. 245

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alternative damages for failure to deliver, in the sum of $8,250.

The respondents' action was maintained and the damages awarded by the trial judge were $4,500, which judgment was affirmed by the Appellate Division.

The sole question involved is whether or not, on the facts of the case, the appellant, on its own behalf, entered into a contract with the respondents to sell them these shares.

The judgment of the majority of the Supreme Court of Canada (Anglin C.J.C. and Rinfret J. dissenting) allowed the appeal with costs and dismissed the respondents' action.

Appeal allowed with costs.

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

R. E. McLaughlin K.C. for the respondents.

BAKKER *v.* WINKLER

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*Feb. 6.
*Apr. 10.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Real property—Oil and natural gas rights—Agreement for sub-lease of—Right to rescission—Head lease made part of sub-lease—Misrepresentation—Finding of trial judge.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Tweedie J. (2), by which the appellant had been given the relief claimed by him.

The appellant was the holder of a lease of 240 acres of oil lands and entered into an agreement with the respondents to grant what is called a sub-lease of 80 acres of such lands, for the consideration of $40,000 payable $1,000 on the signing of the agreement which was made on the 4th of March, 1929, $10,000 on the 19th day of March, $10,000 on the 1st of April and $10,000 on the 15th of April and $9,000 on the 1st of May. The appellant did not personally appear; all the negotiations and acts on his behalf having been performed by W. M. Davidson, barrister, his

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1929) 24 Alta. L.R. 258. (2) (1929) 4 D.L.R. 107.

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attorney. The down payment of $1,000 was made but no further payment, though the trial judge finds that on the 15th of April the balance in full was offered and that actual tender of the amount was waived; and on the next day this action was begun, asking for rescission of the contract. The statement of claim alleges that "the sub-lease was to be subject to the covenants, conditions, stipulations and agreements in the said head lease contained" and that the head lease provided for the commencement of the drilling of a well upon the said premises by the 15th of April, 1929, and that the consideration for the granting of the said lease was "the agreement on the part of the respondents to carry out the above mentioned terms of the head lease and in addition thereto the sum of forty thousand dollars" and that the respondents have paid only $1,000 and "have failed to carry out the terms of the said agreement which required the commencement of drilling upon the said leased premises before the 15th day of April, 1929." It further alleges that the agreement was induced by the fraudulent misrepresentations by the respondents that they were possessed of the means of carrying out the said agreement.

The trial judge gave judgment for the appellants, finding the fraudulent misrepresentation established and holding the contract was induced by them.

The Appellate Division held that, on the facts of the case, even accepting the finding of the trial judge as to misrepresentation, it was too late, when the action was begun, for the appellant to rely on that ground and that, not until then, was any attempt made by the appellant to repudiate on that ground.

On the appeal to this court, the judgment of the court, allowing the appeal with costs, was delivered by Lamont J., who held that there was evidence before the trial judge upon which the latter could find fraudulent misrepresentation and that, he having found it, this court was bound by his finding.

Appeal allowed with costs.

R. S. Robertson K.C. and *S. B. Smith* for the appellant.

J. E. A. Macleod K.C. for the respondents.

WILLIAM F. HARRIS (PLAINTIFF).....APPELLANT;

AND

DANIEL LINDEBORG AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

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*Oct. 9.
*Dec. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Mines and minerals—Group of claims—Oral agreement between free miner and two prospectors—Two miners to do assessment work and look after claims for a two-thirds' interest—Subsequent relocation of ground and new claims added to group—Trusteeship as to proceeds of sale—Statute of frauds—Laches—An Act for preventing Fraud and Perjuries (Statute of Frauds) R.S.B.C. (1924) c. 95—Mineral Act, R.S. B.C. (1924) c. 167, s. 19.

An oral agreement between a free miner and two prospectors whereby the latter were to do, on a certain mining claim, whatever work was necessary to keep up all assessments, record the same, manage and look after the claim, place it under Crown grant, handle, option and sell it, is no mere contract for work and labour, but makes the prospectors agents of the free miner in what they are to do and establishes a fiduciary relationship whereby the prospectors must in equity be held to have become trustees for the miner and they or their representatives must account to him for all sums of money received thereunder.

Under such arrangement, an action by the free miner for a share of the proceeds received and a declaration of trusteeship in respect to the moneys paid to the prospectors is not "asserting an interest in a mineral claim which has been located and recorded by another free miner" and sect. 19 of the Mineral Act (R.S.B.C. 1924, c. 167) does not apply.

Nor is the action barred by the *Statute of Frauds* (R.S.B.C., 1924, c. 95), the agreement, being one only for the division of the proceeds of the sale of land, does not come within the 4th section of the statute.

Discussion of the doctrine of *laches*. When the action is not barred by any statute of limitations, mere lapse of time is not sufficient to deprive one of his equitable rights. In order to decide whether the remedy should be granted or withheld, the courts must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties, and where lies the balance of justice and injustice.

Under an agreement for a division of the proceeds of a sale, the claimant can wait until the sale is completed by the payment of the price before starting his action for an account and for his share of the proceeds.

Judgment of the Court of Appeal (42 B.C. Rep. 276) reversed.

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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HARRIS v. LINDEBORG.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Morrison C.J. S.C. (2) which awarded the appellant $100,000 and reducing the amount to $15,789 as against the respondent Laura McEwan and dismissing the action as against the respondent Daniel Lindeborg.

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

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

J. A. Ritchie K.C. and *E. F. Newcombe K.C.* for the respondent Lindeborg.

R. M. Macdonald for the respondent McEwan.

The judgment of the court was delivered by

RINFRET J.—The appellant Harris is a retired prospector. On the 25th of July, 1904, being then a free miner according to the *Mineral Act* of the province of British Columbia, he discovered and located a certain mining claim situated on the Salmon River, in the Stewart mining division of that province. He described it as the "Jumbo" and had it recorded under that name on the 8th of August, 1904. He did on the ground and recorded, in compliance with the statute, sufficient assessment work to keep the claim in good standing until the 9th of August, 1909.

In his action, the appellant alleged that in or about the month of June, 1908, while at Queen Charlotte Islands, he entered into an oral agreement with one James Proudfoot and one Hiram Stevenson whereby the latter were to do whatever work was necessary to keep up all assessments, record the same, manage and look after the claim, place it under crown grant, handle, option and sell it. For that, they were to receive two-thirds of all the money and profits derived therefrom and the appellant was to get one-third, after deducting all expenses.

The appellant further alleged that, pursuant to the agreement, Proudfoot and Stevenson associated with one Andrew Lindeborg and one Dan. Lindeborg on the basis that they were to have each a quarter interest and, to-

(1) (1930) 42 B.C. Rep. 276; [1930] 1 W.W.R. 411.
(2) (1929) 41 B.C. Rep. 262.

gether with them, entered into possession of the Jumbo claim. They allowed the same to lapse, relocated and recorded it under the name of Big Missouri and grouped it along with certain other mining claims under the name of the Big Missouri group. Subsequently, they gave several options on this group of claims out of which they received various sums of money amounting to $300,000, but they have paid so far to the appellant only the sum of $364.20. He therefore prayed for an account of all sums of money received by the four associates from the options and from the final sale of the Big Missouri group of claims, and for the payment to him of $100,000, being the one-third share of moneys so received.

In addition to pleading laches, the *Mineral Act* and the *Statute of Frauds,* the defence raised was that the moneys paid to the appellant were voluntary gratuities and were not made in pursuance of any agreement whatever.

In the Supreme Court of British Columbia, the trial judge (Morrison C.J.) (1), found that the agreement as pleaded was entered into between the appellant and Stevenson and Proudfoot;

that the Lindeborgs were brought into the agreement or that they intruded themselves on the footing of the agreement and identified themselves with it and were fully aware all along of such agreement.

He gave judgment for the appellant in the terms of the statement of claim. The Court of Appeal (2) set aside this judgment taking the view that the evidence negatived the finding against the Lindeborgs and accordingly dismissed the action against them. As against Proudfoot and Stevenson, for reasons later to be discussed, it was adjudged that the appellant do recover $15,789, less the sum of $521.40 found to have been paid to him on account.

The appellant Harris now appeals to this court to have the first judgment restored. There is also a cross-appeal on behalf of Proudfoot and Stevenson asking that the decision of the Court of Appeal be varied in so far as any sum was awarded to the appellant as against these respondents.

Of the four associates who joined to form the Big Missouri group, three are now dead. Daniel Lindeborg (the only survivor) is now respondent, both personally and as

(1) (1929) 41 B.C. Rep. 262.
(2) (1930) 42 B.C. Rep. 276; [1930] 1 W.W.R. 411.

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the administrator of the estate of his late brother, Andrew Lindeborg. Laura McEwan, the other respondent, is the administratrix of the estate of Hiram Stevenson. For the purposes of the action, she represents both the latter and the estate of James Proudfoot.

The existence of an agreement entered into at Queen Charlotte Islands, in 1908, between Harris, on the one part, and Proudfoot and Stevenson, on the other, can hardly be disputed. It results from the evidence of Harris corroborated by several other miners and prospectors, from admissions by Proudfoot and Stevenson in conversations reported by witnesses heard at the trial and from letters addressed to Harris, written and signed by Proudfoot or Stevenson, each on behalf of the other. Two of these letters may be conveniently reproduced, because they have a particular bearing on the point we are now at, and also—as regards one of them—because it was made the basis of the judgment of the majority of the Court of Appeal and will have to be referred to later when we come to discuss the decision of that court.

The first letter was written by Stevenson, after the Jumbo claim had been re-located in his name and that of Dan. Lindeborg. They had then secured from one Edgecombe their first option on the group formed of the re-located claim and of other claims and they had received the first instalment on the option price:

Stewart, B.C.,
Sept. 27, 1909.

Mr. Harris Dear Friend,

We have made a deal on them claims on Salmon River me and Dan Lindeborg staked the Jumbo in ower names and turned it in with the others we called it the Big Mossourie we bonded ten claims between Lenderborg and Jim Proudfoot and we done some work on the mossouri after we staked it but count get much of a assay she pretty low grade ore you no that we don the best we could we give you five thousand dollars if that will be satictory to you and you will get yours per cent as the payments—Comes do we got the first payment of one thousand dollars on the 15th Sep. we bonded for ninty five thousand and payments comes every ninty dayes. i got fifty three dollars for you as near as i can figer it out on the first Payment and if we never get any more you wount i am sending it over with tom McRostie and if he dont see you he will leave it Sandlands when you get it i wish you would send me a receate Well Harris Portland Canal is better this Summer then ever we bonded Claims on fish Crick to the same outfit.

from Yours truly
Hiram Stevenson.

The second letter was written by Proudfoot for the purpose of sending to Harris part of the latter's share under the same option:

Stewart, B.C.,
Sept. 12th, 1910.

Mr. W. Harris,

Dear Sir,

As requested by you I have thiss day mailled a check to the Canadian Bank of Commerce Prince Rupert for $184 20/100 to be placed to your credet well frind they have not turned Salmon River down yet and if we get one or two of the big payments I will feel Safe.

Yours very truly

J. Proudfoot
Box 32, Stewart, B.C.

Both letters point to the fact that Stevenson and Proudfoot felt themselves under a binding obligation towards Harris. Indeed, certain passages of the first letter are incompatible with the contention of the respondents that the moneys paid to Harris were voluntary gratuities.

You no that we don the best we could we give you five thousand dollars if that will be satictory to you and you will get yours per cent as the payments comes do * * * I got fifty three dollars for you as near as I can figer it out.

are not words suggestive of the intention to make a gift. They are consistent only with the existence of a contract.

We agree with the trial judge who found that a contract existed. It should be noted that the Court of Appeal did not reverse that finding, and only decided that the letters brought about a modification in the agreement originally made.

Of course, the appellant is met *in limine* by the objection that the agreement on which he relies was only verbal, that it was in respect to an interest in land and that it is therefore barred by section 4 of the *Statute of Frauds* (R.S.B.C., 1924, c. 95) and by section 19 of the *Mineral Act* (R.S.B.C., c. 167). We will have to examine how far the appellant's case is affected by these sections. But we may start from the point that, subject to the objection, an oral agreement was proved to have existed and the applicability of these sections will depend, at least to a certain extent, upon the nature of that agreement.

The nature of the agreement made at Queen Charlotte Islands is therefore the first matter to be considered.

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In the appellant's testimony, the agreement is stated to have been as follows:

Q. Now go on and tell me about that.—A. Well, I had this Jumbo claim up at the Portland Canal, and I had located some claims on Hughes Inlet at Jedway, and I wanted to prospect them more and see if I couldn't realize on them quicker than I could on the other. And they said they were going over there to the Portland Canal——

Q. Going back to the Portland Canal?—A. Going back to the Portland Canal; and I says to them, I have some claims up there; and they said, well, we could do your work; I said, yes. And, boys, I said, I will tell you what I will do, you go up there and take care of those claims, and do the work on them, hold them, and we will just go in three and three on them; and hold them until they are sold; you can hold them anyway, and do the work until they are sold, and just divide up the money three and three. That is why I never undertook to bring suit or anything else, because I wanted to carry out my contract.

Q. Well, did they agree to that?—A. Yes, sir; that is what they agreed to do. They agreed to go up and keep—do the work on them claims. There was nothing said about re-locating, and nothing else; they were to do the work. I was very anxious about that claim because it was a mine.

Q. What claim?—A. The Jumbo.

Q. And any talk about any claims they would add?—A. No, there was no talk about any claims that they had; I don't really think they had any at that time.

Q. But any they would take afterwards?—A. I told them anyway we wanted to hold them, they could add on to them, and make a group, and have a crown grant of them and take care of them, and when they were sold I was to retain my share, and each of them get a share.

Q. Each get a share?—A. Each get a share, yes, sir, that was the agreement.

Q. And were they agreeable to that?—A. Yes, sir.

Mr. MACDONALD: Q. At the time of this conversation where you say this agreement was entered into on Queen Charlotte Islands, who were present?—A. Well, I can name a few of them, quite a few.

Q. There were a lot there, were there?—A. Yes, all the old-timers around, a good many of them. There was myself, Jack Peterson, Joe Davis, Tom Wilson, and Jimmy Lidden, I think, and McKay, quite a bunch of the boys there present.

Q. And you were just standing in a group on the beach?—A. Yes, talking to them, when we first commenced talking about it we were on the beach, you see, talking about it, and then we adjourned there and went up to this cabin of Jim Matthew's cabin, Shorty's cabin.

Q. Well, where was the bargain struck?—A. The bargain was wound up in this cabin. We wound it up there; and I called on the boys and said, Boys, you all understand this between us, and you witness this agreement, these men Shorty and Mr. Proudfoot goes over there and take care of them claims and works them, and holds them until they are sold, crown grant them or anything they like, and hold them until they are sold, and when they are sold we divide up the money even. That is why I never bothered the boys, because my contract was when this mine was sold I was to get my money, my third interest.

Q. And did all these men you have mentioned hear the contract entered into?—A. Yes.

Q. And you called on them to witness it?—A. Yes, sir.

* * * * *

They agreed to take charge of my property up there and keep it up and crown grant it if necessary, and hold it until the ground was sold, and then we were to divide even up, the money.

* * * * *

Mr. MACDONALD: What was said, if anything, about adding other claims to them?—A. That is what they could do, they could add on or—

Q. I am asking you what was said?—A. Well, that was what was said.

Q. Who said it?—A. We all said it, we agreed among ourselves, they agreed as well as I did, that they would take them and keep them up, and add on or handle them the same as—until they were sold, and take care of them.

Q. I want you to answer this question, who said anything about adding additional claims?—A. I said it.

Q. And what did you say with respect to that?—A. What did I say? I say, you boys will take these claims and keep them up, do the assessment work, and keep them in good standing, crown grant them if you like, or any way until they are sold, one year or two years or five years —them days we didn't know—and when they are sold we distribute out the moneys three and three, one for each.

Q. Now you haven't said a word there about adding other claims, was anything said by anybody about that?—A. I don't know as there was anything said about it.

Q. You don't know what?—A. I don't know just what was said about adding other claims.

THE COURT: Was there anything said?—A. There might have been said, I don't know. I couldn't say.

The appellant's version is substantially corroborated by several of the "old-timers," whom Harris mentioned as having been present when the agreement was made in Shorty's (Stevenson's) cabin, at Jedway. As already mentioned, the trial judge not only believed Harris, but he found that the contract existed as stated by him and he acted upon it. On that point, we find ourselves in complete accord with the court of first instance.

In our view the contract disclosed establishes a fiduciary relation between Proudfoot and Stevenson on the one hand, and Harris on the other. It is not necessary to decide whether or not a partnership was constituted. It is sufficient that Proudfoot and Stevenson undertook to act as the agents of Harris to perform the necessary assessment work, and to record the same in his name. It was no mere contract for work and labour, because Proudfoot and Stevenson were to represent Harris in what they were to do. Harris was the owner of the claim; they were to do the assessment work for him, and for him and in his name they were to record it. The Court of Appeal appears to

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have taken the view that the existence of this fiduciary relationship was established. The powers of Proudfoot and Stevenson were very wide, and Harris was satisfied to leave it to them to take all the steps necessary to make it possible for them to dispose of the claim. It is true that full authority to obtain a Crown grant or to make a binding sale might have required a writing, but the parties had, no doubt, full confidence in one another. To repeat Harris's words, however, "There was nothing said about relocating, and nothing else; they were to do the work," and if there was anything clearly expressed in the contract, it was that Proudfoot and Stevenson were to keep the Jumbo claim alive until it was sold. This they did not do. They allowed the claim to lapse, and they re-staked the ground under the name of the Big Missouri. We do not think they intended thereby to deprive Harris of what rightfully belonged to him. On the contrary, their subsequent declarations and their letters rather show that they followed the course they did as a matter of policy and as the means best adapted to bring about satisfactory results. Under any view, however, they must in equity be held to have become trustees for the appellant and they or their representatives must account to him for all sums of money they received through the options and the sale of the claim contributed by him under the original agreement,—unless the defences under the Mineral Act and the Statute of Frauds should prevail.

Section 19 of the *Mineral Act* (R.S.B.C., 1924, c. 167) reads as follows:

> No free miner shall be entitled to any interest in any mineral claim which has been located and recorded by any other free miner, unless such interest is specified and set forth in some writing signed by the party so locating such claim.

On behalf of the respondents, it is submitted that that section was expressly intended to put a stop to the practice of free miners asserting interests in each others' properties founded upon alleged verbal contracts. In the present case, however, we do not think the section has any application. Harris is not asserting an

> interest in a mineral claim which has been located and recorded by another free miner.

He had a claim; he held the Jumbo claim and he says he went into an arrangement with Proudfoot and Stevenson

to develop that claim. The agreement he invokes is not one concerning an interest in the claim itself, it relates to an interest in the proceeds of the sale. Harris now asks for his share of the price received and a declaration of trusteeship in respect to the moneys paid therefor. In that view of the case, the courts below rightly decided that the *Mineral Act* did not stand in the way of the appellant.

Nor do we think his action is barred by the *Statute of Frauds* (R.S.B.C., 1924, c. 95). There is authority in this court to the effect that a partnership may be formed by a parol agreement notwithstanding it is to deal in land, and that the *Statute of Frauds* does not apply to such a case. (*Archibald* v. *McNerhanie* (1), a British Columbia case).

Whether, however, there was or was not a partnership, Proudfoot and Stevenson, having, by making use of the opportunity afforded them by their fiduciary position, got into their own names a half-interest in the mineral lands covered by the Jumbo, and in other mineral lands as well, could not escape the obligations of the original contract, by which the proceeds of the sale of the Jumbo were to be divided among the three interested persons equally. They were in a position in which, on these interests being converted into money, they were accountable, by virtue of their fiduciary relation, for one-third of those proceeds. An agreement for the division of the proceeds of the sale of land is not an agreement within the fourth section of the *Statute of Frauds*. *Stuart* v. *Mott* (2).

It is not even necessary to go that length in the present instance, for, in our opinion, the documentary evidence and particularly the letters are sufficient to satisfy the statute, which, under the circumstances, affords the respondents no protection.

Yet another defence is raised against the appellant's action. This defence is based upon the doctrine of laches, and it cannot be denied that the case presented on that ground by the respondents is worthy of serious consideration.

Where a person is obliged to apply for the peculiar relief afforded by equity to declare a trust or to enforce a contract, the principle is that he must come promptly. Now the respondents point to the following facts:

(1) (1899) 29 Can. S.C.R. 564. (2) (1893) 23 Can. S.C.R. 384.

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The location by Harris of the Jumbo claim having lapsed, the ground was re-staked jointly by Stevenson and Dan. Lindeborg and was called "Big Missouri." Shortly afterwards, Proudfoot, Stevenson, Dan. Lindeborg and Andrew Lindeborg grouped all their contiguous claims, ten in number, and gave the option to Edgecombe to which reference has already been made. It was then that Stevenson wrote to Harris the letter of the 27th of September, 1909 (above recited) and offered him $5,000 for his share, at the same time sending him the sum of $53 as the first payment. Harris immediately wrote and told Stevenson he was not satisfied and that he and Proudfoot had not done what they agreed to do.

They agreed to do the work instead of relocating it, and I am not satisfied.

It does not appear that this letter of protest was received by Stevenson, who wrote again on the 31st January, 1910:

Prince Rupert, B.C., Jan. 31, 1910.

Mr. William Harris Dear frend I got a letter from you about a month ago I rote you in September from hear and I gess it must have gon a strae you no the claim you had on Salmon river me and Dan Lenderborg staked it and we Bonded all of ower Claims on Salmon River as near as I can figer it out you will get about five thousand Dollars out of it and as we get the Payments we Put your Share in the Canadian Bank of Comers hear.

from Yours H Stevenson.

Then, on April 7, 1910, a further sum of $100 was sent to Harris in a letter written by Andrew Lindeborg. On July 25, 1910, a cheque signed by James Proudfoot to the order of Harris and for the sum of $184.20 was deposited for the appellant in the Canadian Bank of Commerce, Prince Rupert Branch. On September 12, Proudfoot wrote the letter already reproduced and containing another cheque of $184.20 to Harris' order, always on account of his share of the Edgecombe option. Another letter dated October 3, 1910, emanating from the Manager of the bank at Prince Rupert, advised Harris that yet another sum of $80 was being sent to him under separate cover. The Court of Appeal found that Harris had received these various sums, and this was not disputed at bar.

In the meantime, around September, 1910, Harris went to Stewart, at the head of the Portland canal. There he met all four associates. His evidence is that he then re-

newed his protest, told them that he was "not satisfied the way they "did with the mine, and (he) still retained his interest in that group of claims." The evidence goes on:

Q. What did they say?—A. They said, certainly you will get your interest in them claims the same as if we did the work, you will get it just the same by us re-locating it as you would if we done the work. Put it that way.

Q. What interest: did you tell them?—A. I told them I still retained my one-third interest, according to my first contract, my first contract with them.

Q. With Stevenson and Proudfoot?—A. Yes; I never recognized Lindeborg, never seen him in the contract.

Q. But they came in and said you could have the one-third interest? —A. Yes.

Q. And that was all agreed to?—A. Yes.

Q. And you were all there?—A. Yes.

We have quoted the above verbatim on account of its bearing upon other points of the case, to which we will turn our attention later.

The next development was that Harris wrote to Dan. Lindeborg on the 7th of May, 1911. The letter was not found but was acknowledged by Lindeborg on the 15th of June, 1911. Harris swears to the contents of his letter and says he was inquiring about the options,

how they were getting along with them, and trying to keep in touch with (his) interest.

This is consistent with the terms of the reply by Lindeborg.

Nothing is shown to have passed between the parties from June, 1911, until April 30, 1919.

During that period, no less than six options were executed concerning the Big Missouri group, although comparatively little money was paid on them, and they were all allowed to lapse. Harris was not advised of any one of them. Apparently he was kept in absolute ignorance of what was going on and he does not pretend having made any attempt to find out.

Proudfoot had died about Christmas, 1910, and Stevenson had been killed in action, in France, some time in 1917.

It was not until April 30, 1919, that Arthur J. Harris, the son of the appellant, broke this long silence by writing to Dan. Lindeborg. His letter begins in this way:

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It has been such a long time since we have been in communication with you boys that you are doubtless thinking that we have passed out. We have been talking quite often about the Big Missouri and other properties on Salmon River and have kept in touch with developments there. We are sure delighted to hear of the bright prospects for the Salmon River district.

He goes on rather lengthily to give a lot of family news, he inquires about the death of Stevenson (whom he calls Stevens) and says:

You are of course aware of the agreement that father and Mr. Stevens had in regards the Big Missouri, and father desires to know if that matter was fixed up before Mr. Stevens left.

He winds up by asking Lindeborg to write and let them know "how everything is going." Lindeborg answered he had "not heard if (Stevenson) made any provision for any agreement with (Harris)" but he was forwarding the letter to Stevenson's sister. Almost a year elapsed before Harris' son wrote again to Dan. Lindeborg and got the reply (May 15, 1920) that the administrator of Proudfoot's estate "had not been able to find anything among Jim's papers regarding any agreement of the sort mentioned." Lindeborg added:

so far we have not got anything near out of the property what it has cost us to hang on to it this many years.

Harris was now living in Tacoma, State of Washington, U.S. At his request, on February 12, 1921, his son wrote again to Lindeborg complaining that the letters so far received from the latter were "evasive and did not contain the information (they) wished." He asked for the address of the heirs of Stevenson and said that if they could not find out how they stood with respect to the agreement, Harris would

either come up there himself or send a suitable representative to represent his interest, and would place the necessary papers in the hands of proper authorities for collection.

This brought the following reply:

June 22, 1921.

Mr. Arthur J. Harris,
627 N. State Street,
Tacoma, Washington.

Dear Sir,

Your letter of February 12th last was received by me on my return home and in answer will say that if you think my former letters have been evasive will try to make this plain as possible.

First, you state you have not received the information desired, as near as I can remember you have never stated the nature of information wanted.

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Further you refer to an agreement between your father and myself. Of this I can inform you that there never has been any agreement, verbal or in writing, between your father and myself. If he has any agreement with other parties I have no knowledge of same.

The address of Administrator of the Proudfoot Estate is D. C. Barbrick, 6039 Sherbrooke St., Vancouver, B.C. For Stevenson Estate, address Mrs. Laura McEwan, Koch Siding, B.C.

Trusting you will find this plain enough, I remain,

Yours truly,

DL-I Dan Lindeborg.

The correspondence then shifted from Lindeborg to Barbrick and Mrs. McEwan. Letters were exchanged between them and Harris' son, Harris seeking to find out if Proudfoot or Stevenson "had made any provision for the agreement," (being told that there was none), insisting that he could "make proof" of his rights and asking that they should be recognized. The last letters were addressed to the administrators by A. J. Harris on April 4, 1922, and remain unanswered.

The present writ was issued only on July 18, 1928.

The respondents contend that Stevenson's letter of September 27, 1909, was a repudiation of the agreement, that the administrators challenged the appellant's claim as far back as 1922. They point to the long delay that ensued and to the change of circumstances: the introduction of the Lindeborgs as co-owners invoking a change of parties, the deaths of Proudfoot and Stevenson eliminating all possible evidence on their behalf, and the fact that the "new parties were allowed to go on and spend money on the property and go to all the trouble, expense and risk for years." And they submit that it is impossible, under the circumstances, to avoid the effect of laches.

In *Lindsay Petroleum Co.* v. *Hurd* (1), it is said:

> The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, if founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important

(1) (1874) L.R. 5 P.C. 221, at 239.

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in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

Lord Blackburn, in *Erlanger* v. *New Sombrero Phosphate Co.* (1), quotes the above passage and then adds the following comment:

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

This suit, as we have seen, was not instituted until the 18th of July, 1928, more than six years after the date of the last letter sent on behalf of Harris and to which he got no reply; but the action is not barred by any statute of limitations, and mere lapse of time is not sufficient to deprive the appellant of his equitable rights against the respondents. In order to decide whether the remedy should be granted or withheld, we must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties and where lies the balance of justice and injustice.

We may now apply this test to the several grounds just enumerated and put forward by the respondents as to why the defence of laches should be given effect to in the present case.

1. We have already stated our reasons for construing the letter written by Stevenson on September 27, 1909, not as a repudiation, but, on the contrary, as an acknowledgment of the existence of an agreement between himself, Proudfoot and the appellant. True, it does not contain the whole tenor of the agreement, but if Harris is telling the truth about what took place upon receipt of that letter, he protested against anything in it not in conformity with the original agreement, he told the respondents he "still retained (his) one-third interest according to (his) first contract" and, he says, it was all agreed to at the interview at Stewart, in 1910. This evidence was accepted by the

(1) (1878) 3 App. Cas. 1218.

trial judge, and we see no reason why it should be disbelieved.

2. The letters written by the administrators in 1921 and 1922 are not and could not be a denial of the agreement. The administrators did not know. Their letters are no more than answers to the demand for information coming from Harris, and advising him that, amongst the documents of the respective estates of Proudfoot and Stevenson, nothing was found to indicate the existence of an agreement concerning the Big Missouri.

3. If the Lindeborgs ever became co-owners of the Jumbo or Big Missouri claim, it was in the month of August, 1909, before Harris went to Stewart and before he had with Proudfoot and Stevenson the understanding there arrived at whereby they agreed that, notwithstanding any re-staking, he still retained his one-third interest "according to his first contract." At that time, if ever, the Lindeborgs had already been introduced as new parties.

Consequently, we fail to see how, because of the appellant's delay in coming to court, the respondents can be prejudicially affected through a change which had occurred before the contract was re-affirmed at Stewart and before the period in respect of which laches is now charged.

4. The fact that Stevenson and Proudfoot are both dead no doubt compels the court to sift thoroughly and with great care the evidence rendered on behalf of the appellant; but, in addition to the fact that the latter was amply corroborated, it is not disputed that the learned Chief Justice, who tried the case, and who believed the evidence for the plaintiff, was fully aware of the extent of his duty in the premises, and that he decided to act upon such evidence only because the truthfulness of the witnesses was made to him perfectly clear and apparent (*In re Garnett* (1)).

5. As for the trouble and expense to which the respondents allege they went "for years" and the risk they incurred, suffice it to say that largely, if not entirely, through the Jumbo claim, which the appellant contributed to the common adventure, and which was, as the evidence shows, the "big value" in that group of claims, the respondents made profits admitted to have reached $300,000. It thus becomes an easy matter to decide

(1) (1885) 31 Ch. D. 1, at 9.

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whether the balance of justice or injustice is in favour of granting the remedy or withholding it.

We have now examined, in the order they were presented by the respondents, each of the reasons they urge in support of their plea of laches and we have found that none of them calls for the application of the doctrine. On the part of Harris, there never was conduct from which an intention to abandon his interests can be gathered, and all the evidence shows, on the contrary, "a settled determination to hold to his rights" (*Clarke* v. *Hart* (1)). Those rights, under the agreement, entitled him to divide the money only after the claim was sold. "That is why I never bothered the boys," says Harris in his evidence, "because my contract was when this mine was sold I was to get my money, my third interest." The Big Missouri group was sold to the Standard Mining Corporation for $275,000, the first payments under the option were made shortly before this action was commenced and, in fact, the last instalment of $100,000 was garnisheed and is now paid into court. The appellant could wait, if he so wished, until the sale was completed by the payment of the price before starting his action for an account and for his share of the profits.

We therefore agree with both courts that the defence based on laches, on the *Statute of Frauds* and on the *Mineral Act,* raised by all the respondents must fail. As a result, the conclusion already reached against Proudfoot and Stevenson must stand, and their representatives must account to the appellant.

In the case of the Lindeborgs, however, the story is different. They were not parties to the original agreement. There is no evidence that, at the time of relocating the Jumbo claim, the agreement was disclosed to them or that they knew of it. Fraud on their part is neither alleged, nor proven. Even if they became subsequently aware of the agreement existing between Harris, Proudfoot and Stevenson, that would not make the Lindeborgs partners. They could not become partners without the consent of all the other parties.

Consent on the part of Harris could result perhaps from his *acceptance* of the proposition contained in the letter of

(1) (1858) 6 H. of L.C. 633, at 648.

the 29th of September, 1909, provided it was shown that Stevenson, when making the proposition, was acting for the four associates; but there is no evidence that the Lindeborgs ever bound themselves towards Harris or linked themselves with any bargain towards him. As for Harris, he does not pretend but denies having accepted Stevenson's offer. His conduct and testimony preclude the introduction of the Lindeborgs in any agreement. He stated most positively he "never recognized Lindeborg, never seen him in the contract." His action, far from invoking the letter of the 29th of September, is the very negation of the existence of a modified bargain into which the Lindeborgs could be brought. Whatever part the Lindeborgs took in the whole matter is perfectly consistent with their understanding that Stevenson and Proudfoot were entitled to act as they did. Assuming that, at any time before September, 1910, they were put upon inquiry as to whether Harris had an interest and as to the nature and the extent of that interest, this was made clear as a result of the interview held at Stewart at that date, and where Harris, being fully conversant with all that Stevenson and Proudfoot had done, knowing that they had joined hands with the Lindeborgs, declared (to use his own words):

> It don't make any difference if you located it, if you can handle it better in your name it is alright,

as long as he kept his interest with Stevenson and Proudfoot. This meant, if anything, that he was to look to Proudfoot and Stevenson alone for whatever share he was to get out of the sale of the Jumbo claim; it was a recognition on his part that the Lindeborg interests remained unaffected. Harris himself puts that interpretation upon the interview when he says: "I never recognized Lindeborg, never seen him in the contract."

Fraud having been eliminated and there being with the Lindeborgs neither partnership, nor agency, they could not be declared trustees and, as far as they are concerned, the action against them was rightly dismissed by the Court of Appeal.

It remains to establish the amount Harris is entitled to recover against Proudfoot and Stevenson. Strictly speaking, the action could have been disposed of merely by ordering an account; but, owing to a lack of definite records,

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the profits on the sale of the group of claims have been accepted by both sides as being $300,000.

The trial judge gave judgment in favour of Harris for one-third of that sum. The majority of the Court of Appeal thought the appellant should receive only five ninety-fifths of the $300,000, less the amounts already paid to him. This computation was made on the strength of the letter of the 29th of September, 1909, wherein Stevenson offered Harris $5,000 as his share of the $95,000. This, however, could serve as a basis of computation only if the proposition contained in the letter had been accepted by Harris and a new contract was thereby formed. We have already indicated that, in our view, that was not the case. Express acceptance by Harris was not established. Acceptance, whether express or by conduct, was neither invoked nor relied on by Proudfoot or Stevenson, who took the stand all through the case that no agreement of any kind was ever made. True, the appellant received and kept some moneys. The first sum of $53 enclosed in Stevenson's letter was approximately five ninety-fifths or one-nineteenth of the first Edgecombe payment. But if Harris told the truth about what followed—and his evidence was believed by the trial judge—his acceptance of that sum was of no consequence. The subsequent remittances made to him rather lend colour to his contention, for they show that the alleged one nineteenth proportion was not adhered to. None of the individual payments made to Harris after the first payment of $53 amounts to one-nineteenth, neither does the total received by him correspond with that proportion of the moneys which the respondents got under the options. We must therefore look for another basis and we think it should be found in the following way:

The Big Missouri group was formed of ten claims. Of these, the claim formerly known as the Jumbo was the only one covered by the agreement. On Harris' evidence, we agree with the Court of Appeal that the contract did not cover the adding of other claims. Proudfoot and Stevenson were to hold the Jumbo claim until it was sold. They were not to re-locate it, nor to admit others as partners in the working out of the contract. Harris was right in telling them, at Stewart in September, 1910: "You boys haven't

lived up to your agreement." Yet, being informed of what they had done, he added:

> I says, it don't make any difference if you located it, if you can handle it better in your name it is alright, as long as you keep my interest. And they agreed to it.

We have already referred to other parts of his evidence to the same effect. Harris

> still retained (his) one-third interest, according to (his) first contract * * * with them.

Now the interest in question was an interest in the Jumbo claim (re-named the Big Missouri) and the one-third of the proceeds of that interest meant one-third of the proceeds of the sale of the Jumbo or Big Missouri claim. The respective values of that claim and of the other claims added to it for the purpose of forming the Big Missouri group are not in evidence, although it is abundantly clear that the Jumbo was the dominant claim and the trial judge so found. The amount of Harris' share is not to be calculated according to the principle which governs when a man intermingles his property with that of another without the approbation or knowledge of the latter. Here, Harris, after having acquired knowledge of the situation, approved of it and was willing to accept what his original contract would give him in full satisfaction of his interests. He approved of the method adopted by Proudfoot and Stevenson to bring about the sale of his claim and, as a consequence, in our view, his share is limited to one-third of the amount which, through the means so adopted and so approved, the latter got out of that sale, including the moneys paid on previous options.

As between the four associates: Proudfoot, Stevenson, Andrew and Dan. Lindeborg, we know that they were to divide in four equal shares. On that basis, out of the $300,000, the amount coming to Proudfoot and Stevenson was $150,000. It can hardly be contended by them that this sum of $150,000 does not stand wholly and exclusively for the value of the Big Missouri or Jumbo claim. The only other claim which they are known to have contributed to the group was a claim called " Winner," staked and recorded by Proudfoot in August, 1909. This claim does not appear to have had any bearing on the price paid for the group.

The sale of the Jumbo claim having brought $150,000, Harris, Proudfoot and Stevenson must now, according to their agreement, " divide up the money three and three."

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Proudfoot and Stevenson have received the money and they or their representatives must account to Harris who is entitled to recover from them $50,000 for his share. This was the conclusion of Galliher J.A., with whom we agree.

The appeal should therefore be allowed to the extent indicated, with costs to the appellant before this court against the respondents Proudfoot and Stevenson. The cross-appeal of the latter is dismissed with costs and the appeal of Harris, so far as Andrew and Dan. Lindeborg are concerned, is also dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Burns, Walker & Thomson.*
Solicitor for the respondents: *R. M. Macdonald.*

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Feb. 4, 5, 6.
Apr. 10.

THE SS. "PRINCESS ADELAIDE" (DEFENDANT) ..... APPELLANT;

AND

FRED OLSEN & COMPANY (OWNERS OF THE SS. "HAMPHOLM") (PLAINTIFF) RESPONDENT.

THE CANADIAN PACIFIC RAILWAY CO. (OWNERS OF THE SS. "PRINCESS ADELAIDE") (PLAINTIFF) ..... APPELLANT;

AND

THE SS. "HAMPHOLM" (DEFENDANT) .. RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision—Speed—Fog—Regulations for Preventing Collisions at Sea, 16, 19, 21, 22, 23, 27, 29.

The *P. A.*, a passenger steamer, left Vancouver, bound for Victoria in a dense fog. After passing the first narrows, she was running at a rate of twelve knots, on a course of S.W. ½ S., which course she kept till the collision was imminent. She stopped her engines about a minute before the collision, upon hearing a signal from a tug to port, and one from a ship to starboard, the *H.*, and which she first saw emerging from the fog at a distance of about 300 feet, and between two and three points on her starboard. The *P. A.* then attempted to clear

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

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the *H.* by putting her helm hard astarboard with full speed ahead, but without success, the stem of the *H.* cutting into the *P. A.* on her starboard side, a little ahead of amidships; she was swinging with a speed of about eleven knots. The *H.*, inward bound, passed Point Atkinson at 10.05 a.m. on a course of E. by N. and at a speed of four knots, but seeing the density of the fog decided not to enter the narrows, but to proceed cautiously, by "slow ahead" and "stop" alternatively, to a southerly part of English Bay, and altered her course at 10.25 to E.N.E. Later, at 10.50, hearing signals of other vessels, she changed her course E.S.E. giving proper signals. From 10 o'clock to 11.12 she was proceeding by "slow ahead" and "stop" at close intervals. At 11-12 the *H.* heard the signal from the *P. A.* about 5 or 6 points on her port bow. She stopped her engine, blew the whistle, to which the *P. A.* replied. There followed another exchange of whistles, and while the *P. A.* was whistling for the third time, she emerged from the fog, heading for the *H.* The *H.* then reversed her engine full speed and put her helm hard aport, but too late to avert collision. When they first saw each other the *P. A.* was running at ten knots, and the *H.* at one and a half knots. The collision occurred about half a minute after the two steamships first saw each other.

Held (affirming the judgment of the Exchequer Court ([1930] Ex. C.R. 10)) that, on the facts, the navigation of the *H.* was free from blame. In the circumstances of the case, neither by the cases referred to nor by the practice of seamanship was the *H.* required to reverse before the *P. A.* became visible, as she could have come to a standstill within 30 feet. Upon the assumption that the *P. A.* was proceeding at moderate speed and obeying the injunctions of the pertinent collision regulations, the *H.*, while the vessels were out of sight of each other in the fog, had no occasion to reverse the mere steerageway which she carried, while, on the other hand, it was a matter of prudence and good practice that the ship should not be put out of command, the advantages of maintaining steerageway having frequently been recognized by the courts. The cause, which brought about the collision, was the excessive and reckless speed of the *P. A.* in proceeding in the dense fog which prevailed, and in a harbour where ships were so likely to be met, at the immoderate rate of twelve knots, when the visibility was only about 300 feet, and persisting in the maintenance of that speed, when she was aware that a steamship was approaching on her starboard bow, so as to involve risk of collision.

APPEALS from the judgment of the President of the Exchequer Court of Canada (1), allowing with costs an appeal of Fred Olsen & Company, owners of the SS. *Hampholm* (Respondent), and dismissing with costs a cross-appeal of the Canadian Pacific Railway Company (Appellant), owners of the SS. *Princess Adelaide,* from the judgment of the Honourable Mr. Justice Martin, Local Judge in Admiralty for the British Columbia Admiralty District, in cross-actions brought and tried together

(1) [1930] Ex. C.R. 10.

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on the same evidence, for damage sustained by the respective vessels of the parties as a result of a collision between the said vessels in English Bay, adjacent to the harbour of Vancouver, on the 19th of December, 1928. The Local Judge in Admiralty found both vessels to blame, the *Princess Adelaide* for excessive speed, and the *Hampholm* because she should have reversed sooner; and he apportioned the damages to be borne two-thirds by the owners of the *Princess Adelaide* and one-third by the owners of the *Hampholm*. The owners of the *Hampholm* appealed to the Exchequer Court of Canada contending that the *Princess Adelaide* should have been held solely to blame. The owners of the *Princess Adelaide* cross-appealed, contending that it should have been found that the *Hampholm* did not stop her engines on first hearing the *Princess Adelaide*, and that a case for apportionment of damages according to degree of fault had not been made out, and that the damages should have been directed to be borne equally. The President of the Exchequer Court allowed the appeal of the owners of the *Hampholm* and dismissed the cross-appeal of the owners of the *Princess Adelaide* with costs.

J. E. McMullen for the appellants.

W. M. Griffin K.C. for the respondents.

The judgment of the court was delivered by

NEWCOMBE J.—These two steamships collided in English Bay, the outer harbour of Vancouver, on the forenoon of 19th December, 1928, at about 11.14½ o'clock by the *Hampholm's* time, or 11.16 by the *Princess Adelaide's* time, which appears to have been somewhat faster. There were cross actions to recover damages, and these were, by consent, consolidated and tried together at Vancouver, before the learned local judge of the Exchequer Court for the British Columbia Admiralty District, who found fault on both sides, and apportioned the liability according to his finding of the degree of fault, as provided by the *Maritime Conventions Act*, R.S.C., 1914, 1927, c. 126, viz:—two-thirds on the part of the *Princess Adelaide*, and one-third on the part of the *Hampholm*, saying:

* * * there is a great distinction between the conduct of the two vessels, the former (the *Princess Adelaide*) deliberately violated the Regula-

tions in a gross degree, and the latter (the *Hampholm*) erred in her manner of endeavouring to carry them out.

There was an appeal to the President of the Exchequer Court, and he, finding the *Princess Adelaide* alone to blame, exonerated the *Hampholm,* and remitted the case for the assessment and recovery of the damages sustained by the *Hampholm.*

The case now comes before this court upon appeal from the latter judgment. It was argued at unusual length, although it transpires that the material facts are not disputed in any important particular, and the controversy may, I think, be disposed of with full justice to the parties on the assumption that they are as found by the learned local judge.

On the morning in question, the *Hampholm,* a Norwegian steamship of 4,480 tons gross, 395 feet long, 52 feet beam and 10 knots speed, inward bound from the Orient to Vancouver, entered English Bay at 10.05 o'clock, passing Point Atkinson, which marks the entrance to the northward, about half a mile on her port hand. She evidently found it too thick to attempt the Narrows, and so proceeded cautiously, with the intention of anchoring at the usual anchorage in the southern part of the Bay. In doing this, she necessarily had to cross in a southeasterly direction the course of any outgoing vessel from the inner harbour which might attempt to navigate through the fog, which is described as "dense."

The *Princess Adelaide* is a single-screw steamship of Canadian registry, 3,060 tons gross, 290 feet long, 40 feet beam, and 16 knots speed. She plies daily between Vancouver and Victoria, carrying passengers for the Canadian Pacific Railway Company. She left her berth at Vancouver in the fog at 10.43 a.m., passed through the Narrows, and, emerging into the Bay at Prospect Point at 11.01 o'clock by her time, developed a speed of 12 knots, which she maintained upon her usual outward course, with little diminution, if any, until the moment of the collision.

The learned local judge, in his findings, states the matter thus:

> At the time of collision the weather was calm, but with a dense fog and the tide at the last of the flood. According to the admission of the *Princess Adelaide's* master, she was running through the fog, after she left the Narrows, at a speed of twelve knots on a course which her master says was S.W. 3/4 S, as he marked it on the Admiralty Chart, and he also

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says, and there is no sound reason to doubt that statement, that he did not change that course till the collision became imminent. He had stopped his engine about half a minute before the collision upon hearing the fog whistles from a tug to port, and then, again, from a ship to starboard that turned out to be the *Hampholm,* which he first saw emerging from the fog at a distance of about 300 feet between 2 and 3 points on his starboard bow, and tried to clear her by putting his helm hard astarboard with full speed ahead, but it was too late to avoid the collision, the stem of the *Hampholm* cutting into the *Adelaide* on her starboard side, a little forward amidships, as shown by the position of the models on exhibit 4, which is admitted by both parties to be substantially correct. At the moment of impact the *Adelaide* was still swinging, with a speed of about 11 knots, at least, to avoid the *Hampholm,* which still had, I am satisfied, upon the conflicting evidence on the point, a slight amount of way on her when she sighted the *Adelaide,* but not exceeding 1½ knots; her preliminary acts admits she had "steerage way only." * * *

The *Hampholm,* inward bound to the Narrows, at 10.05 had passed and seen Point Atkinson, half a mile off, on a course E. by N., at a speed of about 4 knots, but shortly afterwards, in view of the density of the fog, had decided not to attempt to enter the Narrows, but to proceed cautiously, by "slow ahead" and "stop" alternately, to the usual anchorage in the southerly part of English Bay, which was in general the proper action to take in the circumstances, and to do so she altered her course at 10.25 to E.N.E. and continued on it at a decreasing alternate speed down to about 3 and 2 knots, and finally, owing to the signals of other vessels, again changed her course, at 10.50, to E.S.E., giving the proper signals and taking soundings.

While on that course and at least as early as 11.12, she heard the signal of another vessel (which turned out to be the *Adelaide*) about 5-6 points on the port bow, upon which she stopped her engines and blew her whistle, to which the *Adelaide* replied, and after another exchange of whistles and when the *Adelaide* was whistling for the third time (if not the fourth, as the *Hampholm's* master gives it) she almost immediately emerged from the fog, at a distance of about 3-500 feet, and apparently heading almost directly for the *Hampholm,* or at least across her bow, upon which the *Hampholm* reversed her engines full speed and put her helm hard aport, but too late to avert the impact, as already noted. The master of the *Hampholm* says he was struck by the *Adelaide* less than "half a minute" after sighting her.

It is, I think, worth mentioning an additional fact, about which there is no dispute, which is thus stated by Capt. Hunter, master of the *Adelaide,* speaking of the last signal which he had from the *Hampholm:*

A. She just came in view then; I put the helm hard astarboard and put the engine full ahead.

Q. Yes. What was the effect on your ship of putting the helm hard astarboard?—A. Well, we swung to port about three-quarters of a point, and then I seen the *Hampholm* coming along and I thought that we might clear him by putting the helm hard aport and swinging the other way—swinging around him, but he was coming too fast and we were too close together then.

Q. Did the port helm order have any effect on the ship?—A. Yes, it stopped the swinging.

Q. Stopped the swing to port?—A. Yes.

Q. What course did the *Hampholm* appear to be on when you saw her?—A. Oh, well, approximately she would be about—I would say about south-east by south or thereabouts.

Q. And what distance away did she seem to you?—A. About 300 feet.

Q. About 300 feet from your ship?—A. Yes, sir.

Later on he says he went hard aport with a view to avoiding a collision, although it is difficult, upon his evidence, to understand the conjunction of these manoeuvres. He admits, however, that in the event the hard aport movement had no more effect than to stop the previous swing to port; but, if the captain thought that the hope of avoiding a collision could be realized only in this manner, it would seem to have been quite out of the reach of anticipation that he would allow so little time and space for the purpose:—about half a minute, or less as found at the trial, and about 300 feet, according to his own testimony.

Now the *Adelaide* contends, and the local judge agrees, that in the special circumstances of the case the *Hampholm* should have reversed her engines when she heard the second whistle from the *Adelaide,* or, at latest, upon hearing the third whistle, and that therefore, the *Hampholm* did not navigate with the requisite caution, and is consequently responsible for a degree of fault. Article 16 of the Collision Regulations admittedly applied. It provides that

> Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

This article is, of course, to be interpreted in connection with articles 27 and 29, which insist upon due regard to all dangers of navigation and collision, the practice of seamen and any special circumstances which may render a departure from the rules necessary in order to avoid immediate danger; moreover, articles 19, 21, 22 and 23 have their application especially to the navigation of the *Adelaide,* and she certainly broke every one of these rules. It is said that, by reason of the fog and consequent difficulty of locating the respective positions, the starboard side rule could not operate until the vessels came within sight of each other, and so it may be; but, after that, it would seem that the rule could not with safety have been disregarded, unless

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overborne by special dangers or circumstances, and that, in any case, the previous navigation of the *Adelaide* should have been conducted in a manner which would have allowed of the possibility of avoiding the collision by the application of the rules laid down for common guidance.

There is abundant evidence to establish the cautious character of the *Hampholm's* navigation from the time she passed Point Atkinson. Her witnesses and records have been produced; and, from 10.56 o'clock, when she was dead in the water, until 11.14½ o'clock, when the collision occurred, it is shewn by her testimony and bell-book that her engine movements were as follows:

3 minutes stopped from 10.56 a.m. to 10.59 a.m.
1 minute slow ahead from 10.59 a.m. to 11 a.m.
1 minute stopped from 11 a.m. to 11.01 a.m.
4 minutes slow ahead from 11.01 to 11.05 a.m.
5 minutes stopped from 11.05 a.m. to 11.10 a.m.
2 minutes slow ahead from 11.10 a.m. to 11.12 a.m.
2 minutes stopped from 11.12 a.m. to 11.14 a.m.
½ minute full astern from 11.14 to 11.14½ (collision).

It was at 11.12 a.m. that the *Hampholm* heard, two or three points forward of her beam, on her port side, the whistle of a vessel which was the *Adelaide,* and her engines were thereupon immediately stopped and remained so until, when two minutes later the *Adelaide* came into view, put full astern under a hard aport helm.

Many cases have been cited; but, neither by any of these, nor by the practice of good seamanship, does it appear that the *Hampholm,* in the circumstances of this case, was required to reverse before the *Adelaide* became visible; and, in my view, the navigation of the *Hampholm* is free from blame. Upon the conceded facts, she could have come to a standstill within 30 feet, but I think her master did well to keep his ship in hand. It must be remembered, as said in Marsden on Collision, 8th edition, p. 8:

> The rules are not made merely for the sake of the vessel which has to observe them, but for the sake of other vessels which may be approaching, or may be manoeuvring at close quarters, and who have every right and reason to suppose the rules will be observed, and none to suppose they will be broken.

And the same learned author says, at p. 403:

> It would seem, therefore, that under the present law the duty to reverse does not arise (except, possibly, in the case of a steamship hearing

the foghorn of a sailing ship close to her and forward) until the ships are in sight of each other, or until the course of the ship, whose duty it is to keep her course, is clearly indicated to the other by the different directions in which her whistle is heard.

Upon the assumption that the *Adelaide* was proceeding at moderate speed and obeying the injunctions of the articles to which I have referred, the *Hampholm*, while the vessels were out of sight of each other in the fog, had no occasion to reverse the mere steerageway which she carried, while, on the other hand, it was a matter of prudence and good practice that the ship should not be put out of command. The advantage of maintaining steerageway is frequently recognized in the cases, and the Supreme Court of the United States, in the *Umbria* (1), says:

> It is probably also true that, considering the great speed of the *Umbria*, it were better that the *Iberia* should keep her steerageway rather than stop her engines and reverse, since she would respond to her wheel more readily, if her engines were kept in motion than if her headway were entirely stopped. The case presented is not one where if both vessels had stopped and reversed, the collision might have been avoided; but whether, under the facts as they subsequently appeared to be, the *Iberia* could be deemed in fault for a manoeuvre which would have tended to avoid the collision rather than bring it about, by aiding her in keeping out of the way of the *Umbria*.

Even the master of the *Adelaide* frankly testifies that he has no complaint. He says:

> Q. Now, have you any complaint to make with the manoeuvring—with the navigation of the *Hampholm*?—A. No, sir.
>
> Q. So that, so far as she was concerned the accident was, as you state in this accident report, unavoidable?—A. Unavoidable as far as I could see, yes.

I cannot avoid the conclusion that the cause, and the only effective cause, which brought about the collision of these two vessels was the excessive and reckless speed of the *Adelaide* in proceeding in the dense fog which prevailed, and in a harbour where ships were so likely to be met, at the immoderate rate of 12 knots, when the visibility, as realized by her master and the officers and members of her crew who testified, was only about 300 feet, and persisting in the maintenance of that speed when she was aware, by the signals of the *Hampholm* heard in the *Adelaide's* wheelhouse, that a steamship was approaching on her starboard bow, so as to involve risk of collision. Let the visibility be increased, as suggested by the learned

(1) (1897) 166 U.S. 404, at 418, 419.

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local judge, to 500 feet, or to 600 feet, as estimated by the *Hampholm's* witnesses; even then, as the event shews, the *Adelaide* entered the area of visibility with a speed which made it impossible for her, as the giving-way ship under article 19, or otherwise, by any action on her part, to keep out of the way, and for the *Hampholm,* notwithstanding the cautious character of her navigation, to resort to any manoeuvre which would successfully aid to avert the collision. See *British Columbia Electric Railway Company Limited* v. *Loach* (1).

The cause of this accident was not unlike that in *The Rosalind* v. *The Senlac* (2); and the following passage, from the judgment of Duff J., at pp. 69 and 70, may, in substance, be affirmed of the *Adelaide,* in place of the *Senlac,* and of the *Hampholm,* in place of the *Rosalind.*

> The most ordinary attention to the most obvious risks of the situation would have led the *Senlac,* at the time she gave the starboard signal, to take such measures as might be necessary to avoid a collision; and this could easily have been done by simply stopping her engines. The truth seems to be that, at the moment the ships were in a position involving risk of collision, but no actual peril if both ships should be navigated with the caution which such a situation required; but that, while the *Rosalind* was navigated with care, the *Senlac* was navigated with a reckless disregard of the safety of both ships. It was this recklessness that was the proximate cause of the collision.

An appeal *de plano* to the Judicial Committee was dismissed, 25th October, 1909; Lord Macnaghten saying that their Lordships agreed with the Supreme Court of Canada in thinking that

> the *Senlac* was navigated with a reckless disregard of her own safety and of the safety of any other vessel that might be approaching her. Their Lordships have had an opportunity of conferring with the Nautical Assessors, and that is their view also.

There are some observations in *United States Shipping Board* v. *Laird Line* (3), which, I think, have their application to the limit, in the special and unusual circumstances of this case. At page 291, Lord Dunedin said:

> Accordingly, the *Rowan* is hit by a consideration analogous to that which prevailed in the well-known case of the *Bywell Castle* (4), and many others—namely, that it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger.

(1) [1916] A.C. 719.
(2) (1908) 41 Can. S.C.R. 54.
(3) [1924] A.C. 286.
(4) 4 P.D. 219.

And, at page 293, Lord Shaw, referring also to the case of the *Bywell Castle* (1), said:

My Lords, I have thought it right to cite these very authoritative judgments because, if the doctrine there laid down be lost sight of, a region of refinement is apt to be entered upon under which the true responsibility for the substantial wrongdoing may be improperly whittled down and a fanciful wrongdoing may be raised improperly into a region of substance as a contributing cause.

Moreover the Supreme Court of the United States, in *The Umbria* (2), uses this language:

Of course there is a point depending upon the number, distinctness and apparent position of the approaching signals, beyond which precautions are unnecessary and the master has the right to assume that he has shaken off the other vessel, but it is entirely clear that that point had not been reached in this case, and that the immediate cause of the collision was the order to go ahead at full speed before the course and position of the *Iberia* had been definitely ascertained. Indeed, so gross was the fault of the *Umbria* in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York* (3), and *The Ludvig Holberg* (4), that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favour.

For these reasons I have come to the conclusion that this appeal ought to be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellants: *J. E. McMullen.*

Solicitors for the respondents: *Griffin, Montgomery & Smith.*

IN THE MATTER OF A REFERENCE ARISING OUT OF THE TRANSFER OF THE NATURAL RESOURCES TO THE PROVINCE OF SASKATCHEWAN.

Constitutional law—Rights as between Dominion of Canada and Province of Saskatchewan, as to lands vested in the Crown at time of admission into Canada of Rupert's Land and North-Western Territory and now within boundaries of Saskatchewan—B.N.A. Acts, 1867, 1871; Rupert's Land Act, 1868; The Queen's Order in Council of June 23, 1870; Saskatchewan Act (Can., 1905, c. 42).

Upon Rupert's Land and the North-Western Territory being admitted into and becoming a part of the Dominion of Canada under the Queen's Order in Council of June 23, 1870, all lands ("lands" includ-

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret, Lamont, Smith and Cannon JJ.

(1) 4 P.D. 219.
(2) (1897) 166 U.S. 404, at 409.
(3) 147 U.S. 72, at 85.
(4) 157 U.S. 60, at 71.

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ing lands, mines, minerals and royalties incident thereto) then vested in the Crown and now lying within the boundaries of the province of Saskatchewan were vested in the Crown in the right of the Dominion of Canada; and not in the right of, or to be administered for, any province or provinces to be established within such area; nor to be administered for the benefit of the inhabitants from time to time of such area (otherwise than as sharing in any benefit which might accrue to them under the dispositions of Parliament); and the Dominion is under no obligation to account to the Province of Saskatchewan for any lands within its boundaries alienated by the Dominion prior to 1st September, 1905 (when the *Saskatchewan Act,* Dom., 1905, c. 42, came into force).

The *B.N.A. Act, 1867* (especially ss. 146, 109, 91); *Rupert's Land Act,* 1868, c. 105 (Imp.); The Queen's Order in Council of June 23, 1870 (and the Addresses from the Houses of the Parliament of Canada therefor); the *B.N.A. Act, 1871;* the *Saskatchewan Act (supra),* and other statutes considered. *The Queen* v. *Burah,* 3 App. Cas. 889, at 904-5; *Hodge* v. *The Queen,* 9 App. Cas. 117, at 132; *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick,* [1892] A.C. 437, at 441-3; *Riel* v. *Regina,* 10 App. Cas. 675, at 678-9; *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada,* [1928] A.C. 475, at 484-6, and *Ont. Mining Co.* v. *Seybold,* [1903] A.C. 73, at 79, cited.

REFERENCE, by order of His Excellency the Governor General in Council, to the Supreme Court of Canada, pursuant to section 55 of the *Supreme Court Act,* of certain questions which arose in connection with the negotiations between the Government of the Dominion of Canada and the Government of the Province of Saskatchewan looking toward the conclusion of an agreement for the transfer to the Province of its natural resources. The questions referred to the Court were as follows:

1. Upon Rupert's Land and the North-Western Territory being admitted into and becoming a part of the Dominion of Canada under Order in Council of June 23rd, 1870, were all lands then vested in the Crown and now lying within the boundaries of the Province of Saskatchewan vested in the Crown:—

(*a*) in the right of the Dominion of Canada, or

(*b*) in the right of any province or provinces to be established within such area, or

(*c*) to be administered for any province or provinces to be established within such area, or

(*d*) to be administered for the benefit of the inhabitants from time to time of such area?

2. Is the Dominion of Canada under obligation to account to the Province of Saskatchewan for any lands

within its boundaries alienated by the Dominion of Canada prior to September 1st, 1905?

(By admission, throughout the said questions the term "lands" means and includes "lands, mines, minerals and royalties incident thereto").

C. J. Doherty K.C. and *A. E. Fripp K.C.* for the Attorney General for Canada.

A. E. Bence K.C., G. H. Barr K.C. and *M. A. MacPherson K.C.* for the Attorney General for Saskatchewan.

J. F. Lymburn K.C. and *W. S. Gray K.C.* for the Attorney General for Alberta.

F. H. Chrysler K.C. for the Attorney General for Manitoba.

The judgment of the court was delivered by

NEWCOMBE J.—The Governor General in Council, by a minute approved on 3rd May, 1930, submits two questions for hearing and consideration, upon the narrative set out in the Order in Council that

The Committee of the Privy Council have had before them a report, dated May 2, 1930, from the Minister of Justice, stating that, in connection with negotiations with the Government of the Province of Saskatchewan looking toward the conclusion of an agreement for the transfer to the Province of its natural resources, the said Government has raised the question of the liability of Canada to render to the Province an account of its dealings, prior to September 1, 1905, with lands lying within the provincial boundaries as now defined, and it is desirable, in order to permit of the execution of such an agreement, that this question should be determined by the reference to the Supreme Court of Canada of questions expressed in a form which the Government of the Province considers appropriate to obtain the judgment of the Court on the contention it has put forward.

The Minister further states that a submission in the form hereto attached has accordingly been prepared on behalf of the Government of the Province, such submission containing certain questions and certain admissions of fact to which it is desirable to agree.

The Minister, therefore, recommends that the said submission be referred to the Supreme Court of Canada pursuant to Section 55 of the Supreme Court Act for hearing and consideration, and in order to obtain answers to the questions in the said submission set forth.

For the purpose of the submission, the following facts are admitted:

(*a*) The area now lying within the boundaries of the Province of Saskatchewan formed a part of Rupert's Land and the North-Western Territory which were admitted into and became a part of the Dominion of Canada under Order in Council of June 23rd, 1870.

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REFERENCE *re* SASKATCHEWAN NATURAL RESOURCES.

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(*b*) From the coming into force of the said Order in Council until September 1st, 1905, portions of the said area were from time to time alienated by the Dominion of Canada.

(*c*) Throughout the following questions the term "lands" means and includes "lands, mines, minerals and royalties incident thereto."

Following and subject to the admissions, the questions are stated as follows:—

1. Upon Rupert's Land and the North-Western Territory being admitted into and becoming a part of the Dominion of Canada under Order in Council of June 23rd, 1870, were all lands then vested in the Crown and now lying within the boundaries of the Province of Saskatchewan vested in the Crown:—

(*a*) in the right of the Dominion of Canada, or

(*b*) in the right of any province or provinces to be established within such area, or

(*c*) to be administered for any province or provinces to be established within such area, or

(*d*) to be administered for the benefit of the inhabitants from time to time of such area?

2. Is the Dominion of Canada under obligation to account to the Province of Saskatchewan for any lands within its boundaries alienated by the Dominion of Canada prior to September 1st, 1905?

It was directed, by order of a Judge, in conformity with the practice, that the Attorneys General of all the provinces should be notified of the hearing, and should be at liberty to file factums of their respective arguments and to appear personally or by counsel.

At the hearing, counsel on behalf of the Attorney General of Saskatchewan submitted that question 1 (*a*) should be answered in the negative; that each of the alternatives of question 1 should be answered in the affirmative, and that question 2 should also be answered in the affirmative. The province of Alberta adopted and relied upon the argument submitted on behalf of Saskatchewan. But none of the other provinces appeared.

An Act of the Dominion, entitled *An Act respecting the transfer of the Natural Resources of Saskatchewan,* cap. 41 of 1930, was assented to on 30th May, 1930, approving an agreement set out in the schedule thereto, dated 20th March, 1930, between the Government of the Dominion and the Government of Saskatchewan; that agreement having previously been approved by the provincial legislature by cap. 87 of 1930, which received the Lieutenant Governor's assent on 10th April. Subsequently, by Imperial Act, c. 26 of 1930, assented to on 10th July, the agreement was confirmed and declared to have the force of law.

The reasons which led the province to advocate the above answers are to be gathered from the argument as set out in the provincial factum and in the recitals of the agreement of 20th March, 1930, to which Saskatchewan is a party. I shall not attempt to expound the meaning of these recitals otherwise than by quoting the text as follows:—

Whereas by section twenty-one of the *Saskatchewan Act,* being chapter forty-two of the four and five Edward the Seventh, it was provided that "All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the Province under the *North-west Irrigation Act,* 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said Province with the substitution therein of the said Province for the North-west Territories;"

And whereas the Government of Canada desires that the Province should be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entry into Confederation in 1905;

And whereas the Government of the Province contends that, before the Province was constituted and entered into Confederation as aforesaid, the Parliament of Canada was not competent to enact that the natural resources within the area now included within the boundaries of the Province should vest in the Crown and be administered by the Government of Canada for the purposes of Canada and was not entitled to administer the said natural resources otherwise than for the benefit of the residents within the said area, and moreover that the Province is entitled to be and should be placed in a position of equality with the other Provinces of Confederation with respect to its natural resources as from the fifteenth day of July, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada;

And whereas it has been agreed between Canada and the said Province that the said section of the *Saskatchewan Act* should be modified and that provision should be made for the determination of the respective rights and obligations of Canada and the Province as herein set out.

The expression, "natural resources," is not defined, but it is evidently thought to include the public lands within the province; and the controversy is concerned only with the lands, situate within the provincial boundaries, which belonged to the Crown when Rupert's Land and the North-western Territory became part of the Dominion, and their proceeds or revenues.

In the case of a *Reference as to the constitutional validity of sec. 17 of "The Alberta Act,"* (1), I had occasion to

(1) [1927] Can. S.C.R. 364.

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outline the legislative steps by which the prairie province of Alberta was constituted and acquired its provincial status under the *Alberta Act*, c. 3 of the Dominion, 1905; and it would be mere repetition, and therefore unnecessary, to reproduce that narrative here, as the facts relating to Saskatchewan are identical. But I shall take the opportunity to rectify a slip which, unfortunately, has found its way into the report of my judgment in the Alberta case, whereby the date of the Order in Council, admitting these territories into the Dominion from and after 15th July, 1870, is printed as 23rd July, 1870, instead of the true date, which is one month earlier.

When the case was submitted, it appeared convenient to hear, at the opening, the argument on behalf of the province; and the Court, having taken the matter into consideration, find it unnecessary to hear the learned counsel who appeared for the Attorney-General of Canada.

The argument whereby it is sought to maintain the provincial answers is avowedly meant to support the pretensions set up by the factum of Saskatchewan, and I shall endeavour briefly to summarize it.

First, it is said that, when Rupert's Land and the Northwestern Territories were admitted into the Union, they became, by express provision of sec. 146 of the *British North America Act, 1867*, "subject to the provisions of this Act"; and it is urged that, since, by sec. 109, the four original provinces retained their Crown Lands at the Union and had, by the fifth enumeration of sec. 92, exclusive legislative power for "The management and sale of the public lands belonging to the province and of the timber and wood thereon," these provisions, upon the introduction of the Territories into the Dominion, had unavoidably the effect to appropriate to the Territories, or to exclusively territorial purposes, the Crown Lands comprised therein; and, consequently, that the Parliament of Canada never had the authority to administer these lands, and certainly not to administer them for Dominion purposes, as subsequently provided by the *Dominion Lands Act*, cap. 23 of 1872, and the succeeding Acts regulating the administration of Dominion lands which, as amended and revised, remain in operation to the present time.

Secondly, it is said that the provisions of the *British North America Act, 1871*, cap. 28 of the United Kingdom, were necessary in order to validate the *Manitoba Act*, cap. 3 of the Dominion, 1870, and equally so for enabling the Parliament of Canada to enact the Saskatchewan and Alberta Acts of 1905; that the authority of the Dominion to constitute the province of Saskatchewan thus depends upon the Act of 1871, and, to quote the submission, that "There is nothing in the Act authorizing the Dominion to hold the public domain for the purposes of Canada." It is recalled that there is a broad distinction between legislative jurisdiction and proprietary rights and that the conferring of the one affords no presumption of the transfer of the other; and it is suggested that the Crown, as represented by the Dominion, has no capacity to enjoy the beneficial interest in any of the public lands of the country, except, under sec. 117, for fortification or defence, and the property appropriated to Canada under the third schedule of the Act of 1867.

Thirdly, even if the Dominion, after the admission of the Territories into the Union, and after the enactment of the *British North America Act, 1871*, had power to legislate for the disposition of the Crown lands in the Territories, it is argued that, upon the passing of the *Northwest Territories Acts*, whereby the Parliament of Canada set up an elective assembly and provided for the government of the Territories, the Parliament, by so doing, became divested of any powers which it previously may have had for the administration of the territorial lands; and that by the operation of these Acts the public lands "were vested in the Crown in the right of the inhabitants of the area, until the province was created in 1905."

These are the points relied upon by the province of Saskatchewan, and they are plainly in conflict with the terms of the *Saskatchewan Act*, c. 42 of 1905, as enacted. The statute proceeds upon two recitals, whereby the *British North America Act, 1871*, is invoked as the authority in the execution of which the Parliament of Canada may establish new provinces in the territories that form part of the Dominion, and make "provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of

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such province, and for its representation in the said Parliament of Canada"; and it is declared expedient to establish, as a province, the territory thereinafter described, and to make provision for the government and representation thereof. The territory comprised within the specified boundaries is accordingly constituted as a province of the Dominion, under the name of Saskatchewan; and it is declared, by sec. 3, that

> The provisions of *The British North America Acts*, 1867 to 1886, shall apply to the province of Saskatchewan in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

Follow provisions for the representation of the new province in the Senate and House of Commons; the constitution of the executive and the provincial legislature; the application of existing laws and official powers and functions; the continuance of the jurisdiction of the Supreme Court of the Northwest Territories until superseded by provincial legislation; special provisions with respect to societies, associations and joint stock companies incorporated by the authority of the legislature of the Northwest Territories; modifications of sec. 93 of the *British North America Act, 1867*, with respect to education; provincial subsidies; and, by secs. 20 and 21, it is provided as follows:

> 20. Inasmuch as the said province will not have the public land as a source of revenue, there shall be paid by Canada to the province by half-yearly payments, in advance, an annual sum based upon the population of the province as from time to time ascertained by the quinquennial census thereof, as follows:—
>
> The population of the said province being assumed to be at present two hundred and fifty thousand, the sum payable until such population reaches four hundred thousand, shall be three hundred and seventy-five thousand dollars;
>
> Thereafter, until such population reaches eight hundred thousand, the sum payable shall be five hundred and sixty-two thousand five hundred dollars;
>
> Thereafter, until such population reaches one million two hundred thousand, the sum payable shall be seven hundred and fifty thousand dollars;
>
> And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.
>
> 2. As an additional allowance in lieu of public lands, there shall be paid by Canada to the province annually by half-yearly payments, in

advance, for five years from the time this Act comes into force, to provide for the construction of necessary public buildings, the sum of ninety-three thousand seven hundred and fifty dollars.

21. All Crown Lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under *The North-west Irrigation Act,* 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the Northwest Territories.

Then there is a clause regulating the division of assets and liabilities as between Saskatchewan and Alberta; a provision that nothing in the Act shall prejudice or affect the rights or properties of the Hudson's Bay Company, as contained in the conditions under which that company surrendered Rupert's Land to the Crown; and, by sec. 24, it is enacted that

The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company.

The legislative intent as to the destination of the lands seems thus to be plainly enough expressed; and compensation has been provided and presumably paid, in lieu of the lands, which it is declared, by the constituting authority, that the province is not to have. It is admitted, and at the foundation of the whole case, that Rupert's Land and the Northwestern Territory were, by the Queen's order of 23rd June, 1870, admitted into and became part of the Dominion on 15th July of that year; by the express terms of the Order in Council, the Parliament of Canada had, from that day, full power and authority to legislate for the future welfare and good government of the Northwestern Territory; and, by the provisions of the *Rupert's Land Act,* cap. 105 of the United Kingdom, 1868, and of the Order in Council, upon the admission of Rupert's Land, which includes by the definition, the whole of the lands and territories held or claimed to be held by the Hudson's Bay Company, it thereupon became lawful for the Parliament of Canada

from the date aforesaid, to make, ordain and establish within the land and territory so admitted as aforesaid, all such laws, institutions and ordinances, and to constitute such courts and officers as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein.

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Moreover, by secs. 91 and 146 of the *British North America Act, 1867*, it had been enacted that it should

> be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces;

and that it should be lawful for the Queen by and with the advice of her Privy Council,

> on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the Northwestern Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

As to the nature and amplitude of the legislative powers conferred by the Imperial Parliament in the creation of subordinate governments of the Empire, it was explained in the Privy Council, by Lord Selborne, in *The Queen* v. *Burah* (1), that

> The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions.

To the like effect are the observations of Sir Barnes Peacock, in *Hodge* v. *The Queen* (2), with reference to the Canadian provinces. And these expressions were quoted with approval by Lord Watson in *Liquidators of the Mari-*

(1) (1878) 3 App. Cas. 889, at 904-5

(2) (1883) 9 App. Cas. 117, at 132.

time Bank of Canada v. *Receiver-General of New Brunswick* (1).

In *Riel* v. *Regina* (2), the petitioner was tried and convicted of treason under the procedure enacted by the *Northwest Territories Act, 1880*, c. 25. S. 76 conferred upon the stipendiary magistrates in the Territories jurisdiction to hear and determine criminal offences, including treason, with the intervention of a jury of six. It was urged before the Board, upon application for special leave to appeal, that the Dominion Parliament had no power to deprive the petitioner of a right which he claimed to have under English law to trial before a judge with a jury of twelve; but Lord Halsbury, L.C., delivering the judgment, at pp. 678-9, said:

> It appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order and good government cannot, as matters of law, be provisions for peace, order and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.
>
> Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure as it is known and practised in this country have been authorized in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence.

Giving due effect to the Dominion powers of legislation, as expounded by or resulting from these authorities, it is very difficult to discover any maintainable ground in the pretension that the province of Saskatchewan, whether on behalf of itself or for the inhabitants of those parts of the Northwest Territories which are embraced in the province, has constitutional rights which the Queen did not, either in Council or in Parliament, bestow upon the territories or upon the province, and which the Parliament of Canada, by the *Saskatchewan Act*, which operates irrevocably under the *British North America Act, 1871*, declared that the province should not possess.

(1) [1892] A.C. 437, at 441-443. (2) (1885) 10 App. Cas. 675.

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It will be observed that, while, by sec. 146 of the *British North America Act, 1867,* Rupert's Land and the North-western Territories, or either of them, may be admitted into the Union on such terms and conditions in each case as are in the Addresses "expressed" and as the Queen thinks fit to approve, "subject to the provisions of this Act," it is declared, by sec. 4 of the *British North America Act, 1871,* without any qualification, that the Parliament of Canada may, from time to time, make provision for the administration, peace, order and good government of any territory not for the time being included in any province; and, whether you consider one or the other, or both of these provisions, as applicable, there are no terms or conditions, expressed in the Addresses, or sanctioned by the terms of Union, with which the legislation of the Dominion conflicts, or is alleged to conflict.

As to the effect of sec. 3 of the *Saskatchewan Act,* the corresponding provision of the *Alberta Act* was considered by the Privy Council in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), where Lord Buckmaster, after reviewing the legislation, which differs in no material respect from that affecting Saskatchewan, including the fundamental provisions of sec. 3 of the *Alberta Act,* said that, reading the whole Act together, their Lordships

> regard the effect of this section as placing the Province of Alberta in the same position as the other Provinces in regard to property, except as varied by the statute, either by express terms or reasonable implication. Sec. 21 is only sensible on this hypothesis, for unless it was assumed that it was required for the purpose of preserving the Crown rights in the property to which it relates, it would be meaningless, but if that be once assumed it follows that the property to which it does not relate is vested in the Crown, not for the purposes of Canada, but for the purposes of the Province of Alberta.

Other passages in Lord Buckmaster's judgment are equally destructive of the argument which seeks to maintain the contention that there is some occult principle of law, not depending upon and indeed proof against legislation, whereby a province or territory of Canada or its inhabitants must have and enjoy, for its or their exclusive benefit, the waste lands of the Crown which lie within its borders. His Lordship said, referring to s. 109 of the *British North America Act, 1867,* a provision upon which the province puts much stress,

(1) [1928] A.C. 475, at 484-6.

The territory out of which the Province of Alberta is constituted was unaffected by this section, but on the admission of the North West Territories into the Dominion of Canada in 1870 and the passing of the British North America Act, 1871, became subject to the laws of the Parliament of Canada. It therefore followed that the Province could never, apart from statute, be in the position of owning lands, mines, minerals and royalties.

And it follows also that the legislation of the Dominion was paramount and unaffected by any powers granted to the legislature or the local government of the Territories, or any territorial exercise of those powers which might prove to be repugnant.

No doubt there is, as counsel for the province suggests, a distinction recognized between legislative powers and proprietary rights, and the Crown may, for one purpose, be represented by the Dominion, and, for the other purpose, by a province, as in the case of the Inland Fisheries or Indian Lands; but it is in perfect conformity with the Canadian system that Dominion rights of property should be subject to the legislative control of the Parliament; and it is expressly so with regard to what is described generally in the first enumeration of sec. 91 of the Act of 1867, as "the public debt and property."

It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant *inter partes* that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by Order in Council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service. I will quote the words of Lord Davey in *Ontario Mining Company* v. *Seybold* (1), where his Lordship, referring to Lord Watson's judgment in the *St. Catherines Milling Case* (2), said

(1) [1903] A.C. 73, at 79. (2) (1888) 14 App. Cas. 46.

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In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North America Act, 1867, "it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

The province has, in my opinion, failed to advance any substantial reason by which to justify the answers which it suggests.

I would, on the contrary, answer to question one, (a) "Yes"; (b) "No"; (c) "No."; (d) "Not otherwise than as sharing in any benefit which might accrue to them under the dispositions of Parliament." I would answer question two in the negative.

Questions answered accordingly.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Saskatchewan: *L. P. Sherwood.*

Solicitor for the Attorney-General of Alberta: *W. S. Gray.*

1930

*Apr. 22.
*June 10.

BELL-IRVING *v.* MACAULAY, NICOLLS, MAITLAND & CO.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale of land—Principal and agent—Introduction of purchaser—Commission

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial court, McDonald J. and maintaining the respondent's action.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) (1930) 42 B.C. Rep. 140.

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BELL-IRVING v. MACAULAY, NICOLLS, MAITLAND & Co.

The respondent, a licensed real estate agent carrying on business in Vancouver, brought an action to recover from the appellant the sum of $12,750, being commission on the sale of certain property belonging to appellant in Vancouver.

The trial judge dismissed the respondent's action, but the Court of Appeal maintained it for the full amount.

The Supreme Court of Canada held that the issue on the appeal was a simple issue of fact, whether the offer to purchase, which culminated in the sale, was brought about by the exertions of the respondent, and, upon the evidence, allowed the appeal with costs and restored the judgment of the trial judge, dismissing the respondent's action.

Appeal allowed with costs.

A. Geoffrion, K.C., and *J. P. Hogg* for the appellant.

C. W. Craig, K.C., for the respondent.

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*Apr. 23.
*June 10.

THOMAS W. DOBIE (PLAINTIFF)..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDENT) ..... } RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Railway—Negligence—Passenger falling off platform—Platforms enclosed by vestibules—Vestibule door left open—Railway Act, R.S.C., 1927, c. 170, s. 390.

The appellant, when nine years old, in 1919, was crossing the continent as an immigrant, with his mother, in one of the respondent's vestibuled trains. While the train was approaching Piapot station, in Alberta, the appellant went to the rear end of the car in which he was riding and, just as he was stepping from the passage to the platform, and while his hand was on the door, there came a sudden jerk of the car, in consequence of which the boy was thrown to the platform and, the vestibule door being open, down the steps to the ground, where his legs came under the wheels and it was found necessary, by reason of his injuries, to amputate his right leg above the knee and his left foot above the ankle. The appellant, in 1928, nine years after the accident, brought an action to recover damages. The jury found that the respondent railway was negligent in that the "exits of the train (were) not properly safeguarded," that the appellant was not

*PRESENT:—Duff, Newcombe, Lamont, Smith and Cannon JJ.

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"guilty of negligence" and that the "proximate cause of the accident" was the appellant's "falling off the train," and the jury gave a verdict for $10,000. After the conclusion of the evidence, the respondent's counsel moved to dismiss the accident; and the trial judge, after the verdict of the jury, dismissed the appellant's action on the grounds that there was no negligence in law established by the evidence or found by the jury and that the action was barred by section 282 of the *Railway Act*, 1906. Two of the four judges sitting in the Court of Appeal held that the appellant had failed to satisfy the onus of proof which rested upon him of shewing negligence or want of care on the part of the respondent, a third one held there had been a mistrial and the fourth would have rendered judgment according to the verdict; the judgment of the trial judge was therefor affirmed.

Held, reversing the judgment of the Court of Appeal (42 B.C. Rep. 30), that judgment should have been rendered in favour of the appellant pursuant to the findings of the jury and that the appellant was thus entitled to recover the $10,000 damages awarded to him by the verdict.

Skelton v. *London and North Western Ry. Co.* ((1867) L.R. 2 C.P. 631) distinguished; in that case, the plaintiff failed by reason of his contributory negligence.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial court, Morrison J. with a jury, and dismissing the appellant's action for damages.

The material facts of the case are fully stated in the judgment now reported.

R. S. Robertson, K.C., for the appellant.

A. MacMurchy, K.C., and *H. J. Dempsey* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The action was brought on 17th May, 1928, to recover compensation for injuries which the plaintiff suffered in an accident which occurred on the defendant company's railway, at or near Piapot Station, in Alberta, on 28th March, 1919, when the plaintiff, then a boy of nine years, was crossing the continent as an immigrant, with his mother, in one of the defendant's vestibuled trains. While the train was approaching the station the boy went to the rear end of the car in which he was riding, and, according to the evidence which the jury accepts, just as he was stepping from the passage to the platform, and

(1) (1929) 42 B.C. Rep. 30; [1930] 1 W.W.R. 6.

while his hand was on the door, there came a sudden jerk of the car, in consequence of which the boy was thrown to the platform and, the vestibule door being open, down the steps to the ground, where his legs, unfortunately, came under the wheels, and it was found necessary, by reason of his injuries, to amputate his right leg at or just above the knee, and his left foot above the ankle.

The case was tried on 25th November, 1928, before Morrison J., with a jury. Questions were submitted by the learned judge, and these, with the answers returned by the jury, are as follows:

Q. Was the defendant guilty of negligence?—A. Yes.

Q. And if so, what was it?—A. The exits of the train not properly safeguarded.

Q. Was the plaintiff guilty of negligence?—A. No.

Q. What was the proximate cause of the accident?—A. Falling off the train.

Q. Damages, if any—A. $10,000.

There is no objection that the charge was unfavourable to the defendant.

After the conclusion of the evidence, the defendant's counsel had moved to dismiss the action; judgment upon this motion had been reserved until after the verdict, and, on 19th January, 1929, the learned judge having in the interval considered the matter, directed the dismissal of the action. He reviewed the evidence and expressed his conclusion as follows:

There was no evidence on which a jury could reasonably find that the defendant company had not complied with all the statutory requirements in handling this particular train. The evidence on behalf of the plaintiff that the train jerked at the particular juncture and about which the testimony was conflicting, would be sound ground, if believed by the jury, upon which negligence could be charged. The only ground so found by the jury was that in answer to the first question—that brings me to Mr. McMullin's submission that there is no negligence in law established by the evidence or found by the jury and with which I agree. There was no legal duty imposed upon the defendant company to have vestibule doors at all. *Skelton* v. *The London N.W. Railway Co.* (1). There was no evidence that they were defective or left in such a way as to invite a passenger to rely upon their structure or condition. The period in which the plaintiff was on the train and the warnings given him by a fellow passenger should have familiarized him with the inherent dangers and risks to which passengers are subjected when availing themselves of this mode of travel. It would be imposing too great an onus even upon a railway company to require that they must have an employee posted at each vestibule door of a car to prevent passengers from opening them.

(1) (1867) L.R. 2 C.P. 625.

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The platforms of a train in motion are taken to be danger spots and railway companies are obliged so to warn their passengers, which the defendant had done. Assuming I may have misconceived the law in this respect, I think the action is barred by virtue of section 282 of the Railway Act, 1906, re-enacted in section 390 of the *Railway Act* of 1919.

At the hearing before us it was urged, on behalf of the defendant, that the plaintiff was disentitled to recover, by reason of his breach of one of the defendant's printed regulations, at the time admittedly posted up in the car in which the plaintiff was riding. The regulation is in evidence, and it provides that

> No person shall use the platform or any step of any car on any line of railway owned or leased or operated by the company as a place on which to stand or stay, but only as a place over which to pass in getting on or off a car, or from car to car; and no person shall travel or be in any baggage car or other car not intended for the conveyance of passengers.

It is, moreover, provided by section 390 of *The Railway Act*, 1919,

> No person injured while on the platform of a car, or on any baggage or freight car, in violation of the printed regulations posted up at the time, shall have any claim in respect of the injury, if room inside of the passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time.

This is the clause to which the learned judge refers at the conclusion of his judgment.

The provincial Court of Appeal, consisting of four judges, was divided. The Chief Justice, with whom Galliher, J. A. agreed, holding that

> the plaintiff has failed to satisfy the onus of proof which rested upon him of shewing negligence or want of care on the part of the defendants.

Martin, J. A. considered that

> there was a case to go to the jury on at least two heads of negligence, and that after the jury had found for the plaintiff the learned judge below should not, with respect, on the facts and findings, have acceded to defendants' motion to dismiss the action.

But, he held that there had been a mistrial because there was no definite finding as to the proximate cause of the accident, and that the answer, "falling off the train," is,

> in the circumstances, meaningless and has no other effect than if the question had remained unanswered, and shews that the mind of the jury was not properly directed to the gist of the case.

Macdonald, J., on the other hand, considered that the case should be governed by the verdict of the jury.

Although, as said by the learned trial judge, the defendant was not expressly required to provide vestibule doors, such doors were, nevertheless, in common use, and, according to the evidence led by the defendant, it is part of the duty

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of the trainmen "to see that they are kept closed when running". Two of these witnesses testified that the doors were shut after leaving Tomkins, the last preceding station, and that, when they came through the train, about 25 or 30 minutes before reaching Piapot, where they slowed down to pick up an order, these doors were closed. There is no doubt, however, that the door at the platform where the boy fell, was open at the time. It is suggested that it might have been opened by a passenger; but this was the last of the passenger cars and was directly followed by the caboose, in which the train-crew rode, and immediately behind that came an official car at the end of the train, and there was evidence from which it may be inferred that the two trainmen, who, at the time of the accident, were on the platform or steps of the caboose, engaged in the reception of the order, did not perceive that the vestibule door was open while the train was slowing down for the order. The jury may, therefore, have considered that the proof of the closing of the door was not satisfactory, or that the fact was not adequately established. The case differs from that of *Skelton* v. *London and Northwestern Railway Company* (1), where the plaintiff failed by reason of his contributory negligence, although Willes J., following the leading case of *Coggs* v. *Bernard* (2), considered also that there was no proof of actionable negligence by the railway.

Vestibules upon passenger trains, while conceded not to be a statutory requirement, add much to the safety and convenience of travellers, and presumably have resulted from consideration of the duty which the railway companies, as carriers, owe to their passengers. The provision and use of vestibules are not, in my view, self-imposed or voluntary duties or precautions, in the sense in which Willes, J., used the term in *Skelton's* case (1); rather I think, it may be said that vestibules, for the class of cars upon which they are usually provided, are in practical use as a part of reasonable railway equipment, and cannot be neglected by the operator with due regard to the general safety, and so we find the defendant's servants instructed in their manipulation, and to keep them closed when the steps are not in use. Obviously, the jury considered that

(1) (1867) L.R. 2 C.P. 631. (2) (1703) 1 Sm. L.C. 6th ed. 177.

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it was unsafe to leave the doors open and unguarded when the train was in motion.

As to the posted notice, forbidding the use of the platform or steps as a place whereon to stand or stay; it is to be observed that, according to the boy's testimony, he was not making use of them for either of these purposes, although, very possibly, he may have had the intention to do so. His several accounts of what happened are inconsistent, and for that reason, along with the other circumstances, I should feel better satisfied if the jury had denied the proof of his case; but what he maintained at the trial was that as he was in the act of passing through the door, which opened from the rear end of the car to the platform, and that, while he had his hand on the knob of the door, he was thrown down by a jolt of the train, and so fell from the steps to the ground. It must, I think, be assumed that the jury adopted this version of the facts, and it was within their province to do so; and assuming that to be right, the boy committed no breach of the regulation, and therefore section 390 of *The Railway Act*, 1919, does not apply to his case.

As to proximate cause, I would not impute any defect to the finding; the plaintiff's' fall to the ground and injury sustained were natural and direct consequences of the open trap-door, and it is not charged that he lost his footing by reason of any contributory negligence.

I would, in these circumstances, maintain the appeal with costs, and direct judgment to be entered pursuant to the findings. The plaintiff should also have the costs of the action and trial and of the provincial appeal.

Appeal allowed with costs.

Solicitor for the appellant: *Arthur Leighton.*

Solicitor for the respondent: *J. E. McMullen.*

CONSOLIDATED DISTILLERIES LIMITED AND ANOTHER (DEFENDANTS).... } APPELLANTS;

1930
*May 1.
*May 5.

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Bond—Shipping—Exportation—Proof—Burden—Inland Revenue Act, R.S.C., 1906, c. 51

The respondent's action was upon a bond executed by the appellants in favour of the respondent, under the provisions of the *Inland Revenue Act* and its Regulations, wherein the appellants bound themselves to the respondent in the sum of $15,048.50. The condition of the obligation was such, that if certain packages of alcohol entered for export, ex-warehouse, by the appellant corporation at Belleville, Ontario, for St. John's, Newfoundland, should be duly shipped and exported and entered for consumption or warehouse at St. John's, and if proof of such exportation and entry was made in accordance with the requirements of the Warehousing Regulations in that behalf within ninety days from the date of the bond, to the satisfaction of the Collector of Inland Revenue for the division of Belleville, Ontario, or if the Consolidated Distilleries Limited, one of the appellants, should account for the said goods to the satisfaction of the said Collector then the obligation was to be void, otherwise to be and remain in full force and effect.

Held that the burden of proving the fulfilment of the entire condition of the bond was upon the appellants.

APPEAL from the judgment of the President of the Exchequer Court of Canada, maintaining the respondent's action with costs.

The facts of the case, as they appear in the judgment of the President of the Exchequer Court, are as follows: On October 18, 1924, at the customs port of Belleville, Ont., the appellant corporation made an entry for the export, ex-warehouse, of twelve metal drums or packages of alcohol, to St. John's, Newfoundland, on a through bill of lading. The alcohol went forward by the Canadian National Railway on the 18th day of October, 1924; the car containing the same reached Montreal on the afternoon of October 20, following, and in this car was merchandise other than the twelve drums of alcohol. Before leaving Belleville, the car was sealed by both the railway and customs authorities; but when the car reached Montreal, these seals had been

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

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removed. The goods were placed in a shed at the Bonaventure station of the Canadian National Railway, Montreal, and there remained presumably under the usual guard and protection until 11 a.m., on October 22, when they were removed by a cartage company—which company does all the carting for the Canadian National Railway from its railway premises at Montreal to the harbour front for furtherance by water—to the Canadian Merchant Marine steamship *Canadian Sapper* bound for St. John's, Newfoundland. This steamer did not sail until October 28, the goods in question meanwhile being stored on the deck of the steamer. She arrived at St. John's on November 5, but according to the evidence, the goods were not landed from the steamer until November 14, when they were entered into a customs warehouse on the following day, November 15. Early in January, 1925, it was discovered by the Customs authorities at St. John's, that the drums contained water only; this discovery was made owing to the fact that the contents had become frozen, causing the drums or packages to bulge. The respondent's action was brought in October, 1927, for $17,111.66, being $15,048.50, the amount of the bond and $2,069.16, interest on same from 18th of January, 1925.

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

J. D. Kearney for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The facts of this case sufficiently appear in the judgment of the learned President of the Exchequer Court. The condition of the bond sued upon is that if the goods in question

shall be duly shipped, and shall be exported and entered for consumption or for warehouse at St. John's, Nfld., aforesaid, and if proof of such exportation and entry shall, in accordance with the requirements of the Warehousing Regulations in that behalf, be adduced within 90 days from the date hereof to the satisfaction of the said Collector of Inland Revenue for the Division of Belleville, or if the said bounden Consolidated Distilleries, Limited, shall account for the said goods to the satisfaction of the said Collector of Inland Revenue for the said Inland Revenue Division of Belleville, Ont., then this obligation to be void, otherwise to be and remain in full force and virtue.

The burden of showing the fulfilment of this entire condition was, in our opinion, upon the defendants. (R.S.C., 1906, c. 51.)

The learned trial judge found that the goods in question had not been "exported and entered for consumption or for warehouse at St. John's, Nfld.," but, on the contrary, that there had been, at the port of Montreal, a substitution of water for the alcohol shipped. While, upon the evidence, we would not be prepared, without further consideration, to maintain the finding of substitution at Montreal, the defendants certainly did not prove delivery at St. John's, Nfld., of the alcohol shipped.

Moreover, it is abundantly clear that the remaining condition of the bond was not complied with, viz., that proof was not adduced

> of such exportation and entry * * * within 90 days from the date * * * (of the bond) to the satisfaction of the said Collector of Inland Revenue for the Division of Belleville;

nor were the goods accounted for to his satisfaction.

The burden of proving the fulfilment of this alternative condition was clearly upon the appellants. They employed one Duncan to obtain the necessary landing certificate and it was duly given to him and was not by him returned to the appellants as they had expected. It was handed, some time in the middle of January (probably, according to the evidence, during the week of the 18th), to the Assistant Deputy Minister of Excise, not to prove delivery of the alcohol at St. John's, but because the fraud practised had then been discovered and Duncan appears to have been anxious to ingratiate himself with the Department. The appellants themselves subsequently obtained a duplicate of this certificate, which they appear to have delivered to the Excise officer at Belleville, about the 11th of February, 1925, well beyond the 90 days, which had expired on the 16th of January, 1925.

For these reasons, we would uphold the judgment imposing liability under the bond upon the appellants. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Meredith, Holden, Heward & Holden.*

Solicitor for the respondent: *John D. Kearney.*

1930
*May 1.
*May 5.

MARWOOD v. CANADIAN CREDIT CORPORATION LTD.

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

Lease of services—Commission on profits—Bonus—Art. 1024 C.C.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Bond J. (2), and maintaining in part the appellant's action.

By a contract dated January 23, 1924, the appellant was engaged as manager of the automobile department of the respondent corporation. The business of the respondent consisted chiefly in discounting the notes and securities held by automobile dealers for automobiles sold. The contract provided for a salary of two hundred dollars per month, plus a bonus on the net profits. The contract was for a period of five years with leave to either party to terminate it upon giving thirty days notice. The appellant worked for the respondent during the years 1924, 1925 and until July 31, 1926, when he resigned. He had been paid his salary and bonus until the end of 1925 and this action was brought to recover the sum of $5,349.75, being the bonus to which he claimed to be entitled for the seven months of 1926.

The judgment of the Superior Court dismissed the appellant's action. The Court of King's Bench maintained it to the extent of $2,994.49 with interest and costs; and the appellant appealed so that this judgment be increased to the sum of $5,349.75. The respondent instituted a cross-appeal, asking for the restoration of the judgment of the Superior Court and the dismissal of the action.

The Supreme Court of Canada dismissed the appeal and allowed the cross-appeal with costs.

Appeal dismissed with costs.
Cross-appeal allowed with costs.

John W. Cook K.C. and *W. C. Nicholson* for the appellant.
Arthur Vallée K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

(1) (1929) Q.R. 47 K.B. 404. (2) (1928) Q.R. 66 S.C. 378.

CANADIAN NATIONAL RAILWAYS *v.* POMERLEAU

1930

*Feb. 19.
*April 10.

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

Negligence—Railway—Level crossing—Speed—Thickly peopled place—Railway Act, R.S.C., 1927, c. 170, s. 309

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Demers J., and maintaining the respondent's action in damages.

Action was brought by the respondent both personally and in her quality of tutrix to her five minor children, for the sum of $25,000, damages resulting from the death of her husband, Alfred Nadeau, as a result of a collision between an electric car belonging to the appellant and an automobile belonging to and driven by one Cournoyer, the respondent's husband at the time a passenger in the automobile.

The Superior Court gave judgment for $12,000 and this judgment was maintained in the Court of King's Bench, Mr. Justice Hall and Mr. Justice Rivard dissenting.

The sole question in the appeal before this court was whether the trial judge was bound to find on the evidence adduced that the sole direct cause of the tragedy was the negligence of Cournoyer, or whether the appellant company, knowing the crossing to be a dangerous one, failed to take reasonable precautions to avoid any accident.

The judgment of the Supreme Court of Canada dismissed the appeal with costs, thus affirming the judgments awarding $12,000 damages to the respondent.

Appeal dismissed with costs.

Arthur Vallée K.C. for the appellant.

J. P. Lanctôt for the respondent.

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ

(1) (1930) Q.R. 48 K.B. 97.

1930

*May 12.
*June 10.

THE SS. "KINGDOC" (DEFENDANT).. APPELLANT;

AND

CANADA STEAMSHIP LINES, LTD. (PLAINTIFF) ..... } RESPONDENT

PATERSON STEAMSHIPS, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE SS. "OXFORD" (DEFENDANT)... RESPONDENT

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Collision—Canal navigation—Right of way—Liability—Cause of the damage

A collision occurred between the K., which was ascending the Lachine Canal at its western exit and the O. which had just begun her descent from Lake St. Louis, about 3.30 a.m., on 5th June, 1927. The K., being light, had moored previously to the south revetment wall of the canal near the place of collision on account of wind and rain, the night being also dark. When the O., approaching the entrance to the canal, came into relation with the K., the weather had cleared so far as to enable the K. safely, in the judgment of her master and pilot, to proceed upon her voyage; and, accordingly, her master gave the order to cast off. The K. then gave two blasts of her whistle, signalling her desire to pass on the starboard side of the O., a signal which the latter promptly answered in like manner, the two ships thus agreeing that they should pass green to green. The K. was shouldering her way along the canal wall and the O. was coming down on the opposite side, when suddenly the O. gave an alarm or danger signal of five or six blasts and reversed her engine at full speed astern. There was then, according to the findings, ample room, in canal navigation, between the starboard side of the K. and the blocks marking the northern side of the channel for the O. to pass. The result of the manoeuvre of the O. was that her stern struck the K's. starboard bow, forcing the K. against the south wall, where her stern struck. Both ships sustained damage and there was an action and a cross-action, which were tried together. The Local Judge in Admiralty at Montreal found the O. solely to blame. This judgment was reversed by the Exchequer Court of Canada, Audette J., who held that the K. was "at fault for a collision which would not have happened had she lain fast at her berth and delayed casting off but a few minutes, * * * with the knowledge (she had) of a downbound vessel coming in at the time with the current, having thereby the right of way."

*PRESENT:—Duff, Newcombe, Lamont, Smith and Cannon JJ.

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SS. *Kingdoc* v. CANADA STEAMSHIP LINES LTD.

Held (reversing the judgment of the Exchequer Court of Canada, [1930] Ex. C.R. 1) that the judgment of the Local Judge in Admiralty, holding the O. solely to blame, should be restored. Upon the facts, the Local Judge rightly held that the collision, having taken place on the south side of the canal, resulted from the faulty navigation of the O., by an abrupt and inconsistent manoeuvre, after exchange of the passing signals, a manoeuvre intervening between the time when the K. got under way and the collision; and, therefor, it was not the untimely casting off of the K. to which the collision can be attributed.—Although the action of those in charge of the K's. navigation was inconsiderate, in leaving her moorings and proceeding outward in the face of the incoming O., the K. should not be held responsible for such an error because it was not the cause of the damage which ensued. *Tuff* v. *Warman* (2 C.B.n.s. 740) and *Radley* v. *London and Northwestern Ry. Co.* (1 App. Cas. 754) followed.

APPEAL from the judgment of the Exchequer Court of Canada, Audette J. (1), allowing with costs an appeal of Canada Steamship Lines, Ltd., owners of the SS. *Oxford,* and dismissing with costs a cross-appeal of the Paterson Steamships Ltd., owners of the SS. *Kingdoc,* from the judgment of the Honourable Mr. Justice Philippe Demers, Local Judge in Admiralty for the Quebec Admiralty District, in cross-actions brought and tried together on the same evidence, for damage sustained by the respective vessels of the parties as a result of a collision between the said vessels at the upper end of the Lachine canal, near Montreal, on 5th June, 1927.

E. Languedoc, K.C., for the appellant.

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

The judgment of the court was delivered by

NEWCOMBE J.—The SS. *Kingdoc,* while ascending the Lachine canal at its western exit, came into collision with the SS. *Oxford,* which had just begun her descent from Lake St. Louis. The accident occurred during the latter part of the middle watch, on 5th June, 1927. Both ships sustained damage, and there is an action and a cross-action. These were tried together before the local judge at Montreal, who sat with two assessors, and he found the *Oxford* solely to blame. Upon appeal to the Exchequer Court, Audette J., the learned judge who presided, and who also had an assessor, reversed the decision of the learned local judge, and now the owners of the *Kingdoc* appeal to this court.

(1) [1930] Ex. C.R. 1.

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SS. *Kingdoc* v. CANADA STEAMSHIP LINES LTD.

Newcombe J.

There is some conflict of fact, and the learned counsel for the respondent very judiciously bases his argument upon the passages which he maintains are not in dispute, realizing, no doubt, the "great and almost insuperable difficulty" with which an appellant is apt to encounter adverse findings of fact upon contradictory testimony. (Per Lord Kingsdown in *The Julia* (1); per Lord Sumner in *The Hontestroom* v. *The Sagaporack* (2).

The material facts may thus be stated in short space and I extract the narrative from the respondent's factum:

> The respondent Steamship *Oxford* had come down with the current through Lake St. Louis and when the *Oxford* reached the entrance of the Lachine Canal the appellant Steamship *Kingdoc* was still moored to the canal wall where she had remained since making fast there about an hour earlier. While the *Oxford* was coming down the narrow canal entrance between certain piers on the north side and the canal wall on the south side of the entrance, the *Kingdoc* cast off from her moorings and commenced to manoeuvre so as to get under way on her proposed voyage up the canal entrance to the lake. The wind was blowing from the southwest across the canal entrance and when the *Oxford* was trying to meet and pass the *Kingdoc* the latter's starboard side came into collision with the stem of the *Oxford*. The *Kingdoc* was light and the *Oxford* was fully loaded.

It should be observed that the navigation in this case is governed by the rules of the road for the Great Lakes, which include the St. Lawrence river as far east as the lower exit of the Lachine canal and the Victoria bridge at Montreal; they differ in several particulars from the international rules.

The learned Judge of Exchequer Court at the conclusion of his reasons for judgment, which are fully stated, propounds the following maxim, as governing his conclusion:

> Moored at the revetment wall of the Canal, the *Kingdoc*, a light ship of 250 feet in length, with a fresh breeze blowing strong enough to affect her, on a dark night, casting off and getting unnecessarily under way, in a canal of 275 feet in width, with the knowledge of a downbound vessel coming in at the time with the current, having thereby the right of way, (Rule 25) will be held at fault for a collision which would not have happened had she lain fast at her berth and delayed casting off but a few minutes.

Now while I agree that, in the circumstances of this case, the action of those in charge of the *Kingdoc's* navigation was inconsiderate, in leaving her moorings and proceeding outward in the face of the incoming *Oxford*, which was close at hand and exhibiting both side lights; nevertheless, the learned's judge's statement requires qualifica-

(1) (1860) 14 Moore's P.C. 210. (2) [1927] A.C. 37, at 47.

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Newcombe J.

tion, for the offending ship should not be held responsible for such an error unless it be the cause of the damage which ensued, and we have here another instance of the application of the rule which was laid down in the well-known case of *Tuff* v. *Warman* (1), and restated by the House of Lords in *Radley* v. *London and Northwestern Railway Company* (2).

It is an undisputed fact that when the *Oxford,* approaching the entrance to the canal, came into relations with the *Kingdoc,* the weather had cleared so far as to enable the *Kingdoc* safely, in the judgment of her master and pilot, to proceed upon her voyage; and, accordingly, her master gave the order to cast off. The following passage occurs in Captain Redfearn's cross-examination:

Q. At page 67 of the transcription of your evidence taken before the Wreck Commissioner I find the Commissioner said:

"Q. And in that case there, with a strong breeze blowing—a fresh wind blowing—and a light ship, it takes some time before you leave, and you cannot help getting an angle obliquely from the wharf, because your stern went away in the first place and all the movements of the helm and engines would only accentuate the position because you cannot fight against a wind?"

to which you answered:

A. Yes, sir.

Q. Would it have been better for you to wait long enough for the *Oxford* to pass?—A. Yes, sir.

Q. You realize that now?—A. Yes, sir. If I had known what was going to happen I would never have left the pier.

The *Kingdoc* then gave two blasts of her whistle, signalling her desire to pass on the starboard side of the *Oxford,* a signal which the latter promptly answered in like manner; thus the two ships agreed that they should pass green to green. When this interchange of signals took place the *Oxford* was, of course, aware that the *Kingdoc* was no longer moored, and was outward bound; the situation was perfectly apparent; neither ship anticipated any unavoidable danger or obstruction in making the passage for which they had mutually stipulated. The narrow channel rule applied, subject to the understanding that each ship should keep to the side which she had elected to take; and the ships were very close to each other. The *Kingdoc* was shouldering her way along the canal wall, at a distance from her stem of about 30 feet, and from her stern of about 60 feet;

(1) (1857) 2 C.B. N.S. 740; (1858) 5 C.B. N.S. 573.

(2) (1876) 1 App. Cas. 754.

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the *Oxford* was coming down on the opposite side; when suddenly the *Oxford* gave an alarm or danger signal of five or six blasts and reversed her engine at full speed astern. The reason for this manoeuvre was not apparent to the *Kingdoc;* for, according to the findings, she was navigating as closely to the southern bank as she could safely go, and there was ample room, in canal navigation, between her starboard side and the blocks which mark the northern side of the channel, for the *Oxford* to pass.

The danger signal is explained by Mr. Austen, the first officer of the *Oxford,* who says:

A. A short while after the *Kingdoc* appeared to have been blown across the canal, and I did not see where we were going to pass him starboard to starboard, so I blew the danger signal.

Q. Five or six blasts?—A. Yes.

Q. How far apart do you think the vessels were when you blew the danger signal?—A. Roughly a couple of boat lengths.

Q. That would be about 500 feet?—A. Yes.

Q. Did they answer that danger signal?—A. No, sir.

Q. When you saw there was no room to pass was anything done with your engines?—A. When I got no answer to the danger signal I put my ship full speed astern.

Q. You gave that order on the telegraph?—A. Yes.

Q. Did they obey it down below?—A. Immediately.

The *Oxford's* stem struck the *Kingdoc's* starboard bow, at no. 2 hatch, 68 feet from the stem, forcing the *Kingdoc* against the south wall, where her stem struck. Evidently it was considered at the trial that the collision took place on the south side of the canal, and resulted from the faulty navigation of the *Oxford,* by an abrupt and inconsistent manoeuvre, after exchange of the passing signals. I am not convinced that the local judge reached an erroneous conclusion; certainly there was a cause intervening between the time when the *Kingdoc* got under way, and the collision; and if the accident was due to the cause found at the trial, it was not the untimely casting off of the *Kingdoc,* to which the collision can be attributed.

For these reasons, I think, with great respect, that the findings and judgment at the trial should be restored, and I would allow the appeal in each case with costs. The appellant should also have the costs of the appeal in the Exchequer Court.

Appeals allowed with costs.

Solicitor for the appellants: *Errol Languedoc.*

Solicitors for the respondents: *Meredith, Holden, Heward & Holden.*

LA BANQUE CANADIENNE NATIONALE (PLAINTIFF) ..... APPELLANT;

1930
*Oct. 23.
*Dec. 15.

AND

DAME ALBERTINE A. AUDET (DEFENDANT) ..... RESPONDENT.

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

Husband and wife—Both shareholders of company—Deed signed by both as security for debts of company—Validity—Good faith of creditor—Burden of proof—Authorization of the wife—When new authorization necessary in case of an appeal—Arts. 176, 178, 181, 183, 306, 1301, 1120, 1177 C.C.—(Q.) 4 Ed. VII, c. 42, s. 1.

A married woman, when authorized generally to maintain or defend an action, can appear as respondent before an appellate court without having obtained a new authorization, when she is seeking the confirmation of a judgment rendered in her favour. (Q.R. 48 K.B. 572 aff.)

A deed of warranty signed by the husband and his wife separate as to property, both being shareholders of an incorporated company, in order to secure reimbursement of advances made or to be made by a bank to the company, the evidence disclosing no benefit derived by the wife from the transaction, is a deed where the wife joins her husband in an obligation which affects interests common to both. As such, it is illegal and void, so far as concerns the wife, as being in contravention of the provisions of article 1301 C.C.

The mere fact, however, that the obligation assumed by the wife with her husband is joint and several is not in itself sufficient to bring it within the article (art. 1301 C.C.).

Since the amendment to art. 1301 C.C., enacted by 4 Ed. VII, c. 42, s. 1 (1904), ignorance on the part of the obligee (créancier) that the money was borrowed for the husband's purposes will protect the rights of the obligee, provided the money was handed over to the wife herself and the obligee had no reason whatever to suspect that it would be used in any way for the husband's benefit; and if subsequently the wife invokes the nullity of her obligation, the burden is upon her to prove that the money was for the husband's benefit to the knowledge of the obligee.

Per Anglin C.J.C.—Upon the evidence, the wife had no personal interest to serve in becoming the guarantor for the company and, when she signed such guarantee, she must have done so with the idea of helping her husband rather than of serving her own interests.—No opinion is expressed upon the validity of a guarantee given by a wife which, although it cannot be said to have been given *"pour son mari"* is given by her *"avec son mari"*.

Judgment of the Court of King's Bench (Q.R. 49 K.B. 67) aff.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

1930

LA BANQUE CANADIENNE NATIONALE v. AUDET.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Letellier J. (2) and dismissing the appellant's action.

The appellant bank brought an action against the respondent Audet and other defendants for the recovery of the sum of $10,134.25, upon two private deeds whereby the respondent and the other defendants agreed jointly and severally to guarantee the reimbursement by a certain company of which they were shareholders, of all advances made to the company by the Banque Nationale up to $10,000. The action was taken by the appellant bank, which had succeeded to the rights of the Banque Nationale, the company being insolvent and owing to the bank more than the full amount of the guarantee.

Charles Frémont K.C. and *A. Gérin-Lajoie K.C.* for the appellant.

J. A. Prévost K.C. for the respondent.

The judgment of the Court (Anglin C.J.C. concurring in the conclusions reached by Rinfret J., but writing separately) was delivered by Rinfret J.

ANGLIN C.J.C.—I concur in the conclusions reached by my brother Rinfret.

It seems to me that if a general authorization such as we have here may be sufficient to entitle a married woman, not only to maintain or defend an action, but also to prosecute an appeal against an adverse judgment, *a fortiori* and at all events must this be so where, as in the present case, in the Court of King's Bench and here, she is not appellant, but respondent.

On the merits I am entirely satisfied that this case falls within the mischief aimed at by art. 1301 C.C. It is clear that the wife had no personal interest to serve in becoming the guarantor for the company and that, when she signed such guarantee, she must have done so with the idea of helping her husband rather than of serving her own interests. That being so, it is correct to say of her guarantee that it was given "*avec et pour son mari*".

(1) (1930) Q.R. 49 K.B. 67 (2) (1930) Q.R. 49 K.B. 67, at 68.

I desire to express no opinion upon the validity of a guarantee given by a wife which, although it cannot be said to have been given "*pour son mari*", is given by her "*avec son mari*". It may, in some future case, be clear that the circumstances entitle her to invoke the protection of art. 1301 C.C. against liability on such a guarantee.

RINFRET, J. (delivering the judgment of the court).— Il se soulève une question préliminaire sur l'appel. L'intimée est une femme mariée. Elle a été poursuivie par l'appelante en même temps que plusieurs autres défendeurs, parmi lesquels se trouvait son mari.

En Cour Supérieure, elle a produit une comparution distincte de celle de ce dernier, bien que par l'entremise des mêmes procureurs. La comparution de l'intimée se lit comme suit:

> Nous comparaissons pour la défenderesse, Dame Albertine Audet, sous toutes réserves que de droit.

La comparution de son mari a été rédigée très probablement dans le but de satisfaire le principe posé par la Cour de Révision dans la cause de *Ducasse* v. *Montgrain* (1) que

> l'assignation d'une femme mariée avec son mari rend ce dernier partie dans la cause; et s'il ne comparaît pas, il autorise tacitement son épouse à ester en justice.

Elle se lit comme suit:

> Nous comparaissons pour le défendeur Edgar Lemieux personnellement, et non pas pour autoriser sa femme, sous toutes réserves que de droit.

Sur production de ces comparutions, la demanderesse présenta une motion priant le juge de donner à l'intimée l'autorisation à "ester en jugement" que lui refusait son mari.

La cour rendit le jugement suivant:

> La cour, vu la motion faite de la part de la demanderesse à l'effet que la défenderesse, Dame Albertine Audet Lemieux, soit autorisée à ester et plaider en la présente cause à toutes fins que de droit, le tout avec dépens:
>
> Parties ouïes sur la présente motion;
>
> Accorde ladite motion, le tout tel que demandé.

L'intimée produisit alors son plaidoyer. Le procès suivit son cours et jugement intervint maintenant la contestation de l'intimée et rejetant l'action, quant à elle, avec dépens.

(1) (1914) Q.R. 46 C.S. 511.

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Il n'y a aucune discussion sur la régularité des procédures devant la Cour Supérieure; mais, lorsque l'appelante porta sa cause en appel, elle omit de faire signifier l'inscription au mari et de faire renouveler préalablement l'autorisation judiciaire permettant à l'intimée d'ester devant la Cour du Banc du Roi.

L'intimée fit alors une motion concluant à ce que les procédures en appel fussent déclarées informes, illégales et nulles, et que les parties fussent mises hors de cour.

La Cour du Banc du Roi rejeta cette motion, monsieur le juge Dorion se déclarant dissident (1).

Puis, le jugement de la Cour Supérieure ayant été confirmé au mérite (2), l'appelante, en venant devant la Cour Suprême du Canada, procéda de la même façon qu'elle avait fait devant la Cour du Banc du Roi, sans signification au mari, et sans nouvelle demande d'autorisation à la femme.

L'intimée prétend donc que toute la procédure est entachée d'une irrégularité fatale, par suite du défaut d'autorisation, à la fois devant la Cour du Banc du Roi et devant cette cour; et, de ce chef, elle nous demande de rejeter l'appel.

Le moyen soulevé par l'intimée s'appuie sur les articles suivants du code civil de la province de Québec:

176. La femme ne peut ester en jugement sans l'autorisation ou l'assistance de son mari, quand même elle serait non commune ou marchande publique. Celle qui est séparée de biens ne le peut faire non plus si ce n'est dans les cas de simple administration.

178. Si le mari refuse d'autoriser sa femme à ester en jugement ou à passer un acte, le juge peut donner l'autorisation.

181. Toute autorisation générale, même stipulée par contrat de mariage, n'est valable que quant à l'administration des biens de la femme.

183. Le défaut d'autorisation du mari, dans le cas où elle est requise, comporte une nullité que rien ne peut couvrir et dont se peuvent prévaloir tous ceux qui y ont un intérêt né et actuel.

Les articles correspondants du Code Napoléon comportent à peu près le même texte, sauf que

la nullité fondée sur le défaut d'autorisation ne peut être opposée que par la femme, par le mari, ou par leurs héritiers.

Ici le moyen est soulevé par la femme. Par conséquent, nous ne voyons pas que, en l'espèce, on puisse tirer un argument de la différence entre les textes du code français

(1) (1929) Q.R. 48 K.B. 572. (2) (1930) Q.R. 49 K.B. 67.

et du code de Québec. Nous pouvons donc sans danger chercher la solution dans la doctrine et la jurisprudence des deux pays.

La question y est très controversée. C'est précisément ce que faisait observer monsieur le juge Dorion en enregistrant sa dissidence en Cour du Banc du Roi.

Naturellement, personne ne conteste le principe que la femme, même séparée de corps et de biens, ne peut ester en justice sans l'autorisation ou l'assistance de son mari, ou, en cas de refus du mari, sans l'autorisation d'un juge, ni que ce principe soit d'ordre public. La divergence d'opinions commence sur la question de savoir si l'appel constitue une nouvelle instance; et bon nombre d'auteurs enseignent que la femme mariée a besoin d'une nouvelle autorisation pour plaider en appel. La Cour de Cassation, en France, vient de réaffirmer dans un arrêt tout récent (*Parisot et autres* c. *Société Le Nickel*) (1) que le principe s'impose à tous les degrés de juridiction.

On admet cependant que l'autorisation de suivre l'instance en appel peut être donnée à la femme mariée en même temps que l'autorisation " d'ester en jugement " en première instance (2). Une autorisation de ce genre n'est pas considérée comme étant contraire à la prescription de spécialité contenue dans l'article 181 du code civil (Boitard, Procédure civile, 15e éd., par Glasson, T. 2e, p. 60). Le mari ne pourrait autoriser généralement sa femme à s'engager dans tout procès où elle pourrait être partie; mais rien ne s'oppose à ce qu'il l'autorise, une fois pour toutes, à suivre un procès dans toutes ses phases.

Dans ces conditions, ainsi qu'on l'a fait remarquer (Laurent, *Supplément aux principes de droit civil*, t. 1er, n° 594, p. 391), la discussion se résout en une question d'interprétation de l'autorisation qui a été donnée. Il est évident que si, dans ses termes, elle est expressément limitée au recours en première instance, elle devra être restreinte à ce degré de juridiction. Si, au contraire, elle s'étend expressément à tous les degrés de juridiction, elle permet à la femme qui l'a obtenue d'ester en appel sans autorisation nouvelle.

(1) S. 27. 1. 56.

(2) D.P. 58. 1. 104.

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Il reste à décider comment il faut interpréter l'autorisation du mari (ou du juge) lorsque l'autorisation ne précise pas et est donnée en termes généraux. La doctrine et la jurisprudence se prononcent dans les deux sens.

La Cour de Cassation a jugé, en général, que l'autorisation accordée à une femme mariée à l'effet de former une demande en justice ne suffit pas pour l'habiliter à appeler du jugement qui a rejeté sa demande. Une nouvelle autorisation est nécessaire. (Consulter sur ce point Fuzier-Herman, *Répertoire du droit français,* vbo. *Autorisation de femme mariée,* nos 657, 658 et 659.)

D'autre part, la même cour a jugé que la femme autorisée par son mari à intenter une demande en justice n'a pas besoin d'une nouvelle autorisation pour défendre en appel le jugement prononcé en sa faveur (*Bonnieu* c. *Dineux* (1); *Pissard* c. *Maury*) (2). Même dans la cause de *Sarlandie,* c. *Sarlandie* (3), l'autorisation donnée à la femme par le président du tribunal civil de procéder à sa demande en séparation de corps a été jugée suffisante pour habiliter la femme à plaider tant sur sa demande principale que sur la demande incidente qui s'y rattachait, et pour lui permettre d'ester en appel sur ces demandes sans recourir à une nouvelle autorisation.

Cependant, il semblerait que la cour ait voulu faire une distinction entre l'autorisation de plaider et celle de former une demande en justice. L'autorisation donnée à la femme généralement et lui permettant de se porter défenderesse ne pourrait être interprétée extensivement (4). Dans la cause de *Parisot* c. *Société Le Nickel* (5), à laquelle nous avons déjà référé, le rapport ne fait pas voir si l'autorisation était spéciale ou générale. Le jugé semble indiquer qu'elle était spéciale. Il se lit:

> Spécialement la femme autorisée à plaider en première instance a besoin d'une nouvelle autorisation pour suivre l'instance en appel.

Dans cet état de choses, la doctrine a évolué de la façon suivante:

Si la femme a perdu en première instance et veut elle-même interjeter appel, elle doit obtenir pour cela une nouvelle autorisation. Mais si la femme a gagné son procès

(1) D.P. 1873. 1. 438.
(2) D.P. 1879. 1. 158.
(3) S. 1885 1. 61.
(4) S. 78. 1. 341; S. 79. 1. 252.
(5) S. 27. 1. 56.

en première instance et si elle est assignée en appel, elle peut, sans nouvelle autorisation, répondre à cette assignation en qualité d'intimée.

Il semble que cette distinction satisfasse la raison. Elle est admise expressément par le code civil dans le cas du tuteur qui veut appeler d'un jugement (art. 306 C.C.). Le mari ou le juge, pour accorder l'autorisation d'ester en jugement, s'est basé sur la justesse et la légalité apparentes des droits que la femme mariée entendait faire valoir, soit en demandant, soit en défendant. Il est raisonnable d'interpréter l'autorisation qu'ils ont donnée comme s'étendant à la juridiction d'appel dans des conditions identiques. (Voir Garsonnet, *Traité de procédure,* 3e éd., vol. 6, p. 37.) Si la situation que le mari ou le juge avait envisagée s'est maintenue, si les droits que la femme a obtenu l'autorisation de faire valoir ont été reconnus par le jugement de première instance, il est logique de considérer l'autorisation d'ester en jugement donnée à la femme sans restriction, et qui n'a pas été révoquée, comme persistant devant les tribunaux d'appel où elle se contente de défendre ses positions. Si, au contraire, le jugement a été prononcé contre les prétentions de la femme, les circonstances dans lesquelles l'autorisation a été donnée sont modifiées et l'on ne saurait présumer que le mari ou le juge a eu l'intention d'étendre son autorisation à un appel dans des conditions qui ont cessé d'être identiques. C'est la solution qui est proposée par Laurent (*Supplément aux principes de droit civil,* t. 1er, n° 594, p. 391) et à laquelle se rallient Colin et Capitant (*Cours élémentaire de droit civil français,* 5e éd., vol. 1er, p. 628) et Planiol et Ripert (*Traité pratique de droit civil français,* vol. 2, p. 372, n° 458).

Avec eux, nous trouvons que cette solution est très raisonnable et qu'il faut l'admettre lorsqu'il s'agit pour la femme mariée qui a gagné son procès de défendre devant la Cour du Banc du Roi le jugement qu'elle a obtenu en première instance.

Ici, l'intimée a été dûment autorisée en termes généraux à " ester et plaider en la présente cause à toutes fins que de droit ". Les prétentions qu'elle a soumises au juge pour le justifier de lui accorder son autorisation ont prévalu dans le premier jugement. Devant la Cour du Banc du Roi et devant la Cour Suprême du Canada, la situation non

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seulement n'est pas changée, mais, la présomption étant en faveur du jugement, elle s'est même améliorée, le premier juge lui ayant donné raison. Le mari n'est pas intervenu pour l'empêcher de suivre l'instance en appel; le jugement qui l'a autorisée n'a pas été révoqué. Jusqu'à preuve du contraire, on doit supposer que l'autorisation avait pour but de l'habiliter à défendre ses droits jusqu'à ce qu'ils soient définitivement reconnus, c'est-à-dire devant toutes les juridictions, jusqu'à jugement final.

Il en eût été autrement si le premier jugement ou la Cour du Banc du Roi avait donné tort à l'intimée. Un jugement contraire à ses prétentions eût changé la situation. Il lui eût fallu une nouvelle autorisation pour interjeter appel.

Nous sommes donc d'accord avec la Cour du Banc du Roi qui a rejeté ce moyen préliminaire de l'intimée. Nous ajouterons d'ailleurs que, dans une question de cette espèce, où il ne s'agit pas d'un défaut absolu d'autorisation, mais de la forme que devait prendre l'autorisation pour habiliter la femme mariée à ester en appel, ce n'est pas sans beaucoup d'hésitation que nous aurions pu être amenés à mettre de côté le jugement du plus haut tribunal de la province.

Passons maintenant à la discussion du mérite de cette cause.

L'appelante, qui était la demanderesse en Cour Supérieure, a demandé jugement contre l'intimée et plusieurs autres défendeurs conjointement et solidairement pour la somme de $10,134.25. Cette poursuite est basée sur deux actes sous seing privé, respectivement en date du 30 avril et du 13 novembre 1924, en vertu desquels les défendeurs se sont portés garants conjointement et solidairement jusqu'à concurrence de la somme de $10,000 en faveur de la Banque Nationale pour le parfait remboursement par la compagnie Pannonia Limitée, de Québec, de toutes sommes que la compagnie devait ou pourrait devoir dans la suite à ladite banque. La compagnie a fait faillite et s'est trouvée endettée envers la banque pour prêts, avances, escomptes et découverts, pour un montant excédant celui de la garantie; et la demanderesse appelante, qui est maintenant aux droits et obligations de la Banque Nationale, réclame donc de tous les garants le montant de la garantie en principal et intérêts.

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L'intimée a plaidé qu'elle a signé les actes pour se rendre au désir de son mari, sans rien connaître de leur contenu ou de leur objet, non plus que des affaires de la compagnie Pannonia; qu'elle est séparée de biens de son mari; et que ces

actes de garantie constituent des cautionnements dans lesquels la demanderesse s'oblige avec et pour son mari en contravention à l'article 1301 du code civil.

La Cour Supérieure a déclaré les actes de garantie nuls d'une nullité absolue quant à l'intimée, et a rejeté l'action de la banque contre cette dernière. Ce jugement a été unanimement confirmé en appel, pour les motifs qu'il s'agissait d'une obligation contractée par une femme mariée "avec" son mari; et, en outre, qu'en s'engageant en l'occurrence conjointement et solidairement avec lui, elle s'obligeait aussi "pour" lui.

L'appelante nous demande d'infirmer ces deux jugements en nous soumettant qu'il ne s'agit pas, au sens légal, d'une obligation contractée par une femme mariée "avec ou pour son mari", mais d'une garantie pour un tiers: la compagnie Pannonia. Elle ajoute que l'intimée était actionnaire de cette compagnie et qu'en devenant garante, l'intimée s'est obligée pour sa propre affaire.

L'article 1301 C.C. est sans doute l'un des plus connus du code civil; mais, pour l'intelligence de la discussion, il vaut mieux en citer le texte une fois de plus:

1301. La femme ne peut s'obliger avec ou pour son mari, qu'en qualité de commune; toute obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet, sauf les droits des créanciers qui contractent de bonne foi.

Nous avons vu que l'intimée est séparée de biens. Elle rencontre donc une première condition de l'application de l'article; elle n'a pu s'obliger, et elle ne s'est pas obligée, "en qualité de commune".

A première vue, elle ne s'est pas non plus obligée pour son mari. Elle s'est portée garante pour la compagnie Pannonia. Ce point, cependant, n'est pas aussi clair que s'il s'agissait d'un tiers qui fût absolument indépendant du mari. Le mari était actionnaire dans la compagnie. La preuve n'établit pas si ses actions étaient payées entièrement ou si elles étaient encore sujettes à appel. Si le mari les avait complètement payées, il avait tout de même des intérêts dans la compagnie. La situation n'est pas stricte-

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ment la même que s'il s'agissait du cas où la femme aurait garanti la dette d'un tiers, dans laquelle le mari n'aurait aucune espèce d'intérêt. Dans l'examen de ce litige, l'on ne saurait écarter cet aspect de la question.

Nous ne croyons pas, cependant, que le seul fait que la femme s'est portée garante conjointement et solidairement avec son mari soit suffisant pour dire que, par là, elle s'est obligée pour lui. Il est vrai que, par suite de la solidarité, elle pourra être appelée à payer le plein montant de la dette; mais c'est là une conséquence de la nature de l'obligation qu'elle a personnellement contractée. Elle s'est portée garante solidairement. La loi veut que dans ce cas elle soit passible du paiement de toute la dette. En s'acquittant, elle ne paie pas pour un autre; elle satisfait pour elle-même l'obligation qu'elle a contractée. C'est seulement lorsque

l'affaire pour laquelle la dette a été contractée solidairement ne concerne que l'un des codébiteurs (que) celui-ci est tenu de toute la dette vis-à-vis des autres codébiteurs qui ne sont considérés par rapport à lui que comme ses cautions (art. 1120 C.C.).

Si l'intimée payait la dette de la compagnie Pannonia, elle ne paierait pas à titre de caution de ses autres codébiteurs solidaires, ni par conséquent de son mari. Elle n'est considérée la caution que de la compagnie Pannonia.

Les avocats de l'intimée nous ont fait remarquer que cette obligation l'exposait à rembourser à son mari une partie des frais qu'il aurait lui-même encourus dans des procédures instituées contre lui pour le recouvrement de la dette. En effet,

l'obligation contractée solidairement envers le créancier, se divise de plein droit entre les codébiteurs, qui n'en sont tenus entre eux que chacun pour sa part (art. 1177 C.C.).

Cela ne veut pas dire que, en tout état de cause, le codébiteur solidaire qui se laisse poursuivre aura contre les autres un recours pour ses frais. En général, ces frais auront été encourus par sa propre faute et il devra seul les supporter. En principe, ces frais ne sont que l'accessoire de la dette; ils ne peuvent en changer la nature; et cette considération ne saurait affecter la discussion.

Il ne manque pas d'arrêts dans la jurisprudence de la province de Québec où la femme mariée a été condamnée, malgré que son obligation fût solidaire avec son mari. Nous pourrions citer mainte et mainte cause où elle a été

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tenue responsable pour avoir signé des billets promissoires avec lui. Il suffira de rappeler le jugement du Conseil Privé dans la cause de *La Banque d'Hochelaga* v. *Jodoin* (1). En cette affaire, les exécuteurs testamentaires de madame Jodoin poursuivaient la Banque d'Hochelaga en revendication de certaines actions de compagnies transférées à la banque en garantie de billets promissoires

signed by the husband in his own name and also in her name as her "procureur" or attorney.

Madame Jodoin était donc obligée solidairement avec son mari. Elle fut condamnée sur le motif que

the whole affair was the wife's affair * * * The wife certainly had the benefit of the advances.

On voit que le fait de solidarité n'a pas empêché sa condamnation; l'existence de la solidarité n'a pas été jugée suffisante pour entacher d'illégalité l'obligation qu'elle avait contractée.

Il est juste de faire remarquer que, dans cette cause, il s'agissait également d'une obligation contractée par une femme mariée "avec * * * son mari". Elle fut quand même tenue responsable par le Conseil Privé. Cela nous amène à examiner l'autre motif donné par la Cour du Banc du Roi en la présente cause pour confirmer le jugement de première instance.

La question présente de sérieuses difficultés et elle n'est pas sans avoir donné lieu à beaucoup de commentaires. Depuis le jugement du Conseil Privé dans la cause de *Trust & Loan Company of Canada* v. *Gauthier* (2), l'on peut dire que la jurisprudence est fixée sur l'interprétation que l'on doit donner à l'article 1301 C.C. lorsque la femme s'est obligée pour son mari. Il ne reste plus, dans ce cas, qu'à préciser la portée de l'amendement de 1904 qui a ajouté à l'article tel qu'il se lisait alors les mots "sauf les droits des créanciers qui contractent de bonne foi". (4 Ed. VII, c. 42, s. 1.) Mais il est loin d'en être ainsi lorsqu'il s'agit d'une femme qui s'oblige simplement "avec * * * son mari"; et le jugement en l'espèce paraît bien être allé plus loin qu'on l'a jamais fait sur cette matière.

Il est nécessaire de se rappeler que les statuts antérieurs au code défendaient à la femme mariée de se porter caution

(1) [1895] A.C. 612. (2) [1904] A.C. 94.

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pour les dettes, obligations ou engagements contractés par le mari avant le mariage ou pendant la durée du mariage (4 Vict. c. 30, art. 36);

et, plus tard,

pour les dettes, engagements ou obligations qui pourront avoir été contractés ou faits en aucun temps pendant la durée de tout tel mariage (Statuts Refondus du Bas-Canada, c. 37, art. 55).

Le 12 mars 1853, la Cour du Banc de la Reine, en appel, à Montréal, dans la cause de *Jodoin* v. *Dufresne* (1), décida que la femme ne pouvait s'obliger avec son mari autrement qu'en sa qualité de commune en biens et que, dans l'espèce, un cautionnement par une femme, conjointement avec son mari, pour un tiers, était nul d'après les dispositions de l'ordonnance 4 Vict., c. 30, à laquelle il vient d'être référé. Suivant le rapport, qui est très succinct, l'intimée soutenait

que toute obligation consentie par la femme avec son mari pour un tiers est plutôt pour sûreté de l'obligation du mari que de celle du tiers.

C'est en se basant sur ce jugement, auquel d'ailleurs ils réfèrent dans leur projet, que les codificateurs proposèrent la rédaction de l'article 1301 C.C. tel qu'il se lit dans le code. Dans leur cinquième rapport (p. 214) ils expliquent que

Cet article est substitué au 1431e du Code Napoléon, qui est supprimé entièrement, vu que la règle qu'il contient a été changée par notre législation. (S.R.B.C., c. 37, s. 55.) D'après cette loi, de date comparativement récente (4 V. c. 30), la femme ne peut s'obliger pour son mari, que comme commune; toute obligation qu'elle contracte autrement est nulle. L'article du code, conforme à l'ancienne jurisprudence française, reconnaît la validité d'une telle obligation en faveur des tiers; seulement la femme, dans ce cas, a son recours contre le mari ou ses héritiers pour le montant qu'elle est appelée, même en renonçant, à payer en vertu de tels actes. Notre article est différent; l'acte par lequel la femme s'oblige pour son mari, ne la lie nullement si elle renonce. Les engagements qu'elle contracte avec son mari ont été, dans notre article, assimilés à ceux qu'elle contracte directement pour lui, d'après une présomption admise par les tribunaux, qui ont justement donné cette extension à la loi.

Il est donc certain que les commissaires chargés de codifier le droit civil ont interprété l'arrêt de *Jodoin* v. *Dufresne* (1) comme une décision à l'effet que l'obligation de la femme mariée contractée avec son mari créait la présomption que c'était une obligation pour son mari. Il est non moins certain, quel qu'ait été le véritable sens de cet arrêt, que ces mêmes commissaires ont proposé à la législature d'accepter cette " présomption admise par les tribunaux " et d'*assimiler* (c'est là l'expression dont ils se ser-

(1) (1853) 3 L.C.R. 189.

vent) "les engagements que la femme mariée contracte avec son mari" aux engagements que la femme "contracte directement pour lui".

C'est dans ces conditions que la législature a adopté l'article 1301 C.C. tel qu'il était soumis par les codificateurs; et l'on peut en conclure qu'il a été inséré dans le code avec l'esprit dans lequel il a été proposé.

Il convient de noter que l'arrêt de *Jodoin* v. *Dufresne* (1) a fait l'objet d'observations intéressantes dans *Hamel* v. *Panet*. On trouve le rapport officiel de cette cause devant le Conseil Privé dans 2 App. C. 121. Mais le volume 3 des Quebec Law Reports contient également, à la page 173, un rapport détaillé de la même cause devant la Cour Supérieure, la Cour du Banc de la Reine et le Conseil Privé. L'on y voit que plusieurs des juges ont émis des doutes sur la solidité de la décision dans *Jodoin* v. *Dufresne* (1).

Le juge-en-chef Meredith, en Cour Supérieure, s'exprime comme suit:

I am not inclined to think that the provision of the Registry Ordinance, which is an exceptional law, ought to be so extended as to deprive a married woman of her common law right, in good faith, and with the express consent of her husband, to become surety for a debt really due by a third party * * *

The Court of Appeals, however, it seems, has held such a suretyship to be null.

En Cour du Banc de la Reine, monsieur le juge McCord ajoutait:

That section prohibits a married woman from incurring any liability for debts or obligations entered into by her husband, but it does not prohibit her from becoming liable for debts due by third parties * * *

She had a perfect right, with the consent of her husband, to become liable alone for her son's debts, and that right could not be impaired by the fact that her husband likewise became surety.

Enfin le Conseil Privé, parlant par la bouche de Lord Selborne, fait le commentaire suivant:

By the law of Lower Canada (it is not necessary to refer to the text), it is provided that a married woman shall not become surety for the debts of her husband; and it has been decided upon that law, in the case of *Jodoin* v. *Dufresne* (1), that all engagements, though with third parties and not creditors immediately of the husband, which the wife enters into concurrently with the husband, are to be treated constructively as his liabilities; that is to say, that the contract, whether it be of suretyship for somebody else or of any other kind, is to be treated as primarily his contract, and the wife as brought in by him to secure the liability

(1) (1853) 3 L.C.R. 189.

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which he is going to contract. Their Lordships wish it to be distinctly understood that they express no opinion upon the question, whether that case of *Jodoin* v. *Dufresne* (1) was well decided or not. It is not in their opinion now necessary to say a word which will detract from its authority, whatever that may be; but they also desire to say nothing which can be deemed to add to its authority.

(Dans le rapport officiel, ce passage se trouve aux pages 152 et 153.)

Mais, comme on le voit, les doutes ou les réserves exprimés dans les passages des jugements que nous venons de reproduire s'adressaient à la législation antérieure au code (4 V. c. 30 et S.R.B.C. c. 37). C'est cette législation que les tribunaux étaient chargés d'appliquer, tant dans la cause de *Jodoin* v. *Dufresne* (1) que dans la cause de *Hamel* v. *Panet* (2). L'on ne peut en tenir compte pour interpréter l'article 1301 du code civil, en présence de la déclaration des codificateurs que cet article est une modification, ou, si l'on veut, une " extension " à la loi antérieure, par laquelle ils adoptent la présomption admise dans la cause de *Jodoin* v. *Dufresne* (1). Ils déclarent vouloir " assimiler " les engagements que la femme contracte avec son mari aux engagements qu'elle contracte directement pour lui. A partir de ce moment, il ne s'agit plus d'un simple jugement que l'on peut continuer de discuter et que les tribunaux supérieurs peuvent infirmer. Le principe posé dans ce jugement a été incorporé dans la loi et il ne reste plus qu'à l'appliquer.

Dans les circonstances, interpréter le mot " avec " dans l'article 1301 C.C. comme ayant le même sens que " pour " serait aller à l'encontre de la déclaration des codificateurs dans leur rapport et contreviendrait à la règle que le législateur n'est jamais présumé parler pour ne rien dire, d'où il faut conclure qu'en ajoutant le mot " avec " au mot " pour ", ils ont voulu indiquer quelque chose de plus que " pour " le mari. C'est ce qui fait dire aux Lords du Conseil Privé (*Trust & Loan Co.* v. *Gauthier* (3)):

Their Lordships cannot accede to the argument that the language used and deliberately adopted in the code must be narrowed and held to have no greater effect than the previous law for which it has been subtituted.

Une discussion intéressante s'est élevée parmi les commentateurs de l'article 1301 C.C., ainsi que dans les arrêts

(1) (1853) 3 L.C.R 189. (2) (1876) 3 Q.L.R. 173.
(3) (1904) A.C., at 101.

des tribunaux, sur la question de savoir si les mots " avec son mari " créaient une présomption *juris et de jure* ou seulement une présomption *juris tantum*. Nous mentionnons la chose pour indiquer qu'elle ne nous a pas échappé et, incidemment, pour déclarer que nous n'entendons pas trancher le débat dans le présent jugement, qui s'appuie sur d'autres considérations.

Il nous faut cependant écarter de ce débat l'argument tiré des nombreuses décisions où la femme mariée, nonobstant le fait qu'elle s'était obligée avec son mari, a été tenue responsable, lorsque l'obligation avait été contractée pour ses propres affaires ou, au moins, lorsqu'il a été démontré qu'elle en avait retiré le bénéfice. (N.B. La plus notoire est celle de *La Banque d'Hochelaga* v. *Jodoin* (1), déjà citée.) Tous ces jugements peuvent s'expliquer par le motif que ces cas ne tombent vraiment pas sous l'article 1301 du code civil. Cet article défend à la femme de " s'obliger ", et les codificateurs ne se sont pas expliqués sur le sens qu'ils donnaient à ce mot dans leur projet. Mais, d'autre part, il résulte du passage de leur rapport que nous avons reproduit plus haut qu'en employant le mot " obliger ", ils n'ont pas entendu introduire à cet égard une innovation dans le code. Ils ont soin de déclarer que la seule " extension à la loi " dans leur projet est l'addition du mot " avec " aux mots " pour son mari ". Or, il est conforme à l'histoire de cette législation, depuis le droit romain jusqu'aux statuts antérieurs au code, de comprendre, par l'expression " s'obliger " de l'article 1301 C.C., uniquement le cautionnement de la femme avec ou pour son mari.

Cette interprétation est maintenant fixée dans la jurisprudence (*Lebel* v. *Bradin*, Cour du Banc du Roi (2); *Laframboise* v. *Vallières* (3); *Banque Canadienne* v. *Carette* (4). Voir 4 Ed. VII, c. 42, qui déclare que l'article 1301 C.C. ne s'est jamais appliqué aux achats, ventes ou échanges d'immeubles, ni aux baux emphythéotiques faits par la femme mariée). Il en résulte que l'obligation de la femme mariée pour ses propres affaires ou pour son propre compte, qu'elle soit ou non commune avec son mari, n'étant

(1) [1895] A.C. 612.
(2) (1913) 19 R.L.N.S. 16.
(3) [1927] Can. S.C.R. 197.
(4) [1931] Can. S.C.R. 33

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jamais, à proprement parler, un cautionnement de sa part, ne constitue pas un acte où elle "s'oblige" au sens de l'article 1301 C.C. et ne tombe pas sous le coup de cet article.

Le principe que l'engagement de la femme mariée n'est pas nul, bien qu'elle se soit obligée avec son mari, s'il apparaît qu'il a pour objet ses propres affaires, ou que la femme en a tiré profit, est de jurisprudence constante. Cependant, pour les raisons que nous venons d'en donner, ce principe ne saurait être considéré comme une exception à l'article 1301 C.C. introduite par les tribunaux. C'est plutôt, dans chacun de ces cas, une constatation que l'obligation n'est pas un cautionnement et que, ne l'étant pas, elle n'est pas couverte par l'article du code.

En plus, il est très important de se rappeler que l'article 1302 du code civil suppose le cas où le mari "s'oblige pour les affaires propres de sa femme", et fournit donc un exemple d'une obligation de la femme avec son mari, qui n'est pas entachée d'illégalité. Comme nous le fait observer monsieur le juge Monk dans *Maîlhot* v. *Brunelle* (1):

> There is nothing in the law which prevents a wife from borrowing money. The mere circumstance of the husband being jointly and severally bound with the wife does not indicate that there is any illegality in the transaction. The wife cannot become security for her husband, except as "commune en biens"; but the husband may be jointly and severally bound with the wife where it is her debt.

Comme nous l'avons mentionné, cependant, il est arrivé rarement que nos tribunaux aient eu à appliquer l'article 1301 C.C. d'une façon aussi rigoureuse que dans le cas qui nous occupe. Nous avons repassé attentivement tous les arrêts sur lesquels le savant procureur de l'intimée a attiré notre attention, dans son factum et à l'argument, à l'appui de ses prétentions. Le motif de chacun de ces jugements est que l'emprunt a été fait pour les affaires du mari; l'argent prêté a servi pour le mari ou, au moins, il n'a pas été prouvé que la femme a eu le bénéfice de cet argent.

Pour ne citer que les deux arrêts sur lesquels peut-être le savant procureur a le plus insisté:

Dans la cause de *Leclerc* v. *Ouimet* (2), l'obligation d'une femme mariée séparée de biens résultant de l'en-

(1) (1870) 15 L.C.J. 197. (2) (1890) 19 R.L. 78.

dossement "pour aval" d'un billet promissoire fait conjointement avec son mari fut déclarée nulle. Le jugement fait voir

> que le billet en question représentait la valeur de marchandises vendues et livrées par les demandeurs au défendeur (i.e. le mari) Moïse-Arthur Ouimet seul.

Le billet avait donc été donné pour les affaires du mari. En plus, la femme avait endossé le billet, et le jugement déclare que sa signature considérée comme un endossement ordinaire

> se trouve avoir cautionné l'obligation de son mari qui était l'endossement la précédant sur le billet; et que si, au contraire, cette signature ne doit être considérée que comme un aval, la défenderesse se trouve avoir contracté conjointement avec son mari une obligation qui ne concerne pas ses affaires à elle.

L'autre cause est celle de *Gagnon* v. *Boivin* (1). L'action était en recouvrement du solde du prix de vente d'un fonds de commerce constaté par les billets à ordre de la femme et diverses factures. Le motif du jugement est que la preuve a établi que les billets ont été signés par l'intimée sans considération pour elle-même et uniquement pour le bénéfice de son mari. C'est le mari seul qui faisait affaires; c'est lui qui, en fait, était le véritable commerçant; et la vente, bien que, en apparence, faite au mari et à la femme, était en réalité à lui seul.

Le premier élément dans la présente cause est que l'intimée s'est portée caution avec son mari pour la dette d'un tiers en une autre qualité que celle de commune en biens. De ce chef, la cause paraît donc de prime abord être régie par le principe général posé dans l'article 1301 du code civil (*Lebel* v. *Bradin* (2)).

Toutefois, l'intimée était actionnaire de la compagnie à l'égard de laquelle elle a signé les actes de garantie. Les circonstances qui ont entouré sa souscription aux actions de la compagnie ont donné lieu à certains commentaires de la part du juge de première instance qui indiqueraient qu'elle ne s'est guère rendu compte de l'opération dans laquelle elle s'engageait lorsqu'elle a consenti à devenir actionnaire; mais elle n'a pas demandé d'être relevée de sa souscription, et d'ailleurs elle n'aurait pu l'obtenir dans un litige engagé uniquement avec la Banque Canadienne Nationale. Elle doit donc être tenue pour actionnaire; et

(1) (1927) Q.R. 44 K.B. 160. (2) (1913) 19 R.L.n.s. 16 at 33.

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il faut partir de là pour envisager la situation: l'intimée s'est portée caution des dettes d'une compagnie dans laquelle elle était actionnaire.

D'autre part, la preuve ne laisse aucun doute sur le fait qu'elle n'a certainement tiré aucun profit de l'obligation qu'elle a contractée.

Mais le mari de l'intimée était lui aussi actionnaire de la compagnie pour laquelle elle s'est portée caution. C'était tout autant, et plus (si l'on tient compte du nombre des actions), son affaire à lui que son affaire à elle. Il s'ensuit que tout en s'obligeant pour sa propre affaire elle s'est en même temps obligée pour son mari. C'est là, suivant nous, l'un des cas où la fonction du mot "avec" dans l'article 1301 C.C. entre en jeu et où son addition au mot "pour" rend l'article sûrement applicable. La femme et le mari avaient des intérêts conjoints dans l'affaire cautionnée et l'obligation que la femme a assumée était donc à la fois "avec" et "pour" son mari.

La cause qui nous paraît se rapprocher davantage de l'espèce actuelle est celle de *Chapdelaine* v. *Vallée* (1). L'action était portée conjointement contre deux défendeurs, mari et femme séparée de biens, sur un écrit sous seing privé en vertu duquel ils promettaient

conjointement et solidairement payer la somme de $182 pour trois voitures achetées dudit André Chapdelaine, pour notre usage commun.

La Cour de Révision du district de Montréal a déclaré nulle l'obligation comme étant en contravention à l'article 1301 du code civil.

La conséquence de cette décision est que l'obligation contractée par la femme avec son mari est sans effet lorsqu'elle n'est pas uniquement pour sa propre affaire mais l'est également pour le compte de son mari.

C'est d'ailleurs la conclusion qu'il est possible de tirer du jugement de cette cour dans la cause de *Klock* v. *Chamberlin* (2), où l'argent prêté sur vente à réméré avait été remis à la femme mariée; mais où il était démontré "qu'une très grande partie" avait servi à payer les dettes du mari. C'est sûrement ce que dit Lord Lindley, en rendant le jugement du Conseil Privé dans la cause de *Trust & Loan Company* v. *Gauthier* (3), lorsque, à la page 100, il s'exprime comme suit:

(1) (1886) 16 R.L. 51. (2) (1887) 15 Can. S.C.R. 325.
(3) [1904] A.C. 94.

Except in dealing with their common property, she is not to bind herself with him, i.e. she is not to join him in any obligation which affects him.

Et, plus loin, il se demande:

What then is meant by "for him"? Does it mean jointly with him, or as his surety and nothing more? or does it mean for him generally, i.e. in any way for his benefit?

Et il donne la réponse suivante (p. 101):

Their Lordships gather from the decisions referred to in the argument and in the published commentaries on the Code Civil that the words "for her husband" are now judicially held to mean generally in any way for his purposes as distinguished from those of his wife; and that ignorance on the part of her obligee (créancier) cannot avail him if it is proved that she in fact bound herself for her husband. These conclusions are in their Lordships' opinion sound and in accordance with the language of art. 1301 and with its evident object.

Notre conclusion est que, dans cette cause-ci, la Cour Supérieure et la Cour du Banc du Roi ont eu raison de considérer les actes de garantie consentis par l'intimée comme entachés de la nullité édictée à l'article 1301 du code civil.

Il reste toutefois à discuter la prétention de l'appelante qu'elle était une créancière de bonne foi et que, comme telle, ses droits sont sauvegardés par l'article.

Dans la cause de *Leclerc* v. *Bédard* (1), la Cour de Révision à Québec (Dorion J.) s'est demandé quelle était la portée de cet amendement. Elle fait remarquer avec justesse qu'il

ne peut pas être question de bonne foi lorsque le contrat prend la forme d'un cautionnement par la femme de l'obligation du mari. C'est là ce qui est expressément prohibé par la loi.

Lorsque l'obligation a été contractée avec le mari, l'amendement vient certainement confirmer le droit du créancier de prouver que la femme s'est obligée pour sa propre affaire. Mais ce droit avait déjà été reconnu au créancier par la jurisprudence.

Il reste le cas où la femme mariée s'oblige seule avec l'autorisation de son mari. Les tribunaux ont toujours annulé cette obligation lorsqu'il était démontré à leur satisfaction que, nonobstant ses termes apparents, l'obligation avait été assumée par la femme, suivant l'expression du Conseil Privé "in any way for her husband's purposes". Mais le jugement du Conseil Privé dans lequel cette expression se rencontre (*Trust & Loan* v. *Gauthier*) (2) ajoutait:

(1) (1913) Q.R. 45 S.C. 129. (2) [1904] A.C. 94.

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Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed.

Leclerc v. *Bédard* (1) a donc décidé que l'amendement de la loi 4 E. VII c. 42, s. 1 fait naître la présomption que le prêt fait à la femme séparée seule, quoique autorisée de son mari, lui a profité à elle-même. Par suite, si elle invoque la nullité de son obligation pour violation de l'article 1301 C.C., c'est sur elle que tombe le fardeau de la preuve que le prêt a profité à son mari à la connaissance du prêteur.

A son tour, la Cour de Révision, à Montréal, dans la cause de *Laberge* v. *Vezeau* (2), considère que les éléments de la bonne foi, dont parle l'amendement, peuvent consister dans le paiement fait par le créancier directement à la femme elle-même et dans l'ignorance du prêteur que l'argent avancé par lui est pour l'avantage du mari. Dans ce cas, il y a présomption que le prêt fait à la femme seule, séparée de biens et autorisée par son mari, n'a profité qu'à elle-même; et la femme qui invoque la nullité de son obligation pour violation de l'article 1301 C.C. doit prouver que le prêt a profité à son mari à la connaissance du prêteur.

Le jugement de la Cour du Banc du Roi dans la cause de *Lebel* v. *Bradin* (3), dont nous avons déjà parlé, contient une étude très complète de toutes les questions qui se soulèvent en vertu de l'article 1301 C.C. et de l'amendement de 1904. Sa conclusion est que, sous l'effet de cet amendement, le créancier qui prête à la femme mariée séparée de biens seule, pour être réputé de bonne foi, doit verser le produit de l'emprunt à la femme elle-même, et il doit ignorer et n'avoir aucune raison de croire que cet argent pourra servir les intérêts du mari. Le créancier, dans ce cas, n'est pas responsable si subséquemment la femme remet les fonds empruntés à son mari; car depuis l'amendement il n'est plus tenu de surveiller l'emploi des deniers provenant du prêt qu'il lui a fait.

Il n'est pas nécessaire de dire que les définitions que nous venons de rapporter épuisent tous les cas où le créancier pourra, en vertu de l'amendement, établir une bonne

(1) (1913) Q.R. 45 S.C. 129. (2) (1911) Q.R. 40 S.C. 224.
(3) 19 R.L. n.s. 16.

foi suffisante pour sauvegarder ses droits à l'encontre de la nullité édictée par l'article 1301 C.C. Mais à la suite de ces définitions, l'on doit sûrement décider qu'il ne peut être question de bonne foi dans le cas d'une obligation contractée expressément par la femme séparée pour son mari. Dans le cas d'une obligation contractée par la femme mariée seule, soit expressément soit apparemment pour elle-même, les droits du créancier seront sauvegardés même si l'argent est subséquemment employé pour les fins du mari, lorsque les circonstances établiront les éléments de bonne foi indiqués par la Cour du Banc du Roi dans la cause de *Lebel* v. *Bradin* (1).

Dans le cas où la femme s'oblige avec son mari, l'amendement permet d'établir la bonne foi du créancier. Mais la loi présume contre lui; et c'est donc à lui qu'il incombe de la prouver.

Nous ne trouvons pas, en l'espèce, la rencontre des éléments nécessaires pour arriver à la conclusion que l'appelante peut invoquer le bénéfice de l'amendement. Dès l'époque où furent signés les deux actes de garantie, elle connaissait toutes les circonstances qui entraînent la nullité de ces actes: le fait que l'intimée était mariée à l'un des co-signataires et le fait que son mari était actionnaire dans la compagnie pour laquelle elle se portait caution. Par suite, il est impossible de dire que l'appelante a contracté de bonne foi. Il s'agit, bien entendu, de la bonne foi au sens légal et suivant le texte de l'article 1301 du code civil.

Nous concluons donc que l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Gérin-Lajoie & Beaupré.*

Solicitors for the respondents: *Prévost, Taschereau & Bresse.*

(1) (1913) 19 R.L.n.s. 16.

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*Feb. 20.
*Apr. 22.

PHILORUM BILLETTE (PLAINTIFF).....APPELLANT;

AND

STEPHEN VALLÉE (DEFENDANT).....RESPONDENT.

ON APPEAL PER SALTUM FROM THE SUPERIOR COURT, PROVINCE OF QUEBEC

Will—Probate—Prima facie evidence—Authentic deed—Validity—Presumption juris tantum—Onus probandi—Action in contestation—Prescription—Arts. 857, 858, 1222, 1223, 2251, 2268 C.C.

The judgment ordering the probate of a holograph will constitutes *prima facie* evidence of the validity of the will. If the heirs or legal representatives against whom it is set up do not "declare under oath that they do not know" the writing or signature of the testator, the will must be presumed to be acknowledged. Such a presumption is *juris tantum* and the burden of proving that the writing or the signature was forged is then upon the party repudiating the will.

Dugas v. *Amiot* ([1929] S.C.R. 600) discussed: in that case, probate was granted upon an affidavit which was held to be irregular.

APPEAL *per saltum* from the judgment of the Superior Court of the province of Quebec, Boyer J., dismissing the appellant's action for the annulment of the holograph will of his mother-in-law, the deceased wife of the respondent, as not having been written nor signed by her.

The material facts of the case are stated in the judgment now reported.

P. St. Germain K.C. for the appellant.

Arthur Vallée K.C. for the respondent.

The judgment of the court was delivered by

CANNON J.—Le demandeur étant partiellement aux droits de son fils Mendoza, qui aurait hérité, au cas où elle serait décédée *ab intestat,* de sa grand'mère maternelle, épouse du défendeur, demande, par une action, signifiée le 21 septembre 1927, l'annulation du testament olographe de cette dernière, en date du 2 juin 1903, comme n'étant ni écrit, ni signé de la main de la testatrice, et d'être déclaré propriétaire d'une partie de cette succession.

Le défendeur, légataire universel en vertu dudit testament et en possession, d'après les allégués de l'action, des biens de la succession depuis 1903, a nié généralement.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

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Le demandeur a produit comme exhibit un inventaire, en date du 27 août 1903, démontrant que la valeur de la succession était de $8,437.05. Par son action, l'appelant réclame la propriété de 174/672 de ces biens, sujet à l'usufruit et jouissance pendant la vie de l'intimée. Je doute que la valeur des biens réclamés par l'appelant soit de $2,000; mais vu qu'il demande par son action l'annulation du testament olographe qui a institué le défendeur légataire universel de toute la succession, je crois qu'il vaut mieux pour cette cour, vu que la question n'a pas été soulevée dans la cause et que les parties de consentement sont devant nous, accepter sa juridiction en la matière.

Le testament attaqué a été vérifié par un jugement de la Cour Supérieure, district de Montréal, le 20 août 1903, à la requête de l'intimé, appuyé par l'affidavit de Louis-Barthélémi Houlé, notaire de la cité de Montréal, qui a juré devant le député protonotaire de la Cour Supérieure, que le testament olographe de dame Cordélia Dorais, épouse de monsieur Stephen Vallée, employé civil de la cité de Montréal, a été écrit et signé de la main de la testatrice, qu'il connaissait sa signature et son écriture, l'ayant vue écrire et signer en plusieurs circonstances; que la signature Cordélia Dorais est la signature personnelle de ladite testatrice.

L'original de cette preuve et vérification, avec l'affidavit du notaire Houlé, a été produit à l'enquête comme exhibit du demandeur appelant.

L'article 857 C.C. déclare que le testament olographe, après vérification par la Cour Supérieure, a son effet jusqu'à ce qu'il soit infirmé; et l'article 858 C.C. ajoute que la vérification ainsi faite du testament n'en empêche pas la contestation par ceux qui y ont intérêt. Les termes de ce dernier article semblent permettre, même après un intervalle aussi long que celui qu'on a laissé écouler en cette cause, de 1903 à 1927, de contester le testament après que les témoins à sa confection, ou l'ayant prouvé lors de la vérification, sont décédés. A moins d'une plus courte prescription, il semble que l'action en contestation est ouverte pendant trente ans. Après ce laps de temps, le document devrait être considéré comme ancien; et d'après les règles de la preuve, en Angleterre du moins, il ne serait pas nécessaire d'en prouver l'écriture et la signature. Phipson On Evidence, 3rd Ed., p. 467. Langelier, De la preuve, n° 285.

Il se peut cependant qu'un légataire en vertu d'un testament olographe, ou d'un testament fait suivant la forme

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dérivée de la loi d'Angleterre, et qui, depuis la date de la vérification est en possession de fait des biens qui forment l'objet de son legs (comme c'est la cas ici), soit à l'abri d'une action en revendication, quant aux meubles, par la prescription de trois ans (art. 2258 C.C.), et, quant aux immeubles, par la prescription de dix ans (art. 2251 C.C.).

Dans la cause de *Dugas* v. *Amiot* (1), notre collègue, monsieur le juge Rinfret, parlant au nom de la cour, fut amené à examiner la portée des articles 857 et 858 du code civil, et exposa les arguments que pouvaient invoquer les héritiers à l'encontre de la présomption en faveur d'un testament vérifié, alors que la loi n'exige même pas " que l'héritier du défunt soit appelé à la vérification " et que cette dernière a pu avoir lieu hors de sa connaissance.

Mais une contestation, instituée comme la présente, plus de vingt-quatre ans après le jugement de vérification, montre le danger de la situation et la difficulté dans laquelle peut se trouver le bénéficiaire d'un testament vérifié, alors que les " témoins compétents à rendre témoignage ", c'est-à-dire ceux qui ont connu le testateur et qui étaient familiers avec son écriture et sa signature, sont morts, disparus, ou ont perdu la mémoire des faits.

Pour décider la cause de *Dugas* v. *Amiot* (1), la cour n'a pas eu à trancher la question de savoir sur qui, de l'héritier légal ou du légataire en vertu d'un testament vérifié, retombe le fardeau de la preuve de l'écriture ou de la signature du testateur. Dans cette espèce, la vérification du codicille, dont il s'agissait, avait été obtenue au moyen d'un affidavit dont la fausseté était reconnue. La vérification fut mise de côté; et, comme conséquence, les parties se trouvèrent au même état qu'elles étaient auparavant. Le jugement fut donc que la partie qui avait invoqué le testament olographe avait l'obligation d'en prouver l'écriture et la signature; et, comme la cour fut d'avis qu'elle n'y avait pas réussi, elle fut déboutée des fins de son action.

Dans la cause actuelle, la situation est différente; et nul ne prétend ici que le jugement de vérification qui a été rendu puisse être rétracté pour une des causes qui, " en matière ordinaire, feraient accueillir une requête civile ". Ce fut l'existence d'une de ces causes qui, dans *Dugas* v.

(1) [1929] Can. S.C.R. 600.

Amiot (1) fit révoquer la vérification. Ici la vérification subsiste et, comme la cour le disait dans cette autre cause, elle peut " constituer une preuve provisoire " ou *prima facie*. D'après l'article 857 du code civil, elle fait " donner effet au testament jusqu'à ce qu'il soit infirmé sur contestation ", et il s'ensuit que si aucune preuve quelconque n'était faite, le testament serait tenu pour valide et conserverait tout son effet.

Nous pourrions dire en plus que nous sommes tout de même en présence d'un document sous seing privé auquel s'appliquent les articles 1222 et 1223 C.C.:

1222. Les écritures privées reconnues par celui à qui on les oppose, ou légalement tenues pour reconnues ou prouvées, font preuve entre ceux qui y sont parties, et entre leurs héritiers et représentants légaux, de même que des actes authentiques.

1223. Si la personne à laquelle on oppose un écrit d'une nature privée ne désavoue pas formellement son écriture ou sa signature, en la manière réglée par le code de procédure civile, cet écrit est tenu pour reconnu. Ses héritiers ou représentants légaux sont obligés seulement de déclarer sous serment qu'ils ne connaissent pas son écriture ou sa signature.

Dans l'espèce actuelle, le demandeur n'a pas juré ne pas connaître l'écriture et la signature de Cordélia Dorais; et, en conséquence, à moins de preuve contraire, le testament, en vertu des articles ci-dessus, doit
légalement être tenu pour reconnu et prouvé et faire preuve de même qu'un acte authentique.

Ceci n'établit pas une présomption *juris et de jure* en faveur du légataire, mais *juris tantum*. Comme le disait Sir Hippolyte LaFontaine, pour la Cour du Banc de la Reine *re Brown* v. *Dow* (2),

Les présomptions *juris* font la même foi qu'une preuve, et elles dispensent la partie en faveur de qui elles militent d'en faire aucune, pour fonder sa défense ou ses défenses; mais, et c'est en cela qu'elles diffèrent des présomptions *juris et de jure*, elles n'excluent pas la partie contre qui elles militent à faire la preuve du contraire, et si cette partie vient à bout de la faire, elle détruira la présomption.

Le demandeur en cette cause semble l'avoir compris et a assumé le fardeau de la preuve. Il ne s'est pas contenté de prouver sa vocation à l'hérédité comme héritier *ab intestat* de son fils, qui était lui-même l'un des héritiers *ab intestat* de sa grand'mère décédée; mais il a voulu, par des experts et par des comparaisons d'écritures, démontrer que le testament olographe n'était pas de l'écriture et ne

(1) [1929] Can. S.C.R. 600, at 613.

(2) [1861] 8 R. J. R. Mathieu 453, at 457.

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portait pas la signature de Cordélia Dorais. Certains experts ont même juré que, dans leur opinion, la comparaison du testament avec certains écrits du défendeur Vallée démontrait que ce dernier avait forgé le testament et la signature de sa femme. Cette preuve allait plus loin que les allégués de l'action qui se contentait de nier l'authenticité du testament. Vallée et son procureur ont évidemment cru qu'ils n'avaient pas, quant à eux, à prouver l'authenticité du document; et Vallée, mis dans la boîte, s'est contenté de jurer positivement que ce n'était pas lui qui avait écrit ce testament. Il faut noter cependant qu'il avait déjà, dans son examen " on discovery ", cité ci-après, juré que le testament était de l'écriture appliquée de la défunte.

L'un des témoins de la demande, dame Adéline Dorais, sœur de Cordélia Dorais, la testatrice, semble avoir vérifié, comme celle de sa sœur, la signature et la façon dont elle faisait certaines lettres. Mais son témoignage n'est pas satisfaisant quant à l'écriture courante de la défunte, ce qui n'est pas étonnant, d'ailleurs, lorsqu'on l'interroge à ce sujet vingt-quatre ans après la mort de sa sœur.

Nous avons dans cette affaire, de part et d'autre, des opinions d'experts qui, de bonne foi, se contredisent. Sauf le témoin Adéline Dorais, que je viens de mentionner, et l'affirmation du demandeur dans son examen préalable, nous n'avons personne qui jure positivement connaître l'écriture de la défunte ou l'avoir vu écrire et signer son testament. D'un autre côté, nous avons, militant en faveur de l'intimé et du jugement de première instance:

1° Le défaut d'intérêt. Au point de vue pratique, Vallée n'aurait gagné rien en forgeant ce document, sauf la nue propriété des biens de sa femme dont cette dernière lui avait donné l'usufruit sa vie durant par leur contrat de mariage;

2° Il semble peu probable qu'il aurait cherché à déshériter son petit-fils Mendoza pour lequel, d'après la lettre exhibit P-3, il semble avoir une grande affection en cette année 1903.

Pour ma part, je partage l'opinion du juge de première instance, qui a vu et entendu ces témoins et qui semble expliquer d'une manière satisfaisante pourquoi l'écriture du testament est plus redressée et plus appliquée que l'écri-

ture courante de prétendues lettres familières de la testatrice produites comme exhibits.

D'ailleurs, il n'y a pas de preuve que ces documents, base de la comparaison, ont été écrits par la défunte. On a eu recours au témoignage de Vallée *on discovery*:

Q. Voulez-vous prendre connaissance de cette autre lettre et nous dire si vous reconnaissez là l'écriture de votre femme?—R. Je ne reconnais pas cette écriture-là.

Q. Connaissez-vous l'écriture de Madame Vallée, votre femme?—R. Oui.

Q. Prétendez-vous que ce n'est pas l'écriture de Madame Vallée, cela?—R. Bien, je ne puis pas dire exactement, mais ce n'est pas son écriture appliquée.

Q. Est-ce que ce serait son écriture pas appliquée?—R. Je ne le sais pas, je n'ai jamais eu ses lettres, c'est la première fois que j'en vois.

Q. C'est la première fois que vous voyez des lettres de Madame Vallée?—R. Oui.

Q. C'est la première fois que vous voyez son écriture?—R. Sur des lettres.

Q. Vous savez à qui est adressée cette lettre-là?—R. Oui, je vois qu'elle est adressée à ma fille.

Q. Vous voyez les initiales à la fin?—R. Oui, je vois bien cela.

Q. Ce sont ses initiales?—R. Si c'est son écriture, c'est son écriture pas appliquée, c'est l'écriture courante. Je ne reconnais pas son écriture appliquée, elle écrivait mieux que cela.

(Me St-Germain, C.R.: Je produis cette lettre comme pièce P-5. C'est une lettre en date du 3 octobre mil neuf cent deux (1902), addressée à Madame Billette.)

Q. Voulez-vous prendre connaissance de cette autre lettre, encore adressée à Madame Billette, et nous dire si cette écriture-là est l'écriture de Madame Vallée en date du trente (30) novembre mil neuf cent deux (1902)?—R. Si c'est son écriture, c'est son écriture négligée.

Q. Voyez-vous une différence entre la première lettre que je vous ai exhibée et l'autre du mois de novembre?—R. Celle du mois de novembre, le trente, est mieux écrite.

Q. Est-ce que vous reconnaissez plus l'écriture de votre femme sur la seconde que sur la première?—R. Je la connais un peu plus, mais ce n'est pas son écriture ordinaire.

Q. Vous reconnaissez plus son écriture sur la seconde lettre?—R. Oui.

Q. Mais ce n'est pas son écriture ordinaire?—R. Non. Quand elle avait son écriture appliquée, c'était bien fait.

Q. En avez-vous de son écriture appliquée?—R. J'ai son testament, si vous voulez le voir.

Q. Vous ne l'avez pas ici?—R. J'ai une copie que j'ai fait faire du testament.

(Me St-Germain, C.R.: Je produis comme pièce P-6 une lettre du trente (30) novembre mil neuf cent deux (1902), adressée à Mme Billette, à Valleyfield.)

Q. Voulez-vous prendre connaissance d'une autre lettre encore adressée à Madame Billette—elle est à la mine, celle-là—lettre en date du seize (16) octobre?—R. Je ne la reconnais plus celle-là.

Q. Vous voyez toujours ses initiales, là, n'est-ce pas?—R. Oui.

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Q. Ce sont bien ses initiales, n'est-ce pas?—R. Oui, c'est C.S.V., mais je ne la reconnais pas pour sa vraie écriture, je ne connais pas du tout son écriture là-dessus.

Q. A part de son testament, avez-vous en votre possession des lettres qui vous permettraient de reconnaître son écriture?—R. Quand le testament a été prouvé, j'étais accompagné du notaire Houlé * * *

Q. Ce n'est pas la question que je pose. Je vous demande si à part de son testament vous avez en votre possession de son écriture?—R. Non.

Q. Vous n'en avez pas?—R. Non.

Q. Vous n'avez absolument aucun document?—R. J'avais un livre dans lequel étaient ses comptes et je pense que ce livre-là a été écarté à la maison, quand j'ai déménagé, ou qu'il est chez le notaire Houlé.

(Me St-Germain, C.R.: Je produis comme pièce P-7 une lettre en date du seize (16) octobre.)

Q. Voulez-vous prendre connaissance de ce manuscrit, qui est une prière, et voulez-vous dire si vous reconnaissez cette écriture-là?—R. Ce n'est pas la même chose du tout.

Q. Celle-là, vous ne la reconnaissez pas comme l'écriture de madame Vallée?—R. Non, du tout.

Q. Savez-vous de qui est cette écriture?—R. Je ne le sais pas.

Q. Mais sur cet écrit-là, vous n'avez aucun doute que ce n'est pas l'écriture de madame Vallée?—R. Je n'ai aucun doute.

(Me St-Germain, C.R.: Je produis comme pièce P-8 ce manuscrit.)

Le demandeur se contente de dire qu'il a trouvé ces lettres dans une boîte dans laquelle on gardait des papiers de famille.

Je ne crois pas que le demandeur ait fait une preuve suffisante pour nous permettre de changer l'état de choses qu'il a laissé subsister du vivant de son fils. Le testament a été vérifié à la satisfaction de la Cour Supérieure, sur l'affidavit d'un homme de profession maintenant décédé, qui a juré positivement bien connaître l'écriture et la signature de Cordélia Dorais, et que l'écriture et la signature sur le document aujourd'hui attaqué étaient bien celles de la défunte épouse du défendeur. Cet affidavit a été produit par le demandeur et nous pouvons en prendre connaissance pour ce qu'il peut valoir, bien qu'il ne fasse pas partie de la preuve en cette cause.

Je crois que le savant juge de première instance a très bien exposé les raisons pour lesquelles il a conclu au renvoi de l'action. Les experts donnent des opinions; mais la cour, avec l'aide de leur témoignage, doit pour maintenir l'action arriver à une certitude morale en faveur de la demande: pour la rejeter il suffit qu'elle reste dans le doute. Le moins que l'on puisse dire dans l'espèce, c'est que la comparaison des écritures, les circonstances de la cause, le laps de temps que l'on a laissé écouler de façon à s'assurer

de la disparition des témoins qui auraient pu identifier la signature et l'écriture laissent dans l'esprit un doute suffisant pour conclure raisonnablement que le demandeur n'a pas d'une façon satisfaisante établi ce qu'il avait allégué et accepté de prouver, savoir, que le testament en question n'a pas été écrit, ni signé par Cordélia Dorais, et que la preuve en cette cause doive prévaloir sur le jugement de vérification déjà rendu en faveur du défendeur.

Dans ces conditions, je suis d'avis de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Germain & St. Germain.*

Solicitors for the respondent: *Perron, Vallée & Perron.*

SOCIETY BRAND CLOTHES LTD (PLAINTIFF) ..... } APPELLANT;

AND

AMALGAMATED CLOTHING WORKERS OF AMERICA AND OTHERS..... } RESPONDENTS.

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

Labour union—Unincorporated association—Legal entity—Whether suable —Point raised at trial—Law of foreign country—Arts. 79, 176 C.C.P.

The respondent, Amalgamated Clothing Workers of America, having its principal place of business in the city of New York, was described in the proceedings as "an unincorporated association"; the other respondents were also described as unincorporated bodies having their head offices and principal place of business in the city of Montreal. They filed an appearance by counsel and pleaded to the merits of an action in damages. At the trial, counsel for the respondents raised orally for the first time the point that, not being legal entities, they were not suable.

Held that the respondents could not be legally sued.

Per Anglin C.J.C., Newcombe, Rinfret and Cannon JJ.—An unincorporated labour union has no legal existence and cannot be considered in law an entity distinct from its individual members and is not suable in the common name.

Per Duff and Rinfet JJ.—The question whether the respondent, the Amalgamated Clothing Workers of America, is or is not a "person"

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Cannon JJ.

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in the judicial sense, i.e., whether or not the members of the collectivity described as such constitute a judicial person distinct from the personality of the individuals, is a question to be decided by the law of New York; and, according to that law, the above unincorporated labour union is not a judicial person in the pertinent sense.

Per Anglin C.J.C. and Newcombe and Cannon JJ.—There is nothing in the record to show that the respondents are "foreign corporations or persons duly authorized to appear in judicial proceedings under any foreign law." (Art. 79 C.C.P.).

Per Anglin C.J.C. and Newcombe, Rinfret and Cannon JJ.—The point that a defendant is not a suable legal entity can be raised at any stage of the proceedings. Art. 176 C.C.P. does not apply to the incapacity of a defendant where it appears throughout on the face of the proceedings. The courts should *proprio motu* take notice that an aggregate voluntary body, though having a name, cannot appear in court as a corporation, when in reality not incorporated.

Per Rinfret J.—This case is distinguishable from the case of *Payette* v. *United Brotherhood of Maintenance of the Way Employees* (25 Q.P.R. 78).

Judgment of the Court of King's Bench (Q.R. 48 K.B. 14) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, P. Cousineau J. (2), and dismissing the appellant's action in damages and quashing an interlocutory injunction against respondents.

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

H. Weinfield K.C. for the appellant.

P. Bercovitch K.C. and *J. Spector* for the respondents.

The judgments of Anglin C.J.C. and Newcombe and Cannon JJ. (Rinfret J. concurring but writing separately) were delivered by

CANNON J.—The defendants were sued for damages and an injunction under the following designation:

Amalgamated Clothing Workers of America, an *unincorporated* association, having its head office and principal place of business for the province of Quebec in the city and district of Montreal, and all the local branches of the said Amalgamated Clothing Workers of America existing in the city and district of Montreal, and the "Montreal Joint Board" of the said Amalgamated Clothing Workers of America, an *unincorporated* subsidiary association of the said Amalgamated Clothing Workers of America, having its head office and principal place of business in the city and district of Montreal.

(1) (1929) Q.R. 48 K.B. 14. (2) (1929) Q.R. 67 S.C. 388.

The trial judge and a majority of the Court of King's Bench dismissed the action against these defendants on the ground that, being unincorporated and not possessing any civil personality, they could neither legally be constituted defendants, nor be sued.

The Court of King's Bench unanimously allowed the appeal, however, and maintained the action against some additional individual respondents, who were condemned to pay to the plaintiff appellant the sum of $6,286.02; and also upheld and declared absolute and permanent as against them the interim injunction which had been granted pending the trial. Mr. Justice Rivard and Mr. Justice Hall, dissenting, would likewise have maintained the appeal against the Amalgamated Clothing Workers of America and would have included them in the foregoing condemnation. Rivard J., in his opinion, seems to go further than the formal judgment and would also hold responsible the "Montreal Joint Board," the other respondent.

The individual defendants did not appeal from this condemnation; and, so far as they are concerned, the judgment is final and binding on both parties.

The plaintiff, however, has come before this court seeking judgment against the two unincorporated bodies, and the only question before us is whether or not an unincorporated labour union may be considered in law an entity distinct from its individual members, suable in the common name and liable to damages recoverable out of the common fund; or, in other words, does legal theory conform to industrial reality and subject an unincorporated collectivity to responsibility for its tortious acts?

We cannot add much that would be useful to the remarks of the learned trial judge and to the opinion of Mr. Justice Bond in the Court of King's Bench. The respondents are not sued as a corporation, or partnership or as entities having legal existences distinct from that of their individual members, but as "unincorporated associations." An attempt was made, however, to show that because in the state of New York, where the first named respondent has its principal establishment, an unincorporated association can be sued through its president or its treasurer, under art. 79 of the Code of Civil Procedure of Quebec, that association may be sued and brought before the courts of

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that province. In the State of New York, there is the following statutory provision:

ACTION OF PROCEEDING AGAINST UNINCORPORATED ASSOCIATIONS

An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership therein, either jointly or in common of their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

On this point we share the views of Mr. Justice Bond, who says:

It is to be observed, however, from a reading of this section, that while headed as an action against an unincorporated association, the text indicates that the action which is contemplated, and may be maintained is one against the president or treasurer of such association in a representative capacity as representing all the individual members, and moreover, is applicable only to certain restricted cases, for or upon which the plaintiff may maintain such an action or special proceeding against all the associates by reason of their interest or ownership, or their liability jointly or in common. The law in question does not purport to incorporate such an association, nor does it appear to recognize such an association, except in so far as it authorizes action against the president or the treasurer under certain particular circumstances, and in the event of a judgment being obtained, the same may be satisfied out of any personal or real property belonging to the association or owned jointly or in common by all the members thereof. (Section 15). In other words, this law appears to create or authorize what, in other jurisdictions, are frequently termed "representative" or "class" actions. The organization itself is not authorized to appear in judicial proceedings.

In this instance, the writ was not issued against either the president or the treasurer, and nothing shows that the defendants now before the court are, to use the terms of 79 C.C.P., "foreign corporations or persons duly authorized under any foreign law."

But it is claimed that the respondents could not raise this point orally at the trial, because they had not, either by way of preliminary motion or by their plea to the merits, alleged that they are not an entity known to the law and capable of appearing in court proceedings.

Our present Chief Justice, in *Local Union No. 1562, United Mine Workers of America et al* v. *Williams et al* (1), said, at page 257:

While I should have thought it better, had the defence in addition to the bare denial of incorporation contained a plea that the Local Union is

(1) (1919) 59 Can. S.C.R. 240.

not registered, is not a partnership, and, as an entity not known to the law, cannot be sued by its adopted name, (R. 93), I incline to think this issue was sufficiently raised by the explicit traverse of the allegation that the Local Union is a body corporate. But, if not, the objection of suing the Local Union being its non-existence as an entity known to the law, I confess my inability to understand how any conduct of those representing that body, such as that here relied on, can create an estoppel which would justify the granting of a judgment against it. A judgment should not wittingly be entered against a non-entity.

Brodeur J., concurred with Anglin J., as did also Duff J., who said (at p. 246):

In order to prevent misconception, I ought to state * * * that this is not, in my judgment, a proper case for amendment, and, moreover, that in disposing of the appeal, we are bound to give effect to the contention that the Union is not a suable entity.

Mignault J., dissented, *dubitante,* and Idington J., also dissented.

This question is referred to, in his opinion, by Mr. Justice Rivard, as follows:

Dans de telles conditions, pourrait-on prêter aux unions non incorporées une sorte de quasi-personnalité civile qui les rende aptes au moins à être poursuivies? (Cf. *United Mine Workers of America* v. *Coronado Coal Co.* (1), C. Suprême des Etats-Unis, 5 juin 1922; D.P. 22-2-153, et note de M. Edouard Lambert.) Pareille solution ne contredirait ni notre décision dans l'affaire de *Rother* (2), ni celles de l'honorable Juge Charbonneau dans *Cournoyer* v. *La Fraternité unie des charpentiers et menuisiers d'Amérique* (3) et l'honorable juge Rinfret dans *Payette* v. *The United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers* (C.S. Montréal 3 février 1923) (4); mais il serait contraire aux principes de l'adopter comme règle absolue.

Je ne crois pas cependant qu'il soit plus nécessaire de prononcer là dessus qu'il ne l'était dans ces causes.

Dans la cause des *United Mine Workers of America* v. *Williams,* jugée par la Cour Suprême du Canada (5), "the issue of want of legal entity was sufficiently raised by the explicit denial of the allegation that the local union was a body corporate."

Dans notre espèce, ce moyen de contestation est-il soulevé? L'est-il en la manière qu'il faut dans notre système de procédure? Je ne le crois pas.

Les deux associations ou unions sont bien décrites, dans les brefs de sommation, comme n'étant pas incorporées; mais elles n'ont pas même pris acte de cette particularité dans leur description par les demanderesses, et, dans leurs plaidoyere, elles se sont bien gardées d'y faire la moindre allusion. Elles n'en ont donc tiré aucun moyen de défense quelconque. Loin de soulever l'objection par exception, elles ne l'ont pas même insérée ou fait pressentir dans leurs plaidoyers au fonds. En somme, elles ont acquiescé à la citation en justice qu'on leur a faite, elles l'ont acceptée telle qu'elle. Elles n'ont pas comparu pour dire qu'elles étaient illégalement amenées devant le tribunal; au contraire, prenant avantage de l'invi-

(1) (1922) 269 U.S. Rep. 344.
(1922) Q.R. 34 K.B. 69.
(2) (1921) Q.R. 60 S.C. 105;
(3) (1914) Q.R. 46 S.C. 242.
(4) (1923) 25 Q.P.R. 78.
(5) (1919) 59 Can. S.C.R. 240.

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tation que leur faisaient les demanderesses à ester en justice, elles ont prétendu faire rejeter les actions au mérite. Ce n'est qu'en dernier ressort et en plaidant oralement devant la cour qu'elles proposent ce moyen. Il est trop tard.

With respect, we cannot agree with this contention; and we feel that Article 176 of the Code of Civil Procedure which says that

> Irregularities in the writ or service or in the declaration are waived by the appearance of the defendant and his failure to take advantage of them within the delays prescribed

cannot apply to incapacity of a defendant where it appears throughout on the face of the proceedings, and we feel inclined to accept the view that a court should *proprio motu* take notice that an aggregate voluntary body, though having a name, cannot appear in court as a corporation, when in reality not incorporated.

Moreover, the decision of the Supreme Court of the United States in the *Coronado* case (1), although discussed by the parties and in the judgments *a quo,* was not mentioned in the evidence given by the two experts called by the parties to prove, as a fact, the foreign law. These two New York lawyers did not refer to it as part of the law of the state of New York which was in issue between the parties, probably because this judgment does not apply to, and does not bind the state courts or govern their practice.

Nor can the defendants be deemed quasi-corporations under the provisions of the *Professional Syndicate Act* of Quebec, 14 Geo. V, c. 112, now c. 255, R.S.Q. (1925), which they have not carried out; neither have they availed themselves of c. 125 of the Revised Statutes of Canada (1906), (now c. 202 R.S.C. (1927)), which contains the following provisions:

> 2. In this Act, unless the context otherwise requires, "trade union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, but for *this Act,* have been deemed to be an unlawful *combination by reason of some one or more of its purposes being in restraint of trade.*
>
> 6. Any seven or more members of a trade union may, by subscribing their names to the rules of the union and otherwise complying with the provisions of this Act with respect to registry, register such trade union under this Act, but if any one of the purposes of such trade union is unlawful, such registration shall be void.
>
> 18. The trustees of any trade union registered under this Act, or any other officer of such trade union who is authorized so to do by the order

(1) (1921) 269 U.S. Rep. 344.

thereof, may bring or defend, or cause to be brought or defended, any action, suit, prosecution or complaint, in any court of competent jurisdiction, touching or concerning the property, right or claim to property of the trade union, and may, in all cases concerning the property, real or personal, of such trade union, sue and be sued, plead and be impleaded, in any such court, in their proper names, without other description than the title of their office.

29. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, or so as to render void or voidable any agreement or trust.

The defendants have not registered under these provisions, no doubt because any advantage that they might secure under s. 29 of the *Trade Union Act* is already theirs under the following sections of the Criminal Code:

497. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section.

498. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company.

(*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or

(*c*) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

590. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute.

It is therefore clear that the defendants have not the status of quasi-corporations to which the decision of the House of Lords in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1), might be applied.

We must accordingly reach the conclusion that, while, under the prevailing policy, our legislation gives to unin-

(1) [1901] A.C. 426.

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corporated labour organizations a large measure of protection, they have no legal existence; they are not endowed with any distinct personality; they have no corporate entity; they constitute merely collectivities of persons. The acts of such an association are only the acts of its members. Therefore, it cannot appear before the courts and its officers have no capacity to represent it before the tribunals of the province of Quebec, where "nul ne plaide au nom d'autrui," (Art. 81 C.C.P.). However cogent the reasons that may be urged in favour of authorizing and legalizing proceedings against unincorporated bodies, the Superior Court, and this court, cannot, under article 50 C.C.P., do more than order and control these bodies "in such manner and form as by law provided." The province of Quebec has not yet legislated to give legal existence to or recourse against unincorporated bodies. The existing legislation compels us to reach the conclusion that Parliament and the legislature have not deemed it proper or necessary to compel, even international trade unions, although governed by foreign administrators, to acquire legal existence and liability in Canada through registration. We must, accordingly, ignore the industrial reality and must refuse to regard an unincorporated labour union as, in law, an entity distinct from its individual members.

We would therefore dismiss the appeal with costs.

DUFF J.—At the conclusion of the argument it appeared to be quite clear that the impleadibility of the respondents, which the respondents disputed, could only be sustained if the respondents could be brought within art. 79 of the Code of Civil Procedure, which is in these words:

> All foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings, may do so before any court in the province.

Admittedly the respondents are not a corporation, whether they are or are not a "person" in the juridical sense, that is to say, whether or not the members of the collectivity, described as the Amalgamated Clothing Workers of America, constitute a juridical person distinct from the personality of the individuals, is a question which is to be decided by the law of New York. The law of New York upon this subject was fully discussed in the evidence. The effect of that evidence is a question of fact. There is

no collectivity in Quebec distinct from the body which has its domicile in New York. I have examined the testimony of the professional witnesses and the authorities cited by them with the greatest care; and in the result I think the weight of argument to be adduced from what is said and from the materials referred to, lies on the side of the negative. My conclusion, that is to say, is that, in point of fact, such a collectivity is not by the law of New York a juridical person in the pertinent sense.

RINFRET J.—Je concours dans le jugement de mon collègue monsieur le juge Cannon.

Entre la présente cause et celle de *Payette* v. *United Brotherhood of Maintenance of Way Employees & Alfred Dérome & al.* (1), (où siégeant en Cour Supérieure, j'ai rendu un jugement que l'on nous a cité), je vois plusieurs distinctions à faire.

Dans la cause de Payette, la défenderesse, au bref d'assignation, était assignée sous la désignation suivante: " Corps légalement constitué de Détroit, dans l'Etat de Michigan, un des Etats-Unis d'Amérique ". Jugement avait été rendu contre elle sous cette désignation; elle avait accepté ce jugement; et la question de sa prétendue incapacité était soulevée par des tiers-saisis, au cours de la contestation de leur déclaration, à la suite d'une saisie-arrêt après jugement.

En outre, aucune loi spéciale de l'Etat du Michigan, où la défenderesse avait son principal bureau d'affaires, n'avait été prouvée dans la cause, et la seule référence fournie à la cour était la décision de la Cour Suprême des Etats-Unis dans la cause de *Coronado Coal Company of Arkansas* v. *United Mine Workers of America* (2) comme étant la loi étrangère qui s'appliquait. D'après la désignation qui lui était donnée au bref, la défenderesse était donc apparemment une corporation; et, comme l'a justement fait remarquer monsieur le Juge Bond, en appel, le jugement *re Payette* (1) repose sur le motif qui y est exprimé comme suit:

> Mais ce n'est pas la défenderesse qui soulève ces moyens. Le premier point pourrait donc être rejeté sur le simple motif que les tiers-saisis excipent du droit d'autrui et que la désignation de la défenderesse ne concerne qu'elle-même.

(1) (1923) 25 Q.P.R. 78. (2) (1921) 259 U.S. 344.

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Il y a jugement contre elle, sous le nom et la description qui lui sont donnés dans le bref de saisie-arrêt après jugement. Elle a comparu sur ce dernier bref; et elle ne se plaint ni du jugement rendu sur l'action principale, ni de la régularité de son assignation ou de sa description dans la saisie-arrêt. Cela sera amplement suffisant pour disposer du premier point.

Dans la présente cause, Amalgamated Clothing Workers of America est décrite comme "an unincorporated Association"; The Montreal Joint Board est désigné comme "an unincorporated subsidiary association of the said Amalgamated Clothing Workers of America" et les "Local Unions" Nos. 115, 167, 209, 247 et 277 comme

being unregistered and unincorporated subsidiary branches in the city and district of Montreal of the said Amalgamated Clothing Workers of America.

En outre, le principal bureau d'affaires de Amalgamated Clothing Workers of America est à New-York. La loi spéciale de l'Etat de New-York est prouvée, et elle n'a pas pour effet de conférer à ces associations la personnalité civile; elle n'en fait ni une corporation, ni une personne; elle se contente d'établir une procédure pour permettre d'assigner les associations de ce genre sans exiger la désignation et l'assignation de tous les membres de l'association.

Dans les circonstances, l'article 79 du Code de procédure civile de la province de Québec ne peut être appliqué à la défenderesse intimée, qui, aux yeux de la loi étrangère, (qui est, en l'espèce, celle de l'Etat de New-York), n'est considérée ni comme "une corporation", ni comme une "personne" et ne peut comme telle "ester en justice".

Appeal dismissed with costs.

Solicitors for the appellant: *Weinfield & Sperber.*

Solicitors for the respondents: *Bercovitch, Cohen & Spector.*

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*Feb. 16.
*Feb. 24.

WILLIAM N. MACASKILL.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Criminal law—Charge of murder—Accused's drunkenness as defence—Degree of incapacity—Murder or manslaughter—Directions to jury—New trial.

The accused appealed from the judgment of the Supreme Court of Nova Scotia (55 Can. Crim. Cas. 51) affirming (by majority) his convic-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

tion for murder. It had been contended in his defence that at the time of his act his condition from drink was such that the act could not be murder; and he alleged misdirection by the trial judge to the jury on this question, which involved the law as to what state of incapacity resulting from drink will reduce a crime from murder to manslaughter.

Held: In the circumstances of the case, an essential question for the jury was: Given the existence of some degree of capacity in the accused, and assuming the facts deposed to by Crown witnesses (if credited) in describing the accused's act in striking the fatal blow and his conduct and expressions before and after that act, whether or not he was so affected by drink as to be incapable of having the intent to kill or of having the intent (in reckless disregard of the consequences) to cause some bodily injury, "known" to him to be "likely to cause death" (*Cr. Code,* s. 259 (*a*) (*b*)). That question was one upon which the jury must pass in order to enable them to determine the existence or non-existence of the intent in fact. (*Beard's* case, [1920] A.C. 479, at 501-502, referred to). And as the trial judge, while properly directing the jury's attention to the defence as put forward by accused's counsel (that accused was in such a state that his mind was not functioning, that his "mind was gone," that he was incapable of a degree of "thought" enabling him to be aware of the nature of his physical acts), did not direct them to the question above defined, there should be a new trial.

APPEAL by the accused from the judgment of the Supreme Court of Nova Scotia *in banco* (1), sitting as a Court of Appeal under the provisions of the *Criminal Code,* which affirmed (Mellish and Carroll JJ. dissenting) his conviction, at trial before Chisholm J. and a jury, on an indictment for murder. A defence of the accused was that his condition of drunkenness, at the time of the commission of the offence, was such that he should not be convicted of the crime of murder; and his main ground of appeal to this Court was that there was misdirection by the trial judge in his instructions to the jury in this regard; the question involving the law as to what state of incapacity resulting from drink will reduce a crime from murder to manslaughter.

D. A. Cameron K.C. for the appellant.

F. F. Mathers K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—We have come to the conclusion that there must be a new trial, and the discussion of the facts will, therefore, be limited to what is strictly unavoidable in the elucidation of the points of law involved.

(1) (1930) 55 Can. Crim. Cas. 51.

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Culpable homicide (by stabbing) was not, at any stage of the proceedings, disputed. The defence rested upon the alleged condition of the appellant resulting from drink, and the real issue was whether or not his condition, at the time of the commission of the offence, was such as to bring the offence within the legal category of manslaughter. The defence appears from the learned judge's charge to have been thus presented to the jury. The accused, counsel seems to have urged, was in such a state that his mind was not functioning, that his "mind was gone," that he was incapable of a degree of "thought" enabling him to be aware of the nature of his physical acts. The learned trial judge told the jury that this view of the prisoner's condition could not be accepted unless they were satisfied that the witnesses for the Crown, who had described the prisoner's act in striking the fatal blow, and had given an account of his conduct and reported the expressions used by him before and after that act, were not worthy of credit.

This, we have no doubt, was a proper direction; but the appeal turns upon other considerations. The rules of law for determining the validity of a defence such as that put forward by the accused, are stated in two propositions in the judgment of Lord Birkenhead in *Beard's* case (1). These propositions, with which the other six Lords agreed, are as follows:

> 2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
>
> 3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

These propositions embody the rules governing us on this appeal; but, before considering the application of them to the facts, it is desirable to advert to the provisions of the *Criminal Code* upon the subjects of murder and manslaughter. The Code (sections 250 and 252), begins by defining homicide. Homicide, it is declared, falls into two classes, culpable and not culpable, of which the last men-

(1) *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479, at 501-502.

tioned, homicide which is not culpable, is not an offence. Culpable homicide (which includes murder and manslaughter) is then defined; and is declared to be murder in the cases enumerated in sections 259 and 260. Section 261 formulates the conditions in which murder may, by "provocation," be reduced to manslaughter, and finally by section 262, it is declared that culpable homicide not amounting to murder is manslaughter. Cases of culpable homicide as defined by sections 259 and 260 constitute murder unless the provisions of section 261, dealing with the effect of provocation, come into play, or the person charged is, on some special ground, protected from criminal responsibility; other cases of culpable homicide, unless the offender is within some such protection, constitute manslaughter.

We are not concerned with section 260 or with the 3rd or 4th subsection of section 259. The definitions now pertinent are those found in subsections (*a*) and (*b*) of section 259, which are in these words:

> 259. Culpable homicide is murder,
>
> (*a*) if the offender means to cause the death of the person killed;
>
> (*b*) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

Subsection (*b*) comes into operation where the offender means to cause bodily harm which he knows to be likely to cause death, and when he is in the state of mind described by the words "reckless whether death ensues or not." In the circumstances of this case, the question of substance for the jury was whether the appellant was capable of having the intent to kill or of having the intent (in reckless disregard of the consequences) to cause some bodily injury, "known" to him to be "likely to cause death."

Section 259 seems to narrow somewhat the common law definition of murder. In the judgment quoted above (1) (at pages 503 and 504), Lord Birkenhead, referring to the judgment of the Court of Criminal Appeal in *Meade's* case (2), uses these words:

> Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and I apprehend can have

(1) *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479.

(2) *Rex* v. *Meade*, [1909] 1 K.B. 895.

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no doubt that the proposition in *Meade's* case (1) in its wider interpretation is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent but whether he was incapable of foreseeing or measuring the consequences of the act. In this respect the so-called rule differs from the direction of Lord Coleridge J., which is more strictly in accordance with the earlier authorities.

The intent necessary to bring a given offence under the definition in subsection (*b*) involves a knowledge by the offender of the "likely" consequences of his act; and a direction to the jury that, in examining a defence based upon incapacity alleged to have been produced by drunkenness, they should not consider the capacity of the accused to "foresee or measure the consequences of his act" would hardly be a direction in conformity with the criteria formulated in section 259. The right direction in cases involving the application of subsection (*b*) is that evidence of drunkenness rendering the accused incapable of the state of mind defined by that subsection may be taken into account with the other facts of the case for the purpose of determining whether or not, in fact, the accused had the intent necessary to bring the case within that subsection; but that the existence of drunkenness not involving such incapacity is not a defence.

The learned trial judge instructed the jury that to justify a conviction for murder they must find that the accused was animated by the intent to kill. This was, technically, a little too favourable to the prisoner; although it is probable that such a departure from strict technical precision would seldom have any effect on the result of a trial. In this case, the learned judge no doubt considered that the jury was not likely to dwell upon the distinction between meaning to kill, and meaning to inflict injury known to be likely to cause death, and in reckless disregard of the consequences.

The issue as to capacity is an issue of fact and is primarily for the jury. There may be cases in which, the defence of want of capacity resulting from drunkenness

(1) [1909] 1 K.B. 895.

having been put forward, the trial judge would be justified in directing the jury that there was no evidence of that degree of incapacity which alone could properly be considered by them in passing upon the existence of intent in fact. This, however, we think, is not one of those cases. The jury evidently negatived the "absolute incapacity," the existence of which the learned judge asked them to consider, and which he exemplified by the illustration of a drunken mother destroying the life of her infant child by rolling over upon it in bed; but there still remained the question—given the existence of some degree of capacity, and assuming the facts deposed to by the witnesses for the Crown, whether the appellant was so affected by drink as to be incapable of having the intent to kill or of meaning to cause an injury which he knew was likely to result in death. This issue, as already observed, was primarily for the jury; and it was an issue upon which they must pass in order to enable them to determine the existence or non-existence of the intent in fact.

The able and experienced judge who presided at the trial properly directed the attention of the jury to the defence as it was put before them by counsel for the prisoner; and, having done this, he did not ask them to apply their minds to the further issue we have just defined. It was the prisoner's right, however, notwithstanding the course of his counsel at the trial, to have the jury instructed upon this feature of the case. We think, therefore, that there must be a new trial.

Appeal allowed, and new trial ordered.

Solicitor for the appellant: *D. A. Cameron.*

Solicitor for the respondent: *F. F. Mathers.*

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*Oct. 13.
*Dec. 23.

BREWSTER TRANSPORT COMPANY, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

ROCKY MOUNTAIN TOURS AND TRANSPORT COMPANY, LIMITED, ROCKY MOUNTAIN ROYAL BLUE LINE MOTOR TOURS LIMITED, JAMES I. McLEOD, WILLIAM WARREN, AND C. E. SIBBALD (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Trade name—Action by first user in territory to restrain use by business competitor in that territory—Extensive prior use in similar business by another in other territories—Equitable principles.

The action was to restrain defendants from using a certain trade name in connection with motor passenger transportation business in Alberta; the plaintiff claiming, as first user in the territory, an exclusive right to the name in that business in that territory.

Held (Cannon J. dissenting), that the judgment of the Appellate Division, Alta., 24 Alta. L.R. 486, which (by a majority, reversing judgment of Ives J.) dismissed the action, should be affirmed, on the ground that, in view of the existing prior extensive use of the name by a certain company and its affiliated corporations in the tourist transportation business in other territories, the use by plaintiff of that name in a like business was not proper, being a use that would mislead the tourist public, and therefore plaintiff had not shown a right to the use entitling it to claim the protection of a court of equity (*McAndrew* v. *Bassett*, 4 De G. J. & S. 380, at 384; *In re Heaton's Trade-Mark*, 27 Ch. D. 570).

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which (Clarke and Lunney JJ.A. dissenting) allowed the defendants' appeal from the judgment of Ives J., and dismissed the plaintiff's action.

Each of the plaintiff and defendant companies had its headquarters at Banff, Alberta.

The plaintiff, in its statement of claim, alleged (*inter alia*) that it had been carrying on the business of motor passenger transportation under the trade name of "Royal

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

(1) 24 Alta. L.R. 486; [1930] 1 W.W.R. 849.

Blue Line" in the province of Alberta, and, until the alleged infringement hereinafter mentioned, had had the exclusive use thereof within that province; that the defendant companies caused the said name to be used in connection with their businesses, which were similar to, and were carried on within the same area as, the plaintiff's business; that the individual defendants were the directors of and in control of the first defendant company and caused to be incorporated the second defendant company for the purpose of using such trade name; that the defendant companies, and the individual defendants through the medium of one or other of such companies, threatened and intended to continue the use of such trade name; and that by such use the defendants were infringing on the plaintiff's right to the exclusive use of said trade name throughout Alberta; and it claimed an injunction, a declaration that it was entitled to the sole and exclusive use of the trade name in connection with such businesses throughout Alberta, and damages.

The defendants denied the plaintiff's allegations, and denied that plaintiff had any right to any exclusive use of the said trade name or that plaintiff had any rights therein or thereto.

A motor transportation company, of the State of Massachusetts, U.S.A., called the "Royal Blue Line Company, Inc.", had for a number of years (long before the plaintiff used the trade name in question) used the words "Royal Blue Line" in connection with its tourist sight seeing business. It carried on business in some cities in the United States and (by an organization which it controlled) in the province of Nova Scotia; and the same kind of business under the same name was carried on by affiliated companies under agreement with it in various other cities and places in the United States, and also in a number of cities in Canada, but not in the province of Alberta. The defendant, the Rocky Mountain Tours and Transport Co. Ltd., entered into an agreement with the Massachusets company, which agreement contained a grant of a right to said defendant company to use (in Banff and within a certain radius therefrom) the name "Royal Blue Line". This agreement was entered into on a date some time after the plaintiff had begun to use the name, but the negotia-

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tions for an agreement had begun some time before the agreement and possibly, on the evidence, before such use by plaintiff. After the agreement the defendants advertised "Royal Blue Line", and the plaintiff complained and brought the present action.

The main question dealt with by the courts was whether or not the plaintiff had acquired a right to the name in the territory in question which enabled it to ask that defendants be restrained from using it.

Ives J. gave judgment for the plaintiff, declaring it entitled to the sole and exclusive use of the trade name in connection with motor transportation businesses and lines throughout Alberta, and granted an injunction against the defendants.

The Appellate Division (1), by a majority, reversed the judgment of Ives J., and dismissed the plaintiff's action. Clarke and Lunney, JJ. A., dissented, upholding the judgment at trial, subject to a modification to confine the operation of the judgment to territory in which the plaintiff carried on its operations.

The plaintiff appealed to the Supreme Court of Canada (special leave to do so being granted by the Appellate Division). By the judgment now reported its appeal was dismissed with costs, Cannon J. dissenting.

A. J. Thomson, K.C., and *C. C. McLaurin* for the appellant.

H. G. Nolan for the respondent.

The judgment of Anglin C.J.C. and Rinfret and Lamont JJ. was delivered by

ANGLIN C.J.C.—The plaintiff in this action invokes the equitable jurisdiction of the court for the protection of its alleged right to the trade name of "Royal Blue Line" by an injunction to restrain the defendants from making use of that name. In such a case the well-known maxim of equity clearly finds its application,—"He who comes into equity must come with clean hands".

As stated by Lord Westbury, L.C., in *McAndrew* vs. *Bassett* (2), dealing with a case of an alleged infringement of a trade mark,

(1) 24 Alta. L.R. 486; [1930] 1 W.W.R. 849.

(2) (1864) 4 De G. J. & S. 380, at 384.

The essential ingredients for constituting an infringement of that right probably would be found to be no other than these: first, that the mark has been applied by the plaintiffs properly, that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation.

The first enquiry must, therefore, be whether or not the plaintiff has shown a right to the use of the trade name in question for which he is entitled to claim the protection of a court of equity. With Mr. Justice Mitchell (1), I am of the opinion that

the plaintiffs have not made out a case sufficient to entitle them to the sole and exclusive use of the trade name "Royal Blue Line" in connection with their motor transportation businesses * * *.

While the statement of defence does not directly charge fraud against the plaintiff in making use of the name "Royal Blue Line", at the outset of the trial of the case its counsel stated that the right of the plaintiff or defendants, or either of them, to the use of the name "Royal Blue Line" in Alberta was the issue to be tried. The plaintiff's exclusive right to use the name in the province of Alberta is also expressly denied in paragraph 2 of the statement of defence. Without, therefore, determining whether the plaintiff has been guilty of such fraud in the appropriation of that name as would justify an injunction being granted against them at the suit of the United States Company (The Royal Blue Line, Inc.), the evidence seems to establish that the plaintiff took this name for trade purposes knowing that it was already in use by the American company, and its affiliated corporations, in a large way, both in the United States and Canada, and that the reputation of the American Royal Blue Line would be quite likely to result in a large body of trade coming to the plaintiff through the use of this name, which it could not otherwise look for. This, in my opinion, amounts to a use of the name calculated to mislead the public to such an extent that its use by the plaintiff cannot be said to have been proper.

In *In re Heaton's Trade Mark* (2), the court was called upon to deal with the rights of persons outside its jurisdiction. The application was to register a trade mark which the applicant had used for half a century in the manufacture of steel. The application was opposed by a Swedish manufacturer who, and whose predecessors, had

(1) 24 Alta. L.R. at 516. (2) (1884) 27 Ch. D. 570.

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used, in the manufacture of steel, the same trade mark for more than a century and a half. They had learned quite recently of its use by the applicant. Kay J. refused an injunction because, in his opinion, to grant it would be sanctioning what he deemed to be a continuing misrepresentation. If that principle should govern in the present case, and I think it should, it cannot be said of the plaintiff that it is coming with clean hands to seek the aid of a court of equity. Its manager testifies that of the business of the Royal Blue Line buses operated by it, ninety-five per cent. comes from United States tourists. To them the use of the name by the plaintiff company would probably indicate connection with the United States Royal Blue Line, Inc.

I agree with the conclusions of the Chief Justice of Alberta, which he states in the following terms (1):

> It seems clear, therefore, that the Court should not assist the plaintiff in its attempt to appropriate by prior use in [the province of Alberta] a name the use of which by it will deceive that public which it is particularly seeking to reach and serve.

I would, accordingly, dismiss the appeal with costs.

NEWCOMBE J.—The plaintiff company, simulating the colour and name of the Royal Blue Line omnibuses, seeks to obtain fares, by thus imposing upon travellers stopping at Banff, in the Rocky Mountains of Canada, the belief that they are being served by the widely known and reputable line of that name, having its seat or headquarters at Boston, Massachusetts, with affiliations and agencies, such as are described in the evidence, in various parts of the United States, Canada and Cuba.

On behalf of the plaintiff company it is sought to justify this method of business upon two grounds. First, it is said that the plaintiff, having painted its cars so recently as August, 1927, had anticipated the defendants, who, a few months later, by leave and licence of the Boston company, advertised and, subject to the stipulated conditions, were preparing to operate a competing line as Royal Blue. Secondly, the plaintiff affirms in effect that it is entitled to the exclusive use of the Boston company's name and description in the province of Alberta, because, at the time when the plaintiff began to use them, the Boston line was

(1) 24 Alta. L.R., at 495.

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not doing business there. These are the plaintiff's pretentions; and they are prompted by the fact that Banff is a tourist resort, frequented by visitors from the United States, among whom the name and service of the Royal Blue Line, and its affiliations, are so well known as to create a preference for their omnibuses, which thus become favoured competitors for the patronage that the plaintiff covets.

The plaintiff is seeking an injunction; and it is, in my opinion, clear enough that its application is in conflict with equitable principles. I would dismiss the appeal, for the reasons stated by the learned Chief Justice of Alberta (1), and upon the authorities to which he refers.

CANNON, J. (dissenting).—The Appellate Division of the Supreme Court of Alberta granted special leave to appeal from its majority judgment dismissing the plaintiff's action for an injunction which had been granted by the trial judge; Clarke and Lunney JJ.A., who had dissented, were in favour of continuing the injunction with certain modifications.

The plaintiff, who had been carrying on a sightseeing business—with also a more or less incidental stage patronage—in and about Banff for many years, inaugurated in 1927 a service under the trade name of "Royal Blue Line" between Banff and Calgary. The buses were painted a cream colour with royal blue badges on each side and with the words "Royal Blue Line" in four-inch gold letters painted thereon; and, in addition, the words "Brewster Transport Company" in gold letters appeared on the windshields.

From 1927 until the date of the action, the plaintiff extended this Royal Blue Line service in sightseeing trips from Banff in different directions. It got out schedules, time-tables and tariffs, which were placed in hotels in Banff and on the prairie, and advertised in newspapers and by other means of publicity.

The evidence establishes the accuracy of the finding of the trial judge that the plaintiff's business under that name and its advertising increased during 1928 and 1929.

(1) 24 Alta. L.R., at 487-495.

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The plaintiff learned of the name "Royal Blue Line", being used by the first named defendant company in February, 1929, by seeing a folder of that company styled "Sightseeing in the Canadian Rockies", advertising tours to Banff, Lake Louise and other localities within the territory served by the plaintiff. This folder had printed on it "Royal Blue Line operated by Rocky Mountain Tours and Transport Company". On March 6th, 1929, the plaintiff's solicitors wrote the following letter:

Calgary, Alberta, Canada,
March 6th, 1929.

Rockymountain Tours and Transport Co., Ltd.,
Banff, Alberta.

Dear Sirs:

It has been drawn to our attention that you are using the name Royal Blue Line in connection with your Sight Seeing Business, even going the length to issue a folder using that name and on behalf of the Brewster Transport Company, Limited, we have to point out that this name has been used quite extensively in this Province, and also we believe in British Columbia, by it for several years. Their busses have been operating between Banff and Calgary and other points with this name plainly printed on the bodies and the name in the minds of the public must signify that any busses or advertising matter bearing such name are operated, issued or sponsored by the Brewster Transport Company, with the consequence that your use of the name is necessarily calculated to deceive the travelling public and result in a considerable number to use your busses in the belief that they are patronizing the lines operated and controlled by our client.

We are informed that the name Royal Blue Line is used by some transportation concerns in the States, but our client was the first to adopt it in this Province and has established a valuable good will by its use.

The use of this name by you is, therefore, unwarranted, and an infringement of our client's property in the same, and we must accordingly ask you to discontinue its use forthwith and recall any and all advertising matter you may have issued or caused to be issued in which your name is associated with the name Royal Blue Line, or in which you hold yourselves out as the operators of the Royal Blue Line in this Province.

We need hardly add that failure to comply with this request will result in our client being compelled to take steps to enjoin the infringement and to recover any damage it may have or may hereafter sustain by your user of this name.

Would you kindly acknowledge this letter shortly and we trust that having brought the fact of our client's right to your notice you will not delay in abandoning the use of this name in your business.

Yours faithfully,

FENERTY & McLAURIN,
Per C. C. McL.

This communication was answered as follows:

600-603 Lancaster Building,
Calgary, Canada,
March 27th, 1929.

MESSRS. FENERTY & MCLAURIN,
Barristers, Solicitors,
Calgary, Alberta.

DEAR SIRS:—

Re Rocky Mountain Royal Blue Line Motor Tours Limited.

Mr. McLeod has forwarded to us your letter to the Rocky Mountain Tours and Transport Co., Ltd., of March 6th, asking us to reply.

We have formed a company for him known as the "Rocky Mountain Royal Blue Line Motor Tours Limited" and this company and this company will carry on all business connected with their tours.

Mr. McLeod will not be back until about the middle of April, so that it is difficult for us to give you any more information until that time. You can take it, however, that the Rocky Mountain Tours and Transport Company will be making no use of the name Royal Blue Line or that any use made by them of that name will be by the Company, Rocky Mountain Royal Blue Line Motor Tours Limited.

Yours faithfully,

BENNETT, HANNAH & SANFORD.
Per P. L. Sanford.

PLS/JM

After further correspondence, an action was launched on the 10th May, 1929, setting forth the prior use by plaintiff for several years past of the trade name and style of "Royal Blue Lines" in the province of Alberta, which name had become a valuable asset to the plaintiff, and the defendants' infringement and illegal adoption of the same.

The plaintiff claimed:

(*a*) An injunction restraining the Defendants and each of them, their servants, agents and employees from using the trade name "Royal Blue Line" in conjunction with the motor transportation business or other business carried on by the Defendants or any of them of a similar nature within the Province of Alberta.

(*b*) A declaration that the Plaintiff is entitled to the sole and exclusive use of the trade name "Royal Blue Line" in connection with motor transportation businesses and lines throughout the Province of Alberta.

(*c*) Damages in the sum of $1,000.

(*d*) Costs of this action.

The statement of defence amounts to a general denial of all the allegations and makes no reference to a contract between the defendant and the Royal Blue Line Company Inc. of Massachusetts, nor does it contain any allegation of fraud against the plaintiff in using in its operations the name and style of "Royal Blue Line".

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I have reached the conclusion that the appellant should succeed. It is common ground that the appellant was the first to use the name "Royal Blue Line" in the province of Alberta. It is also admitted by defendants' manager, McLeod, that the public is bound to be confused if both companies continue to use the same name in carrying on their business in the same territory, which means that the plaintiff would lose customers, who, by mistake, would go to the defendants under the impression that they were dealing with the plaintiff.

The majority of the Court of Appeal thought that the plaintiff could not succeed, because it had failed to establish its right to the use of the name which it adopted in 1927; the learned Chief Justice (1) considered its conduct as an "attempt to appropriate by prior use in [the province of Alberta] a name the use of which by it will deceive that public which it is particularly seeking to reach and serve". This view is based on the fact that, since 1912, a company incorporated in Boston has been doing an extensive business as "The Royal Blue Line" in some parts of the United States and Canada. This company had, however, never thought of doing business in Alberta before it granted, in the latter part of 1928, a licence to the "Rocky Mountain Tours and Transport Company, Limited" to use its trade name in connection with the "sightseeing and motor touring business in said Banff and to operate in and from Banff for a radius of not exceeding five hundred miles. These tours to originate and terminate in Banff, Alberta". This agreement or licence, which, although not invoked in the pleadings, was filed, despite plaintiff's solicitor's objection, *is not transferable,* as appears by its last clause.

In my opinion, this contract and the prior use of the name "Royal Blue Line" outside of the province of Alberta cannot be considered in deciding the issue between the parties. The non-transferable licence was granted to the "Rocky Mountain Tours and Transport Company Limited". That defendant undertook by its solicitors' letter of 27th March, 1929, to make no use of the name Royal Blue Line.

(1) 24 Alta. L.R., at 495.

As to the second defendant, Rocky Mountain Royal Blue Line Motor Tours Limited, this company was organized evidently with a view to providing a way of escape from the false situation in which the first-named defendant was found by its solicitors; this clearly appears from the same letter of March 27th, 1929. Moreover, this new company, whose corporate name includes the words "Royal Blue Line", was brought into existence in order to carry on an unfair competition with plaintiff's business in the Banff territory. They cannot rely to improve their position upon any dealing with the United States company, as they did not make any contract with the latter, and the only licence from this company contains a prohibition against the defendant Rocky Mountain Tours and Transport Company Limited transfering whatever rights they may have acquired under the agreement; so that the second-named defendant stands in the position of having been incorporated, under a name including the words "Royal Blue Line," after the plaintiff's solicitors had written to its co-defendant protesting against the use of that name for transportation purposes in the Banff territory.

As to the respective rights of the Boston company and the plaintiff, while they are really not at stake in this case, out of respect for the majority opinion of the learned judges of the appellate court, I cite, in support of my view that the Boston company has no status to object to the use made of the name "Royal Blue Line" by the plaintiff in Alberta, *Hanover Star Milling Company* v. *Metcalf* (1), where the Circuit Court of Appeal for the Seventh District found:

> Where two parties independently employ the same trade-mark or name, not in general use and susceptible of adoption, upon goods of the same class but in separate and remote markets, the question of prior appropriation is legally insignificant in the absence of intent on the part of the later adopter to take the benefit of the reputation, or to forestall extension of the trade, of the earlier adopter.
>
> While property in a trade-mark is not limited, so far as its use has extended, by territorial bounds, the earlier adopter may not monopolize markets that his trade has never reached and where the mark signifies not his goods but those of another.

I cannot conceive, for instance, that the Canadian Pacific Railway Company could enjoin an Alberta hotelkeeper, who did not claim to be in any way connected with that company, from calling his hotel "Chateau Frontenac" on

(1) (1916) 240 U.S.R. 403.

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the ground that this name is now known and used in the city of Quebec to designate a hotel where the company's services give satisfaction to the travelling public.

Like most cases of this description, this suit must be decided upon the facts. We have before us the ordinary case of parties competing under the same trade name, in the same market; and prior appropriation settles the question in favour of the plaintiff. It has not been alleged, and it was not proved, that the Brewster Transport Company had selected the name with any design inimical to the interest of the Massachusetts company who, in 1927, were not doing business in Alberta and had not yet done anything to extend their trade to that territory. We must refrain, however, from deciding the rights of the Boston company as against the plaintiff, since it is not a party to the present case. Whether or not the foreign company can restrain the plaintiff is not a question before us.

It may be stated that no question relative to trade marks, or the right to particular designations or slogans which may be acquired under statutory enactment is involved in this appeal. The only rights which the plaintiff or the defendants could have, or could assert, in this action are those arising out of the actual appropriation and use by the plaintiff of a certain trade name in the particular vicinity, and out of the defendants' interference, through unfair competition with the business growing out of such use by the plaintiff. Manager McLeod, one of the individual defendants, admits that the Boston company never did business in Alberta until they got in touch with him and his company. It is clear that the Boston company never acquired any rights in or to the exclusive appropriation of the name in question through any use thereof in that province. Never having acquired that right, it is obvious that it could not transfer it to the defendants herein.

The incorporation of the "Rocky Mountain Royal Blue Line Motor Tours Limited" following, as it did, the advertising campaign of the other defendant company, was, in my opinion, unfair trade dealing, even if it did not amount to the invasion of an exclusive right of property in a trademark. It may be accepted in principle that, in the interest of fair commercial dealings, courts of equity, at the

instance of a person who has been first in the field doing business under a given name, and has earned the good will of the public by a sufficient and satisfactory service and by extensive advertising, will protect him to the extent of making competitors take reasonable precautions to prevent deceit upon the public and consequent injury to the business of the person first in the field. Relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practising upon the public—in order to annex the earlier comer's patronage. The United States courts have repeatedly applied the foregoing rule and would probably refuse to interfere, at the instance of the Boston Blue Line Corporation, if the latter, not having been actually engaged in business in the locality, and having no customers there, sought to enjoin a defendant from the use in the locality of the same trade name. *Eastern Outfitting Co.* v. *Manheim* (1).

In the case of *Sartor* v. *Schaden* (2), the court applied the principle in the terse statement that "there cannot be unfair competition unless there is competition".

In England, in *Knott* v. *Morgan* (3), it was held that persons operating omnibuses bearing the name "London Conveyance Company" were entitled to relief against the acts of the defendant in painting the words "Conveyance Company" and "London Conveyance Company" in such characters and on such parts of his omnibus as exactly to resemble the same words on the omnibuses of the plaintiffs, and in reproducing a symbol which was also painted on the omnibuses of the plaintiffs, and imitating the green livery and gold hatbands by which the plaintiffs distinguished their coachmen and conductors, the Master of the Rolls saying:

> It is not to be said that the plaintiffs have any exclusive right to the words "Conveyance Company" or "London Conveyance Company," or any other words; but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belong to, and are under the management of, the plaintiffs.

In *London General Omnibus Co.* v. *Felton* (4), it was decided that, while an omnibus proprietor is not entitled to

(1) (1910) 110 Pac. 23.
(2) (1904) 125 Iowa 696.
(3) (1836) 2 Keen, 213.
(4) (1896) 12 T.L.R. 213.

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any monopoly in the construction of the omnibuses, or in such details as garden seats, special staircases, and the like, or in the colours employed in painting the wheels and body, a competitor is not entitled to arrange the general appearance of his omnibuses in such a way as to pass them off for those of another proprietor, the court remarking that the general appearance was to be looked at, and that it was therefore useless to compare the points of similarity one by one, and that this was certainly not less important when it was borne in mind that omnibuses are not merely stationary, but also moving objects.

An injunction should be granted in a form which is suitable and legitimate for the particular circumstances of the case. *Montgomery* v. *Thompson* (1). As to the exact form of the injunction, appellant's counsel, at the argument, stated that they would be satisfied to accept the limitations suggested by Mr. Justice Clarke, in his dissenting opinion, in the following words (2), which I am disposed to adopt:

> I think, however, the judgment is objectionable in form inasmuch as it gives the plaintiff the exclusive use of the trade name in connection with motor transportation businesses and lines throughout the Province of Alberta. There is no suggestion that the plaintiff operates or intends to operate in the vast areas of the Province not at present occupied by it, viz., the territory including Jasper Park and the Peace River Country to the West, North and East of Edmonton and the part of the Province East of the Calgary and Edmonton route. In such parts I see no objection to the use of the name by others who would not be in competition with the plaintiff. I see no reason either for confining the plaintiff to the Province of Alberta in the use of its name. Trade knows no Provincial boundary. I think the proper order is to confine the operation of the judgment to territory in which the plaintiff carries on its operations.

With this modification, I would allow the appeal, with costs here and in the Appellate Division, and restore the judgment of the learned trial judge.

Appeal dismissed with costs.

Solicitors for the appellant: *Fenerty & McLaurin.*

Solicitors for the respondents: *Bennett, Hannah & Sanford.*

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(1) [1891] A.C. 217.

(2) 24 Alta. L.R., at 515-516.

MATTHEW J. KELLY, PAUL GAGNON AND ZEBIDEE QUIGLEY.... } APPELLANTS;

AND

THE SAINT JOHN RIVER POWER COMPANY ..... } RESPONDENT.

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*Feb. 17.
*Mar. 17.

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

Assessment and taxation—Company's incorporating Act (1926, c. 45, N.B.) exempting (s. 23 (1)) "the company and its property" pertaining to certain power development, from taxation—Construction—Assessment for income tax.

The respondent company was incorporated by c. 45, 1926, N.B., with power to generate and sell electric power. S. 23 (1) provided that for a certain period "the company and its property in New Brunswick pertaining to the development of power on the Saint John River shall be exempt from all municipal and other taxation and assessment" (other than a fixed school tax not in question). The question before this Court was whether or not the company was liable to be assessed in the town of Grand Falls, N.B., (where its head office was) upon or with respect to income derived by it from or by virtue of the sale of power generated at its plant in Grand Falls from the use of the waters of said river.

Held: The company was not liable to be so assessed. The exemption extended, not only to property, but also to the company itself, and included income. The mention of its "property" in said s. 23 (1) did not create an inference of intention that property only should be exempt. The plain language of the exempting provision left no room for operation of any rule for strict construction against the company invoked on grounds that its incorporating Act was in the nature of a private Act and that it was claiming exemption from taxation. *The Interpretation Act*, R.S.N.B., 1927, c. 1, s. 6; *Foley* v. *Fletcher*, 3. H. & N. 769, at 780-781; *City of Halifax* v. *Nova Scotia Car Works, Ltd.*, [1914] A.C. 992, cited. Further, the omission of mention of the company itself in s. 23 (2) exempting "the company's property" pertaining to transmission of power, was significant.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division.

The present respondent, the Saint John River Power Company, applied for an order for a writ of certiorari for the removal into the Supreme Court of New Brunswick of a certain assessment made by the present appellants, as assessors for the Town of Grand Falls in the Province of New Brunswick, in and for the year 1929, with a view to the same being quashed in so far as it related to income and

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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to the real estate of the applicant pertaining to the development of power on the Saint John River. The order was granted and the writ made returnable before the Appeal Division of the Court, and the present appellants were ordered to show cause why the said assessment should not be quashed in so far as it related to the income and real estate aforesaid. The case was stood over, and the parties subsequently agreed upon a stated case, all question of assessment upon real estate being settled and withdrawn. The stated case was as follows:

STATED CASE

"1. The Town of Grand Falls was incorporated by Act of the Legislature of the Province of New Brunswick, 53 Victoria, Chapter 73. Section 62 of that Act confers upon the Assessors of the Town the following powers:

62. The Assessors shall without delay after receiving the warrants of the assessment, meet and enter into a book to be provided at the public expense, the names of all persons to be rated in the said Town, and shall distinguish therein in separate columns the real estate, personal estate and income of each person, and shall without delay, after the expiration of thirty days' notice of their appointment proceed to raise all rates, taxes or assessments levied or imposed upon the said Town, in the manner following, that is to say:—

1st. One-sixth of the whole amount of such tax, rate or assessment, shall be assessed and levied by an equal tax on the poll of every male inhabitant of the said Town of Grand Falls above the age of twenty-one years.

2nd. The remaining five-sixths of the whole amount of such rate or assessment shall be assessed and levied in due proportion upon all real estate in the said Town of Grand Falls and upon the personal estate of the inhabitants thereof, including that of any Joint Stock Company or Corporation which has its principal place of business within the Province and is situated or located in the said Town, after deducting from such personal estate the indebtedness of each inhabitant respectively, and also upon the annual income or emoluments of such inhabitants, companies or corporations derived from any office, profession, trade, business, work, labour, occupation or employment whatsoever within the Province, and not from invested real or personal estate of such inhabitants, and also upon the capital stock, income or other things of Corporations and Joint Stock Companies; * * *

"2. The said the Saint John River Power Company was incorporated by 16 George V (1926), Chapter 45, and by Section 23 thereof was granted certain exemptions from taxation. Said section is as follows:—

23. (1) For a period of forty years from the date of the first generation of power by the Company, the Company and its property in New Brunswick pertaining to the development of power on the Saint John

River shall be exempt from all municipal and other taxation and assessment, other than a tax of five thousand dollars a year which shall be payable to the school district or districts in which the main power works of the Company at or near Grand Falls are situated and in case of more than one such district such amount shall, in case of disagreement as to the apportionment, be apportioned by the Lieutenant-Governor in Council.

(2) The Company's property in New Brunswick pertaining to the transmission of power shall be exempt from all municipal and other taxation and assessment."

"3. The Company commenced the generation of power on or about the fifteenth day of October, 1928.

"4. The head office of the Company was in the Town of Grand Falls aforesaid during the year 1929, and the [present appellants] were the Assessors in and for the said Town for the said year.

"5. That in the said year 1929 the said Assessors assessed the said Saint John River Power Company upon and in respect to real estate of the value of $75,000 and with respect to income in the sum of $100,000.

"6. That on the application of the said Company a Writ of Certiorari was granted to remove into this Court the said Assessment with a view of having the same quashed and a *rule nisi* to quash the same.

"7. That the parties hereto agreed that all questions arising out of and with respect to rates, taxes and assessments, made by the said Assessors upon and with respect to real estate of the said Company have been settled and are hereby withdrawn from the consideration of this Honourable Court in this case.

"8. That this Honourable Court is asked to adjudicate upon the question of liability of the said Saint John River Power Company to be assessed by the Assessors of the Town of Grand Falls upon income.

"9. The Company during the year 1929 and previous thereto had no income except as follows:—

(*a*) Income derived from the sale of electricity developed in the Power Plant of the Company erected at Grand Falls to generate electricity from the use of the waters of the Saint John River.

(*b*) Income derived from the sale of electricity purchased from the Van Buren Light & Power Company of Van Buren, in the State of Maine, and distributed over the system formerly owned by the St. Leonard Electric Com-

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pany, Limited, a company incorporated by Act 1, George V, 1911, Chapter 129, but now owned by the Saint John River Power Company. * * * The Company claims that the result of said operations for the said year 1929 was a loss. The said Assessors claim it was a profit, that the Company is not entitled to charge up interest on the investment and depreciation in arriving at the taxable amount.

"10. The questions for determination by the Court are:

"(1) Is the Company liable to be assessed in the Town of Grand Falls upon or with respect to income derived by it from or by virtue of the sale of power generated at its plant in Grand Falls?

"(2) Is the Company liable to be assessed in the Town of Grand Falls upon or with respect to income derived by it from or by virtue of the sale of power distributed in the manner mentioned in paragraph (9 *b*) of this Stated Case?

"11. Either party is at liberty to refer to any other statute or statutes that they may deem material.

"12. The parties have made an agreement as to costs and the Court is not asked to deal with them."

The Supreme Court of New Brunswick answered "no" to question No. 1 submitted in the stated case, and "yes" to question No. 2, and ordered that so much of the assessment as was made upon the income derived from the sale of electricity in the company's plant at Grand Falls be quashed.

The assessors, pursuant to special leave granted by the Supreme Court of New Brunswick, Appeal Division, appealed to the Supreme Court of Canada against the holding that the company was not liable to be assessed in Grand Falls upon or with respect to income derived by it from or by virtue of the sale of power generated at its plant in Grand Falls.

J. F. H. Teed for the appellants.

P. J. Hughes K.C. and *H. A. Carr* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—Upon application of the respondent, and by order of the Chief Justice of New Brunswick, a writ of certiorari was issued out of the Supreme Court of the

province, to bring up an assessment made by the appellants as assessors for the Town of Grand Falls for the year 1929, with the purpose of having the assessment quashed in so far as it related to income and to real estate of the respondent appertaining to the development of power on the St. John River. The assessors made their return; some differences were determined by agreement, and a case was stated by the parties, submitting, upon agreed facts, two questions for the determination of the court. The questions are as follows:

(1) Is the Company liable to be assessed in the Town of Grand Falls upon or with respect to income derived by it from or by virtue of the sale of power generated at its plant in Grand Falls?

(2) Is the Company liable to be assessed in the Town of Grand Falls upon or with respect to income derived by it from or by virtue of the sale of power distributed in the manner mentioned in paragraph 9 (*b*) of this Stated Case?

The case came before the Appeal Division of the Supreme Court, where, unanimously, the first question was answered in the negative and the second in the affirmative. The appellants thus failed in their contention upon the first question, but succeeded as to the second, and they are now appealing from the first answer.

The St. John River Power Company, respondent, was incorporated by Act of the local legislature, c. 45 of 1926, with head office at the town of Grand Falls, in the province of New Brunswick, and it was provided, by section 5, that

The Company may generate, purchase or otherwise acquire, sell, transmit and distribute electrical power and energy, and specifically, but without limiting the generality of the foregoing, the Company shall have full right and authority to develop hydro-electric power on the Saint John River at or near Grand Falls, etc.

Provisions follow conferring upon the company extensive powers, concessions and privileges in aid of the general project sanctioned by the Act.

By section 23,

(1) For a period of forty years from the date of the first generation of power by the Company, the Company and its property in New Brunswick pertaining to the development of power on the Saint John River shall be exempt from all municipal and other taxation and assessment, other than a tax of five thousand dollars a year which shall be payable to the school district or districts in which the main power works of the Company at or near Grand Falls are situated and in case of more than one such district such amount shall, in case of disagreement as to the apportionment, be apportioned by the Lieutenant-Governor in Council.

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(2) The Company's property in New Brunswick pertaining to the transmission of power shall be exempt from all municipal and other taxation and assessment.

The Town of Grand Falls was incorporated by c. 73 of 1890, and the material taxing provisions of the town are to be found in section 62, and are set out in the stated case. The assessors are to enter the names of all persons to be rated, distinguishing in separate columns the real estate, personal estate and income of each person, and shall proceed, after the statutory delay, to raise all rates, taxes or assessments levied or imposed; one-sixth by a poll tax, and the remaining five-sixths

in due proportion upon all real estate in the said Town of Grand Falls and upon the personal estate of the inhabitants thereof, including that of any Joint Stock Company or Corporation which has its principal place of business within the Province and is situated or located in the said Town, after deducting from such personal estate the indebtedness of each inhabitant respectively, and also upon the annual income or emoluments of such inhabitants, companies or corporations, etc.

No doubt the annual income of any incorporated joint stock company or corporation, within the description of this clause, is to be assessed and the tax is to be levied thereon in proportion. It is not disputed that the words of subsection 1 of section 23, the exempting section of the company's Act of incorporation, would operate to exempt the company from this income tax, if, in declaring the exemption, the legislature had not coupled with the company its property. The words are: "The company and its property in New Brunswick pertaining to the development of power on the Saint John River shall be exempt from all municipal and other taxation and assessment," subject to an exception which is not at present material. But from the mention of property, it is said, arises the inference that it is intended that property only shall be exempt. I am unable to follow this argument, for I can imagine that a company negotiating to establish and operate works within the town might reasonably stipulate, for tax exemption, both for itself and its property; and, if that be allowed, there is certainly no general principle of interpretation by which the expression is not to have effect in any particular, once it is found, as I think it must be, that the exemption, as enacted, in terms extends, not only to the property of the company, but also to the company itself. No question is suggested as to whether the company's exemp-

tion is qualified by the words, "pertaining to the development of power on the Saint John River," which naturally, and primarily at least, have their application to the property of the company, because it appears by the case that the income in controversy is derived "from the sale of electricity developed in the power plant of the company erected at Grand Falls, to generate electricity from the use of the waters of the St. John River"; and, by reference to the frame of the question, it will be perceived that the answer subject to appeal is confined to "income derived by it (the company) from or by virtue of the sale of power generated at its plant in Grand Falls."

The appellant argues that the Act incorporating the respondent company is in the nature of a private Act, and that, therefore, and also because the respondent is claiming an exemption from taxation, the Act should be strictly construed against it, and authorities are cited; but there is nothing in any of these which was ever intended to modify or reduce the effect of a clear statutory provision. Moreever, it is declared by the R.S., N.B., 1927, c. 1, (*The Interpretation Act*), section 6, that

> Every Act shall be deemed to be a public Act and shall be judicially noticed by all Judges, Justices of the Peace and others without being specially pleaded.

I think that, for a case like this, the authorities make it abundantly clear that the company is not to suffer any disadvantage by reason of the fact that it relies upon an exemption sanctioned by its incorporating Act, or for the reason that the effect of the statutory provision is to confer upon the company an exemption which, apart from that provision, it would not have possessed.

In *Foley* v. *Fletcher* (1), Baron Bramwell was considering the question of income tax, and he said:

> I am desirous to say that I disclaim in this case acting on the maxim, that a burden shall not be imposed on the public unless by clear and unambiguous language. In *Re Micklethwait* (2), Parke B., says: "It is a well established rule that the subject is not to be taxed without clear words for that purpose; and also that every act of parliament is to be read according to the natural construction of its words." The latter is the main rule, the other subordinate. Construe the statute correctly, if its meaning can be ascertained. Maxims of the sort referred to, as frequently applied, are mere invitations to erroneous construction, though when properly understood they are quite correct. The natural course of things is, that the heir takes on the death of the person last seised;

(1) (1858) 3 H. & N., 769, at 780-781. (2) (1855) 11 Exch. 452, at 456

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whoever seeks to disturb that rule must make out his right to do so. So, whoever seeks to impose a tax or penalty must establish the right; whoever seeks to punish must establish the guilt. The rule properly understood is, that the burden of proof is on the assertor, not that, wherever there is any doubt, a statute is to be said not to mean what it does mean.

Moreover, in the *City of Halifax* v. *Nova Scotia Car Works, Limited* (1), where, under an agreement with the city specially sanctioned by the legislature, the company was entitled to "a total exemption from taxation," for ten years upon its lands and buildings situated in the city, and a question arose as to whether this exemption extended to a provision whereby the owners of property fronting upon any sewer laid by the city should be contributors to the cost of its construction, according to their frontage, it was said by Lord Sumner, who pronounced the judgment of the Judicial Committee, that

> So far as a simple question of interpretation is affected by presumptions at all, their Lordships are of opinion that this clause should be construed favourably to the respondents. They have performed the whole consideration on their side by establishing their works, and the consideration moving to them has been earned and ought not to be thereafter restricted. The matter is one of bargain and of mutual advantage; it is not a case of one citizen seeking to escape from his share of common burthens and so increasing pro tanto the burthen on the others.

In my view the court would not be justified to deny its proper effect to the provision of the statute whereby the company is, in plain language, declared to be exempt; and the value of this exemption, as distinguished from the exemption of property, so far as we have been shewn, appears to relate principally, if not entirely, to income.

It is also significant that by subsection (2) of the exempting section, by which "the company's property in New Brunswick pertaining to the transmission of power shall be exempt from all municipal and other taxation and assessment," the company itself is not mentioned, an omission which seems remarkable, if the intention were that the exemptions afforded by the two subsections should equally embrace both the company and its property, or should equally be confined to the company's property.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: *Teed & Teed.*
Solicitor for the respondent: *H. A. Carr.*

(1) [1914] A.C. 992.

A. C. LAWSON (PLAINTIFF).....APPELLANT;

AND

INTERIOR TREE FRUIT AND VEGETABLE COMMITTEE OF DIRECTION (DEFENDANT) ..... } RESPONDENT;

AND

THE ATTORNEY-GENERAL OF CANADA ..... } INTERVENANT.

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*Oct. 7, 9.
*Feb. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Produce Marketing Act of B.C.—Ultra vires—Legislation within Dominion power—Trade and Commerce—Levy imposed by s. 10 (k)—Whether levy a tax—Direct or indirect taxation—Licence—B.N.A. Act, ss. 91 (2), 92 (2), 92 (9)—Produce Marketing Act, B.C., 1926-27, c. 54, ss. 2, 3, 10 (1), 10 (k), 15, 16, 20—Amending Act, (1928) B.C., c. 39.

By section 3 of the *Produce Marketing Act* of British Columbia (1926-27), c. 54 a "Committee of Direction" was constituted, "with the exclusive power to control and regulate (under the Act) the marketing of all tree fruits and vegetables * * *, being products grown or produced in that portion of the province contained within" boundaries therein specified. By section 10 (1), it was provided that, "for the purpose of controlling and regulating, under this Act, the marketing of any product within its authority (the) Committee shall, so far as the legislative authority of the province extends, have power to determine at what time and in what quantity, and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters." By section 10 (*k*), the committee was also given the power "for the purpose of defraying the expenses of operation, to impose levies on any product marketed." By subsection 3 of section 16, as enacted by the Amendment Act of 1928, c. 39, it was provided that "the committee may fix licence fees to be paid by shippers."

Held that this legislation is *ultra vires* of the provincial legislature.

Per Duff, Newcombe, Rinfret and Lamont JJ.—Such legislation is referable to the exclusive Dominion power to regulate trade and commerce. (Section 91 (2) B.N.A. Act.)

Newcombe J. however is careful expressly to reserve the position that the legislation would also be *ultra vires* of the province even if not within any of the Dominion enumerated powers.

Per Duff, Rinfret and Lamont JJ.—The provisions of the statute, which authorize the committee to impose levies and to fixe licence fees are *ultra vires,* the levy not being within section 92 (2) and the licence not being within section 92 (9) of the B.N.A. Act.

Per Cannon J.—The levy is an export tax falling within the category of duties of customs and excise and, as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the provincial legislature.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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APPEAL from the decision of the Court of Appeal for British Columbia, affirming the judgment of the trial court, Murphy J. (1), and dismissing the appellant's action.

The action was brought at Grand Forks, on the 9th of August, 1929, by the appellant, a fruit rancher and shipper of fruit against the respondent, the Committee of Direction, claiming that the *Produce Marketing Act* was *ultra vires*, and for a declaration that he was under no obligation to obtain a licence from the Committee of Direction or to pay levies imposed or to otherwise observe the rules, regulations and orders passed by the Committee under the *Produce Marketing Act*, and for an injunction restraining the Committee from collecting such licence fees and levies or otherwise restricting the appellant from marketing the fruit and vegetables grown by him, and also for an injunction restraining the Committee from enforcing the general regulations passed by it and for damages. The action was brought as a test case for the purpose of determining whether or not the *Produce Marketing Act* was *intra vires* of the legislature of the province of British Columbia. The action was tried before the Honourable Mr. Justice Murphy at Vancouver on the 6th of March, 1930, who dismissed the appellant's action on the 11th of March, 1930. The appellant then appealed to the Court of Appeal for British Columbia which affirmed the judgment of the trial judge. The appellant obtained special leave to appeal to the Supreme Court of Canada on the 12th of September, 1930. The Attorney-General of Canada was granted leave to intervene before the Supreme Court of Canada.

H. S. Wood K.C. and *C. F. R. Pincott* for the appellant.

H. B. Robertson K.C. for the respondent.

F. P. Varcoe for the intervenant.

The judgments of Duff, Rinfret and Lamont JJ. were delivered by

DUFF J.—The appellant, who is the plaintiff in the action giving rise to the appeal, claims a declaration that the respondent is not possessed of the authority which it is professing to exercise in control of the marketing outside the province of tree fruits and vegetables grown or pro-

(1) (1930) 42 B.C. Rep. 493; [1930] 2 W.W.R. 23.

duced within a defined area in British Columbia, over which the respondent professes to exercise jurisdiction.

By the *Produce Marketing Act* (s. 3), which was passed in 1927, there was constituted a Committee of Direction, under the name which the respondent bears, with "exclusive power to control and regulate" under the Act,

the marketing of all tree fruits and vegetables (including tomatoes and melons), being products grown or produced in that portion of the province contained within

specified boundaries including what is described as the Grand Forks district, where the appellant has been for some years a fruit rancher and shipper. Two of the members of the Committee are selected by the Growers and Shippers Federation of British Columbia, which is a society of fruit growers and shippers incorporated under the *Societies Act,* while the third member of the Committee, the chairman, is named by the Lieutenant Governor in Council. The powers of the Committee are set forth in general terms, in the first paragraph of s. 10 (1) which reads thus:

10. (1). For the purpose of controlling and regulating, under this Act, the marketing of any product within its authority, a Committee shall, so far as the legislative authority of the Province extends, have power to determine whether or not and at what time and in what quantity and from and to what places *and at what price* and on what terms the product may be marketed and delivered and to make orders and regulations in relation to such matters.

Then follows a series of sub-paragraphs, in which are more specifically described functions and powers: to estimate the quantity of any product to be available for marketing and at what times and places; to fix the quantities which may from time to time be marketed at any place by a shipper; to fix the place or places from which any such product may be delivered or dispatched for marketing; to make arrangements for carriage from time to time; to set minimum and maximum prices for any such product; to require returns; to have inspection of books and other documents; to prescribe the terms of sale of a product including the minimum brokerage which may be paid in respect thereto.

Marketing is defined as

the buying and selling of a product and includes the shipping of a product for sale or for storage and subsequent sale and the offering of a product for sale and the contracting for the sale or purchase of a product, whether the shipping, offering or contracting be to or with a purchaser,

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a shipper or otherwise, but does not relate to the marketing of a product for consumption outside the Dominion and "market" has a corresponding meaning.

Having regard to this definition, it is obvious that the scope of the marketing operations affected by s. 10 does not exclude the shipping for delivery outside the province of British Columbia, or the offering or contracting for sale of the products to which the section applies to or with persons outside the province.

The Committee also has power for the purposes of defraying the expenses of operation "to impose levies on any product marketed," which levies "shall be payable at such rates and in such manner and at such times" as may be determined by the Federation. By s. 15, shippers are obliged to comply with every determination, order or regulation of the Committee, and any contract made by a shipper in violation of this provision is void. By s. 16, shippers are prohibited from doing any act "within the meaning of marketing or selling" in relation to any product "which is subject to the control and regulation" of the Committee, without having obtained a shipper's licence "to market and sell such products." By the 3rd subsection, as amended in 1928

the Committee may fix licence fees to be paid by shippers. Shippers of car-load lots may be classified with reference to the quantity of product marketed and the fee may vary accordingly, but shall not in any case exceed twenty dollars; and in the case of other shippers the fee shall not exceed five dollars.

The Committee is also invested by the same section with authority to suspend or cancel the licence of a shipper

for violation of this Act or of any determination, order or regulation made by it under this Act.

Marketing or selling by a shipper without a licence is an "offence against the Act," and so also is the failure of any shipper to comply with any determination, order or regulation of the Committee. The penalty for an "offence against the Act" is under s. 20, a fine not exceeding $1,000, or imprisonment for a term not exceeding one year, for an individual who is a shipper, and, for a corporation who is a shipper, a fine not exceeding $10,000.

The plaintiff's main contention on this appeal is that the respondent Committee is destitute of the powers it assumes to execute because the statute is *ultra vires*. This proposition is based on two general grounds. First, it is

said that the substantive enactments of the statute are enactments on the subject of "trade and commerce" within the meaning of these words as used in head 2 of s. 91 of the *British North America Act;* then it is said that the statute directly and substantively regulates the conduct of people outside the province and thereby purports to operate within a sphere beyond the control of the provincial legislature. Furthermore, particular provisions are attacked upon special grounds. These will be discussed.

It will not be necessary to pass upon the second of these grounds. What, if any, limitations affect the authority of a provincial legislature to determine, for the province, the legal effect, within the province, of extra-provincial acts, and to prescribe the rules of law, which, except in matters governed by s. 91, the provincial courts are to observe in controversies arising in relation to such acts, is a subject of multifarious ramifications, of great importance, and, in some respects, not free from difficulty. The prudent course would appear to be to express no opinion upon the points which have been raised within the limits of that subject in the present litigation; because in my opinion, the appeal can be determined without any reference to them. It must be understood that it is not intended to throw out or intimate any view upon any of those points.

It should perhaps be noted that the section, which defines, in general terms, the power of the Committee of Direction as a power

> to determine at what time, and in what quantity and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters,

limits, in explicit terms, the scope and operation of the power in this fashion: "so far as the legislative authority of the province extends." It has been pointed out, however, with perfect accuracy, that the section proceeds in a series of subsections to a specification of the powers with which the Committee is endowed, and that in bestowing these specified powers, the section does not, in express terms, impose any such limitation. As against this, it may no doubt be said that the specification is intended only as an exposition and elaboration of the powers embraced within the general words, and that consequently the qualification quoted affects all these specified powers. It is to be observed also that the definition of "marketing" does

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indisputably point to an intention that the jurisdiction of the Committee in controlling the action of shippers shall run beyond the boundaries of the province. As to that again, it may be argued, that it is within the authority of the provincial legislature, in dealing with a subject matter falling within s. 92, to legislate conditionally as well as absolutely. The legislature, although convinced of its own power to pass a given enactment, is quite competent, it may be contended, not without plausibility, to make the legal effectiveness of its enactment dependent upon the condition that the matter of it is within those classes of matters in relation to which it is competent to it to make rules of law. It is not necessary, however, to decide upon the effect of these qualifying words in s. 10, for the purpose of dealing with any branch of the appeal; and no opinion is expressed thereon. The Committee of Direction, in respect of the matters complained of by the appellant, acted systematically on the view that they possessed the powers *ex facie* given them by the statute, when read irrespectively of the qualifying words; and even if the effect of them is to provide an answer to the allegation that the legislation is *ultra vires*, they provide no answer to the charge that, in the matters complained of, the Committee was exercising an authority it did not possess, because the legislature of British Columbia is incompetent to invest it with such authority. And, if the charge can be made good, that the Committee has been employing its ostensible powers to put into effect orders, rules and determinations to which the legislature is not competent to impart compulsory force, the appellant, in so far as they prejudice him, is entitled to a declaration to that effect.

Before proceeding to discuss the question arising in relation to head no. 2 of s. 91, I shall consider, first of all, the levies imposed upon the appellant by s. 10 (*k*), and the demands for the payment of such levies. I think the contention of the appellant is well founded, that such levies so imposed, have a tendency to enter into and to affect the price of the product. I think, moreover, that levies of that character, assuming for the moment they come under the head of taxation, are of the nature of those taxes on commodities, on trade in commodities, which have always been regarded as indirect taxes. If they are taxes, they cannot

be justified as Direct Taxation within the province. That they are taxes, I have no doubt. In the first place they are enforceable by law. Under s. 13 they can be sued for, and a certificate under the hand of the chairman of the Committee is *prima facie* evidence that the amount stated is due; and the failure of a shipper to comply with an order to pay such a levy would appear to be an offence under the Act by s. 15. Then they are imposed under the authority of the legislature. They are imposed by a public body. This Committee, of which the chairman is appointed by the Lieutenant-Governor in Council, and which is invested with wide powers of regulation and control over the fruit and vegetable industry within a great extent of territory, constituted by, and acting in every way under, the authority of the statute, exercising compulsory powers as well as inquisitorial powers of a most exceptional character, is assuredly a public authority. The levy is also made for a public purpose. When such compulsory, not to say dictatorial, powers are vested in such a body by the legislature, the purposes for which they are given are conclusively presumed to be public purposes. Indeed, when one considers the number of people affected by the orders of this Committee, and the extent of the territory over which it executes its orders and directions, it becomes evident that, in point of their potential effect upon the population of the territory and of the interest of the population in the Committee's activities, the operations of the Committee, as contemplated by the statute, greatly surpass in public importance many municipal schemes, the levies for the support of which nobody could dispute, would come under the head of taxation.

This brings us to the question whether the levies complained of are levies which can be brought under head no. 9 of s. 92. The words are these:

> Shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local or municipal purposes.

The question has never yet been decided whether or not the revenue contemplated by this head can in any circumstances be raised by a fee which operates in such a manner as to take it out of the scope of "direct taxation." *Prima facie,* it would appear, from inspection of the language of the two several heads, that the taxes contemplated by no. 9 are not confined to taxes of the same char-

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acter as those authorized by no. 2, and that accordingly imposts which would properly be classed under the general description "indirect taxation" are not for that reason alone excluded from those which may be exacted under head 9. On the other hand, the last mentioned head authorizes licences for the purpose of raising a revenue, and does not, I think, contemplate licences which, in their primary function, are instrumentalities for the control of trade—even local or provincial trade. Here, such is the primary purpose of the legislation. The imposition of these levies is merely ancillary, having for its object the creation of a fund to defray the expenses of working the machinery of the substantive scheme for the regulation of trade. Even the licence fee is discretionary with the Committee. This part of the statute would appear to be *ultra vires*. The levy authorized is not within s. 92 (2), and the licence is not within s. 92 (9).

It follows that the appellant is entitled to succeed upon that branch of his claim *which affects the levies in question.*

Coming now to the first ground of attack, namely, that the statute constitutes an attempt to regulate trade within the meaning of head no. 2 of s. 91. To repeat the general language of s. 10 (1), the functions of the Committee are

> for the purpose of controlling and regulating the marketing of any product within its authority,

and for that purpose the Committee is empowered

> to determine whether or not and at what time, and in what quantity and from and to what places and at what price and on what terms the product may be marketed and delivered.

As I have said, the respondent Committee has attempted (in professed exercise of this authority) and in this litigation asserts its right to do so—to regulate the marketing of products into parts of Canada outside British Columbia. It claims the right under the statute to control (as in fact it does), the sale of such products for shipment into the prairie provinces as well as the shipment of them into those provinces for sale or storage. The moment his product reaches a state in which it becomes a possible article of commerce, the shipper is (under the Committee's interpretation of its powers), subject to the Committee's dictation as to the quantity of it which he may dispose of,

as to the places from which, and the places to which he may ship, as to the route of transport, as to the price, as to all the terms of sale. I ought to refer also to the provision of the statute which prohibits anybody becoming a licensed shipper who has not, for six months immediately preceding his application for a licence, been a resident of the province, unless he is the registered owner of the land on which he carries on business as shipper. In a statute which deals with trade that is largely interprovincial, this is a significant feature. It is an attempt to control the manner in which traders in other provinces, who send their agents into British Columbia to make arrangements for the shipment of goods to their principals, shall carry out their interprovincial transactions. I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not also directly and substantially the concern of the other provinces, which constitute in fact the most extensive market for these products. In dictating the routes of shipment, the places to which shipment is to be made, the quantities allotted to each terminus *ad quem,* the Committee does, altogether apart from dictating the terms of contracts, exercise a large measure of direct and immediate control over the movement of trade in these commodities between British Columbia and the other provinces.

Such matters seem to constitute " matters of interprovincial concern," that is to say, of direct, substantial and immediate " concern," to the receiving province as well as to the shipping province. Otherwise you seem to denude the phrase of all meaning. No doubt the Committee also regulates the local trade in British Columbia, but the regulation of the trade with other provinces is no mere incident of a scheme for controlling local trade; it is of the essence of the statute and of the object and character of the Committee's activities. We have not here to do with any mere matter of contract or of civil status, with the right, for example, to sue in the provincial courts. Contract is no doubt involved, as the control of property is involved; but the central purpose of the legislation is to assume direct control of the trade as trade. Its aim is to regulate the producer and shipper as trader; as proprietor

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and contractor, it affects him directly and necessarily, but only as a means of governing him in carrying on his trade.

The scope which might be ascribed to head 2, s. 91 (if the natural meaning of the words, divorced from their context, were alone to be considered), has necessarily been limited, in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess. Therefore, it has been found necessary to say that this head does not comprise the regulation, by a system of licences, of a particular business within any one or within all of the provinces. But there is no lack of authority for the proposition that regulations governing external trade, that is, trade between Canada and foreign countries, as well as regulations in matters affected with an interprovincial interest, or regulations which are necessary as auxiliary to some Dominion measure relating to trade generally throughout the Dominion, and dealing with matters not falling within s. 92, such as, for example, the incorporation of Dominion companies, are within the purview of that head. In the elucidation of the words by Sir Montague Smith in *Parsons* case (1), it is pointed out that there is a field over which the powers given by that head may operate quite consistently with the settled principle (*Montreal Street Rly. Co.* v. *City of Montreal* (2)), which precludes the Dominion from interfering (in attempted exercise of the authority thereby given) with matters which are not of unquestionably Canadian interest and importance, or which are in each province of local or private interest only. Sir Montague Smith's words are these (*Parson's* case) (3):

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.

(1) (1881) 7 App. Cas. 96. (2) [1912] A.C. p. 96.
(3) (1881) 7 A.C. 96, at 113.

This passage received formal approval by the Judicial Committee in *Wharton's* case (1), where Lord Haldane said:

> Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens' Insurance Co.* v. *Parsons* (2), on head 2 of s. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade.

In the *Insurance* case (3), it was laid down that

> the authority of the Dominion Parliament to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.

The distinction signalized in these cases is that indicated above, and fully expounded in *Montreal Street Ry.* v. *City of Montreal* (4), between what is national in its scope and concern and that which in each of the provinces is of private or local, that is to say, of provincial, interest.

The judgment of Lord Haldane in the *Board of Commerce* case (5), requires special examination. And, first of all, it is necessary to remember what it was the Judicial Committee was there dealing with. The Board of Commerce Act, 1919, had set up a Board endowed with most extraordinary powers, both regulative and inquisitorial, enabling it to examine minutely into the affairs of everybody, traders and non-traders alike, with the view to discovering and preventing the hoarding of the necessaries of life (as defined by the Board), or unfairness in the prices exacted from the purchasers of such commodities, and to promulgate regulations and particular orders in regard to all these things. There are few incidents of the daily economic life of private persons which the powers of the Board were not capable of reaching. These powers extended to matters of interprovincial concern, no doubt, but the predominant feature of the statute was its attempt to control matters of individual and local interest. An attempt was made to support the enactment as enacted under the residuary powers of s. 91, and also by reference to head no. 2 of the same section, Trade and Commerce. As to the first of these arguments, the contention was that, the matter of the legislation being the subjects of hoarding and fair prices, it must in the circumstances of the time be

(1) [1915] A.C. 330 at 340.
(2) (1881) 7 App. Cas. 96, at 112, 113.
(3) [1916] 1 A.C. 588.
(4) [1912] A.C. 96.
(5) [1922] 1 A.C. 191.

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held to have a distinct Dominion aspect, to have, that is to say, in each province, an aspect which was the concern of the Dominion as a whole, and which therefore would fall within the same category as the subject matter dealt with in *Russell's* case (1); that the subject matter of the legislation was not property and civil rights within the provinces, nor was it in each of the provinces substantially of local or private interest, but was strictly a matter of national concern in the sense in which those words were used in *Attorney-General for Ontario* v. *Attorney-General for Canada* (2).

While the legislation dealt with matters which undoubtedly were of Dominion competence, it was, I repeat, mainly designed for the minute regulation of the affairs of individuals, in such a manner that, if it was to take effect, the Board established thereby might supersede the provincial legislatures in no unimportant degree. It is with reference to this state of affairs that the language which now follows must be interpreted: "It can, therefore," said Lord Haldane,

> be only under necessity, in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject-matter to be dealt with in the case would be one falling within s. 92. Nor do the words in s. 91, the "Regulation of trade and commerce," if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the provincial powers under s. 92.

Lord Haldane then proceeds to refer specifically to *Wharton's* case (3), and to the *Insurance* case (4). He lays down two propositions, but these, as we shall see, do not derogate from the proposition in *Wharton's* case, in which the language in *Parson's* case (5) is explicitly approved. He says nothing about it, and for a very good reason. In the *Board of Commerce* case (6), he is not dealing, as we have seen, with matters that Sir Montague Smith mentions as constituting a field for the operation of the Dominion power in relation to trade and commerce, after excluding

(1) (1881) 7 App. Cas. 829.
(2) [1896] A.C. 348, at 360, 361.
(3) [1915] A.C. 330.
(4) [1916] 1 A.C. 588.
(5) (1881) 7 App. Cas. 96.
(6) [1922] 1 A.C. 191.

from the operation of that power matters possessing, in themselves, no immediate interprovincial concern or national concern, but possessing only a local or private interest in each of the provinces. Such matters—matters which in the passage quoted are designated as properly within the field of s. 91 (2)—were not before the Board, because while the statute legislated upon them, its enactments included local matters also, to which, as I have said, the statute was mainly directed; and the operation of the statute in relation to the two classes of matters was so inseparable, that it must be *ultra vires*, as a whole, unless Dominion jurisdiction over such local matters could be maintained.

Of the two propositions, enunciated by Lord Haldane, both of which are expressed in the affirmative, the first is that, while s. 91, head 2, was, in *Wharton's* case (1), held to be susceptible of lending aid to Dominion powers conferred by the general language of s. 91,

> that was because the regulation of the trading of Dominion Companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it.

The matters in respect of which head 2 was invoked in *Wharton's* case (1), and to which Lord Haldane herein refers, were not, in fact, in themselves, matters belonging to or immediately connected with the subject of interprovincial trade or that of foreign trade. They were matters connected with the exercise, within each of the provinces, by Dominion trading companies of their constitutional capacities, which they had received from the Dominion; matters which, in each of the provinces, would have fallen within the subjects described in head 13 or head 16 of s. 92, had it not been for the language of head 11, by virtue of which the provincial jurisdiction in relation to "incorporation of companies" was confined to the creation of "companies with provincial objects," and, accordingly, the subject of the incorporation of companies with "objects" other than "provincial" was relegated to the residuary capacity of the Dominion, under the reservation expressed in the general words of section 91.

The *British North America Act* treats a trading company created by the Dominion, under this residuary author-

(1) [1915] A.C. 330.

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ity, as endowed with the status of an incorporated trading company in all the provinces; and its status and constitution as a corporation as being, therefore, matters not of provincial, but of direct and immediate national concern. Consequently, as Lord Haldane observes, the manner in which such trading companies shall be permitted to trade within each of the provinces acquires character as a matter of interest throughout the Dominion. Matters, otherwise of local concern only, and, so long as they continue to be so, outside the scope of head 2 of section 91, may become, in virtue of their relation to the trading activities of such companies, matters of national concern, and, in so far as they are so, subject to regulation under that head. It seems hardly necessary to observe that, here, there is nothing pointing to the conclusion that the regulative authority in respect of Trade and Commerce, in its application to matters which, in themselves, are involved in interprovincial or foreign trade, can only be invoked in aid of the execution of some power which the Dominion possesses independently of that head. Lord Haldane's proposition is strictly limited to matters which, in themselves, and independently of their connection with a Dominion trading company, would be of local concern only.

His Lordship's second proposition is that

> where there was no such power in that Parliament, as in the case of the *Dominion Insurance Act*, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the provinces (1).

The statute which the Board had to consider in the *Insurance* case (2) was one which professed to regulate, by a licensing system, the whole business of insurance, including business entirely local, within a particular province; and his Lordship is here dealing with the business of insurance in so far as it might be regarded as a branch of trade, as a local matter. In the same judgment, the Dominion Parliament was held to be empowered, in "regulation of Trade and Commerce," to regulate the conditions upon which a foreign insurance company should be entitled to carry on its business in a single province in Canada. The authorities relied

(1) [1922] 1 A.C. 191, at 198. (2) [1916] 1 A.C. 588.

upon were principally *Hodge* v. *The Queen* (1), and the decision on the *McCarthy Act Reference* (2), which affirmed the exclusive authority of the provinces to regulate local trade within their own borders.

I do not think further examination of the authorities would be useful. The more recent cases leave entirely untouched the view embodied in the passage quoted from *Parsons* case (3), and expressly adopted in *Wharton's* case (4), that foreign trade and trading matters of interprovincial concern are among the matters included within the ambit of head 2, s. 91.

It is not necessary, for the purposes of this appeal, to determine whether or not this statute could, in its entirety, be lawfully enacted by the Dominion Parliament alone. It is sufficient, for our present purposes, that in its characteristic and ruling provisions (the qualifying words in s. 10 being neglected), it aims at control of trade "in matters of interprovincial concern," in such a degree as to exclude it from the category of legislation in respect of matters local in the provincial sense; and that the Committee of Direction construes the powers it derives from the Act as enabling it to exercise such control, and executes those powers accordingly.

In the result, the appeal should succeed with costs throughout. The appellant is entitled to a declaration that he is not liable to the imposition of any levy by the respondents on, or in respect of, any product marketed by him; and that the respondents have no authority in any manner, to regulate or control the "marketing" (in the sense defined by the Act) of his product for consumption beyond the boundaries of British Columbia.

NEWCOMBE J.—The legislation in question, unless within property and civil rights in the province or private and local matters in the province, is clearly incompetent to the legislature; and, if it come within any of the classes of subjects enumerated in s. 91, it is, by the concluding paragraph of that section, not within any of the enumerations of s. 92.

(1) (1883) 9 App. Cas. 117.
(2) (1885) 12 L.N. 206.
(3) (1881) 7 App. Cas. 96.
(4) [1918] A.C. 330.

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Newcombe J.

Now I wish to exclude, for the purposes of this judgment, any conclusion as to what the result would be if the *Produce Marketing Act* of British Columbia were not within any of the Dominion enumerated powers; there it appears that differences might emerge, and these are subjects of debate in which it is not necessary that we should now engage, because I am in complete agreement with the majority of my learned brothers that the legislation is referable to the exclusive Dominion power to regulate trade and commerce.

I thought there were two ways, either of which would serve to demonstrate the invalidity of the Act, and I had proposed to shew, independently of s. 91, that the legislation was neither property and civil rights nor private and local matters in the province; and, consequently, not within any of the provincial enumerations—a *ratio decidendi* which I thought free from difficulty. But, seeing that the majority of the Court has reached practically the same result by the other route, holding that the subject matter is embraced in the regulation of trade and commerce, where I think it strictly belongs, I am content, for the present purposes, to leave the extent of the provincial field, as defined by s. 92, unexplored.

CANNON J.—My brother Duff has in his opinion gone into all the details of the Act and regulations and, to avoid repetition, I will shortly state my views.

The Act, if restricted to the local provincial market, would, according to the evidence, have affected less than ten per cent of the fruit and vegetables grown in British Columbia; its intent and purpose was to regulate the trade outside the province. Its actual operation affects the shipment to points in Canada outside of British Columbia of about 90 per cent of the products.

The Act is intended to operate interprovincially, and its clauses and the regulations adopted to carry it out constitute barriers to free trade between the provinces and clash with section 121 of the *British North America Act*, 1867, which, in enacting that

> all articles of the growth, produce or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces,

prevents, in my humble opinion, any hindrance, such as that now before us, by legislation of the untrammelled

commerce between the provinces in all "articles of the growth, produce or manufacture" of any one of them.

By the *Produce Marketing Act* of 1927, the province of British Columbia imposed levies on the fruits or vegetables grown or produced in a large area, including appellant's farm, and obliged all shippers to secure a licence to market and sell products of the province anywhere within the Dominion under a penalty for each contravention. Even leaving aside the licence, and considering only the levy, I believe, as pointed out by my brother Duff, that such imposts on commodities, on trade in commodities, have always been regarded as indirect taxes for a public purpose and come under the head of "taxation"—which is dealt with in Part VIII of the *British North America Act,* where is found article 121. It may be considered as an excise tax which necessarily has a tendency to affect, and affects, the price of the product to the customer in another province. To use the words of Lord MacMillan, in *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Company* (1), the levy in question

> is an export tax falling within the category of duties of customs and excise, and as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the provincial legislature.

I, therefore, reach the conclusion that this legislation is an attempt to impose by indirect taxation and regulations an obstacle to one of the main purposes of Confederation, which was, ultimately, to form an economic unit of all the provinces in British North America with absolute freedom of trade between its constituent parts.

The appellant is entitled to a declaration that he is not liable to the imposition of any levy by the respondent on any product marketed by him, and that the respondent has no authority in any manner to regulate or control the marketing and sale by him of any product to any point beyond the boundaries of British Columbia, with costs throughout against respondent.

Appeal allowed with costs.

Solicitors for the appellant: *Pincott & Pincott.*
Solicitor for the respondent: *T. G. Norris.*
Solicitor for the intervenant: *W. S. Edwards.*

(1) [1930] A.C. 357, at 363.

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*March 16, 17, 18.
*April 28.

THE SHIP "MAY" (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Fisheries—Shipping—Foreign fishing vessel entering Canadian territorial waters—Customs and Fisheries Protection Act, R.S.C., 1927, c. 43, s. 10—"Stress of weather" or other "unavoidable cause" (Customs Act, R.S.C., 1927, c. 42, s. 183)—Convention of October 20, 1818, between Great Britain and the United States.

To justify (as against incurrence of penalty under the *Customs and Fisheries Protection Act,* R.S.C., 1927, c. 43, s. 10) an entry by a foreign fishing vessel into Canadian territorial waters on the ground of "stress of weather" (*Customs Act,* R.S.C., 1927, c. 42, s. 183), the weather must be such as to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains outside such waters he will put in jeopardy his vessel and cargo (*The Eleanor,* Edwards, 135, at 159, 160, 161; *The Diana,* 7 Wallace 354, at 360-361; *The New York,* 3 Wheaton 59, at 68; *Phelps, James & Co.* v. *Hill,* [1891] 1 Q.B. 605, at 614, cited). In each case the questions whether the master fairly and honestly on reasonable ground believed it necessary to take shelter, and whether he exercised reasonable skill, competence and courage in the circumstances, are questions of fact for the tribunal whose duty it is to find the facts.

In the present case, on the evidence, the finding at trial that defendant ship was within such waters when seized, and was not justified on the ground of "stress of weather" in entering them, was affirmed.

A contention that necessity to repair the engine was an "unavoidable cause" (*Customs Act,* s. 183, *supra*) justifying such entry, was rejected, as, on the evidence, the repair in question was not an immediate necessity, the defect not affecting the sailing of the vessel or making it more dangerous; moreover, failure to have the vessel in seasonable repair on going to sea could not be deemed an "unavoidable cause."

The Convention of October 20, 1818, between Great Britain and the United States (respecting fisheries and boundary lines) did not apply to the Pacific waters so far as fisheries were concerned, and therefore could not be available as justification for the entry in question.

APPEAL by the defendant ship from the judgment of Martin J., Local Judge in Admiralty, in the Exchequer Court of Canada, British Columbia Admiralty District, whereby he pronounced that the ship, a foreign fishing vessel within the meaning of the *Customs and Fisheries Protection Act,* R.S.C., 1927, c. 43, at the time of her seizure in

*PRESENT:—Newcombe, Rinfret, Lamont and Cannon JJ. and Maclean J. *ad hoc.*

British waters, had entered British waters within three marine miles of the coast of Canada for a purpose not permitted by treaty or convention, or by any law of Great Britain or of Canada for the time being in force, in violation of the *Customs and Fisheries Protection Act* aforesaid; and condemned the said vessel and the tackle, rigging, apparel, furniture, stores and cargo thereof as forfeited to His Majesty.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

Wm. Savage for the appellant.

D. L. McCarthy K.C. and *J. E. Read K.C.* for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal from a judgment of Mr. Justice Martin pronounced in the Exchequer Court of Canada, British Columbia Admiralty Division, in which he condemned as forfeited to His Majesty a fishing vessel named *May* registered at Ketchikan, U.S.A., and all her equipment, cargo and stores. The vessel was condemned on the ground that she was a foreign fishing vessel within the meaning of the *Customs and Fisheries Protection Act*, cap. 43, R.S.C., 1927, and that, at the time of her seizure, she was within three marine miles of the coast of Canada, having entered British waters for a purpose not permitted by treaty or convention or by any law of Great Britain or Canada, in violation of the said Act.

The *May* was a ten ton salmon trawler owned by B. O. Knudsen, and operated by Knudsen and one fisherman, Henry Christophersen. She was propelled by a 30 horsepower oil burning engine. She left Ketchikan at 9 a.m., June 3, 1930, and had on board 6 tons of ice, 700 gallons of oil and 100 gallons of water. Knudsen says he set out to go to the Cape Calvert fishing grounds, off Goose Island, some 200 or 250 miles south. His course lay straight across Dixon Entrance and down Hecate Straits. He says that about 3 or 4 p.m., a southeast wind sprang up and the sea became choppy; at 5 p.m., as the wind was increasing and dead ahead, he concluded it was too rough to venture

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down Hecate Straits, so he turned to go back to Cape Chacon, in American territory. After running a short distance before the wind, he says, a wave broke over his stern, so he directed his course southwesterly to find shelter behind Rose Spit Point of Graham Island. He sighted Rose Spit buoy between 6 and 7 p.m. and was then about two miles northwest of it. He says he headed south for the anchorage in McIntyre Bay, sailing by compass as it was misty, until about 9.30 when Christophersen took the soundings and found 40 fathoms of water. From the depth of the water he concluded he was outside the three mile limit. He then anchored and, after he had put some packing in the pump which is used to supply the engine with oil, he went to bed.

At 2.30 on the morning of June 4 the Canadian Government Patrol launch *Rividis,* commanded by Captain Sheppard, a commissioned officer in the Fishery Protection Service, ran alongside the *May* and Captain Sheppard boarded her. Both Knudsen and Christophersen were then asleep. He woke them up and Knudsen asked him if he thought he was within the three mile limit, to which Sheppard replied that he thought he was, but that he would wait until it was clear daylight so that he could verify the *May's* position. He then took possession of her papers and manifest and requested Knudsen to come on board the *Rividis* where he questioned him, entering the questions and answers in the log. The material questions and answers are as follows:—

Q. 1. What time did you anchor here?—A. 9.30 p.m. Date June 3rd.

Q. 2. What were the weather conditions when you anchored?—A. Pretty good when I anchored here.

Q. 3. What were the weather conditions for the past 48 hours?—A. Fine when I left Ketchikan and until 4 p.m. 3rd when it started to blow hard, well—not blow hard, but a choppy sea.

Q. 4. What was your reason for anchoring?—A. Bad weather off Rose Spit Buoy. It was very uncomfortable there.

* * * * *

Q. 9. How long have you been fishing in the locality?—A. About 3 weeks this season.

Q. 10. Do you think it was calm and smooth 8 to 10 miles off McIntyre Bay when you anchored off Rose Spit?—A. Possibly it was.

Q. 11. You did not trouble to go off shore and make certain?—A. No 1 steered for the anchorage first.

At daylight between the hours of 3 and 3.30 a.m., June 4, Captain Sheppard took both compass bearings and sex-

tant angles in order to fix the location of the *May*, and found her to be 2·5 miles from shore, half a mile within Canadian territorial waters. The entry in the log as to the location of the vessel is as follows:—

The following sextant angles were taken and verified by Lieut. Comdr. Godfrey.

Tow Hill and Argonaut Hill 25° 15′.

Argonaut Hill and end of trees 64° 10′.

The above angles placed boat *May* 2·5 miles S. 82 W. from end of trees and 1·8 miles from Boundary line between end of Rose Spit and Yakin Pt. I informed the skipper he was anchored inside the 3 mile limit, that the weather was fair and calm when he anchored, and was still fair with light S.E. wind and they were both asleep—so I would have to take him to Rupert. Would he use his own engines? Reply—No I am finished I am inside so do what you like; he would not start his engine to heave in his cable. The boat was taken in tow of Rividis 4.45 a.m. proceeding toward Prince Rupert.

At Prince Rupert proceedings were commenced which resulted in the *May* being declared forfeited.

The *Customs and Fisheries Protection Act*, under which proceedings were taken, provides as follows:—

10. Every fishing ship, vessel or boat which is foreign, or not navigated according to the laws of Great Britain or of Canada, which,

(*a*) Not being thereto permitted by any treaty or convention, or by any law of Great Britain, or of Canada for the time being in force, has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks or harbours of Canada, or in or upon the inland waters of Canada;

(*b*) has entered such waters for any purpose not permitted by treaty or convention, or by any law of Great Britain or of Canada for the time being in force;

* * * * *

shall, together with the tackle, rigging, apparel, furniture, stores and cargo thereof, be forfeited.

It is not contended that the *May* from the time she entered McIntyre Bay until she was seized was fishing or preparing to fish.

It is subsection (*b*) of section 10 that the Crown contends has been violated.

That the *May* was a foreign fishing vessel is admitted. Two questions, therefore, arise in the appeal: (1) When found by Captain Sheppard at anchor in McIntyre Bay, was the *May* within Canadian territorial waters? (2) If so, had she entered such waters for any purpose not permitted by treaty or convention or by the law of Great Britain or Canada then in force? These are purely ques-

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tions of fact or inference from fact or of interpretation. The trial judge gave no reasons for judgment but the formal judgment shews that he found the *May* to be in British waters when Captain Sheppard boarded her and that she had entered those waters in violation of the above Act.

Was the *May* within the three mile limit when seized? The trial judge had before him the evidence of Captain Sheppard that he had taken the sextant angles, which, it is common ground, is the most accurate method of ascertaining location; that he took the angles accurately and that the *May* was anchored two and a half miles from shore. He had also the evidence of D. S. Godfrey, Lieutenant-Commander in the Royal Canadian Navy, who also took the sextant angles and corroborated the evidence of Captain Sheppard. Commander Godfrey had no connection with, or interest in the Fishery Protection Service. His presence on the *Rividis* is accounted for by his having been sent to acquire some knowledge of the coast of the Queen Charlotte Islands. Both these men were highly qualified to ascertain the location of any boat by taking the sextant angles. Captain Sheppard also testified that he had asked Knudsen the questions quoted from the log and that the answers there reported were those given by Knudsen.

Both Knudsen and Christophersen knew that the sextant angles were being taken to locate the position of their vessel and that its fate might depend on the result arrived at; yet no request was made by either of them to be allowed to verify the angles taken. Furthermore, they both say they took compass bearings which shewed the *May* to be three and a half miles from shore, yet they made no protest when informed that they were within the three mile limit, nor did they ask Captain Sheppard to log into shore to verify the distance. Knudsen in his evidence admits that when he was asked to start his engine he replied "No, I think I am through with this boat," while, according to Captain Sheppard, his reply was " No, I am finished, I am inside so do what you like."

The conclusion of Captain Sheppard as to the location of the *May* when seized was questioned at the trial. The defence produced three expert witnesses who took Captain

Sheppard's angles and, by applying them on the chart to a point on Tow Hill and one on Argonaut Hill, found the *May* to be outside of Canadian territorial waters. When asked to explain how, with the same angles, there could be a difference between the location fixed by Captain Sheppard and themselves, they admitted that the difference might arise from his having taken a slightly different point on Argonaut Hill and Tow Hill from those on which they placed their lines on the chart. The discrepancy really arose from the fact that in the log the two hills were mentioned as the points taken. Now Argonaut Hill is situated inland and the top comprises a plateau more than half a mile square, the northwesterly face of which is shewn on the chart to be 535 feet high, while the opposite face is shewn to be 490 feet high. To get the same result it is obvious that each expert must take exactly the same points on Tow Hill and on Argonaut Hill. The defendant's experts frankly admitted that unless the fixed points taken on the ground were so clearly defined in the log that they could be accurately located on the chart, the man who sighted these fixed points on the ground had an advantage over those who had not seen the hills, as he alone knew the exact points on the hills which had been taken. When asked why he did not define in the log the exact points on those two hills, which he took to get the sextant angles, Captain Sheppard said he did not think it was necessary as every navigating officer taking observations around Tow Hill, Argonaut Hill and the "end of the trees" knew exactly the points which were always taken, and "would never use the top of Tow Hill for the simple reason that you cannot get such a fine cut on the sextant with the square faced bluff on Argonaut Hill." The point on Tow Hill which he took was the east side where it drops perpendicularly to the base of the river flat. On Argonaut Hill he took a point on a very conspicuous bluff on the centre of the hill at its highest part—"a peculiar wooded part of the hill that always stands out" when looked at from the position from which he took the angles. Captain MacDonald, one of the defendant's experts, on being recalled, admitted that, taking the points sighted by Captain Sheppard, the location of the *May* was within the three mile limit.

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On this evidence it is impossible to reverse the finding of the trial judge as to the location of the *May* without disbelieving the evidence of witnesses whom he heard and believed.

The next question is: did the *May* enter Canadian territorial waters for any purpose not permitted by treaty or convention or by the law of Great Britain or of Canada for the time being in force?

Counsel for the appellant vessel contended that she was permitted to enter Canadian waters under, (1) the *Customs Act*, section 183, and (2) "The Convention of 1818" between Great Britain and the United States. Section 183 of the *Customs Act* reads as follows:—

> 183. If any vessel enters any place other than a port of entry, unless from stress of weather or other unavoidable cause, any dutiable goods on board thereof, except those of an innocent owner, shall be seized and forfeited, and the vessel may also be seized, and the master or person in charge thereof shall incur a penalty of eight hundred dollars, if the vessel is worth eight hundred dollars or more, or a penalty not exceeding four hundred dollars, if the value of the vessel is less than eight hundred dollars, and the vessel may be detained until such penalty is paid.

It is common ground that this section, although primarily enacted as a customs provision for the protection of the revenue, does, by the exception contained in the words "unless from stress of weather or other unavoidable cause," give effect to a principle of International Law recognized by both countries, namely, that vessels of one nation will be excused for entering the territory of another if there is an actual necessity for their so doing. It is a well recognized principle, both in this country and in the United States, that the jurisdiction of a nation is exclusive and absolute within its own territory, of which its territorial waters within three marine miles from shore are as clearly a part as the land. All exceptions, therefore, to the full and complete power of a nation within its own territory must be traced to the consent of the nation itself given as a general rule by treaty, convention or statute. From this it follows that each nation has the absolute right to prescribe the conditions upon which the vessels of another nation will be permitted to enter its territorial waters. What we have to do, therefore, is to ascertain what conditions have been prescribed, to define the limits thereof, and then see if the facts, as disclosed by the evidence, bring the *May* within these limits.

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The condition prescribed by the *Customs Act* is "stress of weather or other unavoidable cause." In this case the appellant vessel must rely for her justification upon "stress of weather," for the other cause advanced, namely, that it was necessary to seek shelter to repair the engine, does not, in my opinion, merit serious consideration. The only repairing required was to renew the packing of the oil pump, which had become worn, thus causing the pump to leak. The leaking of the pump did not affect its usefulness for feeding the engine with oil, but it resulted in a waste of oil. It in no way affected the sailing of the vessel or made it more dangerous. This is shewn by the fact that Knudsen ran the vessel from, at least, 5 p.m. to 9.30 p.m. with the oil pump in its leaky condition, and stated that if he had found 15 fathoms of water under him instead of 40, when Christophersen took the soundings, he would have gone farther out. The packing of the oil pump was, therefore, not an immediate necessity. Besides, it was Knudsen's duty, not only to have his vessel seaworthy when he left Ketchikan on the morning of June 3, but to have her in seasonable repair, and, if he was compelled to enter into Canadian territorial waters by reason of his failure to have his vessel in seasonable repair, his failure cannot be designated as an unavoidable cause.

What, then, does "stress of weather" connote?

In *The Eleanor* (1), Sir William Scott said:

> Real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws. But if a party is a false mendicant, if he brings into a port a ship or cargo under a pretence which does not exist, the holding out of such a false cause fixes him with a fraudulent purpose. * * * Now it must be an urgent distress; it must be something of grave necessity; such as is spoken of in our books, where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say that there must be an actual physical necessity existing at the moment; a moral necessity would justify the act, where, for instance, the ship had sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage: Such a case, though there might be no existing storm, would be veiwed with tenderness; but there must be at least a moral necessity. Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage, for there the distress is only a part of

(1) (1809) Edwards' Admiralty Reports, 135, at 159, 160 and 161.

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the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner.

In *The Diana* (1), Field J. said:—

It is undoubtedly true that a vessel may be in such distress as to justify her in attempting to enter a blockaded port. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt. "Nothing less," says Sir William Scott, "than an uncontrollable necessity, which admits of no compromise, and cannot be resisted," will be held a justification of the offence. Any rule less stringent than this would open the door to all sorts of fraud.

In *The New York* (2), Livingston J. said:—

The necessity must be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skilful mariner, a well grounded apprehension of the loss of vessel and cargo, or of the lives of the crew. It is not every injury that may be received in a storm, as the splitting of a sail, the springing of a yard, or a trifling leak, which will excuse a violation of the laws of trade. Such accidents happen in every voyage; and the commerce of no country could be subject to any regulations, if they might be avoided by the setting up of such trivial accidents as these.

And Johnston J., in his dissenting opinion, remarked (3) that it was not questioned that if a vessel in the course of its voyage "sustained such damage as rendered it unsafe to keep the sea, she might innocently enter the ports of the United States to repair, and resume her voyage."

In *Phelps, James & Co.* v. *Hill* (4), the question was whether the master of a vessel was justified in deviating from his prescribed course. In his judgment Lopes J., at page 614, said:

A reasonable necessity implies the existence of such a state of things as, having regard to the interests of all concerned, would properly influence the decision of a reasonably competent and skilful master.

A perusal of the above authorities leads to the conclusion that an entry by a foreign vessel into Canadian waters cannot be justified on the ground of "stress of weather" unless the weather is such as to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains outside the territorial waters he will put in jeopardy his vessel and cargo.

(1) (1868) 7 Wallace, 354, at 360-361.
(2) (1818) 3 Wheaton, 59, at 68.
(3) *Ibid*, at 75.
(4) [1891] 1 Q.B. 605.

In every case the questions whether the master fairly and honestly on reasonable ground believed it necessary to take shelter, and whether he exercised reasonable skill, competence and courage in the circumstances, are questions of fact for the tribunal whose duty it is to find the facts.

The evidence in this case does not shew any necessity whatever for entering Canadian waters, much less any apprehension on the part of Knudsen that if he continued his voyage he would be risking the loss of his vessel. On the afternoon of June 3, Christophersen says they were off Zayas Island to the south and west, and were opposite Dundas Island, and passed two or three fishing vessels going north towards Ketchikan. One of them was the *Queen City,* whose captain, Thorgersen, testified in favour of the appellant. The wind was then blowing from the southeast and the other vessels were heading for American territory and running before the wind. Thorgersen says that his boat was getting the sea over her stern once in a while. These boats experienced no difficulty in going with the wind, so why should the *May?* Furthermore, if Knudsen thought there was any danger in continuing his voyage, all he had to do was to run behind Zayas Island, or Dundas Island, and wait until the wind subsided. Instead, however, he sailed southwest for McIntyre Bay. In following that course he was crossing the sea running almost in its trough for a distance nearly as far as that required to take him to Cape Chacon. If the waves passed over his stern when running before the wind it is difficult to understand how he could escape them by taking them on his side. In addition there is the admission of Knudsen that when he was two miles off Rose Spit buoy the wind was moderating and that the weather was "pretty good" when he anchored.

The answers given by Knudsen to the questions put to him by Captain Sheppard and recorded in the log shew that his real reason for going into McIntyre Bay was that it was more comfortable in its sheltered waters than it would have been outside the three mile limit. That there was no necessity for taking shelter is shewn by the fact that outside, some ten or twelve miles from shore, there were, according to Captain Sheppard and Commander Godfrey,

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18 or 20 trawlers fishing, between 5 and 7 p.m., and that at 7 p.m. they appeared to Commander Godfrey to have anchored. It was for the trial judge to pass upon the evidence before him and say whether or not the proper inference to be drawn from it was that there existed at the time such "stress of weather" that the *May* was justified in entering Canadian territorial waters for shelter. His finding was that none existed and, in my opinion, that finding should be affirmed.

Counsel for the appellant argued that even if the term "stress of weather" was held to mean an uncontrollable necessity when applied to merchant ships, it should not be given that meaning when applied to fishing vessels, as fishermen were "wards of civilization and entitled to favourable treatment." The statute makes no such distinction and I am unable to see any good reason why fishing vessels should not comply with the statute. The owners or operators of these vessels carry on their business for profit and, in this case, in competition with Canadian fishermen. They should, therefore, be held to a strict observance of the conditions which the statute prescribes for their entry into Canadian waters.

It is also claimed on behalf of the appellant that the *May* had a right to enter Canadian waters under article 1 of the "Convention respecting Fisheries and Boundary Lines," etc., concluded between Great Britain and the United States on October 20, 1818, which, it is contended, applies to the Pacific coast of Canada. Article I of the Convention contains the following:—

> And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above mentioned limits; Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

To properly understand this article it is necessary to refer to the treaty made at Paris between the two nations in September, 1783. By article 1 of that treaty Great Britain

recognized the independence of the United States. Article 2 defined the boundaries of the United States and fixed the boundary line between the two countries from the Atlantic Ocean westerly to the Lake of the Woods. By article 3 it was agreed that the people of the United States should continue to enjoy the fisheries of Newfoundland and the Gulf of St. Lawrence and at all other places in the sea where the inhabitants of both countries used theretofore to fish, and also that they should have *liberty* to take fish on the British coast generally, and to dry and cure fish on the unsettled bays, harbours and creeks of Nova Scotia, Magdalen and Labrador.

Differences arose between the two countries as to the extent of these liberties, which differences continued until the war of 1812. After that war Great Britain claimed that the liberties were abrogated by the war, while the United States Government contended that they still existed. To settle the dispute a new agreement was entered into by the Convention of 1818. Under that convention the right to take fish, granted by article 3 of the treaty of 1783, was continued, but the liberty to fish within three marine miles of the coasts, bays, creeks or harbours of His Britannic Majesty in America, except in certain specified places, was, by the American Government, renounced forever, but subject to the proviso of article 1 quoted above. The Convention also fixed the boundary between the two countries, west from the Lake of the Woods to Stony (Rocky) Mountains at the 49th parallel of north latitude. Article 3 of the Convention, in part, reads as follows:—

> It is agreed that any country that may be claimed by either party on the north-west coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open for the term of ten years from the date of the signature of the present convention, to the vessels, citizens, and subjects of the two powers.

In 1827 the provisions of article 3 were extended indefinitely. In 1846 the two nations entered into a treaty defining the boundary line between them from the Rocky Mountains, where it had been fixed by the Convention of 1818, to the Pacific Ocean, at the 49th parallel of north latitude. All north of that line to parallel 54° 40′ was awarded to Great Britain, and all south of it to the United

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States. It was not until the ratification of this treaty that the sovereignty of Great Britain to any part of the Pacific Slope, north of the 49th parallel of latitude, was recognized by the United States. This is admitted in the appellant's factum, where the following appears:—

> It should be noted that Article III of the "Convention of 1818" was passed without prejudice to any claim of either party to the territory of the coast of the North Pacific. This did not mean that the territory was "then almost wholly terra incognita." (*The King* v. *The Valiant, supra* (1)) but on the contrary it meant that the territory was claimed by both United States and Great Britain and was finally settled as the property of Great Britain from Lat. 49° Northward to 54° 40′ including the locus in question in this case.

In view of the fact that at the date of the "Convention of 1818" the United States had not recognized the sovereignty of Great Britain to the Pacific slope, it is, in my opinion, impossible to hold that the reference to the "coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America," contained in article 1 of the "Convention," was intended by either party to apply to the Pacific coast. I, therefore, agree with the conclusion reached by Mr. Justice Martin in *The King* v. *The Valiant* (1), that the "Convention of 1818" did not apply to the Pacific waters so far as fisheries were concerned.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Savage & Keith.*

Solicitors for the respondent: *MacNeill, Pratt, MacDougall & Morrison.*

(1) (1914) 15 Can. Ex. C.R. 392; 19 B.C.R. 521.

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*Mar. 17, 18.
*April 28.

THE SHIP "QUEEN CITY" (DEFENDANT)..APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

THE SHIP "TILLIE M." (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

THE SHIP "SUNRISE" (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Fisheries—Shipping—Foreign fishing vessel entering Canadian territorial waters—Customs and Fisheries Protection Act, R.S.C., 1927, c. 43, s. 10—"Stress of weather" (Customs Act, R.S.C., 1927, c. 42, s. 183)—Class of vessel—Weaknesses in vessel—Convention of October 20, 1818, between Great Britain and the United States.

To justify (as against incurrence of penalty under the *Customs and Fisheries Protection Act*, R.S.C., 1927, c. 43, s. 10) a foreign fishing vessel entering Canadian territorial waters on the ground of "stress of weather" (*Customs Act*, R.S.C., 1927, c. 42, s. 183), there must be such a condition of atmosphere and sea as would produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains outside such waters he will put in jeopardy his vessel and cargo (*The May* v. *the King*, *ante*, p. 374, and authorities there cited).

In the present case, *held*, that the evidence amply supported the finding at trial that there was no stress of weather or other sufficient cause to justify the entry of defendant vessels into such waters, and that the judgment at trial declaring them forfeited under s. 10 of the *Customs and Fisheries Protection Act* should be affirmed.

Remarks as to suspicion against *bona fides*, if a foreign fishing vessel entered Canadian waters for shelter because it was of such a class of construction that it could not with safety remain outside against weather that was known to prevail on its fishing grounds. A want of *bona fides* would abrogate any right or privilege to shelter given by the statute. Further, weaknesses in a vessel may be such (as instanced in certain respects in the present case, as, e.g., glass of inadequate thickness in pilot house windows a small height from the sea, constituting a special danger from waves) that any distress arising from them should be deemed a distress created by the owner or master

*PRESENT:—Newcombe, Rinfret, Lamont and Cannon JJ. and Maclean J. *ad hoc*.

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himself (*The Eleanor*, Edwards, 135, at 161), and not due to "stress of weather or other unavoidable cause" (*Customs Act*, s. 183).

The Convention of October 20, 1818, between Great Britain and the United States (respecting fisheries and boundary lines) has no application to Canadian territorial waters on the Pacific Coast, so far as fisheries are concerned (*The May* v. *The King, ante*, p. 374). Even if it had, the defendant vessels could claim no privilege under it, as the only permission to take shelter in Canadian waters given by the proviso to article 1 thereof (or by 59 Geo. III, c. 38, Imp., passed to sanction the Convention) is permission to enter "bays or harbours," and the place where they were seized was not shewn to be a bay or harbour.

APPEAL by the defendant vessels from the judgment of Martin J., Local Judge in Admiralty, in the Exchequer Court of Canada, British Columbia Admiralty District, holding that the vessels, foreign fishing vessels within the meaning of the *Customs and Fisheries Protection Act*, R.S.C., 1927, c. 43, had violated s. 10 of said Act, in that each vessel, (as pronounced in the formal judgment) "at the time of her seizure in British waters, had entered British waters within three marine miles of the coast of Canada for a purpose not permitted by treaty or convention, or by any law of Great Britain or of Canada for the time being in force"; the learned judge holding that, under the particular circumstances, there was no "stress of weather or other unavoidable cause" within the true meaning of s. 183 of the *Customs Act*, R.S.C., 1927, c. 42, warranting such entry; and condemning the vessels and their tackle, rigging, apparel, furniture, stores and cargo as forfeited to His Majesty.

The three actions had been tried together. The material facts of the case are sufficiently stated in the judgment now reported. The appeal in each case was dismissed with costs.

Wm. Savage for the appellants.

D. L. McCarthy K.C. and *J. E. Read K.C.* for the respondent.

The judgment of the court was delivered by

LAMONT J.—These three cases were heard together before Mr. Justice Martin in the Exchequer Court of Canada, British Columbia Admiralty Division, who held that each vessel was a foreign fishing vessel which had entered Canadian territorial waters for a purpose not permitted

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by treaty or convention or by any law of Great Britain or Canada, in violation of section 10 of the *Customs and Fisheries Protection Act*, cap. 43, R.S.C., 1927.

On the morning of June 18, 1930, between 1.30 and 2 a.m., Captain Sheppard of the fisheries patrol launch *Rividis* found five vessels at anchor in Canadian territorial waters on the east side of Rose Spit about three-quarters of a mile from shore. He boarded each in turn and ordered the master of each to come on board the *Rividis* with his ship's papers and manifest. There he questioned each master separately and entered the material questions and answers in the log. Lieutenant Commander Barnes of the Canadian Navy, who was at the time on board the *Rividis*, was present at the examination of each master; heard the questions asked and the answers given, and saw Captain Sheppard enter question and answer in the log. Immediately thereafter he read what Captain Sheppard had written and testified that the questions and answers appearing in the log were the questions put to and the answers given by the several masters. After questioning the masters of the respective vessels, Captain Sheppard directed three of the vessels, namely, the *Sunrise*, the *Queen City* and the *Tillie M.*, to proceed to Prince Rupert. Arriving there the vessels were put in the hands of the customs officers and proceedings were commenced which resulted in their forfeiture. The other two vessels, the *Frederick* and the *Anne*, were not seized, as the explanation of their masters for entering Canadian waters was deemed satisfactory.

It is not disputed that the three vessels were registered in the United States of America, nor that they were within three-quarters of a mile of the Canadian shore when they were seized by Captain Sheppard. The contention of their counsel is that they were permitted to enter Canadian waters (1) by virtue of section 183 of the *Customs Act*, and (2) under article 1 of the "Convention Respecting Fisheries and Boundary Lines, etc.," concluded between Great Britain and the United States on October 20, 1918.

For the reasons set out in the judgment of this court in *The Ship May* v. *The King* (delivered herewith) (1), we are of opinion that the Convention of 1818 has no

(1) *Ante*, p. 374.

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application to the territorial waters of Canada on the Pacific coast, so far as fisheries are concerned. But even if it had, not one of these vessels could claim any privilege under it. By article 1 of the Convention the United States renounced forever the liberty theretofore enjoyed or claimed by the inhabitants thereof to fish within three marine miles of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America, not included in the limits mentioned. But it was provided that American fishermen should be permitted to enter such "*bays* or *harbours* for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever." The only permission to take shelter in Canadian waters given by the proviso of article 1, or by the Imperial statute, 59 Geo. III, cap 38 (which was passed to sanction the Convention) is permission to enter the bays and harbours. Now the place where these three vessels were seized is not shewn on the chart or established by the evidence to have been either a bay or a harbour, and if it is not there is no provision either of treaty or statute which authorizes entry for the purpose of shelter. Moreover the absence from the proviso of article 1, of the words "coasts" and "creeks," which appear in conjunction with bays and harbours in the first part of the article, conclusively indicates that the privileges conferred as to bays and harbours were not meant to extend to coasts not included in that description. The sole question in this appeal, therefore, is: were these vessels, or any one of them, permitted to enter Canadian waters by virtue of section 183 of the *Customs Act,* which inferentially permits entry by a foreign vessel when "stress of weather or other unavoidable cause" compels her to seek shelter therein.

On the authorities referred to in the judgment in *The Ship May* v. *The King* (1), we came to the conclusion that "stress of weather" which would justify a foreign fishing vessel entering Canadian waters—on the ground of stress of weather—must be such a condition of atmosphere and sea as would produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains

(1) *Ante,* p. 374.

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outside the Canadian waters he will put in jeopardy his vessel and cargo. Does the evidence disclose the existence of such a state of atmosphere and sea on June 17, 1930, in the vicinity of Rose Spit, as would justify the entry of a foreign vessel into Canadian waters on the ground of "stress of weather"?

The learned trial judge had before him the evidence of Captain Sheppard and Lieutenant Commander Barnes as to the condition of the weather on June 17, and the early morning of June 18, when these vessels were seized. He had also their evidence as to the statements made by the master of each vessel as set out in the log and the statements of the several masters in the witness box at the trial, which were, in some material respects, in conflict therewith. Further he had certain facts, established by uncontradicted evidence, from which he was entitled to draw inferences as to the credibility of the witnesses.

Captain Sheppard and Lieutenant Commander Barnes testified that, on June 17, they left Skidgate and came up the easterly side of Graham Island, running from three to five miles off shore; that from one o'clock in the afternoon until the vessels in question in this appeal were boarded the wind was "light to fresh westerly, sea smooth, weather clear, barometer steady," and that there was no necessity for any vessel to seek protection from the weather. At 10.30 p.m. they anchored off the east coast of Rose Point and saw five vessels about two or two and a half miles farther north, likewise anchored within half or three-quarters of a mile from the shore. There were also two other vessels, similar in type to those seized, anchored outside the three mile limit. These were later inspected by Captain Sheppard and found to be, one a Canadian trawler, and the other an American. Their crews were then all asleep and the boats were riding peacefully at anchor. Both these witnesses testify that Graham Island furnished protection to vessels as far out as six or eight miles from shore.

L. Sandberg, master of the *Sunrise*, and his partner, Erick Wilson, testified that they were fishing off Rose Spit buoy on June 15, and anchored that night on the fishing grounds, but, about 3.30 a.m. of the 16th, as the wind began to blow hard from the west, they pulled up anchor and came to the east side of Rose Spit for shelter, being

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protected from the force of the waves by Sand Island; they further testified that they remained there until 8 a.m. on the 17th, in the belief that it was not safe to be outside the three mile limit. On the morning of the 17th, being under the impression that they could not remain more than twenty-four hours in Canadian waters, they left for the fishing grounds north of Rose Spit buoy. After going eight or nine miles they turned and came back as the sea was too rough for fishing and, according to their statement, it was not safe for the vessel to remain outside. They got back about 2 p.m., having been out at sea for five hours. According to Captain Sheppard and Lieutenant Commander Barnes, Sandberg stated, when being questioned on board the *Rividis,* that he anchored on the east side of the point at 1 p.m., on the 17th, and, when asked if he could not with safety have run back and forth four miles off shore, replied "No doubt I could." This was denied by Sandberg in his evidence.

Captain Jepsen of the *Tillie M.* testified that he anchored in the fishing ground north of the Rose Spit buoy on the night of the 15th, but came in for shelter on the morning of the 16th, and remained there until 8.30 on the morning of the 17th, when he went out to the fishing grounds again, two or three miles north of the buoy. He started to fish but found the sea too rough, so he came back to the anchorage about 2 p.m., having also been out some five hours. According to the entries in the log Jepsen, when questioned on board the *Rividis,* stated that he had anchored at Rose Spit, "on the 16th p.m.," because "it was blowing too hard to lay off shore."

J. E. Thorgersen, owner and master of the *Queen City,* and his assistant, Jens Blyseth, testified that they left Ketchikan on the morning of June 17 to go to Seattle to get a new block for their engine, but that they intended to fish on the way. They set a course from the east side of Duke Island for Bonila Island fishing grounds on the east side of Hecate Straits, but, in the afternoon, altered their course to the southwest so as to reach the east side of Rose Spit; that, when about fifteen miles from Rose Spit buoy, the wind was blowing hard and the sea was rough; that when they saw Rose Spit buoy they turned south and ran for six or seven miles outside the three mile limit but, fearing they

might be swamped, they turned and ran in close to shore, and anchored at 9.15 p.m. According to the entries in the log, Thorgersen told Captain Sheppard that he anchored at Rose Spit at 10 a.m. on the 17th June; that the weather was stormy and wind increasing. When asked if he thought he could have run up and down the coast four miles off shore with safety, his answer was, "Yes I think I could if everything worked all right."

All these witnesses for the defence claimed that it was too rough to remain outside the three mile limit in safety.

In corroboration of the evidence of Captain Sheppard and Lieutenant Commander Barnes, the trial judge had before him the admission of Captain Jepsen that, when he was attempting to fish on the 17th, he did not consider himself in any danger; and the statement of the master of the *Frederick* that he did not think his boat would have been in danger of swamping had he stayed off shore, but that it would have been uncomfortable. He also had the fact that, on the afternoon and evening of the 17th, the *Queen City* ran right across Dixon's Entrance with the wind on her quarter, going through what is known to be the roughest waters in those parts and at a time when she was supposed to be in a crippled condition by reason of her split engine block. Her master, Thorgersen, when questioned as to the state of the weather when he anchored would not say that it was then any worse than it had been at 6 p.m. The *Queen City* was the smallest of all these vessels, having a capacity of only eight tons net, and having, when loaded with ice as she was that day, both at her stern and amidships, a free board of only 6 or 8 inches. In addition the trial judge had before him the significant fact that outside the three mile limit and directly east of these vessels, two other fishing vessels were riding at anchor, although one of them, the Canadian vessel, had a perfect right to be within the three mile limit if she thought it desirable. The masters of these vessels evidently had no apprehension of loss or damage to their vessels or danger to themselves if they anchored outside the three mile limit, and the Canadian vessel could not have found it even uncomfortable or she would have exercised her right to draw into shore.

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Whether there was "stress of weather" within the meaning of section 183 on the afternoon and evening of June 17, was a question of fact depending upon the credibility of the witnesses. The trial judge is known as an able and careful judge, with more than thirty years' experience in cases similar to those before us, and he accepted the evidence submitted on behalf of the Crown in preference to that submitted on behalf of the several vessels. In *Ruddy* v. *Toronto Eastern Railway Company* (1), the Privy Council said:—

> But upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

The trial judge found that there was no stress of weather or other sufficient cause to justify the entry of these vessels into Canadian territorial waters and, in our opinion, the evidence amply supports the finding, which should be affirmed.

The conclusion which we have reached is sufficient to dispose of the appeal in favour of the respondent, but as, on the argument, great stress was laid by the appellants on the contention that "the extent of the stress of weather should be considered in relation to the class of vessels involved," it may not be inadvisable to make some reference thereto. It was argued on behalf of the appellants that these fishing vessels "have some weaknesses which make them vulnerable when the waves break over them." These weaknesses are specified in the factum as follows:—

(*a*) They have a low free board, i.e., they sit low in the water.

(*b*) They carry no navigating sails, the only sail being a small canvas called a "leg of mutton sail" which is used to assist in steadying the vessel from rolling in the seaway.

(*c*) The *Tillie M.* presented a weak glass front pilot house to the sea which being only a small height from the sea constitutes a special danger in case of waves.

(*d*) They have a large open cockpit at the stern of the vessel in which they clean and dress their fish * * * and when the waves come over the vessel the cockpit fills and settles the vessel down in the sea at the stern making it unsteerable and dangerous.

(*e*) They were powered by diesel or gasoline engines having very delicate parts which are liable to get out of order in storm.

(*f*) These fishing vessels must of necessity carry a large weight in ice for preservation of fish, of fuel for their engines and of water

(1) (1917) 116 L.T. 257, at 258.

and supplies. * * * They are thus too heavily loaded to stand severe storms.

(*g*) Each vessel is manned by a master and fisherman, one of whom usually navigates the vessel and the other operates the engine. These men fish from daylight to dark so that if riding out a storm at night is added to their duties they must suffer from exhaustion.

On the other hand counsel for the Crown strongly urged that the employment for fishing of vessels which present these weaknesses is nothing more or less than a ruse on the part of the owners thereof to occupy Canadian waters under the pretence that their vessels cannot remain outside with safety, and that they then either fish in these waters or use them as a base from which to compete with Canadian fishermen on the international fishing grounds.

In both Great Britain and the United States it is recognized that the jurisdiction of a nation is exclusive and absolute within its own territory which includes the waters within three marine miles from the shore. No other nation can claim jurisdiction as a matter of right within the territorial waters of an independent state. It follows, therefore, that the citizens of a foreign state cannot claim any right or privilege in Canadian waters except such as has been given to them by the British or Canadian Governments. In *The Eleanor* (1), Sir William Scott enunciated the principle which, in our opinion, applies to the weaknesses of the vessels as above set out. He says:—

Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage, for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner.

Canada has nothing to say as to the class of vessel which the citizens of a foreign state may employ to carry on fishing operations outside of Canadian territorial waters. If, however, a foreign fishing vessel enters Canadian waters for shelter against weather which is known to prevail on the fishing grounds, and the vessel is so constructed that it cannot with safety remain outside the three mile limit in such weather, there might arise a suspicion of want of *bona fides* on the part of the master or owner in bringing

(1) (1809) Edwards' Admiralty Reports, 135, at 161.

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a vessel of that class into such seas to fish. A want of *bona fides* would abrogate any right or privilege to shelter given by the statute.

Apart from any distress which may result from the employment of vessels unsuited to the seas or weather which prevail in Dixon's Entrance or Hecate Straits, any distress arising from other "weaknesses" for which consideration is claimed, is, in our opinion, a distress created by the owner or master himself which it is in his power to prevent and therefore cannot be said to be due to "stress of weather or other unavoidable cause."

The frivolous character of these "weaknesses" is illustrated by the contention that the "*Tillie M.* presented a weak glass front pilot house which constituted a special danger in case of waves." A perusal of the evidence of P. C. Jepsen, her master, shews that when the vessel was built the builder put square window glass 12 x 14 in the three windows of the house over the engine room, instead of, as he contends it should have been, port lights, i.e., glass of the thickness of port lights. Jepsen has sailed this vessel for three years without harm, and he says that the window glass is all that he is afraid of in a storm. If he had any real fear as to the safety of his vessel, we think it would have occurred to him sometime during those three years to take out the window glass and put thicker glass in its place.

The evidence in these cases shews that the boats could have remained outside the three mile limit in safety even directly east of the place where they were anchored. Farther to the south they would have been protected as far out as six or eight miles from the shore because the island is higher to the south than at the point where they anchored. It is true it might not have been as comfortable for sleeping outside the three mile limit, owing to the motion of the sea, as in the quiet waters near the shore. The statute, however, has not provided that foreign vessels may enter Canadian waters if it is more comfortable there than outside. From a westerly wind, such as existed on June 17, shelter outside the three mile limit can always be found by running south in Hecate Straits on the east side of Graham Island and, in our opinion, there was no

necessity to approach within three miles of the coast for shelter or by reason of stress of weather.

These appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Savage & Keith.*

Solicitors for the respondent: *MacNeill, Pratt, MacDougall & Morrison.*

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WESTERN CLOCK COMPANY.....APPELLANT;

AND

ORIS WATCH COMPANY, LTD.....RESPONDENT.

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*April 28.
*April 29.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeal—Jurisdiction—Exchequer Court Act, R.S.C., 1927, c. 34, s. 82—"Actual amount in controversy"—Value of right involved—Proof by affidavit—Insufficiency of facts sworn to.

Appellant sued in the Exchequer Court to expunge respondent's trade-mark from the register. No amount was claimed for damages. The action was dismissed. Appellant appealed to this Court (without obtaining leave under s. 83 of the *Exchequer Court Act*). Respondent moved to quash the appeal for want of jurisdiction, on the ground that there was no "actual amount in controversy" in the action. Appellant replied by affidavit that the registration of the trade-mark had "aggrieved" appellant "in an amount exceeding $500."

Held: Assuming, but not deciding, that the words "actual amount in controversy" in s. 82 of the *Exchequer Court Act*, do not imply that there must be a sum of money exceeding $500 actually in dispute, but that a claim for property or rights of which the value exceeds $500, if actually involved in the action, suffices to give this Court jurisdiction to entertain the appeal under s. 82, and that such value may be proved by affidavit, yet appellant's affidavit was insufficient for the purpose, because, while appellant might have sustained the amount of damages sworn to as the result of registration of the trade-mark, it did not follow that the value of its right to have the trade-mark expunged exceeded $500, and that was what required proof, to bring this case (on the assumption aforesaid) within s. 82.

MOTION on behalf of the respondent for an order quashing the appeal, which was brought from the judgment of Audette J. in the Exchequer Court of Canada (1),

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont, Smith and Cannon JJ.

(1) [1931] Ex. C.R. 64.

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dismissing the appellant's action, which was for the expunging from the register of a specific trade-mark registered by the respondent. The respondent's motion was made on the ground of want of jurisdiction, in that there was no "actual amount in controversy" (*Exchequer Court Act*, R.S.C., 1927, c. 34, s. 82) in the action.

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

G. F. Henderson K.C. contra.

The judgment of the court was delivered by

ANGLIN C.J.C.—Without so deciding, but assuming that the words "the actual amount in controversy" in s. 82 of the *Exchequer Court Act* (R.S.C., 1927, c. 34) do not imply that there must be a sum of money exceeding $500 actually in dispute in the action, but that a claim for property or rights of which the value exceeds $500, if actually involved in the action, suit, etc., suffices to give this Court jurisdiction to entertain the appeal under s. 82, (See *Sun Life Assur. Co. of Canada* v. *Superintendent of Insurance* (1); *Burnett* v. *Hutchins Car Roofing Co.* (2)), and that such value may be proved by affidavit,—we are all of the opinion that the affidavit filed on behalf of the appellant to prove the value in this case is insufficient.

The respondent having put in an affidavit to the effect that "there is no actual amount in controversy in this action," the appellant replies by an affidavit which contains the following passages:

2. This is an action to expunge a specific Trade-Mark registered by the Respondent herein, as Folio Number 47084, Register 220.

3. That the registration of the said Trade-Mark by the Respondent as aforesaid has aggrieved the Appellant (Petitioner) herein in an amount exceeding Five Hundred ($500) dollars.

While the appellant may have sustained the amount of damages sworn to as the result of the registration of the trade-mark by the respondent, it does not at all follow that the value of his right to have such trade-mark expunged exceeds the sum of five hundred dollars; yet that is what he would be required to swear to in order to bring this case within s. 82 of the *Exchequer Court Act*, there being no amount claimed for damages, but merely a claim for the expunging of the respondent's trade-mark.

(1) [1930] Can. S.C.R. 612, at 615 *et seq.*

(2) (1917) 54 Can. S.C.R. 610.

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WESTERN CLOCK CO. v. ORIS WATCH CO.

Anglin C.J.C.

As I have indicated, we shall assume the proof of value of the right in question can be made by affidavit, and that, if such value be shown to exceed $500, an appeal lies to this Court under s. 82; but, that not having been done, the alternative was to obtain leave to appeal from a judge of this Court, under s. 83. This has not been done.

Whether the time can now be extended and leave granted by virtue of such extension, under s. 83, is a question for the consideration of the appellant. (*Goodison* v. *McNab* (1).)

Meantime, and as matters now stand, the Court is without jurisdiction to hear the appeal and the motion to quash must be granted with costs.

Motion granted with costs.

Solicitors for the appellant: *Henderson, Herridge & Gowling.*

Solicitors for the respondent: *Smart & Biggar.*

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*Feb. 5, 6.
*April 28.

IN THE MATTER OF THE INCOME WAR TAX ACT

AND

IN THE MATTER OF THE APPEAL OF MRS. CATHERINE SPOONER OF THE CITY OF CALGARY, IN THE PROVINCE OF ALBERTA

MRS. CATHERINE SPOONER.....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Income War Tax Act, 1917 (Dom.), as amended—"Income" —Royalty reserved to vendor of land, of percentage of oil, etc., produced by purchaser.

Appellant sold to a company land, including minerals, for a cash sum, shares in the company, and a royalty (so called) reserved of 10% of all oil, etc., produced and saved from the land free of cost to appellant on the premises. The company covenanted to commence and continue drilling operations, and, on discovery of oil, to instal machinery

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1910) 42 Can. S.C.R. 694.

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for pumping it, etc. It struck oil, sold all the oil produced in 1927, and paid to appellant, as being the royalty under the agreement, one-tenth of the gross proceeds thereof. The question now in issue was whether or not appellant, in respect of the amount so received by her as royalty, was assessable by the Crown for income tax under the *Income War Tax Act, 1917* (Dom.) as amended. Appellant was not a dealer in or in the business of buying and selling oil lands or leases.

Held: Appellant was not so assessable. The amount in question was not income to her within the meaning of the Act. *Jones* v. *Commissioners of Inland Revenue,* [1920] 1 K.B. 711, distinguished, having regard to the subject matter and statutes involved. Judgment of the Exchequer Court (Audette J.), [1930] Ex. C.R. 229, reversed.

APPEAL from the judgment of Audette J. in the Exchequer Court of Canada (1), holding the appellant liable for income tax with respect to certain monies received by her as royalty under an agreement.

By agreement dated April 15, 1925, the appellant sold certain land to a company, which, in consideration of the sale, agreed to pay to the appellant a certain cash sum upon the execution of the agreement by the company, and to issue to her a certain number of shares of the company's capital stock, and further agreed

in consideration of the said sale to deliver to the order of the said vendor (appellant) the royalty hereby reserved to the vendor, namely: ten per cent of all the petroleum, natural gas, and oil, produced and saved from the said lands free of costs to the said vendor on the said premises. * * *

The material clauses of the agreement are sufficiently set out or described in the judgment now reported. (Also the agreement is set out in full in the judgment of the Exchequer Court (2)).

During the fall of 1926 the company struck oil in commercial quantities on the land.

The whole of the oil produced in 1927 (the year in question) was sold by the company and out of the monies received from the sale of the oil (before the company deducted expenses or made any reduction therefrom) one-tenth of the gross proceeds were paid over to the appellant.

In respect of the money so paid over to the appellant, she was assessed for income tax under the *Income War Tax Act, 1917* (Dom.) as amended. She appealed from the assessment on the ground that the money so received by her was not taxable income. The Minister of National

(1) [1930] Ex. C.R. 229.

(2) [1930] Ex. C.R. 229, at 231-233).

Revenue affirmed the assessment on the ground that under and by virtue of the agreement between the appellant and the company the appellant

secured unto herself an income, fluctuating annually in accordance with the production of oil and that the monies realized from the sale of such oil either by herself or through her agent or by contract or otherwise, such monies coming to her constitute taxable income and she is taxable in respect thereof, subject however, to adjustment as to depletion * * *

The appellant appealed from the decision of the Minister, which appeal was dismissed by Audette J. in the Exchequer Court of Canada (1). Leave to appeal to the Supreme Court of Canada was granted by a judge of this Court.

At the opening of the trial in the Exchequer Court, the following facts were agreed upon by counsel for the parties:

1. The Appellant in 1902 purchased from the Canadian Pacific Railway the lands referred to in the hereinafter referred to Agreement along with other lands, the whole for the purpose of conducting ranching operations thereon. The Appellant was not and is not a dealer in or in the business of buying and selling oil lands or leases.

2. The Appellant was in 1927 and is now a resident in Canada.

3. The Respondent determined the income of the Appellant to be in the sum of $9,570.41, being monies received as "Royalties" under the Agreement hereinafter referred to.

4. Vulcan Oils Limited was and is a Company incorporated on the 13th day of April, 1925, under the laws of the Province of Alberta, organized and operated for the purpose of drilling for and procuring the production and vending of oil.

5. That Vulcan Oils Limited and the Appellant entered into an Agreement dated the 15th day of April, 1925, a true copy of which has been filed with and forms part of the records of this Court.

6. That of the property referred to in the said Agreement the Appellant was the owner in fee simple except as to the coal therein and thereunder.

7. That in accordance with the said Agreement Vulcan Oils Limited entered upon the property as in the Agreement described and commenced the operations of drilling for oil with equipment and in a manner satisfactory to the Appellant.

8. That during the fall of 1926 Vulcan Oils Limited struck oil (as referred to in the contract) "in Commercial quantities on the said lands."

9. A transfer of the petroleum, natural gas or oil has not been effected and the Appellant is still the owner in fee simple of the said lands except as to coal.

10. That due to the mining operations the whole of the oil produced in the year 1927, the year in question, was sold by Vulcan Oils Limited and out of the monies received from the sale of the oil (before the Company deducted expenses or made any reduction therefrom) one-tenth of the gross proceeds were paid over to the Appellant.

(1) [1930] Ex. C.R. 229.

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11. That the oil produced by Vulcan Oils Limited is not in fact physically divided by the Company nor is it sold in two distinct portions of 90 per cent and 10 per cent, but the whole is handled in bulk. Vulcan Oils Limited never in fact delivered any of the actual oil to the Appellant, but has in fact delivered (as per the Agreement), "to the order of the said Vendor the royalties hereby reserved to the Vendor" (the Appellant), the delivery in fact being effected by payment in cash.

12. That the Appellant, or her Agent, has in fact from time to time entered upon and viewed the operations and workings of Vulcan Oils Limited as to the operations of the mining of oil on the property.

13. The Appellant upon entering into the said Agreement received the sum of $5,000 in cash and 25,000 shares of Vulcan Oils Limited at a par value of one dollar each, as fully paid up and since the production of oil and the sale thereof has been receiving "royalties" under the contract.

By the judgment now reported the appeal to the Supreme Court of Canada was allowed with costs throughout.

H. S. Patterson K.C. for the appellant.

C. Fraser Elliott K.C. and *W. S. Fisher* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—This is a tax appeal, depending upon the meaning and application of the *Income War Tax Act*, c. 28 of 1917, as amended.

The case came before Audette J., of the Exchequer Court of Canada (1), upon appeal from the decision of the Minister of National Revenue, and was heard upon admissions.

By agreement under seal of 15th April, 1925, the appellant, therein called the vendor, of the first part, who was then the owner in fee simple of the lands to which the agreement relates, agreed with Vulcan Oils, Limited, therein called the company, of the second part, upon the recital that the appellant had agreed to sell to the company the land described as follows, that

The Vendor hereby sells, assigns, transfers and sets over unto the Company, its successors and assigns, all her right, title and interest, in and to the following property; namely, the South twenty acres of the North West quarter of Section Thirteen (13) Township Twenty (20) Range Three (3) West of the Fifth Meridian, which includes all mines and minerals, on, in or under the said lands. Subject to the provisos, conditions and royalties hereinafter reserved.

(1) [1930] Ex. C.R. 229.

The company, in consideration of the sale, agreed to pay to the vendor the sum of $5,000 in cash, upon the execution of the agreement by the company, and to issue to the vendor, or her nominee, 25,000 shares of the company's capital stock of the par value of $1 each, fully paid up.

And, by clause 3, it is stipulated that

> The Company hereby further agrees in consideration of the said sale to deliver to the order of the said Vendor the royalty hereby reserved to the Vendor, namely: ten per cent. of all the petroleum, natural gas, and oil, produced and saved from the said lands free of costs to the said vendor on the said premises. And the said petroleum, natural gas and oil shall be delivered under the instructions and upon the method decided by the Vendor, and the Company further covenants and agrees that it will deliver to the said Vendor the beforementioned percentage of petroleum, natural gas and oil saved on the said land at least once in every thirty days and will not sell or remove any petroleum, natural gas or oil from the said premises until the said percentage or share thereof belonging to the Vendor shall have been delivered as aforesaid.

By clause 5, the company covenanted to proceed forthwith to obtain standard drilling machinery, fully equipped; to commence drilling operations upon the lands as expeditiously as possible, "and to continue such drilling operations without interruption, except as may be unavoidable, until oil and/or gas in commercial quantities is struck or to a minimum depth of 4,500 feet."

By clause 6, the company covenanted, upon oil or petroleum being discovered, to instal and maintain the necessary machinery for pumping or procuring and delivering the oil or petroleum in pipes, reservoirs or tanks, and to carry on the operations.

Clause 7 reads as follows:

> In the event of oil or gas being discovered in commercial quantities on the said lands the Vendor as part of the consideration for this Agreement, covenants to transfer to the said Company by good and sufficient transfer in fee simple the said twenty acres of land freed and discharged from all encumbrances and also shall transfer to the said Company by good and sufficient transfer in fee simple freed and discharged from all encumbrances the South twenty acres of the North West Quarter of Section twenty-four (24) Township twenty (20) Range three (3) West of the 5th Meridian and such transfers shall be completed and delivered forthwith after oil or gas is discovered in commercial quantities by the said Company, reserving always however to the Vendor the said royalty of ten per cent of all petroleum, natural gas and oil in respect to the said South twenty acres of the N.W. ¼ of Section 13, Township 20, Range 3, West of the 5th Meridian and also free access on and over all said lands described in this paragraph to an extent not exceeding three trails and the location of the said trails shall be selected by the Vendor.

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Newcombe J.

It will be observed that clause 3, quoted above, by which, as well as by clause 7, the royalty is said to be reserved, introduces a covenant, on the part of the company, by way of further consideration for the sale; and that the company thereby agrees to deliver to the vendor, on the premises, ten per cent. of the petroleum, natural gas and oil produced and saved from the lands sold, free of cost to the vendor; the delivery to be made at least once in every thirty days; and this suggests a question as to whether the consideration or so-called royalty, which consists of ten per cent. of the minerals recovered, is validly reserved; for, it is said in Sheppard's Touchstone (80), para. 10:

> If a man grant land, yielding or paying money or some such like thing [as a rose, a pound of cummin, etc.] yearly, [or at any other period] this is a good reservation. But if the grantee covenant to pay such a sum of money, or to do such a thing yearly, this is no good reservation, but a covenant to pay a sum of money in gross, and not as a rent, [but whether a clause shall amount to a reservation, or to a covenant, is frequently a question of construction].

One is concerned to know whether the appellant has acquired that which is taxable as income; and, for the purposes of the Act, " income," as defined by the relevant provisions of section 3 (1), means

> The annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source, with the following exemptions and deductions:—
>
> (*a*) such reasonable allowance as may be allowed by the Minister for depreciation, or for any expenditure of a capital nature for renewals, or for the development of a business, and the Minister, when determining the income derived from mining and from oil and gas wells, shall make an allowance for the exhaustion of the mines and wells;
>
> * * *

Now it is clear that one-tenth of the petroleum, gas and natural oil produced from the lands sold is not profit in the hands of the company, which is at the expense of producing it and is bound to give it to the appellant, and, so far as we know, the company did not otherwise make any profit or gain. Also, as the appellant has no reversion, and

receives one-tenth of the specified minerals as part of the consideration of the sale of the inheritance, it is most unlikely that Parliament intended to include the appellant's tenth as income, within the meaning of paragraph (*a*) of section 3, above quoted. Why should a vendor have an allowance for the exhaustion of that which he has sold and been paid for? The definition clause must be interpreted in the light of section 36 of the general *Interpretation Act*, R.S.C., 1927, c. 1, which was in force long before the enactment of the *Income War Tax Act, 1917*, and it provides that

> Definitions or rules of interpretation contained in any Act shall, unless the contrary intention appears, apply to the construction of the sections of the Act which contain those definitions or rules of interpretation, as well as to the other provisions of the Act.

And thus, it follows that the word "income" in the first line of section 3 (1) of the *Income War Tax Act, 1917*, and the same word in clause (*a*) of that subsection are controlled by the same statutory definition. The stipulated tenth is not rendered annually, but at least every thirty days after production, and that irrespective of whether the operation results in profit or loss. It is by the agreement, for the lack of an apt definition, termed a "royalty"; but, whether or not it may appropriately be named a royalty or an annuity, the statute does not, in terms, charge either royalties or annuities, as such; and here the appellant has converted the land, which is capital, into money, shares and ten per cent. of the stipulated minerals which the company may win. What the appellant will realize, under the covenant, is, of course, uncertain; although it may be ascertained in the event.

On the other hand, it may be assumed that if the project prove unprofitable, the minerals will not be raised and that circumstance, as well as the uncertainty of the extent of minerals available, contributes to the speculative character of the appellant's interest; but, nevertheless, the appellant's receipts come from a potential source of capital. The taxable commodity is "income," which means, by the definition, annual profit or gain; and for the appellant, there is no question of profit or gain, unless it be as to whether she has made an advantageous sale of her property.

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In *Jones* v. *Commissioners of Inland Revenue* (1), a case upon which the Crown relies, the appellant sold his interest in certain patents for a sum in money and percentage, called a royalty, payable for ten years, upon the sale of all machines constructed under the patent; and it was held that the sums received by the appellant in respect of the royalty were income and properly so computed for the purpose of the supertax. Rowlatt J., who pronounced the judgment, said at pp. 714-715, as to the contention that the ten per cent. upon sales was part of the consideration for the transfer:

> There is no law of nature or any invariable principle that because it can be said that a certain payment is consideration for the transfer of property it must be looked upon as price in the character of principal. In each case regard must be had to what the sum is. A man may sell his property for a sum which is to be paid in instalments, and when that is the case the payments to him are not income. *Foley* v. *Fletcher* (2). Or a man may sell his property for an annuity. In that case the Income Tax Act applies. Again, a man may sell his property for what looks like an annuity, but which can be seen to be not a transmutation of a principal sum into an annuity but is in fact a principal sum payment of which is being spread over a period and is being paid with interest calculated in a way familiar to actuaries—in such a case income tax is not payable on what is really capital: *Secretary of State for India* v. *Scoble* (3). On the other hand, a man may sell his property nakedly for a share of the profits of the business. In that case the share of the profits of the business would be the price, but it would bear the character of income in the vendor's hands. *Chadwick* v. *Pearl Life Assurance Co.* (4) was a case of that kind. In such a case the man bargains to have, not a capital sum but an income secured to him, namely, an income corresponding to the rent which he had before. I think therefore that what I have to do is to see what the sum payable in this case really is. The ascertainment of an antecedent debt is not the only thing that governs, although in many cases it is a very valuable guide. In this case there is no difficulty in seeing what was intended. The property was sold for a certain sum, and in addition the vendor took an annual sum which was dependent upon the volume of business done; that is to say, he took something which rose or fell with the chances of the business. When a man does that he takes an income; it is in the nature of income, and on that ground I decide this case.

These observations of the learned judge have their application to the statutes which were under consideration in that case; but the question here is, does a man take an income within the meaning of the Canadian Act when he sells his land in consideration of a part of the oil and gas to be extracted from it by the purchaser, if, as is stated in

(1) [1920] 1 K.B. 711.
(2) (1858) 3 H. & N. 769.
(3) [1903] A.C. 299.
(4) [1905] 2 K.B. 507, 514.

the present admissions, "the appellant was not and is not a dealer in or in the business of buying and selling oil lands or leases"; and, when there is no provision for taxing the property delivered by the purchaser to the appellant, either as annuity or royalty; neither of these words having been used in the statute to describe any right such as that which the vendor acquired under the agreement.

It is the duty of the court to ascertain the real nature of the transaction. It was argued for the respondent that the appellant sold her land and joined with the purchaser in the business of recovering the minerals, but she clearly was not engaged in the business; that suggestion is excluded by the facts and admissions.

The case is not without its difficulties, but I am not satisfied that the Crown has made out its claim. And, "inasmuch as it is the duty of those who assert and not of those who deny, to establish the proposition sought to be established, I think the Crown must fail." *Secretary of State in Council of India* v. *Scoble* (1).

Appeal allowed with costs.

Solicitor for the appellant: *H. S. Patterson.*
Solicitor for the respondent: *C. Fraser Elliott.*

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*March 9.
*April 28.

THE OTTAWA ELECTRIC COMPANY (DEFENDANT) ..... APPELLANT;

AND

LEO CREPIN, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, BY HIS NEXT FRIEND AUGUSTIN CREPIN, AND THE SAID AUGUSTIN CREPIN (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Negligence—Res ipsa loquitur—Burden of proof—Obligation as to particularizing negligence alleged—Boy injured by falling on live electric wire on sidewalk—Interpretation of jury's finding.

The infant plaintiff was injured by falling, on the sidewalk, on a loose end of a live electric wire of defendant company, which wire had broken loose during a storm, by reason, apparently, of a swaying tree

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) [1903] A.C. 299.

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branch bringing two wires together and causing a short circuit. It was in evidence that, at the place of the accident, there was a line of trees which overhung the sidewalk. The jury found negligence by defendant, causing the injury, which negligence they stated thus: "We consider the wire was defective, wires running close to trees should have more thorough inspection."

Held (1) The evidence of the wire being on the sidewalk was sufficient to attribute negligence to defendant, in the absence of any other apparent cause or explanation excluding negligence to the satisfaction of the jury (*Scott* v. *London & St. Katherine Docks Co.*, 3 H. & C. 596, at 601, cited). Plaintiffs thus adduced reasonable evidence upon which the jury might find a verdict.

(2) When plaintiffs' counsel, being asked at the opening of the trial (in accordance with a previous application for particulars which had stood over) to specify the negligence upon which he relied, specified, as his main ground, the leaving of a live wire lying on the highway, he was not bound to explain or particularize the facts or negligence which caused or contributed to that, since these were more in the knowledge of defendant; and the case thus appeared to be one in which the occurrence of such an accident in itself justified calling on defendant to prove that it happened without negligence on its part.

(3) The jury's intention was obviously to find defendant's negligence in the defective location of the wire and the inadequacy of the inspection, which permitted the danger incident to contact with the tree branch to remain undiscovered, until advertised by the accident itself.

Judgment of the Appellate Division, Ont. (66 Ont. L.R. 409), sustaining judgment of Kelly J. (*ibid*) for damages to plaintiffs (on the jury's findings), affirmed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing its appeal from the judgment of Kelly J. (2), entered upon the verdict of a jury in favour of the plaintiffs for damages. The action was for damages for injuries suffered by the infant plaintiff when, as alleged, he slipped on a sidewalk and fell on a live wire of the defendant company which had broken loose, and which injuries the plaintiffs alleged were caused by defendant's negligence.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

Geo. F. Henderson K.C. and *D. K. MacTavish* for the appellant.

J. Wilfrid Gauvreau and *J. Burrows* for the respondent.

(1) (1930) 66 Ont. L.R. 409. (2) *Ibid* at 410-412.

The judgment of the court was delivered by

NEWCOMBE J.—The infant plaintiff sustained serious injury, on 4th August, 1928, by falling on an electric wire of the defendant company which had broken loose during a thunder storm on Carling Avenue, opposite the Lady Grey Hospital, in the city of Ottawa.

The accident took place late in the afternoon. The boy, who was at the time eight years of age, was walking on the sidewalk with his brother, who was two years older, and another boy, and, when he fell, came in contact with a live wire belonging to the defendant's system, the loose end of which was at the time lying on the sidewalk. He lost part of his right hand, including four fingers, and he seeks to recover damages from the defendant for negligently causing the accident.

The case was tried by Kelly J., of the Supreme Court of Ontario, with a jury; and, at the conclusion of the learned judge's charge, he submitted questions to the jury, which, with their answers, are as follows:

1. Was there any negligence by the defendant (that is the Ottawa Electric Company) which caused injury to the plaintiff Leo Crepin?—A. Yes.

2. If there was such negligence by the defendants state fully and clearly what was or were the act or acts or omission or omissions which constituted such negligence?—A. We consider the wire was defective, wires running close to trees should have more thorough inspection.

3. Was there any negligence of the plaintiff Leo Crepin which caused or contributed to his injury?—A. No.

4. If there was such negligence by the said Leo Crepin, state clearly and fully what was or were his act or acts or omission or omissions which constituted such negligence on his part?—A. None.

5. At what amount do you assess the damages of Leo Crepin?—A. $10,000.

6. At what amount do you assess the damages of the plaintiff Augustin Crepin?—A. $100.

7. If you find there was negligence by the defendant and also negligence by the plaintiff Leo Crepin, then state the degree in which each of them was in fault and the manner in which the amount of damages found should be apportioned?—A. No answer because none necessary.

There had been a motion for nonsuit, and the learned judge heard argument upon that after the jury was discharged. He reserved his judgment, but subsequently announced his conclusion that there was evidence from which the jury could reasonably attribute the accident to negli-

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Newcombe J.

gence of the defendant company; and so he directed judgment to be entered for the plaintiffs for the damages as found (1).

The defendant appealed, and the appeal was dismissed by the Second Appellate Division (2). The appellant now appeals to this Court, alleging that none of the specific acts of negligence upon which the plaintiffs relied was proved; that there was no evidence upon which the jury could reasonably have found as it did; that the trial judge should have refused to enter judgment upon the findings; that the plaintiffs, having alleged specific acts of negligence, could not rely upon the doctrine of *res ipsa loquitur*, and that the learned Judges of Appeal erred in holding that there was a burden of proof upon the appellant. At the hearing the appellant's counsel emphasized two points. First, he urged that, in view of what took place at the trial, the appellant was limited to alleged acts of negligence which did not include those subsequently found by the jury. It appears that there had been an application for particulars, which had stood over to be disposed of at the trial; and, accordingly, the plaintiff's counsel was at the beginning of the trial asked to specify the negligence upon which he relied. The following is a narrative extracted from the record of what then took place:

His LORDSHIP: It may be difficult to put the case before the jury unless we know what you say the negligence is that you allege.

Mr. BURROWS: The first ground is in leaving a live wire lying on the highway.

His LORDSHIP: State all the acts of negligence upon which you are going to adduce evidence, because I do not want the jury wandering around finding negligence if it is not pleaded.

Mr. BURROWS: Suppose I prove by the evidence I intend to adduce that this wire was on the highway, is your Lordship going to make a ruling now as to whether the maxim (*res ipsa loquitur*) applies or not?

His LORDSHIP: No; I am giving you an opportunity to state what you allege were the acts of negligence on the part of the defendant on which evidence is now to be given.

Mr. BURROWS: If the maxim applies I am not bound to produce any specific acts.

His LORDSHIP: I am not going to shut you out from applying the maxim, but now that you have pleaded negligence if you have in mind the acts of negligence you are relying upon I think we should know what they are.

Mr. BURROWS: And I will not be debarred from applying the maxim?

(1) (1930) 66 Ont. L.R. 409, at 410-412.

(2) (1930) 66 Ont. L.R. 409.

Mr. HENDERSON: I submit that having pleaded negligence the maxim cannot apply.

His LORDSHIP: That is a matter of law.

Mr. BURROWS: My evidence will be as follows:

That a live wire belonging to the defendant company had fallen on the highway about 6.20 p.m.

That the defendant company were notified immediately that a live wire was lying exposed on the highway.

That the infant plaintiff was proceeding along Carling Avenue about 7 o'clock the same evening and fell on this live wire and sustained these injuries.

One act of negligence we complain of is the unreasonable length of time this wire was allowed to remain on the highway and their unjustifiable delay in failing to despatch a repair car or someone to guard the live wire so as to obviate the possibility of accident or injury to travellers on the highway.

Then I submit that it is an act of negligence on the part of the defendant company to allow a live wire to lie exposed on the highway.

Mr. HENDERSON: That is quite satisfactory. I now understand my learned friend's position.

In the case of *Scott* v. *London and St. Katherine Docks Co.*, in the Exchequer Chamber (1), it was said that

> There must be reasonable evidence of negligence, but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

And I think it is clear enough that, in this case, where a dangerous electric wire which should have remained affixed to the poles above the sidewalk, where it belonged, is found upon the public footway, the evidence of that condition is sufficient to attribute negligence to the appellant company, which was responsible for and had the wire in charge, in the absence of any other apparent cause or explanation excluding negligence to the satisfaction of the jury. In my view the plaintiffs thus adduced reasonable evidence upon which the jury might find a verdict.

I may add that when the plaintiffs' counsel specified, as his main ground, the leaving of a live wire lying on the highway, he was not bound to explain or particularize the facts or negligence which caused or contributed to that, since these were more in the knowledge of the defendant company; and the case would thus appear to be one in which the occurrence of such an accident in itself afforded justification to call upon the defence to prove that it happened without negligence on the defendant's part.

(1) (1865) 3 H. & C., 596, at p. 601.

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Then, secondly, it is said, and it appeared that this was the point upon which the appellant principally relied, that there is no evidence of the negligence found by the second answer, in which the jury says that

> We consider the wire was defective; wires running close to trees should have more thorough inspection.

It was in proof, and there was a rough sketch before the jury, put in by defendant's counsel, that the wires along Carling Avenue, at the place of the accident, passed through a line of trees which overhung the sidewalk; five of these trees are shewn upon the sketch.

Our attention was directed to the Dominion Act, c. 111 of 1894, incorporating the defendant company. Section 9 provides that the company may construct, erect, maintain and operate wires along the sides of and across or under any public highways, streets, etc., and supply electric current thereby; and may by its servants, agents and workmen enter any street or highway in any city, town or village, for the purpose of erecting and maintaining its wires along the sides of or across or under the same; and may construct, erect and maintain such and so many poles and other works and devices as the company deems necessary for making, supporting, using, working and maintaining its wires and systems, subject to provisions which include in juxtaposition,

> (*e*) The Company shall be responsible for all damage which their agents, servants or workmen cause to individuals or property in constructing, carrying out or maintaining any of the said works in this or the next preceding section authorized;
>
> (*f*) The Company shall not cut down or mutilate any shade, fruit or ornamental tree.

It was not suggested that the plaintiffs have a statutory right to recover, as for damage caused by the defendant's agents, servants or workmen in the maintenance of the line, even in the absence of any evidence of negligence on their part. Moreover, it was not shewn that, in order to rectify the location of the wire, it would be necessary to cut down any shade tree, or that a place of safety could not be found for the offending wire without mutilating the tree. In fact, the evidence rather suggests that the purpose might be effected without material injury to the tree. But in any event the defendant cannot justify damage caused by its negligence.

Now let us refer to the testimony. The inferences open to the jury are not obscure.

Peskett, one of the plaintiffs' witnesses, tells of finding the wire "detached from a pole * * * and looped over the branch of a tree and hanging straight down in to the centre of the sidewalk."

Clements, an electrician, one of the appellant's foremen, gave evidence for his side. In direct examination he answered as follows:

Q. Was there anything wrong with the line to cause the break there that night?—A. No, not so far as the line is concerned.

Q. Could you see from the condition there what had caused it to fall? —A. Yes; there was a limb which indicated a burn on it, and that limb had caused the two wires to come together and caused them to short circuit and caused it to come down.

Q. That is not an uncommon thing in storms, is it?—A. No.

His LORDSHIP: Q. What did you see on the limb?—A. A burn into the limb.

MR. HENDERSON: Q. Two witnesses here have testified to hearing what sounded like an explosion. Tell His Lordship and the jury what happens when two wires are brought together by the swaying of a tree like that?—A. When two wires come together that are alive it will cause a short-circuit and burn either one off or burn the two off at one time, or sometimes one at a time, and perhaps the other has a little left to hold it on to keep it up, but it is not very much good.

The same witness was asked

Q. How do you know that the wire was not defective at the point where it broke?—A. It did not look it.

Q. You did not see the wire until you arrived on the scene?—A. No; but if there was a wire broken from its own condition there would be only the one fall and not the occasion of the two going at the same time. It chanced that a branch had put those two wires together and caused them to burn and drop down.

Edward Sims, foreman for the Ottawa Hydro Electric line, who arrived at the place of the accident before the appellant's employees, is asked what he found when he got there, and he answers:

I found the wires burned out; the two west ends were hanging up in the trees and the two east ends were down on the street. * * * A matter of 6 or 8 inches of the wire would be on the sidewalk, and the other end ran along the grass.

Peter Burke, the appellant's outside line inspector, says in cross-examination, that he heard about the wire breaking and does not know whether the wire was defective at the point of breaking or not. He says it would be natural for a wire that is defective to break during a storm.

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James T. Lambert, Superintendent of the appellant's lines, gives the following answers in cross-examination:

Q. Any kind of defect?—A. The word "defect" covers a lot of ground.

Q. Exactly. You were quite sure a minute ago that you would notice any defect?—A. A defect in a piece of copper would break the piece of copper and it would not stay up there.

Q. But it might be defective and break later on?—A. Possibly.

Q. It might not break immediately, and if it were defective you might not notice the defect at once,—is not that correct?—A. I think I would notice a defect.

Q. Probably, if you climbed up the pole and examined the wire?—A. A defect would not be very defective or it would show itself.

Q. Would you notice a defect if you glanced up at the wires?—A. I would notice if there was anything wrong.

Q. You want us to believe that you would notice any defect in a wire by glancing up at it?—A. A defect of any importance.

Q. Would you or would you not?—A. No, I would not.

Q. You would not notice the defect?—A. That word "defect" is a funny kind of a way to get at it.

His LORDSHIP: Q. You know the different kinds of defect?—A. A defect in the wire might be a little bit of the insulation scored on the top side of the wire pointing up to the sky, and I would not see that; but if there was a cut in the insulator when they were putting the wire on it would be interrupted by the defect. I would not see a little bit of insulation, but I would see a score in the copper.

* * * * *

Q. You do not know what condition the wire was in on the 4th August, 1928?—A. I have every reason to believe it was all right.

Q. But you have no knowledge personally of the condition of the wire?—A. I saw it put up there.

Q. In 1923?—A. Yes.

Q. And that is the reason why you think it should be in perfect condition?—A. Well, it should not be defective in that space of time.

* * * * *

Q. I am asking you about the wire that fell?—A. I know it was a good wire, the one wire you have reference to.

Q. How do you know?—A. Because it was put up good.

Q. Is that your answer, because it was put up in 1923 it must be good in 1928?—A. Put up with the best material we can buy.

Further on, at the close of his cross-examination,

Q. And because you saw this line constructed in 1923 you are under the impression that it could not have a defective wire in 1928?

His LORDSHIP: You had better give his other reason as well.

Mr. BURROWS: Is that the reason, because you saw the line constructed in 1923 and you know that the best materials were used?—A. Yes.

Q. That is why you think it should not have a defective wire in 1928?—A. Yes.

His LORDSHIP: He also said because he had been inspecting it from time to time.

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Mr. BURROWS: Q. You cannot tell us the last time you inspected it? —A. No; it is not my job to inspect it, but Mr. Burke does the inspecting.

Q. You told His Lordship that you drew that conclusion from inspection. If you were driving along Carling Avenue in your motor car and looked up at the wires, would you call that "inspection"?—A. Yes.

NewcombeJ.

The learned trial judge, in his reasons for judgment upon the motion, directed attention to the fact that while witnesses for the defence told of the manner and extent of the inspection of the wires, and said that they were in satisfactory condition, none of them appears to have observed their condition "at or for some time prior to the accident." He proceeds to say that

> The jury were entitled to draw any reasonable inference as to the condition of the wires from such evidence as that there was an explosion due to contact of the wire with the limb of the tree, and that there was a "burn" on the limb at the place of contact, etc., and it might have been pertinent for them to have considered whether the presence of the "burn" indicated want of insulation or defective insulation of the wire, and whether if there had been more careful or more frequent inspection the defect, if it existed, might have been observed.

He refers to the proximity of the burned limb to the broken wire which fell to the sidewalk and concludes with the observation that in his opinion there was, in the circumstances, evidence from which the jury could reasonably have inferred that the wire was defective.

The appeal was heard before the five judges of the Second Divisional Court, and, with one dissenting, and one who did not state his reasons, they interpreted the finding of the jury as having regard to the situation of the wire in relation to the trees and the limb which, even in accord with the testimony of the appellant's own witnesses, was the probable cause of the trouble.

I agree, and it is, to my mind, very obvious, that the intention of the jury was to find the defendant's negligence in the defective location of the wire and the inadequacy of the inspection, which permitted the danger incident to contact with the limb to remain undiscovered, until advertised by the accident itself.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Henderson, Herridge & Gowling.*

Solicitors for the respondents: *Gauvreau, Burns & Burrows.*

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*May 29.

OLIVER GAUTHIER .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Criminal Law—Appeal to Supreme Court of Canada—Jurisdiction—Cr. C., s. 1023—"Question of law."

An appeal from the judgment of the Appellate Division, Ont. (40 Ont. W.N. 129) affirming (two judges dissenting) the appellant's conviction, by Ross, Co. C.J., for stealing an automobile, was dismissed, on the ground that there was no jurisdiction to hear the appeal, the questions raised, and on which there was dissent in the Appellate Division, being all questions of fact, in regard to which there was no right of appeal to this Court under s. 1023, *Cr. C.*

Assuming that the question whether there was any evidence to support a conviction should be deemed a question of law, yet the question whether the proper inference has been drawn by the trial judge from facts established in evidence, is not a question of law but one of fact.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing (Mulock, C.J.O., and Grant, J.A., dissenting) the appellant's appeal against his conviction, by Ross, Co. C.J., sitting in the County Court Judge's Criminal Court of the County of Elgin, of stealing an automobile (*Criminal Code*, s. 377).

V. T. Foley for the appellant.

I. A. Humphries K.C. for the respondent.

On conclusion of the argument by counsel for the appellant, and without calling on counsel for the respondent, the judgment of the Court was orally delivered by

ANGLIN C.J.C.—The Court is unanimously of the opinion that it has no jurisdiction to hear this appeal.

On examination, it turns out that the questions raised are all questions of fact,—questions of the appreciation of evidence which were eminently for the trial judge, and in regard to which there is no right of appeal to this Court under section 1023, *Cr. C.*

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

(1) (1931) 40 Ont. W.N. 129.

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The jurisdiction of the Court of Appeal is much wider than ours in these matters, but, the mere fact that a judge dissents in that Court on matters of fact, on which it is entirely proper for him to do so, does not mean that there is foundation for an appeal to this Court, where the appeal is confined to matters of dissent in law below.

Assuming that the question, whether there was any evidence to support a conviction, should be deemed a question of law, the question whether the proper inference has been drawn by the trial judge from facts established in evidence, is really not a question of law, but purely a question of fact for his consideration.

Appeal dismissed.

Solicitor for the appellant: *V. T. Foley.*

Solicitor for the respondent: *Wm. H. Price* (Attorney-General for Ontario).

SARENO ROBERTS .....APPELLANT;

AND

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HIS MAJESTY THE KING.....RESPONDENT. *May 27.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Keeping common gaming house—Automatic vending machine—Cr. Code, ss. 226, 229, 986 (2), 986 (4) (as amended, 1930, c. 11, s. 27).

Accused had on his premises an automatic vending machine in which customers placed a five cent coin, pulled a lever, and received from the machine a package of candy, with or without "slugs" (varying in number) which had no commercial or exchangeable value but might be used to operate the machine to shew printed legends for amusement only (no candy being emitted). The candy package emitted for the coin deposited was such as that sold over the counter for five cents, and on the sale of the candy emitted the accused made a profit.

Held (reversing judgment of the Court of Appeal for Manitoba): Accused was not guilty, under the *Criminal Code,* of keeping a common gaming house. *Cr. Code,* ss. 226, 229, 986 (2), 986 (4) (as amended, 1930, c. 11, s. 27), considered. *Rex* v. *Freedman,* 39 Man. R. 407, overruled. *Rex* v. *Wilkes,* 66 Ont. L.R. 319, approved.

APPEAL from the judgment of the Court of Appeal for Manitoba, affirming the conviction of the appellant by

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

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R. B. Graham, Esquire, Police Magistrate, at Winnipeg, Manitoba, "for that he the said [appellant] at the city of Winnipeg aforesaid on or about the 17th day of April, A.D. 1931, did unlawfully keep a disorderly house, to wit, a common gaming house at 605 Corydon Avenue in the City of Winnipeg, contrary to the form of the statute in such case made and provided."

The following statement of facts had been agreed on by the informant and the accused:

"1. That on the 21st day of April, A.D. 1931, an Information and Complaint was laid by the Informant before Fred E. Law, one of His Majesty's Justices of the Peace for the Province of Manitoba, charging that the said accused at the City of Winnipeg, in the Province of Manitoba, did on or about the 17th day of April, A.D. 1931, unlawfully keep a disorderly house, to wit, a common gaming house at 605 Corydon Avenue in the said City of Winnipeg, contrary to the provisions of the Statutes in such case made and provided.

"2. That on the 17th day of April, A.D. 1931, a search warrant was properly and legally issued by R. B. Graham, Esquire, a Police Magistrate in and for the Province of Manitoba under the powers conferred by Section 641 of the Criminal Code of Canada.

"3. That the said Warrant was duly executed on the said 17th day of April, A.D. 1931, and on the said premises of the accused was found in operation an automatic vending machine which is filed as Exhibit 1 in this case and which customers were allowed and invited to use and operate.

"4. The said machine may be operated by placing a five cent coin or a slug which is a perforated metal disc in a slot at the top of the machine and pulling down a lever attached to the side of the said machine.

"5. On pulling down the lever, three discs which can be seen through a glass covering in front, revolve and when they come to a stop, display printed legends or sentences, such printing being on various coloured squares on each of the three discs.

"6. That in every instance that a five cent piece is deposited in the slot of the machine and the lever pulled the interior mechanism of the machine is put in motion and a

package of candy is emitted. The package of candy so emitted is identical with the package of candy which the accused sells over the counter for five cents. In operating the automatic vending machine either with a coin or a slug the machine may or may not emit certain metal discs or slugs varying in number from two to twenty depending upon what point the revolving wheels may come to rest, which discs or slugs remain the property of the accused. In some instances no slugs are emitted. These slugs or tokens have no commercial or exchangeable value but may be used by the customer to operate the machine and when it is so operated with a slug or token, it shows across the cylinders of the machine a printed legend more or less humorous for the amusement of the customer, but the use of the slug or token will not result in the operator receiving any candy. No candy is emitted when slugs are used.

"7. That printed in the front of the machine is a notice which reads as follows:

Candy Vendor

This machine is for the sole purpose of vending candies and confections. Tokens received from this vendor are of no cash or trade value but may be used to play this vendor for the customer's amusement only. No candies or confections vended for amusement tokens.

"8. That this machine, Exhibit 1, is owned by the Accused who is the owner of the premises at 605 Corydon Avenue, in the City of Winnipeg, in Manitoba, and such premises are occupied by the Accused for the purpose of carrying on the business of a confectioner.

"9. That on the 17th day of April, A.D. 1931, an officer of the City of Winnipeg Police Force operated the said machine and deposited with each operation a five cent coin in the slot of the machine, for which he received a package of candy for every five cent piece deposited.

"10. That as a result of the said operation of the said machine the Constable received in addition six slugs which had been discharged from the said machine.

"11. That the said officer offered the said slugs to the Accused in exchange for merchandise and that the said Accused informed the officer that the said slugs had no trade or exchangeable value but that they could only be used to operate the machine."

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The note of the judgment of the Court of Appeal for Manitoba, upholding the conviction, was as follows:

On the admissions filed and on the further admission that there was profit to the Accused on the sale of the candy emitted by the automatic Vending Machine, the Appeal is hereby dismissed.

The appellant, on application to a judge of the Supreme Court of Canada, under the provisions of s. 1025 of the *Criminal Code,* R.S.C., 1927, c. 36, was granted leave to appeal to this Court.

The sections of the *Criminal Code* involved were sections 226, 229, 986 (2) and 986 (4) (as amended by s. 27 of c. 11, 1930).

The Court of Appeal for Manitoba had previously given a decision in *Rex* v. *Freedman* (1) which it followed in the present case. A conflicting decision was the judgment of the Appellate Division of the Supreme Court of Ontario in *Rex* v. *Wilkes* (2), which was relied upon by the appellant in the present case.

M. Marcus for the appellant.

F. H. Chrysler K.C. for the respondent.

After hearing argument by counsel for the appellant and for the respondent, and without calling on counsel for the appellant in reply, the Court delivered judgment orally, allowing the appeal and quashing the conviction, adopting the reasons for decision in *Rex* v. *Wilkes* (2), *supra.*

Appeal allowed; conviction quashed.

Solicitor for the appellant: *M. Marcus.*

Solicitor for the respondent: *John Allen* (Deputy Attorney General for Manitoba).

(1) 39 Man. R. 407; [1931] 1 W.W.R. 775.

(2) (1930) 66 Ont. L.R. 319.

ABRAHAM STEINBERG .....APPELLANT; 1931

AND *May 20. *May 26.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Criminal law—Appeal to Supreme Court of Canada—Jurisdiction—Cr. Code, s. 1023—"Question of law"—Trial judge's charge to jury.

The general appellate jurisdiction of the Supreme Court of Canada is confined to civil matters; to found an appeal to the Court in any criminal matter, resort must be had to some special statutory provision enacted by the Dominion Parliament. Save for the special case provided for by s. 1025, *Cr. C.*, the only right of appeal to the Court in any criminal cause is that conferred by s. 1023, *Cr. C.* For an appeal to come within s. 1023, the conviction must have been affirmed by the court below and there must have been dissent by some member thereof on a question of law.

The present appeal was from the judgment of the Appellate Division, Ont., 40 Ont. W.N., 71,† affirming appellant's conviction for murder, two judges dissenting on what the order of the court declared (apparently in accordance with former subs. 5 of s. 1013, *Cr. C.*, but which subsection had been repealed by s. 28 of c. 11, 1930) to be questions of law. In the opinion of some of the members of this Court, this Court lacked jurisdiction to hear the appeal because, in their view, the grounds of dissent below were not on any question of law, but only on matters which it was competent for the jury to pass upon and which depended entirely upon an appreciation of the weight of evidence in regard to the points discussed. But the ground taken (unanimously) for dismissal of the appeal was that it failed on the merits, as the reasons for dissent below did not, on examination of the matters dealt with therein and of the trial judge's charge as a whole, shew justification for setting aside the conviction.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing the appellant's appeal against his conviction, on trial before Jeffery J. and a jury, for the murder of one Samuel Goldberg at Toronto. In the Appellate Division, Mulock, C.J.O., and Grant, J.A., dissented from the judgment of the majority of the court, and held that the summing up by the trial judge in his charge to the jury was not fair to the accused

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

†Not yet published in the Ontario Reports.

(1) (1931) 40 Ont. W.N. 71. Not yet published in the Ontario Reports.

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and might have caused a miscarriage of justice, and that, therefore, the conviction should be quashed and a new trial directed.

By the judgment now reported the appeal to this Court was dismissed.

I. F. Hellmuth K.C. for the appellant.

E. Bayly K.C. and *W. B. Common* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—This Court was created by the Dominion Parliament in 1875 as a "General Court of Appeal for Canada" by virtue of the power conferred by section 101 of the *British North America Act.* Purely statutory in its origin,—although the Court is, by the Supreme Court Act, declared to be a court of law and equity, and, by section 35 of that Act, is constituted an appellate court with "civil and criminal jurisdiction within and throughout Canada"—by section 36, criminal causes are expressly excluded from its appellate jurisdiction. It follows that the general appellate jurisdiction of this Court is confined to civil matters and that, as provided for by section 44 of the Act, resort must be had to some special statutory provision enacted by the Dominion Parliament to found an appeal to the Court in any criminal matter. Such a provision is made by section 1023 of the *Criminal Code,* which reads as follows:

> Any person convicted of any indictable offence whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal. * * *

Save the special case provided for by section 1025 of the Code, I know of no other right of appeal in any criminal cause to this Court than that conferred by section 1023.

Two conditions must exist in order that an appeal may come within section 1023, viz., the conviction must have been affirmed by the court below, and there must have been dissent by some member of that court on a question of law. In the present case, the conviction was affirmed by a majority of the Appellate Division of the Supreme

Court of Ontario (1), two of its members dissenting on what the order of the court declared to be questions of law. Such a declaration was formerly necessary under section 1013 (5) (*Davis* v. *The King* (2)), and, notwithstanding the repeal of that provision in 1930 (Statutes of Canada, 1930, 20-21 Geo. V, c. 11, s. 28), is found in the order presently before the Court. Presumably, the repeal of subsection 5 escaped the notice of the Registrar and of the solicitors for the Crown and for the defendant who are responsible for the wording of the order; otherwise, it is difficult to account for the presence of the declaratory provision referred to. At all events, it is not binding upon us.

At the threshold of the present appeal, we are confronted with the question of the jurisdiction of this Court to entertain it, which depends upon whether or not the dissent rests upon " any question of law " within the meaning of section 1023 of the *Criminal Code*. Although notice of application for leave to appeal was given, the record before the Court contains nothing, save a passing reference to it by Hodgins J.A., to shew that such application was actually made, or as to its disposition. The appeal to the Appellate Division should probably, therefore, be regarded as having been confined to the subject matter of clause (*a*) of section 1013, which enables an appeal to be taken *de plano* " on any ground of appeal which involves a question of law alone." *Prima facie,* the words " any question of law " found in section 1023 of the Code should be read as referring to " any ground of appeal which involves a question of law alone," as set out in clause (*a*) of section 1013, and should receive the same construction as that obviously applicable to that clause, i.e., the grounds of appeal to this Court must be confined to " questions of law alone," the appeal to this Court under section 1023 being likewise *de plano*.

However that may be, some of my learned brothers are of the opinion that this Court lacks jurisdiction to hear the appeal because they are unable to find any question of law whatever in the grounds of dissent stated by the Chief Justice of Ontario, in which Mr. Justice Grant agreed, their

(1) (1931) 40 Ont. W.N. 71. Not yet published in the Ontario Reports.

(2) [1924] Can. S.C.R. 522.

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view being that all matters dealt with by the learned Chief Justice are really matters which it was competent for the jury to pass upon, and depend entirely upon an appreciation of the weight of evidence in regard to the several points discussed. Personally, I am inclined strongly to this view.

But it seems unnecessary to dispose of the case on this ground, having regard to our view upon the merits in respect to which we are unanimous.

Assuming that there may be one or more points of law involved in the grounds of dissent, a careful examination of those grounds and the evidence referred to in them, and of the entire record, including the charge of the learned trial judge as a whole, has satisfied us that, while that charge may not have been ideally perfect, in that the learned judge (as was not at all improper) shewed, especially by his adverse comments on the evidence offered in support of the defence of alibi, that he had been more favourably impressed by the Crown's case than by that of the defence, the meticulous criticism made by the Chief Justice of Ontario of that charge cannot be justified. The defence of alibi was the main, if not the sole, defence raised at the trial and the evidence in support of it was fully presented to the jury, accompanied, it is true, by some comments, which may or may not have discredited that evidence. Such comments, if they had such a tendency, were quite within the competence of the trial judge and did not amount to a withdrawal of the issue as to alibi, or of any evidence in support of it from the consideration of the jury. On the contrary, they were told more than once by the learned trial judge that that issue, and the evidence offered in support of it, were matters exclusively for their consideration.

It is true that the learned Chief Justice concludes his judgment by stating that the charge, as a whole, was unfair to the accused, but he qualified that statement by adding, " For the reasons above mentioned." Examining these reasons one by one, we fail to find therein anything amounting to a withdrawal of any evidence from the jury, or any direction to the jury contrary to law. On the contrary, while criticising the evidence offered by the defence, at times, perhaps, somewhat severely, the learned trial

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judge was always careful to add to his observations of that character a clear statement that the several matters so discussed were wholly for the jury to consider, both as to the credibility of the evidence offered thereupon, and the inferences to be drawn from it.

As Mr. Justice Middleton said,

> Here the charge of the learned Trial Judge is saturated from beginning to end with repeated statements that the weight and effect of evidence is for the jury and for the jury alone, and that the onus is always upon the Crown and that the prisoner is always entitled to the benefit of any doubt that has been raised in their minds.

Indeed, in connection with his comments upon the defence of alibi in particular, after devoting remarks, which cover several pages of the record, to a discussion of the evidence offered in support thereof, the learned trial judge proceeded to add that, if proved to their satisfaction, that defence would be a complete answer to the Crown's case, but he was careful to say in the very next sentence that, if any reasonable doubt remained in the minds of the jury on further consideration, the defendant was entitled to the benefit of such doubt.

Upon the whole case, therefore, we are of the opinion that the appeal fails.

Appeal dismissed.

Solicitor for the appellant: *T. Herbert Lennox.*

Solicitor for the respondent: *E. Bayly.*

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*Feb. 3.
*April 28.

CARTWRIGHT & CRICKMORE, LTD. (DEFENDANT) ..... } APPELLANT;

AND

IAN S. MACINNES (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Stock broker—Agency—Conversion—Delivery of shares to broker to sell at certain price—Agreement to return same certificate—Sale at lower price—Right of customer—Custom and usage—Tender by broker of another certificate.

The respondent, a customer of a broker, delivered to the latter a certificate for 500 shares of a mining company registered in his name with instructions to sell the shares at not less than a certain price and, if

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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not so sold, to return to him the same certificate. The broker, having received from another customer 1,000 shares of the same company represented by two certificates of 500 shares each, sold 1,000 shares for the account of the latter and, in making delivery, used one of the certificates belonging to him and the certificate belonging to the respondent. When the respondent demanded his certificate the broker tendered him another certificate of the same company for the same number of shares in accordance with the custom of the stock exchanges. The respondent refused to accept it and sued for conversion.

Held, affirming the judgment of the Court of Appeal (43 B.C. Rep. 265), that the respondent was entitled to judgment; custom and usage of the stock brokerage business cannot override the obligations of an actual contract between the parties contrary to that custom and usage.

APPEAL, by special leave granted by the Court of Appeal for British Columbia, from the judgment of that court (1) reversing the judgment of the trial judge, Ruggles C.C.J., and maintaining the respondent's action.

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

W. B. Farris K.C. for the appellant.

Geo. F. Henderson K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The respondent, who is a clerk residing in the city of Vancouver, brought this action against the appellant, a firm of stock brokers having its place of business in the same city. The plaint was that, on the 23rd of July, 1929, the respondent delivered certificate no. 951 for 500 shares in the capital stock of the Silver Cup (Hazelton) Mining Company, Limited (non-personal liability) for sale by the appellant at a price not less than 30 cents per share; that the appellant had sold the shares and had failed to account to the respondent therefor; that, in the alternative, the appellant had converted the shares to its own use; wherefore the respondent claimed damages for the alleged detention of his funds or for failure to carry out his instructions, an accounting and costs.

The facts proven were that the respondent owned 500 shares of the Silver Cup Mining Company and held the certificate for those shares. One Christie, an agent for the

(1) (1930) 43 B.C. Rep. 265; [1931] 1 W.W.R. 81.

appellant, called on the respondent and advised him to buy some Weymarne Oil Stock. The respondent yielded to the suggestion upon the following conditions which, as we find them to be the very crux of this case, had better be stated in the precise words of the evidence:

Q. When you gave Christie this order to buy Weymarne, how was he to handle it?—A. He agreed to sell my Silver Cup stock for 30 cents or better and buy Weymarne. If this was not done he was to return the certificate to me.

The COURT: Q. What is that, the last?—A. He was to sell my Silver Cup stock for 30 cents or better, and with the proceeds buy Weymarne. If it was not sold, he was to return my own certificate to me.

The COURT: That is a different thing. That is not varying it.

Mr. GROSSMAN: Yes, that simply means an option to buy the Weymarne, and unless the Silver Cup is sold he is not to buy Weymarne.

The COURT: You say, notwithstanding any agreement to the contrary, they could have bought this Weymarne and made this man pay for it?

Mr. GROSSMAN: Yes, and we say we bought it for him and notified him we bought it for him.

Mr. MACINNES: Q. Did you ever receive any notice?—A. I never received any notice from Cartwright & Crickmore with regard to that stock.

The COURT: I will allow that question.

Mr. MACINNES: Q. If the Silver Cup stock were not sold, what was Christie to do with that certificate?—A. He was to return my own certificate to me.

Q. And what became of the buying order for Weymarne?—A. It was immediately cancelled.

* * *

it
(i.e., the order to buy Weymarne)
was only given to them on the condition that when it
(i.e., the Silver Cup stock)
was sold, they were to buy 100 Weymarne.

It is common ground that the Silver Cup shares never reached 30 cents on the market; also that the Weymarne stock was not purchased and the order for same was eventually cancelled.

The respondent requested the return of his certificate several times. At first, he only saw a young clerk in the office of the appellant and was told that the certificate could not be located, but that he should "come in to-morrow." Later, he was informed that the Silver Cup stock was held as collateral for the Weymarne purchasing order. The respondent says, on that occasion, Christie happened to be present in the office, and, upon being told what was the matter, immediately stated that "there was a mistake right there."

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Finally, the respondent wrote to the appellant for the return of his stock certificate. He was tendered another certificate (296) for the same number of shares. He refused it and returned it to the appellant. At the trial, when asked why he did so, he replied as follows:

A. I wrote this letter so that Christie would produce my own certificate.

Q. Christie had told you he was not holding it as collateral?—A. Well, why didn't he give it to me back? They would not give it to me back.

Q. That is the only explanation you can give me?—A. Yes, Christie was the man I had practically all my dealings with.

Q. And you actually did receive a certificate for 500 shares, another certificate, of course?—A. I received another certificate, but not my own.

Q. Was it identically the same as the certificate you handed in?—A. No, not to me.

Q. Why?—A. Because it was not mine.

Q. That is the only reason it was not worth that much to you, is that it?—A. It was not my own certificate.

Q. It was a certificate in blank endorsed in blank?—A. Yes.

What had taken place, as the respondent eventually found out, was this:

On July 23, 1929, the appellant had received the respondent's certificate for 500 shares of the Silver Cup Mining Company. The certificate shewed that the respondent was the registered holder of the shares and that they were transferable only on the books of the company by endorsement herein and surrender of this certificate.

As usual, it bore on the *verso*, a form of transfer which the respondent had signed in blank.

On August 5, 1929, the appellant received from another customer 1,000 shares of Silver Cup represented by two certificates of 500 shares each. On August 14, they sold the 1,000 shares of Silver Cup for the account of the other customer; but, in making delivery of the shares in fulfilment of that sale, they used one of the certificates belonging to the other customer and the certificate belonging to the respondent.

That mode of dealing with the respondent's securities, the appellant did not attempt to excuse on the ground of mistake. On the contrary, they asserted their right to use the certificate as they did in the ordinary course of their business and in accordance with what they claimed to be the custom of the Exchange.

We are thus brought to the discussion of the appellant's defence which, in the dispute note, was expressed in the following way:

9. * * * the defendant says that the plaintiff deposited the said shares with the defendant subject to the rules, by-laws and customs of the Vancouver Stock Exchange, and subject to the general practice, customs and usage of the stock brokerage business.

10. It is the custom and usage recognized by the Vancouver Stock Exchange, and in general use amongst all stock brokers, that delivery of the identical certificate deposited is not required, but that a tender or delivery of a certificate covering an identical number of shares is good and sufficient tender or delivery.

In the appellant's factum, this defence is elaborated by a quotation from the judgment of the Supreme Court of the United States in *Gorman* v. *Littlefield* (1), where Mr. Justice Day, in course of delivering the opinion of the court, referred to *Richardson* v. *Shaw* (2), and speaking of the decision in that case said:

This court therefore had to consider the legal relation of customer and broker, in buying and holding shares of stock, and it was held that the certificates of stock were not the property itself, but merely the evidence of it, and that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon or harness, and that stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another.

And the appellant's counsel strongly urged before us that the above was a correct exposition of the law upon the subject, that it governed the case, and that the respondent was bound by the customs and usage of the Vancouver Stock Exchange.

We think it may be stated as settled law that a man who gives authority to a stock broker to do business for him on a Stock Exchange should, in the absence of evidence to the contrary, be taken to have employed the broker on the terms of the Stock Exchange. (*Forget* v. *Baxter*) (3). But it is, after all, a question of fact whether the contract was or was not entered into with reference to the customs and usage referred to (*Clarke* v. *Bailie*) (4). Custom and

(1) (1913) 229 U.S. 19.
(2) (1908) 209 U.S. 365.
(3) [1900] A.C. 467.
(4) (1910) 45 Can. S.C.R. 50, at 68.

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usage cannot override a special contract. In the present case, the respondent testified to the fact that there was a special contract whereby the identical certificate should be returned to him, in case the shares were not sold at the named price. The statement was made clearly and repeated several times in the course of the respondent's testimony. It remained uncontradicted. Christie, with whom the contract was made, was not offered as a witness, although it is not explained that he was not available. The stipulation may be unusual, but it is not unreasonable. The intention may have been to prevent the certificate from losing its identity by being mixed with all the other stocks in the brokers' safety deposit box, or it may have been to avoid precisely what is shown to have happened in the premises.

Ruggles C.C.J., who tried the case in the County Court of Vancouver, dismissed the action. But we do not think it should be assumed from his judgment (which he delivered without giving reasons) that he disbelieved the respondent or that he found against him on the fact whether the special stipulation was made or not. The judgment can be explained upon other grounds; and, besides, we have the statement of counsel for the appellant that the point was not argued before the trial court.

The point, however, was raised before the Court of Appeal, and the learned Chief Justice of that court found that

> the arrangement between the plaintiff (respondent) and Christie was that the certificate should not be parted with unless the shares were sold at the named price but should be kept and re-dilevered to the (respondent).

In our opinion, on the facts proved, the correctness of that finding cannot be disputed. It being so, we see no escape from the consequence that the special arrangement must be given effect to.

We think the evidence sufficiently shows the existence, among brokers in Vancouver, of a general practice and of a well understood usage, such as was alleged by the appellant in their dispute note, if we add to it the proviso that the broker should always have on hand or under immediate control a sufficient number of shares to take care of his obligations towards all his clients. As a rule, the proper inference would be that transactions and dealings between broker and customer, in respect to stocks negotiated on the

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Vancouver Stock Exchange, are impliedly affected by the incidents of the practice and usage referred to. But there can be no recognized custom in opposition to an actual contract, and the special agreement of the parties must prevail.

What we have just said is sufficient to dispose of the appeal. The Court of Appeal awarded damages and, under the particular circumstances of the case, the question whether, on account of the technical breach, any loss was inflicted upon the respondent, was one of not inconsiderable nicety. In view of the terms of the order granting special leave to appeal, there would be no object in our expressing an opinion upon that or upon any other point, except so far as we have already stated.

The appeal is therefore dismissed. The question of costs was already provided for in the order granting leave.

Appeal dismissed.

Solicitors for the appellant: *Farris, Farris, Stultz & Sloan.*
Solicitor for the respondent: *C. S. Arnold.*

CASE STATED BY THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

1931

*Feb. 3.
*May 11.

IN THE MATTER OF the complaints of the Western Canada Flour Mills, Ltd., Calgary, and the Calgary Board of Trade against proposed cancellation of the present arrangement of absorbing terminal charges at Vancouver on traffic destined to the Orient, such terminal charges to be added to the rail and ocean rate, except on shipments from Manitoba points;

AND

IN THE MATTER OF Order No. 36108, dated February 19th, 1925, suspending, pending hearing by the Board, the C.P.R. Co's. proposed amendment, subsection "D", Sup. 10, to its tariff C.R.C. No. W-2755, and the C.N.R. Co's. proposed amendment, Item 10-A, Sup. No. 2 to tariff C.R.C. No. W-401; File No. 33564.1;

AND

IN THE MATTER OF the application of the New Westminster Harbour Commissioners, New Westminster, B.C., that the

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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CASE STATED BY BOARD OF RAILWAY COMMISSIONERS FOR CANADA *re* POWERS AS TO WHARFAGE CHARGES.

prevailing practice of the Canadian National Railways and the Canadian Pacific Railway Company of absorbing one-half wharfage, or 25 cents per ton, *re* handling of export flour through the ports of Vancouver and Victoria, be extended to include the port of New Westminster;

AND

IN THE MATTER OF the jurisdiction of the Board to deal with wharfage charges. File No. 33564.5.

Railways—Powers of Board of Railway Commissioners for Canada—Wharfage charges—Railway Act, R.S.C., 1927, c. 170, ss. 2 (32), 358.

The Board of Railway Commissioners for Canada has no power, under the *Railway Act*, R.S.C., 1927, c. 170, to regulate (no question as to discrimination being involved) as to absorption by a railway company of wharfage charges in respect of transpacific freight, at the point where the goods are transferred from rail to ship for ocean carriage to the transpacific country.

The function of the Board as to tolls and charges is (excepting as to powers conferred by s. 358 of the Act) limited to regulating charges for carriage and for those other services which are incidental to carriage, as railway services, within the meaning of the Act. The wharfage service in question is not such a service. This would appear to be so independently of, but is put beyond doubt by, s. 358. The definition of "toll" (s. 2 (32)) cannot properly be construed as declaring that any wharfage service is a railway service in the above sense.

CASE STATED by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada, under s. 43 of the *Railway Act*, R.S.C., 1927, c. 170, on the question set out *infra*.

Under tariffs in force for a number of years prior to 1925, the Canadian Pacific Railway Company and the Canadian National Railways undertook to absorb, in the case of import as well as export traffic, 50% of the wharfage charge at Vancouver and Victoria, where such wharfage did not exceed 50 cents per 2,000 pounds, such absorption being borne equally between transpacific steamship lines and the railways. The absorption extended to traffic moving from points in Canada east of Edson and Canmore, Alberta, and Kootenay Landing, British Columbia. In 1925 the steamship companies took the position that they would no longer participate in the absorption except on business originating at points east of the Manitoba-Saskatchewan bound-

ary. The railways then proposed to amend their tariffs so that the absorption would apply only on traffic moving from points in Canada east of the Manitoba-Saskatchewan boundary. On complaint being made to the Board by certain shippers, an order was issued suspending, pending hearing by the Board, the proposed amendments.

At subsequent hearings held by the Board the question of the Board's jurisdiction in respect of such wharfage charges was raised, and after hearing the matter the Board stated a case in writing for the opinion of this Court upon the question (set out below) as to the Board's jurisdiction.

The judgment of the Assistant Chief Commissioner delivered in the matter was the case stated by the Board, and it concluded as follows:

In general, it may be said that the Board has dealt with absorptions concerned with the following situations:

(1) Where the absorption takes place as incidental to service, over the lines of the railway carrier in Canada and intermediate between the initial point and the destination point, both being located in Canada.

(2) Permission has been given in some instances to absorb.

(3) The question of absorption has arisen in connection with correcting unjust discrimination and undue preference.

The point involved in the question as to control over wharfage absorption is a new one. In summary form, the matter divides itself under the following headings:

(1) A movement from a point in Canada to a point in a foreign country, involving, in the case of the Canadian Pacific, a movement over its rails and a further movement over its wharf to the ship; and in the case of the Canadian National, from its rails to a wharf which is not owned by it, and a movement from this to the ship.

(2) It is contended that under Section 358, the powers of the Board in respect of water-borne transportation are limited to movements between points in Canada. In the present instance, there is a movement which has its initial point in Canada but which has its destination in a foreign country.

(3) It is submitted that while the Board may have power to deal with absorptions which are intermediate to movements between an initial point in Canada and destination point, no such power exists where the traffic has gone beyond the end of the rails of the carrier and is being moved to a destination in a foreign country.

(4) It is admitted that subsection 32 of the Interpretation Section of the Railway Act, includes under "toll" a charge or allowance for wharfage. But it is contended that this is only a definition section, and that the scope of the Board's powers thereunder must be obtained from the section or sections dealing with the particular subject matter concerned. It is claimed that the definition concerned in the definition section, while applicable in so far as The Railway Act applies, is limited by the words, "unless the context otherwise requires." And it is contended that the limitations contained in Section 358, which have already been set out, show that the context, on account of the limitation of the field within

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which the Board has power, precludes the possibility of subsection 32 of Section 2, in regard to wharf charges, being applicable.

The question which the Board, in pursuance of the powers conferred upon it by Section 43 of The Railway Act submits for the opinion of the Supreme Court of Canada is:

> "Does the fact that the Board's powers under Section 358 of The Railway Act are limited as set out above, preclude the application of Section 2 (32) of the Act in respect of wharfage charges on transpacific freight?"

F. P. Varcoe for the Attorney General of Canada.

W. N. Tilley K.C. for the Canadian Pacific Railway Company.

Alistair Fraser K.C. for the Canadian National Railways.

The judgment of the court was delivered by

DUFF J.—I have carefully examined the sections of the Act dealing with the powers of the Board, and have come to the conclusion that (excepting the powers conferred by section 358) the function of the Board as to tolls and charges is limited to regulating charges for carriage and for those other services which are incidental to carriage, as railway services, within the meaning of the Act. My conclusion would have been that, independently of section 358, the service in question is not such a service. Section 358, I think, puts the matter beyond doubt. The office of interpretative sections is well known. The definition of "toll" cannot properly be construed as declaring that any wharfage service is a railway service in the above sense.

I confess I have had some difficulty as to the form of the question. I have read it, however, as framed on the assumption that section 358 is to be read in conjunction with the other pertinent sections of the statute; reading it in that sense the answer is in the affirmative.

Question answered in the affirmative.

Solicitor for the Board of Railway Commissioners for Canada: *A. G. Blair.*

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Canadian Pacific Railway Company: *E. P. Flintoft.*

Solicitor for the Canadian National Railways: *Alistair Fraser.*

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B.C. FIR AND CEDAR LUMBER COMPANY (DEFENDANT) ..... } APPELLANT; *May 1. *May 13.

AND

HIS MAJESTY THE KING (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Provincial income tax—"Income" in B.C. Taxation Act—"Use and Occupancy Insurance" policy—Moneys paid for loss of profits not earned—Taxation Act, R.S.B.C., 1924, c. 254, s. 2.

Insurance moneys received under a policy commonly known as "use and occupancy insurance" and paid by way of indemnity for profits not earned, but irretrievably lost, are not taxable income nor subject to taxation under the British Columbia *Taxation Act*, R.S.B.C., 1924, c. 254, s. 2.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the decision of Macdonald J. (2) and maintaining the respondent's action.

The respondent brought an action to recover $8,750.68 alleged to be due and payable by the appellant for taxes upon its property and income. The appellant claimed to be entitled to a substantial set off or allowance. The appellant was carrying on business as manufacturer and dealer in lumber products, at the city of Vancouver. In 1923 it insured with 17 fire insurance companies against loss and damage to its plant and property by fire, and also against loss or damage which might be sustained in the event of its plant being shut down and business suspended in consequence of fire and damage. The insurance last mentioned is commonly known as "use and occupancy insurance." It was effected by the appellant under such policies to the total amount of $60,000 in respect of loss of "net profits," and $84,000 in respect of "fixed charges." The plant and premises of the appellant were destroyed by fire in August, 1923, and, by adjustment with the insurance companies under the last mentioned policies, the appellant was paid $43,000 for

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

(1) (1930) 43 B.C. Rep. 227; [1931] 1 W.W.R. 33.

(2) (1929) 42 B.C. Rep. 401; [1931] 1 W.W.R. 33.

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loss of "net profits" and $52,427.90 in respect of "fixed charges," making a total, thus paid by the insurance companies to the appellant, of $95,427.90. The appellant without taking legal advice upon the question as to whether these insurance moneys were taxable or not, included, in its "return" for the year 1923, the sum of $41,293.20 of such moneys, and in the year 1924 the sum of $33,706.80. The appellant, without at the time questioning its liability, voluntarily paid income tax on these amounts and sought in the respondent's action an allowance or set-off in respect of such payments.

The definition of "income" in the *Taxation Act*, R.S. B.C., 1924, c. 254, s. 2, reads as follows:—

> "Income" includes the gross amount earned, derived, accrued, or received from any source whatsoever, the product of capital, labour, industry, or skill; and includes all wages, salaries, emoluments, and annuities accrued due from any source whatsoever (including the salaries, indemnities, or other remunerations of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies and Municipal Councils, Commissions, or Boards of Management, and of any Judge of any Dominion or Provincial Court, whether the said salaries, indemnities, or other remunerations are paid out of the revenues of His Majesty in right of the Dominion or in right of any Province thereof or by any person); and includes all income, revenue, rent, interest or profits arising, received, gained, acquired, or accrued due from bonds, notes, stocks, debentures, or shares (including the stocks, bonds, or debentures of the Dominion or of any Province of the Dominion, or of any municipality), or from real and personal property, or from money lent, deposited, or invested, or from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business, or profession of any kind whatsoever:

J. W. de B. Farris K.C. for the appellant.

E. Pepler for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—We are of the opinion that this appeal should be allowed with costs throughout.

The British Columbia *Taxation Act* nowhere provides for taxation of moneys paid by way of indemnity for profits not earned, but irretrievably lost.

The moneys in question here represent insurance placed by the appellant in order to meet the possibility of destruction by fire of its means of earning profits. That event occurred, with the result that the appellant made no profits

whatever out of the property in respect to which it had placed the insurance, which could be taxed for the period in question. There are, therefore, no profits to tax and, in the absence of clear language authorizing such a course, I find nothing in the statute to warrant the taxing of money substituted for the profits by way of indemnity for their loss.

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Appeal allowed with costs.

Solicitor for the appellant: *C. H. Locke.*

Solicitor for the respondent: *E. Pepler.*

LA CORPORATION DE LA PAROISSE DE ST-GERVAIS (DEFENDANT)..... APPELLANT;

AND

ALFRED GOULET (PLAINTIFF).....RESPONDENT.

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*Feb. 25.
*Apr. 28.

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

Municipal corporation—By-law authorizing works—Action by ratepayer—Annulment—Contractors mis-en-cause in trial court—Not joined in the proceedings before appellate court—Judgment in appeal annulling contract—Nullity—Res judicata.

The respondent, a ratepayer, brought an action against the appellant municipal corporation for the annulment of a by-law and contracts authorizing the construction of three bridges; and he joined in the case the contractors to whom were awarded the contracts. The trial judge having dismissed the action, the respondent appealed from that judgment but only against the municipal corporation. The appellate court declared the by-law valid, but annulled the contracts.

Held that an appellate court, the same as the trial judge, cannot pronounce the nullity of a contract when all the contracting parties have not been called before the court; that in this case the contractors were not made parties in the proceedings before the appellate court; that it is now impossible to order that they should be joined in proceedings before this court or the appellate court as the decision of the trial judge has acquired the authority of *res judicata* as to them. Therefore, the appellate court could not validly render a judgment annulling the contracts, and the judgment appealed from must be reversed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the trial judge, Lemieux C.J., and maintaining the respondent's action.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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CORPORATION DE LA PAROISSE DE ST-GERVAIS v. GOULET.

The material facts of the case and the question at issue are stated in the above head note and in the judgment now reported.

Ls. St. Laurent K.C. and *Oscar Boulanger K.C.* for the appellant.

Noël Belleau K.C. and *Lucien Moraud K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET, J.—L'appelante est une corporation municipale régie par le code municipal de la province de Québec.

L'intimé est un électeur de cette municipalité et l'un des contribuables appelés à payer le coût des travaux dont il s'agit dans cette cause.

Le 4 mars 1929, l'appelante a adopté un règlement ordonnant la construction de trois ponts. L'exécution des travaux fut confiée, au moyen de trois contrats, à une société d'entrepreneurs.

Par voie d'action ordinaire devant la Cour Supérieure, l'intimé a demandé l'annulation du règlement et des contrats, en invoquant plusieurs moyens, dont le principal était que l'appelante, avant d'octroyer les contrats, ne s'était pas conformée aux exigences de l'article 627 (*a*) due code municipal.

Cette action fut dirigée contre la corporation municipale, comme défenderesse, et contre les entrepreneurs, comme mis en cause.

La Cour Supérieure, ayant écarté comme mal fondés tous les moyens soulevés par l'intimé, trouva le règlement
en tout conforme à l'article (*a*) du code municipal,
l'interpréta comme pourvoyant efficacement
au prélèvement d'une taxe spéciale des contribuables pour le paiement du quart du coût de la construction des ponts,
(la balance étant payée au moyen d'une subvention du gouvernement) et déclara les contrats valides.

Le juge de première instance ajoute d'ailleurs que la presque totalité de la part incombant à l'appelante, dans le prix des contrats, avait été acquittée à l'égard des entrepreneurs au moyen de matériaux vendus à ces derniers. Comme conséquence, les contribuables n'avaient été appelés à payer qu'une somme très minime.

Celle du demandeur s'est élevée à $0.80, et il paraît avoir été le seul à ne pas avoir acquitté cette faible contribution.

En plus, lors de l'audition devant la Cour Supérieure, les travaux étaient terminés, acceptés et reçus par le département des travaux publics et par l'appelante, sans aucune protestation de la part des contribuables, " et tout le monde paraît avoir été satisfait ". Les entrepreneurs avaient été payés et les ponts étaient ouverts à la circulation.

Ces faits furent prouvés à l'enquête, par suite d'un plaidoyer *puis darrein continuans* dûment autorisé. Ils sont constatés au jugement de la Cour Supérieure, qui conclut, après avoir fait remarquer que, en vertu de l'article 627 (*a*) C.M., l'intimé aurait pu demander l'émanation d'un bref d'injonction pour empêcher l'exécution des travaux:

Il n'en a rien fait; et, par son silence, il a tacitement approuvé tout ce que le conseil a fait. La procédure adoptée par lui dans la présente cause est le résultat d'une arrière-pensée. D'ailleurs, à l'audition, il a admis que le tout se réduisait à une question de frais.

La cour rejeta l'action avec dépens.

Par ce jugement, il fut donc déclaré, tant à l'égard de la corporation municipale qu'à l'égard des entrepreneurs, que le règlement ordonnant la construction des trois ponts était légal, et que les contrats pour l'exécution des travaux étaient valides et liaient la corporation vis-à-vis des entrepreneurs.

L'intimé inscrivit sa cause en appel seulement à l'encontre de la corporation municipale.

La Cour du Banc du Roi décréta de nouveau que le règlement était légal; mais la majorité décida que les contrats n'étaient pas valides, parce que le règlement ne pourvoyait pas à l'appropriation des deniers nécessaires pour payer le coût des travaux.

Le règlement, sur ce point, se lit comme suit:

Pour le pont Patoine:

Il est aussi statué et ordonné qu'une taxe spéciale *sera* prélevée sur tous les biens imposables des contribuables obligés audit pont afin d'en faire le paiement dans un seul versement au comptant.

Pour les ponts LaBrecque et Letellier:

Il est aussi statué et ordonné qu'une taxe spéciale *sera* imposée et prélevée sur tous les biens, etc.

La majorité de la cour exprima l'opinion que, par cette phraséologie (employant le temps futur au lieu du temps présent), le règlement " n'impose actuellement aucune taxe spéciale ou autre ". Elle jugea donc que les contrats pour

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l'exécution des travaux avaient été octroyés avant que la corporation eût satisfait à toutes les prescriptions de l'article 627 (*a*) C.M., et que la demande en nullité devait être accueillie quant aux trois contrats attaqués.

M. le juge Bond, toutefois, trouvait que la discussion n'avait plus qu'un intérêt académique, vu que les travaux étaient terminés, que le gouvernement provincial avait versé sa part de l'entreprise et que les entrepreneurs avaient été payés. Il considérait que l'omission reprochée par la majorité était

> *ex post facto* immaterial * * * and no useful purpose will be served now by annulling these contracts, which have been completely executed and paid for.

Il n'eût donc maintenu l'action de l'intimé que pour les frais; et il n'eût pas annulé les contrats.

Il appert d'ailleurs des notes de jugement déposées au nom des autres juges qu'ils fussent arrivés à la même conclusion que M. le juge Bond, s'ils n'eusent été d'avis que la preuve des faits postérieurs à l'action était irrégulière et qu'il n'était pas possible de la prendre en considération.

Il nous semble cependant que la présence au dossier d'un plaidoyer *puis darrein continuans* justifiait la preuve qui a été faite, et, en tenant compte de toutes les circonstances, devant l'admission de l'intimé enregistrée au jugement de la Cour Supérieure " que le tout se réduisait à une question de frais ", nous croyons que le plus que l'intimé aurait dû obtenir en l'espèce, eût dû être le maintien de son action pour les frais seulement. Mais, pour le motif qu'il nous reste à exposer, et sans nous prononcer sur les autres questions soulevées, nous croyons que la Cour du Banc du Roi ne pouvait pas annuler les contrats, comme elle l'a fait.

Ces contrats ont été déclarés valides par la Cour Supérieure dans une instance entre l'intimé d'une part, et la corporation appelante ainsi que les entrepreneurs d'autre part. L'intimé, nous l'avons vu, a inscrit en appel seulement contre la corporation. Les entrepreneurs, parties aux contrats, n'étaient pas devant la Cour du Banc du Roi. Or, la nullité d'un contrat ne peut être prononcée que dans une instance où tous les contractants sont devant le tribunal comme parties. C'est l'arrêt de la Cour du Banc du Roi de la province de Québec dans la cause de *Lachapelle*

v. *Viger* (1) et c'est le principe posé par la Cour Suprême dans la cause de *Burland* v. *Moffatt* (2):

The nullity of a deed should not be pronounced without putting all the parties to it *en cause en déclaration de jugement commun.*

En général, on remédie à une semblable situation en ordonnant la mise en cause des personnes dont la présence est nécessaire. C'est ce que nous avons fait tout récemment encore (19 mars 1928) dans la cause de *Lamarre* v. *Prudhomme.* Ce qui est arrivé dans cette affaire—et cela est susceptible de se produire dans chaque espèce du même genre—est que les parties dont la mise en cause fut ainsi ordonnée ont représenté qu'elles avaient droit de lier contestation par des défenses écrites et, à tout événement, de recommencer l'instruction pour leur propre compte afin de contre-interroger les témoins de la partie adverse et de soumettre la preuve qu'elles pouvaient avoir à offrir. Cette cour a dû faire droit à ces représentations et a remis la cause devant le tribunal de première instance.

Dans tous les cas, avant de prononcer la nullité d'un contrat, toutes les parties contractantes doivent être appelées devant le tribunal. Et ce principe s'impose tout autant à la juridiction d'appel que devant le tribunal de première instance.

Or, dans l'espèce, les entrepreneurs n'étaient pas devant la Cour du Banc du Roi, et il n'est plus possible de les mettre en cause parce que, en ce qui les concerne, nonobstant l'appel contre la corporation municipale, la première décision conserve toute sa force et a acquis pour eux l'autorité de la *chose jugée.* (Sirey, 1907, I. 13.) Ils ne peuvent plus être appelés à venir défendre des contrats qui, à leur profit, ont été définitivement jugés valides.

Le résultat est que, dans la même cause et à l'instance du même demandeur, des contrats entre la corporation de St-Gervais et ses entrepreneurs ont été déclarés valides quant aux entrepreneurs et invalides quant à la corporation. Cette dernière est liée envers ses entrepreneurs par un jugement passé en force de *chose jugée* et elle serait déclarée déliée par un jugement en appel où les entrepreneurs ne figuraient plus. Résultat inadmissible et qui rendrait chacun des jugements impossible d'exécution.

(1) (1906) Q.R. 15 B.R. 257.

(2) (1884) 11 Can. S.C.R. 76, at pp. 88, 89.

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La Cour de Cassation décide que l'appel dirigé contre quelques-unes seulement des parties qui ont figuré en première instance est irrecevable, lorsque la contestation ne peut être jugée que contradictoirement avec les parties omises (D. 1854. 3. 29; D. 72. 1. 442; D. 1906. 1. 310; S. 1909. 1. 370; D. 1922. 1. 163. D. 1924. 1. 189; 1927. 1. 248).

Un exemple tiré de Dalloz (Répertoire, vbo. *Appel civil,* n° 611) nous paraît très au point. Il dit:

Quant aux parties intéressées à l'appel, ce n'est pas seulement une faculté, c'est une obligation pour l'appelant de les intimer. Ainsi, lorsqu'on a actionné en première instance le vendeur et l'acquéreur, pour faire déclarer une vente nulle, on ne peut, sur l'appel, se contenter d'assigner le vendeur; il faut citer les deux parties.

A l'appui de cette proposition, il cite le jugement dans la cause de *Hervé* c. *Larue,* où le passage qui a trait à cette question se lit comme suit:

Attendu que Hervé n'a pas relevé appel du jugement du 19 août 1811 contre Fromont, acquéreur, mais seulement contre Larue, vendeur; et qu'il n'est pas possible d'annuler le contrat de vente qui fait l'objet du procès, dans l'intérêt du vendeur, tandis qu'il subsisterait dans celui de l'acquéreur; d'où il résulte que la prétention de Hervé est non recevable devant la cour, attendu qu'elle ne lui est soumise que par un appel relevé contre Larue seul, et adoptant au surplus les motifs du jugement dont est appel.

Cette solution nous paraît inévitable dans la cause actuelle. L'inscription en appel de l'intimé était insuffisante et inefficace pour faire prononcer la nullité des contrats. S'il y avait eu moyen d'y remédier, nous l'aurions fait. Comme cela n'est pas possible, il faut adopter la seule alternative qui reste ouverte.

L'intimé ne peut s'en plaindre, parce que c'était à lui qu'il incombait de mettre devant la Cour du Banc du Roi toutes les parties requises. Comme le disait M. le juge Taschereau, dans la cause de *Burland* v. *Moffatt* (1):

He has failed voluntarily to put the court in a position to grant (his demand), and his adversary has then an acquired right to its dismissal.

Notre devoir est de rendre le jugement que la Cour du Banc du Roi aurait dû rendre (Loi de la Cour Suprême, art. 47). La Cour du Banc du Roi ne pouvait pas annuler les contrats alors qu'elle n'avait pas toutes les parties contractantes devant elle; et, comme elle a déclaré le règlement légal, elle aurait dû confirmer le jugement de la Cour Supérieure.

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

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C'est là le jugement que nous croyons devoir rendre maintenant. L'appel est donc maintenu et le jugement de la Cour Supérieure est confirmé, avec dépens tant devant la Cour du Banc du Roi que devant cette Cour.

Appeal allowed with costs.

Solicitors for the appellant: *Boulanger, Marquis & Lessard.*
Solicitor for the respondent: *L. G. Belley K.C.*

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*Feb. 10.
*June 12.

WINNIPEG ELECTRIC COMPANY (DEFENDANT) ..... } APPELLANT;

AND

JACOB GEEL (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Motor vehicles—Negligence—Injury caused by motor vehicle—Motor Vehicle Act, Man., C.A. 1924, c. 131, s. 62—Onus of proof as to negligence—Operation of the statutory presumption—Efficiency of brakes (s. 15)—Inspection—Evidence—Jury's findings—Particularizing of alleged negligence—Pleadings—Rule 334, c. 46, R.S.M. 1913.

Plaintiff, while in a motor car, was injured by defendant's motor bus striking the car, by reason, apparently, of the giving way of a small bolt or pin in the bus's braking appliances, rendering its brake ineffective. Defendant claimed that there had been proper inspection of the bus and equipment and that the collapse of the brake mechanism was owing to a latent defect in the pin not discoverable by careful inspection. The jury found negligence in defendant, causing the injury, and, asked in what particulars, as alleged by plaintiff, the negligence consisted, answered "In not keeping brakes and braking equipment in proper repair, and insufficient inspection of said brakes." Judgment at trial for damages to plaintiff was upheld by the Court of Appeal, Man., on a divided court (39 Man. R. 18). Defendant appealed.

Held: In view of the evidence, and the provisions of the *Motor Vehicle Act,* Man. (C.A. 1924, c. 131), the jury's verdict should not be set aside.

Per Duff and Lamont JJ.: S. 62 of said Act created against defendant a rebuttable presumption of negligence. Under its operation, the onus of disproving negligence remains throughout. If the evidence, when concluded, is too meagre or too evenly balanced to enable the tribunal to determine this issue, as a question of fact, then, by force of the statute, the plaintiff is entitled to succeed. This does not mean that defendant must "demonstrate its case"; it must give reasonable evidence in rebuttal of the legal presumption against it, and the evi-

*PRESENT:—Duff, Rinfret, Lamont and Cannon JJ., and Maclean J. *ad hoc.*

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dence must be such as to satisfy the judicial conscience of the tribunal of fact. Nor does it mean that necessarily, in all cases, defendant must shew precisely how, through the agency of its vehicle, the injury was brought about (the onus in this aspect discussed). As to the form of the verdict in the present case, the jury's answer to the first question (as to negligence in defendant, causing the injury) was really conclusive; its answer to the second question (as to particulars) could only be regarded as material if it tended (as, *held,* it did not) to shew that, in answering the first question, it had been misled into error. It was not necessary to require the jury to specify defendant's negligence, nor for plaintiff to have given particulars of negligence and established it as particularized. In fact, it is not incumbent on plaintiff, proceeding under the statute, to charge negligence in terms; for the law presumes negligence in his favour, and it is for defendant to rebut the presumption (Rule 334, c. 46, R.S.M. 1913).

Per Rinfret, Cannon and Maclean (*ad hoc*) JJ.: In view of s. 15 of the Act (requiring adequate brakes, sufficient to control at all times), and of s. 62 (as to onus), and on the evidence (as to sufficiency of brakes and of inspection), the jury had warrant for its findings, which should not be disturbed.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) dismissing, in the result, on a divided court, the defendant's appeal from the judgment, on trial of the action before Dysart J. and a jury, in favour of the plaintiff for $11,158.25, in an action for damages for personal injuries alleged to have been suffered by the plaintiff by reason of an automobile in which he was riding being struck, while it was standing, by a motor bus of the defendant, owing, as alleged, to defendant's negligence. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was dismissed with costs.

W. N. Tilley K.C. for the appellant.

E. F. Newcombe K.C. for the respondent.

The judgment of Duff and Lamont JJ. was delivered by

DUFF J.—The facts are outlined in the judgment of Mr. Justice Robson (2) in these passages:

On the evening of Sunday, 22nd April, 1928, at about nine o'clock, the plaintiff had come from the Capitol Theatre and entered the Reo automobile of a friend, one Galsbeck, evidently to go home. The plaintiff was in the back seat. The Reo automobile proceeded a short space westerly towards the Donald Street intersection and stopped in a group of cars against which at the moment the signal was directed. While thus at

(1) 39 Man. R. 18; [1930] 2 W.W.R. 305.

(2) 39 Man. R. 18, at 36-37.

rest, the Reo was struck from behind with considerable force by a motor bus of the defendants and plaintiff suffered injuries.

* * *

The plaintiff called as witnesses certain occupants of the Galsbeck car and bystanders and medical men. The plaintiff also introduced as evidence part of the examination on discovery of Erhardt, the driver of the defendants' motor bus. This latter was the only testimony dealing with the bus mechanism adduced by plaintiff. The other witnesses on that phase were called by defendants and were Erhardt, Holmes, a bus and brake superintendent, Colyer, a mechanic, and Johnston, also a mechanic.

In the portion of the Erhardt examination introduced by plaintiff, Erhardt said the bus was of the "White" make and was about four or five years old; that defendant had had it since late in 1925; that they bought it from a private individual in Winnipeg and used it about half time; that at the time of the accident he (Erhardt) was on his regular route between Winnipeg and Transcona and was just on his way from Transcona to the Winnipeg Terminal on Hargrave street; that the bus a twenty-five passenger one, but that he had only one passenger at the time. The bus was gas propelled, and weighed, Erhardt thought, between five and six tons. He said he had been proceeding along Portage Avenue at about twelve or fifteen miles an hour; that that was his usual speed and he couldn't go any faster in that traffic; that he was about to stop for the intersection when something gave way and the brake was then ineffective, hence the collision. This was attributed to the giving way of a small bolt or pin in the braking appliances, but whether it was the breaking of the bolt or its loss from its position, is not clear.

The defence of the appellants in substance was, that the equipment of the motor bus was adequate, and that the collapse of the brake mechanism by reason of which the driver lost control of the vehicle, was due to the fracture of a brake pin, owing to a latent defect in the pin, not discoverable by careful inspection; and, that the bus and its equipment had been subjected to a proper inspection, which had revealed nothing pointing to any deficiency in the machinery. The trial judge directed the jury thus:

So I repeat, this action is based upon negligence. One thing is clear; there was no negligence on the part of the plaintiff himself. There was nothing that he did that was in violation of any duty towards the defendant, and there was nothing that he ought to have done in the circumstances. That narrows the field of inquiry down to the question, which I have already mentioned, "Was there any breach of duty on the part of the defendant which caused the injury to the plaintiff?"

We have in this province for our guidance a Motor Vehicle Act, section 63 [62] of which states: "When any loss, damage or injury is caused to any person by a motor vehicle, the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle * * * shall be upon the owner or driver of the motor vehicle." In other words, by reason of that enactment the onus is now upon the defendant to show that it was not negligent, whereas normally in other cases it would be upon the plaintiff to show that the defendant was negligent. The result of that is that if

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the evidence is evenly balanced both ways the defendant has not shown that there was no negligence, and having failed in that, it could be held liable for negligence or a breach of duty, because the duty on the defendant is to free itself from the imputation of negligence. In doing that, the defendant has not to carry it to any unreasonable extremes; it is just a mere preponderance in the balancing of the evidence. If the weight is with the defendant, it should have the benefit.

The verdict of the jury was given in answer to specific questions, which, with the answers, were these:—

(1) Was there any negligence on the part of the defendant which caused the injury to the plaintiff?—A. Yes.

(2) If you find there was such negligence, in what particulars as alleged in the statement of claim did that negligence consist? Answer: Paragraph (*f*), In not keeping brakes and braking equipment in proper repair, and insufficient inspection of said brakes.

(3) If you find such negligence, at what do you assess the damages of the plaintiff?—A. Ten thousand dollars ($10,000) plus expenses as agreed to by counsel.

I have no doubt that the learned trial judge was right in directing the jury as he did, that, by force of the statute cited, the plaintiff, having proved that he had suffered injuries caused by a motor vehicle owned by the appellants and driven by their servant, was entitled to recover reparation from the appellants unless they established that these injuries " did not arise through the negligence or improper conduct " of the appellants or their driver. The statute creates, as against the owners and drivers of motor vehicles, in the conditions therein laid down, a rebuttable presumption of negligence. The onus of disproving negligence remains throughout the proceedings. If, at the conclusion of the evidence, it is too meagre or too evenly balanced to enable the tribunal to determine this issue, as a question of fact, then, by force of the statute, the plaintiff is entitled to succeed.

This does not mean, of course, that the defendants " must demonstrate their case." They must given reasonable evidence in rebuttal of the legal presumption against them, and the evidence must be such as to satisfy the judicial conscience of the tribunal of fact. Nor does it mean that it is necessarily, in all cases, incumbent upon the owner or driver, against whom the statute is invoked, to adduce evidence, shewing precisely how, through the agency of the motor bus, " the loss, damage or injury " was brought about; the circumstances may be such that the proper course, or, indeed, the only course open to the defendants,

is to prove affirmatively that the duty cast upon them by law to exercise proper care in order to avoid such "loss, damage or injury" was duly discharged. The sufficiency of the explanations advanced will be considered by the tribunal in light of the opportunities of knowledge possessed by the parties respectively, and due consideration will be given to care or absence of care in respect of the preservation and production of available material evidence.

I do not enter upon a discussion of facts. Sufficient is said in the judgment of Mr. Justice Robson, to shew that, on the evidence, a finding by the jury that the appellants had not acquitted themselves of the onus cast upon them, could not, as the law governing such matters stands, be set aside by an appellate court as a perverse or unreasonable verdict.

As to the form of the verdict, the finding of the jury in answer to the first question is really conclusive. The answer to the second question could only be regarded as material, if it tended to shew that, in answering the first question, the jury had been misled into error. For the reasons given by Mr. Justice Robson, that is, I think, a proposition which cannot be maintained. But I think it should be noticed, perhaps, that the learned trial judge, while his charge to the jury left nothing to be desired in point of fairness, went beyond what was demanded of him in requiring the jury to specify the negligence of the appellants. In saying this, it must be added, that counsel for the plaintiff, as well as counsel for the defendants, proceeded from the beginning of the action, in their pleadings and down to the end of the trial, upon the assumption that, notwithstanding the statute, it was the duty of the respondent to give particulars of negligence, and to establish the existence of negligence as particularized. In truth, it is not incumbent upon the plaintiff, proceeding under the statute, to charge negligence in terms; for the reason that the law presumes negligence in his favour, and the burden of rebutting the presumption lies upon the defendant. Marginal Rule, 334, ch. 46. R.S.M. 1913, reads thus:

> Neither party need in any pleading allege any matter of fact which the law presumes in its favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

The appeal should be dismissed with costs.

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The judgment of Rinfret, Cannon and Maclean (*ad hoc*), JJ., was delivered by

CANNON J.—The respondent sued the appellant company to recover damages for injuries suffered by him, on or about the 22nd day of April, 1928, by reason of a collision between a bus operated by the appellant and an automobile in which the respondent was driving. The version of the accident, as given by the driver of the bus, was adopted by both parties as follows:

Q. Well then, the cause of the accident was the trouble with the brake?—A. The little bolt, it is in the brake evener on the brake rods, I call it the brake mechanism; I don't know whether it was in the brake evener or the rod itself; it broke as I applied the brakes, letting my brake pedal go right through the floor board with no pressure on the brake.

Q. This is the mechanism that is connected with the pedal?—A. Yes.

Q. Didn't you have an emergency brake on?—A. The emergency and the pedal brake of that car are on the one brake evener.

Q. Did you try to use the emergency?—A. I did put it on; as soon as I hit for the curb I put the emergency on.

Q. And that didn't hold up?—A. It held it up but not enough to stop me in time.

The respondent's solicitor, before the case went to the jury, insisted that the jury should be left free to return a general verdict, because, in this case, the onus being on the defendant to clear itself entirely, if the latter did not do so, the jury might find in a general way that the appellant was guilty of negligence. The judge, however, asked the jury to answer certain questions, to which they did as follows:

1. Was there any negligence on the part of the defendant which caused the injury to the plaintiff?—A. Yes.

2. If you find there was such negligence, in what particulars as alleged in the statement of claim did that negligence consist?—A. Paragraph (*f*), In not keeping brakes and braking equipment in proper repair and insufficient inspection of said brakes.

Thereupon judgment was entered for the respondent for $11,158.25 and costs.

The defendant appealed from this judgment and verdict to the Court of Appeal for Manitoba, which dismissed the appeal without costs, dismissal of the appeal being favoured by Prendergast C.J.M. and Robson J.A., while Fullerton and Dennistoun JJ.A., would have allowed the appeal; Trueman J.A., held that the verdict and judgment could not be upheld, and favoured a new trial (1).

(1) 39 Man. R. 18; [1930] 2 W.W.R. 305.

The appellant alleges the following reasons to support the appeal:

1. There was no negligence on the part of the defendant, and the verdict and judgment are not supported by the evidence.

2. The learned trial judge failed to properly or sufficiently direct the jury as to the duty of the defendant to keep brakes and braking equipment in repair and proper condition, and as to inspection thereof, and should have told the jury the defendant was under no higher duty to the plaintiff than the ordinary careful motor car owner or driver.

3. The learned trial judge should have instructed the jury that, inasmuch as the evidence submitted established the cause of the accident, the question of onus as a determining factor of the liability did not arise.

4. The Court of Appeal having differed in opinion, the majority in favour of the appellant should have allowed the appeal and set aside the verdict and judgment, failing which a new trial of the action should have been ordered.

5. The damages awarded by the jury were excessive.

The learned counsel for the appellant gave up the branch of the appeal concerning the quantum of damages, and very ably gave reasons why the verdict of the jury should be set aside as contrary to the evidence.

He also acknowledged the onus imposed upon the appellant by the *Motor Vehicle Act* at the time in force in Manitoba, cap. 131, 1924 Consolidated Amendments, section 62, which provides:

62. When any loss, damage or injury is caused to any person by a motor vehicle the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle, and that the same had not been operated at a rate of speed greater than was reasonable and proper having regard to the traffic and use of the highway or place where the accident happened, or so as to endanger or be likely to endanger the life or limb of any person or the safety of any property, shall be upon the owner or driver of the motor vehicle.

Section 15 of the same Act says:

Every motor vehicle shall be equipped with adequate brakes sufficient to control such motor vehicle at all times, and with a windshield wiper, and also with suitable bell, gong, horn or other device which shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of the approach of any such vehicle.

According to the evidence of the appellant's own witnesses, the bus in question was not provided with independent service and emergency brakes; but both the emergency and the pedal brakes of that car were dependent on one simple brake evener, which was found to be out of commission when a certain bolt broke or left its place. The appellant, in its attempt to exculpate itself, proved that the car had been inspected on the 5th of March, 1928, by one Albert Colyer. It appears that, on the above date,

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a "light" inspection took place when all clevises and pins in the brakes and brade rods were supposed to be overhauled. The pin in question, according to the appellant, was in a place where it would not wear at all, and this witness Colyer, who is supposed to have made the inspection, says:

Q. How do you examine a pin?—A. You can tell if there is any lost motion, whether it is worn at all.

Q. And that is what you do?—A. Yes.

Q. You just attempt to see if there was any wear in it?—A. Yes.

Q. If it is a pin that can't wear at all, what do you do? Some pins are in places where they won't wear at all?—A. Well, we do not bother about them. If there is any lost motion anywhere we generally check it up and see where it is.

Q. But if it is a pin that won't wear you don't do anything with it?—A. We just see it is all right, and has got a cotter pin in it.

The accident took place on the 22nd April, 1928, and the car had not been inspected at that time since the 5th March. It was also proven by the appellant that the car should be inspected after running 750 miles. Holmes, appellant's superintendent of bus and brake equipment, said that this White bus was to be inspected every 750 miles and greased thoroughly by two men. He says, however:

Q. How many miles did the bus operate subsequent to that inspection and before the accident?—A. In the neighbourhood of 1,000 miles. I can't be positive of that. I know it did about 500 miles in the month of March, and about 500 miles in the month of April.

Q. You have record of that?—A. We have records of that, yes.

The jury on this evidence could reasonably reach the conclusion that, at the time of the accident, an inspection was past due; that if it had been made with thoroughness, the defect in the bolt in question might have been located and remedied. The appellant acknowledges that they had to prove to the satisfaction of the jury that they had not been negligent; or, to use the words of my brother Duff in *Canadian Westinghouse Co.* v. *Can. Pac. Ry. Co.* (1), they had to "produce evidence reasonably satisfying the tribunal of fact that all proper precautions had been taken in order to provide against risks which might reasonably be anticipated."

The tribunal of fact in this case, the jury, thought there was negligence on the part of the appellant, which consisted in not keeping brakes and braking equipment in proper repair, and insufficient inspection of said brakes.

(1) [1925] Can. S.C.R. 579, at 585.

A company using busses of a capacity of twenty-five persons for the conveyance of the public was bound to inspect minutely the braking apparatus, especially in view of the fact that this particular White car was not provided with two independent braking systems and that both service and emergency brakes were dependent entirely for their operation on a perfect state of maintenance and repair.

The legislature of Manitoba has laid down an imperative rule which is in very clear terms; we do not need, in order to understand them, to have recourse to the interpretation given by English or other tribunals to regulations which are not perhaps couched in the same terms. The courts' discretion was restricted by the legislature when it imposed the duty on the driver of having brakes sufficient "at all times" to control these dangerous machines. It was the duty of the defendant to equip all its motor vehicles with adequate brake service to control such vehicles *at all times*. In order to be sure that the brakes were efficient and sufficient at all times, it may be necessary to inspect them daily or even several times a day. The only evidence brought forward by the appellant was that they had done a "light" inspection of the car several weeks before the accident. The jury found this defence insufficient and took the trouble to say so in answering the question which requested particulars of negligence. Although insufficient inspection did not appear in the particulars given by respondent, the learned counsel for the appellant very fairly stated that appellant would not quibble on this point, as inspection was discussed by the judge and was before the jury. The latter, in finding that the brakes and braking equipment were not kept in proper repair, added, as a necessary consequence, that the inspection of the brakes had been insufficient, in view of the statutory obligation to keep the braking apparatus sufficient, i.e., efficient at all times to control appellant's motor bus.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guy, Chappell & Turner.*

Solicitors for the respondent: *Chapman, Thornton & Chapman.*

1930
*Oct. 24.
1931
**Feb. 23.
**June 12.

PEOPLE'S HOLDING COMPANY, LIMITED (RESPONDENT) ..... } APPELLANT;

AND

THE ATTORNEY-GENERAL OF QUEBEC (PETITIONER) ..... } RESPONDENT;

AND

THE ATTORNEY-GENERAL OF CANADA (INTERVENANT).

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

Company—Incorporated under federal authority—Petition by the Attorney-General of a province for its dissolution—Allegations that the company was violating the law and defrauding the public—Right to take proceedings—Exception to the form—Arts. 978 and foll. C.C.P.

The Attorney-General for Quebec instituted proceedings under articles 978 and following C.C.P., invoking irregularities and illegalities in the management of the appellant company, incorporated under the *Companies Act* of the Dominion, also alleging violations of the law or of the Acts by which the appellant was governed with the object of defrauding the public and of endangering the public welfare and further asserting that the proceedings were taken to abate these alleged violations and were instituted and carried out in the general public interest of the people of the province of Quebec in particular. Consequently, the Attorney-General for Quebec asked that the letters patent of the appellant company be forfeited and that the company itself be dissolved. The appellant, by way of an exception to the form, moved for the dismissal of the action on the ground, *inter alia,* that the Attorney-General of Quebec had neither the quality nor the capacity to institute these proceedings against a company holding its powers from the federal authority.

Held that the Attorney-General for Quebec was qualified to institute the proceedings and that the exception to the form has been rightly dismissed by the court appealed from. The Crown, as *parens patriae,* represents the interests of His Majesty's subjects, and the Attorney-General for a province, acting as the officer of the Crown, is empowered to go before the courts to prevent the violation of the rights of the public of that province, even if the perpetrator of the deeds complained of be a creature of the federal authority. In other words, the Attorney-General of a province has not only the right, but the duty, to suppress the civil offences committed within the limits of the province.—No opinion is expressed as to the question whether the courts may, at the instance of the Attorney-General of a province, direct the dissolution or winding up of a company incorporated

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Cannon JJ.

**PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

by Act of the Parliament of Canada or by letters patent issued under its authority. Such a question can arise only on the merits of the case and exception to the form is not the proper procedure for that purpose nor is it the appropriate way of raising it.

Held, also, that, by enacting art. 978 C.C.P., the legislature of Quebec intended to confer the power of prosecuting violations of the law therein stated on the Attorney-General of the province. Wherever the words "Attorney-General" are used without qualification in a code or in a statute of Quebec, they have reference to the Attorney-General for Quebec. But the Attorney-General for Canada may also avail himself of the benefit of the enactment provided by art. 978 C.C.P. (*Dominion Salvage & Wrecking Co.* v. *The Attorney-General of Canada* (21 Can. S.C.R. 72) ref.).

To the extent above indicated, the following judgments are approved: *The Attorney-General* v. *The Niagara Falls International Bridge Company* (20 Grant's Ch. R. 34); *The Attorney-General* v. *The International Bridge Company* (27 Grant 37); *Loranger* v. *Montreal Telegraph Company* (5 L.N. 429); *Turcotte* v. *Compagnie de chemin de fer Atlantique* (17 R.L. 398); *Casgrain* v. *Dominion Burglary Guarantee Company* (Q.R. 6 S.C. 382); *Guimond* v. *National Real Estate* (16 Q.P.R. 328).

Judgment of the Court of King's Bench (Q.R. 48 K.B. 133) aff.

APPEAL, by special leave of appeal, from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J., and dismissing the exception to the form filed by the appellant as a preliminary answer to the proceedings instituted by the respondent for the dissolution or winding-up of the appellant company.

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

J. de G. Audette K.C. for the appellant.

A. Geoffrion K.C. and *A. Garneau* for the respondent.

O. M. Biggar K.C. for the Attorney-General for Canada.

F. H. Chrysler K.C. for the Attorneys-General for Manitoba and Saskatchewan.

J. Sedgewick for the Attorney-General for Ontario.

The judgment of the court was delivered by

RINFRET J.—The People's Holding Company Limited is a federal company incorporated under the *Companies' Act*, now c. 27 of R.S.C., 1927, originally with its head office in

(1) (1930) Q.R. 48 K.B. 133.

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the province of Ontario. On the record before us, it would appear that the head office was later transferred to Montreal, in the province of Quebec, but it is alleged that the proceedings adopted for that purpose were not according to law and therefore ineffectual.

This case originated by a petition on behalf of the Attorney-General of Quebec, in right of His Majesty the King, under articles 978 and following of the Code of Civil Procedure, alleging irregularities and illegalities in the organization, the activities and the management of the company; asserting that the company made use of its charter to defraud the public who, in the words of the petition,

a déjà perdu des sommes considérables par l'achat d'un certain nombre d'actions de la compagnie intimée.

and that, without the present intervention of the Attorney-General,

le public du Canada et de la province de Québec en particulier est en danger de perdre des sommes très considérables.

Under the circumstances, the prayer of the petition is that a writ of *scire facias* should issue pursuant to the articles of the code already mentioned in order that it might be declared:

(*a*) Que la compagnie intimée a commencé et a continué ses opérations en violation de l'acte qui la régit;

(*b*) Que la dite compagnie intimée a assumé et assume des pouvoirs, privilèges, franchises, qui ne lui appartiennent pas et qu'elle est en conséquence devenue passible de la forfaiture de ses droits.

(*c*) Que les lettres patentes ou charte de l'intimée, ainsi que tous les droits et privilèges que les dites lettres patentes ou charte comportent, soient déclarés forfaits; et

(*d*) Que la dite compagnie intimée ayant un capital minimum d'un million de dollars, soit déclarée dissoute et * * * qu'un curateur soit nommé aux biens de la dite compagnie intimée.

The appellant, by way of exception to the form, prayed for the dismissal of the action on several grounds. Some of these grounds raised questions purely of procedure. They have already been disposed of in the Quebec courts and they are not open in this appeal. Another ground was that

proceedings by way of *scire facias* are not the proceedings provided by law when seeking the remedy asked for by petitioner in the present case.

Yet another ground—and the one about which we are mainly concerned—was that the provincial Attorney-General had

neither the quality nor the capacity to institute the proceedings

against a company holding its powers from the federal authority.

The Superior Court, in Montreal, held that the Attorney-General of Quebec was the proper person to present the special information (Art. 980 C.C.P.) and dismissed the exception to the form, but without distinguishing between the various kinds of relief prayed. On appeal, the judgment was unanimously affirmed. Some of the learned judges, in their reasons, made reservations with regard to part of the conclusions of the petition, but these reservations were not expressed in the formal judgment of the court. It was feared, therefore, that the decision might be regarded as *res judicata* between the parties upon all of the points raised by the appellant. That involved undoubtedly questions of law of great public importance applicable to the whole Dominion, and affecting all joint stock companies incorporated by Act of the Parliament of Canada or by letters patent issued under its authority.

For those reasons, special leave to appeal was granted by this court so that the true effect of the judgments may be determined and that, if necessary, these important questions may be further discussed and decided.

The Attorney-General of Canada and the Attorneys-General of all the other provinces were notified in order that they may take part in the appeal and be given an opportunity to submit their views. Thus, for the decision presently to be stated, we had the benefit of arguments not only on behalf of the parties immediately concerned, but also on behalf of the Attorney-General of Canada and of other provincial Attorneys-General.

For the better understanding of the nature of the litigation, it will be convenient to give here the text of the article of the Code of Civil Procedure under which the information was presented:

978. In all cases of general public interest, the Attorney-General must, and in all other cases, may, but need not unless sufficient security is given to indemnify the Government for the costs to be incurred, prosecute the violations of the law in the following cases:

1. Whenever any association or number of persons acts as a corporation without being legally incorporated or recognized;

2. Whenever any corporation, public body, or board, violates any of the provisions of the acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits acts the doing or omission of

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which amounts to a surrender of its corporate rights, privileges and franchises, or exercises any power, franchise or privilege, which does not belong to it or is not conferred upon it by law.

At the outset, it may be stated that we do not find it necessary to decide the point whether, upon the allegations of the information and to secure the object sought for, the writ of *scire facias* would be a proper remedy. The appellant urged that the writ did not lie to attack, cancel and annul letters patent granted by the Crown or to dissolve a corporation created by or under an Act of parliament. Upon that contention we need not express any opinion. The information of the Attorney-General is substantially within the terms of articles 978 and following of the Code of Civil Procedure. It is expressly stated that the proceedings are taken out in compliance with those articles. It does not matter if the petition calls *scire facias* a writ which, in truth and strictly speaking, may not be *scire facias*. It is sufficient that the proceedings taken out are those authorized by the articles of the code the Attorney-General expressly appeals to. Giving the writ an erroneous or improper appellation does not alter its nature, nor does it modify the position of the parties.

We should therefore proceed to a consideration of the true nature of the petition and inquire whether or not the Attorney-General of Quebec has the "capacity" and the "quality" to maintain these proceedings.

The real question in dispute is one of quality and not of capacity. It is unquestionable that the Crown has the capacity to be a party to any suit. It exercises that capacity through its recognized officers and, in Quebec (Art. 81 C.C.P.), as well as in all other provinces, that officer is the Attorney-General (c. 16 of R.S.Q. 1927). It should be evident that the appellant does not wish to dispute that proposition and the issue he intends to raise really is: Whether, for the particular purpose, the Attorney-General of Quebec is qualified to represent the Crown.

That, by enacting article 978 C.C.P., the legislature of Quebec intended to confer the power referred to on the Attorney-General of Quebec does not seem to leave any room for discussion. Although the decision of the court in *Dominion Salvage & Wrecking Company* and *The Attorney-General of Canada* (1), is authority for the proposi-

(1) (1892) 21 Can. S.C.R. 72.

tion that the Attorney-General of Canada may also avail himself of the benefit of the enactment, it may not be doubted that the words "Attorney-General" wherever used without qualification in a code or in a statute of Quebec have reference to the Attorney-General of the Province of Quebec (See art. 5 of the Code of Civil Procedure, subs. 17 of s. 36 of R.S.Q. 1909 and subs. 14 of s. 61, c. 1 of R.S.Q. 1925). The respondent is therefore the officer of the Crown primarily designated in art. 978 and qualified to institute all proceedings originated under that article.

But the objection of the appellant goes deeper and it says: The People's Holding Company Limited is a federal corporation whose status cannot be impaired by provincial authority. The respondent, as an executive officer of the province, is not empowered to conduct litigation in respect of any subject within the authority or jurisdiction of the Dominion. He cannot, as such, grant a fiat for the issue of a writ to annul federal letters patent, nor can he take out such a writ himself without permission from the proper federal authority. In brief: Article 978 C.C.P., on which the respondent relies, does not apply to federal companies or, if it does apply in such cases, then the proceedings can only be brought by the Attorney-General of Canada or, in the alternative, if the article is meant to apply to federal companies and if it should be interpreted as giving the alleged power to the Attorney-General of Quebec, then it is pro tanto *ultra vires*.

There are no decisions of the higher courts precisely in point. In two instances (*The Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1); *Casgrain* v. *Atlantic & North West Ry.* (2)), similar proceedings in the name of the Attorney-General of Quebec against companies incorporated under Dominion law went to the Privy Council without there being any suggestion, either by the Board or by counsel, that the provincial Attorney-General was not the proper plaintiff.

In the case of the *Dominion Salvage Company* already referred to (3), under former articles of the code of which 978 and following are the re-enactment, the charter of a federal company—being an Act of the Parliament of Can-

(1) (1883) 9 A.C. 157. (2) (1895) 64 L.J.P.C. 88.
(3) (1892) 21 Can. S.C.R. 72.

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ada—was declared forfeited, but at the instance of the Attorney-General of Canada. The majority of the court, for whom Taschereau J., afterwards Chief Justice, delivered the judgment, declared however that the articles in question "apply by their very terms to all corporations whatsoever," and the court expressly reserved the question

whether, and in what cases, the Attorney-General for the province could also exercise that right.

It has now become our duty to decide whether the present information in the name of the provincial Attorney-General is a proper and competent exercise of the right.

The allegations of the petition all point to violations of the law or of the Acts by which the appellant is governed, with the object of defrauding the public and of endangering the public welfare. The prosecution tends to abate the alleged violations and is declared to be instituted and carried on in the general public interest of the people of the province of Quebec in particular.

Now the Crown, as *parens patriae,* represents the interests of the whole of His Majesty's subjects, and we can discover no reason why the Attorney-General for the province, acting as the officer of the Crown, should not be empowered to go before the courts to prevent the violation of the rights of the public of that province, even if the perpetrator of the deeds complained of be a creature of the federal authority. In the words of Surveyer J., in the present case: "le procureur-général d'une province a le droit et le devoir de réprimer les délits civils qui se commettent dans les limites de sa province."

This accords with the position taken at bar by the Attorney-General of Canada who stated that he did "not desire to contest the right of an attorney-general of a province to take such proceedings as may be open to him to take, according to the practice of the courts of the province, for the purpose of compelling the observance within the province of any law, federal or provincial, which may be in force therein." To the extent so far indicated and also to the extent to which they have so decided we think that the following judgments, referred to during the course of the argument and on which the courts below relied,

should be approved; *The Attorney-General* v. *The Niagara Falls International Bridge Company* (1); *The Attorney-General* v. *The International Bridge Company* (2); *Loranger* v. *Montreal Telegraph Company* (3); *Turcotte* v. *Compagnie de chemin de fer Atlantique* (4); *Casgrain* v. *Dominion Burglary Guarantee Company* (5); *Guimond* v. *National Real Estate Company* (6); to which should be added the judgments now appealed from.

What we have said is sufficient to conclude that, for the reasons stated, the exception to the form was rightly dismissed and that the appeal should accordingly be disallowed.

The confirmation of the judgments *a quo* does not imply that the courts may, at the instance of the Attorney-General of a province, direct the dissolution or winding-up of a company incorporated under the Canadian *Companies Act*. These questions will arise only on the merits. There is no decision on these points, as it is not the proper procedure on which to make an adjudication of that kind, nor is it the appropriate way of raising these questions.

We were told by the appellant that those were the only remedies prayed for in the information. We do not wish to be understood to mean that they are not open. We only say that if they are not, when the facts are found to have been established, some other order may be made, on the conclusions as drawn or upon proper amendments, which will have the effect of protecting the public and forcing the appellant to obey the laws to which it is subject.

A powerful argument was addressed to us urging that, articles 978 and following of the Code of Civil Procedure being in substance a re-enactment of pre-confederation statutes (Statutes of Canada, 12 Vict., c. 41, s. 8; Consolidated Statutes of Lower Canada, c. 88, s. 9) which, it is claimed, have never been repealed at least so far as concerns the province of Quebec, full effect should be given to their provisions in that province even as regards Dominion bodies or federally incorporated companies, as long as the Parliament of Canada does not intervene to introduce conflicting legislation or to appoint its own executive officers

(1) (1873) 20 Grant's Ch. R. 34.
(2) (1879) 27 Grant 37.
(3) (1882) 5 L.N. 429.
(4) (1889) 17 R.L. 398.
(5) (1894) Q.R. 6 S.C. 382.
(6) (1915) 16 Q.P.R. 328.

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for the purpose of prosecuting matters of this nature within its constitutional authority (see *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1).

The point is so much involved with the question of remedies, with which, after all, article 978 C.C.P. is primarily concerned, that, as a consequence of what we have just said, we think it should properly be left for discussion on the merits.

Appeal dismissed with costs.

Solicitors for the appellant: *Audette & O'Brien.*

Solicitors for the respondent: *Bertrand, Guerin, Goudrault & Garneau.*

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*Oct. 28.

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*April 28.

DAVID SEGAL (PLAINTIFF).....APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT)RESPONDENT.

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

Prohibition—Writ—Municipal law—Recorder's Court—Jurisdiction—Canvassers—Licence—By-law—Ultra vires—Company having licence—Employee canvassing without licence—Arts. 50, 1003 C.C.P.

The appellant was employed by the Fuller Brush Company, of Hamilton, Ontario, to canvass in the city of Montreal for orders for his employer's goods. Section 29 of by-law 432 of the city of Montreal provides that "no person, corporation or firm shall do business * * * as * * * canvasser * * * without having previously obtained a licence * * *," such by-law having been passed under authority of the city's charter enacted by the provincial legislature. The appellant was brought before the Recorder's Court on a complaint that he was "unlawfully doing business * * * as a canvasser * * * without having previously obtained a licence * * *." The company itself had obtained from the city authorities a licence to canvass for the sale of its goods and that licence was in full force at the time proceedings were taken against the appellant. Upon judgment having been given against him and as no right of appeal existed by statute, the appellant petitioned the Superior Court for a writ of prohibition commanding the Recorder's Court and the city to discontinue all proceedings against him in the matter, on the grounds that the appellant did not come within section 29 of the by-law as he was

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) [1931] A.C. 310, at 327.

merely an instrument by means of which the company was carrying on business under its licence and that the by-law was, moreover, illegal and *ultra vires* as being indirect taxation.

Held that the appellant was not entitled to the issue of a writ of prohibition, inasmuch as, the action before the Recorder's Court being for the enforcement of a by-law, that court had jurisdiction under article 484 of the city charter to determine the law involved, as well as the facts, in order to decide whether or not the appellant had committed a breach of such by-law. A writ of prohibition does not lie to review an erroneous judgment of a judge of an inferior court from which no right of appeal has been given by statute. The functions of the Superior Court, on an application for such a writ under article 1003 C.C.P. are not those of a court of appeal; the Superior Court has nothing to do with the merits of the dispute between the parties but is concerned only to see that the inferior court does not transgress the limits of its jurisdiction.

Held, also, that the by-law and the enabling statute were not *ultra vires*. Section 92 (9) of the B.N.A. Act gives the provincial legislature exclusive power to make laws in relation to "shop * * * and other licences in order to the raising of a revenue for provincial, local or municipal purposes," and the effect of the by-law was to provide additional revenue for the city of Montreal.

Held, also, per Duff, Newcombe, Rinfret and Lamont JJ., that the appellant was not doing business as canvasser within the meaning of the by-law and was under no obligation to take out a licence. Anglin C.J.C. expressed no formal opinion, although being disposed to concur with the majority of the court, if it had been proper to determine that matter.

Judgment of the Court of King's Bench (Q.R. 46 K.B. 375) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, de Lorimier J. (2), and dismissing the appellant's petition for a writ of prohibition.

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

L. M. Gouin K.C. for the appellant.

G. Saint-Pierre K.C. for the respondent.

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Lamont and I agree in his conclusion that this appeal must be dismissed on the ground that the Recorder's Court had jurisdiction to determine the law involved, as well as the facts, in order

(1) (1929) Q.R. 46 K.B. 375.

(2) (1929) Q.R. 46 K.B. 375, at 377.

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to decide whether or not the appellant had committed a breach of the by-law in question.

As Mr. Justice Lamont says,

> In an action for the enforcement of a by-law (which this action clearly is) the Recorder, in my opinion, has jurisdiction—in fact it is his duty—to determine, not only all facts relevant to the case but also the meaning to be put on the by-law. How else can he try the action?

It is well settled law that a judge cannot give himself jurisdiction by wrongly finding as facts the existence of conditions essential to his jurisdiction. On the other hand, it is equally well settled that, where it is necessary for a judge to interpret a statute or by-law, in order to determine whether the facts established come within its purview, the interpretation of such statute or by-law, so far as may be necessary to his decision, is as much within his jurisdiction as is the finding of the relevant facts themselves.

In *The Queen* v. *Bolton* (1), it is said that

> The test of jurisdiction under this rule is, whether or not the justices had power to enter upon the enquiry, not whether their conclusions, in the course of it, were true or false—

and this applies equally whether the conclusion be one of law or fact. As was said by Riddell J.A., in *Township of Ameliasburg* v. *Pitcher* (2),

> * * * if it be necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the division court judge may go.

Here, the facts are either admitted or established beyond dispute; there is no controversy as to them. So, the only question for determination by the Recorder's Court was whether or not, upon the facts, the by-law in question, properly construed, covered the case. The determination of this question of law was as much a part of the duty of the Recorder, imposed on him by Art. 484 of the Charter of the city of Montreal, as would have been the determination of the facts themselves, if in dispute. The only matter open for consideration in such a case is whether or not the tribunal sought to be prohibited had the right to enter on the enquiry; and not at all, assuming such right, whether its conclusion was or was not correct.

By Art. 1003 of the Code of Civil Procedure it is provided that,

> The writ of prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction.

(1) [1841] 1 Q.B. 66.

(2) (1906) 13 O.L.R. 417 at 420.

This particular article dealing with the writ of prohibition is exclusive of any general supervising jurisdiction of the Superior Court to be inferred from Art. 50, C.C.P. To hold otherwise would be to violate the well-known rule of legal interpretation, *Generalia specialibus non derogant.* As Mr. Justice Lamont says,

> Dealing with the question of prohibition, it is important to bear in mind that the functions of the Superior Court are in no sense those of a court of appeal. It has nothing to do with the merits between the parties; it is concerned only to see that the Recorder's Court does not transgress its jurisdiction.

If it were proper now to determine that matter, I would be disposed, as at present advised, to take the view of my brother Lamont in regard to the proper interpretation of by-law no. 432. I, however, confine my decision to the point that the defendant failed to establish want of jurisdiction in the Recorder's Court.

On the issues raised, as to the by-law being illegal, *ultra vires* and unconstitutional, I entirely agree with the views expressed by my brother Lamont.

The judgments of Duff, Newcombe, Rinfret and Lamont JJ. were delivered by

LAMONT J.—This is an appeal from the judgment of the Court of King's Bench (District of Montreal) reversing an order of the Superior Court by which the respondent (hereinafter called the " City ") and the Recorder's Court of the city of Montreal were enjoined from continuing proceedings in that court against the appellant. By a summons issued by the City the appellant was, on February 18, 1925, brought before the Recorder's Court on a complaint that he was, on February 9, 1925,

> unlawfully doing business within the city of Montreal as a canvasser in St. Matthew street without having previously obtained a licence from the said city and without having paid the city treasurer the sum of $100, contrary to the by-law of the said city in such case made and provided.

On being served with the summons the appellant, by his attorneys, wrote to the clerk of the Recorder's Court and claimed that the court was without jurisdiction to determine the complaint against him as the by-law under which he was sued was illegal, *ultra vires* and unconstitutional. The section of the by-law (no. 432), which the appellant was charged with having violated, in part reads as follows:—

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Sect. 29. No person, corporation or firm shall do business within the city of Montreal, as auctioneer, pawnbroker, junk or second-hand dealer, pedler, hawker, huckster, itinerent trader, public vendor, canvasser * * * without having previously obtained a licence from the city and without having paid to the City Treasurer the following sums or those which may be fixed by the civic by-laws:

(Canvassers) $100.00

Before the Recorder evidence was submitted by the City that on the day in question the appellant had gone from house to house soliciting orders for brushes and exhibiting samples which he carried with him, and that, when questioned, he had admitted that he did not have in his own name a licence from the city to canvass. On his part the appellant submitted evidence that he was an employee of the Fuller Brush Company, Limited, the head office of which was in Hamilton, Ontario; that the company was incorporated by Dominion letters patent and was authorized to carry on business throughout the Dominion of Canada by its

representatives, salesmen and agents going from house to house displaying samples, circulars and pictures of the goods manufactured by or being sold by the company and taking orders for such goods to be subsequently delivered;

that, on October 5, 1924, the company had obtained a licence to canvass in private houses in Montreal for the sale of its goods, and other articles, and that the licence was in full force and effect at the time proceedings were taken against him. He also put in evidence his contract of employment with the company which shewed that it was his contractual duty to go from one private house to another within the territory assigned to him and canvass for orders for his employer's goods; that his whole time belonged to the company; that he was entirely under its control and had contracted not to sell the merchandise of anyone else. For his services he received a salary of $12 per week and a commission of 15 per cent on the amount of his sales. On these facts it was contended on behalf of the appellant that he did not come within section 29 of the by-law above quoted, inasmuch as his company had a licence to canvass and he was merely the instrument by means of which the company was carrying on business, under its licence. The Recorder, however, found him guilty of violating the by-law and imposed on him a penalty of $40 and costs and, in default of payment, two months imprisonment, basing

his judgment on the case of *City of Montreal* v. *Leslie Davignon,* decided by him some time previously.

Upon judgment being given against him the appellant petitioned the Superior Court for a writ of prohibition commanding the Recorder's Court and the City to discontinue all proceedings against him in the matter. The Superior Court held that the City was not authorized by the by-law to require the appellant to furnish himself with a licence in his own name in addition to the licence held by him employers, and that in imposing a penalty upon the appellant for want of such licence the Recorder's Court had exceeded its jurisdiction. He therefore directed the writ of prohibition to issue.

Against the granting of the writ the City appealed to the Court of King's Bench (Appeal Division). That court held that it was for the Recorder to determine whether or not the appellant was doing business as a canvasser within the meaning of the by-law and, if his decision on this point was erroneous, an erroneous decision on a matter which the Recorder was competent to try did not justify the issue of a writ of prohibition. The judgment of the Superior Court (granting prohibition) was, therefore, set aside. From the judgment of the Court of King's Bench this appeal is brought.

Before dealing with the question of the Recorder's jurisdiction, I shall consider whether or not the by-law required the appellant to have a licence to canvass in his own name in view of the fact that his employers had one and he was merely canvassing for the sale of their goods.

By paragraph (*g*) of the by-law " canvasser " is defined as follows:—

> (*g*) *Canvasser* shall apply to every person canvassing, in private houses, for orders for the sale of goods, provisions or any other article whatsoever, but not to the head or the regular and salaried employee of a business firm who, occasionally and in the ordinary course of business, goes into a private house to take an order, at the previous request of a customer, nor to commercial travellers.

That what the appellant was doing brought him within this definition is not disputed, but it is pointed out that the prohibition in section 29 is not against canvassing, but against " doing business as canvasser " and, it is contended, that to do business as canvasser, within the meaning of this by-law, imports doing it by the canvasser on his own

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account and does not include an employee who is merely carrying out his employer's instructions. Whether the employee as well as the corporation was required to have a licence is entirely a question of the legislative intention as disclosed in the by-law. This intention is to be ascertained from the language used, the nature of the by-law, and the object sought to be attained thereby. In construing the by-law the paramount duty of the judicial interpreter is to give the language thereof its plain and rational meaning and to promote its object. *Maxwell on Interpretation of Statutes*, 7th ed., page 226.

The nature and object of the by-law are apparent. Article 364 of the City's charter, as amended by 9 Edw. VII, c. 81, art. 16, authorizes the City to impose and levy:—

> A special tax not exceeding $200 on * * * hawkers, pedlers, canvassers, hucksters, second-hand dealers and on all itinerant traders doing business in the city * * *.

Article 365 provides that this tax may be imposed in the form of a licence and section 53 of the by-law authorizes the Recorder to impose a fine, not exceeding $40 and, in default of payment, imprisonment for two months, for the infraction of the above quoted part of section 29. The by-law, therefore, is a taxing measure enacted for the purpose of obtaining revenue for the City. That the legislature was within its jurisdiction in authorizing the City to impose and levy the special tax referred to is, in my opinion, beyond dispute. The only questions on this branch of the case are: What does the by-law, properly interpreted, mean, and does that meaning carry it beyond the authority given to the City by the legislature?

It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language. A subject is not to be taxed unless the taxing statute clearly imposes upon him the obligation to pay. According to the by-law the tax is levied upon those who are doing certain classes of business within the City, and is imposed irrespective of whether the business is being done by a person, corporation or firm. The fact that it is in the form of a licence in no way alters its character as a tax, for it is only a tax that the City, under the statute, is authorized to impose.

The prohibition contained in section 29, above quoted, is against any person, corporation or firm doing business as canvasser within the City without having previously obtained a licence therefor. What did the framers of the by-law mean when they used that language? Can they reasonably be held to have meant anything other than that if any person, corporation or firm paid the tax and obtained the licence, he or it, as the case might be, would be at liberty to do business as canvasser in the City? A corporation, however, can only do business by its employees or agents, as the City, when enacting the by-law, well knew. Must we not therefore conclude that it was intended, when the by-law was enacted, that every corporation paying the tax and obtaining a licence to canvass would be entitled to canvass by its employees or agents?

The contention of the City is that it was authorized by the statute to define, by by-law, who would be considered a canvasser; that under the definition adopted "canvasser" (with certain exceptions not material here) means "every person canvassing in private houses for the sale of goods"; that the appellant was a person within the meaning of this definition, that he had canvassed in the City and, therefore, he came within the by-law.

In order to determine the validity of this contention it is necessary to ascertain what constitutes "doing business as canvasser" when those doing it are considered as subjects of taxation. If the by-law had imposed a tax on every person, corporation or firm doing business as hardware merchant, could such provision reasonably be construed as imposing the tax on every clerk or employee of the hardware merchant engaged in selling his employer's goods? In my opinion it could not, unless language was used making it clear that every clerk or employee selling hardware under his employer's instructions would be considered to be doing business as a hardware merchant. The language of the by-law in question does not, in my opinion, indicate an intention on the part of the City that an employee soliciting orders for his employer's goods, and having no interest in the orders beyond his stipulated remuneration, is to be considered as "doing business as canvasser," rather than the person, corporation or firm whose goods he was endeavouring to sell and whose employee he is. If the City

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had intended the by-law to apply to the individual, whether principal or employee, soliciting in private houses, there was no necessity for mentioning corporation or firm in section 29, for it is not contended that both an employee and his employer must have a licence.

What is meant by "doing business" has been judicially considered in a number of cases.

In *Williamson* v. *Norris* (1), a clerk of the House of Commons was charged with having unlawfully sold intoxicating liquor contrary to the *Licensing Act*. He was employed by the Kitchen Committee of the House, and sold liquor under its direction. The Act provided that

No person shall sell any intoxicating liquor without being duly licensed to sell the same * * *.

It was held that the Act did not apply to an employee selling liquor the property of his master by his master's orders.

In *Lewis* v. *Graham* (2), the defendant lived at Lewisham but was employed as clerk by a solicitor at his office in London. An action was brought against him in the Lord Mayor's Court. That court had jurisdiction under the Act "if the defendant resided or carried on business within the city." It was contended that he carried on business there. On an application to prohibit the Lord Mayor's Court from continuing proceedings against the defendant, as being without jurisdiction, it was held that the defendant did not carry on business within the city, within the meaning of the Act; that the business there carried on was the business of his employer. In his judgment Lord Coleridge, C.J., at page 782, said:—

There are two cases in the Court of Exchequer in which the questions were as to the jurisdiction of an inferior court. It was contended in one of those cases that a clerk in the Admiralty, and in the other that a clerk in the Privy Council carried on business within the jurisdiction. In both cases the court held that the clerk did not "carry on his business" for the purposes of the respective Acts within the jurisdiction, because he was a mere servant employed in a department of the state. Those cases would be directly in point except for the word "his" in the Acts on which they arose. But I think that word makes no difference, because the words "carry on business" must mean carry on his business.

And Matthew J., at page 784, said:—

The *Mayor's Court Act* means "provided the defendant shall carry on 'his' business"—not the business of another. Can it be said that in serving his master in the city, a clerk carries on "his" business there? I think the words "carry on" apply to much more than mere service. The

(1) [1899] 1 Q.B. 7. (2) (1888) 20 Q.B.D. 780.

business of the plaintiff is not even carried on in any fixed place, because it is the business of a solicitor's clerk to carry on business wherever he is instructed to do it. It appears to me that the Act does not apply under these circumstances.

See also *Ex parte Smith* (1).

Counsel for the City referred us to certain decisions of the courts in the Western provinces as supporting his contention. These cases, on examination, afford no assistance in construing the by-law before us. They are all cases under statutory provisions dealing with hawkers and pedlers.

In *Rex ex Rel. Kane* v. *Haworth* (2), the Saskatchewan Court of Appeal held that the person required to be licensed by the *Hawkers' and Pedlers' Act* was the individual who goes from house to house soliciting orders and not the corporation which employed him. That case, in my opinion, is clearly distinguishable. The sections of the statute there applicable read as follows:—

1. In this Act the expression "hawker" or "pedler" means a person who goes from house to house selling or offering for sale goods, wares or merchandise, or * * * but does not include any person selling fresh meat or nursery stock, or products of his own farm or fish of his own catching or the *bona fide* servant or employee of any such person having written authority to sell.

2. No person shall engage in the business of a hawker or pedler within Saskatchewan without first obtaining a licence therefor from the Provincial Secretary and no city, town, village or rural municipality or officer thereof shall issue a licence to any hawker or pedler who does not first produce a provincial licence then in force.

3. No hawker or pedler shall sell or offer for sale any goods, wares or merchandise of any sort or class other than those set forth in his licence.

A perusal of these sections shews that the statute was enacted not merely with the intent of securing a revenue for the province and the municipality, but also with the intent of controlling and limiting the classes of goods which could be offered for sale from house to house. Furthermore the exclusion from the definition of the *bona fide* servant or employee of the persons mentioned in the last clause of section 1, when such servant or employee had written authority to sell, but leaving such servant or employee under the operation of the Act when he had not, seems to me to establish clearly, as the court held, that the Act was framed to apply to the individuals going from house to house and not to their employers. In any event

(1) (1874) 15 N.B.R. 147.

(2) (1920) 13 Sask. L.R. 364.

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in that case neither the accused nor his employer had a licence. The employer had applied to the Government for a licence and had tendered the fee but had been refused on the ground that the statute did not contemplate anyone being licensed except the individual who offered the goods for sale or solicited orders. It was quite within the competence of the legislature to require the individual canvasser to take out a licence, and to control the classes of goods he offered for sale.

In *Rex ex Rel. Nalder* v. *Barlow* (1), the expressions "hawker" and "pedler," as defined by the Ordinance, under which the prosecution was laid, expressly included the agent as well as the principal, and Stuart J.A., in his judgment, said:—

> The very use of the word "agent" shews that the reference is to the individual persons.

In the present case the by-law, being a taxing measure, can only be enforced against those upon whom the tax is clearly imposed. The onus was, therefore, on the City to shew that the by-law imposed it upon the appellant. "Doing business," within the meaning of the by-law, imports, to my mind, something more than the acts of a mere employee carrying out, both as to time and service, his master's instructions. It implies that he is wholly or partially carrying on business on his own account as the Recorder held in *City of Montreal* v. *Lafond*. This the appellant was not doing. The tax being a tax on doing business was, in my opinion, intended to be paid by the owner of the business, whether the owner was a person, corporation or firm.

The appellant, therefore, was not doing business as canvasser within the meaning of the by-law and was under no obligation to take out a licence.

Another consideration leads me to the same conclusion. The word "person" in section 29, if used alone, would, by virtue of article 17 (11) of the Civil Code, and section 2 of the by-law, include a corporation unless the context otherwise required. By placing "corporation" in juxtaposition with "person" in the section, the City, in my opinion clearly indicated that "person", as there used, was not intended to include a corporation. But for section 29 the

(1) (1922) 19 Alta. L.R. 66; (1923) 1 D.L.R. 262.

Fuller Brush Company, by virtue of its corporate powers, would have had a right to canvass in private houses in Montreal. That right is interfered with only to the extent of the prohibition in the by-law, that is, it must not be exercised without first obtaining a licence.

The next question we have to consider is whether a writ of prohibition lies to review an erroneous judgment of the Recorder from which no right of appeal has been given by statute. Article 50 of the Code of Civil Procedure reads:

50. Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the province, are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided.

and article 1003 provides as follows:—

1003. The writ of prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction.

In dealing with the question of prohibition it is important to bear in mind that the functions of a superior court on an application for a writ are in no sense those of a court of appeal. It has nothing to do with the merits of the dispute between the parties; it is concerned only to see that the Recorder's Court did not transgress the limits of its jurisdiction.

Article 484 of the City's charter deals with the jurisdiction of the Recorder's Court and, in part, reads as follows:

484. The recorder's court has the jurisdiction of a recorder and shall hear and try summarily:

* * *

3. Any action for the enforcement of any by-law.

The principles governing the right to a writ of prohibition have been pretty well established, although in certain cases it is difficult to draw a sharp line between lack or excess of jurisdiction which gives the right, and the improper exercise of jurisdiction which gives no right. The first question which a judge has to ask himself, when he is invited to exercise a limited statutory jurisdiction, is whether the case falls within the defined ambit of the statute; if it does not, his duty is to refuse to make an order as judge; and, if he makes an order, he may be restrained by prohibition. Davey, L.J., in *Farquharson* v. *Morgan* (1).

The City's complaint was that the appellant had violated the by-law and it asked that it be enforced against him.

(1) [1894] 1 Q.B. 552.

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The action, therefore, being for the enforcement of a by-law, on its face falls within the jurisdiction given by article 484.

In *The Queen* v. *Bolton* (1), it was held, in the analogous case of a magistrate's conviction, that the test of jurisdiction is whether or not the justices had power to enter upon the inquiry, not whether their conclusions in the course of it were true or false. In his judgment Lord Denham, C.J., said:—

> Where a charge has been well laid before the magistrate, on its face bringing itself within its jurisdiction, he is bound to commence the inquiry; in so doing he undoubtedly acts within his jurisdiction and, unless during the course of the inquiry evidence is offered which raises issues which it is beyond his jurisdiction to inquire into, he has jurisdiction to complete the inquiry and make the order he thinks proper.

Mr. Gouin for the appellant in his very able argument, contended that, even although the Recorder had jurisdiction to commence the inquiry, yet the moment it was shewn that the appellant was in the exclusive employ of the Fuller Brush Company, the Recorder's jurisdiction was ousted because the by-law, on its proper construction, did not require the appellant to take out a licence and the Recorder could not be said to have jurisdiction

> when the facts upon which the complaint was based did not constitute an offence, or when there was no evidence whatever shewing an offence.

It is now well settled law that where the jurisdiction of the judge of an inferior court depends upon the construction of a statute, he cannot give himself jurisdiction by misinterpreting the statute. *Elston* v. *Rose* (2); *In re Long Point Co.* v. *Anderson* (3).

The rule was succinctly stated by Riddell, J.A., in *Township of Ameliasburg* v. *Pitcher* (4), in the following language:—

> I think the true rule established by *In re Long Point Company* v. *Anderson* (3), and similar cases, is that if it be necessary to interpret a statute in order to find out whether the division court should decide the rights of the parties at all, then if the division court judge misinterprets the statute and so gives himself jurisdiction to decide such rights, prohibition will lie; but if it be necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the division court judge may go.

It has also been said that a judge of an inferior court cannot give himself jurisdiction by a wrong decision on

(1) (1841) 1 Q.B. 66.
(2) (1868) L.R. 4 Q.B. 4.
(3) (1891) 18 Ont. A.R. 401.
(4) (1906) 13 O.L.R. 417 at 420.

the facts. With reference to this statement Lord Esher, M.R., in *Regina* v. *Commissioners for Special Purposes of the Income Tax* (1), points out that, although it is correct enough for certain purposes, its application is often misleading. It is correct where the legislature has said that, if certain facts exist, the judge shall have jurisdiction. In such a case the existence of the facts is a condition precedent to the exercise of jurisdiction. The statement, however, is inaccurate where the legislature entrusts the tribunal with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as jurisdiction on finding that it does exist, to proceed further and do something more. In a case of this kind the jurisdiction is conferred not conditionally upon the facts actually existing, but upon a finding that they do exist. The rule, I think, may be stated in another way, as follows:—

If the existence or non-existence of the jurisdiction of a judge of an inferior court depends upon a question of fact, then, if, upon the facts proved or admitted he has no jurisdiction, his finding that he has jurisdiction will not prevent prohibition, but if the jurisdiction depends upon contested facts and there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, and the judge decides in such a way as to give himself jurisdiction, a superior court, on an application for prohibition, will hesitate before reversing his finding of fact and will only do so where the grounds are exceedingly strong. *Mayor of London* v. *Cox* (2); *Brown* v. *Cocking* (3); *Liverpool Gas Company* v. *Everton* (4); *Rex* v. *Bradford* (5).

To determine whether prohibition lies in the present case it is essential to see precisely what was decided. In his judgment the Recorder said that

> having regard to the true purpose of the by-law and the discharge of his duties by the accused,

the case was indistinguishable from that of *City of Montreal* v. *Davignon*. Turning to his judgment in the *Davignon* case (a copy of which has been furnished to us), we

(1) (1888) 21 Q.B.D. 313 at 319.
(2) (1867) L.R. 2 H.L 239.
(3) (1868) L.R. 3 Q.B. 672.
(4) (1871) L.R. 6 C.P. 414.
(5) [1908] 1 K.B. 365, at 371.

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find that there the accused was likewise an employee of the Fuller Brush Company and that he was charged with the same offence as the appellant; that the same defences were set up, and that the accused was convicted. After disposing of the constitutional questions raised the Recorder proceeded as follows:—

> Taking up the second main ground of defence, it is established that accused was in the exclusive employ of Fuller Brush Company Ltd. within an assigned territory. * * * The accused reported every morning to an office of the company * * * where he had no exclusive desk room. He would proceed thence to his assigned territory, within the limits of the city and leave in any house he selected a card entitling the recipient to a free brush. Accused, a day or so later, within his own discretion, would call at the houses where he had left the cards, give away a brush and, by means of a case of samples, try and sell some of the large variety of brushes manufactured by the Fuller Brush Co. Ltd. * * *
>
> It is quite clear then, that the accused was *his own master* in so far as his occupation as canvasser is involved. He carried through his selling campaign upon his own initiative, * * *

Did the Recorder by this language mean to hold that once it was established that the accused was soliciting orders for the sale of goods in private houses, the by-law constituted that act "doing business as canvasser," or did he mean that he found as a fact that the accused was doing business as canvasser within the meaning of the by-law? If the former, he misinterpreted the by-law; if the latter, he made an erroneous finding of fact. Does prohibition lie on either view?

A good working rule as to when prohibition lies was laid down by Tyndal, C.J., in the old case of *Cave* v. *Mountain* (1), and was approved and adopted by Lord Denham in *Rex* v. *Bolton* (2), and by Avory J. in *Rex* v. *Bloomsbury Income Tax Commissioners* (3), as follows:—

> But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation.

In the present case the charge was that the appellant had been doing business as canvasser without a licence. If the complaint was true in fact there can be no doubt of the jurisdiction of the Recorder for, in imposing the penalty, he was simply enforcing the by-law. If the charge was not true in fact but the Recorder found that it was, he must

(1) (1840) 1 Man. & G. 257. (2) [1841] 1 Q.B. 66.
(3) [1915] 3 K.B. 768.

still be within his jurisdiction for he cannot have jurisdiction if he decides one way, and be without jurisdiction if he decides the other way.

If the Recorder's judgment is to be considered as a misinterpretation of the by-law, then, applying the rule laid down in *Township of Ameliasburg* v. *Pitcher* (1), we have to ask ourselves if the Recorder construed the by-law in order to find out if he had jurisdiction to decide the rights of the parties at all. The answer to that question must be in the negative for the simple reason that jurisdiction to try the action was not conferred by the by-law but by the statute. (Art. 484). Therefore whether we take the imposition of the penalty as based simply upon the Recorder's finding of fact or upon his construction of the by-law, he was acting within his jurisdiction, and prohibition does not lie.

I quite agree that if the statute had given the Recorder jurisdiction only where the person charged had been actually doing business as canvasser, then, upon this court coming to the conclusion that he had not been doing business, it would be our duty to direct a writ of prohibition to issue. The statute, however, did not so limit his jurisdiction.

A case in this court very similar to the one before us is that of *Molson* v. *Lambe* (2). There the defendant was an employee of Molson & Bros., brewers, and was charged with selling liquor without being duly licensed to do so. His employers, as brewers, had a licence to sell liquor and he contended that, as he was merely an employee of Molson & Bros. and was selling under their instructions, that the statute did not apply to him. He was convicted however, and an application was made to the Superior Court for a writ of prohibition. On appeal to this court it was held that prohibition did not lie.

In *Regina* v. *Judge of Greenwich County Court* (3), it was held that an erroneous decision as to the admissibility of evidence, or a decision without any evidence to support it, given by a county court judge in a matter in which he

(1) (1906) 13 O.L.R. 417. (2) (1888) 15 Can. S.C.R. 253.
(3) (1888) 60 L.T.R. 248.

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has jurisdiction, is not ground for a prohibition. In his judgment Fry, L.J., at page 250, said:—

> In the case of *Home* v. *Earl Camden* (1), Eyre, C.J., says: "It must be admitted that the misinterpretation of either the common or statute law, in a proceeding confessedly within the jurisdiction of these courts, and where they are bound to exercise their judgment upon one or the other, seems to be rather a matter of error, to be redressed in the course of the appeal which the law has provided, than a ground of prohibition." I say, therefore, that this being a proceeding professedly within the jurisdiction of the County Court, the question whether there was any legal evidence upon which to grant a new trial is also within the jurisdiction of that court. A wrong decision of the County Court Judge upon that question is not ground for a prohibition.

To like effect were the judgments of the Master of the Rolls and Lopes, L.J.

In an action for the enforcement of a by-law (which this action clearly is), the Recorder, in my opinion, has jurisdiction—in fact it is his duty—to determine not only all facts relevant to the case but also the meaning to be put on the by-law. How else can he try the action?

It is suggested that the same principle should be applied here as in cases of assessments to land tax where it has been held that prohibition will lie if the land in question is, in fact, not subject to land tax. But, as Mr. Justice Bray points out in *Rex* v. *Kensington Income Tax Commissioners* (2), the reason for these decisions is that there is no jurisdiction to assess unless the land is liable to the tax. In each case the extent of the jurisdiction of an inferior court must, in the last resort turn upon the statute conferring jurisdiction.

Counsel for the appellant further contended that even if the Recorder had jurisdiction to try the action yet prohibition would lie if he applied a wrong principle of law to the facts, and he cited 10 Halsbury, 142, where the learned author says:—

> 289. Prohibition lies not only for excess or absence of jurisdiction, but also for the contravention of some statute or the principles of the common law.

The authorities cited in support of the statement are: *Maconochie* v. *Penzance* (Lord) (3); *Veley* v. *Burder* (4); *Gould* v. *Gapper* (5); *White* v. *Steele* (6).

(1) (1795) 2H Blackstone 633, at 536.
(2) [1913] 3 K.B. 870.
(3) [1881] 6 A.C. 424.
(4) (1841) 12 Ad. & E. 265, at 312.
(5) (1804) 5 East 345.
(6) (1862) 13 C.B. (N.S.) 231.

I have perused all these cases and I find that the prohibitions therein granted were directed to the Ecclesiastical or the Admiralty courts, both of which had a special jurisdiction and decided numerous matters coming before them in accordance with the canon or the civil law as distinguished from the common law. In such courts where a statute was given a meaning different from that which the common law courts gave it, or where these courts declared the common law to be something different from that which the common law courts declared it to be, prohibition would issue. The reason for this was that it was the duty of the common law courts under the constitution to declare the common law and expound the statute law and it would have been considered a scandal if a statute or a common law rule were given one interpretation in one court, and another and inconsistent interpretation in another court. The principle upon which prohibition was granted in these cases cannot, however, have any application to the case before us. As was stated by Patterson J. in *In re Bowen* (1):—

> This is not exactly like *Gould* v. *Gapper* (2), where it was held that prohibition lies where a spiritual court puts a wrong construction on a statute. The County Court is different from a court of peculiar jurisdiction; it is a temporal court which proceeds on the same rules as we do ourselves and, therefore, we cannot interfere when it has decided upon the construction of a statute in a subject-matter over which it clearly has jurisdiction.

Even if in other jurisdictions prohibition lies for the misinterpretation of a statute, it cannot apply in this case, for article 1003 C.C.P. limits the cases in which prohibition can be granted in the province of Quebec to those wherein the inferior court has exceeded its jurisdiction.

The last argument advanced on behalf of the appellant was that both the by-law and the enabling statute were *ultra vires* as being indirect taxation. In answer to this contention nothing more, in my opinion, need be said than that the *British North America Act,* section 92 (9), gives the provincial legislature exclusive power to make laws in relation to

> shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local or municipal purposes.

It is not disputed that the object of the by-law was to provide additional revenue for the City of Montreal. In

(1) (1852) L.J. 21 Q.B. 10. (2) (1804) 5 East, 345

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Brewers & Malsters' Association for Ontario v. *Attorney-General for Ontario* (1), the Privy Council had before it the question as to whether the licence required to be obtained by a brewer in order to sell wholesale was direct taxation. It was held that it was. As to subsection 9 of section 92, their Lordships said:—

> They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see what is the genus which would include "shop, saloon, tavern" and "auctioneer" licences and which would exclude brewers' and distillers' licences.

The appeal should be dismissed but without costs.

Appeal dismissed without costs.

Solicitors for the appellant: *Beaulieu, Gouin & Mercier.*

Solicitors for the respondent: *Saint-Pierre, Damphousse, Butler, Parent & Choquette.*

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*Apr. 28.

MARIE THEIRLYNCK .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Criminal law—Keeping of common bawdy house—Evidence of general reputation—Sufficiency of evidence—Prima facie evidence under s. 986 (1) Cr. C.

Evidence of the general reputation of a house is admissible to show that it is a bawdy house.

Held that, in view of such rule, it was sufficient, in order to affirm the appellant's conviction, that the evidence made it clear that the house was being maintained for the purpose of prostitution without direct proof of the act itself and that such proof may be made, not only by bringing evidence of general reputation but also of such facts, circumstances and conditions as would warrant the inference and belief that the house was being so maintained. More particularly it is clear that, under s. 986 (1) Cr. C., the delay that occurred in opening the premises on the demand of the police officers was *prima facie* evidence of guilt.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (2), dismissing (Lunney J.A. dissenting) the appellant's appeal against her conviction for keeping and maintaining a common bawdy house.

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*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) [1897] A.C. 231, at 235, 237.

(2) (1931) 25 Alta. L.R. 236; [1931] 1 W.W.R. 352.

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The material facts of the case and the conditions existing at the house when the arrest was made have been summarized by Mitchell J., who delivered the judgment of the majority of the appellate court, as follows:

About 6 p.m. two city constables proceeded to the house and found it occupied by the accused. The front portion of the building purported to be a confectionery store. At the rear are living rooms occupied by a Chinese cook, and at times one or two girls. Adjacent to this is what is known as the private dwelling of the accused. The stock consists of a very limited supply of cigarettes, cigars and soft drinks. The shelving contains only "dummies." The city shop licence held by accused covering 1930 had not been renewed. The entrance to the shop portion is kept locked and bolted at all times. The window in the entrance door is screened, the view blocked and the glass barred over with a strong wire screen. The constables have "visited these premises off and on every few days in the past three months" and are known to the accused. The police find it difficult to obtain ready access to the place but customers are scrutinized and have little difficulty in gaining admission. No person wishing to purchase goods could get in there without being scrutinized. On the evening in question the constables, after considerable delay, were admitted to the premises by the accused. The latter first pulled aside the window curtain of the door to ascertain who were there, and instead of opening the door ran back into the room behind the store, later returning and admitting the constables who proceeded to the room in the rear of the premises. There they found the accused who was apparently in charge, and known to be owner of the store. A man was found seated on a couch, wearing an overcoat unbuttoned. Upon closer examination it was found that the fly of his pants "was all unbuttoned." A girl was found in a clothes closet, and on coming therefrom was seen to be adjusting her dress in some manner. This girl disappeared from the place almost immediately and has not since been seen by the police. During the past three months there have been two or three different girls stopping in this house, and men have been seen going to and coming from the same. One constable describes the traffic as heavy. What appears to have been a somewhat unusual supply of liquor was found in the adjoining house described as the accused's private dwelling. Upon being questioned by Constable Clarke as to why his pants were unbuttoned, the visitor gave the significant reply "Well you know." Two weeks previous to the occasion now in question, the same constables upon making an examination of the house were attracted by the action of the Chinaman cook adjusting an oil cloth on the floor of the toilet room and discovered a trapdoor in the floor beneath which a girl was concealed. They also at that time "saw in the toilet a laundry bag containing a number of used towels such as are used in these places." The evidence as to the general reputation of the premises is, in the main, as follows:—

Constable Clarke:

"Q. What is the general reputation of the place?—A. Oh, bawdy house. The accused several times when we have been going in or coming out, the accused has come out to the sidewalk and looked East and West to see if we were about. That is the general condition."

Constable Hunter:

"Q. What would you say as to the general reputation of this house? —A. It is known to the police as a bawdy house.

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COURT: You say it is known to the police as a disorderly house?—A. Yes.

Mr. CAMERON: Q. What is that based on?—A. The reputation you mean?

Q. Yes, there has to be something to base it on. Did some one tell you it was a bawdy house?—A. Well, I have gained my knowledge as a constable on the beat from those I came in contact with.

COURT: Q. You were on beat there?—A. Yes, for years, and I know the places well.

Mr. CAMERON: Q. That is all you found the reputation on?—A. Just merely on this ground.

Q. Men coming in and out?—A. I have no knowledge of the act of prostitution other than the traffic that has been observed.

A. M. Sinclair K.C. for the appellant.

W. S. Gray K.C. for the respondent.

On conclusion of the argument by counsel for the appellant and for the respondent, heard during the morning sitting of the court, judgment was reserved; and at the opening of the afternoon sitting, the judgment of the court was orally delivered by

ANGLIN C.J.C.—In this case the appellant was convicted by a stipendiary magistrate for keeping a common bawdy house. Lunney J. dissents on the alleged ground that there was no evidence. This is the only possible ground of law which could be urged, as, if the question were one of weight of evidence, there would be no appeal to this court under section 1023 of the Criminal Code.

On examination of the matter, we are inclined to the view that the judgment of Lunney J. amounts to nothing more than a holding that the weight of evidence does not justify the conviction and that no question of law is involved in the appeal; but, assuming that the question should be regarded as one of law, i.e., that the dissent is based on the ground that there is no evidence to warrant the inference of guilt, we are all clearly of the opinion that there was evidence on which it could well be found that the accused was guilty.

Whatever doubt there might be as to the propriety of the finding that the other circumstances in evidence establish a case of *prima facie* guilt against the accused, it is entirely clear that, under section 986 (1) Cr. C., the delay

that occurred in opening the premises on the demand of the police officers was *prima facie* evidence of guilt. The evidence of the facts in this particular is uncontradicted and suffices to maintain the conviction.

The evidence of the circumstances set out in the judgment of Mr. Justice Mitchell is as follows:

> It is well settled that evidence of a general reputation of a house is admissible to show that it is a bawdy house. It is an element tending to establish the offence charged. Clarke J.A., in *Rex* v. *Roberts* (1), has pointed out that "the gist of the offence is the keeping of the house for purpose of prostitution, not the act of committing fornication." Having this in mind it seems to me that it is sufficient in this case, if the evidence makes it clear that the house was being maintained for a specific purpose without direct proof of the act itself. This may well be done by proof, not only of a general reputation but of such facts, circumstances and conditions as would warrant the inference and belief that the house was being so maintained.
>
> The inference may be drawn in this instance from the manner in which the place was conducted, the arrangement of the premises, the presence of men and women, the frequency of the visits to the place by men and the hours, their appearance and conduct, as well as any other circumstance tending to show the likelihood of unlawful intercourse between the sexes, and particularly the conditions at the time of the arrest.
>
> Here we have present many of the elements from which, when coupled with general reputation, guilt may properly be inferred. The suggestive answer to the constable, "You know" when interrogated respecting the condition of his trousers, the unusual action of the female inmate, are all of significance and relative to the charge.

We agree with what Mr. Justice Mitchell said and, accordingly, this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant: *A. M. Sinclair* and *J. McK. Cameron.*

Solicitor for the respondent: *W. S. Grey.*

(1) (1921) 36 C.C.C. 381.

1931
*April 28.

CHARLES MARINO AND FRANK C. YIPP ..... } APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Unlawful distribution of drugs—Indictment charging two separate sales—Whether constituting two offences, contrary to s. 853 (3) Cr. C.—Meaning of the word "distribute" as used in s. 4 (f) of c. 144, R.S.C., 1927, Opium and Narcotic Drugs Act.

An appeal from the judgment of the Court of Appeal for British Columbia affirming (Macdonald C.J. dissenting) the appellants' conviction of having unlawfully distributed morphine and cocaine, on the ground that the indictment, charging two separate sales, therefore charged two offences contrary to the provisions of s. 853 (3) Cr. C. The question on the appeal was whether the word "distribute" as used in s. 4 (*f*) of the *Opium and Narcotic Drugs Act* covered the facts in the case.

Held, affirming the appellants' conviction, that, upon the evidence, the appellants had the drugs in question for distribution and that they did in fact "distribute" them. The appellants cannot contend that, because two separate sales were proved in evidence, two offences were actually charged, as there could be no distribution unless more than one sale was proved.

APPEAL from the judgment of the Court of Appeal for British Columbia, dismissing (Macdonald C.J. dissenting), the appellants' appeal against their conviction of having unlawfully distributed drugs.

The question in this appeal is whether the word "distributes" as used in s. 4 (*f*) of Chap. 144, R.S.C., 1927, *Opium and Narcotic Drugs Act,* which enacts that

> Every person who
> (*f*) manufactures, sells, gives away or distributes any drug to any person without first obtaining a licence from the Minister;

shall be guilty of a criminal offence * * *.

covers this case. The appeal is based on the ground that the indictment charges two separate sales and, therefore, charges two offences, contrary to the provisions of section 853 (3) of the Criminal Code.

The conviction might have been under subsection (*d*) as well as subsection (*f*) of section 4 of chapter 144; but it

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

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purported to be under subsection (*f*) and must be upheld under that subsection if at all.

J. R. Nicholson for the appellants.

O. Bass K.C. for the respondent.

On conclusion of the argument by counsel for the appellants, and without calling on counsel for the respondent, the judgment of the court was delivered by

ANGLIN C.J.C.—To contend that, because two separate sales were proved in evidence, two offences are actually charged seems absurd. How could distribution be shown unless more than one sale was proved? A single sale probably does not amount to "distribution" within the meaning of that word, as used in the Criminal Code. There is nothing to restrict what may be proved as evidence of distribution to a single sale.

It is manifest that the defendants had the drugs in question for distribution and the proof shows they did in fact "distribute" them. That seems to be all that is necessary.

As to the difficulty created by the words "to any person" found in the section in question, it is fully met by the interpretation clause in s. 31 (*j*) of c. 1 of R.S.C., 1927, and by the admission of counsel for the appellant that "any person" includes "any persons."

We are all of the opinion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for the appellants: *J. R. Nicholson.*

Solicitor for the respondent: *Oscar Bass.*

GEORGE MILLER .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1931

*Apr. 28.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Criminal law—Common betting house—Means or contrivances for betting—Sufficiency of evidence of—Prima facie evidence—Ss. 229 and 986 (2) Cr. C.

An appeal from the judgment of the Appellate Division, Alta. (25 Alta. L.R. 273) affirming (Lunney J.A. dissenting), the appellant's conviction for unlawfully keeping a common betting house (s. 229 Cr. C.)—

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

1931

MILLER
v.
THE KING.

The chief evidence consisted in the finding of certain cards marked in duplicate and similar to those used for checking hats at a hotel, but also suitable for the purpose of betting, which might constitute "means or contrivances for betting" within the meaning of s. 986 (2) Cr. C.

Held that, in the absence of any suggestion in the evidence as to the possibility of the duplicate cards having been used by the appellant for any other purpose than that of betting, there was *prima facie* evidence of guilt.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing (Lunney J.A. dissenting), the appellant's conviction for unlawfully keeping a common betting house (s. 229 Cr. C.).

A. M. Sinclair K.C. for the appellant.

W. S. Grey K.C. for the respondent.

The judgment of the court was orally delivered by

ANGLIN C.J.C.—This is an appeal from the decision of the Appellate Division of the Supreme Court of Alberta affirming the conviction of the defendant by a stipendiary magistrate for keeping "a common gaming house" (s. 229, Crim. Code).

The chief evidence consisted in the finding of certain cards suitable for the purpose of betting and which might constitute a "means" for betting under s. 986 (2) of the Criminal Code.

In the absence of any suggestion in the evidence as to the possibility of the duplicate cards found having been used by the appellant for any other purpose than that of betting, there appears to have been *prima facie* evidence of guilt.

We, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *A. M. Sinclair* and *J. McK. Cameron.*

Solicitors for the respondent: *W. S. Grey.*

(1) (1931) 25 Alta. L.R. 273; [1931] 1 W.W.R. 537.

THE MINISTER OF NATIONAL REVENUE ..... } APPELLANT;

AND

THE ROYAL TRUST COMPANY, TRUSTEE UNDER A DEED OF DONATION IN TRUST FROM JOHN DAY JACKSON. . } RESPONDENT.

1931
*May 5.
*June 12.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax (Dom.)—Income War Tax Act, 1917, c. 28 (as amended)—Income "accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests" (s. 3 (6), as enacted 1920, c. 49, s. 4)—Probable beneficiaries residing out of Canada—Effect, as authority, on this Court, of judgment of this Court affirming on equal division the judgment below.

J., resident in the United States, by deed executed in the province of Quebec, gave to respondent, a company incorporated under the laws of Quebec and carrying on business in Canada, in trust, as a donation *inter vivos* and irrevocable, certain Canadian securities, to be held, together with all accumulations and additions thereto, upon trust for the benefit of J.'s surviving children until five years after J.'s death, "when the entire trust estate is to be equally divided amongst his surviving children, and in the event of any or all of his said children predeceasing [J.] or being unable to take, the division shall be made to the survivor or survivors, and the issue of such predeceased child or children, as representing their parent, *per stirpes*." The Crown claimed from respondent an income tax under the Dominion *Income War Tax Act, 1917*, c. 28 (as amended), on the income received by respondent, as trustee under the said deed, for the year 1927. J. and his wife were alive, and had eight children living, all minors and residing with J. in the United States. The trust fund was invested in Canadian stocks and bonds, held by respondent in Montreal, Canada, where the income was accumulating and being invested in Canadian stocks and bonds.

Held (reversing judgment of Audette J. in the Exchequer Court, [1930] Ex. C.R. 172): The income was "accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests," and taxable in respondent's hands, under s. 3 (6) of said Act (as enacted 1920, c. 49, s. 4). Such income accumulating in trust is distinctly a subject of taxation under s. 3 (6), regardless of the residence, if ascertainable, of probable beneficiaries, whose interest is contingent during the taxation period.

The above holding accords with the decision of this Court in *McLeod* v. *Minister of Customs and Excise*, [1926] Can. S.C.R. 457, which, having affirmed the judgment below on an equal division of opinion may not be binding as an authority on this Court (*Stanstead Election* case, 20 Can. S.C.R. 12), but is entitled to great respect.

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

1931

MINISTER OF NATIONAL REVENUE. v. ROYAL TRUST CO.

APPEAL by the Minister of National Revenue from the judgment of the Exchequer Court of Canada (Audette J.) (1) allowing the present respondent's appeal from the decision of the Minister of National Revenue confirming the assessment levied on income for the year ending 31st December, 1927, received by the present respondent as trustee under a certain deed of donation.

John Day Jackson, a resident of New Haven, in the State of Connecticut, one of the United States of America, executed a deed of donation in trust, before a notary public in Montreal, Province of Quebec, dated 19th February, 1918, in favour of The Royal Trust Company (the present respondent) as Trustee, whereby, in consideration of the love and affection he bore towards his children, he gave as a donation *inter vivos* and irrevocable, unto the Trustee in trust for the purposes therein mentioned, the Canadian securities described in the schedule to the deed. In the deed it was, among other things, provided, and the Trustee covenanted, that the Trustee should hold the securities upon trust as follows:

(*a*) *For the benefit* of the surviving children of the Donor until five years after the death of the Donor, the property described and set forth in Schedule "A" hereto, together with all accumulations and additions thereto, when the entire Trust Estate is to be equally divided amongst his surviving children, and in the event of any or all of his said children predeceasing the Donor or being unable to take, the division shall be made to the survivor or survivors, and the issue of such predeceased child or children, as representing their parent, *per stirpes;*

(*b*) *Upon the termination* of the said Trust, the said Trust Estate shall be converted into cash and distributed as set forth in the preceding paragraph hereof, with all due diligence.

The following facts were admitted:

"1. John Day Jackson and his wife are both alive at this time.

"2. The age of Mrs. Jackson is 42; Mr. Jackson 61.

"3. There are eight children by the marriage presently living, all minors.

"4. The capital of the trust fund set forth in Schedule A is invested in Canadian stocks and bonds, which are held by the trustee in the city of Montreal, where the income therefrom is accumulating and being invested in Canadian

(1) [1930] Ex. C.R. 172.

stocks and bonds by the trustee, the income from the investments likewise accumulating and subject to the same trusts.

"5. The trustee is a Canadian company incorporated under the Laws of the Province of Quebec, and carrying on business in Canada with power to act as a trustee."

It was admitted in the pleadings that the said John Day Jackson is an American citizen and resides at New Haven, Connecticut, U.S.A.; that his said eight children, all minors, live with him and reside at New Haven aforesaid; that since the receipt by the trustee of the securities mentioned in the deed of donation, the trustee had received the income therefrom and retained the same in accordance with the provisions of the said deed; that from time to time since the execution of the deed, the question of tax payable under the *Income War Tax Act* on the income received from the trust property had been under discussion with the officers of the Department of National Revenue; that in recent years income tax had been paid under protest and pending a decision of the income tax authorities as to liability; that an assessment covering the 1927 period had been received by the trustee, and a tax levied in the sum of $147.39, which had been paid by the trustee without prejudice to its rights in the appeal; that the trustee, in accordance with the provisions of the *Income War Tax Act,* gave notice of appeal; that the Minister affirmed the assessment; and that the trustee filed a notice of dissatisfaction with the Minister's decision.

Audette J., in the Exchequer Court (1), decided in favour of the trustee, the present respondent; its appeal from the Minister's decision was allowed, and the assessment set aside. Leave to the Minister to appeal to the Supreme Court of Canada was granted by a judge thereof.

The appellant relied on ss. 2, 3 and 4 of the Dominion *Income War Tax Act, 1917,* c. 28 (as amended), reading in part as follows:

2 (*d*). "Person" means any individual or person and any syndicate, trust, association or other body and any body corporate, and the heirs, executors, administrators, curators and assigns or other legal representatives of such person * * *

3 (6). [As enacted by s. 4 of c. 49, 1920]. The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature

(1) [1930] Ex. C.R. 172.

1931

MINISTER OF NATIONAL REVENUE. v. ROYAL TRUST CO.

shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period. Income accumulating in trust for the benefit of unascertained persons or of persons with contingent interests shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.

4 (1). There shall be assessed, levied and paid, upon the income during the preceding year of every person residing or ordinarily resident in Canada * * * the following taxes:—* * *.

and contended that the respondent, in whose hands the income was accumulating in trust for the benefit of unascertained persons or persons with contingent interests, was liable to the tax as a "person" within the meaning of the Act, resident in Canada; that residence of the beneficiaries of a trust for unascertained persons cannot be a factor in determining whether the accumulated income for such unascertained persons in or is not taxable as against the trustee; that s. 3 (6) is a complete taxing measure within itself; that the present case was on all fours with *McLeod* v. *Minister of Customs and Excise* (1), on which the appellant relied.

The respondent contended that the John Day Jackson Trust was not a "person" within the definition in the Act; that the taxing section of the Act only applies to residents of Canada, and that the income of the trust, being the income of the beneficiaries of the trust and such beneficiaries not being residents of Canada, was not taxable; that the beneficiaries of the trust were not unascertained persons or persons with contingent interests within the meaning of s. 3 (6); they were the children of the donor and were capable of being ascertained at any time and were ascertainable for the 1927 taxation period; the class was definite and ascertained, and this definite ascertainment of the class was sufficient to enable the gift to vest; nor was there any contingency which could take the income away from the children or their descendants; that *McLeod* v. *Minister of Customs and Excise* (1) was distinguishable on the facts, and was not contrary to respondent's contentions in the present case.

C. F. Elliott K.C. and *W. S. Fisher* for the appellant.

W. N. Tilley K.C. and *S. G. Dixon K.C.* for the respondent.

(1) [1926] Can. S.C.R. 457.

The judgment of the court was delivered by

ANGLIN C.J.C.—In our opinion this appeal must be allowed.

The *Income War Tax Act* provides expressly for the taxation of accumulating income held in trust for the benefit of unascertained persons, or of persons having contingent interests. The income is made

> taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.

(Subsection 6 of Section 3 of the *Income War Tax Act, 1917*, as enacted by section 4 of chapter 49 of the Statutes of 1920; see also section 10 of the Act of 1920).

Whether the word " trust " means a person or body holding the property, or distributing the trust estate, or means the property itself, or means the trust upon which such property is held, is quite immaterial in view of what is said above.

Those who are at the present time probable beneficiaries of the trust, or some of them, it is true, reside in the United States. But that fact does not prevent this case coming within subsection 6 of section 3 above referred to, nor render exempt from taxation in the hands of trustees income accumulated on a trust for unascertained beneficiaries or beneficiaries having contingent interests. On the contrary, in our opinion, such income accumulating in trust is distinctly a subject of taxation under the subsection referred to, regardless of the residence, if ascertainable, of probable beneficiaries, whose interest is contingent during the taxation period.

This view accords with that which prevailed in the case of *McLeod* v. *Minister of Customs and Excise* (1). It may be that that decision is not binding upon this court because there the judgment below was affirmed on an even division of opinion amongst the judges who constituted the Supreme Court. (See *Stanstead Election* case, *Rider* v. *Snow* (2)). It is, nevertheless, entitled to great respect.

We are, accordingly, of the opinion that this appeal should be allowed and that judgment should be entered for

(1) [1926] Can. S.C.R. 457. (2) (1891) 20 Can. S.C.R. 12.

1931

MINISTER OF NATIONAL REVENUE. v. ROYAL TRUST CO.

Anglin C.J.C.

the appellant, with costs here and in the Exchequer Court, upholding the income tax assessment in question.

Appeal allowed with costs.

Solicitor for the appellant: *C. Fraser Elliott.*

Solicitors for the respondent: *McGibbon, Mitchell & Stairs.*

1931

* May 12
* June 12

HIS MAJESTY THE KING (PLAINTIFF) APPELLANT;

AND

FRASER COMPANIES, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Special War Revenue Act, R.S.C., 1927, c. 179, ss. 86, 87—Goods manufactured for sale, but consumed by the manufacturer.

Respondent was a manufacturer of lumber for sale, and consumed a portion in construction and building operations, carried on over a period of years, the lumber so consumed having been taken from stock in its yards, produced and manufactured in the ordinary course of its business of manufacturing for sale, and not produced or manufactured especially for the purpose for which it was used.

Held (Cannon J. dissenting): Respondent was liable, under the *Special War Revenue Act,* R.S.C., 1927, c. 179, ss. 86, 87, for sales tax on the lumber so consumed. The intention of the Act was to levy the tax on the sale price of all goods produced or manufactured in Canada, whether they be sold by the manufacturer or consumed by himself for his own purposes. Respondent could not avoid liability by invoking the wording of s. 87 (*d*) of the Act.

Judgment of the Exchequer Court, [1931] Ex. C.R. 16, reversed.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the defendant (the present respondent) was not liable for the consumption or sales tax claimed from it by the plaintiff (appellant).

The defendant (respondent) is a body corporate under and by virtue of letters patent issued under the *Companies Act* of Canada, with head office at Plaster Rock, N.B., and chief executive office and principal place of business at Edmundston, N.B.

* Present:—Newcombe, Rinfret, Lamont, Smith and Cannon, JJ.

(1) [1931] Ex. C.R. 16.

During the period from February 1, 1924, to August 31, 1928, the defendant was engaged, *inter alia,* in the production, manufacture and sale to the lumber trade of long and short lumber and was in possession of a sales tax licence issued to it under the provisions of s. 5 of c. 68, 14-15 George V (1924), *An Act to amend The Special War Revenue Act, 1915* (now s. 95 of the *Special War Revenue Act,* c. 179, R.S.C., 1927).

During the said period the defendant was also engaged in the course of the development of its business in the construction and building of pulp and other mills and in the repair thereof and in the construction, building and repair of houses and other structures for employees of the company, and in the course of such construction, building and repairing the defendant during the period aforesaid used or consumed certain quantities of long and short lumber in such work. All of such long and short lumber was taken from stock in the yards of the company, and produced and manufactured for sale and in no instance had been produced or manufactured especially for the purpose for which the same was used.

The question for the opinion of the court (under a special case stated for the opinion of the Exchequer Court) was whether or not the defendant was liable to pay His Majesty the King a consumption or sales tax in respect of the long and short lumber referred to in the next preceding paragraph.

Maclean J. (1) held that the defendant was not liable, and the present appeal was from that decision. The appeal was allowed, with costs in this Court and in the Exchequer Court, and judgment directed to be entered in favour of the Crown (Cannon J. dissenting).

F. P. Varcoe for the appellant.

R. B. Hanson, K.C., for the respondent.

The judgment of the majority of the court (Newcombe, Rinfret, Lamont and Smith JJ.) was delivered by

SMITH J.—The respondent was a manufacturer of lumber for sale, and consumed a portion of the lumber so manufactured in construction and building operations, carried on

(1) [1931] Ex. C.R. 16.

1931

THE KING v. FRASER COMPANIES, LTD.

Smith J.

over a period of years, the lumber so consumed having been taken from stock in the yards of the company, produced and manufactured in the ordinary course of the company's business of manufacturing for sale, and not produced or manufactured especially for the purpose for which it was used.

The appellant sued the respondent company for sales tax on the lumber so consumed, amounting to the sum of $7,302.90.

Sections 86 and 87 of the *Special War Revenue Act* are as follows:

> 86. In addition to any duty or tax that may be payable under this Act or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of four per cent. on the sale price of all goods
>
> (*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him;
>
> * * * * *
>
> 87. Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because
>
> * * * * *
>
> (*d*) such goods are for use by the manufacturer or producer and not for sale;
>
> the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

The learned President of the Exchequer Court, before whom the case was tried, dismissed the action (1), on the ground that the lumber so consumed was produced in the ordinary course of business for sale, and not specifically for use by the manufacturer, within the meaning of the above quoted s. 87 (*d*).

With great respect, I am unable to take this view of the meaning and effect of these provisions of the Act. To so construe them is to put a narrow and technical construction upon the precise words used in clause (*d*), without taking into consideration the meaning and intent of the statute as a whole. It seems to me clear that the real intention was to levy a consumption or sales tax of four per cent. on the sale price of all goods produced or manufactured in Canada, whether the goods so produced should be sold by the manufacturer or consumed by himself for his own purposes.

(1) [1931] Ex. C.R. 16.

The view taken in the court below would result in the introduction of an exception to the general rule that all goods produced or manufactured are to pay a tax, and would amount to a discrimination in favour of a particular consumer. As an example, it is not unusual for a manufacturer engaged in the production and manufacture of lumber for sale to engage at the same time in the business of a building contractor. He manufactures his lumber for sale, and, as a general rule, would not manufacture any specific lumber for use in connection with his building contracts, but would simply take lumber for these purposes from the general stock manufactured for sale, and might thus, under the view taken in the court below, escape taxation on all lumber thus diverted from the general stock manufactured for sale.

I am of opinion that, construing the provisions of the Act as a whole, the respondent is liable for taxes on the lumber consumed by him, as claimed.

The appeal should therefore be allowed with costs, and judgment entered in the court below for the amount claimed, with costs.

CANNON, J. (dissenting)—In the special case submitted for the opinion of the Exchequer Court of Canada, it is stated, and admitted by the Crown, that all the long and short lumber which we are called upon to declare liable to pay the " consumption or sales tax " " was taken from stock in the yards of the Company, and produced and manufactured for sale and in no instance had been produced or manufactured especially for the purpose for which the same was used."

On the facts as stated above, I agree with the learned President of the Exchequer Court (1), because, although manufactured for sale, these goods were never sold; nor can they be taxed under section 86 of the *Special War Revenue Act*, nor under section 87, because they were not manufactured or produced in Canada for use by the manufacturer or producer, but for sale, as appears by the above mentioned statement of facts. In this case as in the *Wampole* case (2), in which judgment is rendered to-day,

(1) [1931] Ex. C.R. 16. (2) Reported *infra* at p. 494.

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Cannon J.

the facts agreed upon are such that the taxing provisions, as I understand them, are non-applicable.

As the Privy Council said in *Crawford* v. *Spooner* (1), "We cannot aid the Legislature's defective phrasing of the Act; we cannot add, and mend, and, by construction, make up deficiencies which are left there." If a statute professes to impose a charge, "the rule", said the Judicial Committee in *Oriental Bank Corporation* v. *Wright* (2), is "that the intention to impose a charge on the subject must be shewn by clear and unambiguous language."

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *Hanson, Dougherty & West.*

1931

* May 20, 21
* June 12

HIS MAJESTY THE KING (PLAINTIFF) APPELLANT;

AND

HENRY K. WAMPOLE & COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Special War Revenue Act, R.S.C., 1927, c. 179, ss. 86, 87—"Use" by manufacturer (s. 87d)—Goods distributed as free samples —Statement in special case—Effect of admission as to payment—Double taxation.

Defendant, in the course of its business as a manufacturer of pharmaceutical preparations, put up in special small packages and distributed free amongst physicians and druggists samples of its products, to acquaint them with their character and quality. The question in issue was whether or not defendant was liable for the consumption or sales tax in respect of the samples, under ss. 86 (*a*) and 87 (*d*) of the *Special War Revenue Act,* R.S.C., 1927, c. 179. Clause 4 of the special case agreed on stated that "the cost of producing such samples was paid by [defendant] as a necessary expense of business, and [defendant] in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles [defendant] has paid sales tax".

Held: The "use" by the manufacturer or producer of goods not sold, dealt with in s. 87 (*d*), includes any use whatever that he may make

(1) (1846) 6 Moore P.C. 1, at 9. (2) (1880) 5 App. Cas. 842, at 856.

* PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

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THE KING v. HENRY K. WAMPOLE & CO., LTD.

of such goods, and is wide enough to cover their "use" for advertising purposes by their distribution as free samples, and would have covered their use in the present case, and the samples would have been subject to the tax, but for said clause 4 of the special case, which must be taken as an admission that the sales tax had already been paid upon the cost of producing the samples for free distribution, in which case to hold them now subject to the tax would involve double taxation, which the legislature should not be taken to have intended. Therefore the judgment of the Exchequer Court (Maclean J.), [1931] Ex. C.R. 7, holding defendant not liable for the tax claimed, was affirmed in the result, but not for the reasons therein given. Newcombe J. dissented as to the effect of said clause 4, and would have allowed the Crown's appeal.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the defendant (respondent) was not liable to pay a consumption or sales tax, under the *Special War Revenue Act,* R.S.C., 1927, c. 179, ss. 86 (*a*) and 87 (*d*), on or in respect of certain samples of its products put up for distribution and distributed.

A special case was agreed on between the parties for the opinion of the Exchequer Court, which read as follows:

"1. The defendant is an incorporated company having its head office in the town of Perth, in the province of Ontario, and its chief executive office at the town of Perth, in the province of Ontario.

"2. The defendant is and was during the period hereinafter referred to engaged in the manufacture and sale of drugs and pharmaceutical supplies, and as such was the holder of a licence under subsection 6 of section 19BBB of the *Special War Revenue Act, 1915* (now section 95 of the *Special War Revenue Act,* R.S.C., 1927, chapter 179).

"3. The defendant in the course of its business as a manufacturer of pharmaceutical preparations put up in special small packages, samples of its products to be distributed amongst physicians and druggists as specimen or trial samples for the purpose of acquainting the physicians and druggists with the character and quality of the aforesaid pharmaceutical supplies. The said samples were, as a part of a well defined policy and in the ordinary course of business, distributed free of charge amongst the said physicians and druggists.

(1) [1931] Ex. C.R. 7.

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"4. The cost of producing such samples was paid by the company as a necessary expense of business, and the company in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company has paid sales tax.

"5. There has been assessed, imposed and levied on the defendant a consumption or sales tax of $139.75 in respect of the said samples mentioned in paragraph 3 hereof.

"6. All acts have been done and all times have elapsed to entitle His Majesty the King to payment by the defendant of the sum of $139.75 and interest as hereinafter mentioned, if this Honourable Court shall hold, on the facts as above set out, that the defendant is liable to pay a consumption or sales tax on the samples aforesaid under and by virtue of section 19BBB, subsection 1, and subsection 13 (*d*) of the *Special War Revenue Act, 1915* (now section 86*a* and section 87*d* of chapter 179 aforesaid).

"7. The question for the opinion of this Honourable Court is: whether on the facts as above stated and admitted herein, the defendant is liable to pay to His Majesty the King the consumption or sales tax on or in respect of the samples referred to in paragraph 3.

* * * * *"

Leave to appeal from the judgment of Maclean J. (1) was granted to the Attorney-General of Canada by a judge of the Supreme Court of Canada.

I. F. Hellmuth, K.C., and *F. P. Varcoe* for the appellant.
H. A. O'Donnell for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Rinfret, Lamont and Cannon JJ) was delivered by

ANGLIN, C.J.C.—I was, at the hearing of this appeal, strongly of the view that the sample goods in question were subject to the tax sought to be collected in this case. My construction of clause (*d*) of section 87 is that the "use" by the manufacturer or producer of goods not sold includes

(1) [1931] Ex. C.R. 7.

any use whatever that such manufacturer or producer may make of such goods, and is wide enough to cover their "use" for advertising purposes by the distribution of them as free samples, as is the case here. I am, therefore, with great respect, unable to agree in the reasons assigned by the learned trial judge for dismissing this petition (1).

But, in clause 4 of the Special Case, we find the following statement :

> 4. The cost of producing such samples was paid by the company as a necessary expense of business, and the company in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company has paid sales tax.

It is obvious to me that it cannot have been the intention of the Legislature to tax the same property twice in the hands of the manufacturer. Having regard to the admission of paragraph 4, above quoted, such double taxation would ensue were we to hold the samples here in question to be now subject to the consumption or sales tax, it being there admitted that the cost of producing such samples is included in the

> cost of production of articles manufactured and sold, in respect of which * * * the company has paid sales tax.

If the cost or value of these goods used as samples has already been a subject of the sales tax in this way, it would seem to involve double taxation if they should now be held liable for sales tax on their distribution as free samples. But for the admission of paragraph 4, however, I should certainly have been prepared to hold that the "use" by the company of goods manufactured by it as free samples for advertising purposes is a "use" within clause (*d*) of section 87 of the *Special War Revenue Act*, R.S.C., 1927, ch. 179.

If it was not intended by paragraph 4 to make an admission that the sales tax had already been paid upon the cost of producing the samples for free distribution, that paragraph in the Special Case is wholly irrelevant and most misleading and I cannot understand the Crown assenting to its insertion unless it intended thereby to make the admission I have stated.

For these reasons the appeal fails and must be dismissed with costs.

(1) [1931] Ex. C.R. 7.

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NEWCOMBE, J. (dissenting).—I am in agreement with my lord and my learned brethren as to the interpretation of the charging section; but I am not persuaded that the facts admitted by clause 4 of the case constitute payment, or operate to relieve the respondent company of its liability for the tax. If the sale price of the goods were increased by the company's method of book-keeping, I do not doubt that the fact would have been stated.

I see nothing in the case to justify a finding of double taxation, or that the tax upon the samples, to which, in the view of the Court, the Government was entitled, has been paid; and I would, therefore, allow the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *Stewart, Hope & O'Donnell.*

1931
*April 2.
*April 13.

IN THE MATTER OF THE AUTHORIZED ASSIGNMENT OF LOUIS WEBBER DOING BUSINESS UNDER THE STYLE AND NAME OF "NEW YORK MILLINERY COMPANY."

MAX VALINSKY .....APPLICANT;

AND

G. R. BACON (TRUSTEE).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Bankruptcy—Application to judge of Supreme Court of Canada for special leave to appeal—Time for application—Extension of time—Jurisdiction—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 174, 163 (5), 2 (l), 152; Bankruptcy Rules 72, 68.

The Supreme Court of Nova Scotia *en banc* cannot, nor can a judge of the Supreme Court of Canada, extend the time fixed by Bankruptcy Rule 72 for an application to be made to a judge of the Supreme Court of Canada for special leave to appeal to this Court. (Strong doubt was expressed whether even the court exercising the original jurisdiction in bankruptcy could grant such extension†).

By its decision made on February 7, 1931, and order dated February 28, 1931, the Supreme Court of Nova Scotia *en banc* dismissed an appeal

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*Cannon J. in chambers.

†*Reporter's Note:* See, further, *In re Smith & Hogan Ltd., infra,* p. 503, where Cannon J. held that a grant of such extension by the judge exercising original jurisdiction in bankruptcy was made without jurisdiction.

from an order of Chisholm J., sitting in bankruptcy, setting aside an order of the Official Receiver for the sale to appellant of certain of the bankrupt's stock in trade. On March 10, 1931, said Court *en banc* made an order extending the time for application to a judge of the Supreme Court of Canada for leave to appeal, to 60 days from February 7, 1931. The application came before Cannon J. on April 2, 1931, who dismissed it, holding that he had no jurisdiction, as the application was not made within the period (30 days from pronouncement of the decision complained of) fixed by Rule 72, and the order extending the time was made without jurisdiction.

Bankruptcy Act, R.S.C., 1927, c. 11, ss. 174, 163 (5), 2 (*l*), 152; Bankruptcy Rules 72, 68, considered. *In re Gilbert*, [1925] Can. S.C.R. 275, at 278, 277; *Eastern Trust Co.* v. *Lloyd Mfg. Co.*, 3 C.B.R. 710, at 713-714, referred to.

APPLICATION for special leave to appeal to the Supreme Court of Canada from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing (two judges dissenting) an appeal from the order of Chisholm J., sitting in bankruptcy (2), setting aside an order made by the Registrar and Official Receiver directing a sale to the appellant of certain of the bankrupt's stock in trade. The material facts of the case, for the purposes of the present judgment, are sufficiently stated in the judgment now reported and are indicated in the above headnote. The application was dismissed with costs, on the ground that it was made too late and a judge of this Court had now no jurisdiction to entertain it.

E. F. Newcombe K.C. for the applicant.

Pierre Casgrain K.C. for the respondent.

CANNON J.—This is an application brought before me in chambers on the 2nd day of April, 1931, by Max Valinsky, for special leave to appeal to this court from the decision of the Supreme Court of Nova Scotia *in banco* rendered herein on February 7, 1931 (1), and to fix the security for costs. The material facts are the following:

On 14th June, 1930, Louis Webber made an assignment for the benefit of creditors.

On 16th June, 1930, the Official Receiver (Harris) appointed Canadian Credit Men's Trust Association, Custodian.

(1) (1931) 12 C.B.R. 274. (2) (1930) 11 C.B.R. 490.

1931

IN RE WEBBER; VALINSKY v. BACON.

Cannon J.

On 21st June, 1930, an order was made by the (Registrar and) Official Receiver, for the sale of certain of the stock in trade, consisting of women's hats, to one Max Valinsky.

On 28th June, 1930, a meeting of the creditors of the bankrupt appointed George R. Bacon, Trustee, and authorized him to institute proceedings by way of appeal, to set aside the order of 21st June, and

On 30th June, 1930, Bacon appealed to the Judge in Bankruptcy to set that order aside.

On 6th August, 1930, Mr. Justice Chisholm (1) set aside and vacated the Official Receiver's order of 21st June.

On 20th September, 1930, Max Valinsky, the purchaser of the said stock in trade at the said sale, appealed against the order of the Bankruptcy Judge, and

On 28th February, 1931, the Supreme Court of Nova Scotia *in banco* dismissed Valinsky's appeal with costs, (Mellish J. and Paton J. dissenting) (2).

On 10th March, 1931, the Supreme Court of Nova Scotia *in banco* extended the time within which an application for leave to appeal could be made to a Judge of the Supreme Court of Canada, to 60 days from 7th February, 1931, (viz., to 8th April, 1931).

The learned counsel for the trustee opposed the application for several reasons, the first of which was that I had no jurisdiction to grant leave to appeal under the General Bankruptcy Rule 72, because this application is presented to me after thirty days from the pronouncing of the decision complained of. The relevant section and rule are:

174. Any person dissatisfied with an order or decision of the court or a judge in any proceedings under this Act may appeal to the Appeal Court if the

(*a*) question to be raised on the appeal involves future rights; or
(*b*) order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or
(*c*) amount involved in the appeal exceeds five hundred dollars; or
(*d*) appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars.

2. The decision of the Appeal Court upon any such appeal shall be final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that court.

(1) 11 C.B.R. 490.

(2) 12 C.B.R. 274. The date of the decision was 7th February, 1931; the date of the order was 28th February, 1931 (Reporter's note).

Rule 72:

An application for special leave to appeal from a decision of the Appeal Court and to fix the security for costs, if any, shall be made to a Judge of the Supreme Court of Canada within thirty days after the pronouncing of the decision complained of and notice of such application shall be served on the other party at least fourteen days before the hearing thereof.

Is the order of the Supreme Court of Nova Scotia *in banco,* rendered on the 10th March, 1931, extending the delay fixed by the above rule 72 for a further period of thirty days, making the time within which such application for special leave to appeal can be made a period of sixty days from February 7, 1931, sufficient to give me jurisdiction to hear this application and grant an appeal, if good cause is shown?

The applicant relies on section 163, paragraph 5, which says:

Where by this Act, or by General Rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose.

The court, as defined by sec. 2 (*l*), is the one " which is invested with original jurisdiction in bankruptcy under this Act "; and section 152 invests the Supreme Court of Nova Scotia during term, and in vacation or in chambers, " with such jurisdiction at law and in equity as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by the Act."

It appears to me that, even if the Supreme Court of Nova Scotia was empowered to extend the delay, such power should be exercised by a judge thereof exercising the original jurisdiction above defined. In this instance, however, the extension of delay was granted by the Supreme Court of Nova Scotia *en banc,* whose jurisdiction is limited by section 152, par. 3, of the *Bankruptcy Act* " to make or render on *appeal asserted,* heard and decided according to their ordinary procedure, except as varied by General Rules, the order or decision which ought to have been made or rendered by the court appealed from."

Clearly, in my mind, the Supreme Court *in banco* has no jurisdiction in bankruptcy, except on appeal from a decision or order covered by paragraphs a, b, c, or d of section 174. They cannot in the first instance hear or entertain a

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IN RE WEBBER; VALINSKY v. BACON.

Cannon J.

petition to extend the delay. Moreover, I entertain grave doubts whether such a petition could be granted even by the original court in bankruptcy.

Rule 68 reads as follows:

68. No appeal from a judge to the Appeal Court shall be brought unless notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of or *within such further time* as may be allowed by a judge.

(2) At or before the time of entering an appeal the party intending to appeal shall lodge in the court the sum of one hundred dollars to satisfy, in so far as the same may extend, any costs that the appellant may be ordered to pay. Provided that the Appeal Court may in any special case increase or diminish the amount of such security or dispense therewith.

This clearly gives to a judge the right to extend the time to give notice of appeal to the Appeal Court. Rule 72, concerning the appeals to the Supreme Court, does not contain a similar provision and gives to no judge, either of the provincial courts or of this court, power to extend the thirty days within which an application for special leave to appeal and to fix the security for costs must be made to a judge of the Supreme Court of Canada. As pointed out by Mignault J., in *In re Gilbert* (1), "the time fixed by bankruptcy rule 72, *supra*, for applying for leave to appeal goes to the jurisdiction of the judge to whom this application is made and who here acts as *persona designata*"; and "it is to be observed that these rules, provided they are not inconsistent with the terms of *The Bankruptcy Act*, must be judicially noticed and have effect as if enacted by the Act" (section 161, R.S.C., 1927, chapter 11). I have no power to extend the delay and *a fortiori* the court below has no jurisdiction to do so, no more than they can issue an order allowing an appeal to this court. I agree with Harris C.J., in *Eastern Trust Co.* v. *Lloyd Mfg. Co.* (2), who says:

An examination of the bankruptcy Rules shows that they are a full and complete code and framed for the obvious purpose of providing summary and expeditious methods for determining questions arising in bankruptcy matters with the minimum of cost. It is of the utmost importance that bankrupt estates should be wound up as cheaply and expeditiously as possible and Parliament had the right in dealing with the question of bankruptcy and insolvency to do what I think it has done in this case—prescribe a special procedure for determining questions raised in realizing the assets of the estate.

(1) (1925) 5 C.B.R. 790, at 792, 791-2; [1925] Can. S.C.R. 275, at 278, 277.

(2) (1923) 3 C.B.R. 710, at 713-714 (N.S.).

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IN RE WEBBER; VALINSKI v. BACON.

Cannon J.

A judgment of the Appeal Court can be depended upon by the trustee as "res judicata," unless leave to appeal is obtained within 30 days; the object of the Act and Rules would be defeated if such leave could be granted at any time at the discretion of any judge.

The order extending the time for the present application was made without jurisdiction, could not, at all events, prevail against a statutory delay such as provided by rule 72, and, therefore, I cannot now entertain the application, which comes too late and is dismissed with costs.

Application dismissed with costs.

Solicitor for the applicant (appellant): *L. A. Lovett.*
Solicitor for the respondent: *T. R. Robertson.*

1931

*June 20.
*June 23.

IN THE MATTER OF THE ESTATE OF SMITH AND HOGAN, LIMITED, AUTHORIZED ASSIGNOR.

INDUSTRIAL ACCEPTANCE CORPORATION LIMITED, AND CANADIAN ACCEPTANCE CORPORATION, LIMITED ..... APPLICANTS;

AND

THE CANADA PERMANENT TRUST COMPANY, TRUSTEE ..... RESPONDENT.

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

Bankruptcy—Application to judge of Supreme Court of Canada for special leave to appeal—Time for application—Extension of time—Jurisdiction—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 163 (5), 174; Bankruptcy Rules 68-73.

There is no power given to any judge, under the *Bankruptcy Act* (R.S.C., 1927, c. 11) or Bankruptcy Rules, to extend the time fixed by Bankruptcy Rule 72 within which to apply to a judge of the Supreme Court of Canada for special leave to appeal to this Court.†

Section 163 (5) of the Act does not apply to appeals, but only to acts or things to be done before the Court in Bankruptcy in the exercise of its original jurisdiction.

*Cannon J. in chambers.

†*Reporter's note:* See also *In re Webber; Valinsky* v. *Bacon, ante* p. 498, where Cannon J. held that the Supreme Court of Nova Scotia *en banc* could not, nor could a judge of the Supreme Court of Canada, extend the time for such an application. In the present case, the extension, held to have been granted without jurisdiction, was granted by the judge exercising original jurisdiction in bankruptcy.

1931

IN RE SMITH & HOGAN LTD. — INDUSTRIAL ACCEPTANCE CORP. LTD. AND CANADIAN ACCEPTANCE CORP. LTD. v. CANADA PERMANENT TRUST CO.

APPLICATION for special leave to appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1) dismissing an appeal taken from the judgment of Barry, C.J.K.B., sitting in bankruptcy (2), dismissing an appeal taken from the decision of the Trustee of the estate in bankruptcy, disallowing claims of the appellants in so far as appellants claimed to be secured creditors under certain conditional sale agreements.

On July 30, 1930, Smith and Hogan, Limited, made an authorized assignment under the *Bankruptcy Act*. The respondent was elected trustee of the estate in bankruptcy. Each of the appellants filed with the trustee a proof of claim as a creditor of said Smith and Hogan, Limited, in which proof of claim it claimed to be a secured creditor in a certain sum ($5,541.16 in the one case, $2,057.84 in the other) at which it valued its security on certain automobiles under certain conditional sale agreements entered into by it with the said Smith and Hogan, Limited. The trustee notified each appellant that it disallowed its claim to be secured in respect of the automobiles as a conditional vendor. Each of the appellants then appealed from such disallowance to the Judge sitting in Bankruptcy. As in each case the facts were similar and the points of law at issue substantially the same, the appeals were consolidated on the hearing before the judge. The appeal came before Barry, C.J.K.B., who upheld the disallowance (2). The appellants appealed to the Appeal Division of the Supreme Court of New Brunswick, which dismissed the appeal without costs (1). The date of the order of the Appeal Division was April 24, 1931.

On application to Barry, C.J.K.B., as the Judge sitting in Bankruptcy, he on May 19, 1931, granted an extension of the time for applying to a judge of the Supreme Court of Canada for special leave to appeal to this Court from the judgment of the Appeal Division. The extension granted was until June 23, 1931.

The application for special leave to appeal to the Supreme Court of Canada (now in question) came before Cannon J. on June 20, 1931.

L. A. Forsyth K.C. for the applicant.

Nigel B. Tennant for the respondent.

(1) (1931) 12 C.B.R. 468. (2) (1930) 12 C.B.R. 93.

CANNON J.—Section 163, par. 5, of the *Bankruptcy Act* does not apply to appeals but only to acts or things to be done before the Court in Bankruptcy in the exercise of its original jurisdiction. Appeals are dealt with separately in section 174—and Bankruptcy rules 68 to 71, 72 and 73. Rule 68 provides specifically for an extension by a judge of the court of original jurisdiction of the delay of ten days to serve notice of appeal to the Appeal Court, but rule 72 contains no such provision permitting, by any judge, the allowance of further time after the thirty days delay within which a judge of the Supreme Court of Canada has jurisdiction to receive an application for special leave to appeal to this Court. In this case, the Court of Appeal of New Brunswick rendered judgment on the 24th of April, 1931. This application, made on the 20th of June, 1931, comes too late, as the extension of delay granted cannot give me a power or jurisdiction expressly restricted by a statutory rule of Practice.

The application is therefore dismissed with costs.

Application dismissed with costs.

Solicitor for the applicants (appellants): *W. Arthur I. Anglin.*

Solicitors for the respondent: *Inches & Hazen.*

1931
* May 12
* May 20

IGNATIUS McNEIL, WILLIAM McNEIL AND DENNIS McNEIL..... APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Criminal law—Charge of shop breaking by night with intent to assault—Cr. C., s. 461—Omission in charge of essential allegation to constitute the crime—Power of amendment (Cr. C., s. 889(2))—Evidence—Conviction quashed.

Appellants were convicted, in the County Court Judge's Criminal Court, on a charge of breaking and entering by night the shop of C. P. "with intent to commit an indictable offence, to wit, to assault one C. P. contrary to the form of statute in that behalf made and provided". The trial judge's finding against each appellant was "[appellant] tried this day on a charge of shop breaking by night with intent.

* PRESENT:—Newcombe, Rinfret, Lamont, Smith and Cannon JJ.

1931

MCNEIL
v.
THE KING

Found guilty." On appeal it was objected that in the charge the word "therein" was omitted (after the word "offence") and therefore the charge as laid did not come within s. 461, *Cr. Code,* and constituted no offence in law. The Crown contended that the objection was not open, as an amendment could have been made under s. 889(2), and, under s. 898, every objection to any indictment for any defect apparent on the face thereof must be taken by demurrer or motion to quash the indictment, before pleading.

Held: S. 889(2), by its terms, provides for amendment only where "the matter omitted is proved by the evidence"; and there was no evidence to indicate that appellants broke or entered with any intent to assault C. P., "therein" or elsewhere, although there was evidence possibly justifying an inference of breaking in with intent to assault her son A. P. The charge, intended to be of an offence under s. 461, lacked an allegation essential to constitute the crime, namely, that the intent was to commit the assault (that is, on C. P., as charged) in the shop that was broken into; and there was no evidence that supplied this omission, so as to give foundation for an amendment under s. 889(2) that would make it in reality a charge under s. 461. Without amendment, and without proof of the crime intended to be described, there was a finding of guilty of the charge, as set out, which did not describe any crime. The conviction must therefore be quashed.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc,* sitting as a Court of Appeal under the provisions of the *Criminal Code,* dismissing (Mellish and Ross JJ. dissenting) the present appellants' appeal from their conviction by Crowe, Co. C.J., at a sittings of the County Court Judge's Criminal Court for District No. 7, sitting at Sydney, in the county of Cape Breton, Nova Scotia, on the charge for that they "at New Waterford in the county of Cape Breton on or about the 22nd day of November, A.D. 1930, did wrongfully and unlawfully break and enter by night the shop of Selina Passerini, there situated with intent to commit an indictable offence, to wit, to assault one Celina Passerini contrary to the form of Statute in that behalf made and provided".

The material facts of the case and the issues in question are sufficiently stated in the judgment now reported. The appeal was allowed and the conviction quashed.

J. W. Maddin, K.C., for the appellants.

Neil R. McArthur, K.C., for the respondent.

The judgment of the court was delivered by

SMITH, J.—The three appellants were tried in the County Court Judge's Criminal Court of District No. 7,

county of Cape Breton, Nova Scotia, on the following charges:

* * * for that they, the said Ignatius McNeil, William McNeil and Dennis McNeil, at New Waterford in the county of Cape Breton on or about the 22nd day of November, A.D. 1930, did wrongfully and unlawfully break and enter by night the shop of Celina Passerini there situated with intent to commit an indictable offence, to wit, to assault one Celina Passerini contrary to the form of Statute in that behalf made and provided.

That they, the said Ignatius McNeil, William McNeil and Dennis McNeil, at New Waterford in the county of Cape Breton, on or about the 22nd day of November, A.D. 1930, did wrongfully and unlawfully break and enter by night the dwelling house of Celina Passerini, there situated with intent to commit an indictable offence, to wit, assault upon one Celina Passerini contrary to the form of Statute in that behalf made and provided.

The accused elected to be tried by the judge without a jury, and the trial proceeded on the charges as above set out. The minute of election, as set out at page 34 of the record, is as follows:—

The accused having been brought up for election on the charge that they did, on or about the 22nd day of November, A.D. 1930, at New Waterford in Cape Breton county, unlawfully break and enter by night the dwelling house of Mrs. Celina Passerini with intent to commit an indictable offence therein contrary to the form of Statute in that behalf made and provided;

Elected to be tried under the "Speedy Trials Act".

It is to be noted that the word "therein" appears in this minute after the words "indictable offence", but does not appear in the two charges set out. The record contains no minute of election as to the first charge.

The minute of trial sets out that the accused, on being arraigned on the following accusation, each pleaded not guilty, and the accusations are then set out in the same language as stated above.

The finding of the trial judge is as follows:—

Ignatius McNeil tried this day on a charge of shop breaking by night with intent. Found guilty.

William McNeil tried this day on a charge of shop breaking by night with intent. Found guilty.

Dennis McNeil tried this day on a charge of shop breaking by night with intent. Found guilty.

Ignatius McNeil was sentenced to six months in the common gaol, William McNeil to two years in the Dorchester penitentiary, and Dennis McNeil to two years and six months in the Dorchester penitentiary.

The accused appealed to the Supreme Court of Nova Scotia against the conviction, and the appeal was dismissed by a majority of three to two.

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The intention evidently was to charge the accused parties with an offence under sec. 461 of the *Criminal Code,* and with an offence under sec. 462 of the *Criminal Code,* which read as follows:—

461. Breaking Shop, etc., with Intent.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings, or any pen, cage, den or enclosure mentioned in the last preceding section with intent to commit any indictable offence therein.

462. Being Found in Dwelling-House at Night.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit any indictable offence therein.

The ground of appeal is that in each charge the word "therein" is omitted, and that therefore the charges as laid do not come within the sections referred to, and constitute no offence in law.

The Crown contends that this objection is not open to the accused, because an amendment could have been made under sec. 889(2) of the *Criminal Code,* and that under sec. 898 every objection to any indictment for any defect apparent on the face thereof must be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards; and, under subs. 2, no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under authority of this Act.

Section 889(2) reads as follows:

If it appears * * * that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

It is contended that this section does not authorize an amendment that would change a charge that does not allege or describe any crime into a charge describing a crime, and that, in any case, there was no amendment here; so that the conviction is really on the charge as laid, that does not constitute a crime.

It is not necessary here to determine the extent to which this section goes in the matter of allowing amendments, because, by its terms, the amendment is only to be made where the matter omitted is proved by the evidence. It

therefore becomes necessary to examine the evidence to ascertain if the matter omitted has been proved; that is, to ascertain whether or not it has been proved that the accused broke into the shop "with intent to commit therein an indictable offence, to wit, to assault Celina Passerini", or did enter the dwelling-house "with intent to commit an indictable offence therein, to wit, assault upon one Celina Passerini".

I have perused the evidence very carefully from beginning to end, and I find no evidence whatever that suggests any such intent. The evidence establishes that the three accused broke in the door of Celina Passerini's shop a little after midnight, when some members of her family and some visitors were sitting in the dining-room, which is connected with the shop by a doorway, and when Celina Passerini, her son Angelo and some boarders were in bed upstairs. Celina Passerini came downstairs, and the following is her evidence as to what happened when she was standing on the step:—

Q. What happened when you were standing on the step?

A. Dennis McNeil was there with beer bottles in his hand, and he said, "Where is your - - - son? He won't live more than five minutes if I get him." And he make a spring to get by me and then he took a top off the stove and struck me on the leg.

On cross-examination, she states that when she came downstairs the three McNeils, her daughter Irene, Peter Guthro, one Dickson and Jack McKeigan were there in the dining-room. The other McNeil boys were right behind, one leaning against the wall.

The examination proceeds as follows:—

Q. Who was leaning against the wall, which one was it?

A. Iggy, Ignatius there.

Q. Where were the other fellows?

A. Trying to get upstairs.

Q. Did they have bottles?

A. Yes, when they came in.

She states that they had a lot of bottles; that Dennis had one in each hand, and some in his pockets, and that he placed two on the table. Then we have the following:—

Q. You say they have two bottles?

A. Not all; and they attempt to come upstairs. I tells him he is not going upstairs and then he pick up the piece of the stove and throw at me, the iron.

Irene Passerini is asked what accused came for, and answers, "Looking for Angelo". This is all there is in reference to an assault.

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I think it is not possible to infer from this evidence that the premises were entered with the intention of committing an assault upon Celina Passerini. It indicates, I think, quite the contrary, namely, that the accused Dennis McNeil for the first time formed in his own mind alone an intent to assault Celina Passerini at the time she prevented him from going upstairs, because she so prevented him. Although she says "they attempted to come upstairs", it appears that only Dennis McNeil made such attempt, because she goes on to say, "I tells him he is not going upstairs"; and she has said just before that Ignatius was leaning against the wall; and in her examination in chief she referred to Dennis only as having tried to go upstairs. There is nothing to indicate that there was in the mind of any of the accused, at the time of breaking in, an intent to assault Celina Passerini, in the shop or elsewhere.

The enquiry addressed to her by the accused Dennis McNeil as to the whereabouts of her son, the threat made in reference to him, and the spring made to get past Celina Passerini on the stair, which she swears to, is evidence of an intent on the part of Dennis McNeil at that time to make an assault on her son, Angelo Passerini, and possibly might justify an inference that he broke in with that intent, and might possibly also justify the further inference that all three were acting with a common intent; but this is not a matter that arises for consideration here.

The meaning of the learned judge's finding, as I read it, is that all three accused broke into the shop with the intention of committing an assault as charged, that is, on Celina Passerini. He could not have had in mind an intent to commit an assault on anyone else, because there is no suggestion in the charges of an attempt to commit an assault on anyone but Celina Passerini. The particular place where accused intended to make the assault is not involved in the finding of guilty, because no particular place was alleged in the charge, and the finding is simply "guilty". We therefore have what was intended to be a charge of an offence under sec. 461 of the *Criminal Code* which lacks an allegation essential to constitute the crime

described in that section, namely, that the intent was to commit the assault in the shop that was broken into. There was no evidence that supplies this omission. It was after midnight, and the shop was closed. The accused first rapped at the back door of the dwelling part of the premises. There is nothing to warrant an inference that the intent at the time of breaking in was to assault Celina Passerini in the shop so as to give foundation for an amendment pursuant to sec. 889 (2) that would make it in reality a charge under sec. 461.

Without any amendment of this charge, which really does not describe any crime, and without any evidence that would amount to proof of the crime intended to be described in the first charge, there is a finding of guilty of this charge, as set out, that does not describe any crime.

If it is attempted to uphold the conviction on the ground that the accused might have been held guilty, on the evidence, of a charge under sec. 462, that is, of unlawfully entering or being in a dwelling house by night with intent to commit an indictable offence therein, to wit, an assault on Angelo Passerini, the obvious answer is that, even if an amendment to that effect could have been made under sec. 889 (2), there is no conviction for that offence.

If the learned judge's finding as recorded can be construed as a conviction under sec. 461 of the Code, there was in reality no charge before him under that section, and no evidence that proved an offence under that section. The appeal must therefore be allowed, and the conviction quashed.

Appeal allowed; conviction quashed.

Solicitor for the appellants: *J. W. Maddin.*

Solicitor for the respondent: *Neil R. McArthur.*

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* March 9
* May 26

IN THE MATTER OF THE ESTATE OF CECILIA ROACH, DECEASED

GEORGE ROACH..... APPELLANT;

AND

THOMAS ROACH, SURVIVING EXECUTOR OF THE WILL OF CECILIA ROACH, DECEASED, ARTHUR JOSEPH HOLMES, EXECUTOR OF THE WILL OF MARY ROSELLA KORMANN, DECEASED,..... FANNY KING ROACH AND FREDERICK S. KING, EXECUTORS OF THE WILL OF MARTIN ROACH, DECEASED.... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Will—Construction—Vesting—Power to divide and apportion—Capacity of survivor of donees of power to execute it—Equal division among beneficiaries.

The testatrix' will gave all her estate "in the manner following," and then directed that the estate be held in trust by her executors, that her son John be maintained from it so long as he lived, and whatever portion was not used for him was, at his death, "to be divided among my remaining sons and daughter as follows," and then directed that, after her sons Thomas and William each received $1,000, the entire balance of the estate was to be divided among the remaining two sons Martin and George and her daughter Mary "as in the judgment of my son Thomas and my daughter Mary deem wise, fit and proper to divide and apportion the estate". One H., Thomas and Mary were appointed executors. The testatrix died in 1923, Martin in 1926, Mary in 1928, and John in 1929.

Held: (1) Upon the testatrix' death, Martin, George and Mary took vested interests (subject to the prior gifts and to the power of apportionment) in whatever portion of the estate was not used for John. The gift to them in remainder vested at once on the testatrix' death, although the division was postponed until John's death.

(2) The power to Thomas and Mary to divide and apportion was a discretion only, which might or might not be exercised; the children took under the will, even if the power was not executed; they took through the executors who, under the will, held as trustees for them, and not through the named donees of the power; the gift was not subordinate to the exercise of the power; the power was not in the nature of a trust; it was a bare power given to two persons by name (and not annexed to the office of executorship), a "joint confidence," and so could not be executed by the survivor (Farwell on Powers, 3rd

* PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

ed., p. 514, referred to); therefore Thomas, the surviving donee of the power, could not exercise it. S. 25 of *The Trustee Act*, R.S.O., 1927, c. 150, did not apply.

(3) The result was that, on John's death, and after payment of the legacies to Thomas and William, the residue of the estate belonged to George, the estate of Martin, and the estate of Mary, in equal shares.

APPEAL by George Roach from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing his appeal from the judgment of Logie J. (2), declaring (upon motion brought by way of originating notice on behalf of the surviving executor of the will of Cecilia Roach, deceased, for interpretation of the said will) that the estate of Martin Roach, deceased, the estate of Mary Rosella Kormann, deceased, and the said George Roach, are each entitled to one-third of the residue of the estate of Cecilia Roach, deceased, after payment of certain bequests under the said will.

The appellant contended that Martin Roach and Mary Rosella Kormann did not acquire any vested interest in the estate of the testatrix, Cecilia Roach, at the time of the latter's death, and, having predeceased John Roach, never acquired any interest in the estate; that until the power to divide had accrued there could be no vesting in the objects of the power; that the appellant, who survived John Roach, was alone entitled to the residue of the estate after payment of the legacies to Thomas Roach and William J. Roach. Alternatively, the appellant contended that, if the court should hold that the time of vesting was on the death of the testatrix, Cecilia Roach, then Thomas Roach (the survivor of the two who were given the power to divide and apportion) had power to divide and apportion the said residue among the estate of Martin Roach, deceased, the estate of Mary Rosella Kormann, deceased, and the appellant, as he (Thomas Roach) deemed wise, fit and proper.

The provisions of the will in question and the material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

(1) (1930) 39 Ont. W.N. 109. (2) (1930) 38 Ont. W.N. 189.

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In re ROACH.

ROACH *v.* ROACH

J. C. McRuer, K.C., and *F. A. Browin* for the appellant.

A. J. Holmes for the respondent, the executor of the will of Mary Rosella Kormann, deceased.

F. D. Hogg, K.C., for the respondent, Thomas Roach, surviving executor of the will of Cecilia Roach, deceased.

(No one appeared for the respondents, the executors of the will of Martin Roach, deceased.)

DUFF J.—This appeal should be dismissed with costs.

The judgment of Newcombe, Rinfret, Lamont and Cannon JJ. was delivered by

RINFRET J.—This is a motion brought by way of originating notice in the Supreme Court of Ontario for interpretation of the last will and testament of the late Cecilia Roach. The will reads as follows:

I Revoke all former Wills and other Testamentary Dispositions by me at any time heretofore made, and declare this to be my last Will and Testament.

I Direct all my just debts and funeral and testamentary expenses to be paid and satisfied by my executor and trustees hereinafter named.

I Give, Devise, and Bequeath all my Real and Personal Estate which I may die possessed of or interested in, in the manner following, that is to say:

I direct that my entire Estate both Real and Personal shall be held in trust by my Executors and trustees hereinafter named and my son John Roach M.D. will be maintained from my estate after the maintenance given him from his Father's Estate is exhausted and that the entire Estate be held in trust for him and for him only so long as he lives.

Whatever portion of my Estate is not used in behalf of my son John Roach M.D. as herebefore directed at the time of his demise such portion is then to be divided among my remaining sons and daughter as follows:

After my son Thomas Roach, Priest and William J. Roach Priest each receive One Thousand Dollars legacy then the entire balance of the Estate is to be divided among the remaining two sons Martin Roach and George Roach and my daughter Mary Rosella Kormann as in the judgment of my son Thomas and my daughter Mary Rosella deem wise, fit and proper to divide and apportion the Estate.

My Executors and trustees are to dispose of my Real Estate only when and as same can be done advantageously.

I direct that my Executors and trustees shall apply One Hundred Dollars of my Estate for Masses for the Repose of my soul after death and Two Hundred Dollars for Monument to be erected for my deceased husband and myself.

And I nominate and appoint Thos. P. Hart, Estate Agent of the Town of Orillia, Ont., and my son Thomas Roach, Priest and my

Daughter Mary Rosella Korman to be executors and trustees of this my last Will and Testament.

In Witness Whereof I have hereunto set my Hand the day and year first above written.

The testatrix died on the 9th of June, 1923.

John Roach, M.D., for whom the entire estate was to be held in trust so long as he lived, died on the 5th of February, 1929. During his lifetime, he received the maintenance directed in the will.

Martin Roach died on the 1st of March, 1926, and, by his will duly probated, named as executors his widow and Frederick S. King.

Mary Rosella Kormann, the daughter and one of the executors, is also dead (22nd of October, 1928). By her will, she appointed Arthur J. Holmes as her executor. The executors of Martin Roach and Mary Rosella Kormann are the respondents in this appeal.

George Roach is the only surviving child and, as will be noticed, was also the only child still living at the death of John Roach. He is the appellant in this court.

Thomas P. Hart, one of the three executors, died on the 5th of December, 1929.

Thomas Roach is the only surviving executor. He sought the interpretation of the will with reference to the following matters, namely:

"(*a*) To determine what interest, if any, the estate of Martin Roach and the estate of Mary Rosella Kormann take with George Roach under the said Will.

"(*b*) If the estates of Martin Roach and Mary Rosella Kormann share in the Estate of the said Cecilia Roach to determine the discretion that may be exercised by the surviving executor in dividing the balance of the estate among the estates of Martin Roach and Mary Rosella Kormann and George Roach."

Logie, J., in the Supreme Court of Ontario, considered that

the two sons Martin and George and the daughter Mary Rosella took upon the death of the testatrix vested interests (subject to the apportionment of Thomas and Mary Rosella) in whatever portion of the estate of Cecelia was not used on behalf of John, but the enjoyment thereof was postponed until after the death of John.

He further considered that the power of apportionment was

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a bare power and not a trust and * * * the power (was) not exercisable by the survivor of the two persons in whom it was vested.

Accordingly, upon the principle that "equality is equity" he directed that the balance of the estate should be divided equally among George Roach and the representatives of Martin Roach and Mary Rosella Kormann (1).

That judgment was unanimously confirmed by the Appellate Division (2).

On this appeal, the surviving executor is maintaining merely his application for advice and directions.

Our first duty is to determine what interest, if any, the estates of the deceased children take with George Roach, the surviving child.

We agree with the courts below that Martin Roach and Mary Rosella Kormann took vested interests immediately upon the death of the testatrix.

The controlling words, in the will, are found in the third sentence:

> I Give, Devise, and Bequeath all my Real and Personal Estate which I may die possessed of or interested in, in the manner following, that is to say:

Those are the only words of gift. All the other clauses are directions subordinated to these introductory words. They are words of present gift, under which Martin Roach, George Roach and Mary Rosella Kormann immediately became entitled to a share in "the entire balance of the estate". There is a prior gift, but it is only for the maintenance of John Roach, "so long as he lives". The "remaining" or other children took the beneficial ownership in the contingent *corpus*, that is: in "whatever portion of (the) estate is not used in behalf of * * * John Roach, M.D., as herebefore directed" (i.e., for his maintenance). On account of the position of the property, because of the prior gift for life, the division was postponed, but the gift in remainder vested at once (Theobald on Wills, 8th ed., p. 656). What was "not used in behalf of John Roach" is precisely what the executors now have on hand. The beneficial interest in that contingent *corpus* vested, upon the death of the testatrix, in the named chil-

(1) (1930) 38 Ont. W.N. 189. (2) (1930) 39 Ont. W.N. 109.

dren and not only in such of them as would survive their brother John. The personal representatives of those who died in the lifetime of John are entitled to the property (Williams on Executors, 11th ed., p. 800), subject to the power of apportionment now remaining to be discussed.

The scheme devised by the testatrix is that the entire estate is to be held in trust by the three executors, first to provide maintenance for John Roach, and "then to be divided among (the) remaining sons and daughter", and the division is to be "as follows": $1,000 to Thomas Roach, $1,000 to William J. Roach, and

> then the entire balance of the Estate is to be divided among the remaining two sons Martin Roach and George Roach and my daughter Mary Rosella Kormann as in the judgment of my son Thomas and my daughter Mary Rosella deem wise, fit and proper to divide and apportion the Estate.

The first point to be noticed in the disposition thus made by the testatrix is that the power to divide is not given to the executors and trustees. There are three executors and trustees. The power is given *nominatim* to Thomas Roach and Mary Rosella Kormann. They are, in fact, two of the trustees, but the power is not conferred on them as such; and the elimination of the third executor, from among those who are to exercise the power, indicates the intention of the testatrix that the power should not be considered annexed to the office.

Then, the fair construction of the will is that the testatrix intended to make provision for all her children, each of whom is clearly indicated by name. They take through the trustees who hold for them and not through the named persons who are given the power. It is not a power to select or to appoint; it is a power to divide and apportion. A discretion is left to Thomas Roach and to Mary Rosella to use their "judgment", but it is a discretion only—which they may or may not exercise—and, under the terms of the will, the children take even if the named persons do not execute the power. It follows that the gift is not subordinate to the exercise of the power and, therefore, that there was not, on the part of the testatrix, an intention of making the exercise of the power a duty. The power is not a trust nor in the nature of a trust; and nobody could complain of a breach of trust if it were not exercised. See *In re Mills. Mills* v. *Lawrence* (1).

(1) [1930] 1 Ch. 654, at 670.

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Rinfret J.

It being so, this is not a case where s. 25 of *The Trustee Act* (c. 150 of R.S.O. 1927) applies. It is a case of a bare power given to two persons by name, it is "a joint confidence", and it cannot be executed by the survivor. (Farwell on Powers, 3rd ed., p. 514). The result is that, Mary Rosella Kormann having died, the surviving donee of the power (Thos. Roach) can no longer exercise the discretion.

Our opinion on the matters submitted is therefore in accord with that of the Supreme Court of Ontario and of the Appellate Division. It is not necessary to say anything further to dispose of the appeal, which should be dismissed with costs. Both courts, however, expressed the view that, as a consequence of the failure of the power, the residue of the estate must be divided equally between the appellant and the estates respectively represented by the respondents Holmes, Fanny King Roach and F. S. King. We have no doubt that, the power being now impossible of execution, a trust results in favour of all the persons in whose favour the power would have been exercisable and they take the property in equal shares.

Appeal dismissed with costs.

Solicitors for the appellant: *Foy, Knox, Monahan & Keogh.*
Solicitor for the respondent Thomas Roach: *Fred. C. MacDonald.*
Solicitor for the respondent, Estate of Mary Rosella Kormann, deceased: *A. J. Holmes.*
(The executors of the will of Martin Roach, deceased, respondents, did not appear).

1931
* May 15
* May 18

SHAWINIGAN WATER & POWER COMPANY (PETITIONER)..... } APPELLANT;

AND

EDWARD GAGNON (RESPONDENT)..... RESPONDENT.

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

Expropriation—Indemnity—Part of land taken—Damage to remaining land—Aviation field—Transmission line.

An owner of land is entitled to compensation, not only for the land actually taken, but also for the damage caused to his remaining land in respect of the use to which the land taken from him is to be put, in

* PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

addition to that caused merely by the construction of the undertaking. Halsbury, Laws of England, v. 6, p. 41, ref.

Jurisprudence of the English courts is applicable to expropriation cases in the province of Quebec, whenever its legislation is similar to that of England.

Judgment of the Court of King's Bench (Q.R. 50 K.B. 381) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court which approved an order of the Public Service Commission awarding the sum of $3,367.60 to the respondent.

The appellant company constructed in 1929 a transmission line from the city of Quebec to Thetford Mines. It had the right to take expropriation proceedings in accordance with the provisions of its charter (Q.) 18 Geo. V, c. 111, s. 32. The expropriation proceedings had to be brought before the Quebec Public Service Commission, according to the provisions of the Quebec *Railway Act* (1925) R.S.Q., c. 230. In conformity with that Act, the appellant gave to the respondent a notice containing an offer for the value of the land taken amounting to $541.10, which offer was refused by the respondent who claimed $15,000, representing the value of the land and the damages suffered as a result of the expropriation.

Ls. St. Laurent K.C., and *Robert Taschereau K.C.*, for the appellant.

Fernand Choquette K.C., for the respondent.

The judgment of the court was delivered by

RINFRET, J.—La compagnie appellante, voulant construire une ligne de transmission électrique dont le parcours traverse la propriété de l'intimé, a institué contre ce dernier des procédures en expropriation.

En vertu de la charte de la compagie (c. 111, Stat. de Qué. 18 Geo. V, art. 32), et comme conséquence de la loi du régime des eaux courantes de la province de Québec (art. 22 et suiv. du chapitre 46, S.R.Q. 1925), l'expropriation devait se faire conformément aux prescriptions de la loi des chemins de fer de Québec (c. 230 des Statuts Refondus de Québec, 1925).

(1) [1931] Q.R. 50 K.B. 381.

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SHAWINIGAN W. & P. Co. v. GAGNON

Rinfret J.

La Commission des Services Publics de Québec, chargée de décider de l'indemnité qui devait être payée à l'intimé, a rendu une ordonnance fixant la somme à $3,367.60.

Il est admis que, dans cette somme, le montant de $367.60 représente la valeur du terrain exproprié; et cette partie de la sentence arbitrale n'est pas attaquée. Mais la balance de l'adjudication, c'est-à-dire la somme de $3,000, a été accordée par la commission pour "la dépréciation subie" par le reste du terrain à raison du fait que ce dernier aurait la propriété de s'adapter à l'établissement d'un champ d'aviation et que, par suite de la construction de la ligne de transmission, son utilisation pour cette fin est devenue impossible.

La preuve faite devant la commission chargée de l'arbitrage a démontré les faits qui précèdent, sauf que le terrain de l'intimée n'était pas suffisamment grand et que, pour les besoins d'une exploitation de ce genre, il fallait y adjoindre la propriété voisine, qui n'appartient pas à l'intimé. L'appelante a admis que cela ne modifiait pas le côté légal de la question et laisse aux arbitres le droit d'apprécier la possibilité d'adaptation du terrain (*Lukis* v. *Chesterfield Gas & Water Board* (1).

D'autre part, cette possibilité d'exploiter, comme champ d'aviation, les deux propriétés réunies pouvait s'inférer du fait qu'une compagnie avait déjà commencé à exécuter le projet, bien qu'elle l'eût ensuite abandonné pour des raisons qui ne tenaient aucunement à la conformation ou à la qualité des terrains.

L'appelante demande la modification de la sentence arbitrale et la réduction de l'indemnité, en retranchant du montant alloué par la commission cette somme de $3,000 qui, d'après elle, n'est pas admissible en loi.

La Cour du Banc du Roi a confirmé le jugement de la Commission des Services Publics de Québec; mais sur les cinq juges, deux (les honorables juges Howard et Hall) ont enregistré leur dissidence, qui cependant paraît porter sur le question de fait plutôt que sur la question de droit.

C'est la question de droit seulement que l'appelante a soumise à cette Cour; et elle l'a posée de la façon suivante: La dépréciation du terrain de l'intimé résulte de l'établissement de l'ensemble de la ligne de transmission électrique

(1) [1909] I K.B. 16

plutôt que de son passage à travers le terrain. Cette dépréciation serait la même si la ligne de transmission passait sur la propriété voisine sans traverser le terrain de l'intimé. Elle n'est donc pas la conséquence de l'usage qui va être fait du terrain exproprié, suivant les exigences du statut (s. 107 du chapitre 230 S.R.Q. 1925); mais elle est le résultat de la mise à exécution de l'ensemble du projet de la compagnie appelante; et, en pareil cas, les arbitres ne devraient pas " porter en compte " le prétendu préjudice.

Nous sommes d'avis que ce moyen d'appel n'est pas fondé.

Il est admis que, sur ce point, les législations anglaise et canadienne sont semblables en substance. La proposition nous paraît désormais solidement établie en Angleterre: L'arbitre, en décidant de l'indemnité à payer, peut avoir égard, non-seulement à la valeur de la partie du terrain qui est expropriée, mais également au préjudice qui sera éprouvé par le propriétaire sur toute la balance de son terrain. Le fait de l'expropriation a pour résultat de saisir l'arbitre de la question; et, dès lors, il a la compétence nécessaire pour se prononcer à la fois sur la valeur du terrain pris et sur la perte causée au reste du terrain par suite de la mise à exécution du projet de la compagnie expropriante. Le propriétaire d'un terrain voisin peut, jusqu'à un certain point, éprouver les mêmes inconvénients; mais cette question n'est pas du domaine de l'expropriation et elle relève des tribunaux civils.

Le principe est posé très clairement dans la cause de *In re Stockport, Timperley & Altringham Ry. Co.* (1) et il a été approuvé, avec la distinction qu'il comporte, par la Chambre des Lords dans les causes de *Duke of Buccleuch* v. *Metropolitan Board of Works* (2), et de *Cowper Essex* v. *Acton Local Board* (3). La jurisprudence anglaise peut être considérée comme résumée dans ce passage de Halsbury, *Laws of England,* vol. 6, p. 41:

> An owner is also entitled to compensation for the damage caused to his remaining land in respect of the use to which the land taken from him is to be put, in addition to that caused merely by the construction of the undertaking. In this respect the compensation to be awarded differs from that to which a person is entitled for injurious affection of his land when no land is taken from him.

(1) [1864] 33 L.J. Q.B. 251. (2) [1871] 5 H.L. 418.
(3) [1889] 14 A.C. 153.

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SHAWINIGAN W. & P. Co. v. GAGNON

Rinfret J.

Dès 1893, dans la cause de *Wood* v. *Atlantic & North West Railway* (1), la Cour du Banc de la Reine de la province de Québec, dans un jugement très élaboré où tous les arrêts de la jurisprudence anglaise sont passés en revue, a adopté le principe qu'elle contient et a déclaré qu'il devait s'appliquer dans la province de Québec aux expropriations régies par une législation conforme à celle de l'Angleterre. Le *jugé* suivant résume bien la portée de la décision de la Cour du Banc de la Reine:

> Under the Canadian *Railway Act* of 1888, as well as under the English *Railway Acts*, a railway company is responsible, where land or real rights are or have been actually expropriated, to compensate the proprietor, not only for the land actually taken, but for the direct damage to his remaining land, resulting either from construction and severance, or from the use of the railway line and the operation of the traffic service.

Le Conseil Privé (2), devant qui cette cause fut portée, n'eut pas à se prononcer sur la question, parce qu'elle ne lui fut pas soumise. Dans le jugement prononcé par Lord Shand, on constate que " the decision on these points has been acquiesced in " (p. 258). Mais, dans la cause de *Sisters of Charity of Rockingham* v. *The King* (3), venue en appel de la Cour Suprême du Canada, le Conseil Privé a appliqué à une espèce semblable les décisions de la Chambre des Lords dans les causes de *Stockport* (4); *Duke of Buccleuch* (5) et *Cowper Essex* (6); en leur donnant la portée que nous indiquons plus haut. Il s'agit d'une question *in pari materia*, et il n'y a pas de raison pour que le présent appel ne soit pas décidé dans le même sens.

L'appel doit donc être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Taschereau, Parent, Taschereau & Cannon.*

Solicitor for the respondent: *Fernand Choquette.*

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(1) [1893] Q.R. 2, Q.B. 335.
(2) [1895] A.C. 257.
(3) [1922] 2 A.C. 315.
(4) [1864] 33 L.J. Q.B. 251.
(5) [1871] 5 H.L. 418.
(6) [1889] 14 A.C. 153.

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IN THE MATTER OF THE RAILWAY ACT; AND IN THE MATTER OF THE DETROIT AND WINDSOR SUBWAY COMPANY

* March 10
* May 11

STEPHEN KOLODZI AND LOTTIE KOLODZI (CLAIMANTS) ..... APPELLANTS;

AND

THE DETROIT AND WINDSOR SUBWAY COMPANY ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Expropriation of land—Tunnel construction—Power to expropriate part of subsoil—Expropriating company's incorporating Act, 17 Geo. V, c. 83 (Dom.); Railway Act, 1919, c. 68 (Dom.)—Quantum of compensation awarded.

The respondent company was empowered by its incorporating Act, 17 Geo. V, c. 83 (Dom.), to construct a tunnel under the Detroit river, and for that purpose proceeded to expropriate a "parallelopipedon" or core of earth running through and forming part of appellants' land, of a uniform depth or thickness of 33½ feet and at depths from ground surface to top of portion taken of about 38 to 34 feet. The said Act provided that "the Company may expropriate and take any lands actually required for the construction * * * or may expropriate and take an easement in, over, under or through such lands without the necessity of acquiring a title in fee simple thereto * * * and all the provisions of *The Railway Act, 1919,* applicable to such taking and acquisition, shall apply as if they were included in this Act * * * *The Railway Act, 1919,* shall, so far as is not inconsistent with the special provisions of this Act, unless the context otherwise requires, apply to the Company and to its works and undertakings and wherever in *The Railway Act, 1919,* the word "railway" occurs, it shall, for the purposes of the Company, mean the subways and tunnels authorized by this Act." The present appeal was from the judgment of the Appellate Division, Ont., 65 Ont. L.R. 398, dismissing the appellants' appeal from the award of compensation to them, made by Coughlin, Co. C.J., as arbitrator.

Held: (1) Respondent had power to expropriate (as it purported to do) a part only of the subsoil, without also expropriating all the soil and the building above it. The said incorporating Act, also the *Railway Act,* ss. 2 (15), 215 (par. a); *Hill* v. *Midland Ry.* Co., 21 Ch. D. 143; *Metropolitan Ry. Co.* v. *Fowler,* [1893] A.C. 416, at 425, referred to. No rule to a contrary effect, based upon the dictum in *Farmer* v. *Waterloo & City Ry. Co.,* [1895] 1 Ch. 527, at 531, was applicable in this case.

(2) Upon the evidence, the amount awarded to appellants by the arbitrator should not be disturbed.

Judgment of the Appellate Division, Ont. (*supra*) affirmed.

* PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing the present appellants' appeal from the award made by Coughlin, Co. C.J., as arbitrator, for compensation to them for that part of their land expropriated by the respondent for the construction of a tunnel between the city of Windsor, Ontario, and the city of Detroit, Michigan, and for damages resulting therefrom to the remainder of the land. The material facts of the case and the questions in issue are sufficiently stated in the judgment of Cannon J. now reported. The appeal was dismissed with costs.

R. S. Robertson, K.C., and *W. D. Roach* for the appellants.

H. H. Davis, K.C., and *J. B. Aylesworth* for the respondent.

DUFF, J.—The statute of the respondents, in my opinion, empowers them to "expropriate and take" any lands required for the authorized purposes under a title in fee simple or any "easement" required for such purposes.

The pertinent words are:

> The Company may (*a*) expropriate and take any lands actually required for the construction, maintenance and operation of the subways or tunnels authorized by this Act.

Land, as a physical object, may, of course, have boundaries horizontal as well as vertical, curvilinear as well as rectilinear.

I can discover nothing in the statute prescribing the manner in which the lands to be taken are to be bounded; nor anything which says that the company, "actually" requiring a particular piece of land, is under a legal obligation, for the purpose of expropriating it, to "expropriate and take" a much larger piece of land (which is not "actually required"), in order to extend its domain *ab centro usque ad coelum*. Such a result could only be reached by adding words which are not found in the enactment.

(1) (1930) 65 Ont. L.R. 398.

As to the supposed rule of construction based upon a dictum of Kekewich J. in *Farmer* v. *Waterloo & City Ry. Co.* (1), I prefer not to discuss that dictum in the abstract, although at present I see no reason to differ from what Masten, J.A., says about it (2). In construing the statute before us, we are bound to take into account the character of the authorized works and the nature of the powers reasonably necessary for the prosecution of such an undertaking according to the usual methods. In view of these considerations, there is no room for the application of such a rule.

The land owner's protection lies in his right to compensation for severance.

On the questions of fact involved, the conclusions of the Appellate Division (3) seem to me to be well founded.

The appeal should be dismissed with costs.

NEWCOMBE, J.—I agree, for the reasons stated by my brothers Duff and Cannon, that this appeal should be dismissed with costs.

RINFRET and LAMONT JJ. concurred with Cannon J.

CANNON, J.—This appeal is asserted from the judgment of the Second Division of the Appellate Court of the Supreme Court of Ontario (3), which dismissed with costs the appeal of the appellants from the award of His Honour Judge Coughlin, Judge of the County Court of the County of Essex, fixing at the sum of $5,160, with costs, the compensation for that part of the appellants' land expropriated by the respondent for the construction of a tunnel between the city of Windsor, in the province of Ontario, and the city of Detroit, in the state of Michigan, and for damages resulting therefrom to the remainder of the land.

By a notice of expropriation, the respondent notified the appellants that it required for the construction of its tunnel, and offered $5,000 as compensation for, the following land:

All and singular that certain parcel or tract of land and premises, situate, lying and being in the City of Windsor, in the County of Essex and Province of Ontario, being composed of part of Lot number 4, according to Registered Plan No. 91. The part to be taken is of a

(1) [1895] 1 Ch. 527, at 531.
(2) (1930) 65 Ont. L.R. 398, at 402-403.
(3) (1930) 65 Ont. L.R. 398.

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uniform depth or thickness of thirty-three feet six inches (33' 6") measured vertically, the upper face of which is thirty-eight feet ten inches (38' 10") below the top of the sidewalk at the south limit of Sandwich street, and rises with a uniform grade of 3·97%, going southerly from Sandwich street. The vertical projection of the above described parcel, at the surface of the ground, was also specified.

The offer having been refused, an arbitration became necessary to fix the compensation to which the appellants were entitled for the expropriation of what has been called a "parallelopipedon" or core of earth running through and forming part of the appellants' land at a depth from the surface of the ground to the top of the portion taken of some 38 feet at the northerly boundary of the appellants' land and sloping upwards at a uniform grade to a depth of about 34 feet from the surface at the southerly boundary thereof.

The arbitrator applied the word "easement" to the section of land expropriated from appellants and mentioned that the surface area of the land above the easement is 2,101 square feet; and the learned County Judge then proceeds:

In the presentation of the Kolodzi claim the factors contributing to the claim for compensation were separated into two divisions, namely, First: Compensation for prospective damages to the building at present upon the Kolodzi land by the construction and operation of the tunnel; and second: Compensation for the taking of the easement and for all damages resulting therefrom or from the construction or operation of the tunnel exclusive of the damages included in the first division. With respect to both divisions I have not taken into account damages which might be caused through the negligence of the Company or its servants or agents as such damages if suffered by the Claimant would be recoverable by suit against the Company.

With reference to the first division I find that the building on the Kolodzi lands is a three storey brick building upwards of forty years old, in fair condition, and now used as a hotel. I accept Mr. Page's valuation of the building—approximately $17,000 as being a correct valuation.

The expert evidence as to the effect of the construction of the proposed tunnel on this building varies very widely,—from a 50-50 chance of complete ruin on the one side to an almost complete absence of any risk of damage on the other. It seems foolish to have to now make a finding on widely divergent expressions of opinion with respect to a matter which in a few months' time will be absolutely determined by facts then existing. But as no agreement has been come to by the parties to so wait, I must proceed to determine the matter on the evidence produced before me. I am of opinion that in the absence of negligence on the part of the Subway Company, its servants or agents, there is practically no risk of the collapse of the Kolodzi building. There is, in my opinion, a likelihood of some damage occurring and a possibility, not a probability, that some at present unforeseen contingency may, without any negligence on the part of the Company, result in substantial damage to the building.

I think it is fair to conclude that a prospective purchaser would reduce the price he would otherwise be prepared to pay for the building by 20% of its value as ascertained above, namely, $3,400.

With reference to the second division above mentioned it has been urged that the existence of such an easement as that taken, even though no immediate damage should be suffered and though no future damage could be definitely predicted, has an immediate depressing effect with respect to the price obtainable for the land subject to the easement. I am satisfied that this contention is entitled to some consideration. It is urged that if the tunnel were not there there would be a prospect that the land would some day be used as a site for an office building or some other high structure. On this last mentioned point I am satisfied on the evidence given that within a few years at the most, when whatever subsidence may result from the construction of the tunnel has terminated, a ten storey building may be erected with the same safety and cost as if the tunnel were not there. The inability to build a still higher structure would in my opinion diminish the present value of the property to but a very slight degree.

Taking the sum of all possibilities which might operate to produce a psychological effect on the mind of an intending purchaser in reducing the price he would otherwise pay, I place the compensation with respect to all the elements referred to in the second division at 10% of the value of the land exclusive of the buildings.

I find the value of the land alone to be $17,600, making the compensation under this head $1,760.

Adding the above amounts of $3,400 and $1,760 together makes a total of $5,160 which sum I award the claimants Kolodzi and I direct that the costs of the arbitration be paid by the Company.

In arriving at the above amounts I have paid some attention to the offers made by the Company or by persons acting in their interest as some evidence of the psychological effect of the easement and of the prospect of damages on the market value of the servient property.

The appellants served a notice of appeal from the award in which they set forward the following grounds :

1. That the learned Judge, as Arbitrator, erred in finding that the value of the Claimants' land would be depreciated by reason of the easement in favour of the Respondent by only ten (10) per cent. of the value of the land, exclusive of the building.

2. That the amount awarded by the learned Judge, as Arbitrator, for damages for depreciation by reason of the presence of the easement as aforesaid, is an arbitrary sum not supported by the evidence and that, upon the evidence, the learned Arbitrator should have found that such depreciation will be greatly in excess of the amount awarded.

3. That the learned Judge, as Arbitrator, having found as a fact that there is a likelihood that the construction of the tunnel by the Respondent through the Claimants' land below the building thereon will cause some damage, and that there is a possibility of substantial damage to the building being caused thereby, erred in concluding, as a result of such finding, that the damage to the claimants by reason thereof is only twenty (20) per cent. of the value of the building, and that having made that finding of fact he should have awarded the Claimants a sum approximating the total value of the building.

4. And upon such further grounds as may be alleged by Counsel on the hearing of the appeal.

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We concur with the Court of Appeal (1), and especially with the reasons of Honourable Justice Masten that, upon the evidence, the quantum of the allowance could not effectively be attacked. The reasons of the arbitrator appear to be entirely satisfactory and the evidence would not warrant any disturbance of the amount of the award. The appellants, while retaining the ownership of the building, are claiming 100% of its value, as prospective damages.

Counsel for the appellants, however, here and before the Court of Appeal, raised a point not covered by the notice of appeal and argued that the Special Act under which the respondent derived its power of expropriation did not permit it to expropriate any part of the substratum; but it was bound to take the whole of the land, from the centre of the earth to the sky and that consequently the whole proceedings were vitiated *ab initio* and the award invalid.

Although the Court of Appeal might have disposed of this point by refusing to entertain it, the parties were, however, heard upon it and Mr. Justice Riddell accepted the appellants' view in his dissenting judgment. We must therefore give due consideration to this phase of the appeal.

With all respect for the dissenting opinion, we believe that the question must be determined by referring to our own *Railway Act* and the Special Act incorporating the company, 17 Geo. V, c. 83, which reads as follows, in part:

Whereas a petition has been presented praying for the incorporation of a company to construct and operate subways or tunnels for vehicular, pedestrian, railway and other purposes, beneath the bed of the Detroit river from the city of Windsor, the town of Sandwich and the town of Walkerville to the city of Detroit as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

* * * * *

12. The Company may,—(*a*) lay out, construct, complete, maintain, work, manage and use subways or tunnels under the Detroit river, for vehicular, pedestrian, railway and other purposes, with the necessary approaches from convenient points on the Canadian side in or near the city of Windsor, the town of Sandwich and the town of Walkerville, to points in or near the city of Detroit, in the state of Michigan, one of the United States of America;

(*b*) construct, maintain and operate elevators, lifts, escalators, and other means of ingress to and egress from the said subways or tunnels;

* * * * *

15. The Company may,—(*a*) expropriate and take any lands actually required for the construction, maintenance and operation of the subways

(1) (1930) 65 Ont. L.R. 398.

or tunnels authorized by this Act, or may expropriate and take an easement in, over, under or through such lands without the necessity of acquiring a title in fee simple thereto, after the plan of such lands has been approved by the Governor in Council; and all the provisions of *The Railway Act, 1919,* applicable to such taking and acquisition, shall apply as if they were included in this Act; and all the provisions of *The Railway Act, 1919,* which are applicable, shall in like manner apply to the ascertainment and the payment of the compensation for or damages to land arising out of such taking and acquisition, or the construction or maintenance of the works of the Company;

* * * * *

21. *The Railway Act, 1919,* shall, so far as is not inconsistent with the special provisions of this Act, unless the context otherwise requires, apply to the Company and to its works and undertakings and wherever in *The Railway Act, 1919,* the word "railway" occurs, it shall, for the purposes of the Company, mean the subways and tunnels authorized by this Act.

Clause 2 of the *Railway Act,* R.S.C., 1927, chapter 170, is also relevant:

2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

(15) "lands" means the lands, the acquiring, taking or using of which is authorized by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, *and any easement, servitude, right, privilege or interest in, to, upon, under, over or in respect of the same.*

The words from "and any easement" to the end of the subsection were added by chapter 68 of the statutes of 1919, section 2, and introduced a radical change in the nature and extent of a railway company's right of expropriation. The right to expropriate a mere easement was then given expressly for the first time. Therefore, it would appear that the *Railway Act,* as amended, would have justified, without the special powers given by its Act of incorporation, the taking of that part of the appellants' lands actually required for the passage of the tunnel. Section 215, paragraph (*a*) of the same *Railway Act* confirms our view, when it directs that the notice of expropriation to be served shall contain either a description of the land to be taken or of the *power to be exercised* with regard to any land therein described.

We believe that the respondent had power to expropriate a part only of the sub-soil without also expropriating all the soil and building above it.

The learned arbitrator gave the name of easement to the acquisition in fee simple of the parallelopipedon (i.e., a prism whose six faces are parallelograms) beneath the surface of defendants' land. The company is clearly author-

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ized by section 15 of its charter to expropriate and take an easement in, over, under, or through any land, provided that portion is actually required for the construction, maintenance and operation of its tunnel. The easement of tunnelling seems to have been recognized in England as early as 1882 in *Hill* v. *Midland Railway Company*, (1), where the heading mentions the "easement of tunnelling under land"; Fry, J., in referring to plaintiff's argument, uses the word "easement" to describe the "right to construct a tunnel" and finds that the word "lands" in the English *Lands Clauses Act* "is declared to extend to tenements and hereditaments of any tenure" and asks himself "whether this easement, or the right to construct this tunnel, is or is not a hereditament." "It is a right to enter upon the land to construct a tunnel, and to enjoy and use that land for particular purposes"; and the learned justice added what may be applied to this case *mutatis mutandis:*

> But then it is said (and said with perfect truth) that there are decisions which shew that generally easements are not included within the word "lands" in the 85th section (of the English *Lands Clauses Act*). But why are they not included? Not because they are not hereditaments within the meaning of the 85th section, but simply because there is usually no power to take an easement. That is the defect in the ordinary scheme of legislation with regard to railways which prevents easements coming within the scope of the definition of the word "lands".

This defect, in this case, has been remedied by this new subsection 15 of clause 2 of our *Railway Act* and the charter of the respondents.

The respondents were authorized to expropriate and use a portion of the subsoil for the construction of their tunnel; and we say, paraphrasing Lord Watson, in *Metroplitan Railway Company* v. *Fowler* (2), that the nature of the Company's power depends upon the provisions of the Act authorizing their undertaking. As matters stand, the owners of the soil (the appellants) are practically divested of interest in that part of it which has been converted into a tunnel. They have no right to occupy it and their exclusion is not for a limited period but for all time coming. To expropriate means to appropriate compulsorily, i.e., to take and keep a thing by exclusive right; and, we consider, under the Act, the authority conferred upon the company is to take and exclusively possess as much of the sub-soil

(1) (1882) 21 Ch. D. 143. (2) [1893] A.C., 416, at 425.

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under such lands as may be actually required for the purposes of the undertaking.

For these reasons, and for those given in his carefully prepared judgment by Masten, J.A., we are of opinion that the notice of expropriation was well given, that the proceedings were regular and that the award should not be interfered with.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Roach, Riddell & Dore.*

Solicitors for the respondents: *Bartlet, Bartlet, Barnes, Aylesworth & McGladdery.*

SYLVESTER DUNPHY (PLAINTIFF).....APPELLANT;

AND

E. R. CROFT (DEFENDANT).....RESPONDENT.

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*Feb. 16, 17
*June 30.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Constitutional law—Shipping—Revenue—Customs Act, R.S.C., 1927, c. 42 (as amended, 1928, c. 16), ss. 151, 207—Enactments with respect to vessels hovering within 12 marine miles of coast of Canada—Constitutional validity.

S. 151 (7) of the *Customs Act*, R.S.C., 1927, c. 42, as amended, 1928, c. 16, in so far as it enacts that "territorial waters of Canada" shall, for the purposes of ss. 151 and 207 of the Act as so amended (examination and seizure in respect of vessels hovering in territorial waters of Canada) include, in the case of any vessel registered in Canada, the waters within 12 marine miles of Canada, is *ultra vires*.

Judgment of the Supreme Court of Nova Scotia *en banc*, 2 M.P.R. 350, affirming judgment of Paton J. (*ibid*) upholding the legislation, reversed.

Newcombe and Cannon JJ. dissented, holding that the legislation was *intra vires*, in its application to the facts of the present case, and having regard to the purpose for which such legislation was invoked, namely, prevention of use of such vessels as depots for supply of intoxicating liquors to boats engaged in smuggling liquor into Canada.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *en banc* (1), dismissing his appeal from the judgment of Paton J. (1) dismissing the plaintiff's action.

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1930) 2 M.P.R. 350.

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The case arose out of the seizure of a schooner (registered at Digby, N.S.) owned by plaintiff, with a cargo of liquor (also owned by plaintiff) on board, on June 13, 1929, by a patrol boat in the employ of the Department of National Revenue of Canada, and of which the defendant was the commander. Plaintiff brought action for the return of the vessel and cargo, or payment of their value, and damages for their detention. The defence was that the vessel had dutiable goods on board, was "hovering" within twelve marine miles of the coast of Canada, and was liable to seizure under ss. 151 and 207 of the *Customs Act*, R.S.C., 1927, c. 42, as amended by c. 16 of the Acts of 1928. (The material parts of these sections are set out in the judgment of Newcombe J., dissenting, now reported.)

The case was tried before Paton J. with a jury. It was agreed between counsel that the only question to be submitted to the jury was whether the schooner at the time she was seized was within twelve marine miles of Flat Point Lighthouse (a lighthouse at the entrance to Sydney Harbour, in the county of Cape Breton, N.S.), and that all other questions of fact were to be decided by the judge. The jury found that the schooner was three-quarters of a mile inside the said limit. Paton J. made certain findings (*inter alia*) as to the use and conduct of the schooner, which are quoted or stated in the judgment of Newcombe J. (dissenting) now reported, and found that the schooner when seized was "hovering" within the meaning of that word as used in the *Customs Act*. It was contended on behalf of the plaintiff that the schooner and her cargo were seized upon the High Seas, and that the legislation invoked by the defendant as justifying the seizure was *ultra vires* of the Parliament of Canada. Paton J. held against this contention and dismissed the action (1). The plaintiff appealed to the Supreme Court of Nova Scotia *en banc*, solely on the question of the power of the Parliament of Canada to enact the legislation in question. The Court *en banc* held that the Parliament of Canada had such power and dismissed the appeal (1). The plaintiff appealed to the Supreme Court of Canada, and, by agreement between counsel, the only question argued was as to the validity of the legislation.

(1) (1930) 2 M.P.R. 350.

D. A. Cameron K.C. for the appellant.

C. B. Smith K.C. and *J. E. Read K.C.* for the respondent.

The judgment of Duff and Lamont JJ. (with whose conclusion Rinfret J. also concurred) was delivered by

DUFF J.—The phrase "peace, order and good government" is found generally in the English colonial charters, and, unless the constitution set up is federal or quasi federal, it commonly is employed to designate, as regards subject matter, the scope of the legislative authority conferred. It is an accepted principle that *prima facie* the jurisdiction of subordinate legislatures is territorially limited. It may be considered as axiomatic that a grant of legislative authority to a British colony for "the peace, order and good government" of the colony, does not, as a general rule, empower the colonial legislature to enact laws penalizing acts, otherwise lawful, done beyond the territory of the colony, or legalizing such acts when otherwise unlawful. Broadly, it may be laid down, as a rule of construction, that subordinate legislatures do not possess such extra-territorial jurisdiction unless it has been granted in express terms or by necessary implication. The restriction is a restriction of power, and enactments framed in disregard of it not only will be ignored by foreign countries, but will be treated as *pro tanto* inoperative by the courts of the colony itself; in this regard differing in its effect from the restrictions imposed upon a sovereign state by international law and the competing jurisdictions of other sovereign states, which, at the command of the supreme legislative authority of the state, will be ignored by its courts.

When the subject matter of a power possessed by the Crown falls within "peace, order and good government," and is consequently within the scope of a grant of legislative authority by the Imperial Parliament, then, if that power necessarily involves, in its complete enjoyment, the authority to execute extra-territorial acts of sovereignty, such as acts of constraint upon the person, this comple-

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mentary authority also passes with it. *Attorney-General for Canada* v. *Cain* (1) is an application of this principle.

I see no reason whatever to think that a general authority to detain and arrest ships extra-territorially, passes under the formula "peace, order and good government," nor do I think that the fullest enjoyment of the powers given under the heads "Navigation and Shipping," "Trade and Commerce," and "Taxation" necessitates, in the pertinent sense, the possession of such authority. As a rule, indeed, legislative authority in respect of taxation is limited strictly, in its exercise, by the territorial boundaries. *Commercial Cable Company* v. *Attorney-General of Newfoundland* (2). I shall assume that the question, under this topic, is precisely the same as if the regulation of imports were explicitly included among the enumerated items of section 91.

One must emphasize here the distinction between the necessity from which a legal implication proceeds, and those considerations which merely go to establish the convenience, amounting even, in judicial opinion, to practical necessity from the political point of view, of extending a power admittedly given. The law implies the grant of all proper means necessary for the execution of the power itself as given, but that is the only necessity of which, for this purpose, the law takes notice. The courts have no authority to extend the scope of an admitted power merely because the power as given is not sufficiently comprehensive to attain an object never so important or urgent, in the judicial view. The implied power must, to use the language of the Privy Council in *Cain's* case (1), be "the complement," in the sense just explained, of the power expressly conferred. There is no general test for determining that this condition is satisfied, but it seems abundantly clear that no such necessity can be affirmed of the power to maintain at large on the high seas a preventive service with authority to detain British ships destined for Canadian ports, for the purpose of ascertaining whether they carry non-admissible goods or non-admissible persons. It is nothing to the purpose that the statute applies only to ships of Canadian registry. If the argument

(1) [1906] A.C. 542. (2) [1912] A.C. 820, at 826.

of the Crown is sound, the statute would be equally within the scope of Canadian jurisdiction if the reference to Canadian registry were absent. Nothing in *Cain's* case (1) countenances such a procedure in relation to immigrants.

The judgment in *Nadan's* case (2) exemplifies the rigour which governs the courts in examining this question of necessary implication. The subject of that judgment is the ambit and effect of the item of section 91 that is concerned with criminal law and criminal procedure. By that section, Parliament is empowered to make laws "in relation to" these subjects; and, within the territorial bounds of its jurisdiction, these powers are subject to no limitation or qualification. "But, however widely these powers are construed, they are confined to action to be taken in the Dominion." *Nadan* v. *The King* (3).

Plenary legislative authority, for Canada, in relation to criminal law and procedure in the entire scope of those subjects, it might have been argued, not without force, would embrace authority to declare the finality of Canadian judgments and sentences in criminal proceedings; and that for the purpose of making such declarations effective, the legislative authority must extend so far as to enable Canada to deal with the operation, in Canada, of the jurisdiction of His Majesty in Council in respect of the review of colonial judicial proceedings. But since such a review by His Majesty's order does not fall within the category of "action to be taken within the Dominion," the principle of grant by necessary implication does not take effect. This is not the only ground of the judgment, but it is an independent one and of co-ordinate authority with the others.

There remains to consider the limitation of the enactment to ships of Canadian registry. This does not, so far as I can see, affect the matter. It may be assumed that section 735 of the *Merchant Shipping Act* presupposes colonial authority to establish a system of colonial registration and to prescribe conditions therefor; but I can find nothing in that section, which, by implication, creates or recognizes a general authority to regulate ships of colonial

(1) [1906] A.C. 542. (2) [1926] A.C. 482.
(3) [1926] A.C. 482, at 492.

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registry by requiring them to submit to such extra-territorial acts as those authorized by the legislation before us.

There is no occasion to consider the extent of the authority given or recognized by this section in relation to subject matters dealt with by the *Merchant Shipping Act*. Nor need we discuss the scope of such authority, in respect of conditions of registration, precedent or subsequent; that is not the character, in substance or in form, of the enactment with which we are concerned.

I do not enter upon a discussion of the effect of the *Colonial Laws Validity Act*. It would, I think, be a new reading, and, it would seem to me, a misreading, of that statute, to construe it as imparting extra-territorial validity to the enactments of a colonial legislature professing to operate extra-territorially, where the legislature is not otherwise endowed with power to pass such legislation.

In my view, the legislation is *ultra vires*.

The appeal should be allowed with costs and the action remitted to the Supreme Court of Nova Scotia to be disposed of in accordance with the view herein expressed.

RINFRET J.—I agree with Mr. Justice Duff that the impugned section is *ultra vires* and that the appeal should be allowed with costs and the action remitted to the Supreme Court of Nova Scotia to be disposed of in accordance with the view herein expressed.

The judgment of Newcombe and Cannon JJ., dissenting, was delivered by

NEWCOMBE J.—The plaintiff, who is a master mariner, brings this action as owner of the schooner *Dorothy M. Smart*, registered at Digby, in Nova Scotia. The defendant is a Canadian customs officer, employed for the prevention of smuggling and the enforcement of the *Customs Act*, c. 42 of the R.S.C., 1927. The plaintiff alleges in his statement of claim that he "was engaged in the business of buying liquors for the purpose of sale upon the high seas," having cleared from St. Pierre Miquelon, and that his vessel was seized by the defendant while lawfully engaged in that business. We are told in the statement of case that the seizure was made at a point eleven and one-quarter miles off Flat Point light (a lighthouse at the entrance of

Sydney Harbour, in Cape Breton) by a patrol boat in the employ of the Department of National Revenue of Canada, and under the defendant's command.

The defendant justifies the seizure under authority of s. 151 of the *Customs Act*, c. 42, R.S.C., 1927, as enacted by s. 1 of c. 16 of the Dominion Acts of 1928. The provisions of this section material to the case are as follows:

151. (1) If any vessel is hovering in territorial waters of Canada, any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and may bring the vessel into port.

* * *

(7) For the purposes of this section and section two hundred and seven of this Act, "Territorial waters of Canada," shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada.

By s. 207, as enacted by c. 16 of 1928, it is provided that

If upon the examination by any officer of the cargo of any vessel hovering in territorial waters of Canada, any dutiable goods or any goods the importation of which into Canada is prohibited are found on board, such vessel with her apparel, rigging, tackle, furniture, stores and cargo shall be seized and forfeited * * *.

The action was tried by Paton J., of the Supreme Court of Nova Scotia, who found that the vessel cleared on 8th June, 1929, from St. Pierre Miquelon, for the high seas, with a cargo of assorted liquor and rum; the particular destination being a place about fifteen miles northeast of the lighthouse, and the nearest point of land to a vessel lying in that direction; that, on the night of 12th June the vessel arrived at its destination, "and from that time until the next afternoon about four o'clock, it was jogging about in various directions, waiting for customers to come out in boats from shore." The learned judge also found that

There is no doubt the intention was to remain in such proximity to the coast as would enable customers or purchasers, under the cover of darkness or fog, to smuggle the liquor into Canada. Since the adoption of prohibition in Nova Scotia, Halifax is the only entry port in Nova Scotia for alcoholic liquors, and lawful importation could not be made at North Sydney nor at Sydney.

The plaintiff, as owner of the schooner and cargo, and his captain must have known, and I find they did know, that any liquor that might be sold could only be to persons desiring to smuggle it into this country.

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The learned judge upheld the legislation and dismissed the action (1). His judgment was unanimously affirmed by the Supreme Court *en banc* (1); and it now comes before this Court upon the single objection that the above quoted provisions of the *Customs Act* are *ultra vires* of the parliament of Canada.

There is no question of international or of alien rights. The plaintiff is a British subject resident at North Sydney, in Nova Scotia; and his schooner is registered in the same province. It is not suggested that the Dominion legislation conflicts with provincial powers. The rights, such as they are, are all *intra familiam*. All that is conceded. But what the plaintiff seeks to justify in opposition to the *Customs Act*, the executive power and the preventive service of Canada, is the use of his vessel upon the outer margin of Canadian territorial waters, contiguous to his place of residence, as a depot of supply of intoxicating liquors to boats engaged in the smuggling of the liquor into the province.

If the defendant were a pirate prowling on the coast, or if he were, in time of war, using his vessel to supply an enemy squadron attempting to blockade the port of Sydney, is it conceivable that the powers of the parliament of Canada would be found inadequate to sanction the seizure? Parliament is specifically empowered to legislate for the regulation of trade and commerce, the raising of money by any mode or system of taxation, defence, navigation and shipping and the criminal law; also to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces; and there are, moreover, the latent powers which, as explained in *Toronto Electric Commissioners* v. *Snider* (2), are exercisable in cases of emergency.

The Hovering Acts of Great Britain have been justified in principle and practice, and the enactments now in contest exemplify provisions which are reasonable, and, it seems, necessary, for the protection of the country.

The *Act to remove Doubts as to the Validity of Colonial Laws*, c. 63 of the United Kingdom, 1865, which is de-

(1) (1930) 2 M.P.R. 350.

(2) [1925] A.C. 396, at p. 412.

scribed by Mr. Dicey as the charter of colonial legislative independence (*Law of the Constitution,* 8th ed., p. 101), enacts, by sec. 2, that

> Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

There is no repugnancy found or suggested as between the legislation upon which the Crown relies and any imperial Act, order or regulation having force or effect in Canada; and, therefore, whatever operation secs. 151 and 207 of the Canadian *Customs Act* may have, it would seem, according to express enactment, that they shall not "be and remain absolutely void and inoperative."

It is unnecessary to repeat the well known rule enunciated by Lord Selborne in *The Queen* v. *Burah* (1), and restated in *Hodge* v. *The Queen* (2).

Upon the reference to this Court of the *Bigamy Sections of the Criminal Code* (3), the point considered was whether these sections were, by reason of their extra-territorial operation, *ultra vires* of the Dominion to legislate for the criminal law, and the legislation was upheld by the majority of the court; but the learned Chief Justice (Strong), although he dissented in the particular case, gave expression in his judgment to the view which, I think, is not controverted, that

> As the Imperial Parliament is a sovereign legislature I do not for a moment dispute the proposition that it may confer upon a colonial legislature powers in this respect co-equal with its own, by granting it authority to enact the personal liability of all British subjects resident within its jurisdiction, or indeed of all British subjects generally, for crimes committed without the jurisdiction. The question to be dealt with here is not as to the power of Parliament in this respect, but as to whether such authority has actually been conferred (4).

Referring to the general powers of the Dominion to legislate for the peace, order and good government of Canada, Lord Halsbury held in *Riel* v. *The Queen* (5), that these words "are apt to authorize the utmost discretion of

(1) (1878) 3 App. Cas. 889, at 903-5.
(2) (1883) 9 App. Cas. 117, at 131-2.
(3) (1897) 27 Can. S.C.R. 461.
(4) (1897) 27 Can. S.C.R. 461, at 472-3.
(5) (1885) 10 App. Cas. 675, at 678-9.

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enactment for the attainment of the objects pointed to." And by the preamble of the *British North America Act, 1867*, it is recited that the project is union of the provinces under the Crown, "with a constitution similar in principle to that of the United Kingdom," and that "such a union would conduce to the welfare of the provinces and promote the interests of the British Empire."

The case, as submitted, does not disclose the port of departure of the plaintiff's vessel upon the voyage to St. Pierre Miquelon for the lading of the cargo in respect of which the seizure took place; but, seeing that both the plaintiff and his vessel were locally situate in Nova Scotia, it is not a violent presumption that they cleared, or at any rate went, from that province upon the voyage in question. When, therefore, a British subject resident and being in Canada sets himself up to defeat the Customs laws by contriving to evade them, to defraud the revenue and illegally to introduce into the country a prohibited commodity which has been found a menace to the national life, threatening disaster; and when the Parliament of Canada, having the powers to which I have alluded, finds a remedy in the enactments of which the appellant complains, is that not, in the words of Lord Selborne, in the case of this Dominion, constituted as it is, "legislation within the general scope of the affirmative words which give the power" to legislate for the peace, order and good government of Canada? Certainly, "it violates no express condition or restriction by which that power is limited"; and any limitation, to be effective, must, according to the rule laid down, be express. It may also be regarded as significant that, while the enumerations of provincial powers in sec. 92 of the *British North America Act, 1867*, are usually, or not infrequently, qualified by the words "in the province," or a like restriction, there is not, in a single instance, a corresponding qualification to be found in sec. 91, which describes the powers of parliament.

I conclude therefore that the legislation now the subject of attack is, in its application to the facts of this case, *intra vires*, and that this appeal should be dismissed.

Appeal allowed with costs.

Solicitor for the appellant: *D. A. Cameron.*

Solicitors for the respondent: *Henry, Stewart, Smith & McCleave.*

IN THE MATTER OF A REFERENCE AS TO THE JURISDICTION OF PARLIAMENT TO REGULATE AND CONTROL RADIO COMMUNICATION.

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*May 6, 7.
*June 30.

Constitutional law—Radio communication—Dominion and provincial jurisdiction—B.N.A. Act, 1867, ss. 91, 92, 132.

In the existing state of radio science and in the light of the knowledge and use of the art as actually understood and worked, radio communication is subject to the legislative jurisdiction of the Dominion Parliament. Rinfret and Lamont JJ. dissenting.

Per Rinfret and Lamont JJ. dissenting.—The Dominion Parliament has not jurisdiction to legislate on the subject of radio communication *in every respect*. This subject falls within the primary legislative jurisdiction of the provinces either under no. 13 (property and civil rights) or under no. 10 (local works and undertakings) of section 92 of the B.N.A. Act, except in cases where the Dominion Parliament has superseding jurisdiction under some of the heads of section 91 and under section 132 (relating to treaties) of the B.N.A. Act.

REFERENCE by the Governor General in Council to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of s. 55 of the *Supreme Court Act*, R.S.C., 1927, c. 35.

The facts and questions, as stated in the Order in Council, are as follows:

The Committee of the Privy Council have had before them a report, dated 17th February, 1931, from the Minister of Justice, submitting that His Majesty's Government of the province of Quebec has questioned the jurisdiction of the Parliament of Canada to regulate and control radio communication and has submitted questions to the Court of King's Bench (in appeal) of the province, whether the Radiotelegraph Act (R.S.C., 1927, chapter 195) in whole or in part, is within the jurisdiction of the Dominion to enact and whether a certain legislative scheme projected by the said Government of the Province for the regulation and control of certain radio communication, is within the jurisdiction of the Legislature of the Province to enact.

The Minister apprehends that the Radiotelegraph Act and Regulations made thereunder were enacted by reason of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interest.

The Minister reports that on the 25th day of November, 1927, an international radiotelegraph convention was signed by the representatives of about eighty countries including the Dominion of Canada. The said convention was ratified by the Government of Canada and the instrument of ratification deposited pursuant to the convention at Washington on the 29th day of October, 1928. The convention went into effect on January 1, 1929. Legislation exists and is necessary to make provision for performing the obligations of Canada under the said convention.

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

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The Minister further reports that a treaty which came into force on the 1st March, 1929, was effected by the exchange of notes between the United States, Canada, Cuba and Newfoundland relative to the division between the countries of channels of communication in that part of the spectrum represented by the range of frequencies from 1,500 kilocycles to 6,000 kilocycles.

The Minister further reports that negotiations have taken place between Canada and the United States with the object of dividing between the two countries the total number of channels (96) which exist in that part of the spectrum represented by frequencies of 550 kilocycles to 1,500 kilocycles, appropriated by the International Convention hereinbefore mentioned, to the service of broadcasting. No agreement has as yet been made, but at present Canada is making use of 17 channels of which 6 are being used exclusively by Canada and of which 11 are being used by both countries.

The Minister further reports that an informal arrangement was made in 1930 between Canada and the United States with reference to the use of radiotelegraphy by aircraft passing between the two countries.

The Minister further reports that on the 31st May, 1929, a treaty was entered into between the principal maritime nations of the world relating to the safety of life at sea. Provision was made for the compulsory fitting of wireless apparatus on board certain classes of vessels.

The Minister further reports that at the Imperial Conference 1930, a committee was set up to consider questions relating to imperial communications other than transport, which committee considered a scheme for the establishment of an empire broadcasting service and considered questions relating to the establishment of telephone and telegraph services for the broadcasting of weather maps.

In December, 1928, the Government appointed a royal commission on radio broadcasting to examine into the broadcasting situation in the Dominion of Canada and to make representations to the Government as to the future administration, management, control and financing thereof. On the 11th September, 1929, the said royal commission reported.

The Minister further reports that radio provides for various forms of communication which may be classified as follows:—

(*a*) Radiotelegraph, which provides for the transmission of intelligence on the Morse telegraphic code;

(*b*) Radiotelephone, which provides for the transmission of spoken word, music and sounds of all kinds;

(*c*) Facsimile, which provides for the transmission of photographs, pictures, printed matter, handwriting, etc., in such a manner that they are reproduced in like form at point of reception;

(*d*) Television, which provides for the transmission of pictures of moving objects.

The Minister further reports that radio is used in Canada for the following purposes:—

(*a*) Coast stations are established to provide radio facilities whereby any ship within 500 miles of the Canadian coast can establish instant contact with the shore. Constant watch, 24 hours a day and 365 days a year, is maintained at practically all of the stations. The coast stations consist of three chains, one extending from Vancouver to Prince Rupert on the Pacific coast, another from Port Arthur at the head of the Great Lakes to Newfoundland and Labrador, and the third from Port Churchill to the

eastern entrance to Hudson Straits. The 60 stations forming this system are owned by the Department of Marine. Of these, 41 are operated by the department itself while the remaining 19 are operated by the Canadian Marconi Company under contract. In addition a long distance station owned and operated by the Canadian Marconi Company is maintained at Louisburg, N.S., for communication with ships at long range. This station can maintain communication with ships at a distance of 2,000 miles.

(*b*) Direction finding stations to the number of 17 are owned and operated by the Department of Marine on the Atlantic coast. There are 4 on Hudson Bay and Strait and one on the West coast. These stations give bearings upon request to any ship.

(*c*) Radio beacons to the number of 17 are owned and operated by the Department of Marine. There are 9 on the East coast, 5 on the Great Lakes and 3 on the West coast. Any ship fitted with direction finding apparatus can take her own bearings from stations of this class which transmit signals automatically once every hour day or night and continuously during foggy weather.

(*d*) Radiotelephone stations to the number of 8 are owned and operated by the Department of Marine on the Pacific coast for communication with small craft and for life saving purposes.

(*e*) Special services including weather forecasts, storm warnings and time signals are also transmitted by the above mentioned stations for the benefit of ships at sea.

(*f*) Ship Stations. There are 319 ships of Canadian registry fitted with radio apparatus. The Radiotelegraph Act calls for the compulsory fitting of certain passenger vessels with such apparatus.

(*g*) Public commercial stations to the number of 46 are licensed, although 9 only are as yet established for operation. These are designed for handling paid traffic between fixed points. The principal ones in operation are those operated by the Canadian Marconi Company for communication with New York, England and Australia.

(*h*) Private commercial stations to the number of 131 are licensed. These are established for communication with isolated points not reached by telegraph or telephone.

(*i*) Experimental and amateur experimental stations to the number of 700 are licensed.

(*j*) The Department of National Defence maintains 104 stations and in addition operates 10 stations in the Northwest Territories on behalf of the Department of the Interior. It also operates 21 stations for airmail and forestry and has 20 aircraft fitted with radio.

(*k*) Broadcasting stations to the number of 67 physical stations are licensed in Canada having power rating from 50 to 5,000 watts. Owing to the limited number of frequencies or channels available for broadcasting in Canada (6 exclusive and 11 shared with the United States out of a total of 96 as explained above) 2 or 3 stations in the same centre may be required to share time and frequency. In assigning a channel to any station, the matter of geographical separation and power employed have to be considered. It is the practice, for example, not to assign the same frequency or channel to two 50 watt stations which are less than 200 miles apart or to two 500 watt stations which are less than 1,800 miles apart.

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(*l*) Receiving sets to the number of 472,531 were licensed by the Dominion in the nine months ending December 31, 1930.

The Minister further reports that the Department of Marine maintains a service to detect and investigate interference with reception throughout Canada. Furthermore inspectors are maintained throughout Canada to administer and enforce the Radiotelegraph Act and Regulations with regard to compulsory equipment of ships, the licensing of stations and the inspection of stations to see that they maintain the frequency or channel assigned to them in order that interference may not occur.

The Minister further reports that operators' certificates of proficiency issued by the Minister of Marine are, under reciprocal arrangement with Great Britain and the other dominions and colonies, accepted.

The Minister further reports that during the fiscal year 1929-30 the prosecution of 1,267 persons in various parts of Canada for operating receiving sets without licence was undertaken. In two cases, one at Regina and another at Summerside, where adverse decisions were rendered against the Department on the ground that the statute did not in terms apply to receiving sets, the decisions were appealed and the contention of the department upheld.

The Minister further reports that the revenue collected for licence fees in the fiscal year 1929-30 was $449,010.40 and for 1930-31 (9 months) the revenue was $479,488.20.

The Minister further reports that, as the use of Hertzian waves for transmission and reception of communications is a development of recent years, he has had prepared by Mr. J. W. Bain, radio engineer, Department of Marine, a memorandum of explanation of the principles underlying radio communication, which memorandum is annexed hereto.

The Minister recommends, in view of the fact that the jurisdiction of Parliament has been questioned, that the opinion of the highest judicial authority in Canada be obtained with the least possible delay and that, with this in view, the following questions be referred to the Supreme Court of Canada for hearing and consideration pursuant to the authority of section 55 of the Supreme Court Act:—

1. Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed?
2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited?

The Committee concur in the foregoing, and advise that the said questions be referred to the Supreme Court of Canada for hearing and consideration, accordingly.

W. N. Tilley K.C. and *J. L. St. Jacques K.C.*, for the Attorney-General of Canada.

Charles Lanctôt K.C. and *Aimé Geoffrion K.C.* for the Attorney-General of Quebec.

Joseph Sedgwick for the Attorney-General for Ontario.

F. H. Chrysler K.C. for the Attorneys-General for Manitoba and Saskatchewan.

R. B. Hanson K.C. for the Attorney-General for New Brunswick.

Brooke Claxton for the Canadian Radio League.

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ANGLIN C.J.C.—The Governor General in Council, under the authority of section 55 of the *Supreme Court Act,* has referred to this court the following questions:

1. Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed?

2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited?

Personally I should have preferred to withhold judgment on the present reference until the determination by the Privy Council of the Aviation Reference now pending before it on appeal from this court, especially in view of the insistence by counsel representing the province of Quebec that light would be thrown on the issues involved in the present reference by that decision. The majority of my colleagues, however, take the view that the public interest demands that judgment should be given during the present term, in order that the Government may be in a position to obtain the views of the Privy Council on the questions involved in this reference in time to enable it to bring down legislation at the next session of the Dominion Parliament. I somewhat reluctantly defer to that view.

I have had the advantage of reading the carefully prepared opinions of my colleagues.

Dealing with the first question, the most important thing to observe would seem to be its subject matter. It does not concern the rights of property in the instruments used for communication, their ownership, or civil rights in regard to them, but has to do entirely with the effects produced by them. In other words, it is "radio communication" that is dealt with by this question, rather than the instruments employed in making it, which are alluded to merely incidentally.

After giving the matter such consideration as time and circumstances have permitted, I am of the opinion that question no. 1 should be answered generally in the affirmative. My reason for so concluding is largely that overwhelming convenience—under the circumstances amount-

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ing to necessity—dictates that answer. In dealing with this reference, however, I desire it to be clearly understood that I do so solely in the light of the present knowledge of Hertzian waves and radio and upon the facts disclosed in the record. I fully accept the following paragraph from the judgment of my brother Newcombe:

> I interpret the reference as meant to submit the questions for consideration in the light of the existing situation and the knowledge and use of the art, as practically understood and worked, and, having regard to what is stated in the case, assumed as the basis for the hearing. Therefore I proceed upon the assumption that radio communication in Canada is practically Dominion-wide; that the broadcasting of a message in a province, or in a territory of Canada, has its effect in making the message receivable as such, and is also effective by way of interference, not only within the local political area within which the transmission originates, but beyond, for distances exceeding the limits of a province, and that, consequently, if there is to be harmony or reasonable measure of utility or success in the service, it is desirable, if not essential, that the operations should be subject to prudent regulation and control.

Without entering into any lengthy discussion of the constitutional issues involved, it seems to be certain that Hertzian waves and radio were not only unknown to, but undreamt of by, the framers of the *British North America Act*. It is, therefore, not to be expected that language should be found in that Act explicitly covering the subject matter of the present reference. On the other hand, if the Act is to be viewed, as recently suggested by their Lordships of the Privy Council in *Edwards* v. *Attorney-General of Canada* (1).

> as a living tree, capable of growth and expansion within its natural limits,

and if it

> should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words,

and bearing in mind that

> we are concerned with the interpretation of an Imperial Act, but an Imperial Act creating a constitution for a new country,

every effort should be made to find in the B.N.A. Act some head of legislative jurisdiction capable of including the subject matter of this reference. If, however, it should be found impossible to assign that subject matter to any specifically enumerated head of legislative jurisdiction, either in section 91 or in section 92 of the B.N.A. Act, it would seem to be one of the subjects of residuary power

(1) [1930] A.C. 124.

under the general jurisdiction conferred on the Dominion by the opening paragraph of section 91.

It is also obvious that, for certain purposes and within certain limitations, there are several specific heads of legislative jurisdiction in section 91 broad enough to cover, in part at least, the subject of radio communication and that, in so far as the subject matter falls within those several heads, Dominion legislative jurisdiction as to it is exclusive. I refer to

5. Postal Service.
7. Militia, Military and Naval Service, and Defence.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping, (and)
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

It seems to me that, under this last head, which really brings the exceptions set out in subsection 10 of section 92 into section 91, as distinctive heads of Dominion legislative jurisdiction (*City of Toronto* v. *Bell Telephone Co.* (1)), more particularly under the word "telegraphs" in clause (*a*) thereof, giving to that word a reasonably broad construction of which it is susceptible (*ibid* and *Attorney-General* v. *Edison Telegraphs of London* (2)—we find a sound basis for holding that "radio communication" is subject to the exclusive legislative jurisdiction of the Dominion Parliament.

Reading through the various subsections of section 92, no one of them do I find broad enough to cover the subject matter of radio communication. The two subsections of section 92 relied on by counsel for the provinces were nos. 13 and 16. No doubt, in some aspects, radio communication has to do with "property and civil rights in the province"; but so have many other subjects which have been held to fall within some one of the enumerated heads of section 91, and as to which the concluding paragraph of that section establishes the exclusiveness of Dominion legislative jurisdiction over them. (*The Fisheries Case* (3); *Toronto Electric Commissioners* v. *Snider* (4)). Radio communication in this respect does not differ from any of such other subjects.

(1) [1905] A.C. 52, at 57.
(2) (1880) 50 L.J. C.L. 145.
(3) [1898] A.C. 700, at 715.
(4) [1925] A.C. 396, at 406.

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Anglin C.J.C.

Bearing in mind what Lord Watson said in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1), that legislation by the Dominion

> in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.

and that it is not competent to the Dominion to make laws

> in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion.

I fail to find anything of a "local or private" nature in radio communication such as would exclude Dominion jurisdiction over it. I agree with Mr. Justice Newcombe that

> "radio communication," in the state of the science and development which it has attained, is not, substantially or otherwise, a local or private matter in the province.

Of course, it may some day become so, should radio science develop to such an extent that it will be possible so to control the effects of Hertzian waves, that those effects may be confined within the limits of a province, both as to their use and interference by them.

Subject to such possible further scientific development, I am, for the foregoing reasons, of the opinion that question no. 1 should be presently answered in the affirmative. It is, therefore, unnecessary to answer question no. 2, which is based on the assumption of a negative answer to no. 1.

My formal answers to the questions are,

Question no. 1. In view of the present state of radio science as submitted, Yes.

Question no. 2. No answer.

NEWCOMBE J.—My trouble with this case is to know the facts. Although the narrative of the order of reference and the printed statement of principles were not at the hearing seriously disputed, one is apt to suspect that the knowledge of the art of radio, which we have derived from the submissions and what was said in the course of argument, is still incomplete and, perhaps, in some particulars, not free from error; that some accepted theories are still experimental or tentative, and that there may be possibilities

(1) [1896] A.C. 348, at 360.

of development and use, not only in the Dominion but also in a provincial field, which have not yet been fully ascertained or tested.

A difficulty also arises from the fact that the questions propounded do not apply themselves to actual legislation, but seek generally the definition of Dominion authority to "regulate and control radio communication," in, perhaps, its widest sense.

In these conditions, it is expedient to proceed with great care and certainty, or caution, and, in affirming or denying a legislative power, wisely to say nothing which may be construed to express or imply an intention to extend a ruling upon the assumed or hypothetical case submitted to a state of actual facts that may prove to be materially different, and which, though at present no more than imaginary, may yet be realized.

I interpret the reference as meant to submit the questions for consideration in the light of the existing situation and the knowledge and use of the art, as practically understood and worked, and, having regard to what is stated in the case, assumed as the basis for the hearing. Therefore I must proceed upon the assumption that radio communication in Canada is practically Dominion-wide; that the broadcasting of a message in a province, or in a territory of Canada, has its effect in making the message receivable as such, and is also effective by way of interference, not only in the local political area within which the transmission originates, but beyond, for distances exceeding the limits of a province, and that, consequently, if there is to be harmony or reasonable measure of utility or success in the service, it is desirable, if not essential, that the operations should be subject to prudent regulation and control.

Now, the power of the Dominion to regulate or control is denied, upon two grounds, by the province of Quebec and other provinces which have associated themselves with the argument of Quebec; they say that the exercise of the power, as broadly suggested by the first question, would offend against the provincial enumeration of "Property and Civil Rights in the Province"; and, secondly, or, perhaps, alternatively, that it would be obnoxious to the concluding paragraph of section 92, "Generally all Matters of a merely local or private Nature in the Province." Ex-

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ceptions are, however, conceded, and these may be introduced no better than by a quotation from Lord Herschell's great judgment in the first *Fisheries Case* (1), where, referring to section 91, he said

> The earlier part of this section read in connection with the words beginning "and for greater certainty," appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91, is not within the legislative competence of the provincial legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a provincial legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word "exclusively." It would authorize for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the *British North America Act*.

Now, referring to the text of section 91 for the enumerations that may, for present purposes, be invoked, it is enacted by the concluding words of the section that

> Any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And it is, I would think, not doubtful that the regulation of radio communication has a Dominion aspect, or at least an overlapping relation, capable of being worked as incidental or ancillary, with respect to some of the subjects specially enumerated in section 91; for example: "2. The Regulation of Trade and Commerce; 5. Postal Service; 7. Military and Naval Service and Defence; 9. Beacons, Buoys, Lighthouses and Sable Island; 10. Navigation and Shipping; 11. Quarantine and the Establishment and Maintenance of Marine Hospitals, and 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Most obviously in this

(1) [1898] A.C. 700, at 715.

true as applied to the three enumerations that are concerned with the safety of ships and navigation. It follows that a provincial legislature could not sanction or uphold any sort of radio communication which would interfere or conflict with competent Dominion regulations, enacted with relation to these enumerated subjects. It is expressly, and most justly, conceded by the factum of the Attorney-General of Quebec that

> Where any subject is under its exclusive legislative authority the Dominion Parliament has power to regulate by substantive and by ancillary and necessary incidental legislation.

Also, by section 132, which has been judicially considered in other cases,

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any province thereof as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

There is the International Radiotelegraph Convention, "Done at Washington, 27th November, 1927," between the Governments therein mentioned, including Canada, Great Britain and the United States of America, and ratified on behalf of Canada, 12th June, 1928; also an agreement between Canada, the United States, Newfoundland and Cuba, relative to the assignment of "frequencies" on the North American continent, effective as from 1st March, 1929. These and other international agreements or regulations, to which Canada adheres, are printed in the appendix of the case; and, in so far as they answer the description of the last quoted section, the Parliament and Government of Canada have, by the express enactment, all powers necessary or proper for performing the obligations of Canada, or of any province thereof, arising thereunder.

But, while Mr. Geoffrion concedes that interference internationally may be avoided under the powers conferred by section 132, he suggests that, if it be necessary to provide against interprovincial interference, the objects should be attained by arrangement between the provinces, and he refers to *City of Montreal* v. *Montreal Street Railway* (1). That case is mentioned in the recent *Aviation Case* (2); and it is distinguishable upon all the points debated with relation to the questions now submitted. I refer to it here by way of reminder that, as shewn by Lord Atkin-

(1) [1912] A.C. 333.
(2) [1930] S.C.R. 663 at 702.

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son's remark at the foot of page 345, the power of Parliament to acquire jurisdiction by the exercise of its authority to make a declaration under paragraph (*c*) of the 10th enumeration of section 92, was not without a persuasive influence in the result which His Lordship reached; and I think all are agreed that paragraph (*c*) has no application to the radio powers which are now in difference.

But while the Dominion has at least the authority to regulate and control radio activities, and to provide against confusion or interference, as affecting its own enumerated subjects, and for the performance of treaty obligations, it also has the comprehensive power involved in the declaration of its authority

> in relation to all matters not coming within the classes of subjects by the *British North America Act* assigned exclusively to the legislatures of the provinces;

and Quebec, in effect, contends that the classes so excepted include " radio communication," within the meaning of the first question submitted. As to this, the provincial case seems to depend upon the interpretation of the two provincial powers which I have quoted; and my view is that the subject in question has not the prescribed limitation of locality. It is said that " radio communication," as explained by the reference, is a matter of " Property and Civil Rights in the Province," or of a " merely local or private Nature in the Province "; and this I deny, because, upon the assumptions involved in the case, the matter substantially extends beyond provincial limits.

The words "Matters of a merely local or private Nature" are also used in the last paragraph of section 91, and Lord Watson interpreted them as meant to include and correctly to describe all the matters enumerated in the heads of section 92 as being, from a provincial point of view, of a local or private nature. *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); and, on the next two pages of the same case His Lordship said, referring to the general authority of Parliament under the introductory enactments of section 91,

> But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to en-

(1) [1896] A.C. 348, at 359.

croach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power of the Parliament of Canada in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

And, as I interpret the case submitted, "radio communication," in the state of the science and development which it has attained, is not, substantially or otherwise, a local or private matter in a province. In the course of discussion an attempt was made to distinguish between the transmission of a message and the reception of it; and it was said that the receiving instrument is property in a province, and that a message is received in a province when the instrument, being there, is adapted and worked for that purpose. But the question is directed, not to rights of property in goods or chattels situate within a province, but to "radio communication"—an effect which is not local, but interprovincial. There must be two parties to a communication; there may be many more; and, if the sender be in a foreign country, or in a province or territory of Canada, and the receiver be within another province, it is impossible, as I see it, to declare that the communication, is local, either to the transmitting or to the receiving province.

As usual, in cases where the validity of provincial legislation is attacked as engaged with a subject matter not local, the *Manitoba Liquor* case (1), is cited in support of the power. The passages are at pages 77-80 of Lord McNaghten's judgment, and the meaning is relieved of some obscurity when the reasons are considered. Manifestly, His Lordship's conclusion depends upon the text of the par-

(1) [1902] A.C. 73.

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ticular Act and he quoted and emphasized the recital and the 119th section by which there is introduced a legislative declaration that the object is to suppress the liquor traffic in Manitoba by prohibiting provincial transactions, and that, while the act is intended to prohibit transactions in liquor which take place wholly within the province, except as otherwise specially provided, and to restrict the consumption of liquor within the limits of the province,

it shall not affect and is not intended to affect *bona fide* transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly.

That section, his Lordship said, was as much part of the Act as any other section contained in it, and must have its full effect in exempting from the operation of the Act the transactions which came within its terms. Their Lordships were not satisfied that the legislature of Manitoba had transgressed the limits of its jurisdiction in passing the *Liquor Act*. But provincial legislation for the regulation and control of radio communication is a much more expansive matter and cannot, upon present information, be constructed in a manner to qualify as relating to matters of a local or private nature in the province.

The subject is one which, undoubtedly, relates to the peace, order and good government of Canada; and I am not satisfied, for any of the reasons which have been submitted, or which I have been able to discover, that it falls within any of the classes of subjects assigned exclusively to the legislatures of the provinces.

For these reasons I certify to the Governor in Council, for his information, my opinion that the first question submitted should be answered in the affirmative; and, of course, in view of that conclusion, I am not required to answer the second question.

RINFRET J.—En donnant son opinion sur les questions déférées au sujet de la loi autorisant le contrôle de l'aéronautique (1), mon collègue, Monsieur le Juge Duff, avec qui j'ai concouru, commence son jugement par l'exposé suivant:

The view presented by the Solicitor General of the questions raised by the interrogatories, which it is our duty to answer, was based primarily

(1) [1930] S.C.R. 663, at 684.

upon the proposition that the Dominion possesses authority to legislate upon the subject of aeronautics, in every respect, and that this authority is exclusive, or, at all events, overrides any law of a province.

This proposition is supported upon a variety of grounds. It is contended that, in their very nature, the matters embraced within that subject cannot be local, in the provincial sense, and that accordingly the subject is beyond the ambit of section 92; that, in the alternative, it falls within one of the enumerated heads of section 91, no. 10 Navigation and Shipping; that, as a sort of further alternative, so many aspects and incidents of the subject fall within various enumerated heads of section 91, such as the regulation of trade and commerce, undertakings extending beyond the limits of a province, customs, aliens, beacons and lighthouses, postal service, defence, ferries, or under immigration (s. 95), that the subject must as a whole be treated as within Dominion jurisdiction, that being, it is argued, the only interpretation under which the undoubted authority of the Dominion over the various aspects of the subject can be effectively exercised. Still again, it is said, the authority of the Dominion under section 132, to legislate for the performance of its obligations under the Convention relating to Aerial Navigation, 1919, extends over the whole field.

En substituant la radiocommunication à l'aviation, et en retranchant la mention relative au paragraphe 10 de l'article 91 de l'*Acte de l'Amérique Britannique du Nord* concernant " Navigation and Shipping", nous avons dans le passage cité un exact résumé de l'argumentation qui a été faite de la part du procureur général du Canada dans l'affaire qui nous est actuellement soumise.

D'autre part, les procureurs généraux des provinces, pour réclamer la juridiction en faveur des gouvernements qu'ils représentaient, dans cette cause de l'aviation comme dans la présente, se sont surtout appuyés sur le paragraphe 13 (" property and civil rights in the province ") et sur le paragraphe 10 (" local works and undertakings ") de l'article 92 de l'Acte constitutionnel.

Il en est résulté, entre la cause de l'aviation et la présente cause de la radiocommunication, une très grande analogie, au moins dans la manière dont la question nous a été présentée. On peut donc regretter que nous soyons appelés à nous prononcer sur les questions qui nous sont actuellement soumises avant d'avoir eu l'avantage de connaître la décision finale du Conseil Privé dans l'affaire de l'aviation, car il me paraît évident que cette décision nous aurait apporté une aide considérable dans la solution du problème que nous avons maintenant à trancher.

De même que dans la référence sur l'aviation, il nous faut ici adapter une loi constitutionnelle datant de 1867 à

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un sujet qui non seulement n'avait aucune existence, mais dont on ne soupçonnait même pas la possibilité à cette époque. Il est exact de dire cependant que l'*Acte de l'Amérique Britannique du Nord* "is always speaking" et que ses dispositions doivent recevoir un sens de plus en plus étendu, au fur et à mesure que les inventions scientifiques et les développements de la vie nationale exigent de nouvelles solutions constitutionnelles (1).

A la question nouvelle soulevée par la découverte de l'aviation, cette cour a répondu que la juridiction primordiale appartenait aux provinces. Il me semble qu'il existe à l'égard de cette question nouvelle qui est maintenant soulevée par l'invention de la radio des raisons encore plus fortes pour décider dans le même sens.

La radiocommunication, telle qu'elle est connue et telle que la science nous la présente jusqu'à date, consiste dans un appareil émetteur, des ondes radioélectriques (que le dossier appelle "Hertzian waves") circulant dans l'éther, et un appareil récepteur.

En soi, l'appareil émetteur et l'appareil récepteur sont des objets de propriété "d'une nature locale" situés dans la province, au sens de l'article 92.

Qu'on les envisage comme objets de propriété purs et simples, ou comme des travaux couverts par le paragraphe 10 de l'article 92, ils tombent de prime abord sous la juridiction provinciale.

En plus, la personne qui opère un appareil émetteur ou la personne qui opère un récepteur, exerce un droit civil dans la province; et l'une ou l'autre opération, prise isolément, est indiscutablement matière à contrôle provincial.

De ce point de vue, il existe sans doute une différence entre l'opération de l'appareil récepteur et l'opération de l'appareil émetteur. Alors que la réception ne peut d'aucune façon être envisagée comme étant autrement que d'une nature purement locale, il est exact de dire que, suivant les données actuelles de la science, l'émission ne peut pas être circonscrite dans un rayon précis et les ondes qui sont mises en mouvement par l'appareil émetteur se propagent dans toutes les directions, sans qu'on puisse les limiter aux frontières d'un territoire.

(1) [1930] A.C. 124.

Je ne crois pas cependant que cette dernière particularité enlève à l'opération de l'appareil émetteur son caractère de droit civil dans la province, suivant la portée qu'il faut donner au paragraphe 13 de l'article 92. Un droit civil ne perd pas sa nature de droit civil contrôlable par la province simplement parce qu'il peut produire des effets au delà de la province. Un contrat passé dans une province produit des résultats en dehors de cette province, sans que pour cela il soit soustrait à l'autorité provinciale. Une firme, à Montréal, qui fait avec un voyageur de commerce un contrat de louage de ses services, verra sa responsabilité engagée vis-à-vis d'une personne à Vancouver, dans la Colombie-Britannique, par l'acte de ce voyageur de commerce, et cette responsabilité résultant du contrat d'abord fait à Montréal continuera d'être régie par la loi provinciale.

Pour prendre un exemple encore plus frappant, un journal publié à Toronto et dont la circulation est répandue dans tout le Dominion ne cessera pas pour cela d'être de la part de ses propriétaires l'exercice d'un droit de propriété et d'un droit civil dans la province d'Ontario et d'être subordonné à la législation de la province.

Supposons encore une fanfare qui jouerait un concert dans une province, sur les bords de la frontière. Elle ne tomberait pas sous le contrôle fédéral parce que les sons de sa musique seraient entendus dans une autre province.

On pourrait donner ainsi des exemples presque à l'infini.

Si maintenant l'on traite l'appareil émetteur ou l'appareil récepteur comme des "travaux.... d'une nature locale", je ne crois pas qu'on puisse prétendre que, par le seul fait que ces travaux ont une répercussion au delà des frontières d'une province, ils perdent leur caractère local.

Je suppose un phare qui serait érigé sur le territoire d'une province mais suffisamment près de la frontière pour que ses feux et sa lumière soient projetés sur le territoire d'une autre province. Il me semble que l'on ne pourrait en conclure que ce phare cesse d'être un ouvrage d'une nature locale au sens du paragraphe 10 de l'article 92.

J'écarte donc la prétention qui voudrait que par cela seul qu'un droit civil ou un ouvrage local produit des effets en dehors d'une province, il acquiert *ipso facto* un caractère qui a pour effet de le soustraire à la juridiction provinciale.

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Mais on objecte que le sujet dont il s'agit n'est pas l'appareil émetteur ou l'appareil récepteur en soi, que la véritable question est la communication qui s'établit entre les deux appareils et que, comme il est impossible de restreindre cette communication aux limites d'une province, il en résulte qu'elle tombe dans le domaine fédéral.

Sur ce point, on invoque les sous-paragraphes du paragraphe 10 de l'article 92 qui sont des exceptions et qui, en vertu du paragraphe 29 de l'article 91, doivent être envisagés comme faisant partie des catégories de sujets réservés au pouvoir législatif fédéral.

Il y a là trois sous-paragraphes: (*a*), (*b*) et (*c*). (*b*) s'occupe des lignes de bateaux à vapeur entre les provinces et les pays dépendant de l'Empire britannique ou tout autre pays étranger. Il n'a donc rien à voir avec la question actuelle. (*c*) traite des travaux qui, bien qu'entièrement situés dans la province, sont déclarés par le parlement du Canada être pour l'avantage général du Canada ou pour l'avantage de deux ou d'un plus grand nombre de provinces. Il ne s'agit pas d'une déclaration de ce genre dans la question qui nous est soumise.

Reste le sous-paragraphe (*a*). Il s'applique à " lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province ".

L'interprétation souveraine qui doit nous guider dans la portée qu'il faut donner à ce sous-paragraphe a été donnée par le Conseil Privé dans la cause de *Montreal* v. *Montreal Street Railway* (1). Il y est dit, en référant aux travaux dont il s'agit dans ce sous-paragraphe: " These works are physical things, not services." Or, la distinction fondamentale entre la radiocommunication et la communication par télégraphe, téléphone ou autres travaux du même genre auxquels s'applique le sous-paragraphe (*a*) du paragraphe 10 est précisément que la radiocommunication peut être un " service ", mais elle n'est pas un " physical thing ".

En outre, il n'existe pas de connexion physique entre l'appareil émetteur et l'appareil récepteur, comme le fil qui, dans le télégraphe et le téléphone, relie l'endroit d'où sont émis les sons ou les signaux à l'endroit où ils sont reçus.

(1) [1912] A.C. 333.

A la rigueur, une ligne de radiocommunication établie par une firme commerciale pour le service du public partant d'une ou de plusieurs stations d'émission fixes qu'elle possèderait dans une province et qui transmettrait des messages de toutes natures à l'aide des ondes hertziennes à des stations de réception fixes, dont la firme serait également propriétaire, et qui seraient situées dans d'autres provinces, constitueraient un " undertaking " tombant sous la juridiction fédérale. Il semblerait cependant que, dans ce cas, le pouvoir fédéral procèderait non pas du sous-paragraphe (*a*) du paragraphe 10 de l'article 92, mais du paragraphe 2 de l'article 91 concernant " The regulation of trade and commerce ".

Nous avons eu tout dernièrement un exemple de l'application de ce principe de juridiction dans l'arrêt de cette cour Re: *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1).

Il est juste toutefois de faire remarquer que même l'attribution de la juridiction fédérale sur une entreprise commerciale, comme celle dont nous venons de parler, reliant deux ou plusieurs provinces, laisserait quand même intacte la juridiction provinciale sur des entreprises du même genre établies entre des stations fixes exclusivement à l'intérieur d'une province, et surtout sur tous les appareils opérés par des amateurs ou par des gouvernements locaux, ou de toute autre façon qui ne serait pas pour des fins de profit.

Mais tous les cas mentionnés au sous-paragraphe (*a*) du paragraphe 10 sont des cas où il s'agit d'une connexion physique continue dans les travaux ou l'entreprise (sauf peut-être les lignes de bateaux à vapeur ou autres bâtiments, avec lesquels la radiocommunication n'a aucune espèce d'analogie) et d'un " physical thing " tout entier sous le même contrôle, sinon de propriété, au moins d'opération. La plus récente décision sur ce point se trouve dans l'arrêt du Conseil Privé dans la cause de *Luscar Collieries* v. *McDonald* (2), où Lord Warrington of Clyffe, qui a prononcé le jugement, revient à deux reprises sur le caractère de continuité de la voie de chemin de fer dont il s'agissait dans cette cause et dit (p. 932):

A part of a continuous system of railways operated together by the Canadian National Railways Company and connecting the province of

(1) [1931] S.C.R. 357.

(2) [1927] A.C. 925.

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Alberta with other provinces of the Dominion; (puis p. 933): There is a continuous connection by railway between the point of the Luscar Branch farthest from its junction with the Mountain Park Branch and parts of Canada outside the province of Alberta.

Ces expressions semblent bien marquer que, pour tomber sous l'effet du sous-paragraphe (*a*) du paragraphe 10, il faut le double caractère de continuité dans le " physical thing " et de propriété, de contrôle, ou, au moins, d'opération par la même personne ou la même compagnie, sans quoi l'on ne se trouve plus en présence d'un seul " undertaking ", mais l'on a plusieurs " undertakings " distincts.

Ces deux caractères manquent à la radiocommunication, dont la nature habituelle et la plus ordinaire est de procéder d'un appareil émetteur qui appartient à un propriétaire vers des appareils récepteurs qui appartiennent à d'autres propriétaires complètement indépendants, sans aucune espèce de relations avec le propriétaire de l'appareil émetteur, et que ce dernier ne connaît même pas. Du point de vue légal, il est difficile de voir la distinction qu'on peut faire entre la radiocommunication opérée dans ces conditions et la transmission des sons de toute autre façon (comme, par exemple, par la fanfare dont nous parlions tout à l'heure) d'une province à l'autre. Et il est assez juste, sous ce rapport, d'assimiler l'appareil récepteur à une simple amplification de l'appareil auditif humain, puisque sa fonction n'est rien autre chose que de rendre perceptibles à l'oreille des sons ou des signaux transmis à travers l'éther par la propagation de vagues intangibles.

De toutes façons, par conséquent, et sauf les exceptions que j'ai mentionnées au cours de ce jugement jusqu'ici, le sujet de la radiocommunication me paraît tomber essentiellement dans la catégorie des sujets de " Property and civil rights in the province " ou de " Local works and undertakings ", tels que prévus au paragraphe 10 de l'article 92.

Dans ces conditions, la juridiction primordiale réside donc dans les provinces, et cette juridiction ne peut être entamée qu'en autant que l'on peut trouver dans l'article 91 des sujets de juridiction fédérale qui donneraient, dans les limites de leur application particulière, le pouvoir d'empiéter sur cette juridiction provinciale primordiale.

En effet, dès qu'un sujet tombe sous le contrôle provincial en vertu de l'une des clauses de l'article 92, il ne peut être transféré au domaine fédéral qu'à la condition de tom-

ber expressément sous l'une des clauses de l'article 91; et il est absolument fallacieux de prétendre que, sauf dans un cas de " national emergency ", le Dominion pourrait s'emparer de ce contrôle en vertu de la clause résiduaire et sous prétexte que l'autorité provinciale n'a pas l'ampleur voulue pour contrôler effectivement le sujet qui est attribué à sa juridiction.

Pour mieux exprimer ma pensée, je me permettrai de citer sur ce point un passage du jugement de notre collègue, Monsieur le juge Duff, dans la cause de *The King* v. *Eastern Terminal Elevator Company* (1):

> The other fallacy is (the two are, perhaps, different forms of the same error) that the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme. The authority arises, it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the *Board of Commerce Case* (2), and, indeed, is the view which was unsuccessfully put forward in the *Montreal Street Railway Case* (3), where it was pointed out that in a system involving a division of powers such as that set up by the *British North America Act*, it may often be that subsidiary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

Cela m'amène à examiner de plus près la véritable base sur laquelle, de la part du procureur général du Canada, on a voulu placer l'argumentation en faveur de la juridiction fédérale.

L'on nous a dit que, à cause de sa nature même, la radiocommunication échappait au domaine provincial et qu'elle ne pouvait être contrôlée d'une façon efficace que par le pouvoir fédéral, parce qu'elle exige un contrôle central et unique.

A mon humble avis, c'est là porter la discussion exactement sur le terrain dont parle Monsieur le juge Duff dans le passage que je viens de citer, et c'est nous ramener, une fois de plus, à cet argument si souvent offert et autant de fois rejeté par les tribunaux que, parce qu'il serait plus avantageux de concentrer toute la législation sur un sujet entre les mains du pouvoir central, c'est-à-dire, en l'espèce, du pouvoir fédéral, il en résulte que le fédéral devrait avoir juridiction. Il n'y a pas le moindre doute que s'il existait

(1) [1925] S.C.R. 434, at 448. (2) [1922] 1 A.C. 191.
(3) [1912] A.C. 333.

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un seul parlement, tous ces conflits de juridiction seraient évités. Mais cet argument de "convenience" ou de "inconvenience" ne saurait évidemment constituer une règle d'interprétation. La constitution du Canada a créé une union fédérale en distribuant les pouvoirs législatifs entre un parlement central et des parlements provinciaux. C'est uniquement par l'interprétation du texte de cette constitution que l'on doit être guidé lorsqu'il s'agit d'attribuer un sujet à l'une ou l'autre juridiction. La question de savoir s'il serait plus avantageux que les choses fussent autrement ne saurait entrer en ligne de compte et, à tout événement, ne saurait trouver place devant une cour de justice. Le principe que, par suite du fait qu'une législation fédérale serait pour le plus grand avantage du Canada, ou rencontrerait d'une façon plus efficace les exigences de la situation, il en résulterait que le pouvoir central a la compétence pour l'adopter a reçu son coup de grâce dans le jugement de *Toronto Electric Commissioners* v. *Snider* (1).

L'autre point soulevé de la part du procureur général du Canada, et l'on peut dire sans doute le pivot de son argumentation, c'est que, dans l'état actuel de la science de la radio, il est absolument impossible d'empêcher les inconvénients résultant des interférences, et que, à moins d'une législation uniforme ayant pour but de répartir ce que j'appellerai les bandes de communication ("channels of communication"), il se produira une telle confusion que tous les bénéfices de la radiodiffusion seront absolument annihilés. On en conclut que cela nécessite le contrôle unique du parlement fédéral.

De la part des provinces, on a nié le danger de cette interférence et on a assuré, à tout événement, qu'il y avait exagération dans la prétention émise par le Dominion. En la prenant pour acquise, je ne vois pas comment ce fait peut venir modifier la question de juridiction.

Si j'ai bien compris le développement de cet argument, le brouillage peut avoir lieu à la source, c'est-à-dire au poste émetteur, ou au moment de la réception. De toutes manières, c'est le récepteur qui est empêché de recevoir utilement la radiocommunication. Si l'interférence provient d'une cause locale située dans la même province que

(1) [1925] A.C. 396, 412

l'appareil récepteur, la province qui a juridiction sur l'appareil récepteur peut également adopter la législation nécessaire pour empêcher cette interférence. Si la difficulté provient d'une répartition des " channels " entre les provinces, il m'est impossible de voir pourquoi la solution ne pourrait pas être trouvée dans une entente entre les provinces, ainsi qu'il est suggéré par le Conseil Privé dans la cause de *City of Montreal* v. *Montreal Street Railway* (1).

Mais il semble admis que l'interférence peut tout autant provenir d'une source extérieure non seulement à l'une des provinces, mais d'une source extérieure au pays lui-même. Je déduirais même de l'exposé scientifique qui est au dossier et de l'argumentation qui a été faite devant nous que la principale, pour ne pas dire l'unique, difficulté de toute la situation vient des Etats-Unis, pays voisin, et de l'exploitation du nombre considérable de postes émetteurs qui se trouvent dans ce pays. Or, l'on ne peut éviter de faire remarquer que s'il en est ainsi, ce n'est pas par une législation fédérale qu'on empêchera cette interférence. Le parlement du Canada sera tout aussi impuissant que n'importe quel parlement des provinces pour légiférer sur une situation de ce genre. Aucune loi du Canada ne pourrait empêcher les postes émetteurs des Etats-Unis de causer dans notre pays, ou dans chacune des provinces, toutes les interférences que la science prévoit.

La réponse à l'argument du Dominion serait donc:

1° Ce n'est pas parce qu'une personne située ailleurs dans le Dominion vient causer dans une province une interférence avec l'exercice d'un droit civil dans cette province que le Dominion acquerra de ce fait une juridiction sur ce droit civil. Cette interférence constitue un conflit entre deux droits civils. Un conflit de ce genre n'a pas pour résultat de soustraire les droits civils à la juridiction provinciale et de les transférer au domaine fédéral.

2° Si la source de l'interférence est située dans le pays, bien que dans une autre province, la véritable manière pour les provinces de régler le conflit entre les droits civils qui sont respectivement de leur domaine, est par une entente entre les provinces. Le Dominion n'acquiert aucune juridiction comme conséquence d'un conflit de ce genre.

(1) [1912] A.C. 333.

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3° Si la source est située en dehors du pays, le Dominion, par sa propre législation, est tout aussi impuissant que n'importe laquelle des provinces pour y mettre fin; et la seule ressource en pareil cas: c'est le traité avec le ou les pays voisins.

Au point de vue pratique, je crois bien que, en donnant à l'objection fédérale la plus ample portée que l'on puisse lui attribuer, la vraie question qui résulte du danger de l'interférence est en réalité une question internationale. Or, du moment qu'on en arrive à cette conclusion, la difficulté de juridiction ne se présente plus. Une question internationale ne peut se régler que par un traité; et, dans ce domaine, le parlement fédéral a toute la latitude nécessaire. L'article 132 de l'*Acte de l'Amérique Britannique du Nord* établit ses pouvoirs en pareil cas; et, dans le jugement que cette cour a rendu sur la question d'aviation (1), nous avons défini les droits du parlement fédéral en matière de traités, tant dans leur adoption que dans leur exécution, de façon à ce qu'il n'y ait pas lieu d'y revenir, sujet naturellement à ce que pourra dire le Conseil Privé sur cette question.

Dans la cause actuelle, il est résulté de l'argumentation de part et d'autre que l'étendue des pouvoirs du parlement fédéral, agissant en vertu de l'article 132 de l'acte constitutionnel, ne faisait pas l'objet de la moindre discussion. Il suffit peut-être de faire remarquer, par conséquent, que c'est là, en définitive, que le parlement fédéral va trouver le remède à la principale difficulté qui semble le préoccuper à l'heure qu'il est, c'est-à-dire cette question d'interférence. Elle ne peut se régler que par traité; et, en matière de traités, les pouvoirs fédéraux sont probablement illimités.

Et tout ce que je viens de dire au sujet de l'interférence provenant de l'étranger s'applique avec autant de force, au Canada, à la règlementation de la radiodiffusion et de la radiocommunication venant de l'étranger. Là encore, c'est une question de traité; et sur ce point le fédéral est souverain.

Mais, si l'on se borne au domaine national, mon opinion est que, pour les raisons que j'ai exposées, la base de la

(1) [1930] S.C.R. 663.

juridiction en matière de radiocommunication est primordialement entre les mains des provinces.

Il reste évidemment que, nonobstant cette juridiction provinciale primordiale, le parlement fédéral conserve la juridiction prépondérante chaque fois qu'il s'agit d'un des sujets qui lui sont expressément attribués par l'article 91. Cela est admis dans le factum qui nous a été soumis de la part de la province de Québec:

> It may be at once conceded that where any subject is under its exclusive legislative authority the Dominion Parliament has power to legislate by substantive and by ancillary and necessarily incidental legislation.

Cela comprendrait, au moins, les sujets suivants:

1° " The regulation of Trade and Commerce ", dans les limites qui ont été assignées à ce sujet dans les arrêts de *Citizens Insurance Company* v. *Parsons* (1); *The Insurance Reference* (2); *The Board of Commerce Act, 1919,* et *The Combines and Fair Prices Act, 1919* (3);

2° " Postal service ";

3° " Militia, Military and Naval Service, and Defence ";

4° " Beacons, buoys, lighthouses and Sable Island ";

5° " Navigation and Shipping ";

6° " Sea coast and inland fisheries ";

7° Les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la loi constitutionnelle aux législatures des provinces, conformément au paragraphe 29 de l'article 91, dans les limites que j'ai expliquées au cours de ce jugement.

Ce que j'ai dit jusqu'ici me dispenserait de traiter plus amplement de la juridiction provinciale. Je crois cependant devoir ajouter que même si, contrairement à la conclusion à laquelle j'en arrive, le sujet de la radiocommunication appartient primordialement au domaine fédéral, l'on ne pourrait quand même dire que son contrôle est absolu, ou, pour employer une expression que nous avons adoptée lors de la référence sur l'aviation, que ce contrôle existe " in every respect ".

Il me paraît certain que pour la réparation des dommages moraux et matériels qui pourraient être causés par la radiocommunication, pour la responsabilité civile en matière de radiodiffusion, il y aura lieu de recourir aux règles du droit

(1) (1881) 7 App. Cas. 96. (2) [1916] 1 A.C. 588.
(3) [1922] 1 A.C. 191.

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civil, et, par conséquent, à la législation provinciale. Les droits des propriétaires de postes émetteurs, ou les droits des propriétaires d'appareils de réception devront quand même être régis par le droit civil. En plus, il y a, entre les divers émetteurs, ou entre les émetteurs et les compositeurs, écrivains, auteurs de tous genres, orateurs, conférenciers, artistes ou exécutants, fournisseurs d'information, annonceurs, toutes les personnes désireuses de transmettre des communications ou de faire de la réclame, des rapports éventuels de droit privé, civil ou commercial qui devront trouver leur solution dans le droit commun des provinces et dans la législation provinciale. (Voir Revue Juridique internationale de la radio-électricité, 1930, n° 24, p. 234.)

Enfin, toujours si le sujet de la radiodiffusion appartient de prime abord à la juridiction fédérale, je ne vois pas bien comment on pourrait empêcher les provinces d'exercer leur pouvoir de taxation directe en vertu du paragraphe 2 de l'article 92, et leur pouvoir de licence dans le but de prélever un revenu pour des objets provinciaux, locaux ou municipaux, en vertu du paragraphe 9 de l'article 92.

Comme conséquence de ce qui précède, je réponds comme suit aux questions qui nous ont été soumises:

J'interprète la première question comme impliquant de la part du gouvernement du Canada une juridiction absolue et sous tous les rapports; et ma réponse est dans la négative.

Quant à la seconde question, les différents aspects sous lesquels, à mon avis, le parlement du Canada a juridiction en matière de radiocommunication sont exposés en détail dans le présent jugement.

LAMONT J.—In this case I agree with my brother Rinfret that the jurisdiction of the Dominion Parliament over the subject of radio communication is not exclusive, although, in some particulars, a very large measure of control admittedly belongs to it.

When we consider the nature of radio communication and the fact that once the electro-magnetic waves are discharged from the transmitting stations they cannot be confined within the boundaries of a province, or even the limits of a country, it is evident that a provincial legislature, whose jurisdiction is only province wide, is not in a posi-

tion to control the transmission of these waves, yet, without some control, radio communication would be impossible. So far, therefore, as the transmission of the waves is concerned, a very wide jurisdiction must, in the present state of the art, be conceded to the Dominion Parliament. It belongs to Parliament because the more important matters which must be regulated and controlled lie in the international field where control can only be assured by treaty, convention or agreement between nations.

As indicating the matters over which those who have been dealing with radio communication in a practical way have felt the necessity for control, reference may be made to the International Radiotelegraph Convention at Washington, in November, 1927, and also to the agreement between Canada, the United States, Newfoundland, Cuba, et al. (effective since March 1, 1929), relating to the assignment of frequencies on the North American Continent. All parties to these agreements recognize that until the development of the art progresses to the stage where radio interference can be eliminated, special administrative arrangements are necessary to minimize this interference and promote standardization. To this end the contracting governments have agreed that all transmitting stations will, so far as possible, be established and operated in such manner as not to interfere with radio electric communication of other contracting governments, or persons authorized by them to conduct a public radio service; that no transmission station will be established or worked by an individual without a special licence issued by the government of the country to which the station is subject; that they will propose legislative measures to prevent the unauthorized transmission and reception of correspondence of a private nature, or the divulgence of messages received; and, further, that they will take necessary measures to connect the International Radio Service with the general communication system of each country.

The matters covered by these agreements shew the extent of the field in which control can only be secured by agreements between the nations. As to these matters jurisdiction lies with the Dominion Parliament under section 132 of the B.N.A. Act, 1867, which reads as follows:—

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The Parliament and Government of Canada shall have all powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.

Besides the transmission of electro-magnetic waves there are other matters in respect of which jurisdiction to regulate and control must exist in some authority. These are, for example, the capturing of these waves and the delivery of the messages they contain. These, to my mind, present a very different question from the transmission of the waves into space. According to Mr. Bain's report, which is printed with the case, the receiving apparatus performs two functions: it receives the transmitted wave, and converts it into an understandable signal. When electro-magnetic waves are thrown into space from one or more transmitting stations, they pass, by virtue of their potentially expanding force, not only over every parcel of land in the province in which the transmitter is situate, but over land far beyond the province. In the case of broadcasting they are not directed to any particular individual, but are left to be captured by anyone who can capture them. Where an owner of land in a province erects on his property a receiving antenna and to it attaches an apparatus which selects a given wave and delivers the message impressed upon it as an understandable signal to those who are within the limits of its varrying power, I am unable to see why the receiving apparatus cannot properly be designated a "local work" under no. 10 of s. 92. The services it performs, first in capturing the wave and then in extracting and delivering its message, are all performed within the province and, therefore, localized. In my opinion such localized service and such an instrumentality constitute a "local work." If it is not a local work within no. 10 of s. 92, I should consider that it would then fall within no. 16 " Generally all Matters of a merely local or private Nature in the Province." *Prima facie,* therefore, legislation upon these subjects would come within the jurisdiction assigned to the provincial legislatures by s. 92.

The jurisdiction of the province, however, is subject to being overborne by competent legislation on the part of the Dominion Parliament, ancillary or incidental, to any of the enumerated heads of s. 91.

I would, therefore, answer the questions as follows:—

1. Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed?

Answer: Not exclusive jurisdiction.

2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited?

Answer: The jurisdiction of Parliament is limited as set out above.

SMITH J.—There are submitted, for the hearing and consideration of the court, pursuant to the authority of s. 55 of *The Supreme Court Act*, the following questions:—

1. Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed?

2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited?

It becomes necessary in the first place to consider the nature of radio communication, how it is brought about, the extent of its effects, its usefulness to the inhabitants of the country at large, and the manner in which that usefulness may be made available.

The principles underlying radio communication are set out in an article compiled by J. W. Bain, radio engineer of the Marine Department, and printed in the case. This document is inserted for the convenience of the court, and it is stated that its accuracy may be verified by reference to the various standard textbooks on the subject. Its general accuracy was, I think, not controverted, and I therefore resort to this document for a brief general description of how radio communication is effected.

An alternating current is one which periodically changes direction in its circuit. For a certain time it flows in one direction, with varying strength, and then reverses and flows for an equal time in the opposite direction. The time in fractions of a second which elapses between two successive maximum values of current in the same direction is

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called a period or cycle, and the number of such periods or cycles per second is called the " frequency " of the alternating current. The maximum value to which the current rises in each half cycle is called the " amplitude " of the current. A high frequency alternating current is one of which the frequency is reckoned in tens of thousands.

By the use of alternate electric current in a transmitting apparatus, magnetic and electric fields are created, which expand and contract with the varying strength of the current, the energy being continually sent out into the surrounding medium and returned to the wire to be sent out again with a reversal of direction as the current increases from zero to maximum in one direction, and then decreases to zero, to increase again to a maximum in the opposite direction. If the frequency is very high, all the energy cannot return to the wire after each half-cycle, and it remains in space, to be pushed further out by the next expansion of the field; and the energy so pushed out at each successive cycle forms an electro-magnetic wave, which is radiated out from the radio antenna.

It is formed of two fields, a magnetic and an electric field at right angles to each other and to the direction of propagation, varying in intensity in step with one another and at the frequency of the current which gave rise to them, and travelling through space at the speed of light, that is: three hundred million metres per second. This figure of three hundred million, when divided by the frequency in cycles per second, gives the wave length in metres, and, conversely, when divided by the wave length, gives the frequency.

Part of the energy is radiated in a direction parallel to the surface of the earth, and forms what is known as the direct or ground wave. Another part is radiated upwards into space, and there exists in the upper part of the atmosphere a conducting layer of electrified particles which possesses the property of reflecting radio waves back to earth, making them available, to a certain extent, for radio communication.

The electro-magnetic waves here referred to are energy waves sent out into surrounding space in the manner indicated, and are the means by which radio communication is carried on. This communication involves not only the

production and radiation of electro-magnetic waves, but also their reception by suitable apparatus, which intercepts these waves by means of a receiving antenna. The passage of the waves across this antenna produces in it a voltage. The receiving apparatus, which is coupled to this antenna, must be capable of so amplifying the small voltage generated in the receiving antenna as to deliver at the output end a signal of suitable strength. Owing to the great number of electro-magnetic fields, due to the waves issuing from a corresponding number of transmitting stations engaged in the various services of radio communication, the receiving apparatus must also be able to discriminate between all these waves and select the desired one.

The fundamental method of arranging the receiving apparatus so as to select the desired wave is by tuning it to the frequency of the wave so desired. It follows that if more than one wave of the same or nearly the same frequency are coming to the receiving apparatus, one would interfere with the reception of the others and destroy the efficiency of all. In order to prevent this result, it is necessary that stations sending out these waves within certain distances of each other be limited to the use of frequencies sufficiently separated to avoid such interference.

By International Convention, frequencies from 550 kilocycles to 1,500 kilocycles have been appropriated to the service of broadcasting, and this band of 950 kilocycles is divided into 96 channels, giving approximately a width of 10 kilocycles to each channel, deemed necessary to prevent a transmitting station operating on one of these channels from interfering with the station operating on an adjoining channel. The electro-magnetic waves sent out from a transmitting station ordinarily travel through space in all directions, and the distances at which they can be picked up by a receiver, and at which they may cause interference with other transmitting stations, vary with the electric power and the frequency used.

In "Elements of Radio Communication," by John H. Morecroft, page 98, there is a table shewing the variation according to power. It is there stated that a fifty-watt station will give good service at ten miles, poor service at 100 miles, and interference at 600 miles; a five hundred-watt station will give good service at 30 miles, poor ser-

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vice at 300 miles, and interference at 1,800 miles; and a five thousand-watt station will give good service at 100 miles, poor service at 1,000 miles, and interference at 6,000 miles. At page 76 of the same book it is stated that if frequency is increased, keeping the current constant, more and more energy is radiated until, when the frequency is a million or more, the radiated power may be detected at great distances; and that, for a given current, the power radiated from a given circuit varies as the square of its frequency.

It is scarcely necessary to give in detail the extent and importance of the service now rendered to the whole people of this and other countries by radio communication. The broadcasting service is the one most familiar to the masses of the people, and is useful to them as a means of enjoyment, of information and of education. The vast importance to the Dominion as a whole of the coast stations established throughout Canada, and the services that they render to shipping over great distances, as set out in the case, need not be enlarged upon. Of scarcely less importance to the people of all sections of the Dominion is the service by radio communication, which scatters everywhere daily the news of the world and the happenings of the various localities, in which people everywhere are interested; and the service which enables people everywhere to carry on expeditiously business affairs.

From what has been said above, and what further appears in the case, it is evident that all these services by radio communication would be rendered of little practical use to anybody if there were not regulation somewhere by which transmitting stations would be prevented from interfering with each other.

By the questions submitted, we are asked to determine whether or not the Dominion Parliament, under the *British North America Act,* is vested with the general power of dealing with the subject.

Section 91 of the *British North America Act* is as follows:

> 91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as

to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

Then follows a list of 29 classes of subjects.

Section 92 reads as follows:—

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

Then follow 10 enumerated classes of subjects, among which are:

13. Property and Civil Rights in the Province.

16. Generally all matters of a merely local or private nature in the province.

Many disputes have arisen as to the respective jurisdiction of the Dominion and the provinces by virtue of these sections, resulting in many appeals to the Privy Council, in which the construction to be put upon them has been authoritatively laid down. Lord Watson, in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1), makes the following statement:—

These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.

Viscount Haldane, in *Toronto Electric Commissioners* v. *Snider* (2), states the result of what has been laid down in previous decisions, as follows:

The Dominion Parliament has, under the initial words of s. 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the provinces by s. 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in s. 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of s. 91.

Radio communication is, of course, not specifically mentioned in either of these sections, unless the word "Telegraphs" in s. 92-10 (*a*) includes it. It is, however, contended, on behalf of the provinces, that it falls within the

(1) [1896] A.C. 348, at 360. (2) [1925] A.C. 396, at 406.

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class of subjects in s. 92 (13), "Property and Civil Rights in the Provinces," or no. 16, "Generally all matters of a merely local or private nature in the Provinces."

It is, of course, conceded on behalf of the provinces that if general jurisdiction is vested in the provinces by virtue of these clauses, that jurisdiction is still subject to any Dominion legislation properly enacted in reference to the classes of subjects specifically assigned to the Dominion Parliament under s. 91 and for the performing of the obligations of Canada or of any province thereof arising under treaties, pursuant to s. 132 of the *British North America Act*.

Dealing firstly with class no. 16, is it possible, having in view the nature and effect of radio communication, as described, to say that, when carried on in a province, it is a matter of a merely local or private nature in the province? When a transmitter sends out into space these electro-magnetic waves, they are projected in all directions for the great distances referred to, and it is not possible for the transmitter to confine them within the bounds of a province. As already pointed out, a transmitter of only fifty-watt power—the power of an ordinary house lamp—will radiate these waves in all directions around it for a distance of 600 miles with sufficient energy at that distance to disturb and interfere with any radio communication passing through that field on the same or nearly the same channel or frequency.

Mr. Lanctôt, in his argument, pointed out that by the Beam system electro-magnetic waves can in a large measure be prevented from radiating in any but a given direction. This is accomplished by fencing the transmitter behind and at each side by certain apparatus, which results in limiting largely radiation of waves in these directions, with a consequent diminution of power and distance in those directions, and, apparently, increased power and distance in the remaining direction. He stated that it was possible that these waves so projected in one direction might travel around the world, and in that way come back to the starting point. If his general argument is sound, then every resident of the province of Quebec, and of every other province, has a right at will to send out waves of this or any other character, on any or all channels or fre-

quencies, without limitation or control, unless the province in which the sender resides sees fit by legislation to establish control. The result, if the practice were resorted to to any considerable extent by the residents of the various provinces, would be, as has been pointed out, to destroy the usefulness of radio communication, not only throughout all the provinces, but far beyond the bounds of the Dominion. This, Mr. Lanctôt argues, is a matter of a merely local or private nature in the province. I am of opinion that it is not a matter of that nature, and that radio communication does not fall within the class of subjects mentioned in this clause 16.

Is it, then, within the class of subjects described in clause 13, "Property and Civil Rights in the Province?" It is difficult to conceive of any legislation having a general effect that would not limit or affect in some way an individual's dominion over his property or over his actions; and if we are to hold that all legislation having this effect deals with property and civil rights in the province, within the meaning of clause 13, then that clause is all-embracing; and notwithstanding the general jurisdiction given to the Dominion Parliament in express terms by s. 91, the practical result would be that, by virtue of this clause 13 of s. 92, the province has general jurisdiction, limited only by the jurisdiction given to the Dominion in reference to the particular classes of subjects enumerated in s. 91.

Counsel for the provinces disclaimed any intention of arguing for any such extended interpretation of clause 13, and conceded that legislation merely affecting property and civil rights in the province would not necessarily be legislation in connection with that class of subjects. The argument is that a transmitting set and a receiving set are both pieces of property, and that the resident of a province has a right to use such property within the province, and that any legislation by the Dominion that presumes to control or limit his right to such user is legislation in respect of property and civil rights in the province. We are not, however, here dealing with a transmitter or a receiver simply as pieces of property, but are dealing with radio communication by means of these instruments; and it is shewn that the effects of that means of communication cannot be confined within the limits of the province.

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REFERENCE *re* REGULATION AND CONTROL OF RADIO COMMUNICATION.

Smith J.

It is clear that the provinces cannot, by legislation under clause 13, effectively deal with radio communication and so control it as to make that class of service available within the province to any degree of efficiency. No one province can prevent the entrance of these electro-magnetic waves from another province, or in any way eliminate the interference coming from outside the province. The subject can only be dealt with effectively by the Dominion Parliament. The various International conferences and treaties that have been entered into, to which Great Britain and Canada are parties, for the regulation and control of radio communication, in order to make it available and useful to people of all these countries, and the negotiations on the subject still in progress, shew that even the Parliament of Canada is unable of itself to exercise the control and regulation necessary to secure to the Canadian people the full benefits of this recently discovered and marvellous means of communication.

A good deal has been said as to the importance, to provincial governments, of radio communication for maintaining easy connection with the large areas within their bounds, sparsely inhabited or uninhabited, but containing natural resources of great value, such as timber, requiring supervision, that is greatly facilitated by radio service. This, however, contributes little to the argument, because the object and effect of Dominion legislation on the subject is not to deprive provincial governments and residents of the provinces of radio service, but to secure it to them in a degree of efficiency otherwise unobtainable, by preventing disturbance from bringing about a condition of chaos that the provincial legislatures themselves have not jurisdiction to prevent.

Legislation by the Dominion Parliament on the subject no doubt affects the use that the resident of a province may make of a piece of property that he owns, namely, a transmitter or a receiver, and may affect what is claimed to be a civil right to use such property within the province, but it is not legislation directly dealing with property and civil rights in the province. It is legislation, in my opinion, dealing with a subject not included in the classes of subjects expressly mentioned in s. 91 or s. 92, which

therefore falls within the general jurisdiction assigned to the Dominion Parliament by s. 91.

In view of what has just been stated, it becomes unnecessary to discuss the jurisdiction that may be conferred on the Dominion Parliament in reference to radio communication by s. 92-10 (*a*). It has been held that the word "Telegraphs" in that subsection includes telephones, though telephones were not invented until several years after the passage of the *British North America Act*. *Attorney-General* v. *Edison Telephone Company* (1). If this case is authority for holding that radio communications are telegrams, then the jurisdiction over that subject vested in the Dominion Parliament by virtue of this clause (*a*) may amount, practically, to general, or almost general, jurisdiction, because radio communication connecting a province with any other or others of the provinces, or extending beyond the limits of the province, could not be carried on with any degree of efficiency without controlling the disturbance that would otherwise arise from radio communication within the various provinces.

I am of opinion that question no. 1 should be answered in the affirmative.

It therefore becomes unnecessary to answer question no. 2.

The official judgment of the court is as follows:

ANGLIN C.J.C.—Q. 1. In view of the present state of radio science as submitted, Yes.

Q. 2. No answer.

NEWCOMBE J.—Q. 1 should be answered in the affirmative.

Q. 2. No answer.

RINFRET J.—Q. 1. Construing it as meaning jurisdiction in every respect, the answer is in the negative.

Q. 2. The answer should be ascertained from the reasons certified by the learned judge.

LAMONT J.—Q. 1. Not exclusive jurisdiction.

Q. 2. The jurisdiction of Parliament is limited, as set out in the learned judge's reasons.

(1) (1880) L.R. 6 Q.B.D. 244.

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REFERENCE *re* REGULATION AND CONTROL OF RADIO COMMUNICATION.

SMITH J.—Q. 1. Should be answered in the affirmative. Q. 2. No answer.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Ontario: *E. Bayly.*

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

Solicitor for the Attorney-General of Manitoba: *W. J. Major.*

Solicitor for the Attorney-General of New Brunswick: *John B. M. Baxter.*

Solicitor for the Attorney-General of Saskatchewan: *M. A. MacPherson.*

Solicitor for the Canadian Radio League: *Brooke Claxton.*

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* April 28
* May 18

ART. J. SMITH..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

JACK B. BLACKMAN..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Criminal law—Habeas corpus—Common law offences—Section 57 of the Supreme Court Act—Construction—Jurisdiction of the Supreme Court of Canada.

The jurisdiction of the Supreme Court of Canada in respect of *habeas corpus* extends only to cases of commitment following upon charges of offences which are criminal by virtue of statutes enacted by the Parliament of Canada; it does not extend to cases of commitment for offences at common law or under statutes enacted prior to Confederation which are still in force, even if these last offences have also been declared to be criminal by a federal statute. *In re Charles Dean* (48 Can. S.C.R. 235) approved, Lamont J. dissenting.

APPEAL from the judgment of Newcombe J., in Chambers, dismissing the applications of the two appellants for writs of *habeas corpus.*

PRESENT:—Anglin C.J.C., and Rinfret, Lamont, Smith and Cannon JJ.

The appellants, in a trial before a magistrate on a charge of attempted theft, were convicted and sentenced to three years' imprisonment. They appealed to the Court of Appeal upon the ground *inter alia* "that the said sentence (was) excessive". The Court of Appeal, by a majority judgment (1), ordered that the sentence "be reduced * * * to the term of two years and six months* * * *." The appellants then made an application before Newcombe J. in Chambers for the issue of a writ of *habeas corpus* on the ground that the term of imprisonment was in excess of the maximum punishment prescribed by law for the offence.

The judgment of Newcombe J. was as follows:

These two applications coming before me this morning, when it was explained by the prisoners' counsel that each of the prisoners had appealed from his conviction, under the provisions of the Criminal Code, to the Court of Appeal for British Columbia, and that the Court had dismissed these appeals, subject to a reduction of the term by six months in each case,— I reject both applications, upon the view that a judge in British Columbia would have been bound by the law of the case, as interpreted by the provincial Court of Appeal; and that, as my jurisdiction under the Supreme Court Act is concurrent with that of a single judge in British Columbia, I am equally bound, and cannot in this proceeding review the conclusion of the Court of Appeal.

H. R. Bray for the appellants.

C. M. O'Brian K.C., for the respondent.

ANGLIN C.J.C.—I fully concur in the judgment of Mr. Justice Rinfret, who holds this court has no jurisdiction because the offences charged exist under the common law independently of the code.

However, had it been competent for us to deal with that aspect of these cases, I would have been disposed to think Mr. Justice Newcombe right, in deferring, as he did, to the Court of Appeal of British Columbia as to the right of the magistrate to impose two years in addition to the six months. I doubt if it would have been competent for any judge in British Columbia to have ignored the judgment of the Court of Appeal dealing with the matter; and, for that reason, I am inclined to think my brother Newcombe right in considering that he was bound thereby.

(1) [1931] 2 W.W.R. 111.

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The judgment of Rinfret, Smith and Cannon JJ. was delivered by

RINFRET J.—The petitioner was arraigned before George Jay, Police Magistrate in and for the district of Victoria, on the 24th day of November, 1930, on the charge that he, at the city of Victoria, in the province of British Columbia, between, on or about the 8th day of November and the 23rd day of November, 1930, both dates inclusive, did unlawfully attempt to steal the sum of $8,765.33, the moneys of Reginald Pierce, contrary to the Criminal Code.

The petitioner consented to be tried before the Police Magistrate on the said charge, pursuant to the provisions contained in Part XVI of the Criminal Code dealing with the summary trial of indictable offences. After hearing evidence and argument, the Police Magistrate found that the petitioner was guilty, that he "must be convicted on this charge", and sentenced him to three years' imprisonment, as appears by a true copy of the warrant of commitment attached to the application.

The petitioner appealed to the Court of Appeal of British Columbia upon several grounds, the most important of which was "that the said sentence (was) excessive". The Court of Appeal, by a majority judgment, (1) ordered that the sentence

be reduced from three years' imprisonment, as set out in the conviction by the Magistrate, to the term of two years and six months * * * and as and from the 4th day of December, 1930; and that the appellant be imprisoned for such term.

Whereupon the petitioner made this application for the issue of a writ of *Habeas Corpus ad Subjiciendum* on the ground that the term of imprisonment was in excess of the maximum punishment prescribed by law for the offence, and that the jurisdiction of the magistrate in respect thereof was limited to the imposition of a sentence for a term not exceeding six months. Mr. Justice Newcombe, following the view already expressed by Sedgewick, J., in *In re Patrick White* (2) and by Girouard, J., in *In re Chas. Seeley* (3), refused to interfere with the decision of the provincial court of appeal. The petitioner now appeals to the court from the order made by Mr. Justice Newcombe in chambers.

(1) [1931] 2 W.W.R. 111 (2) [1901] Can. 31 S.C.R. 383
(3) [1908] Can. 41 S.C.R. 5.

At the hearing before the court, counsel for the Crown, *in limine,* raised the objection that the Supreme Court of Canada, or any of the judges of the court, was without jurisdiction to entertain the present application because, as he contended, the commitment was not "in a criminal case under any Act of Parliament of Canada", as required by section 57 of the *Supreme Court Act.*

In *In re J. H. Roberts* (1), the present Chief Justice of this Court pointed to the fact that

> both in its constitution and in its jurisdiction, the Supreme Court is a purely statutory court * * * subject to certain qualifications and restrictions specified in * * * the *Supreme Court Act;*

that, in *habeas corpus* matters the jurisdiction of a judge of the court is limited to commitments in criminal cases under an Act of Parliament of Canada and that, except for that purpose,

> a judge of this court possesses none of the original powers and is subject to none of the duties in regard to *Habeas Corpus* of the ordinary courts of common law, whether arising under the common law itself, or conferred by Imperial or Provincial statutes.

That view of section 57 of the Act was approved by the full court in *Doherty* v. *Hawthorne* (2), where the decision of Mr. Justice Mignault, based on the judgment in *In re Roberts* (1), was unanimously confirmed.

The appellant was convicted of the offence of attempt to steal. Stealing or theft was a common law offence. The Criminal Code defines that offence, but it did not create it. An attempt to steal was also a common law offence. (*Regina* v. *McPherson* (3).) Every attempt to commit a felony or a misdemeanour was a misdemeanour at common law, whether the crime attempted was one created by statute or at common law. Archbold's *Criminal Pleadings,* 28th ed., p. 3 And, now, the distinction between felony and misdemeanour has been abolished (Criminal Code, s. 14).

In the present case, the magistrate has, in the warrant of commitment, described the offence, of which the prisoner was found guilty, as "contrary to the Criminal Code", presumably intending thereby to indicate, in view of section 15, that the offence was one "liable to be prosecuted and punished under" the code. Whether or not such was the

(1) [1923] S.C.R. 152. (2) [1928] S.C.R. 559
(3) [1857] 7 Cox's Cr. Law Cases, 281.

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intention, it does not affect the fact that theft and attempt to steal are not criminal offences by virtue of the Criminal Code. They were criminal offences at common law; and, by force of the Ordinance introducing the Criminal Law of England into British Columbia, they were criminal offences in that colony prior to Confederation and prior to its union with Canada. (See sec. 11 of the Criminal Code).

That the jurisdiction of the judges of the Supreme Court of Canada in respect of *habeas corpus* extends only to offences which are criminal by virtue of statutes of the Parliament of Canada and not to offences which were criminal at common law is, we think, the true effect of section 57 of the *Supreme Court Act.* (See *In re Pierre Poitvin* (1), and *In re Robert Evan Sproule* (2), in each of which cases the commitment was for murder). In the *Sproule* case (2), we draw particular attention to the reasons at pages 184, 203 and 240.

In *In re Charles Dean* (3), Mr. Justice Duff, having to deal with an application for *habeas corpus* in a case of house-breaking, came to the conclusion that he had no jurisdiction; and, speaking of section 57, then section 62, he said:

> The language indicates an intention on the part of Parliament to confer only a strictly limited jurisdiction. Anything like frequent interposition in the administration of the criminal law in the provinces by the judges of the Supreme Court of Canada, through the instrumentality of the writ of *habeas corpus,* would obviously lead to the most undesirable results; and, before exercising the authority in a given case, I think it is my duty to scrutinize most carefully the terms in which that authority is given to ascertain whether or not the case is clearly one of those in which it was intended to be exercised.
>
> The jurisdiction extends only, I think, to those cases in which the "commitment" has followed upon a charge of a criminal offence which is a criminal offence by virtue of some statutory enactment of the Parliament of Canada; it does not, in my opinion, extend to cases in which the "commitment" is for an offence which was an offence at common law or under a statute which was passed prior to Confederation and is still in force.

The opinion thus enunciated by Mr. Justice Duff sitting in chambers may now be stated as being the opinion of the court. In our view, his judgment is a correct expression of the law, and we approve of it. As a result, in the present case, the objection by counsel for the Crown to the

(1) [1881] Cassels' Digest, 327. (2) [1886] 12 Can. S.C.R. 140
(3) [1913] 48 Can. S.C.R. 235.

jurisdiction of any judge of this court is well taken; the application of the petitioner cannot be entertained, and the appeal must be dismissed.

This judgment likewise disposes of the appeal on identical grounds from a similar order of Mr. Justice Newcombe in the case of Blackman.

LAMONT J. (dissenting).—In this case I find myself unable to reach the conclusion arrived at by the other members of the court. The question involved in the appeal is the right of a convicted person on an application for *habeas corpus*.

On the 4th day of December, 1930, the accused in each of the above cases was convicted by George Jay, Police Magistrate in and for the city of Victoria, B.C., for the offence stated in the Blackman warrant of commitment as follows:

> For that he, the said Jack B. Blackman, between, on or about the 8th day of November, 1930, and the 23rd day of November, 1930, both days inclusive, at the city of Victoria aforesaid, did unlawfully attempt to steal the sum of $8,765.33, the moneys of Reginald Pierce, contrary to the Criminal Code.

The accused, in each case, was sentenced to three years' imprisonment.

Contending that the police magistrate had no jurisdiction in a summary trial with the accused's consent, under part 16 of the Criminal Code, to impose, for the offence charged, a sentence of more than six months' imprisonment, the accused appealed to the Court of Appeal of British Columbia. That court reduced the sentence to imprisonment for two years and six months, holding that the police magistrate had jurisdiction to award that sentence.

Being still of opinion that the sentence imposed was in excess of the maximum punishment prescribed by law for the offence on summary trial, the accused in each case made an application to Mr. Justice Newcombe of this court for an order that a writ of *habeas corpus ad subjiciendum* do issue.

The application was refused on the following ground:

> I reject both applications, upon the view that a judge in British Columbia would have been bound by the law of the case, as interpreted by the provincial Court of Appeal; and that, as my jurisdiction under the *Supreme Court Act* is concurrent with that of a single judge in British Columbia, I am equally bound, and cannot in this proceeding review the conclusion of the Court of Appeal.

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From the refusal of the application the accused appeal to this court.

The jurisdiction of a judge of this court on an application for *habeas corpus* is set out in section 57 of the *Supreme Court Act,* as follows:

57. Every judge of the court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum,* for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

2. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the court.

Two questions are before us in this appeal:

(1) Is a judge of this court who has only concurrent jurisdiction with the courts or judges of the several provinces bound by the views of a provincial court of appeal as to the jurisdiction of a magistrate to impose the sentence which he in fact imposed?

(2) Where the offence charged is an offence both under the Criminal Code and at common law, but is expressly laid and the commitment made under the Criminal Code, is the commitment made thereunder a commitment in a criminal case under an Act of the Parliament of Canada within the meaning of section 57 of the *Supreme Court Act?*

Dealing with the first of these questions I incline to the view that the argument on behalf of the accused is sound. That there is considerable authority for the view adopted by my brother Newcombe I admit. That view was taken by Gwynne J. in *In re Boucher* (1), where that learned judge said :

The decision of the Court of Appeal should be considered conclusive, and should not be interfered with by a single judge of any court sitting in chambers, but the applicant must be left to any recourse he might have against the adjudication of the Court of Appeal for Ontario.

This view was also given effect to by Sedgwick J. in *In re Patrick White* (2), and by Girouard J. in *In re Charles Seely* (3). These views, however reasonable they may be, seem to me to be inconsistent with the judgment of the House of Lords in *Cox* v. *Hakes* (4), where Lord Halsbury, at page 514, said :

My Lords, probably no more important or serious question has ever come before your Lordships' House. For a period extending as far back

(1) [1879] Cassels' Dig., 327.
(2) (1901) 31 Can. S.C.R. 383.
(3) (1908) 41 Can. S.C.R. 5.
(4) (1890) 15 App. Cas. 506.

as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might—see *Ex parte Partington* (1), make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question.

In the same case Lord Herschell at page 527, said:—

> It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty.

Again in *Eshugbayi Eleko* v. *Government of Nigeria* (2), the Privy Council, at page 442, said:—

> If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule and every judge must hear the application on the merits.

The writ of *habeas corpus ad subjiciendum* is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty. 10 Halsbury, 39.

The law of England has always been very jealous of any infringement of personal liberty and has been most assiduous in its preservation. In view of the fact that the great object of the writ is to give the person restrained of his liberty an immediate hearing so that the legality of his contention may be inquired into and determined, and in view of the statements contained in the judgments above quoted, I am led to the conclusion that a judge of this court, on an application for a writ of *habeas corpus,* to inquire into the validity of a commitment by which a person is detained in custody, has cast upon him the duty of determining for himself whether such detention is in accordance with the law. In giving effect to his own view as to the validity of the detention I am unable to see how the judge

(1) (1845) 13 M. & W. 679 at 684. (2) [1928] 3 W.W.R. 437.

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can be said to be reviewing the conclusion of a provincial court of appeal. He is merely exercising the primary jurisdiction vested in him. This I think is clear from the language of Lord Bramwell in the *Cox* case (1), where, at page 523, his Lordship said:—

> I cannot agree that going first to a judge of one court, and then, on being refused by the judge, going to a court, and, on being refused by one court, going to another, was or is an appeal. The court applied to after refusal by a judge or other court was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction.

The concurrent jurisdiction exercised by a judge of this court is jurisdiction to issue the writ for the purpose of inquiring into the validity of the commitment. That such jurisdiction does not oblige him to accept the view of the Court of Appeal in any province is, I think, clear when we consider the position he would be in if the Court of Appeal in some other province had interpreted the sections of the Criminal Code in question in this appeal as meaning something different from the meaning placed upon them by the Court of Appeal of British Columbia, and an application were made by the person convicted in each province for a writ of *habeas corpus*. Could a judge of this court say to the petitioner from one province that the relevant sections of the Code mean one thing in his province, and to the other that the same sections mean, in his province, something entirely different? In my opinion, he could not. It is obvious that the sections of the Code must be construed the same way for all provinces by a judge of this court. This consideration, in my opinion, makes it impossible to hold that he is bound by the construction placed upon the particular sections by any provincial court of appeal.

So far as this particular case is concerned the point is not of vital importance because the accused have taken advantage of section 57 (2), above quoted, and have appealed to this court, and no one suggests that this court is bound by the view of the Court of Appeal. Our duty is to state what, in our opinion, is the true interpretation of the sections.

Counsel for the Crown, however, has raised a preliminary objection to our jurisdiction to pass upon the merits of the

(1) (1890) 15 App. Cas. 506.

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appeal. He puts forward the contention that the appellants were not "committed" in a criminal case under any Act of the Parliament of Canada. His argument is that the offence of attempting to steal was an offence at common law in British Columbia prior to the enactment of the Criminal Code and that the jurisdiction of a judge of this court, under section 57 of the *Supreme Court Act,* is limited to cases in which the offence charged was not an offence in the province at common law or under a pre-confederation statute but *became a criminal offence solely by virtue of the provisions of an Act of the Parliament of Canada.* In support of his contention he cited the following cases: *In re Sproule* (1); *In re Roberts* (2); *In re Dean* (3); and *Doherty* v. *Hawthorne* (4).

With reference to these authorities, only one, the *Dean* case (1), in my opinion, is in point, although *dicta* may be found in the others which support the argument.

The case of *In re Sproule* (1) was tried in 1886, before the enactment of the Criminal Code which came into force in 1892. The charge was murder. At the date of the conviction there was no Dominion statute making murder a crime. It was a crime at common law and the common law had been introduced into the province of British Columbia, but the only existing Dominion statute dealing with offences against the person (32 and 33 Vict. c. 20), dealt merely with the punishment and not with the offence. As there was no Act of the Parliament of Canada at that time which made murder a criminal offence there was no jurisdiction in a judge of this court to entertain an application for a writ of *habeas corpus,* as the court held.

In the case of *In re Roberts* (2) the appellant was in custody at Quebec under the authority of a special Act of the legislature for an alleged offence against the privileges, honour and dignity of the provincial legislature of Quebec. It was an offence under a provincial law and, as the present Chief Justice of this court pointed out on an application to him for a writ of *habeas corpus,* there was

> no ground whatever for suggesting that it was a crime under any Act of the Parliament of Canada.

In *Doherty* v. *Hawthorne* (4), the petitioner was confined in the common gaol in the county of York, N.B.,

(1) (1886) 12 Can. S.C.R. 140.
(2) [1923] Can. S.C.R. 152.
(3) (1913) 48 Can S.C.R. 235.
(4) [1928] Can. S.C.R. 559.

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under a warrant of commitment following his conviction for selling intoxicating liquor contrary to section 56 of the *Intoxicating Liquor Act*—a provincial statute. He made an application for a writ of *habeas corpus* to Mr. Justice Mignault of this court, in chambers. That learned judge dismissed the application on the gound that the commitment was made under a provincial statute and not under an Act of the Parliament of Canada and he had, therefore, no jurisdiction. An appeal was taken to this court which affirmed the dismissal of the application for the reasons given by Mr. Justice Mignault.

None of these cases, in my opinion, are any authority for the contention made here by counsel for the Crown, for in none of them was the offence, for which the petitioner was committed, a criminal offence under a Dominion statute at the date of the conviction.

The case of *In re Dean* (1), is, however, squarely in point. In that case the petitioner had been tried and convicted of house breaking and committed to gaol. He made an application to my brother Duff in chambers for a writ of *habeas corpus ad subjiciendum*. My learned brother dismissed the application on the ground that as a judge of this court he had no jurisdiction to entertain the application. He held that the jurisdiction given to a judge of the court by section 57 (then s. 62) of the *Supreme Court Act* was limited to those cases in which the "commitment" has followed upon a charge of a criminal offence which is a criminal offence by virtue of some statute of the Parliament of Canada and did not extend to cases in which the

"commitment" is for an offence which was an offence at common law or under a statute which was passed prior to Confederation and is still in force.

With great deference I find myself unable to so construe the language of section 57. To give a judge of this court jurisdiction there must be a "commitment" and that commitment must be made in a criminal case under an Act of the Parliament of Canada. That is the language of the section. In this case the appellants were committed. Their commitments followed on a charge of attempting to steal. Attempting to commit theft is an indictable offence

(1) (1913) 48 Can. S.C.R. 235.

under the Criminal Code (ss. 386 and 773) for which an accused person with his consent may be tried summarily. It is also an offence at common law. Section 15 of the Criminal Code provides:

> 15. Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence.

This section makes it clear that the appellants might have been prosecuted and punished either at common law or under the Code. Both the charge and the commitment, however, shew that they were prosecuted and convicted for the offence of unlawfully attempting to steal "contrary to the Criminal Code." As the Criminal Code is a Dominion statute I am of opinion that the appellants were committed "in a criminal case under an Act of the Parliament of Canada." The fact that they might have been tried and punished for the offence at common law is, to my mind, immaterial, for they were not so tried and punished. The appellants, therefore, are entitled to have the merits of their appeal determined.

In view of the conclusion reached by the other members of the court that we have no jurisdiction to hear this appeal on the merits, it is unnecessary that I should consider the merits at greater length than to say that I find myself in accord with the views expressed by Mr. Justice Martin in his dissenting judgment in the court below, and that the sentence should be reduced to imprisonment for six months.

Appeals dismissed.

Solicitor for the appellants: *H. R. Bray.*

Solicitor for the respondent: *C. M. O'Brian.*

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* Feb. 24
* May 26

DAME LILLIAN MAHON (DEFENDANT) APPELLANT;

AND

LA CORPORATION DE NOTRE DAME DU CHEMIN (PLAINTIFF)..... RESPONDENT.

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

Sale—Agreement of—Condition as to clear titles—Drains and water supply system existing on the property—Servitude—Action for annulment.

The respondent corporation entered into an agreement with the appellant by which the latter agreed to transfer to the respondent all her rights to part of a certain property, under a promise of sale from the owner of the land, in consideration of a stipulated purchase price which the respondent agreed to pay on condition that the titles to the property should be found to be perfect, the condition of the respondent's acceptance being thus expressed: "à condition que les titres des immeubles susdits soient parfaits et libres de toute charge ou hypothèque, * * * le tout à la satisfaction de la corporation susdite." Subsequently the representatives of the respondent corporation became aware of the existence on the property of drains and a water supply system which were absolutely necessary for the part of the property not sold to the respondent. The owner of the property then declared that he would not sign any deed of sale without a clause being inserted that the drains and water supply system would remain on the land. The respondent thereupon refused to carry out the agreement and sued the appellant asking for its annulment and for damages.

Held that the "charges" complained of by the respondent corporation as existing on the property were within the scope of the condition expressed in the agreement and that the respondent was entitled to a judgment annulling the agreement.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Fortier J., and maintaining the respondent's action.

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

Lucien Cannon, K.C., for the appellant.

Antonio Langlois, K.C., for the respondent.

The judgments of Duff, Newcombe, Lamont and Galipault JJ. were delivered by

* PRESENT:—Duff, Newcombe, Rinfret, Lamont JJ. and Galipault J. ad hoc.

DUFF J.—The *acte de vente* of the 28th of June, 1929, is in these words:

L'an mil neuf cent vingt-neuf, le vingt-sixième jour de juin. Devant Laurent Lesage, notaire public pour la province de Québec, résidant et pratiquant à Québec, comparaît: Madame Lillian Mahon, de la cité de Québec, épouse de monsieur Louis Couture, du même lieu, de la "Eastern Canada Stevedore Co." de son dit mari ici présent dûment autorisée;

Laquelle fait, au préalable, l'exposé suivant:

1. La compagnie a obtenu des Révérendes Sœurs Dominicaines de l'Enfant-Jésus, Chemin St-Louis, Québec, une promesse de vente du lot numéro deux cent dix-huit-A (218 A) du cadastre de la paroisse de St-Colomb de Sillery, ainsi que d'une lisière de cinquante pieds de profondeur sur toute la largeur du dit lot deux cent dix-huit-A du côté nord-ouest, à prendre sur le lot deux cent dix-huit (218) de même cadastre;

2. La comparante en est venue à une entente avec la Corporation de Notre-Dame du Chemin, pour céder tous ses droits d'achat dans ces immeubles;

Ceci exposé, la comparante promet céder à la Corporation de Notre-Dame du Chemin, tous les droits résultant en sa faveur de ses conventions avec les Sœurs Dominicaines sur les immeubles susdits;

Elle s'engage de plus à intervenir au besoin dans un acte de vente des dits lots qui sera passé directement entre les Sœurs Dominicaines et la Corporation de Notre-Dame du Chemin, pour céder tous ses droits et donner suite aux présentes;

En considération de cette cession, il lui sera payé par la Corporation de Notre-Dame du Chemin, une somme de vingt mille piastres ($20,000), dont huit mille à la signature du contrat avec les Sœurs Dominicaines, et la balance de douze mille piastres, le quinze septembre prochain (1929);

A ces présentes intervient:—

La Corporation de Notre-Dame du Chemin, corps politique et incorporé par le statut 14 Geo. V chapitre 122, ayant le siège de ses affaires en la cité de Québec, ici représenté par le Révérend Père Arsène Roy, s.j., curé de Notre-Dame du Chemin, dûment autorisé aux fins des présentes;

Laquelle après avoir pris connaissance des présentes, les accepte et s'engage à les exécuter selon leur forme et teneur, à condition que les titres des immeubles susdits soient parfaits et libres de toute charge ou hypothèque, sauf les hypothèques Marois et Bédard, le tout à la satisfaction de la corporation susdite.

Fait à Québec sous le numéro trois cent trente-six des minutes du notaire soussigné. En foi de quoi, les parties ont signé avec le notaire et en sa présence, lecture faite.

(Signé) LILLIAN MAHON COUTURE,
LOUIS COUTURE,
P. ARSÈNE ROY s.j., curé N.-D. du Chemin, Prés. Corporation N-D. du Chemin,
LAURENT LESAGE, N.P.

Vraie copie de la minute demeurée en mon étude.

LAURENT LESAGE.

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Duff J.

The condition of the acceptance of the respondents, it will be observed, is thus expressed:

à condition que les titres des immeubles susdits soient parfaits et libres de toute charge ou hypothèque, sauf les hypothèques Marois et Bédard, le tout à la satisfaction de la Corporation susdite.

The " charges " complained of appear to be within the scope of this condition. Having fully considered the judgment of Allard J. as well as the powerful argument addressed to us by counsel I cannot otherwise construe these words. Nor do I find anything in the conduct of the parties which, in point of law, can avail to preclude the respondents from taking advantage of this condition.

The appeal must be dismissed with costs.

The judgment of Rinfret J., with whom Galipault J. also concurred, is the following:

RINFRET J.—Je concours dans le jugement de mon collègue, monsieur le juge Duff.

Le contrat qui a donné lieu aux deux appels qui nous ont été soumis est reproduit dans son jugement. Il est exact, comme le soumet l'appelante, qu'elle s'engage seulement à

céder * * * tous les droits résultant en sa faveur de ses conventions avec les Sœurs Dominicaine, (et) à intervenir, au besoin, dans un acte de vente des dits lots qui sera passé directement entre les Soeurs Dominicaines et la Corporation de Notre-Dame du Chemin pour céder tous ces droits et donner suite aux présentes;

mais l'intimée n'a accepté cette convention et ne s'est engagée à l'exécuter que si les titres des immeubles auxquels l'appelante devait céder ses droits étaient

parfaits et libres de toutes charges et hypothèques, sauf les hypothèques Marois et Bédard, le tout à la satisfaction de la corporation susdite

(i.e. l'intimée). C'était là la condition de l'acceptation. Si les titres n'étaient pas " parfaits et libres de toutes charges à la satisfaction de " l'intimée, il n'y avait pas d'acceptation, et il n'y avait pas de contrat.

La solution du litige ne dépend donc pas, comme l'a prétendu l'appelante, uniquement de la question de savoir si elle serait en état de céder ses droits au moment où l'acte de vente interviendrait entre les Soeurs Dominicaines et la corporation intimée. L'existence de titres parfaits et libres de toutes charges était une condition essentielle de la formation même du contrat entre l'appelante et l'intimée. Il n'y a pas à se demander qui de l'appelante ou des Soeurs Dominicaines devait fournir des titres parfaits. Il suffit de constater que, au moment requis, les titres n'étaient ni par-

faits, ni libres de toutes charges. Comme conséquence, la condition essentielle de l'acceptation manquait, et l'intimée n'était pas engagée à exécuter la convention envers l'appelante.

D'ailleurs, c'est bien ainsi que l'appelante a compris la situation, puisque, lorsque l'intimée l'informa que la communauté des Soeurs Dominicaines avait un tuyau d'aqueduc et un tuyau d'égout qui traversaient la propriété, qu'elle entendait les maintenir et qu'elle ne voulait pas consentir de titre de vente sans

se réserver le droit de maintenir ces tuyaux et de vaquer sur la propriété pour les réparer ou renouveler au besoin,

l'appelante fit répondre par l'intermédiaire de son notaire qu'elle verrait

à ce que les titres de ces propriétés soient rendus conformes à (l') engagement du 26 juin 1929, devant le notaire Laurent Lesage,

c'est-à-dire au contrat dont il s'agit. Il n'apparait nulle part au dossier que l'appelante ait donné suite à cette réponse.

Il est douteux que l'appelante eût droit à un délai pour rendre les titres parfaits. L'intimée pouvait s'autoriser du fait que les titres n'étaient pas libres de toutes charges pour considérer qu'elle n'était pas liée envers l'appelante et pour traiter la convention avec cette dernière comme n'ayant jamais été complétée, vu que la condition de l'acceptation n'était pas remplie.

Mais, comme on peut le constater par les plaidoiries écrites, l'appelante admet que, le, ou vers le, 8 juillet 1929, elle a notifié l'intimée qu'elle " n'entendait pas résilier le dit contrat ". Cela justifiait la demande en annulation du contrat (*Desjardins* v. *Corbeil*) (1).

L'appelante ajoute que la Cour Supérieure et la Cour du Banc du Roi ont fait erreur " quant à la nature et à l'étendue des réserves faites par l'intimée ".

Cette dernière acquérait de l'appelante les droits qu'elle détenait sur le lot 218A et sur la tranche additionnelle de cinquante pieds sur toute la lageur du lot 218. Elle acquérait le résidu du lot 218 directement des Soeurs Dominicaines. Or, l'appelante dit que, au moment du contrat du 26 juin 1929, les trois sections de propriété qui devaient faire l'objet de l'acquisition appartenaient toutes les trois aux Soeurs Dominicaines et qu'il ne pouvait donc

(1) [1930] Q.R. 49, K.B. 162

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Rinfret J.

exister alors aucune servitude, puisque nulle servitude ne peut être établie sur des immeubles appartenant à un seul propriétaire.

Cet argument de l'appelante trouve sa réponse dans Pothier (Bugnet, 3e éd, vol. 1, p. 321, sous l'article 228):

> Lorsque deux héritages appartiennent au même maître, le service que l'un tire de l'autre, comme lorsqu'une maison a une vue ou un égoût sur l'autre, n'est pas servitude, *quis res sua nemini servit;* L. 26, ff *de Servit, pr. rust.* C'est destination du père de famille. Si par la suite ces maisons viennent à appartenir à différents maîtres, soit par l'aliénation que le propriétaire fera de l'une de ces maisons, ou par le partage qui se fera entre ses héritiers, le service que l'une des maisons tire de l'autre, qui était *destination de père de famille,* lorsqu'elles appartenaient à un même maître, devient un droit de servitude que le propriétaire de cette maison a sur la maison voisine de qui la sienne tire ce service, sans qu'il soit besoin que par l'aliénation qui a été faite de l'une de ces deux maisons, ou par le partage, cette servitude ait été expressément constituée.
>
> La raison est que la maison qui a été aliénée est censée l'avoir été en l'état qu'elle se trouvait et pareillement que lorsqu'elles ont été partagées, elles sont censées l'avoir été telles et en l'état qu'elles se trouvaient; et par conséquent l'une comme ayant la vue, l'égout, etc. sur l'autre, et l'autre comme souffrant cette vue, cet égout, etc. ce qui suffit pour établir la servitude. C'est ce que signifie notre coutume par ces termes: destination de père de famille vaut titre.

Conformément au principe posé par Pothier, il y avait donc, en l'espèce, une destination de père de famille, qui pouvait servir de titre à une servitude d'aqueduc et d'égout, et qui devenait un droit de servitude dès que les deux parties de la propriété cessaient d'appartenir au même propriétaire. C'est ce droit de servitude que les Soeurs Dominicaines déclaraient se réserver. Il restait à en spécifier " la nature, l'étendue et la situation ", suivant l'article 551 du code civil, et c'est précisément ce qu'elles entendaient établir dans la réserve qu'elles voulaient faire.

Je suis donc d'accord avec mon collègue, monsieur le Juge Duff, pour dire que " the charge complained of appears to be within the scope of the condition " et pour conclure avec lui au rejet de l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Cannon & Cannon.*

Solicitor for the respondent: *Antonio Langlais.*

THE STANDARD TRUSTS COMPANY (PLAINTIFF) ..... APPELLANT;

1931

*Feb. 5
*June 12

AND

PETER LA VALLEY (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Bills of exchange—Agreement to pay sum of money—Payment by rendering services—Promissory note—Mortgage—Transfer—Applicability of sections 101, 102 and 103 of the Land Titles Act, Alta. S. [1922] c. 133.

If under the terms of a written promise to pay a sum of money the obligation may be discharged in part or in full by "allowing credit (to the debtor) for any land sales commissions", such promise is not an unconditional one to pay a sum certain; and, therefore, the document is not a promissory note.

Sections 101, 102 and 103 of the Alberta *Land Titles Act*, relative to transfer of mortgages, have no application where the mortgagor's interest in the land has disappeared before transfer and there remains nothing but the personal responsibility of the mortgagor arising under covenant or otherwise.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Tweedie J. and dismissing the appellant's action with costs.

The appellant's claim is against the respondent as the maker of a certain promissory note dated the 1st day of December, 1925, to the order of the Standard Trusts Company of Winnipeg in the sum of $1,641.70 payable on or before the 1st day of December, 1928, together with interest thereon at the rate of 7% per annum. The defence *inter alia* denies the making of the promissory note. On the argument before the Appellate Division, for the first time, objection was taken that the note sued on was not a promissory note and that, therefore, the appellant could not succeed on its statement of claim. The document sued upon is:

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1930) 25 Alta. L.R. 1; [1930] 3 W.W.R. 305.

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"A5019

$1641.70/100 December 1st 1925 NO....

On or before Dec. 1st 1928 after date, for value received, I promise to pay to the order of

THE STANDARD TRUSTS COMPANY, at Winnipeg, Sixteen hundred and forty-one.....70/100 Dollars. Together with interest thereon at 7 per cent. per Annum from Date Hereof

Until Paid. With the Privilege of allowing credit for any land sales commission.

Witness

"J. F. Rose" "Peter LaValley"

The material facts of the case are stated by Harvey, C.J.A., as follows:—

In 1909 the defendant bought some land from the O. W. Kerr Co., an American company. Later payment of the unpaid balance of purchase price was arranged by the plaintiff advancing $6,600 on a first mortgage from the defendant and the O. W. Kerr Company taking a second mortgage for the balance. Nothing was ever paid on the second mortgage. Owing to failure of crops the plaintiff's mortgage fell into arrears and foreclosure proceedings were taken resulting in the foreclosure of the second mortgage and the defendant's equity and a vesting order issued to the plaintiffs in December, 1915. The defendant then leased the land and in 1916 he had a valuable crop and in December, 1916, he entered into an agreement with the plaintiff to purchase the land for $8,000. The purchase price was all paid before the end of 1917. After he had paid all the money, but before he had received a transfer, the plaintiff's manager informed him that the plaintiff had purchased the O. W. Kerr Co. second mortgage and asked him for a mortgage on the land to secure the amount due under it. The upshot was that a note for $2,000 was given dated 1st November, 1917, payable on 1st December, 1918, with interest at 7%. The document sued on represents the amount of that $2,000 and interest remaining unsatisfied on December 1, 1925.

H. R. Milner, K.C., for the appellant.

A. M. Sinclair, K.C., for the respondent.

The judgment of the Court was delivered by

DUFF J.—There is no ground upon which the decision of the Appellate Division that the document sued is not a promissory note, can successfully be impugned.

(After discussing the proceedings the learned judge added.)

There will be a new trial. The costs of all appeals as well as of the abortive trial will abide the result of the new trial; and all parties will have full liberty to amend and the

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THE STANDARD TRUSTS COMPANY v. LA VALLEY

Duff J.

right to discovery in respect of the amended pleadings, subject of course to the directions of the Supreme Court of Alberta. It seems convenient to express now our view that sections 101, 102 and 103 of the *Land Titles Act* have no application where the mortgagor's interest in the land has disappeared before transfer, and there remains nothing but the personal responsibility of the mortgagor arising under covenant or otherwise.

Appeal allowed, new trial ordered.

Solicitors for the appellant: *Shepherd, Dunlop & Rice.*
Solicitors for the respondent: *F. M. Rose.*

ALBERT LUND (PLAINTIFF) .....APPELLANT;

AND

HARRINGTON WALKER (DEFENDANT)..RESPONDENT.

1931

*May 22.
*June 12.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Appeal—Right of—Order "made with the consent of parties" (Judicature Act, Ont., R.S.O., 1927, c. 88, s. 23)—Exclusion of evidence at trial—New trial.

In the course of a trial (and after the trial judge had ruled out certain evidence which plaintiff was offering) plaintiff's counsel expressed a wish to have the record withdrawn on plaintiff undertaking to pay costs. In the course of the discussion which followed, defendant's counsel remarked "I cannot consent to anything but the dismissal with costs" (which was all defendant could get if successful in the action), but his attitude throughout was against defendant being a party to any settlement, his insistence being on dismissal with costs as a matter of right. The trial judge endorsed the record: "This action is dismissed with costs," and added, as requested by plaintiff's counsel, "by consent of the plaintiff." Defendant's counsel then asked for and got permission to take out his exhibits. The formal judgment recited: "and the plaintiff by his counsel consenting," but was silent as to consent by defendant.

Held (Anglin C.J.C. and Cannon J. dissenting): The judgment was not an order "made with the consent of parties," within the meaning of s. 23 of the Ontario *Judicature Act*, R.S.O., 1927, c. 88, and plaintiff was not precluded by that section from appealing from the judgment. Judgment of the Appellate Division, Ont., on this point (65 Ont. L.R. 53) sustained.

A judgment by consent within s. 23 is a judgment determining an issue between parties to the litigation with the consent of the parties to the issue so determined. It is only when the "parties" consent that the right of appeal is taken away. It is not for the court to extend

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

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the scope of the section so as to deprive a litigant of a right to appeal unless he comes within the express language of the Act.

Per Anglin C.J.C. and Cannon J. (dissenting): The judgment was a consent judgment. Defendant's counsel must be taken to have consented to it, having regard to its effect, and to what took place in the discussion at the trial. The authority of counsel to consent may be assumed; it would not have been competent for the Appellate Division (nor for this Court) to pass upon that question; the fact that the judgment of the trial court had been formally completed distinguishes this case from *Shepherd* v. *Robinson,* [1919] 1 K.B. 474, and *Neale* v. *Gordon Lennox,* [1902] A.C. 465, and similar cases; once a final judgment by consent has been formally drawn up, signed, sealed and entered, as here, unless by agreement of the parties, it may be set aside only in a fresh action brought for that purpose; especially must that be so where such an issue as consent or no consent must be decided on controversial evidence. (*Harrison* v. *Rumsey,* 2 Vesey Sr. 488; *Ainsworth* v. *Wilding,* [1896] 1 Ch. 673; *Firm of R.M.K. R.M.* v. *Firm of M.R.M. V.L.,* [1926] A.C. 761, at 771; *Kemp-Welch* v. *Kemp-Welch et al.,* [1912] P. 82; *Kinch* v. *Walcott,* [1929] A.C. 482, cited). The fact that the judgment does not show on its face the explicit consent of the defendant (who got by it all he could get in the action), or the fact that his consent was not formally given, does not prevent its being a consent judgment. (*Hadida* v. *Fordham,* 10 T.L.R. 139; *Holt* v. *Jesse,* 3 Ch. D. 177, and other cases referred to). The statement, as to what constitutes consent, in Daniell's Chancery Practice, 8th Ed., p. 1110, discussed and explained in the light of the cases there cited (*Davis* v. *Chanter,* 2 Phillips, 545; *Aldam* v. *Brown,* [1890] W.N. 116; *Hadida* v. *Fordham, supra*); Annual Practice (1929) at p. 2141, (1930) at p. 2139, (1931) at p. 2139, also referred to and discussed in this connection.

Held further (unanimously) that, on the merits (which were argued, subject to determination of the other question), there should be a new trial, as one of the grounds on which the trial judge ruled out certain evidence was clearly wrong and would have the effect of preventing the plaintiff (who had other witnesses yet to be called) from offering further evidence on matters on which he was entitled to adduce evidence; under all the circumstances, plaintiff should be given an opportunity to place all his evidence before the court. Judgment of the Appellate Division, Ont., on this question (38 Ont. W.N. 122) reversed.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario, which, while holding that the judgment of Logie J. dismissing the action was not an order "made with the consent of parties" within the meaning of s. 23 of the Ontario *Judicature Act,* R.S.O., 1927, c. 88, and therefore that the plaintiff was not precluded by that section from bringing his appeal (1), yet held that, on the merits, the plaintiff's appeal should, as against the present respondent, be dismissed (2).

(1) (1930) 65 Ont. L.R. 53. (2) (1930) 38 Ont. W.N. 122.

In the action, the plaintiff claimed (*inter alia*) a declaration that the defendant Walker (the present respondent) was a trustee for the plaintiff of certain shares of stock in a company, and that the sale and transfer of the said shares made by plaintiff to said defendant was null and void and that the same be cancelled. The issues now in question arose out of certain proceedings at the trial. These are described in the judgments now reported, and are indicated in the above head-note; and the discussion leading up to the pronouncement of the judgment at the trial is quoted in full in the Court below, when dealing with the question of whether or not the judgment at trial was a "consent judgment" (1). The trial judge endorsed the record: "By consent of the plaintiff this action is dismissed with costs." The formal judgment at trial (which is also quoted in the Court below (2)), dismissing the action with costs, contained the recital: "and the plaintiff by his counsel consenting," but was silent as to consent by defendant.

By the judgment of the Supreme Court of Canada, now reported, the plaintiff's appeal was allowed, and a new trial ordered; the costs of the abortive trial to be in the discretion of the judge who will preside at the new trial, and the costs of the appeal to this Court and in the Appellate Division to be costs to the appellant in the cause. Anglin C.J.C. and Cannon J. dissented, on the ground that the judgment at trial was a consent judgment and therefore non-appealable.

W. N. Tilley K.C. for the appellant.

Glyn Osler K.C. for the respondent.

The judgment of the majority of the court (Newcombe, Rinfret and Smith JJ.) was delivered by

SMITH J.—The (defendant) respondent Walker, when holding appellant's 250 shares in the capital stock of Hiram Walker & Sons, Limited (also a defendant in the action) in trust to sell or dispose of them in the same way as he should dispose of his own in a contemplated sale of the

(1) See 65 Ont. L.R. 53, at 61-62. (per Riddell J.A., dissenting on the point there dealt with).

(2) See 65 Ont. L.R. 53, at 60 (per Riddell J.A., dissenting on the point there dealt with).

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business of the company, bought the shares himself. The fiduciary relationship existing between the parties imposed on the respondent the duty of making full disclosure of all facts within his knowledge, unknown to the appellant, affecting the value of the shares.

The appellant was a director of the company residing in England, and the respondent was also a director and the president of the company. The appellant brought this action to have the sale of his 250 shares to respondent set aside on the ground that in his absence and without his knowledge some assets of the company had been concealed and not accounted for, and others transferred to the respondent, his brother and others, at less than their value, and that products of the company had been sold at a low price and resold at a profit, the respondent sharing in these profits; all of which transactions, it is alleged, affected the value of the shares.

At the trial the appellant's counsel called as a witness one Nash, a member of a firm of chartered accountants that had, on behalf of the Dominion Government, investigated the affairs of the company. He declined to give evidence as to the affairs of the company, because the Department of Customs and Excise objected on the ground of public interest to the disclosure of information obtained in this way. After considerable discussion, the learned trial judge gave his final and decisive ruling, as follows: "I refuse it on two grounds: first, that it is against public policy, secondly, that we are not here enquiring into the private affairs of the company, which has been definitely stayed by an order of the Master. Next witness." Counsel for appellant had pointed out that he was offering this evidence in support of the allegation in the pleadings of wrongful dealings with the property and assets of the company not disclosed to him by respondent.

The first ground for the ruling, that is, public policy, affected only the particular witness Nash, but the second ground applies to all witnesses that might be called because the allegations of non-disclosure could only be proved by going into the private affairs of the company. The ruling therefore effectively prevented the appellant from offering further evidence of alleged wrongful dealing with the company property and assets, and was clearly wrong.

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At the conclusion of the argument before us, the Chief Justice intimated that a new trial would be ordered unless it should be determined that the appellant had no right of appeal because the judgment was a consent judgment within the meaning of section 23 of the *Judicature Act*, which point was reserved.

For the reasons stated by Mr. Justice Masten (1), concurred in by the Chief Justice and Orde and Fisher, JJ.A., I am of opinion that it was not a consent judgment within the meaning of section 23, which reads as follows:—

> No order of the High Court Division or of a Judge thereof made with the consent of parties shall be subject to appeal, and no order of the High Court Division or of a Judge thereof as to costs only which by law are left to the discretion of the Court shall be subject to appeal on the ground that the discretion was wrongly exercised, or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the court or judge making the order.

Counsel for the appellant asked for a judgment by consent, but counsel for respondent absolutely refused to be a party to a consent judgment, and protested to the end against such a judgment. He stood out to the last for what he claimed as his client's right, namely, a dismissal of the action, with costs, on the merits. Charges had been made in the pleadings against the defendant, and what Mr. Osler evidently desired was a vindication of his client, not by a consent judgment, but by a dismissal of the action by the Court on the merits.

The learned trial judge endorsed the record as follows: "This action is dismissed with costs." Then the learned judge said to plaintiff's counsel, "If you like, I will add the words 'by consent of the plaintiff'"; and plaintiff's counsel replied, "That is what I ask, my Lord." His Lordship remarked, "Well, there is no harm in that that I see," and added the words "By consent of the plaintiff," to the endorsement. It was clearly a consent by one party only.

A judgment by consent within the meaning of the section is a judgment determining an issue between parties to the litigation with the consent of the parties to the issue so determined. The word "parties" is in the plural, and, as Mr. Justice Masten points out, it is only when the "parties" consent that the right of appeal is taken away. It is not for the court to extend the scope of the section so

(1) (1930) 65 Ont. L.R. 53, at 54-57.

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as to deprive a litigant of the right which he has to appeal unless he comes within the express language of the statute as it stands.

While the above result is arrived at without regard to the affidavits filed, it may be noted that these affidavits were to the effect that the judgment entered was not in fact by consent of the plaintiff.

There must be a new trial, in the terms set out in the reasons of the Chief Justice.

The judgment of Anglin C.J.C. and Cannon J. (dissenting) was delivered by

ANGLIN C.J.C.—The plaintiff appeals from the affirmance by the Second Appellate Divisional Court (Ontario) (1) of the judgment entered at the trial of this action (in so far as it affects the defendant Harrington E. Walker) which dismissed the action with costs "by consent of the plaintiff." In so far as this judgment might operate in favour of the other defendants, Hiram Walker & Sons, Limited and C. W. Isaacs, as to whom the action had been stayed by orders competently made, and who were, therefore, not before the learned trial judge, it was pronounced *per incuriam;* and the necessary correction was made by the Appellate Court, so that the action stands as against these two defendants, and the judgment dismissing it is now confined in its operation to the defendant Harrington E. Walker.

The judgment in favour of Harrington E. Walker was attacked on two grounds,—

First, that it was not a "consent judgment" within the meaning of Section 23 of the Ontario *Judicature Act* (R.S.O., 1927, c. 88) and,

Second, that the consent, on which the order purported to have been made, was given by his counsel contrary to the plaintiff's express instructions.

(1) (1930) 38 Ont. W.N. 122. See also 65 Ont. L.R. 53, overruling the preliminary objection by respondent that the judgment at trial was a consent judgment.

In dealing with the first point, the authority of counsel to consent may be assumed. Indeed, I more than doubt the competency of the Appellate Divisional Court to have passed upon that question—which indeed, it did not do. The fact that the judgment of the trial court had been formally completed distinguishes this case from *Shepherd* v. *Robinson* (1), and *Neale* v. *Gordon Lennox* (2). In the former case, the order had not been drawn up; and, in the latter, before the order was drawn up, steps had been taken to set it aside, as appears from the statement of facts, at p. 467 of the report. In *Neale* v. *Gordon Lennox* (3), Lord Lindley pointed out that, before the order had been drawn up,

> one of the parties interested discovers that it is made without her consent at all, and not only without her consent, but in spite of her express instructions. * * * Unfortunately the plaintiff here wishing to get rid of the order drew it up with the view of getting it set aside, and in form this is an application, not to prevent the drawing up of the order, but to have it set aside; but that is mere form—mere machinery.

As pointed out by the Earl of Halsbury, L.C. (at the foot of p. 469), in effect, in that case, the defendant sought the assistance of the court to enforce the order—

> The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on;

and it was *à-propos* of that fact that Lord Lindley said (p. 473),

> It would be absolutely wrong, to my mind, for the Court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the Court never would have dreamt of making if the Court had known the facts.

In a number of other similar cases, i.e., where the judgment has not actually been completed by signature, sealing and entry, the court has dealt with it, although it appeared to have been pronounced by consent, and has set it aside on the ground that, in reality, it was not a consent judgment.

But, once a final judgment by consent has been formally drawn up, signed, sealed and entered, as here, unless by agreement of the parties, it may be set aside only in a fresh action brought for that purpose; especially must that be so where such an issue as consent or no consent must be

(1) [1919] 1 K.B. 474. (2) [1902] A.C. 465.
(3) [1902] A.C. 465, at 473.

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decided on controversial evidence. (*Harrison* v. *Rumsey* (1); *Ainsworth* v. *Wilding* (2); *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.* (3); *Kemp-Welch* v. *Kemp-Welch et al.* (4); *Kinch* v. *Walcott* (5). Of course, in an action brought for that purpose, a judgment based upon consent, though formally completed, may be set aside on any ground which would suffice to set aside an agreement between the parties in the terms of such judgment, including mistake. (*Wilding* v. *Sanderson* (6); *Hickman* v. *Berens* (7); *Lewis's* v. *Lewis* (8)). Many other authorities might be cited for this proposition.

Proceeding, therefore, on the assumption that counsel had the usual authority to give the consent in question, the other ground of attack must be considered; and I am quite prepared to concede that it was entirely within the jurisdiction of the Appellate Divisional Court to deal with that aspect of the appeal before it, but regret to find myself unable to concur in its conclusion thereupon.

In the first place, the judgment in question gave to the defendant all he could possibly expect in the action,—all he could possibly be entitled to, viz., a dismissal with costs, which he asked for impliedly, if not expressly, in his statement of defence. It is not at all surprising to find his counsel (Mr. Osler), in the course of the brief discussion, which resulted in the entry of the judgment in question, saying:

> Mr. OSLER: I cannot consent to anything but the dismissal with costs.
> Mr. GRANT (who appeared for the plaintiff): Well, I will consent to a dismissal with costs, if we can't get any other terms.

Mr. Osler, it is true, subsequently stated that he did not wish his client to be put in the position of appearing to consent to anything, because his consent might later be used against him as implying a desire, on his part, to be rid, at any cost, of the action and of the charges involved in it rather than have them publicly tried; Mr. Walker's attitude was quite the reverse. But, from a perusal of the short conversation which ensued between counsel and the presiding judge, I am entirely satisfied that he (Mr. Osler) never intended to withdraw from the position he took when

(1) (1752) 2 Vesey Sr., 488.
(2) [1896] 1 Ch. 673.
(3) [1926] A.C. 761, at 771.
(4) [1912] P. 82.
(5) [1929] A.C. 482.
(6) [1897] 2 Ch. 534.
(7) [1895] 2 Ch. 638.
(8) (1890) 45 Ch. D. 281.

he said, "I cannot consent to anything but the dismissal with costs," thus, impliedly, stating to the court, "I am prepared to consent to that order being made," which was immediately followed by the statement of Mr. Grant, above quoted, "Well, I will consent to a dismissal with costs, if we can't get any other terms." Eventually (and this was the only departure from the judgment "dismissing the action with costs" *simpliciter*, to which Mr. Osler had certainly consented—a departure pressed for to the point of insistence by Mr. Grant), the learned judge merely added to his minute of the judgment, at Mr. Grant's specific request, the words, "by consent of the plaintiff," observing at the same time, "Well, there is no harm in that that I see." Whereupon Mr. Osler, apparently acquiescing in that view and accepting the order, said, "My Lord, may we have our exhibits out"—and he took his exhibits out shortly afterwards. If the judgment then pronounced be not a consent judgment binding on the plaintiff, I do not understand what a consent judgment is.

To say it is not a consent judgment because it does not show on its face the explicit consent of the defendant, who got by it all he could possibly ask for in the action, seems to me to ignore the authorities, to the effect that the form of a judgment is not necessarily binding upon the court and may be gone behind for the purpose of ascertaining the true facts, in order to determine whether or not there actually was a "consent judgment," when that question is properly raised before the court. These authorities are, amongst others, *Neale* v. *Gordon Lennox* (1); *Michel* v. *Mutch* (2), and *Darley* (*Trustee of Baines*) v. *Tulley* (3).

If a plaintiff, having (as occurred here) by his counsel, apparently clothed with authority to do so, consented to a judgment dismissing his action with costs (that being the greatest relief the defendant could get, and there being no counterclaim, nor any issue in the action other than one of liability of the defendant to the plaintiff) can, nevertheless, solemnly come into court and be heard to say that he has not consented to the judgment, and that it is not binding on him as a consent judgment, although, on the face of it, it purports to have been made by his consent, the obser-

(1) [1902] A.C. 465. (2) (1886) 54 L.T. Rep. 45.
(3) (1923) 155 L.T. Jo. 128.

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vation of the Vice-Chancellor in *Holt* v. *Jesse* (1) would seem to me to be very much in point, when he said: That is tantamount to giving

> a general licence to parties to come to this Court and deliberately to give their consent, and afterwards at their will and pleasure come and undo what they did inside the Court, because on a future day they find they do not like it.

It does strike me as rather absurd to ask that, in order to make a judgment a consent judgment, assent to its terms by the party in whose favour that judgment is pronounced (which accords to him, as it does, everything he could expect to get in the action) should necessarily be formally given or should appear on the face of the judgment. *Hadida* v. *Fordham* (2), and *Holt* v. *Jesse* (3), I may refer to as two cases, amongst the many I have examined, in which the orders on their face appeared to show consent only by the party adversely affected by them. Thus, in *Hadida* v. *Fordham* (2) which, the reporter says, "illustrates the danger of giving an undertaking in place of allowing a hostile order for an injunction to be made in case of a possible appeal," the only reference to consent in the order was to be found in the fact that "the defendants' counsel submitted to give an undertaking not to use" a certain word objected to by the plaintiff. An appeal from the order was taken by the defendant. The appeal, however, was summarily dismissed, the view expressed by the Court of Appeal being that the order, except so far as costs were concerned (as to which there had been a trial), amounted to a consent order; and there could be no appeal from a consent order.

In *Holt* v. *Jesse* (3), an application was made to the judge who had pronounced it to discharge an order to which a consent had been given by counsel, in the presence of, and with the sanction of his client to its terms, which included the following: "the defendant, by his counsel, submitting to account." In disposing of the motion the Vice-Chancellor said that "under those circumstances, the order was treated as a consent order." The motion to discharge it was, accordingly, refused, notwithstanding the fact that, before the order had been drawn up or entered, the client

(1) (1876) 3 Ch. D. 177, at 184. (2) (1893) 10 T.L.R. 139.
(3) (1876) 3 Ch. D. 177.

had changed his mind and withdrawn his consent. In neither case is there anything in the report of the case to indicate that any consent had been given by counsel for the plaintiff, in whose favour the order had gone, to its being made in the form it took. No doubt, upon further search, other similar instances could be found in the reports; but these two would seem to suffice for the present. (See also *Levi* v. *Taylor* (1).)

Accordingly, the consent of the party against whom the judgment, now before us, is made would seem to be all that is necessary. Yet, it is the very party who so consented, who is here seeking to appeal, after having given his consent. As put by Riddell J.A. (2),

> Influenced, rightly or wrongly, by the strenuous pressure of the plaintiff through his counsel, the Judge finally directed that the judgment should go dismissing the action by the consent of the plaintiff.

To quote the language of Lord Cottenham in *Davis* v. *Chanter* (3), such a party should be told: "You complain of the court having done what you asked it to do." In my opinion, upon that fact becoming apparent, he should not be further heard.

For these reasons, I am, with deference, of the opinion that the judgment in question was really a "consent judgment" within the meaning of the language of Section 23 of the Ontario *Judicature Act*, and that the court has no jurisdiction to set it aside, except in a fresh action brought for that purpose. It follows, in my opinion, that the appeal now before this court should be dismissed with costs.

To appreciate the distinction between the preposition "with," in the context in which it is found in Section 23 of the Ontario *Judicature Act*, and the prepositions "on" and "upon," in a like context, made by Mr. Justice Riddell, with the utmost respect for that very able judge, requires a subtlety and finesse of intellect of which I freely confess myself incapable.

The following passage, however, from the judgment of the learned judge who wrote for the majority on this question appears to call for some further observation. We find him saying (4):

(1) (1903) 116 L.T.Jo. 64.
(2) 65 Ont. L.R., at 63.
(3) (1848) 2 Phillips 545, at 547.
(4) 65 Ont. L.R. 53, Masten J.A., at 56.

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(Section 31 of the Judicature Act of 1925). "No appeal shall lie, without the leave of the Court or Judge making the order, from an order of the High Court or any Judge thereof made with the consent of the parties."

Referring to that provision, it is said in Daniell's Chancery Practice, 8th Ed., p. 1110: "To constitute consent there must be a bargain between the parties, and not a mere acceptance of the order offered." In the Annual Practice of 1929, at p. 2141, the result of the cases is expressed in identically the same terms, and in support of the statement there is quoted the following cases: *Davis* v. *Chanter* (1); *Aldam* v. *Brown* (2); *Hadida* v. *Fordham and Sons Ltd.* (3). I have perused and considered these cases, and they appear to me to bear out the conclusion expressed in the text books.

It is true that, in Daniell's Chancery Practice, 8th Ed., p. 1110, the language quoted is found. The significance of the passage, however, can best be ascertained by looking at the authorities cited in support of it which are those mentioned by the learned judge. It is obvious that the author meant no more than this, that, where an election is offered to a party by the court, his acceptance of an order, couched in what he regards as the least onerous of alternative terms proposed, does not amount to an acquiescence in, or consent to, those terms. Thus, in *Davis* v. *Chanter* (4), Lord Cottenham, then Lord Chancellor, said that

An order that a cause shall stand over with liberty to amend by adding parties is as much an adjudication as far as it goes as any other. The Court says, I cannot give you relief unless you do a certain thing. Is the plaintiff to ask the Court to dismiss the bill? If so, what is he to say when he comes here on appeal? He would be told, you complain of the Court having done what you asked it to do.

And the order was held not to be binding as a consent order upon the appellant merely because he had accepted an alternative offered him by the court.

The next case referred to is *Aldam* v. *Brown* (5). In this case the plaintiff was offered the alternative of having an account and enquiry taken, or having his action dismissed. The report reads,

The plaintiff elected to take this account and enquiry rather than have the action dismissed. The judgment, after the usual reference to the pleadings, evidence and argument, proceeded: "And the plaintiff by his counsel accepting an enquiry and account in the form hereinafter directed, this Court doth order, etc." The plaintiff appealed.

The Court of Appeal held that an appeal would lie because the order could not be looked upon as a consent order, the

(1) (1848) 2 Phillips 545.
(2) [1890] Weekly Notes, 116.
(3) (1893) 10 T.L.R. 139.
(4) (1848) 2 Phillips 545, at 547 (reported below in 15 Sim. 93).
(5) [1890] W.N. 116.

plaintiff having merely taken the less objectionable alternative offered him by the court.

The third case cited is *Hadida* v. *Fordham* (1), above referred to, where the order, against which the defendant appealed, stated his submission to give an undertaking not to use a word objected to by the plaintiff. Far from being an authority for the appellant, in the present instance, as I read the report of this case, it is distinctly against him, the court having there dismissed the appeal on the ground that the appellant (defendant), by submitting to the undertaking, as he did, had given his consent to the order made and could not be heard to object to it on appeal.

When, however, I look at the reference in the Annual Practice (1929), p. 2141, I find the passage relied on by the learned judge reads as follows:

> To constitute consent, there must be a bargain between the parties, not mere acceptance by the appellant of an order offered by the court.

The same words are to be found in the Annual Practice for 1930 and for 1931, at p. 2139 in each volume. It is, perhaps, significant that the first case cited by Daniell in his book is not referred to, reference being made merely to *Aldam* v. *Brown* (2) and *Hadida* v. *Fordham* (1). Here, the case is not one of *mere acceptance by the appellant of an order offered by the court,* but rather there was pressure by his counsel at the trial amounting to insistence, yielded to by the learned judge, to give the very judgment which he pronounced.

I understand, however, that the majority of my brethren take the opposite view on the aspect of the case now under consideration and are prepared to hold that, because the formal consent of the defendant does not appear on the face of the order, and because his counsel took the stand that he did not wish it to appear that he was consenting for the reason above stated, although immediately upon the judgment being pronounced he asked and got permission to withdraw his exhibits from the court (a permission on which he acted), that the judgment formally entered, dismissing this action "by consent of the plaintiff," cannot be regarded as a "consent judgment" within the meaning of section 23 of the Ontario *Judicature Act,* and that

(1) (1893) 10 T.L.R. 139. (2) [1890] W.N. 116.

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the plaintiff is not bound thereby, but is entirely at liberty to appeal therefrom.

Having regard to this conclusion of the majority, it is unnecessary for me to express any opinion on the further point discussed as to the proper construction of section 23, i.e., as to whether or not the concluding phrase thereof applies only to its immediate antecedent, viz., a discretionary order dealing with costs, or whether its application extends to the whole section, so as to enable "the court or judge making" an order by consent to give leave to appeal therefrom. Were I required to pass upon that question, I should be inclined to take the view expressed by Mr. Justice Riddell, viz., that the proper construction of this clause, as it now stands, in the statute is that leave to appeal of the court or a judge making the order may be given only where the order, so far as sought to be appealed from, deals merely with costs, and may not be given where, as here, the "judgment by consent" deals with the substance of the action.

Moreover, although that learned judge refrained from determining whether or not the appeal should be stayed to ascertain whether the appellant could obtain the leave of the trial judge to appeal, I have no hesitation whatever in saying, that, in my opinion, any such application should be refused, having regard to the improbability and, possibly, the impropriety of the trial judge,

after yielding to the urgent pressure of the plaintiff and against the will of the defendant, and directing the judgment to be entered as the plaintiff wished it in a form against which the defendant protested to the last, then, on the request of the party who had induced him to direct judgment to be entered as on his consent, giving leave to him to appeal from the judgment he had asked for. * * * This would savor of absurdity and great unfairness to the party upon whom the judgment was, at the instance of the appealing party, forced.

As to the question of whether counsel for the plaintiff had, or had not, authority to consent to the order made by the trial judge, and as to the effect of lack of such authority, then unknown to counsel for the defendant (Mr. Osler, at the request of the court, on his responsibility as counsel, informed us that he was quite unaware of any limitation placed upon the authority of plaintiff's counsel to give the consent at the time it was given, and, for my part, I entirely accept Mr. Osler's statement), it is also unnecessary, and would probably be improper, for me to ex-

press any view, having regard to my opinion above stated, that it would not have been competent for the Appellate Divisional Court to deal with that matter and, therefore, cannot be competent for us here to pass upon it. But, reference may be had to *Shepherd* v. *Robinson* (1) as a late and a very satisfactory exposition of the law upon this aspect of the case.

Subject to the question as to whether the judgment pronounced at the trial of this action should, or should not, be regarded as a "consent judgment" and, as such, non-appealable—the question first taken up and on which judgment was reserved,—the appeal was argued by counsel on its merits.

It would appear that the plaintiff had some seven or eight additional witnesses, whom he had not yet called, when he was surprised by a ruling of the learned trial judge to the effect that, as the action had been stayed as against the defendant company, and that company was not represented at the trial, it would not be competent for the plaintiff to enquire into its private affairs in its absence, although those affairs were directly involved in, and formed the basis of, allegations made by the plaintiff against the defendant who was before the court and it was necessary to enquire into them, as the plaintiff claimed, in order that he should establish his case. This ruling was given while a witness, one Nash, was under examination-in-chief, and upon objection by counsel for the defendant to a question about certain shipments of goods alleged to have been made by the company through the Canadian National Railway Company. This ruling having been made and briefly discussed, Mr. Grant and Mr. Osler had a conference, after which Mr. Grant announced to the court,

We have arranged that matter, my Lord. I wish my friend would consent to our withdrawing the record on our undertaking to pay costs.

Whereupon a short discussion ensued as to the terms in which the judgment would be pronounced:

Mr. OSLER: I have explained to my friend that my client could not be party to any settlement of this action.

His LORDSHIP: Well, by consent action dismissed with costs.

Mr. OSLER: Not by consent, my Lord.

Mr. GRANT: I am consenting.

His LORDSHIP: *Have you finished your case?*

(1) [1919] 1 K.B. 474.

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Mr. GRANT: *Yes, my Lord.*
His LORDSHIP: Then I will dismiss it with costs.
Mr. GRANT: No, no, I don't want that, my Lord.

As will be seen, Mr. Grant's affirmative answer to his Lordship's question, "Have you finished your case?" was given upon the basis of a judgment going in the terms to which he was consenting. Yet, this observation is relied upon by the Appellate Court as a statement that he deliberately declined to call any further witnesses. To say that this was a deliberate election by counsel to abandon calling the further witnesses he had in court seems to us to be a misconception of his position. The circumstances render the decision in *Judson* v. *McQuain* (1), cited by Riddell J.A., quite inapplicable. No doubt, where the sole ground on which a new trial is asked is that, although the party seeking it has had a full opportunity to give evidence himself at the trial, he had deliberately refrained from doing so, that affords

no ground for a new trial—to allow the defendant to have another chance of convincing another jury in another way would violate all principles of fair play.

Such was the holding in *Judson* v. *McQuain* (1). But there, the circumstances were entirely different from those of the case now before us. Counsel there deliberately decided to call no witnesses and thus to have the advantage of the last address to the jury. The client stood by and did not object.

The fact that counsel has not called any witnesses for the defence is no ground for a new trial, whether this was due to his yielding to the advice of others, as in *Brown* v. *Sheppard* (2) (Burns J., calls this a "novel ground for applying for a new trial," but we have progressed since his day); or to the fact that he rested his defence on what appeared from the evidence of the plaintiff, as in *Young* v. *Moodie* (3); or to relying upon the weakness of the plaintiff's evidence and desiring to have the last word to the jury, as in *Hurrell* v. *Simpson* (4)—even though the Court should be dissatisfied with the verdict (5).

With the utmost respect for the learned trial judge, his ruling that all evidence bearing upon the affairs of the company must, in its absence, be excluded, was erroneous, and was largely the cause of the subsequent trouble in this action. An answer to the question put to the witness might involve a disclosure by him of facts ascertained when he

(1) (1923) 53 Ont. L.R. 348.
(2) (1856) 13 U.C.R. 178.
(3) (1857) 6 U.C.C.P. 244.
(4) (1862) 22 U.C.R. 65.
(5) *Judson* v. *McQuain*, (1923) 53 Ont. L.R. 348, at 350.

examined the books of Hiram Walker & Sons, Limited, on behalf of the Crown, in order to prepare evidence to be given before a Royal Commission. It was, no doubt, objectionable on two perfectly distinct grounds:—

First. It was really an attempt to put in secondary evidence as to what the books show.

Second. It was contrary to public policy to permit such enquiry to be made of the witness.

The latter ground appears to have been taken by the learned judge as well as that now found to have been wrong, but the former ground does not seem to have been taken by either counsel or court, Mr. Osler having simply said, "I object to that question."

In our opinion, under all the circumstances, the plaintiff should be given an opportunity to place all his evidence before the court. To quote language used by Armour C.J., in the case of *Murphy* v. *G.T.R. Co.* (1), "The case should go back, not for a new trial, but to be tried." Unfortunately, it will be impossible for the parties to avail themselves of the evidence already in the record and thus to avoid the expense of taking it again, because that would involve sending the case back to the same judge who heard that evidence and who alone is in a position to pass upon the credibility thereof. Mr. Tilley, of counsel for the plaintiff, objects to that course being taken and, as is within his right, wishes that the new trial shall take place before another judge. As is customary in this court where a new trial is ordered, we refrain from further discussion on the merits. Accordingly, as was intimated by this court at the hearing of the present appeal, it will be allowed and the judgment dismissing the action vacated and, in substitution, an order made directing a new trial of this action; the costs of the abortive trial to be in the discretion of the judge who shall preside at the new trial, and the costs of the appeal to this court and in the court of appeal to be costs to the plaintiff in the cause.

Appeal allowed; new trial ordered.

Solicitors for the appellant: *Winnett, Morehead & Co.*

Solicitors for the respondent: *Blake, Lash, Anglin & Cassels.*

(1) Queen's Bench Division, Ont., 27th May, 1889, not reported.

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*May 19.
*June 12.

PHILOCLÈS LANCTOT (PLAINTIFF).....APPELLANT;

AND

LA MUNICIPALITÉ DE ST-CONSTANT (DEFENDANT).....RESPONDENT.

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

Municipal corporation—Improved road—Department of roads—Maintenance and repairs—Levy of costs—By-law—Owners of boundary properties—R.S.Q., 1925, c. 91, s. 69.

When a municipal corporation has passed a resolution placing under the control of the Minister of Roads (Q. 12 Geo. V, c. 42) the maintenance and repairs of an improved road, the costs incurred by the corporation are levied only on the properties whose owners are bound to maintain the road, if there is a by-law then in force to that effect, notwithstanding the facts that the resolution of the corporation was adopted years after the enactment of the by-law and that the cost of improvements made under the authority of the Minister was higher than anticipated by the ratepayers, when they petitioned for an improved road, and by the by-law describing the work and imposing the expense on certain interested landowners.

Judgment of the Court of King's Bench (Q.R. 48 K.B. 145) aff.

APPEAL from the decision of the Court of King's Bench appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Duclos J. (1) and dismissing the appellant's action, which asked the annulment of a collection roll for the payment of the costs of maintenance and repairs made by the provincial department of roads on an improved municipal road.

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

Gustave Monette for the appellant.

Chas. Laurendeau K.C. and *V. Dupuis* for the respondent.

The judgment of the court was delivered by

CANNON J.—La Cour du Banc du Roi de la province de Québec, par un jugement du 23 novembre 1929 a permis à l'appelante de nous soumettre l'arrêt de cette même cour

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

(1) [1930] Q.R. 48 K.B. 145.

de 29 octobre 1929, maintenant, avec la dissidence de MM. les juges Tellier et Rivard, l'appel de la municipalité défenderesse et rejetant, avec dépens, l'action du demandeur intimé, qui avait réussi devant la Cour Supérieure. La permission d'appeler a été accordée parce que la cour de dernier ressort de la province de Québec considère qu'il s'agit d'une matière importante intéressant non seulement l'appelant mais aussi plusieurs autres propriétaires contribuables de la municipalité de St-Constant, et que la question en est une d'intérêt général, dont la solution a suscité une divergence d'opinions considérable parmi les juges du présent litige.

Le conseil municipal de St-Constant, à la demande du demandeur et d'un certain nombre d'autres intéressés, a, par règlement, le 4 novembre 1912, pourvu au macadamisage du chemin du rang St-Pierre, situé dans cette municipalité, et à son entretien à l'avenir, suivant certaines spécifications, stipulant que les dépenses pour lesdits travaux ne devraient pas dépasser chaque année la somme de $6,000 et qu'

> il serait prélevé chaque année par le conseil sur les biens-fonds imposables des contribuables obligés à ce chemin, par voie de taxation directe, toute somme de deniers nécessaires pour subvenir aux frais de la confection et de l'entretien dudit chemin macadamisé.

Il était décrété par le même règlement que cette route et ce chemin seraient faits et entretenus à l'avenir comme route et chemin macadamisés. Les améliorations prévues furent faites avec l'aide de la province.

Subséquemment, en 1922, l'entretien du chemin du rang St-Pierre ayant été négligé et n'étant pas de la qualité requise par la voirie publique, a été, suivant la contestation telle qu'engagée, mis légalement sous le contrôle du ministère de la voirie par une résolution du conseil municipal à sa séance du 3 avril 1922. En conséquence, les travaux de réfection du chemin furent faits suivant les exigences du département de la voirie et en vertu de la loi passée par la législature pour assurer l'uniformité et la qualité de la voirie dans toute l'étendue de la province; et ce, dans l'exercice de l'hégémonie que l'on a cru devoir accorder au département de la voirie en centralisant la confection et l'entretien des chemins et en abandonnant le système, qui avait prévalu jusqu'alors, de la décentralisa-

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tion et du contrôle municipal; voulant évidemment ne pas laisser ce service important à la merci de l'apathie et des diverses exigences locales.

Le département, s'étant rendu à la prière de la municipalité de St-Constant, a accordé un contrat pour les travaux nécessaires pour l'entretien et la réparation de la route en question, qui, d'après l'article 2041nn de 12 Geo. V, c. 42, comprend, entre autres, " l'huilage, le goudronnage et la réfection des macadams; le rechargement des gravelages; le renouvellement en général des revêtements des chaussées ".

Les travaux coûtèrent au total $56,017.83, qui furent payés par le gouvernement, sauf une somme, finalement réduite à $12,088.76, que la province, en vertu de la loi, a droit de recouvrer de la municipalité intimée. Comme le dit parfaitement l'honorable juge Létourneau, toute la cause repose sur l'interprétation et l'application qu'il faut faire de l'article 2041qq de 12 Geo. V, c. 42, qui était encore en vigueur le 3 avril 1922, lorsque, par résolution, la municipalité a soumis au contrôle du ministre de la voirie le chemin dont il s'agit.

Cette disposition a été reproduite par 13 Geo. V, c. 34, et se retrouve au chapitre 91 des statuts revisés de la province de Québec de 1925, sec. 69:

69. Aussitôt que le trésorier de la province lui a indiqué le montant dû par une corporation municipale en vertu d'un certificat émis par le ministre de la voirie, sous l'autorité des articles 62 et 66, le secrétaire-trésorier ou greffier de cette corporation doit immédiatement, en se conformant aux dispositions du code municipal ou de la loi régissant cette corporation, préparer un rôle spécial de perception et prélever le montant réclamé, soit sur toute la municipalité, soit seulement sur les immeubles dont les propriétaires sont tenus à l'entretien du chemin où les travaux ont été exécutés, suivant que l'exigent les règlements de voirie en vigueur dans la municipalité.

Le secrétaire-trésorier s'est-il conformé à cet article et a-t-il prélevé le montant réclamé sur les immeubles dont les propriétaires sont tenus à l'entretien du chemin où les travaux ont été exécutés suivant les règlements de voirie alors en vigueur dans la municipalité?

Le demandeur-appelant, propriétaire de 165 arpents en superficie, devrait la somme de $558.60 pour sa quote-part d'une somme totale de $8,111.65 répartie entre les contribuables du rang St-Pierre.

Par son action, le demandeur, sans contester la légalité des procédures mettant sous le contrôle du département les chemins de la municipalité, ni la validité de la réclamation provinciale contre la municipalité intimée, nous dit que le contrat passé entre le ministre de la voirie et O'Connors Ltd peut bien lier légalement la municipalité défenderesse, mais ne lie nullement les intéressés du rang St-Pierre, le demandeur en particulier, tous affectés par des règlements spéciaux dont les spécifications n'auraient pas été observées par la défenderesse. Il allègue que les travaux publics sont à la charge de tous les contribuables de la municipalité intéressée, à moins que des règlements spéciaux les aient mis à la charge d'un groupe particulier de contribuables; et, dans ce dernier cas, encore faut-il que les conditions desdits règlements spéciaux aient été respectées. Les spécifications contenues au règlement municipal alors en vigueur pourvoyant à la confection et à l'entretien des chemins du rang St-Pierre peuvent-elles prévaloir contre les dispositions de la loi qui laissent au ministre de la voirie la décision quant à la nature et à l'étendue des travaux qu'il convient de faire pour entretenir les chemins dans l'état jugé convenable par l'administration?

Je crois que nous sommes en présence d'un des cas où l'intérêt particulier doit s'effacer devant l'intérêt général; et la législature a statué:

1° Les spécifications locales ne sauraient prévaloir ni être maintenues à l'encontre des exigences du département pour atteindre au degré de perfection uniforme voulu par l'administration;

2° Le secrétaire-trésorier a été désigné pour répartir, par un rôle spécial, la partie du coût des travaux exigibles de la municipalité, et ce conformément au mode prévu aux règlements alors en vigueur dans la municipalité.

Or, quelle était la législation municipale de St-Constant au moment où cet officier a dû préparer ce rôle spécial? D'après la loi, le montant réclamé devait être prélevé: 1° soit sur toute la municipalité; 2° soit seulement sur les immeubles tenus à l'entretien du chemin où les travaux avaient été exécutés et ce, dans les deux cas, suivant les règlements de voirie en vigueur dans la municipalité. Cette disposition doit se relier à l'article 463 du code municipal qui donne à toute corporation le pouvoir d'ordonner, par

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résolution ou par règlement, 1° que les travaux d'entretien d'un chemin macadamisé seront faits par les contribuables eux-mêmes désignés dans la résolution ou le règlement, ou à leurs frais, ou 2° aux frais et à la charge de la corporation intéressée, au moyen de deniers prélevés par taxation directe sur tous les biens-fonds imposables dans la municipalité; mais, dans tous les cas, sous le contrôle de la municipalité dans les limites de laquelle se trouve le chemin en question.

Il ressort de cette législation, comme des articles 533 et 535 (*a*) de l'ancien code municipal en vigueur en 1912, qu'un règlement est nécessaire pour déterminer si les travaux d'entretien d'un chemin macadamisé sont à la charge de la corporation et payables à même les deniers prélevés sur tous les biens-fonds de la municipalité, ou si, comme dans notre espèce, les travaux d'entretien doivent être faits par les contribuables désignés dans le règlement et à leurs frais.

Il est incontestable que les seuls règlements en vigueur lors de la préparation du rôle de perception dans cette municipalité concernant la route St-Pierre sont ceux invoqués par le demandeur dans son action. Il veut les maintenir en vigueur pour la nature et le coût des travaux, nonobstant la législation intervenue.

D'après moi, la loi a maintenu ces règlements en vigueur seulement pour permettre au secrétaire-trésorier de déterminer le mode de perception et prélever le montant réclamé par le gouvernement, soit sur toute la municipalité, quand un règlement le dit, soit seulement sur les immeubles dont les propriétaires sont tenus à l'entretien du chemin, quand un règlement à cet effet existe dans la municipalité.

Le demandeur se plaint d'être appelé à payer un montant plus considérable qu'il n'aurait eu à débourser si les travaux avaient été limités au macadamisage, tel que prévu en 1912. Il ne faut pas oublier cependant que, dès cette date, des intéressés prévoyaient une dépense possible de $6,000 par année. Dans l'espèce, pour des travaux plus complets, on ne charge à cet arrondissement, déduction faite de la contribution de l'état, qu'un montant total de $8,111.65, soit $2,111.65 de plus que les $6,000 prévus au règlement dont se réclame le demandeur. Mais, même si la loi telle qu'adoptée avait des conséquences plus dures

pour l'appelant, il nous faudrait tout de même l'appliquer; c'est la raison d'être des tribunaux.

Pour ces raisons et celles des honorables juges Létourneau et Hall, je suis d'avis que cet appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

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Solicitors for the appellant: *Patenaude, Monette, Filion & Boyer.*

Solicitors for the respondent: *Dupuis & Venne.*

SEM LACAILLE (PLAINTIFF) ..... APPELLANT;

v.

LA CORPORATION DE LACAILLE (DEFENDANT) ..... RESPONDENT.

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*Feb. 25.
*June 12.

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

Promissory note.—Overdue—Letter granting delay for payment—Action after maturity—Delay not then expired—Whether action is premature —Rights of debtor.

On September 3, 1929, the appellant sued the respondent corporation on four promissory notes overdue and the defence set up was that the action was premature because, on August 28, 1929, the appellant had written a letter to the secretary of the corporation stating *inter alia* that unless payment was made within fifteen days he would take proceedings; but he brought his action before the expiry of that time.

Held, reversing the judgment appealed from (Q.R. 49 K.B. 172) that the appellant was entitled to judgment. On the letter, the most the respondent might have hoped for was that on payment before pleading the court would relieve it of the costs up to payment.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court P. Cousineau J. (1), and dismissing the appellant's action.

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

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1930) Q.R. 49 K.B. 172.

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Charles Laurendeau K.C. for the appellant.

Hervé Roch for the respondent.

The judgment of the court was delivered by

LAMONT J.—The facts in this case are not in dispute. The appellant sued the respondent corporation in the Superior Court on four promissory notes made by the corporation in favour of the appellant and amounting in all to $6,073.47.

The defence set up was that the action was premature. At the time the action was brought, September 3, 1929, the maturity date of the notes sued on was passed, but the corporation relies on the fact that, on August 28, 1929, the appellant wrote to the secretary of the corporation a letter in the following terms:—

> Je vous retourne vos billets pour la dernière fois et je vous avertis que d'ici à 15 jours si je n'ai pas un règlement de tous les billets je prendrai des procédures.
>
> Je ne peux pas porter ces billets.

This letter, it was contended on behalf of the corporation, had the effect of extending the time for payment of the notes until the expiration of fifteen days from the date of the letter and, as action was brought within fifteen days, it was prematurely brought.

The first question to be considered is: Did the appellant, by this letter, intend to signify to the corporation that he was extending the time within which the notes would become due for another fifteen days, or simply to intimate that he would not exercise his right to sue on the overdue notes for that length of time? In my opinion the latter is the true construction. I cannot see in the letter anything that would justify the conclusion that the appellant was assenting to any modification of the terms of the obligations expressed in the promissory notes. Putting it at the very highest, the letter neither declares nor conveys by implication anything more than an assent to postpone the exercise of his undoubted right to sue. The letter is not to be construed as depriving the appellant of his rights to any greater extent than the language used calls for. Even conceding that it implies a promise to refrain from suing for fifteen days, and assuming that, in the circumstances, the respondent assented to this promise, such a

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promise would not afford a defence to the action. That being so and the notes being overdue when the appellant sued, his action cannot be said to have been prematurely brought. On the letter the most the respondent might have hoped for was that on payment before pleading the court would relieve it of the costs up to payment.

The appeal should, therefore, be allowed, the judgment below set aside and the judgment of the Superior Court restored. The appellant is entitled to his costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Lalonde & Lalonde.*

Solicitors for the respondent: *Baril & Tousignant.*

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*June 23.

MAURICE J. BOULIANNE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Broker—Conversion—Theft—Witness—Accomplice—Charge —Misdirection—Proper course by trial judge as to warning.

Conviction of appellant for conversion affirmed, the court holding that the jury could not, on the evidence, have reached another conclusion. Though finding misdirection in a material matter, the majority of the court (Cannon J. *contra*) held that it did not result in a miscarriage of justice or wrong to the accused. (Cr. C., s. 1014 (2).)

Per Anglin C.J.C. and Newcombe, Lamont and Smith JJ.—The misdirection by the trial judge to the jury was that, although he warned the jury properly of the danger of convicting on the uncorroborated evidence of an accomplice, he further instructed them, in effect, that if they believed his evidence, although not corroborated, it was their duty to convict the accused. This was a departure by the trial judge from the direction given by this court in *Vigeant* v. *The King* ([1930] Can. S.C.R. 396, at 399, 400) as to the proper course to be taken in regard to warning of the danger of convicting without corroborative evidence. The law as very carefully considered and laid down in that case should be strictly followed by trial judges and any substantial departure from it must always be attended with peril. The rule requiring warning applies equally whether there be or be not in fact corroborative evidence of the testimony of an accomplice.

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*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

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APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Court of King's Bench, criminal side, and sustaining the conviction of the appellant.

The appellant was charged with having received from his clients, in the course of his business as broker, various sums of money and other securities with instructions to apply the same, in whole or in part, to the purchase of securities upon stock exchanges and of fraudulently, in violation of good faith and contrary to such direction, applying these sums of money and securities to his own private use and the use of his firm. The main testimony against the accused was given by a witness who, it was admitted, had been an accomplice. The principal ground of appeal was that the trial judge failed to properly instruct the jury as to the danger of accepting, without corroboration, the testimony of an accomplice.

L. Gendron K.C. for the appellant.

E. Bertrand K.C. for the respondent.

At the conclusion of the argument, the judgment of the majority of the court was orally delivered by

ANGLIN C.J.C.—We do not think it necessary to reserve judgment in this case. We have had abundant opportunity to look into it both during the exhaustive argument here and before. While the majority of us are of the opinion that there was misdirection in a material matter, in that the learned judge, although he warned the jury properly of the danger of convicting on the uncorroborated evidence of an accomplice, further instructed them, in effect, that if they believed his evidence, although not corroborated, it was their duty to convict (and we wish to compliment counsel for the accused on the ability he has shewn in the presentation of the case in this regard), we are also satisfied that the jury, properly directed, must have reached the same conclusion as that actually reached in this case (*Brooks* v. *The King* (1)).

Moreover we are all satisfied that the jury could not, on the evidence in the case, have failed to convict the accused. The case, therefore, is one for the application of

(1) [1927] Can. S.C.R. 633.

section 1014 (2) of the Criminal Code, and the Court, being convinced that the misdirection did not result in any miscarriage of justice or wrong to the accused, is unanimously of the view that the appeal fails and that the conviction must be affirmed. The appeal is, therefore, dismissed.

We should add that we entirely disagree with the view of Mr. Justice Hall that the rule requiring warning does not apply where there is, in fact, corroboration. The rule applies equally whether there be or be not corroborative evidence of the testimony of an accomplice.

The departure by the learned trial judge in the present case from the plain direction given by this court in *Vigeant* v. *The King* (1), as to the proper course to be taken in regard to warning of the danger of convicting without corroborative evidence very nearly wrecked this conviction. The law as very carefully considered and laid down in that case should be strictly followed by trial judges. Any substantial departure from it must always be attended with peril.

CANNON J.—With respect, I cannot agree that the learned trial judge, after warning the jury properly of the danger of convicting on the uncorroborated evidence of an accomplice, further instructed them, in effect, that if they believed that evidence, although not corroborated, it was their duty to convict, I cannot read such instructions in the following words of the learned judge:

Maintenant la complicité se présente dans cette affaire. La défense a prévenu le tribunal de donner la direction aux jurés que si les jurés en arrivent à la conclusion qu'il y a des témoins complices en cette cause—évidemment il ne peut s'agir que de Statz—il est toujours dangereux de condamner un individu sur le témoignage de son complice, surtout si ce témoignage n'est pas corroboré. Mais il est de mon devoir de vous dire que, même s'il n'est pas corroboré, vous devez tout de même prendre en considération le témoignage du complice, le peser et en tirer les conclusions que vous croyez devoir tirer. Le témoignage du complice est reçu, mais il a plus ou moins de force selon qu'il est plus ou moins corroboré.

I reach the conclusion that the two points raised by the dissenting judgment of Mr. Justice Allard were badly taken, and I would dismiss the appeal.

Appeal dismissed.

(1) [1930] Can. S.C.R. 396, at 399-400.

1931

*May 26.
*June 12.

MÉDARD HUDON AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

DAME ÉMILIE TREMBLAY (DEFENDANT) ..... } RESPONDENT;

AND

LA CORPORATION DU CANTON TREMBLAY (MISE-EN-CAUSE).

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

Appeal—Jurisdiction—Petition in revocation of judgment (requête civile) —Judgment maintaining it—Whether it is a "final judgment" or a judgment "directing a new trial"—Supreme Court Act, s. 2 (e) and s. 36 (a) and (b)—Arts. 1177 et seq. C.C.P.

A judgment of the Court of King's Bench, maintaining the "rescindant" conclusions of a petition in revocation of judgment (*requête civile*) and annulling the judgment of the Superior Court, so as to place the parties in the same position as they were before that judgment and continue the suit, is not a "final judgment" within section 36 (*a*) and 2 (*e*) of the *Supreme Court Act* nor a "a judgment * * * directing a new trial" within section 36 (*b*).

MOTION to quash for want of jurisdiction on appeal from a decision of the Court of King's Bench, appeal side, province of Quebec, maintaining the conclusions of a petition in revocation of judgment (*requête civile*).

A. Talbot for the appellant.

J. A. Gagné for the respondent.

The judgment of the court was delivered by

CANNON J.—L'intimée, par sa motion, demande le renvoi et la cassation, à toutes fins que de droit, de l'appel interjeté par les demandeurs intimés du jugement de la Cour du Banc du Roi, rendu à Québec, le 31 mars 1931, qui se lit comme suit:

Attendu que par jugement de la Cour Supérieure, Phydime Gauthier, ancien secrétaire-trésorier de la Corporation du Canton Tremblay, a été condamné à payer à cette dernière, une somme de $1,143.68, plus $610.90

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

frais d'audition, sur poursuite des intimés, contribuables, en réclamation des sommes pour lesquelles le défendeur en sadite qualité aurait été déficitaire;

Attendu que l'appelante, légataire universelle de son mari, reprenant l'instance, se pourvoit par requête civile, alléguant la découverte depuis le jugement d'une pièce décisive et d'une preuve concluante qui, si elles eussent été connues en temps, auraient provoqué un jugement différent;

Attendu que les conclusions de la requête civile sont à l'effet que le jugement soit rétracté et que les parties soient placées dans le même état où elles se trouvaient avant ledit jugement;

Attendu que ladite requête civile n'a été contestée que verbalement, les procureurs des intimés se contentant de transquestionner les témoins produits par la requérante;

Attendu que par jugement de la Cour Supérieure, la requête civile a été rejetée, le tribunal se prononçant à la fois sur le rescindant et sur le rescisoire;

Considérant que la requérante a fait plus qu'une preuve *prima facie* des allégués de sa requête civile;

Considérant que la preuve des allégués de la requête civile aurait pour effet de faire rendre un jugement différent du premier;

Considérant que l'article 1175 du C.P.C., dans l'énumération des cas qu'il prévoit, n'est pas limitatif, mais simplement illustratif;

Considérant que la requérante se trouve dans les conditions voulues pour le remède de la requête civile;

Considérant que les conclusions de la requête ne vise qu'à la rétractation du jugement et à la continuation de l'instance;

Par ces motifs, fait droit à l'appel, infirme le jugement de la Cour Supérieure, et maintient les conclusions de la requête civile, et ordonne que le jugement soit rétracté et que les parties soient placées dans le même état où elles se trouvaient avant ledit jugement, le tout avec dépens.

D'après l'intimée, cette cour devrait renvoyer l'appel pour défaut de juridiction, parce que

1° la somme ou valeur en litige ne dépasse pas la somme de $2,000 et est même moindre que cette somme, soit $1,754.58;

2° le jugement de la Cour du Banc du Roi accordant la requête de l'intimée ne décide pas du fond du litige, et partant n'est pas un jugement final;

3° les appelants n'ont pas droit à un appel *de plano* devant cette cour et ne sont dans aucun des cas prévus par la loi pour en appeler devant nous.

Médard Hudon, par un affidavit, cherche à établir que le montant en litige dans cette cause dépasse $2,000 parce que dans le montant payé en satisfaction du jugement qui a été rescindé par la Cour du Banc du Roi seraient compris:

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Capital		$1,754 58
Intérêts		199 18
Frais taxés		478 05
auxquels il faudrait ajouter le surplus auquel l'appelante aurait droit, d'après les allégués de la requête civile		856 32
		$3,288 13

Même en admettant ces chiffres, qui, en ajoutant les frais, semblent contraires à l'article 40 de la loi de la Cour Suprême, qui décrète que lorsque le droit d'appel dépend de la somme ou valeur de l'affaire en litige dans l'appel, cette somme ou valeur peut se prouver par attestation sous serment, mais elle ne doit pas comprendre l'intérêt postérieur à la date du prononcé du jugement porté en appel, ni aucuns frais, on pourrait peut-être dire qu'il n'y a aucun intérêt pécuniaire directement en litige. On ne saurait donner une valeur précise en argent au droit réclamé par l'intimée et accordé par la Cour du Banc du Roi de faire rétracter le jugement en Cour Supérieure pour remettre les parties dans l'état où elles étaient avant jugement et compléter l'enquête. Le remboursement par la mise en cause des montants payés, si l'intimée réussit plus tard en Cour Supérieure sur le rescisoire, est une conséquence possible du jugement frappé d'appel, mais ce n'est pas le jugement.

Il n'est pas nécessaire, cependant, de décider définitivement cette question, vu que, dans notre opinion, nous ne sommes pas en présence d'un jugement final ou définitif, aux termes de l'article 36 de la loi de la Cour Suprême.

L'article 2, paragraphe (*e*), signifie

tout jugement, règle, ordonnance ou décision qui détermine en totalité ou en partie un droit absolu d'une des parties au procès dans une procédure judiciaire.

Le jugement de la Cour du Banc du Roi, tout en accordant, dans l'exercice de sa discrétion, le rescindant, a expressément réservé le rescisoire et ordonne seulement que le jugement soit rétracté et place les parties dans le même état où elles se trouvaient avant le jugement. Je ne crois pas que cette décision puisse être interprétée comme décisive concernant les droits de l'une ou l'autre des parties au premier litige devant le tribunal de première

instance. Il est vrai que la controverse est réouverte et que toute la question, qui semblait avoir été vidée définitivement par le premier jugement de la Cour Supérieure, sera de nouveau décidée après la réouverture de l'enquête. Je ne crois pas que nous soyons en présence d'un jugement final, suivant les données qui nous sont fournies par la Cour d'Appel en Angleterre dans *Salomon* v. *Warner* (1):

No order, judgment or other proceeding can be final which does not at once affect the status of the parties for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive againts the defendant, and if it is given for the defendant it is conclusive against the plaintiff, and no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute.

Et Lord Esher, dans cette cause, nous dit:

If the decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of the rule it is final. On the other hand, if the decision if given in one way will finally dispose of the matter in dispute, but *if given in the other will allow the action to go on,* then I think it is not final but interlocutory.

Si la Cour du Banc du Roi avait renvoyé l'appel et maintenu le jugement de la Cour Supérieure renvoyant la requête civile, on pourrait dire qu'elle aurait réglé définitivement et finalement le procès en refusant le dernier recours utile contre le jugement. Mais le jugement dont on veut appeler étant favorable à la requérante et n'ayant pas d'autre effet que de lui permettre de réouvrir l'enquête et de continuer le procès, sans déterminer le bien ou le mal fondé du droit réclamé par les demandeurs appelants dans leur action, n'a pas les éléments nécessaires pour en faire un jugement final et définitif au sens de l'article.

Je crois bon de mentionner que l'article 36 (*b*) donne juridiction à cette cour lorsque le jugement de la plus haute cour établie dans une province accorde une motion de désistement ou ordonne un nouveau procès. Pouvons-nous, vu que la requête civile a été accordée et le jugement mis de côté à cause de la découverte d'une nouvelle pièce, considérer ce jugement comme ordonnant un nouveau procès aux termes de ce sous-paragraphe 36 (*b*)? Je serais porté à conclure dans l'affirmative, si ce sous-paragraphe, tel que rédigé, pouvait s'appliquer à un arrêt admettant le rescindant sur une requête civile, procédure toute spéciale au

(1) [1891] 1 Q.B. 734.

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régime légal de la province de Québec. Il ne s'agit pas exactement d'un nouveau procès, mais de la continuation de l'enquête en plaçant les parties dans le même état où elles étaient avant le jugement, avec permission de produire une nouvelle preuve pour compléter le même procès et obtenir un nouveau jugement dans la même instance.

Pour ces raisons, je crois que la motion devrait être accordée et l'appel renvoyé pour défaut de juridiction, le tout avec dépens contre les appelants.

Motion granted with costs.

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*May 5.
*June 30.

FRANK PIERCE (PLAINTIFF).....APPELLANT;

AND

THE RURAL MUNICIPALITY OF WINCHESTER (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporation—Drainage—Flooding of land—Repairs—Duty of municipality—Effect of section 740 Municipal Act—Right of action for damage—The Municipal Act, R.S.M., 1913, c. 133, ss. 471, 472, 624, 625, 740.

The appellant brought an action for damage by flooding of his lands caused by the non-repair and obstruction of a drain or ditch situated within the territorial limits of the respondent municipality and partially built with the aid of the government of the province. Section 740 of the *Municipal Act* provides that "it shall be the duty of each municipality through which, or through any part of which, any drain, constructed wholly or partially by or at the expense of the Government of Manitoba, runs to keep such drain, or that portion of such drain, within its boundaries, properly cleaned out and in repair."

Held, affirming the judgment of the Court of Appeal (39 Man. R. 132), Newcombe and Cannon JJ. dissenting, that section 740 was intended merely to make it clear that, as between the government of the province and the municipality, the duty was on the latter to keep such drains in repair, and that it was not intended to make the municipality liable to an action for damage caused to the owner of adjacent land by the municipality's failure to perform that duty. The improvement or protection against flooding of adjacent land was not a purpose of the construction of the ditch, but the sole object of such construction was to facilitate the maintenance and use by travellers of the roadway. Thus the appellant, as owner, was not a person for whose benefit the duty of maintaining the ditch in repair was imposed on the municipality by section 740, and he cannot therefore maintain

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and cannon JJ.

an action for damages against the municipality based solely upon its nonfeasance or neglect to perform a duty imposed by that section. *City of Vancouver* v. *McPhelan*, 45 Can. S.C.R. 194, at 209, applied.

Per Newcombe J. dissenting.—*Prima facie*, a proprietor, whose lands are flooded by reason of the neglect of the municipality to discharge its statutory duty to clear the drain, is entitled, in the absence of any expression or necessary implication of the statute to the contrary, to recover from the municipality the consequential damages. The burden is upon the respondent to displace the ordinary and natural interpretation and effect of section 740; and no provision of the statute has been cited to justify the conclusion that section 740 was meant only to relieve the province of a possible liability against which it was desirous to protect itself.

Per Cannon J. dissenting.—Section 471 of the *Municipal Act* provides that "the council shall not permit the damming up, obstruction of * * * any ditch in or upon any road * * * or *elsewhere in the municipality*"; and section 472 gives a recourse for damage alleged to have been done to a property in consequence of a violation of section 471. Therefore the appellant was entitled to recover damages to his property in consequence of a violation by the respondent of the provisions of section 471 and also of section 740 of the *Municipal Act*. That statute, expressly or by implication, does not exclude the right of action presently exercised by the appellant under these sections, section 472 merely creating an additional recourse.

APPEAL from the decision of the Court of Appeal for Manitoba (1), reversing the judgment of the trial judge, Armstrong C.C.J. (1), and dismissing the appellant's action for damages caused by the flooding of his land.

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

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

F. M. Burbidge K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Rinfret and Smith JJ.) was delivered by

ANGLIN C.J.C.—We are of the opinion that this appeal fails and must be dismissed with costs, substantially for the reasons given by Mr. Justice Fullerton.

The improvement, or protection against flooding, of adjacent lands was not, in any sense, a purpose of the construction of the ditch in question. It was found by the courts below that the object (no doubt, they meant the sole object) of such construction was to facilitate the main-

(1) (1930) 39 Man. R. 132; [1930] 2 W.W.R. 752.

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tenance and use by travellers of the roadway leading to the nearby town. That being so, it cannot be said that the plaintiff, as owner of adjacent lands, which he alleged to have been flooded in consequence of failure to keep in repair the ditch in question, is a person for whose benefit the duty of maintaining the ditch in repair was imposed on the municipality by section 740 of the *Municipal Act*, notwithstanding the fact that the Manitoba Government had contributed to the expense of its construction. As indicated in *City of Vancouver* v. *McPhalen* (1), he, therefore, cannot maintain an action for damages against the municipality based solely upon its nonfeasance or neglect to perform a duty imposed by section 740. An analogous principle underlies the discussion of the case of *The John Goodison Thresher Co.* v. *Township of McNab* (2).

Section 471—the only other section invoked by the appellant—provides for the case of mis-feasance or of the non-completion of a work by a municipality. (The word "permit" in that section, having regard to its context, should be read as meaning "give permission for," i.e., "actively sanction" not merely "passively allow.") The facts in evidence in the case now before us do not bring it within section 471; nor is there any finding that would justify this appeal under that section.

Reference was also made in the course of the argument to section 625, in addition to section 624, both of which are mentioned by Fullerton J.A., towards the close of his judgment, as indicating the practice of the legislature of Manitoba, when intending to confer a right of action for non-feasance by a municipality, to do so in explicit terms. Of course, the proviso of section 624 has no application to the present case, because, here, the overflow of water was not occasioned by ice or snow obstructions in the ditch, or by reason of unusual rainfalls. Nor has section 625 any application to the case at bar, because it has to do entirely with keeping in repair public roads, streets, bridges and highways and does not concern the overflow of water in ditches by reason of non-repair or otherwise. In both sections, however, the liability of the municipality for non-repair upon the works therein specified is recognized and a right of action is impliedly conferred in section 624, and ex-

(1) (1911) 45 Can. S.C.R. 194, at 209 *et seq.*

(2) (1910) 44 Can. S.C.R. 187; 19 O.L.R. 188.

plicitly conferred in section 625, upon the persons aggrieved by a non-performance of the duty of repair.

NEWCOMBE J. (dissenting).—By judgment of the County Court of Deloraine, Manitoba, the plaintiff recovered damages from the defendant municipality for the flooding of his lands, caused by the overflow of a drain constructed thereon by and within the limits of the municipality with the aid of the Government of the province.

Section 740 of the *Municipal Act*, R.S.M., 1913, c. 133, as amended, provides that

> It shall be the duty of each municipality through which, or through any part of which, any drain, constructed wholly or partially by or at the expense of the Government of Manitoba, runs, to keep such drain, or that portion of such drain within its boundaries, properly cleaned out and in repair. Any person filling up or partially filling up any such drain shall be liable to a fine of not less than five dollars nor more than fifty dollars, and, in default of payment, to imprisonment for not less than one week or more than two months. R.S.M., c. 133, s. 740.

The majority of the Court of Appeal was of the opinion that this enactment did not operate for the benefit of the plaintiff or other proprietors in the vicinity, but that the purpose of the drain was to enable the defendant municipality to make roads in a low-lying district, and that, although, incidentally, it had the effect, while properly maintained, of draining the plaintiff's land and so improving it, the intent of the legislative provision was, nevertheless, merely to declare that, as between the Government and the municipality, the duty to repair fell to the municipality, and not to the Government; and that it was not intended to impose liability upon the municipality to a proprietor who had suffered damages by the flooding of his land, consequent upon the natural clogging of the ditch which it was the duty of the municipality to prevent; this view, it is said, is confirmed by sections 624 and 625 of the *Municipal Act* respecting public roads, by which it is not only provided that the roads shall be kept in repair by the municipality within which they lie, but expressly, that, for default in keeping the roads in repair, the municipality shall

> be civilly responsible for all damages sustained by reason of such default.

But I am not satisfied with that interpretation, nor to reverse the decision of the learned County Court Judge. It is possible of course to speculate as to legislative motives in most cases depending upon the application or interpretation of statutes which come to be determined; but the

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meaning must be ascertained by interpreting the language which the legislature has used, not by substituting a different expression. It is more likely, I think, that the legislature would provide a sanction for the upkeep of the drains to the construction of which the province had contributed than that it would use the language of section 740 for no other purpose than to deny provincial liability; and I am unable to reject the meaning, so plainly expressed, that it is the duty of the municipality to clear out the drains described. If it were for the maintenance of the road that the drain was required, the neglect to repair it would, I should have thought, be actionable negligence which could be charged by any person who, in the lawful use of the highway, suffered damages by the neglect to repair. This would seem to follow from Lord Watson's judgment in the Privy Council in *Sanitary Commissioners of Gibraltar* v. *Orfila* (1), where, referring to the *Mersey Docks* case (2), he quoted the rule there enunciated by Blackburn J., which met with the approval of the House of Lords, that

> In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing.

It is true that, as to the road itself, the civil liability to answer for damages caused by non-repair, is expressly provided by sections 624 and 625 of the *Municipal Act*. But the question of municipal liability for mere non-feasance in the maintenance of highways and bridges had been much agitated in Canada; and it had been viewed as an exception from the general law, for reasons which are to be extracted from a long line of cases, early examples of which include *Thomas* v. *Sorrell* (3), and the well known case of *Russell* v. *Men of Devon* (4); and the question had, for Nova Scotia at least, been determined by the judgment of the Privy Council in *Municipality of Pictou* v. *Geldert* (5), overruling a decision of this court and the provincial cases under the *Municipal Act* of that province. And subsequently, in this court, it was held, upon appeal from British Columbia, in the *City of Vancouver* v. *McPhalen* (6) (affirming the

(1) (1890) 15 A.C. 400 at 412.
(2) (1864) L.R. 1 H.L. 93.
(3) (1667) Vaughan, 340.
(4) (1788) 2 T.R. 667.
(5) [1893] A.C. 521.
(6) (1911) 45 Can. S.C.R. 194.

judgment of the Court of Appeal) that, quoting the words of the headnote,

Where a municipal corporation is guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect (v.g. 64 Vict., ch. 54 B.C.), persons suffering injuries in consequence of such omission may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself or in the circumstances in which it was enacted justifies the inference that no such right of action was to be conferred.

Per Fitzpatrick, C.J., and Duff, J.—The common law obligation under which the inhabitants of parishes, in England, through which highways passed were responsible for their repair has no application in the province of British Columbia.

It was therefore very natural that in Manitoba they should introduce special provisions with regard to the highways and bridges; but the reasons did not exist for any express declaration of civil liability as to the ditches which did not form part of the roads; and as to these I would not draw any inference of an intention to exempt the municipality from liability for flooding caused by the neglect of its statutory duty to repair.

The question therefore is, whether the Assembly, in enacting section 740 of the *Municipal Act*, expressed, as it is, without any qualification, has shewn an intention to exclude the proprietors of contiguous lands from the benefit of its general provisions; and the answer, I think, is to be found in the dissenting judgment of Blackburn, J., in *Coe* v. *Wise* (1). The majority was reversed by the Exchequer Chamber (2), which maintained the action for the reasons stated by Blackburn, J., to the effect that in view of then recent decisions in *Gibbs* v. *Trustees of Liverpool Docks* (3), and *Mersey Docks Board* v. *Penhallow* (4), the enquiry was reduced to one question, namely, whether the statute had imposed on the Drainage Commissioners a duty to take due care that the sluice was maintained as unqualifiedly as the duty which the law cast upon the Mersey Docks Board to take care that their docks were reasonably safe. He quoted the statute and proceeded to say that

Nothing has been pointed out on the argument, and I have not myself discovered anything to qualify this enactment, which certainly seems to

(1) (1864) 5 B. & S. 464, at 465.
(2) (1866) L.R. 1 Q.B. 711.
(3) (1858) 3 H. & N. 164.
(4) (1861) 7 H. & N. 329.

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me to cast upon the Drainage Commissioners the duty to maintain this sluice. The common law gives a right of action against those neglecting a duty cast upon them to those who, in consequence, sustain damage. I entirely assent to the position that if the Legislature have shewn an intention to prohibit this right of action in the present case that will effectually prevent it, and I agree that such an intention need not be shewn in express words if it can be collected from the whole Act, but I think that the onus lies on the defendants to shew that it was intended to prevent the right of action, and not on the plaintiff to shew that it was intended to give it.

My conclusion therefore is that, *prima facie,* a proprietor whose lands are flooded by reason of the neglect of the municipality to discharge its statutory duty of clearing the drain would, in the absence of any expression or necessary implication of the statute to the contrary, be entitled to recover from the municipality the consequential damages; and I see no reason why that intention should be regarded as improbable. The burden is upon the municipality to displace the ordinary and natural interpretation of the clause which creates the duty; and our attention has not been called to any provision of the statute to justify the competing suggestion, which seems to rest upon nothing more real than conjecture, that the clause in question was meant only to relieve the province of a possible liability against which it was desirous to protect itself.

The argument by which it is sought to limit the application of the statute by reference to its headings has been held to be inadmissible in cases like this where the enactment is clear. But if the headings may be invoked, it should be observed that section 740, along with the two next preceding sections, is itself included in a separate group led by the words "Protection of Property"—an introduction not inapt for a clause intended to impose a duty of care to prevent the flooding of property.

I would allow the appeal and restore the trial judgment, with costs, both in this court and in the Court of Appeal.

CANNON J. (dissenting).—Under section 471 of the *Municipal Act,* being chapter 133 of the Revised Statutes of Manitoba, 1913, the council of any municipality must make full and adequate provision for conveying off the water and preventing its lodgment on any place, or the overflow thereof on contiguous lands; and, accordingly,

the council shall not permit the damming up, obstruction, or leave uncompleted for any length of time any ditch in or upon any road, highway, street, lane, *or elsewhere in the municipality.*

Section 472 gives a recourse for damage alleged to have been done to the property of an individual in consequence of a violation of section 471.

Moreover, under section 740, the municipality had the duty to keep properly cleaned out and in repair this drain which had been constructed and reconstructed partially at the expense of the government of Manitoba.

The above statutory duty being imposed, in my opinion, on the respondent, for the benefit of individual landowners like the appellant, the following questions must be answered:

(*a*) Has the appellant suffered a special damage by such breach?

The answer must be in the affirmative, in view of the findings of the trial judge and the uncontradicted evidence of the plaintiff.

(*b*) Is the damage within the mischief contemplated by the statute?

I reach the conclusion that the statute contemplates the conveying off of the water and preventing its lodgment or the overflow thereof on contiguous land; the damages claimed by the plaintiff resulted to his property from the very mischief mentioned in the above section.

(*c*) Has the statute, expressly or by implication, excluded the remedy by action?

My answer is in the negative. Section 472 creates an additional recourse, but does not do away with the jurisdiction of the ordinary courts to enable an individual to recover damages to his property in consequence of a violation by a municipality of the provisions of sections 471 and 740 of this statute.

I would therefore grant the appeal and restore the judgment of the trial judge which costs throughout for the appellant.

Appeal dismissed with costs.

Solicitor for the appellant: *M. S. Colquhoun.*

Solicitors for the respondent: *George & Watson.*

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*Feb. 26.
*June 12.

VICTOR ABRAN (DEFENDANT).....APPELLANT;

AND

PERKINS ELECTRIC LIMITED (PLAINTIFF)

AND

GEORGE F. PERKINS (INTERVENANT) ..... } RESPONDENT.

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

Revendication—Petition to recover goods—Judgment granting it—Intervention by third party claiming ownership or lien—Goods destroyed by fire before judgment dismissing intervention—Right of owner to claim value of goods from third party—Allegation of petition—Whether it constitutes an admission or "aveu"—Litigious rights—Arts. 1200, 1570, 1582 et seq. C.C.

One who, upon legal proceedings being brought against the liquidators of an insolvent estate to recover possession of certain machines, by filing an intervention in the proceedings prevents the owner of the machines from getting immediate possession (to which the liquidators consent), is liable to the owner for the value of the machines if, pending contestation, they are destroyed by fire and the intervention is subsequently dismissed. Per Rinfret and Lamont JJ.: In such a case, the intervenant is not penalized for having had recourse to the courts in an attempt to exercise his rights; but, under 1200 C.C. and foll., he is condemned to fulfill the obligation incurred by reason of the wrongful detention of the property of another, after having been duly put *en demeure* to deliver it.

The allegation in the respondent's petition brought against the liquidators for the recovery of the machines, that the goods were in the liquidators' possession, did not constitute an admission or "aveu" of such a fact; but it was simply an averment of fact, in the nature of an argument, which the liquidators were at liberty to admit or deny. Per Duff, Newcombe and Cannon JJ.—Even if such an allegation could be construed as an admission or "aveu," it cannot be invoked as such by the appellant and cannot affect the question as to the possession of the goods at the time of the fire, which occurred long after such allegation, inasmuch as it had been made in proceedings taken, not against the appellant, but against the liquidators.

The provisions of the Code relating to *retrait litigieux* (C.C. 1582 & foll.) do not apply to the sale of debts and rights of action of an insolvent estate made, after judicial authorization, by the liquidator of the estate.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Marchand J., and maintaining the respondent's intervention.

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

Gregor Barclay K.C. for the appellant.

H. N. Chauvin K.C. for the respondent.

The judgment of Duff, Newcombe and Cannon JJ. was delivered by

CANNON J.—Cette cause revient pour la seconde fois devant cette cour, après avoir été jugée à deux reprises par la Cour Supérieure et la Cour du Banc du Roi. Dans les deux cas, l'appelant, après avoir réussi en Cour Supérieure, s'est vu condamné par la Cour du Banc du Roi à payer aux demandeurs-intimés $2,769, à défaut de la remise de trois appareils de vues animées, propriété des intimés.

Le 9 septembre 1922, la demanderesse produisait une requête dans la faillite de J.-A. Caron et J.-F. Toupin, du Cap de la Madeleine, propriétaires de théâtre, pour être mise en possession de trois appareils cinématographiques dont elle réclamait la propriété. Cette requête était dirigée contre les syndics Damphousse et Hébert, qui ne la contestèrent pas.

Le 10 octobre 1922, l'appelant Abran fit une intervention demandant le renvoi de la requête des demandeurs, prétendant être le propriétaire de certaines machines échangées en paiement partiel des appareils en question, et demandant d'en garder possession, à tout événement, vu l'existence d'un privilège de locateur sur les effets réclamés par l'intimée.

L'intervention de l'appelant fut rejetée par jugement en date du 2 avril 1924.

Les syndics informèrent l'intimée qu'ils se trouvaient dans l'impossibilité de le remettre en possession des appareils, vu qu'ils avaient été détruits par un incendie le 26 décembre 1922, au cours de l'instance. Lors du feu, Abran était propriétaire de l'immeuble, dont il laissait la jouissance aux syndics, qui avaient sous-loué à des tiers. En

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vertu du bail, tous les droits des syndics contre le locataire avaient été transportés à l'appelant depuis le 23 juillet 1922, et ce dernier devenait le locateur ayant droit direct d'action contre le sous-locataire.

La Cour du Banc du Roi a décidé que l'appelant, lors de l'incendie, était en possession des appareils, en défaut de les remettre à la demanderesse, leur propriétaire, et, qu'en conséquence, vu la perte de la chose, il devait en payer la valeur.

L'appelant prétend que le jugement de la Cour du Banc du Roi est erroné:

1° En déclarant que l'appelant aurait réclamé, le 10 octobre 1922, la possession des appareils cinématographiques en question;

2° En déclarant que l'appelant était en possession de ces appareils lors de l'incendie, le 26 décembre 1922;

3° Par un factum supplémentaire, l'appelant soulève un point nouveau basé sur le prétendu aveu de l'intimée, dans sa première réclamation, que, en septembre 1922, les machines étaient en possession des syndics; le jugement rendu entre les parties sur l'intervention de l'appelant et celui accordant la requête en revendication de l'intimée ayant acquis l'autorité de chose jugée, militeraient en faveur de l'appelant.

Ce dernier moyen ne semble pas avoir été soulevé devant la Cour du Banc du Roi; et, malgré l'argument ingénieux du procureur de l'appelant, je ne crois pas pouvoir lui donner raison. Lorsque l'intimée a allégué que les syndics étaient en possession le 9 septembre 1922, il ne faisait que constater que ces derniers, malgré ses instances depuis la faillite, au mois d'avril précédent, avaient négligé de remettre ces machines, qui, de toute évidence, en vertu des contrats, n'étaient pas la propriété des faillis et n'auraient jamais dû être considérés comme faisant partie de l'actif cédé. Mais, comme il appert abondamment à la preuve, les syndics, de concert avec l'appelant, dans le but de conserver une valeur au théâtre, propriété de ce dernier, et de lui garder une clientèle en continuant l'exploitation, avaient adopté tous les moyens dilatoires possibles pour conserver les machines absolument nécessaires à cette fin. On avait l'espoir de trouver un acquéreur qui permettrait de désintéresser l'appelant, propriétaire de l'immeuble, et

payer en même temps la demanderesse, propriétaire des appareils sur lesquels rien n'avait été payé par les faillis. D'ailleurs, lorsque cette allégation fut faite par le procureur de la demanderesse, aucune instance n'existait entre cette dernière et l'appelant. Quand l'appelant eut produit son intervention pour conserver la possession des machines, la demanderesse, dans sa réponse, indique en quoi consistait la prétendue possession des syndics, qui, depuis le 22 avril 1922, avaient refusé ou négligé de lui remettre ces machines, qui n'avaient jamais appartenu à Caron et Toupin, les faillis. Je crois donc que cette allégation, même si elle constituait un aveu, ne saurait être invoquée par l'appelant et ne peut affecter la possession des objets lors de l'incendie, plusieurs mois après cette allégation, vu qu'elle aurait été faite dans une procédure dirigée non contre lui, mais contre les syndics à la faillite. Dans la contestation de l'intervention par la demanderesse, on ne peut relever aucune allégation semblable, et le jugement se contente de renvoyer comme non fondée en fait et en droit l'intervention de l'appelant. Les amendements intervenus après l'incendie ont rétroagi jusqu'à la date de la réclamation et ne sauraient aider la prétention de l'appelant. D'ailleurs, suivant Demolombe, vol. 30, n° 450:

> Ce qui caractérise donc essentiellement l'aveu, c'est, disons-nous, qu'il est fait avec la volonté formelle, avec l'intention sérieuse, de donner à une autre personne le droit de s'en prévaloir comme d'une preuve, en tenant le fait pour avéré.
>
> D'où il suit que toutes les déclarations, auxquelles ce caractère manque, ne sauraient légalement constituer un aveu, lors même, bien entendu, qu'elles seraient relatives au patrimoine et aux affaires de celui dont elles émanent.
>
> Telles sont, par exemple, les allégations et les explications fournies par une partie à l'appui des moyens sur lesquels elle fonde sa demande ou sa défense. Ce sont là des armes, qu'elle emploie dans son seul intérêt, et dont elle n'entend certes pas se dessaisir au profit de son adversaire. Ce sont, en un mot, seulement des moyens, des arguments; ce ne sont point des aveux, c'est-à-dire des déclarations faites avec l'intention de fournir une preuve toute faite contre soi à la partie adverse.

Aubry & Rau, vol. 8, sec. 751, p. 167, ajoute:

> L'aveu (*hoc sensu*) est la déclaration par laquelle une personne reconnaît pour vrai, et comme devant être tenu pour avéré à son égard, un fait de nature à produire contre elle des conséquences juridiques.
>
> Il résulte de cette définition, que toutes espèces de déclaration faites par une personne relativement à ses affaires ne constituent point des aveux, et qu'on ne doit considérer comme tels que les déclarations faites d'une manière sérieuse, et avec la pensée que celui au profit duquel elles ont eu lieu se trouvera, en les invoquant, dispensé de prouver les faits

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qui en forment l'objet. Ainsi, les allégations faites par une partie à l'appui des moyens sur lesquels elle fonde sa demande ou sa défense ne sont point à considérer comme des aveux, alors même que ces allégations se trouveraient consignées dans un interrogatoire sur faits et articles, et qu'elles auraient été répétées à l'audience. Ainsi encore, les déclarations faites par un témoin, dans une procédure civile ou criminelle, ne forment pas des aveux.

Du moment que nous éliminons le troisième moyen soulevé par le procureur de l'appelant, l'appel doit nécessairement être renvoyé, conformément aux deux jugements unanimes rendus en cette cause par la Cour du Banc du Roi.

En demandant à cette cour de déclarer qu'il n'était pas en possession lors de l'incendie, Abran nous invite à trouver contraire à la vérité sa réclamation pour la valeur des machines, dans laquelle il affirmait que ces machines étaient dans la bâtisse incendiée, lui appartenaient et étaient en sa possession à la date du feu. D'ailleurs, sans tenir compte des droits de retention qu'il alléguait pour empêcher les syndics de remettre à l'intimée sa propriété, le seul fait qu'il réclamait un privilège de locateur démontre qu'il avait, comme tel, la possession *de facto* des machines qui garnissaient son immeuble.

Comme je l'ai déjà exposé, dans une cause de *Manson* v. *Hartney Company Ltd. and Mayer* (1):

> Cette mise en gage des objets apportés par le locataire remonte au droit romain et au droit coutumier. Ce gage s'établit tacitement par le seul fait de l'entrée en possession du preneur et l'on peut dire qu'il y a deux possessions superposées; celle du locataire et celle du bailleur; ce dernier acquiert sur les meubles de son locataire un titre de possession indirecte résultant de cette circonstance que ces meubles se trouvent dans son immeuble. De plus, le privilège frappe les meubles garnissant les lieux loués qui appartiennent à un tiers ou qui ont été confiés par ce tiers au locataire, à moins que le tiers propriétaire ait notifié au bailleur son droit de propriété avant l'introduction de l'objet dans les lieux loués.

L'honorable juge-en-chef Lafontaine, *Re: Miller* v. *Williams & Clement* (2) disait:

> Il est de principe que le privilège du locateur frappe dès leur entrée dans l'immeuble loué les meubles qui le garnissent, même lorsqu'ils appartiennent à des tiers et que ce privilège a pour base un nantissement de fait qui subsiste aussi longtemps que le locateur d'une part conserve la possession, à titre de propriétaire, de l'immeuble loué et aussi longtemps d'autre part que les meubles qui l'ont garni y restent déposés, le locateur étant dans la situation d'un créancier gagiste, dont le privilège demeure et

(1) [1929] Q.R. 47 K.B. 148, at 152.

(2) [1922] Q.R. 61 S.C. 184, at 186.

se conserve par lui-même, sans qu'il soit besoin d'aucune procédure judiciaire, aussi longtemps que le gage a été mis et est resté en la possession d'un créancier gagiste.

Il me paraît évident que, par son intervention, l'appelant a voulu, au moins, garder la possession des machines qu'il considérait comme gage garantissant son loyer. Il est bien vrai que cette intervention et cette demande étaient clairement de mauvaise foi. Il savait, depuis la première assemblée des créanciers, que ces appareils appartenaient à la demanderesse; et, par sa lettre du 30 mars 1922, adressée à la demanderesse, il informait cette dernière qu'il était devenu propriétaire du Théâtre National, au Cap de la Madeleine, et qu'il désirait la voir le plus tôt possible au sujet des machines. L'appelant savait donc, avant même de donner à bail ce theâtre, que les machines qui s'y trouvaient étaient la propriété de la demanderesse. Il a voulu, de concert avec les syndics, garder et utiliser, de propos délibéré, pour son profit et avantage, le bien d'autrui, sans en payer le prix.

Bien plus, il a eu l'audace d'assurer cette machinerie contre le feu comme étant sa propriété. Il en a reçu la valeur des compagnies d'assurance; et il prétend aujourd'hui ne pas être tenu d'indemniser le propriétaire, qui, n'eût été son intervention évidemment vexatoire dans la faillite, aurait obtenu dès septembre 1922, avec le consentement des syndics, sous l'autorité de la Cour Supérieure, remise des machines. Par cette réclamation intempestive, l'appelant s'est mis lui-même en demeure et en défaut et doit, en conséquence, subir les conséquences de la perte par incendie des objets qu'il détenait injustement. Il n'a ni allégué, ni prouvé, cas fortuit ou que la chose aurait également péri en la possession du créancier (art. 1200 C.C.). Il est clair, d'après les témoignages des syndics, que les locataires et sous-locataires détenaient et exploitaient les machines pour Abran, qui produisit son intervention pour justifier et prolonger le retard des syndics à se rendre à la juste demande de l'intimée.

L'appelant, à l'audition orale, a suggéré que le demandeur par intervention fait valoir un droit d'action qui ne saurait être cédé et, qu'à tout événement, il a acquis un droit litigieux, sujet à certaines restrictions. Son mémoire supplémentaire ne mentionne pas ces deux moyens. Je ne

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sais s'il y renonce implicitement, mais je les crois mal fondés. L'intimé a acquis l'universalité des biens et créances de la compagnie demanderesse en liquidation au cours de l'instance et avait droit de se substituer à elle pour obtenir jugement sur l'action originaire demandant livraison des machines détenues illégalement ou leur valeur (art. 1200 C.C.). Nous pouvons dire que toutes les créances qui font partie d'un patrimoine peuvent, à moins d'une exception formelle contenue dans une disposition législative, être l'objet d'une cession-transport. Dans l'espèce, nous avons l'acte des liquidateurs qui autorise précisément la vente de l'actif d'une compagnie; et, d'après la décision de la Cour du Banc du Roi *re Brossard* v. *Banque du Peuple et DeSerres* (1),

> la vente et le transport en bloc des biens, effets et droits mobiliers de la compagnie, soit aux enchères publiques, soit par vente privée, est un moyen de liquidation autorisé par la loi et l'autorité judiciaire; cette liquidation, nécessaire et en obéissance à la loi, participe beaucoup du caractère des ventes judiciaires, et il répugnerait de considérer pareille vente comme celle de droits litigieux.

Mais l'article 1582 C.C. ne peut être appliqué à l'espèce, car le défendeur n'a jamais demandé le retrait et offert de rembourser à l'intervenant intimé le prix de vente avec frais et loyaux coûts et les intérêts. L'appelant a contesté la créance au mérite et jusqu'à l'argument devant cette cour, il n'a jamais été question de retrait; or, pour exercer ce retrait, il faut le demander par la défense. Le but du retrait litigieux étant de mettre fin au procès, il est inadmissible que le retrayant pousse le procès jusqu'au bout et n'exerce le retrait qu'après que le droit aura cessé d'être litigieux par la décision sur le fond. 19 Baudry-Lacantinerie et Saignat, p. 952; 7 Mignault, 203.

Je n'ai donc aucune hésitation à renvoyer l'appel avec dépens.

The judgment of Rinfret and Lamont J.J. was delivered by

RINFRET J.—Les faits de ce litige sont compliqués. La multiplicité des procédures et les nombreux amendements n'ont pas eu pour résultat de simplifier la situation.

Tel qu'il se présente à cette cour, après deux appels à la Cour du Banc du Roi et au moment de ce second appel à

(1) [1903] Q.R. 13 K.B. 148.

la Cour Suprême, l'intervenant George F. Perkins demande que le défendeur Abran soit condamné à lui payer la valeur de certains appareils cinématographiques qui ont été détruits dans un incendie, alors que, suivant la prétention de Perkins, Abran était en demeure de lui en faire la livraison.

La Cour du Banc du Roi a maintenu l'intervention et a condamné Abran à payer. Ce dernier a prétendu que le jugement devrait être infirmé, pour plusieurs raisons dont nous avons maintenant à décider si elles sont fondées.

Le 26 août 1921, J.-A. Caron, alors seul propriétaire du Théâtre National, situé au Cap de la Madeleine, province de Québec, a acheté de George F. Perkins, qui faisait alors affaires sous le nom de Perkins Electric Company, des machines de cinéma, qu'il installa dans son théâtre. Cette acquisition fut faite au moyen d'un de ces contrats en vertu desquels le vendeur demeure propriétaire jusqu'à paiement intégral du prix de vente.

Alors que le prix de vente n'avait pas encore été payé et que, par conséquent, Perkins Electric Company était encore propriétaire des machines, J.-A. Caron, le 20 décembre 1921, vendit son théâtre à réméré au docteur C.-A. Bouchard. Les machines étaient dans le théâtre au moment de cette vente.

Le 21 janvier 1922, J.-A. Caron fit un acte de société avec J.-Henri Toupin, sous le nom de Caron & Toupin. Dans l'intervalle, Perkins Electric Company était devenu The Perkins Ladd Electric Limited.

Le 24 février 1922, la société Caron & Toupin acheta de The Perkins Ladd Electric Limited les trois machines cinématographiques dont il s'agit dans la présente cause. Elle le fit au moyen d'un contrat semblable à celui qui était intervenu dans le premier cas, c'est-à-dire que le vendeur demeurait propriétaire des machines jusqu'à ce qu'elles fussent entièrement payées par les acheteurs. En plus, The Perkins Ladd Electric Limited reprit les machines qui avaient été vendues à Caron le 26 août 1921. Il est à noter qu'à cette date le prix d'achat de celles-ci n'avait pas encore été complètement acquitté et que Caron, ou la société Caron & Toupin, n'en était pas encore devenu propriétaire. Aussi The Perkins Ladd Electric Limited se contenta-t-elle de créditer sur le prix d'achat des nouvelles machines

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le montant qui avait jusqu'alors été payé en acompte en vertu du premier contrat.

Caron négligea d'exercer son droit de réméré, et le docteur Bouchard devint le propriétaire irrévocable du théâtre (art. 1550 C.C.). Le 25 mars 1922, il vendit le théâtre à Abran.

Le 22 avril 1922, la société Caron & Toupin fut déclarée en faillite, et MM. Damphousse & Hébert furent nommés syndics. Par lettres patentes supplémentaires, le nom The Perkins Ladd Electric Limited avait été changé en celui de Perkins Electric Limited. Dès la première réunion des inspecteurs de la faillite, à laquelle Abran assistait, Perkins Electric Limited fit valoir ses droits de propriétaire aux machines cinématographiques qui étaient dans le Théâtre National. Ces droits furent expliqués et établis; et, de ce moment, Abran en fut pleinement informé.

Par diverses lettres écrites directement, ou par l'entremise de ses avocats, Perkins Electric Limited réclama la possession des machines. Mais les syndics à la faillite de Caron & Toupin et le propriétaire du théâtre, Abran, se rendant compte qu'ils pourraient faire une vente plus avantageuse si les machines restaient dans le théâtre, agirent de concert pour en retarder la remise aussi longtemps que possible. C'est alors que Perkins Electric Limited fit une requête demandant qu'il fût déclaré qu'elle était la propriétaire des machines cinématographiques en question, et que la possession lui en fût attribuée.

Cette requête était dirigée contre les syndics. Ils décidèrent de ne pas la contester et de la laisser accorder. Sur présentation de la requête, ils consentirent à ce que la compagnie Perkins reprit possession; mais la compagnie en fut empêchée par suite du refus d'Abran, qui, effectivement, produisit une intervention demandant le renvoi de la requête. Les raisons qu'Abran invoquait étaient les suivantes:

Comme subrogé aux droits de son vendeur Bouchard, il était propriétaire des machines qui avaient fait l'objet du premier contrat avec la compagnie Perkins et que cette dernière avait reprises lors de la deuxième vente. Il ajourtait

que même si la requérante (Perkins Electric Limited) était propriétaire des machineries qu'elle réclame, l'intervenant aurait son privilège de locateur sur lesdits effets mobiliers n'ayant jamais connu le fait que ladite requérante était propriétaire desdits effets.

L'intervention d'Abran porte la date du 10 octobre 1922. Elle fut rejetée par un jugement, en date du 2 avril 1924, qui déclarait que Perkins Electric Limited avait toujours été propriétaire des machines qu'elle réclamait par sa requête, qu'Abran n'avait nullement justifié ses prétentions, qu'il n'avait aucun droit sur les machines originaires ou sur celles qui les avaient remplacées, qu'il n'avait pas prouvé qu'il lui fût dû quoi que ce fût pour loyer au moment de la requête de Perkins Electric Limited, et que son intervention était mal fondée en fait et en droit. Il n'y eut pas d'appel de ce jugement.

Mais, lorsque Perkins Electric Limited vint subséquemment pour prendre possession de ces machines, elle fut informée que, au cours de la contestation, à savoir le 26 décembre 1922, le théâtre et les machines avaient été détruites par un incendie.

C'est dans ces circonstances que Perkins Electric Limited intenta son action contre Abran, concluant que ce dernier fût condamné à lui payer la valeur des machines.

Il n'est pas nécessaire de relater toutes les procédures et les appels qui se sont produits depuis. Ils n'ont pas modifié la nature de cette action par laquelle la demanderesse alléguait qu'Abran était en demeure de lui remettre la possession des machines lorsqu'elles furent détruites par l'incendie et que, par conséquent, il était maintenant tenu d'en payer la valeur.

Par deux fois la Cour Supérieure a décidé dans la négative et la Cour du Banc du Roi a unanimement décidé dans l'affirmative. Le jugement de la Cour Suprême qui est intervenu entre les deux appels avait simplement ordonné un nouveau procès par suite d'insuffisance dans les allégations et dans la preuve.

Depuis que la présente cause a été commencée, George F. Perkins a été substitué à Perkins Electric Limited par suite du fait que cette dernière avait été mise en liquidation et que, le 25 octobre 1926, le liquidateur lui avait cédé.

all the assets of the said Perkins Electric Limited in liquidation, including * * * bills and accounts receivable * * * the good will of the business, all claims, demands and rights of action, bad debts and other assets belonging to, or possessed by the said company * * * with an absolute right on the part of the purchaser to ask, demand, sue for and recover the said debts, claims and demands, and every one of them, and to give effectual receipts and discharge thereof.

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Cette vente fut effectuée par le liquidateur avec l'avis des inspecteurs de la liquidation et à la suite d'une autorisation judiciaire qui lui fut donnée par la Cour Supérieure du district de Montréal.

A l'audition devant cette cour, l'appelant Abran a prétendu que Perkins n'était pas valablement saisi de la créance; que c'était d'ailleurs un droit litigieux qui ne pouvait faire l'objet d'une cession; qu'il ne pouvait être tenu responsable en dommages du fait qu'il aurait fait valoir ses droits devant les tribunaux; que, lors de l'incendie, il n'était pas en possession des machines, et que, sur ce point, il pouvait invoquer l'admission de la compagnie Perkins elle-même dans sa requête pour réclamer les machines des syndics.

La seule objection d'Abran qui mérite notre attention est celle où il nie sa responsabilité sous prétexte qu'il n'était pas en possession des machines lors de l'incendie.

Nous pouvons très rapidement disposer de toutes les autres. Le liquidateur de Perkins Electric Limited a vendu à Perkins toutes les créances et droits d'actions de la compagnie. La validité d'une pareille vente est reconnue par la loi (art. 1570 C.C.) et fut autorisée par la cour. La réclamation dont il s'agit tombait dans la catégorie des créances et droits d'actions. La compagnie Perkins avait même déjà intenté son action lors de la vente de cette créance par le liquidateur à Perkins. Ce dernier a acquis un titre parfaitement légal et valide. Il ne lui restait plus qu'à faire la procédure nécessaire, comme il l'a fait, pour que son nom fût substitué à celui de Perkins Electric Limited.

Il est vrai qu'au moment de cette vente le droit était incertain, disputé par son débiteur, et que la demande en était déjà intentée en justice. Le droit était donc réputé litigieux (art. 1583 C.C.). Mais

la cession par adjudication de créances litigieuses dépendant d'une faillite, ou la cession de créances comprises dans la vente d'une universalité de biens ou de créances, n'est pas soumise au retrait.

(*Guilbault* v. *Desmarais* (1); *Brossard* v. *Banque du Peuple* et *Gaspard Deserres*) (2).

En outre, même lorsqu'il s'agit d'un droit litigieux soumis au retrait, celui de qui il est réclamé peut en être déchargé seulement.

(1) [1889] 18 R.L. 516.

(2) [1903] Q.R. 13 K.B. 148.

en remboursant à l'acheteur le prix de vente avec les frais et loyaux coûts et les intérêts sur le prix à compter du jour que le paiement en a été fait. (Art. 1582 C.C.)

et, pour bénéficier de cette disposition de la loi, le débiteur doit s'en prévaloir dès le début du litige en faisant des offres pures et simples et sans condition du prix de vente qu'il lui incombait ainsi de rembourser (*McNaughton* v. *Irvine*) (1). Le but de cette disposition de la loi est de mettre fin au procès à son origine. Si le débiteur ne s'en prévaut pas *in limine,* ce but ne peut plus être atteint; et il est trop tard pour essayer de faire valoir ce moyen après que le débiteur a contesté l'action (19 Baudry-Lacantinerie, p. 952; 24 Laurent n° 602). Nous mentionnons ce dernier précepte uniquement pour démontrer les limites de ce moyen de défense. Nous n'avons même pas besoin d'en parler ici, puisque, à aucune phase de la procédure et pas même depuis que la cause est en délibéré devant nous, l'appelant n'a rempli les conditions nécessaires pour être en mesure d'invoquer le bénéfice des articles 1582 et suivants. La question du retrait litigieux ne se pose même pas.

Il en est de même de la prétendue admission que Perkins Electric Limited aurait faite dans sa requête originaire pour revendiquer la possession des machines. Elle a allégué que, lors de la faillite de Caron & Toupin, les syndics avaient pris possession et avaient depuis conservé possession des machines. Une allégation n'est pas une admission: elle est une prétention de fait ou un argument de droit. Elle ne constitue un aveu que si (suivant l'expression de Aubry & Rau, vol. 8, p. 167, n° 751) elle

reconnaît pour vrai et comme devant être tenu pour avéré à son égard un fait de nature à produire contre (la personne qui la fait) des conséquences juridiques.

C'est ainsi que l'entend Pothier (Obligations, n° 831). Il n'y avait aucun aveu dans l'allégation de la compagnie Perkins que les syndics étaient en possession des machines. Elle invoquait par là un simple moyen de fait, que les syndics pouvaient ou non contester, mais dont, au moins pour les fins de ce litige, il n'y avait pas lieu de demander acte. D'ailleurs, comme nous allons le voir plus loin, toute cette situation a été changée par le fait même de l'appelant, lorsqu'il a jugé à propos d'intervenir sur la requête pour possession.

(1) [1926] S.C.R. 8.

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Enfin, traiter l'action de Perkins comme une demande en dommages résultant du fait que l'appelant aurait tenté d'exercer un droit devant les tribunaux, c'est déplacer complètement la question. Il ne s'agit pas ici d'une action en dommages; et Perkins ne demande pas une pénalité contre Abran pour avoir contesté sa requête en possession. Il réclame l'exécution d'une obligation en vertu de laquelle Abran est devenu son débiteur, l'obligation de remettre les machines qu'il détenait. "A la place d'une exécution réelle, qui n'est plus possible", Perkins exige "une exécution fictive, une exécution en argent" (Baudry-Lacantinerie, 2e éd. tome 3, nº 1918). Comme conséquence du jugement de la cour, Abran ne sera pas puni; il sera simplement contraint à exécuter son obligation de la seule façon dont cette exécution soit encore possible, c'est-à-dire en payant l'équivalent pécuniaire de la valeur des machines détruites par l'incendie. L'effet de la demeure est de le rendre tenu d'indemniser "encore qu'il n'y ait aucune faute de sa part." (Planiol, *Traité élémentaire de droit civil,* 8e éd. vol. 2, nº 625).

Bien que l'objet ait péri, l'obligation subsiste. Elle est "perpétuée", suivant l'expression des jurisconsultes romains (Baudry-Lacantinerie, *loco citato*). L'action que prend le créancier, en pareil cas, n'est rien autre chose qu'une demande de l'exécution de l'obligation.

Il ne reste plus qu'à se demander si, en l'espèce, comme l'a décidé la Cour du Banc du Roi à deux reprises, l'action était justifiée. Nous sommes d'avis qu'elle l'était.

La compagnie Perkins a réclamé la possession de ces machines par requête devant la cour. Les syndics ont immédiatement consenti à ce que les machines fussent remises. En autant qu'ils avaient la possession, comme représentant les droits de Caron & Toupin, ils l'ont abandonnée et en ont effectué la délivrance à la compagnie, au sens même du code. Ils ont "consenti qu'elle en prenne possession, tous obstacles en étant écartés". (Art. C.C. 1493.) Ils n'avaient plus l'*animus possidendi.*

A partir de ce moment, rien n'empêchait plus la compagnie Perkins de prendre les machines et de les transporter dans ses magasins. Si elles eussent été là lors de l'incendie du Théâtre National, elles n'auraient pas péri.

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Mais Abran est intervenu. Il a contesté le droit de la compagnie à la possession des machines. Il en avait, en somme, la possession physique, puisque les machines étaient dans son théâtre. Du moment qu'il a produit son intervention, il en a, au moins, assumé la détention au sens de la loi. Il affirmait son droit à cette détention sous prétexte qu'il n'était pas tenu de les laisser aller avant que la compagnie Perkins eût remis les machines qu'elle avait reprises lors du second contrat, et sous prétexte également qu'il avait un droit privilégié pour le paiement du loyer qu'il prétendait lui être dû.

Le litige pour la possession des machines s'est donc engagé de ce moment entre la compagnie Perkins, qui les réclamait, et Abran, qui les détenait et qui ne voulait pas les laisser aller.

En gardant et en retenant les machines, Abran encourait l'obligation de les remettre si le jugement sur la requête en revendication les attribuait à la compagnie Perkins.

C'est ce qui s'est produit. La cour a reconnu les droits de propriété de la compagnie et a ordonné de la remettre en possession des machines. Cet ordre s'adressait à la seule personne qui avait contesté le droit à la possession et qui les détenait depuis que la contestation était liée sur l'intervention. Cet ordre s'adressait donc à Abran.

Son intervention n'avait pas été produite dans le but d'appuyer les droits des syndics, que d'ailleurs ces derniers avaient cessé d'affirmer. Son intervention avait été faite pour son propre compte, dans le but de faire reconnaître ses droits à lui. Etant le seul qui, dès lors, gardait et retenait les machines, il encourait par le fait même l'obligation de les rendre, du moment que son droit de rétention n'était pas reconnu. Le jugement sur la requête en revendication ayant déclaré qu'il n'avait pas de droit de rétention, il est devenu débiteur de l'obligation de rendre; et c'est là que l'article 1200 du code civil entre en jeu.

Au moment où il a été tenu d'accomplir l'obligation de rendre, les machines qui faisaient l'objet de cette obligation avaient péri. Il a donc invoqué l'impossibilité d'exécuter son obligation. Mais l'article 1200 du code civil dit que, en pareil cas, l'obligation est éteinte seulement lorsque "l'objet * * * périt * * * avant que (le débiteur) soit en demeure", ou "lors même que le débiteur est

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en demeure, dans le cas où la chose serait également périe en la possession du créancier".

Même en admettant—ce qui dans la présente cause n'est ni allégué, ni prouvé, et ce qui ne peut se présumer—que l'incendie fût un cas fortuit, Abran ne peut pas l'invoquer ici, parce que, par son intervention, il s'est mis en demeure de livrer les biens revendiqués, au cas où le jugement lui serait défavorable.

Comme il n'est pas "dans le cas où la chose serait également périe en la possession du créancier", il n'est pas libéré de l'obligation de rendre; et il doit la valeur des machines, non pas comme punition pour avoir eu recours aux tribunaux, mais comme conséquence de l'obligation dont l'exécution est demandée par l'action et qui, dans les circonstances, s'est "perpétuée". Il n'est pas dans un des cas prévus par l'article 1200, où le débiteur est libéré de son obligation pour cause d'impossibilité d'exécution par suite de la perte de la chose.

C'est donc à bon droit que la Cour du Banc du Roi l'a condamné à payer à Perkins la valeur des machines détruite, et son jugement doit être confirmé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Lafleur, MacDougall, MacFarlane & Barclay.*

Solicitors for the respondent: *Chauvin, Meagher, Walker & Stewart.*

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*May 26.

THE CORPORATION OF THE CITY OF TORONTO ..... } APPLICANT;

AND

SAUNDERS ET AL. ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Appeal—Jurisdiction—Matter in controversy (sole question, one as to jurisdiction of Ontario Railway and Municipal Board)—Title to land —Future rights—Supreme Court Act, R.S.C., 1927, c. 35, s. 41.

MOTION on behalf of the Corporation of the City of Toronto for special leave to appeal (such leave having been

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

refused below) from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, on an equal division of the court, dismissed its appeal (which was in form a motion for leave to appeal but was treated as an appeal) from a holding of the Ontario Railway and Municipal Board that the Board had no jurisdiction under s. 6 of the *Local Improvement Act,* R.S.O., 1927, c. 235, to entertain an application for approval of a certain work proposed to be undertaken by the City as a local improvement, and sometimes referred to as the "Jarvis-street extension." The nature of the proposed work is described and discussed in the judgments in the Appellate Division (1).

After hearing the arguments of counsel, the judgment of the Court was orally delivered by the Chief Justice, refusing the motion with costs, on the ground that this Court had no jurisdiction to grant the leave to appeal applied for; the sole question in controversy was one as to jurisdiction of the Board; the title to land might be indirectly and remotely involved, but only very indirectly and remotely; it could not be said that there was any title to land in controversy in the appeal; and there was no matter in question affecting future rights, as they are to be understood in clause (*c*) of the proviso to s. 41 of the *Supreme Court Act.*

Motion refused with costs.

G. R. Geary K.C. for the motion.

S. M. Clark contra.

(1) [1931] O.R. 116.

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*Oct. 13.
*Nov. 9.

IN THE MATTER OF THE ESTATE OF SMITH AND HOGAN, LTD., AUTHORIZED ASSIGNOR

INDUSTRIAL ACCEPTANCE CORPORATION LTD., AND CANADIAN ACCEPTANCE CORPORATION, LTD. ..... } APPELLANTS;

AND

THE CANADA PERMANENT TRUST COMPANY, TRUSTEE ..... } RESPONDENT.

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

Bankruptcy—Appeal—Application to judge of Supreme Court of Canada for special leave to appeal—Power of bankruptcy judge to extend time for application—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 163 (5), 174; Bankruptcy Rule 72—Appeal to the Court from decision of judge in chambers on application for leave to appeal.

The judge sitting in bankruptcy from whose decision an appeal was taken to the Appeal Court under s. 174 of the *Bankruptcy Act* has power, under s. 163 (5) of the Act, to extend the time limited by Bankruptcy Rule 72 for applying to a judge of the Supreme Court of Canada for special leave to appeal to this court (under s. 174 (2)) from the Appeal Court's decision. Judgment of Cannon J., *ante*, p. 503, reversed.

The rule established by *Williams* v. *Grand Trunk Ry. Co.* (36 Can. S.C.R. 321) and other cases, that a decision by a judge of this court in chambers granting or refusing, on the merits, an application for leave to appeal is not appealable to the Court, does not extend to a case where the judge has granted leave to appeal in disregard of some essential statutory condition of the right of the applicant to have his application for leave heard and passed upon, or to a case where the judge, owing to a misunderstanding touching the effect of a statute, decides that an applicant for leave to appeal is not entitled to have his application heard, although in truth he has complied with all the statutory and other prerequisites of such an application.

MOTION by way of appeal from the decision of Cannon J. in chambers (1), dismissing an application for special leave to appeal to this Court from the judgment of the Appeal Division of the Supreme Court of New Brunswick (2), dismissing an appeal taken from the judgment of Barry, C.J.K.B., sitting in bankruptcy (3); the ground of

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) *Ante*, p. 503 (2) (1931) 12 C.B.R. 468.
(3) (1930) 12 C.B.R. 93.

the decision of Cannon J. being that he had no jurisdiction to hear the application, as the time fixed by Bankruptcy Rule 72 for such an application had expired, and that the order of Barry, C.J.K.B., as the judge sitting in bankruptcy, granting an extension of time for such application, was made without jurisdiction.

The judgment of the Court on the present motion was that the decision of the Judge in Chambers to the effect that the applicants were not entitled to apply for leave to appeal be rescinded; and that the applicants might proceed with their application; the costs of the abortive application before the Judge in Chambers to be costs in the application, and the costs of the proceedings before the Full Court to be costs to the applicants in any event of the application.

L. A. Forsyth K.C. for the motion.

E. H. Charlson, contra.

THE COURT.—We have come to the conclusion that Barry, C.J.K.B., as the judge sitting in bankruptcy had authority to grant an extension of time for applying for special leave to appeal to this Court.

Section 163, subsection 5, of the *Bankruptcy Act* is in these terms:

5. Where by this Act, or by General Rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose.

By sec. 174 an appeal is given to any person dissatisfied with an order or decision of the court or a judge in proceedings under the Act. By subsec. 2 of sec. 174 it is enacted that the decision of the Appeal Court shall be final unless "special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that court." By sec. 161 the Governor in Council is authorized to make general rules, "not inconsistent with the terms of this Act, for carrying into effect the objects thereof." By Rule 72 of the general rules made pursuant to the authority conferred by sec. 161, it is provided as follows:

72. An application for special leave to appeal from a decision of the Appeal Court and to fix the security for costs, if any, shall be made to a Judge of the Supreme Court of Canada within thirty days after the pro-

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In re SMITH & HOGAN LTD.

INDUSTRIAL ACCEPTANCE CORP. LTD. AND CANADIAN ACCEPTANCE CORP. LTD. *v.* CANADA PERMANENT TRUST CO.

nouncing of the decision complained of and notice of such application shall be served on the other party at least fourteen days before the hearing thereof.

Subsec. 5 of sec. 163 confers upon the Bankruptcy Court a power, the ambit of which embraces "any act or thing" the time for "doing" which is limited by "this Act or by General Rules." *Ex facie* an application under sec. 174 to which Rule 72 applies, is within that ambit.

Moreover, sec. 163 is found in Part VII, which embraces the sections beginning with sec. 152 and ending with sec. 174. The scope of Part VII is indicated by the general heading "COURTS AND PROCEDURE"; and sec. 174, which is the last of the sections within the part, deals with the subject of appeals, including appeals to the Supreme Court of Canada. Sec. 163 is one of a fascicle of provisions under the subhead "Procedure." In passing, it may be observed, that while the right of appeal is, speaking generally, not matter of procedure but of substantive law, the rules regulating the various steps in initiating and prosecuting an appeal are rules of procedure; and regulation 72 is a rule of that character.

It is, of course, the duty of a court or judge, in construing subsec. 5 of sec. 163, to give effect to the language of the subsection according to the ordinary sense of the words selected by the legislature to express its intention; unless there is to be found in some qualifying context, or in the subject matter or general purpose and object of the statute, sufficient ground for ascribing to it another reading. Our attention has not been drawn to anything of the kind; and of course judicial tribunals cannot act upon vague notions, not susceptible of definite statement, as to the intention of the legislature, and there is no consideration, arising out of the general scope of the legislation and capable of being so formulated, to justify a departure from the construction that is dictated by the ordinary meaning of the words.

We agree with the view expressed by Ritchie, C.J., and Strong, J., in *In re Sproule* (1), that where "jurisdiction is conferred on a judge in chambers a right to revise his decision is impliedly conferred on the court unless there is something in the subject matter or context leading to a contrary conclusion." In *Williams* v. *Grand Trunk Ry. Co.* (2),

(1) (1886) 12 Can. S.C.R. 140, at pp. 180 and 209 respectively.

(2) (1905) 36 Can. S.C.R. 321.

it was held that no appeal lies to the Full Court from a refusal on the merits of an application for leave to appeal from an order of the Board of Railway Commissioners under the provisions of the *Railway Act*. It has many times been held for obvious reasons that a decision by a judge in chambers dealing with an application for leave to appeal on the merits, whether granting or refusing the application, is not appealable. The chief purpose in requiring leave to appeal is to prevent frivolous and unnecessary appeals, a purpose which would, in great degree, be frustrated if an appeal were permitted from such a decision. Authorities giving effect to this view are cited in the judgment of Taschereau, C.J., in *Williams'* case (1) and need not be reproduced here.

But *Williams'* case (1) should not be regarded as governing cases in which the judge in chambers has granted an application for leave to appeal in disregard of some essential statutory condition of the right of the applicant to have his application for leave heard and passed upon. It was in pursuance of this principle that this court, recently, in *Montreal Tramways Company* v. *C.N.R.* (2), held that an appellant who had obtained an order for leave to appeal, without giving notice of an application for leave and without affording the respondent an opportunity to answer such an application, was not entitled to proceed with his appeal without obtaining leave upon a proper proceeding. For similar reasons that authority does not extend to a case where a judge in chambers, owing to a misunderstanding touching the effect of a statute, decides that an applicant for leave to appeal is not entitled to have his application heard, although in truth he has complied with all the statutory and other prerequisites of such an application.

The order of the learned judge in chambers will be set aside and the applicant will be entitled to proceed with his application.

Motion granted accordingly.

Solicitor for the appellants: *W. Arthur I. Anglin.*

Solicitors for the respondent: *Inches & Hazen.*

(1) (1905) 36 Can. S.C.R. 321. (2) Motion, October 6, 1931.

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*Feb. 6.
*Oct. 6.

THE GOVERNMENT OF THE PROVINCE OF ALBERTA..... } APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS AND THE CANADIAN PACIFIC RAILWAY COMPANY.. } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Rates on grain and flour—Order of Board of Railway Commissioners for Canada, No. 448, of August 26, 1927—Question whether rates complied with Order—Board's right to allow the rates complained of—Railway Act, 1919 (as amended, 1925, c. 52), s. 325, subs. 5, 6.

The Board of Railway Commissioners for Canada, by its General Order No. 448, dated August 26, 1927, ordered (*inter alia*) "that the rates on grain and flour from all points on Canadian Pacific branch lines west of Fort William to Fort William * * * be equalized to the present Canadian Pacific main line basis of rates of equivalent mileage groupings (the rates governed by the Crow's Nest Pass agreement not to be exceeded)" and "that all other railway companies adjust their rates" on grain and flour to the Canadian Pacific rates. The present appeal was by the Government of Alberta from the Board's acceptance, as being in compliance with its order, of the rates published by the Canadian National Rys.; the appellant asserting that certain of those rates contravened the order, and that, in any case, under s. 325 of the *Railway Act*, they could not be sanctioned or charged.

Held (1): What was required of the Canadian National Rys. under Order 448 was to adjust its rates in such a way that in territory competitive as between it and the Canadian Pacific Ry. Co. grain shippers in such territory would be placed on as equal a rate basis as possible, all things considered; and the Canadian National Rys., in adopting the mileage grouping in effect from the nearest point, parallel or contiguous, main or branch line station, on the Canadian Pacific, had complied with the order.

(2): The Board's order (construed as above) and the Board's allowance of the rates in question (fixed on above basis) were within its powers. As rightly interpreted by the Board, the effect of subs. 5 and 6 of s. 325 of the *Railway Act, 1919* (as amended, 1925, c. 52) was, not that in applying the Crow's Nest Pass agreement rates on grain and flour to all railways in the territory the proper standard was of a per mileage basis (the Crow's Nest Pass agreement, and c. 5 of 1897, pursuant to which it was made, discussed and explained in this connection), but, in the given territory, to establish a relationship between the rates on the Canadian Pacific governed by the Crow's Nest Pass Act and agreement and the rates on other railways, which would put on an equal footing all persons and localities situated under substantially

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

similar circumstances; in attempting to secure a fair and reasonable rate structure, account should be taken of the equivalent or competitive points as between the railways.

APPEAL by the Government of the Province of Alberta from the Order of the Board of Railway Commissioners for Canada, No. 45846, dated November 25, 1930, refusing the application of the appellant for an order directing that the Canadian National Railways should forthwith publish, file, and put into effect tariffs on grain and flour from certain points on its railway system to Fort William, Port Arthur, Westport and Armstrong, Ontario, and from certain points on its railway system to Vancouver, British Columbia, for export, at certain rates set out in statements annexed to the application.

The appellant had submitted in its application to the Board, that the rates between the said points, published by the Canadian National Railways, contravened the Board's General Order No. 448, dated August 26, 1927.

The Board granted leave of appeal to the Supreme Court of Canada upon the following questions of law, namely:

"(1) Whether as a matter of law the Canadian National Railways have any right to charge the rates in the said application complained of?

"(2) Whether as a matter of law the Board has any right to allow the Canadian National Railways to charge the rates in the application complained of?

"(3) Whether as a matter of law the rates complained of in the said application do not contravene the provisions of paragraphs 1 and 2 of General Order No. 448, dated 26th August, 1927?"

The said Order No. 448, and other matters leading to the present appeal or bearing on the questions now in issue, are sufficiently set out in the judgments now reported.

As pointed out on behalf of the appellant, the questions of law Nos. 1 and 2 raised the matter of the right of the Railway Company, having regard to the provisions of s. 325 of the *Railway Act, 1919* (as amended, 1925, c. 52), to charge the rates complained of, and the jurisdiction of the Board to allow the Company to do so.

Leave was granted to the Canadian Pacific Railway Company to intervene as a respondent.

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By the judgment of this Court, now reported, questions 1 and 2 were answered in the affirmative, and question 3 in the negative, and the appeal was dismissed with costs.

S. B. Woods, K.C., for the Government of the Province of Alberta.

W. N. Tilley, K.C., for the Canadian Pacific Railway Company and the Canadian National Railways (with him, *E. P. Flintoft, K.C.*, for the Canadian Pacific Railway Company, and *Alistair Fraser, K.C.*, for the Canadian National Railways).

DUFF, J.—I concur with the conclusions of Mr. Justice Rinfret.

The appeal involves the construction of subsections 5 and 6 of section 325 of the *Railway Act*. The subsections are as follows:

5. Notwithstanding the provisions of section three of this Act the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company: Provided that, notwithstanding anything in this subsection contained, rates on grain and flour shall, on and from the twenty-seventh day of June, one thousand nine hundred and twenty-five, be governed by the provisions of the agreement made pursuant to chapter five of the Statutes of Canada, 1897, but such rates shall apply to all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

6. The Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities or of undue or unreasonable preference, respecting rates on grain and flour, governed by the provisions of chapter five of the Statutes of Canada, 1897, and by the agreement made or entered into pursuant thereto within the territory in the immediately preceding subsection referred to, on the ground that such discrimination or preference is justified or required by the said Act or by the agreement made or entered into pursuant thereto.

The agreement referred to in subsection 5, which is to govern the rates mentioned, affected only rates in force at its date. It did not apply to tariffs of rates thereafter made payable for transport from stations not at that date

in existence. Moreover, it applied only to the tariffs of the Canadian Pacific Railway. The effect of the word "govern" is, I think, to require that the tariffs prescribed by the agreement are to be the basis for determining the rates for the carriage of grain and flour throughout the territory described; but subsection 6 deals with the territory as a whole (west of Fort William), and makes it clear that in the determination of rates, the provisions of the statute as to unjust discrimination and undue and unreasonable preference are to guide the Board in deciding any question as to such rates, and it is, I think, impossible to hold that the function of the Board is limited to mere arithmetical calculation. The intention is, I think, that subject to and consistently with the fundamental conditions just stated, the Board is to act conformably with the general principles controlling the constitution of tariffs of rates.

Some questions as to the construction of these subsections need not be discussed; we need not, for example, consider whether under them the Board has authority to eliminate a rate actually fixed by the statute and agreement of 1897, upon the ground that, *vis-à-vis* other rates actually fixed thereby, it is unjustly discriminating. The railway companies deny this power, which the Board has held is vested in it; but the point is not material for the purposes of this appeal, and I express no opinion upon it.

The Board's Order (No. 448) is in these terms:

1. That the rates on grain and flour from all points on Canadian Pacific branch lines west of Fort William to Fort William, Port Arthur and Westport be equalized to the present Canadian Pacific main line basis of rates of equivalent mileage groupings (the rates governed by the Crow's Nest Pass agreement not to be exceeded): that the Canadian Pacific Railway Company publish rates in accordance with the above direction, and that all other railway companies adjust their rates on grain and flour to Fort William, Port Arthur, Westport and Armstrong to the rates so put into effect by the Canadian Pacific Railway Company, such changes to become effective on the twelfth day of September, 1927.

2. That the rates on grain and flour from prairie points to Vancouver and Prince Rupert for export shall be on the same basis as the rates to Fort William, but in computing such rates, the distance from Calgary to Vancouver via the Canadian Pacific Railway shall be assumed to be the same as from Edmonton to Vancouver via the Canadian National Railway, namely, 766 miles.

I do not understand that the appellant—the Province of Alberta—disputes the jurisdiction of the Board to pronounce this order. The province's contention is that, properly understood, the order is a valid one; but that,

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DUFF J.

construed and applied as the Board has construed and applied it, it would not be competent in view of the enactments of section 325.

Mr. Woods directed the weight of his argument in support of the proposition that the tariffs in dispute are not in compliance with the order. On that topic, I expressed my views during the argument, at the close of which, I think, we were all agreed that in so far forth as the question relating to it is a question of law, it must be answered in the negative. The reasons for this conclusion are now clearly and fully expressed in the judgment of my brother Rinfret.

By question 2, we are asked to direct the Board upon the point, whether, in contemplation of law, the tariffs attacked could be sanctioned by the Board in exercise of its powers under Section 325. I am not sure that I have correctly penetrated the sense of the Province's contention. As I interpret it, the view advanced is that in applying the standard laid down by the Board, which is the standard for which the Province has, from the beginning, contended, mileage is the exclusive determining factor. That standard is the system of mileage group rates for the Canadian Pacific Railway's main line in force at the date of Order No. 448. In applying that standard to the Canadian National Railway, the Board is to observe the directions of the statute. The rates mentioned are to "govern" the Canadian National Railway rates, subject to the rule in subsection 6, that no otherwise unjust discrimination or undue or unreasonable preference is to be permitted upon the plea that such discrimination or preference is required by the statute and agreement of 1897.

The language of the proviso of subsection 5 is very general. It is, of course, contemplated that it shall be worked out (under the condition prescribed by subsection 6) by the Board. And, while I agree that subsection 6 applies to the Canadian National Railway—I think the language of the subsection is in that respect imperative—I think we are not compelled by the general words of subsection 5 to infer an intention that the Board shall, in working out that subsection, obliterate from their minds the fact that there are two systems of railways which are, and which for the purposes of rate making have always

been treated as, competitive systems. I think that is a circumstance which the Board is entitled to take into account.

Accordingly, it seems to me that the Board did not depart from the intent of the statute in giving effect to the view that the Canadian National Railway was adjusting its rates in conformity with the statutory standard, in adopting for its datum in such cases, the rate for "the mileage grouping in effect from the nearest parallel or contiguous main or branch line station on the Canadian Pacific Railway."

The answer to question one is dictated by the answers to questions 2 and 3.

Questions 1 and 2 should be answered in the affirmative; question 3 in the negative.

The appeal should be dismissed with costs.

The judgment of Newcombe, Rinfret, Lamont and Cannon JJ. was delivered by

RINFRET, J.—The circumstances out of which the present appeal arises are the following:

On the 14th of October, 1924, a majority of the Board of Railway Commissioners for Canada held that the railway rates stipulated in the *Act to authorize a Subsidy for a Railway through the Crow's Nest Pass* (c. 5 of the Statutes of Canada, 60-61 Vict., 1897) and in the agreement made thereunder between the Government of Canada and the Canadian Pacific Railway Company should no longer be regarded as imposed by statute, but became subject to the control of the Board of Railway Commissioners created by the *Railway Act, 1903*, as a result of the wide powers conferred on the new Board for carrying out the scheme of rate control there adopted.

Upon appeal, this Court held that the said statute and agreement were binding on the Board, which had therefore no power to change the rates thereby fixed; but that the rates so fixed applied exclusively to the designated traffic between points which were on the Canadian Pacific Railway Company's lines in 1897 (*The Governments of Alberta, Saskatchewan and Manitoba* v. *The Canadian Pacific Railway Company* (1)). The history of the legislation and of

(1) [1925] Can. S.C.R. 155.

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the judicial pronouncements leading up to the decision of this Court just referred to is fully set out in the judgment and need not be repeated here.

Subsequent to the year 1897, the Canadian Northern Railway and the Grand Trunk Pacific Railway Company (now forming part of the Canadian National Railways) constructed extensive lines of railway between eastern and western Canada; and, as their lines were from time to time opened for carriage of traffic, they charged, between all competitive points, and irrespective of mileage, the same rates on grain and flour as were in force on the Canadian Pacific Railway Company's lines.

The Crow's Nest Pass Act and agreement, although not applying to the Canadian National Railways, of necessity had the effect of indirectly controlling their rates on all competitive lines.

The judgment of this Court on the Crow's Nest rates (1) was delivered on the 26th of February, 1925.

Up to that year, the rates on grain and flour from all points which were on the Canadian Pacific Railway lines in 1897 were governed by the following section of the Act (also covenanted in the agreement):

(*e*) That there shall be a reduction in the Company's present rates and tolls on grain and flour from all points on its main line, branches, or connections, west of Fort William to Fort William and Port Arthur and all points east, of three cents per one hundred pounds, to take effect in the following manner: One and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-eight, and an additional one and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-nine; and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned on such merchandise from the points aforesaid.

In 1925, section 325 of the *Railway Act, 1919,* was amended by adding thereto subsections 5 and 6 and was made to read as follows:

325. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

2. The Board may designate the date at which any tariff shall come into force, and either on application or of its own motion may, pending investigation or for any reason, postpone the effective date of, or either before or after it comes into effect, suspend any tariff or any portion thereof.

(1) [1925] Can. S.C.R. 155.

3. Except as otherwise provided, any tariff in force, except standard tariffs hereinafter mentioned, may, subject to disallowance or change by the Board, be amended or supplemented by the company by new tariffs, in accordance with the provisions of this Act.

4. When any tariff has been amended or supplemented, or is proposed to be amended or supplemented, the Board may order that a consolidation and reissue of such tariff be made by the company.

5. Notwithstanding the provisions of section three of this Act the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company: Provided that, notwithstanding anything in this subsection contained, rates on grain and flour shall, on and from the twenty-seventh day of June, one thousand nine hundred and twenty-five, be governed by the provisions of the agreement made pursuant to chapter five of the Statutes of Canada 1897, but such rates shall apply to all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

6. The Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities or of undue or unreasonable preference, respecting rates on grain and flour, governed by the provisions of chapter five of the Statutes of Canada 1897, and by the agreement made or entered into pursuant thereto within the territory in the immediately preceding subsection referred to, on the ground that such discrimination or preference is justified or required by the said Act or by the agreement made or entered into pursuant thereto.

On the 5th of June, 1925, Order in Council No. 886 was issued directing the Board to make a full and complete investigation into the rate structure of railways and railway companies subject to the jurisdiction of the Board,

with a view to the establishment of a fair and reasonable rate structure which will in substantially similar circumstances and conditions be equal in its application to all persons and localities, etc.

Pursuant to the directions in the order in council contained, extensive hearings took place throughout the whole of Canada. After argument, the Board gave a judgment following which General Order No. 448, dated the 26th day of August, 1927, was issued, which, *inter alia,* ordered as follows:

1. That the rates on grain and flour from all points on Canadian Pacific branch lines west of Fort William to Fort William, Port Arthur and Westport be equalized to the present Canadian Pacific main line

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basis of rates of equivalent mileage groupings (the rates governed by the Crow's Nest Pass agreement not to be exceeded): that the Canadian Pacific Railway Company publish rates in accordance with the above direction, and that all other railway companies adjust their rates on grain and flour to Fort William, Port Arthur, Westport and Armstrong to the rates so put into effect by the Canadian Pacific Railway Company, such changes to become effective on the twelfth day of September, 1927.

2. That the rates on grain and flour from prairie points to Vancouver and Prince Rupert for export shall be on the same basis as the rates to Fort William, but in computing such rates, the distance from Calgary to Vancouver via the Canadian Pacific Railway shall be assumed to be the same as from Edmonton to Vancouver via the Canadian National Railway, namely, 766 miles.

For the purpose of complying with this Order (No. 448), the Canadian Pacific Railway Company and the Canadian National Railways published and filed new tariffs.

The Government of the Province of Alberta thereupon complained that the tariffs filed by the Canadian National Railways contravened General Order No. 448, in that some of the rates and tolls prescribed in those tariffs were "in excess of the rates for similar mileages according to the Canadian Pacific main line basis of rates, the rates governed by the Crow's Nest Pass agreement not being exceeded."

Application was therefore made to the Board, praying for the disallowance of the tariffs in question as being "contrary to the terms of the said General Order and therefore contrary to law."

It was made clear that the application was not "directed to any Canadian Pacific Railway rates, that railway company having, in the applicant's view, put into effect the proper rates under General Order No. 448", save in two instances not material here.

It was further understood, it was in fact stated in the application, that there was no dispute as to the facts and that what was involved was simply a question of law.

Prior to the application, the Board, having received a letter from Mr. Chard, the Province's Freight and Traffic Supervisor, directed its Secretary to reply that the Board had accepted the rates published in the Canadian Pacific Railway and the Canadian National Railways tariffs "as complying with the provisions of General Order No. 448". The reply added:

The rates are published in groups as in the past and the Western boundary or extreme mileage of these groups for the Canadian Pacific Railway main line, are as follows:

(Instances were then given stating the names of the railway stations, the respective mileage and rates).

That in the grouping of branch line rates as required by the Order, the Canadian Pacific Railway have followed the usual and proper practice of applying rates for the mileage contained in the main line groups as above. Under the proposal contained in your letter, the mileage groups for branch lines would be greater than that for main lines.

That by the Order the Canadian National Railways were required to adjust their rates to those of the Canadian Pacific Railway. The Board is of the opinion that this has been done in the tariff above referred to as the Company has adopted the mileage grouping in effect from the nearest point parallel or contiguous main or branch line station on the Canadian Pacific Railway.

* * * * *

That both the Canadian Pacific and Canadian National Railways have published rates to Vancouver for export in accordance with General Order No. 448.

In the application, reference was made to that correspondence, and the position of the Province of Alberta was condensed in the following sentence:

The matter rests entirely upon whether the opinion expressed by the Board as stated in the letter of the Board's Secretary of February 6, 1928, (i.e., the letter above quoted in part) is correct or erroneous as herein claimed.

By Order No. 45846, upon reading the said application and the statements and the correspondence therein referred to, together with the reply to the said application of the Canadian National Railways, the Board refused the application of the Province of Alberta; but, at the request of the latter, in a subsequent order, the Board granted leave to appeal to the Supreme Court of Canada upon questions formulated as follows:

(1) Whether as a matter of law the Canadian National Railways have any right to charge the rates in the said application complained of?
(2) Whether as a matter of law the Board has any right to allow the Canadian National Railways to charge the rates in the application complained of?
(3) Whether as a matter of law the rates complained of in the said application do not contravene the provisions of paragraphs 1 and 2 of General Order No. 448, dated 26th August, 1927?

The first question is really subsidiary to the other two, and the answer to it must result from the answer to be given to questions Nos. 2 and 3.

It will be more convenient to deal first with question No. 3.

The answer to that question depends, of course, upon the interpretation to be put upon General Order No. 448.

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The argument of the appellant on that point is not precisely that the tariffs filed are contrary to the formal terms of the Order; but he quotes certain portions of the reasons for judgment, he submits that the passages quoted correctly reflect the views of the Board, and they show, he claims, that "the exclusive governing consideration in the determination of what the proper rate under the order should be, from any given point in the territory affected, is the rate from a point in the corresponding mileage group according to the Crow's Nest Pass agreement main line C.P.R. rate basis".

According to the appellant, the tariffs now complained of were not made upon that basis and therefore fail to carry out the Order.

We are not prepared to admit that the passages in the reasons for judgment relied on by the appellant bear the construction just mentioned, in view of the context from which they are detached and in view also of the issue to which, at the moment, the members of the Board address the particular language they use. The question then in discussion was the equalization of rates as between the main line and the branch lines of the Canadian Pacific Railway, not the determination of a rate basis in its application to the other railway companies. We would add that, if the effect of the General Order were to be determined from the reasons delivered by the members of the Board, the whole of these reasons, and not solely the passages referred to, would have to be considered. But, for the purpose of ascertaining the intention of the Order, this Court must take primarily the Order itself. The order is the criterion. It embodies the meaning which the Board gave to its own words in the judgment delivered by it.

Now, the Order reads:

> That the rates * * * on Canadian Pacific branch lines * * * (shall) be *equalized* to the present Canadian Pacific main line basis of rates of equivalent mileage groupings * * * and that all other railway companies (shall) *adjust* their rates * * * to the rates so put into effect by the Canadian Pacific Railway Company * * *.

If the Order meant to equalize on a mileage basis all rates on all railways, as the appellant's theory would have it, it would have been very easy to say so; and the same language would then have been used in reference both to the Canadian Pacific Company and to the other railway companies. Yet, when dealing with Canadian Pacific main

and branch lines rates, the Order says they should be *equalized;* and when speaking of the other railways' rates it says they should be *adjusted.* It must be taken that the Board intended a different meaning to be ascribed to the two distinct words deliberately adopted in the Order.

The Canadian National Railways contend that the obvious meaning of the direction was to adjust (their) rates in such a way that in territory competitive as between both the Canadian Pacific and Canadian National, the rate adjustment should place grain shippers in such territory on as equal a rate basis as possible, all things considered.

Accordingly, in the tariffs it has published, the company adopted the mileage grouping in effect from the nearest point parallel or contiguous main or branch line station on the Canadian Pacific Railway.

The Board accepted the tariffs so filed, as complying with the provisions of General Order No. 448.

While we think that the question of whether an Order of the Board has been complied with is peculiarly one to be dealt with by the Board itself, we have no hesitation in stating that, in our view, the interpretation put forward by the Canadian National Railways is strictly in accordance with the letter and the spirit of the Order and that the principle adopted in adjusting the rates correctly carries out the terms of the Board's judgment.

It is satisfactory to point out further, that Order No. 448, so interpreted and carried into effect, accords with the main object of Order in Council P.C. 886, namely: "to secure a fair and reasonable rate structure, which, under substantially similar circumstances and conditions, would be equal in its application to all persons and localities".

The answer to question No. 3 should therefore be in the negative.

As a consequence, subject to what we will have to say with regard to question No. 2, the answer to the first question must be in the affirmative. For, if the rates complained of do not contravene the provisions of General Order No. 448, the Canadian National Railways have the right to charge those rates so long as the Board does not otherwise order, unless as a matter of law the Board was lacking in power to authorize the rates. This brings us to the discussion of the second question which, in effect, asks: Whether General Order No. 448 is contrary to the provisions of subsections 5 and 6 of section 325 of the *Railway Act.*

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The appellant clearly contends "that it is not open to the Canadian National Railways under the *Railway Act* to charge the rates complained of with or without the consent of the Board."

To decide that point, consideration of the scope and effect of the amendment of 1925 to the *Railway Act* is necessary. By that amendment, subsection 5 of section 325 of the *Railway Act, 1919,* was repealed and the new subsections 5 and 6 (reproduced at the beginning of this judgment) were added. It is common ground that the amendment was adopted to meet the points determined in the judgment of this Court on the Crow's Nest Pass rates (1). As already mentioned, one of these points was that the rates were statutory and binding on the Board of Railway Commissioners. The other point was that the rates so fixed applied only to carriage of the designated commodities between the stations which were on the Canadian Pacific Railway Company's lines in 1897; and that, against such restricted application, the anti-discrimination provisions of the *Railway Act* could not be invoked.

The enactment of 1925 begins by conferring on the Board powers of the most sweeping character

to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require,

notwithstanding the provisions of section 3 of the *Railway Act,* that is: notwithstanding the over-riding provisions of any Special Act passed by the Parliament of Canada relating to the same subject-matter. The powers are not to be

limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways.

The Board

shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company.

Then comes the proviso concerning rates on grain and flour:

Provided that, notwithstanding anything in this subsection contained, rates on grain and flour shall, on and from the date of the passing of this Act, be governed by the provisions of the agreement made pursuant to chapter five of the Statutes of Canada, 1897, but such rates shall apply to

(1) [1925] Can. S.C.R. 155.

all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

Chapter five of the Statutes of Canada, 1897, is the Crow's Nest Pass Act, and the obvious effect of the proviso is that, as to grain and flour, the rates provided for in the Crow's Nest Pass agreement are to remain in force, that they are hereafter to apply to all points west of Fort William to Fort William or Port Arthur, whether they were or were not on the Canadian Pacific Railway Company's lines in 1897, and in fact whether they are on the Canadian Pacific lines or on any other line of railway now or hereafter constructed by any company subject to the jurisdiction of the Parliament of Canada. By force of subsection 6, within the territory referred to, no charge of unjust discrimination or preference respecting rates on grain and flour is to be excused on the ground that it is justified or required by the Crow's Nest Pass Act or agreement.

We fail, however, to agree with the appellant that the effect of the proviso was to compel equalization on a mileage basis of all rates on grain and flour for all railways in the territory. If it were so, the result would be that, as a consequence of the enactment, the fixing of those rates became a mere mathematical operation to be governed exclusively by length of haulage and withdrawn, for all practical purposes, from the control of the Board. If nothing else, the removal in subsection 6 of any excuse for unjust discrimination or preference would show the contrary intention.

But the difficulty which stands uppermost in the way of the appellant's contention is that the Crow's Nest rates have not been built upon mileage, and such was the finding of the Board upon the facts.

The Crow's Nest Pass agreement did not purport to establish any basis for rates on grain and flour, nor did the Act pursuant to which the agreement was made. The Act and the agreement contain no actual unit of measurement. They provide merely for certain specified reductions to be made gradually on the rates existing in 1897.

The rates on grain and flour existing in 1897 were higher on certain branch lines than they were on the main line. As a result of the agreement, the stipulated reductions having been made, the difference in rates, as between main and

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branch lines, continued to exist in the same proportion as before; and these rates, notwithstanding they were discriminatory under the general law, were nevertheless statutory Crow's Nest rates by force of the over-riding provisions of the Special Act. This was noticed by this Court in the *Crow's Nest* case (1) and again by the Board in the judgment appealed from.

There being no uniform scale, no fixed basis (except no doubt a final fixing of certain maximum rates), whereby it should be governed and, on the other hand, having to remove all cases of unjust discrimination, the Board, in its judgment, decided to equalize all Canadian Pacific Railway rates on the basis of the main line rates. This meant that the higher branch line rates were to come down to the level of the main line rates. The Board further directed that in no case should the rates governed by the Crow's Nest Pass agreement be exceeded.

Having thus provided for the Canadian Pacific Railway Company's rates, the judgment *a quo* ordered that other railways in the territory should so adjust their grain and flour rates as to meet the rates adopted for the Canadian Pacific Railway. In so doing, the Board interpreted the statute to mean that in applying the Crow's Nest rates to other railways, the standard to be reckoned with was not of a per mileage basis, since such a basis never existed,—but the intention of Parliament, as expressed in the enactment, was, in the given territory, to establish a relationship between the rates on the Canadian Pacific Railway governed by the Crow's Nest Pass Act and agreement and the rates on the other railways, which would put on an equal footing all persons and localities situated under substantially similar circumstances. That view is further supported by the removal of all limitation to the application of the discriminatory provisions of the *Railway Act*. It is consistent with the spirit of those provisions, as well as with the usual and proper railway practice, that in attempting to secure a fair and reasonable rate structure, account should be taken of the equivalent or competitive points as between the several railways.

In our opinion, the view taken by the Board is in conformity with the enactment of 1925.

(1) [1925] Can. S.C.R. 155.

A further consideration, suggested by counsel for the respondent, and not without considerable weight, is that, if effect were given to the contentions of the appellant, it would mean that in many instances the rates from Canadian National points in competitive territory would be reduced below the level of rates from competing stations of the Canadian Pacific Railway. The result would be that, in order to retain the business from such competitive points, the Canadian Pacific Railway Company would be compelled to lower its rates further, a result not contemplated by the existing legislation.

In carrying out General Order No. 448, the Canadian National Railways, in the tariffs complained of, adopted the mileage grouping in effect from the nearest point, parallel or contiguous, main or branch line station, on the Canadian Pacific Railway. This was considered by the Board not to be contrary to the Order and the Board refused to disallow it. It cannot be said, as a matter of law, that the Board had no right to allow the Canadian National Railways to charge the rates thus approved; and we answer the second question in the affirmative.

As to rates from points west of Fort William to Vancouver and Prince Rupert, we do not interpret the questions submitted as intending to cover them. Those rates do not come within the proviso of the Statute of 1925. Any objection to them must be based on grounds of unjust discrimination or preference, the determination of which are eminently within the Board's province.

Our conclusion is that the Board of Railway Commissioners of Canada was competent to issue General Order No. 448 and that the tariffs filed thereunder did not contravene the Order.

The questions submitted should be answered as follows:

(1) Whether as a matter of law the Canadian National Railways have any right to charge the rates in the said application complained of? YES;

(2) Whether as a matter of law the Board has any right to allow the Canadian National Railways to charge the rates in the application complained of? YES;

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(3) Whether as a matter of law the rates complained of in the said application do not contravene the provisions of paragraphs 1 and 2 of General Order No. 448, dated 26th August, 1927? NO;

and the appeal should be dismissed with costs.

Questions answered as above, and appeal dismissed with costs.

Solicitors for the appellant: *Woods, Field, Craig & Hyndman.*

Solicitor for the respondent, Canadian National Railways: *Alistair Fraser.*

Solicitor for the respondent, Canadian Pacific Railway Company: *E. P. Flintoft.*

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*Feb. 10.
*June 23.

THE VILLAGE OF KELLIHER (DEFENDANT) ..... } APPELLANT;

AND

A. C. SMITH (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Municipal corporations—Councillor of municipality injured while operating municipality's fire extinguisher—Responsibility for injury—Degree of care—Duty of municipality—Duty of councillor operating the machine—Liability—Volenti non fit injuria—Doctrine of Rylands v. Fletcher—Expert evidence—Charge to jury—Jury's findings.

Plaintiff, as a councillor of defendant village, acting under authority of a village by-law, took charge of operation of its chemical fire extinguisher at a fire, turned the crank which broke the sulphuric acid bottle (to generate pressure) and was severely injured by an explosion, which occurred because the bolt holding in place the covering of the sulphuric acid chamber was not screwed down. The extinguisher had been kept in a pool room. The village council had appointed the village constable as "fire chief," and required him to keep the extinguisher "in proper working shape." Plaintiff sued the village for damages. The jury found that plaintiff's injury was caused by defendant's negligence in "not having their fire extinguisher properly inspected and kept in perfect working order"; that plaintiff was guilty of contributory negligence "only to the fact that he was a councillor on the date of the fire, but not negligent in the operation of the fire extinguisher at the time of the fire." The Court of Appeal

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

for Saskatchewan (25 Sask. L.R. 65), reversing judgment of Taylor J. (24 Sask. L.R. 198), gave judgment to plaintiff for damages. Defendant appealed.

Held (Duff and Newcombe JJ. dissenting) that the appeal should be dismissed.

Per Rinfret, Lamont and Cannon JJ.: It was for the jury, on all the evidence, to say whether the proper inference to be drawn was that the acid chamber covering was loose because the fire chief had failed to tighten the bolt when he had last recharged the extinguisher or to inspect it properly afterwards, or that some third person had unscrewed the bolt (as to interference by a third person, the onus was on defendant to establish it, or at least to shew such probability that the jury would infer it: *Dominion Natural Gas Co.* v. *Collins,* [1909] A.C. 640). Also the question of plaintiff's negligence was one of fact for the jury; it was for them to say whether or not, in his operation of the extinguisher, he had failed to exercise the care which a reasonably prudent and careful man would have exercised in like circumstances. Unless plaintiff had reason to suspect that the fire chief had not done his duty as to inspection, the jury was entitled to find plaintiff not guilty of negligence in assuming that he had. There was evidence from which the jury might find that plaintiff's injuries were caused by negligence of defendant, and also that plaintiff's conduct in operation of the extinguisher was free from want of care. The maxim *volenti non fit injuria* did not apply; plaintiff, who was unaware that the covering was not properly fastened, neither appreciated the danger he was running nor voluntarily incurred the risk (*C.P.R.* v. *Fréchette,* [1915] A.C. 871, at 880, cited). The first part of the jury's finding as to contributory negligence, viewed in the light of the circumstances and the judge's charge, meant that the only negligence of which they found plaintiff guilty was that he shared with his fellow councillors in their representative capacity in not seeing to it that the extinguisher was duly inspected and kept fit for immediate use. As to this, it has long been established law that a person is not liable in his individual capacity for a tort committed in his corporate capacity (*Mill* v. *Hawker,* L.R. 9 Ex. 309, at 321, and other cases cited). The objections by defendant to the judge's charge to the jury were not maintainable. Taken as a whole, it did not direct that there was an absolute duty on defendant to keep its extinguisher from doing harm (Doctrine of *Rylands* v. *Fletcher,* L.R. 3 H.L. 330, discussed, and held not to apply, the extinguisher having been brought to the village for common protection of the corporation and its citizens as individuals; *Rickards* v. *Lothian,* [1913] A.C. 263, at 280; *Hess* v. *Greenway,* 48 D.L.R. 630, cited), but impressed upon them that the only basis on which defendant could be charged with liability was negligence; his direction that the care to be observed by defendant must be commensurate with the danger of harm involved, was a proper one. His direction to disregard the evidence of one F., an inspector for the fire commissioner of the province, to the effect that one operating the extinguisher should see that the covering was tight before breaking the acid bottle, was unobjectionable, as the elements did not exist to justify its admission as expert evidence, and the jury were as capable as the witness of forming a correct judgment as to plaintiff's acts.

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Per Duff and Newcombe JJ. (dissenting): The risk of escape of the liquid to the injury of persons in proximity was one which it was the absolute duty, in point of law, of any person working the machine, to avoid, if reasonably possible. Plaintiff knew of the danger if the covering were not tight, and to ascertain and correct the condition was a simple and quick operation. It was the duty of the municipality, at the time of actual operation, not to release the acid without first seeing that the covering was securely fastened. The acts of plaintiff in his operation of the machine were the acts of the municipality, and its said duty was equally his duty; he owed a duty to it to see that the responsibility resting upon it, in respect of the precautions to be observed in working the machine, were, so far as reasonably possible, discharged. He was not entitled to assume that, because of instructions given to the "fire chief," the covering was tight, in view of the facts (known to plaintiff) that the machine had been exposed in a place open to the public, that it could be made unsafe very easily, that, by reason of the fire chief's other duties, a periodical inspection was the utmost that could be expected, and in view of possibility of neglect by the fire chief, the simple nature of the precaution required at the moment of operation, and the magnitude of the danger. The direct and proximate cause of plaintiff's injuries was his own neglect. Further, there were errors in the charge to the jury, as to the extent of defendant's duty, and in withdrawing from the jury F.'s evidence as to the proper, known and recognized method of working the machine; which errors in the charge, were the action not to be dismissed, would be ground for a new trial.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1).

The action was for damages for personal injuries sustained by the plaintiff through the explosion of one of the defendant's chemical fire extinguishers, the operation of which extinguisher the plaintiff (who was a member of the council of the defendant village) had taken charge of at a fire, the cause of the accident being, so plaintiff alleged, the defendant's negligence. The trial judge, Taylor J., on certain findings of the jury and his construction thereof and his view of the law bearing on the matters involved, dismissed the action (2). The plaintiff appealed, and the defendant cross-appealed (against certain findings of the jury as perverse and on other contentions). The Court of Appeal (1) allowed the plaintiff's appeal and dismissed the defendant's cross-appeal, set aside the judgment below and directed that judgment be entered for the plaintiff for the amount awarded by the jury ($1,250.26 for special damages,

(1) 25 Sask. L.R. 65; [1930] 2 W.W.R. 638.

(2) 24 Sask. L.R. 198; [1929] 3 W.W.R. 655.

and $5,200 for general damages; no appeal was taken as to the amount assessed). The material facts of the case, the findings of the jury, and the issues in question, are sufficiently stated in the judgments now reported.

The appeal to this Court was dismissed with costs, Duff and Newcombe JJ. dissenting.

P. H. Gordon, K.C., for the appellant.

P. M. Anderson, K.C., for the respondent.

The judgment of the majority of the court (Rinfret, Lamont and Cannon JJ.) was delivered by

LAMONT, J.—This is an appeal from a judgment of the Court of Appeal of Saskatchewan (1) in favour of the plaintiff in an action for damages for personal injuries sustained by him through the explosion of one of the defendant's chemical fire extinguishers at a fire which occurred in the Village of Kelliher on the evening of December 22, 1927. The defendant's extinguisher consists of a forty gallon cylindrical tank on wheels to which a hose is attached. Attached to it also is a framework whereby the machine can be pushed or pulled as required. Towards the rear end but inset in the top of the tank in a separate chamber is a glass bottle of sulphuric acid holding about three pints. This chamber is covered with an iron dome covering, convex in shape. Over this dome is an iron circular band which is bolted to the tank. Through the centre of this band is an iron screw bolt which when screwed down tight holds the iron dome firmly in its place so that no gas or liquid can come out of the top of the sulphuric acid chamber. The tank is filled with a solution of water and bicarbonate of soda. To put the extinguisher in operation at a fire the sulphuric acid bottle has to be broken. This is done by turning a crank on the outside of the tank which causes a hammer on the inside to strike it. The acid then mingles with the solution in the tank and generates a high pressure of carbonic acid gas which forces the mixture through the nozzle of the hose upon the fire and smothers it. The extinguisher was kept in the village pool room because it was a central place and was always warm in winter.

(1) 25 Sask. L.R. 65; [1930] 2 W.W.R. 638.

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About eight o'clock on the evening of December 22, 1927, an alarm of fire was given in Kelliher, and the plaintiff, who was a general merchant and also a member of the village council, ran to the pool room and, with a Mr. Wilson, got one of the two extinguishers owned by the defendant and pulled it to the fire. Having got it in place, the plaintiff turned the crank and broke the sulphuric acid bottle to generate pressure. In a few seconds the dome covering of the sulphuric acid chamber blew off and a stream of sulphuric acid struck the plaintiff in the face, burning him severely and practically destroying his eyesight. The dome blew off because the iron bolt for holding it in place had not been screwed down. This was shewn by the fact that the threads on the bolt had not been injured. It was the duty of the fire chief, H. G. Clark, to keep the extinguishers in good working order.

At the trial the plaintiff's contention was that his injuries were caused by the failure of the defendant to maintain the extinguisher in a safe and proper condition for use; while the defendant contended that the explosion was due to the plaintiff's want of care, (*a*) in attempting to operate the extinguisher without first seeing that the bolt which held the dome cover in place had been screwed down tight, and (*b*) in that he and his fellow councillors had not kept the extinguisher in proper condition for use. The defendant also set up that the plaintiff was well aware of the danger, and voluntarily accepted the risk. The material questions, and the answers of the jury thereto, are as follows:—

Q. 1. Was the injury to the plaintiff on the 22nd December, 1927, caused by the negligence of the defendants?—A. Yes.

Q. 2. If so, in what did such negligence consist? Give particulars.—A. For not having their fire extinguisher properly inspected and kept in perfect working order.

Q. 3. Do you find the plaintiff guilty of contributory negligence?—A. Yes.

Q. 4. If so, in what did such contributory negligence consist? Give particulars.—A. Only to the fact that he was a councillor on the date of the fire but not negligent in the operation of the fire extinguisher at the time of the fire.

On these findings the trial judge dismissed the action (1).

The plaintiff appealed to the Court of Appeal and the defendant served notice of cross appeal stating that on the hearing it would contend that there was no evidence upon

(1) 24 Sask. L.R. 198; [1929] 3 W.W.R. 655.

which a jury could reasonably find that the defendant was guilty of negligence, nor could they reasonably absolve the plaintiff from contributory negligence in his operation of the extinguisher at the fire, and that their answers on both points were perverse. The notice further stated that the defendant would contend that the maxim *volenti non fit injuria* should be applied in this case. The Court of Appeal allowed the plaintiff's appeal and dismissed the cross appeal (1). From that judgment this appeal is brought.

Before us counsel for the defendant again advanced the argument that the answers of the jury to Question 2, and the latter part of their answer to Question 4, were perverse and contrary to the evidence; and he stressed the fact that the extinguisher was kept in a place open to the public, any one of whom might have unscrewed the bolt which holds in place the iron dome.

The jury had before them the fact that the defendant had brought to the village as a fire fighting apparatus this chemical extinguisher which was a highly dangerous instrumentality unless care was taken to keep the dome covering of the sulphuric acid chamber tightly fastened. They knew that the extinguishers were kept in the pool room and that the defendant intended and expected its citizens, on hearing an alarm of fire, to go to the pool room and get the extinguishers and take them to the fire where they were to be used in fighting the flames. To be effective for that purpose the extinguishers were required to be in a condition in which they could be immediately and safely operated. In his charge the trial judge instructed the jury that if the municipality keeps a machine which is dangerous, or potentially dangerous, it assumes the responsibility of keeping it from doing harm; that if the machine is kept to be used at fires and there is an extra danger in its use, then there is upon the municipality so providing it a duty to take precautions to avoid that danger and that the duty was commensurate with the danger involved. The council recognized its obligation in this respect and had notified the fire chief that it was his duty to "keep the extinguishers in proper working shape". The jury had also before them the fact that, in August, the fire chief had recharged the extinguishers, which necessitated taking the dome covering

(1) 25 Sask. L.R. 65; [1930] 2 W.W.R. 638.

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off the sulphuric acid chamber, and that neither extinguisher had thereafter been used until the fire in question. The fire chief in his evidence stated that he knew the bolt had been screwed down after the extinguisher had been recharged or he would not have left it. This the jury may have thought was reasoning rather than recollection, at any rate it was for them to say whether or not they would accept the evidence. They had also before them conclusive evidence that when the other extinguisher was taken to the fire the wheel that opens the valve which permits the mixture to flow through the hose was stuck fast and could not be turned. This fact alone was evidence that there had been no proper inspection of the extinguishers and entitled the jury, if they thought fit, to reject the evidence of the fire chief and the overseer that they had inspected the extinguishers a few days before the fire and that everything was in good order. There was also the fact that, although for years the extinguishers had been kept in the pool room, no one had ever improperly interfered with them. It was for the jury, on all the evidence, to say whether the proper inference to be drawn was that the dome covering was loose because the fire chief had failed to tighten the bolt when he recharged the tank or to properly inspect the extinguishers afterwards, or that some third person had unscrewed the bolt, which is the only other explanation suggested. As to interference by a third person, the onus was on the defendant to establish it or at least to shew such a probability of its having taken place that the jury would infer that it had. *Dominion Natural Gas Co* v. *Collins* (1).

On the question of the plaintiff's contributory negligence, the jury had before them an account of the acts of the plaintiff shewing just what he did and how he did it. They had also his testimony that he saw nothing to indicate that the dome covering was loose or to direct his attention to it, and that he assumed the fire chief had obeyed the council's instructions and kept the extinguishers in proper working order. With all these facts before them it was the duty of the jury to say whether or not, in his operation of the extinguisher, the plaintiff had failed to exercise the care which a reasonably prudent and careful man would have exercised in like circumstances.

(1) [1909] A.C. 640.

For the defendant it was pointed out that there was in force a village by-law which enacted that "the overseer of the village, or in his absence any member of the council, whom failing, the fire inspector, shall be the director of operations at" a fire, and it was urged that this imposed upon the plaintiff the duty of making sure that the extinguisher was in a condition in which it could be used with safety before putting it in operation. The by-law does not in terms require a councillor directing operations at a fire to make an inspection of the extinguisher before putting it in operation. That was the duty of the fire chief, and unless the plaintiff had some reason to suspect that the fire chief had not done his duty the jury were entitled to find that he was not guilty of negligence in assuming that he had. Furthermore, it must not be forgotten that in taking charge of the extinguisher at the fire the plaintiff was fulfilling an obligation imposed upon him in his official capacity by the by-law. In the absence, therefore, of a statutory provision making a councillor individually responsible for the failure of the fire chief to obey his instructions, which the by-law does not do, or casting on a councillor the duty of personal inspection of the extinguishers, the whole question of the plaintiff's negligence was a question of fact for the jury. I, therefore, agree with the Court of Appeal that there was evidence from which the jury might find, not only that the plaintiff's injuries were caused by the negligence of the defendant, but that the conduct of the plaintiff in his operation of the extinguisher at the fire was free from any want of care on his part.

The argument of the defendant's counsel that this was a proper case for the application of the maxim *volenti non fit injuria,* cannot be supported. In *C.P.R.* v. *Fréchette* (1), the Privy Council held that to establish this defence it must be shewn, (1) that the plaintiff clearly knew and appreciated the nature and character of the risk he ran, and (2) that he voluntarily incurred it. In the present case the plaintiff was not aware that the dome covering was not properly fastened and, therefore, he neither appreciated the danger he was running nor voluntarily incurred the risk.

As far as the matters before the Court of Appeal are concerned there is only one question which, in my opinion,

(1) [1915] A.C. 871, at 880.

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requires consideration, and that is: what did the jury mean by their finding that the plaintiff was guilty of contributory negligence "only to the fact that he was a councillor on the date of the fire"? Their express finding that he was "not negligent in the operation of the fire extinguisher at the time of the fire" shews that the negligence of which they found him guilty as a councillor did not include any want of care on his part in his operation of the extinguisher from the moment it reached the scene of the fire. From that moment he is absolved from any charge of contributory negligence. With negligence on the part of the plaintiff in the operation of the extinguisher excluded, the answer of the jury is, to my mind, intelligible, and their meaning reasonably clear viewed in the light of the circumstances and the instructions given to them. By their answers to the first two questions they had found the defendant guilty of negligence causing the plaintiff's injuries. The defendant could only act through its council. The negligence of the defendant was, therefore, the negligence of its council. In his charge the trial judge said:—

> Some things are more dangerous than other things and if it is highly dangerous, very dangerous, the law imposes on the municipality the duty to protect against that danger. They cannot escape the duty that is put upon them by simply delegating it to someone else. It is insufficient to pass a resolution requiring someone or some persons to inspect the machinery and let it go at that.

This the jury would understand referred to the direction of the council to the fire chief to keep the extinguishers in good working order which the fire chief admitted involved the duty of an inspection. By reason of this direction the jury knew that the defendant village could not escape liability on the ground that the council directed the fire chief to perform a duty which the law cast upon the council itself. What the jury meant, therefore, by their answer, in my opinion, was that the only negligence of which they found the plaintiff guilty was that which he shared with his fellow councillors in their representative capacity in not seeing to it that the extinguishers were duly inspected and kept fit for immediate use. At first sight it might seem that the jury by finding the plaintiff guilty of negligence as a councillor "on the date of the fire," had in mind some specific dereliction of duty by him as councillor on that date. I do not think, however, that the words mean, or were intended to mean, anything more than that the plain-

tiff was, on the day of the fire, a councillor and, as such, he had failed to see that the duty resting on the council had been performed. That this was the jury's meaning seems established by the fact that, once negligence in the operation of the extinguisher was eliminated, there was nc negligence of which the plaintiff, under the circumstances, could be guilty except a breach of duty in his representative capacity, and it has long been established law that a person is not liable in his individual capacity for a tort committed in his corporate capacity.

In *Mill* v. *Hawker* (1), Kelly, C.B., said:—

> I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is ultra vires, and is not, and cannot be in contemplation of law, a corporate act at all.

See also *Mahoney* v. *Guelph* (2); *Harman* v. *Tappenden* (3).

The only other contention made was that there should be a new trial, because the trial judge failed to properly direct the jury in three material particulars:—

(*a*) that he instructed them that the law imposed upon the defendant the duty of keeping and maintaining at all times the fire extinguisher in a safe and proper condition at their peril;

(*b*) that he failed to instruct them as to the degree of care to be exercised by the plaintiff in handling the extinguisher; and

(*c*) that he directed them to disregard the evidence of Johnson and Furby as to the way of operating the extinguisher.

These objections had been taken at the trial although a new trial was not asked for in the court below.

The portion of the charge objected to under (*a*) reads:—

> Persons having highly dangerous articles assume the responsibility of keeping them safe. It was the duty of the defendants to maintain the same, to maintain the fire extinguisher, "in a safe and proper condition for use and operation as required." As it is put in one case "they are bound to keep it secure at their peril."

It was contended that, by the use of the words "at their peril", the trial judge instructed the jury that there

(1) (1874) L.R. 9 Ex. 309, at 321. (2) (1918) 43 Ont. L.R. 313.
(3) (1801) 1 East, 555; 102 E.R. 214.

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was an absolute duty resting upon the defendant to keep its extinguisher from causing harm, and that the law did not impose such an onerous duty but only imposed the duty of using a reasonable, or at most, a high degree of care. I do not think the doctrine of *Rylands* v. *Fletcher* (1) has any application to a case like the present. That rule provides that any person who, for his own purposes, brings on his land or keeps or collects there anything likely to do mischief if it escapes, keeps it at his peril. If it escapes and does harm to others, the owner is responsible independently of the existence of either wrongful intent or negligence on his part. The rule, however, only applies where the dangerous agency is kept by the defendant for his own purposes. It, therefore, has no application where, as here, the extinguisher was brought to the village for the common protection of the corporation and its citizens as individuals. *Rickards* v. *Lothian* (2); *Hess* v. *Greenway* (3). Although the trial judge, in instructing the jury as to the degree of care required from the defendant, did use a phrase which, if it stood alone, might be understood as imposing liability without any negligence on the defendant's part, a perusal of his charge makes it very clear that he impressed upon the jury that the only basis upon which the defendant could be charged with liability was negligence on its part—that is that the defendant village through its council had failed to observe that degree of care which a careful and prudent man would have observed under the circumstances. He told the jury that the care which it was the defendant's duty to observe must be commensurate with the danger of harm involved. This, in my opinion, was a proper direction. It may be that the use of a particular instrumentality might be attended with such extraordinary risk that the only care commensurate with the danger would be such care as operates to prevent injury. In my opinion this objection cannot be maintained.

The portion of the charge referred to in (*b*) reads:—

> When it comes to the standard of duty to be observed by the plaintiff to guide you in determining whether he has been guilty of contributory negligence or not it is not so easy to put it into words. He was bound to use such care as a reasonable and prudent man in like circum-

(1) (1868) L.R. 3 H.L. 330. (2) [1913] A.C. 263, at 280.
(3) (1919) 48 D.L.R. 630.

stances would use, such care as a reasonable and prudent man in the circumstances would observe. You are the judges of that standard.

To this Mr. Gordon, counsel for the defendant, states his objection in the following language:—

I think your lordship should have informed them what a reasonable and prudent man would have done with full knowledge of the danger that he was encountering in breaking the bottle.

As the plaintiff was unaware of the special danger he was encountering through the dome covering not being fastened, I do not see that the trial judge could have been more explicit on this point than he was without invading the province of the jury. In *Sherman & Redfield on the Law of Negligence,* 6th ed., par. 53, page 105, the learned author says:—

There are no abstract rules, defining so clearly the duties of men, under all circumstances, that the court can state them without passing upon any question of fact. The extent of the defendant's duty is to be determined by a consideration of all the surrounding circumstances. The law imposes duties upon men, according to the circumstances in which they are called to act. And though the law defines the duty, the question, whether the circumstances exist which impose that duty upon a particular person, is one of fact. In very many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence or good men of business would use under similar circumstances. Of course, this raises a question of fact as to what men of this character usually do under the same circumstances. This is a point upon which a jury have a right to pass, even though no evidence of the usage were given; for they may properly determine the question by referring to their own experience and observation. Indeed, they must do so; since expert evidence on such points is usually not admissible.

The instruction to disregard the testimony of Johnson and Furby, complained of under (*c*), had reference to the opinion each expressed that, in operating an extinguisher such as the defendant had, it was the duty of the operator to ascertain if the dome covering was properly fastened before breaking the bottle of sulphuric acid. Johnson was the village blacksmith, and Furby was an inspector for the fire commissioner for the province, whose duty it was to go to the various cities, towns and villages to see if the fire equipment of each was in order. In effect what these witnesses were being asked was whether or not the plaintiff, in operating the extinguisher the way he did, had been guilty of negligence which contributed to his injuries. This was surely the province of the jury. It was contended that the testimony was admissible because the witnesses were experts. In *Beven on Negligence,* 4th ed., at page 141, the author says:—

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To justify the admission of expert testimony two elements must co-exist:

(1) The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.

(2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.

In my opinion, the jury were just as capable as the witnesses of forming a correct judgment as to the plaintiff's acts, and the evidence does not disclose that either of the witnesses had ever operated a similar fire extinguisher. The object of expert evidence is to explain the effect of facts of which otherwise no coherent rendering can be given. *Carter* v. *Boehm* (1).

I would dismiss the appeal with costs.

The judgment of Duff and Newcombe JJ., dissenting, was delivered by

DUFF, J.—This is one of those cases in which the plaintiff's sufferings evoke naturally the compassion and sympathy of everybody, and I add, without the least hesitation, having considered the circumstances fully in every one of their aspects, in my own mind, a feeling of profound regret that the village community, represented by the appellant municipality, should have thought it right that his claim for compensation should be considered and determined on strictly legal principles. The duty of this court, however, is a rigorous one; here, the claim must be investigated and decided dispassionately, as matter of legal right.

The respondent was severely injured, having (*inter alia*) his sight gravely impaired, through the escape from a "chemical" fire extinguisher of liquid under high pressure heavily charged with sulphuric acid.

For the sake of clearness, it is convenient here to describe the fire extinguisher. The extinguisher, which is of a design in common use, consists of a cylindrical tank carried on a frame between two wheels about three feet high. At one end there is a handle used to pull or push it when required. At the same end is a leg or prop to hold the tank in a horizontal position. At the top of the tank and at the end nearest the handle is an opening through

(1) (1766) 1 Sm. L.C., 13th ed., 546, notes at page 561.

which the extinguisher is charged. The tank is first filled with a solution of water and bicarbonate of soda. Inside the opening is a cage in which is placed a bottle of sulphuric acid. Over the opening there is a metal dome held firmly in position by a screw-bolt which is screwed into the opening. A lever passes through the top of the screw-bolt, by which it can be tightened or loosened readily by hand. As to this end of the tank, set in the centre of it, there is a handle that, when pulled, throws up a hammer which breaks the bottle containing the sulphuric acid, which then becomes mixed with the solution of bicarbonate of soda. Carbonic acid gas is developed and the pressure of the gas forces the solution through a hose connected with the tank. There is also a pressure gauge and valve which must be opened to enable the liquid to escape. The pressure indicated on the valve is as high as 200 pounds.

The respondent was one of the village councillors, and, a fire having broken out in the village, he was (in execution of his duty as he conceived it) in charge of the extinguisher at the scene of the fire, when he was injured.

The respondent says that he pulled the handle attached to the hammer, breaking the bottle of sulphuric acid, and called upon a bystander to open the valve connected with the hose, which he says was done, when the metal dome was forced from its place and a jet of liquid emerged which struck him in the face. There was no dispute that the dome could not have been firmly screwed into its place or that the escape of the liquid was due to this.

His claim against the appellants was based upon a charge of negligence. The duty, stated in general terms, in which he alleged the municipality had failed, is accurately defined in the finding of the jury, as a duty to have "their fire extinguisher properly inspected and kept in perfect working order". The particular matter in which the municipality is alleged to have made default (the matter intended to be designated by the finding of the jury) was the failure at all times "to keep the cap closed"—to quote the words of the trial judge. The jury found in favour of the respondent, and an appeal to the Court of Appeal of Saskatchewan was dismissed (1).

(1) 25 Sask. L.R. 65; [1930] 2 W.W.R. 638.

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Before proceeding to comment upon the legal contentions, it is essential to make plain the actual position of the respondent and to outline the steps taken by the municipality for the care of the two fire extinguishers which it possessed. The village had statutory authority to "make provision for protection against fire"—I am quoting the summary of the legislation given by the trial judge in his charge. Acting in part, no doubt, under that authority, the council had passed a by-law containing this clause:—

> 43. The Overseer of the Village, or in his absence any member of the council, whom failing, the fire inspector, shall be the director of operations at, and regulate the conduct of all persons assisting in the suppression or extinguishment of fires, and he may call upon any person present at any fire to render every assistance in his power to suppress and extinguish the same.

The learned trial judge instructed the jury that the council had exceeded its powers in professing to make it obligatory upon councillors to perform the duties prescribed in section 43. As to that, I express no opinion, and it may be that the direction has no bearing upon this appeal. At all events, in the view I take upon other aspects of the case, the point is unimportant. The by-law does clearly authorize the councillors, in the contingency defined, to take charge (to direct operations and to regulate the conduct of persons assisting); and to that extent it is clearly *intra vires*. The respondent in what he did acted upon the authority embodied in the by-law. That is left beyond doubt by his own evidence.

> Q. When you four men were over there was there any one taking charge of this?—A. I did.
>
> Q. Why did you?—A. I was the only councillor present.
>
> Q. What authority as councillor did you have to do this?—A. Well, I have authority from the by-law.
>
> Q. What by-law?—A. By-law No. 34, Fire by-law.
>
> Mr. ANDERSON: I would like to put that by-law in as an exhibit.
>
> His LORDSHIP: I would like to know if he was familiar with that by-law.
>
> Mr. ANDERSON: Were you familiar with that by-law?—A. I was.
>
> His LORDSHIP: How and when? It may be most material. How and when?
>
> Q. Were you familiar with that by-law before the time of this accident?—A. Yes, I was.
>
> Q. Do you remember what year it was passed in?—A. 1926.
>
> Q. How did you familiarize yourself with it?—A. Well, I was on the council. When I went into the council it was the natural thing to go into the by-laws and read them up.
>
> Q. And you did familiarize yourself with by-law No. 34?—A. Yes.

The municipality had no proper place of its own where the extinguishers could be stored; and they were kept in a pool room, where, it is admitted, they were accessible to the public. There was a great deal of discussion at the trial as to the duties of one Clarke, who is generally referred to as the fire chief. In point of fact, Clarke was, and had been for years, the village constable charged with the duties incident to that office, as well as the duties of caretaker of the rink, receiving a wage of $30 a month. In 1927, he complained to the council that he had not access to a number of hand extinguishers which were left in the custody of individuals in their houses, and asked for authority to inspect them. A by-law was passed appointing him Fire Chief and he was then instructed by the village overseer and the plaintiff, to quote the plaintiff's evidence, "to look after these fire extinguishers and see they were kept in proper working order and kept in some safe place". No additional wage was attached to the new office, and admittedly there was no intention to change the place of storage of the fire extinguishers with which we are concerned. It was the duty of Clarke, from time to time, to recharge the extinguishers; and they had been recharged on some day in the late summer or early fall.

The learned trial judge held, and so instructed the jury, that the appellants were under a legal obligation "to maintain this extinguisher in a safe and proper condition for use and operation as required." They were bound, he said, "to keep it secure at their peril." This obligation included, he held, the specific legal duty "to keep the cap closed." In the Court of Appeal, the duty of the appellants, by Mackenzie J.A., is described in the terms of the jury's finding to have the extinguishers "kept in perfect working order." This view he grounds apparently upon "the emergency conditions under which such apparatus must often necessarily be used" * * *

There can be no question as to how the accident happened, in that the metal cap covering the chamber was loose and so permitted the expulsion of the acid upon its release from the chamber. It is denied that it became loose when the extinguisher was taken to the fire. It must therefore have become loose while it was being kept in the poolroom. The council, however, had appointed Clarks as fire chief for the very purpose of keeping it in proper working order. Therefore Clarke must have been derelict in his duty and so have rendered the defendant liable.

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Turgeon J.A. puts the case in a rather different way. He says:

> The defendant corporation, in order to secure its own property and the property of its citizens against the spread of fire, purchased this extinguisher and kept it, ready for use, in a place accessible to the public; and it was intended and desired that the public, in case of fire, should take the extinguisher, convey it to the place required, and operate it. Admittedly, the extinguisher contains a dangerous substance, sulphuric acid, and is sure, or almost sure, to cause a serious accident, when operated, unless it is in perfect condition; that is, unless (for the purposes of this case) the metal cap above referred to is firmly bolted down.
>
> * * * * *
>
> In these circumstances, and assuming that the jury accepted this evidence, which they had the right to do, I think that the least that can be said concerning the defendants' liability is that they were under obligation to take all reasonable precautions to keep this machine in safe condition, having regard to the dangerous nature of its contents and to the fact that, when wanted, it would be wanted in a hurry and that the call for its use might come at any moment of the day or night, and considering also that it was lodged in a place accessible in daytime to many people, uncovered, and unprotected in any manner from the curious and the meddlesome, and that it might be made unsafe very easily, by a simple turn of the wrench.

In view of the course of the trial, and the expressions of opinion just quoted, it is important to recall that on this appeal we are only concerned with negligence causing the injury to the respondent, negligence, to quote the phrase of Lord Cairns, *dans locum injuriae;* and that the appellants can be held responsible to the respondent, in law, only for breach of some duty owing to him which they have violated, and the violation of which was the direct cause of the harm of which he complains. We are not now to consider the rules or principles which might come into play, if somebody, with no express authority from the appellants, had taken possession of this machine and in ignorance of the working of it had, through his ignorance or unskilfulness, been the cause of an injury to a bystander. In such a case, we should have to investigate the question of the responsibility of the appellants for the acts of the person working the machine. There is evidence in the by-law before us, that such a procedure was not contemplated by the municipality; and whether the municipality did order its affairs in such a way as to preclude it from disputing responsibility in such circumstances, is a question which might involve debatable issues of law and fact. Had the unskilled person who had assumed the responsibility, in

his ignorance, of working the machine, been himself injured, a further question, still, might arise. These points are not now before us.

The respondent, throughout the occurrences, was acting, as he says, under the authority vested in him as councillor. The machine when under his control was under the control of the municipality, his acts were the acts of the municipality—in taking the machine to the scene of the fire, in releasing the sulphuric acid, and setting up the pressure which was the immediate agency in expelling the liquid that so grievously disfigured him. This last mentioned act was the decisive, the effective act, and, to repeat, it was the act of the municipality, as well as that of the respondent.

Now, as regards third parties, the responsibility of the municipality for the consequences of this act is indisputable. A great deal is said, in the charge and in the judgments, about the importance of keeping the metal cap always securely fastened in preparation for any sudden emergency requiring the employment of the extinguisher. But whatever may be said about that, it is self-evident that the necessity of that precaution could never be so palpable as at the very moment when the machine is to be put into operation. There can be no room for argument upon the point that at that moment, it was the duty of the municipality to see that the dome was securely fastened.

One must visualize the situation in the concrete. Several persons were in close proximity to the machine. All these were exposed to the danger of the gravest injury if the solution in the tank, instead of being forced through the hose, were expelled through the aperture intended to be sealed up by the metal dome. The risk of the escape of this liquid was a risk, which it was the absolute duty, in point of law, of any person working the machine, to avoid, if reasonably possible. Moreover, in point of fact, there was no necessity, no sort of excuse, even, for incurring such a risk. We have not here the case of a pressing emergency, in which some desirable precaution could only be observed at the cost of dangerous or even inconvenient delay or of serious loss of efficiency. To ascertain whether the tank was securely closed, and if not, to screw in the cover, and make the machine absolutely safe, was the work

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of an instant only, and of course an operation of the very simplest character. It was therefore, plainly, the duty of the municipality not to incur the wholly needless and useless risk of the liquid escaping, by releasing the sulphuric acid without first seeing that the covering was securely fastened.

This was equally the duty of the respondent. He was engaged personally in working the machine. He was cognizant of all the facts. He says he knew and appreciated the character of the risk.

Q. You knew exactly how these things functioned at the time of the accident?—A. I did.

* * * * *

Q. You knew you had to direct operations?—A. I did.

* * * * *

Q. You did not forget the dangerous machine you were handling at all did you?—A. I don't think so.

* * * * *

Q. You were of course aware that the cap holding down the sulphuric acid would have to be tight or there would be danger?—A. Certainly.

* * * * *

I shall presently comment upon the excuse the respondent proffers. At this point, I wish to emphasize again the fact that the respondent had assumed charge of the machine under the authority given by the by-law, that is to say, he had assumed the duty of "director of operations" on behalf of the municipality. In this capacity, he was bound to see that the responsibility resting upon the municipality, in respect of the precautions to be observed in working the machine, were, so far as reasonably possible, discharged. That duty he owed to the municipality.

The respondent's justification for his heedless act is that the "fire chief" had been instructed to keep the extinguishers in good order and he assumed that he had done his duty.

I do not desire to speak with severity, but I cannot forbear observing that unless we are to put out of sight completely the considerations just mentioned, it is difficult to take this explanation seriously. The respondent knew, as everybody did, that the extinguishers were kept in a place open to the public by day, "uncovered, and unprotected in any manner from the curious and the meddlesome, and that it might be made unsafe very easily by a simple turn of the wrench", to quote Turgeon, J.A.; he knew, of course,

none better, that the village constable, the caretaker of the rink, receiving a wage of $30 a month, who acted as "fire chief", was not intended to keep these machines under constant guard; that consistently with due attention to his other duties, a periodical inspection was the utmost that could be expected from him; and the respondent himself says that Clarke would have discharged his duty by inspection once a month.

It seems unnecessary to say that the danger which attended the working of the machine depended upon the state of the tank, not in the previous month or week or day, but upon its state at the moment; and that the duty of the respondent to take precautions, was a duty to be exercised with reference to the conditions of the moment, and not to those of some anterior time.

Reverting to the excuse advanced, I do not accept the argument that, in any relevant sense the respondent was entitled "to assume" that Clarke "had done his duty". Having regard to the magnitude of the danger to which the unsuspecting bystanders were exposed, if the cap was not securely fastened, the respondent was not acting reasonably in taking it for granted, as a fact governing his actions, that Clarke, in exercising his functions, had been at all times free from the common human faults of inattention, forgetfulness or even neglect; ordinary care involves, in the circumstances in which the respondent was acting, the highest degree of care; he was not proceeding conformably to that standard in staking the safety of the bystanders upon the assumption which he puts forward as his excuse. But let us put this aside. Let us suppose that Clarke had performed every duty expected of him in his capacity as "fire chief"; that he had examined the extinguisher, not within the preceding month (according to the notion of the respondent as to his duty), but within the preceding week, or for that matter, within the preceding twenty-four hours, and that, in fact, he had left the cap securely fastened; and let us suppose, furthermore, that this was known to the respondent. I do not agree that in such circumstances, knowing also, as the respondent did, that the machine had, in the meantime, to quote Turgeon, J.A., again, been exposed in a place open to the public "uncovered, and unprotected in any manner from the curious

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and the meddlesome", and that it might have been "made unsafe very easily" by a touch of the hand—I am unable to agree that such knowledge would have afforded an answer to a claim by Martin, for example, whose clothes were ruined, and who only escaped disfigurement because the respondent's body served him as a shield.

Having regard to the ease with which the cap could be loosened, and the risk, so vividly described by Turgeon, J.A., of its being found in that condition, and the simple nature of the precaution required, a finding exonerating the respondent from responsibility in face of such a claim could not, in my judgment, be sustained as reasonable.

The direct and proximate cause of the respondent's painful injuries was, I regret to say, his own neglect.

This is sufficient to dispose of the appeal. But I cannot take leave of the case without commenting upon another aspect. The learned trial judge told the jury:—

> The by-law makes him a director of operations, but in terms the by-law does not require him to check over the machinery to see that it is in good order. He was entitled to assume, unless he had a good reason to know, such a good reason that he ought to know to the contrary, he was entitled to assume that the municipality had performed its duty to have this machine in safe and proper condition for use and operation. The duty was imposed upon them by law to do so, and he was entitled as all men are entitled to assume that they had performed their duty.

Unfortunately, the case, perhaps, has become a little obscured by the use of vague general language to describe a simple concrete matter. The controversy at the trial turned, as it now turns, upon the responsibility for the act by which, on the occasion of the fire, the sulphuric acid was released and became mixed with the solution of bicarbonate of soda, at a moment when the simple precaution (to securely fasten the metal dome) known by everybody to be essential, had not been observed.

The passage quoted would, in light of the preceding passages in the charge, convey to the jury the idea that the law imposed upon the municipality the duty to see that, at all times, whether the tank was in use or not in use, the dome was so fastened, and that the respondent was entitled to assume this duty had been performed. Neither the respondent, nor anybody, supposed for a moment that such a duty rested upon the municipality; and the respondent knew that the municipality had made no pretence of performing such a duty.

In laying down such a rule for the guidance of the jury, the learned judge was plainly wrong; and the mischief could not be corrected by some not very precise observations as to what the respondent might be presumed to know as to the practice.

The learned judge quite failed to make it plain to the jury, as he should have done, that, as regards precautions, the critical moment was the moment when the bottle was broken, and that, in the circumstances, the duty, not to break the bottle in the absence of the obvious precaution, was a duty of the most imperative character.

The learned judge also gravely erred in rejecting the evidence of Mr. Furby, an inspector for the fire commissioner of the province. The learned judge had, as we have seen, instructed the jury that it was the duty of the municipality, a duty imposed by law, to have the machine at all times "in safe and proper condition for use and operation." The negligence imputed by the jury to the appellants was "in not having" the extinguisher "kept in perfect working order." It is plain from this answer that the charge had created, in the minds of the jury, the impression that the duty defined by the learned judge in respect of the maintenance of the machine, was a duty owing to the respondent, in the circumstances in which the respondent took possession of the machine; and, further, that this duty involved the obligation to have the metal dome fastened tight at that moment. I pass over the question as to the character of the duty (if any), as to the condition of the machine at that moment, owing by the municipality to the respondent. Even if the rule were accepted, as the jury understood the learned judge to have laid it down, viz., that the municipality was under an obligation to keep the extinguisher "in perfect working order," it is not open to dispute, on that hypothesis, the jury should have been instructed that, in passing upon the question whether the obligation had been performed, they should consider very carefully whether the extinguisher was not in fact "in perfect working order" or "in safe and proper condition for use and operation." The learned judge ought also to have told the jury that in considering that question, they must take into account the ordinary and proper method of working the machine. Obviously, it would be difficult to say

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whether or not the machine was in perfect working order without knowing how the machine was to be worked.

I find myself quite at a loss to conceive on what ground the evidence of the inspector for the fire commissioner could properly be withdrawn from the attention of the jury. The proper method of working the machine, he explained, is not to break the bottle until after the exit into the hose is opened and the metal dome securely fastened. He explained that instruction to this effect is regularly given to the fire chiefs in the cities, towns and villages of the province, as well as to councillors. This was evidence, not merely as to the proper method of working the machine, but evidence, also, as to the known and recognized method of working it, and it ought not to have been withdrawn from the jury. The jury should have been told that, if that evidence was accepted, they could not properly find that the machine was not " in perfect working order " when it came into the hands of the respondent.

It is clear to me, as I have already said, that the respondent's claim fails, because his injuries were due, not to the violation of any duty which the municipality owed to him, but to his own neglect to perform his duty to the bystanders and the municipality; but, for the reasons that I have just given, it is equally plain that if the action were not to be dismissed, there must be a new trial on account of the errors into which the learned trial judge fell in his charge to the jury.

The appeal should be allowed and the action dismissed. The appellants would perhaps consider whether they should ask for costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gordon & Gordon.*

Solicitors for the respondent: *Anderson, Bayne & Co.*

JANE LIDSTONE .....APPELLANT;

AND

WILLIAM NELSON McWILLIAMS AND JAMES B. CHAMPION, EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALFRED McWILLIAMS, DECEASED... } RESPONDENTS.

1931
*Feb. 17, 18, 19.
*May 11.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND

Will—Validity—Testator's knowledge and approval of contents—Costs

APPEAL from the judgment of the Supreme Court of Prince Edward Island *in banco* (1).

The present appellant caused a citation to be issued out of the Probate Court calling upon the present respondents, who were the executors named in the will of Alfred McWilliams, deceased, and to whom had been granted probate in common form, to prove the will in solemn form. Palmer, P.J., by whom the matter was heard, ordered that the will be set aside and the probate thereof rescinded. The Supreme Court of Prince Edward Island *in banco* (1) reversed the judgment of Palmer, P.J., and ordered that his order rescinding the grant of probate be cancelled, and that the will be established.

On the appeal to the Supreme Court of Canada, after hearing the arguments of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal. The question to be determined was, whether or not the testator, when he executed the will, knew and approved of its contents. Written reasons were delivered by Lamont J., with whom the other members of the Court concurred, in which he held, on the evidence, that the propounders of the will had affirmatively established that the testator both knew and approved of the contents of the will. It was ordered that there should be no costs throughout, as the Court was of opinion that, had the respondent McWilliams gone into the witness box at

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1930) 1 M.P.R. 350.

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the trial and given explanation in certain matters, the costs of the two appeals would have been avoided.

Appeal dismissed.

W. E. Bentley K.C. and *J. J. Johnston K.C.* for the appellant.

T. A. Campbell K.C. and *J. O. C. Campbell* for the respondents.

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*Oct. 19.
*Oct. 26.

ANDREW R. McNICHOL (DEFENDANT) APPELLANT;

AND

DELVINA GRANDY (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Slander—Publication—Words spoken by defendant to plaintiff overheard by third person—Liability—Matters to be considered—Onus of proof—Negligence—Questions for jury.

In an interview between defendant and plaintiff in the dispensary of plaintiff's drug store, defendant, in a loud angry tone (according to evidence given), used words which, plaintiff alleged, slandered her. The conversation was overhead by W. (an employee of plaintiff) who was in an adjoining dressing room and was able to hear because of a small hole (covered over) which firemen had cut in the wall. Neither defendant nor plaintiff knew that W. was in the dressing room or that a person there could overhear what was said in the dispensary. At the trial of the action (for slander), on motion at close of plaintiff's case, Adamson J. held that there was no evidence of publication, withdrew the case from the jury, and dismissed the action. The Court of Appeal for Manitoba (39 Man. R. 442) ordered a new trial. Defendant appealed.

Held, affirming judgment of the Court of Appeal, that there should be a new trial.

What may amount to actionable publication, proof thereof, matters to be considered and onus of proof with regard to them, discussed at length and authorities reviewed.

Per Anglin C.J.C., Rinfret and Cannon JJ.: Assuming, but not deciding, that a defendant is not liable for a purely accidental communication to a third person who hears him utter a slander, the defendant not knowing, nor having any reason to suppose, that any person other than the plaintiff is within earshot, and being free from any fault leading to the communication to the third person; yet, in this case, there was explicit affirmative evidence of negligence of defendant, which was proper for submission to the jury, in the fact that defendant, being angry, raised his voice; and it must be for the jury to say

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*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

whether, under all the circumstances of time and place, etc., such raising of his voice amounted to fault on his part so as to make him responsible for W. overhearing what he said.

Per Duff J.: When the defamatory matter is intended only for the plaintiff but is unintentionally communicated to another person, the responsibility must, generally speaking, depend upon whether communication to that other person, or to somebody in a similar situation, ought to have been anticipated. Where the communication is the direct result of the defendant's act, the burden is upon him to show that the communication was not the result of his negligence. As regards proof of publication, the law recognizes no distinction between cases in which express malice in uttering the defamatory words is proved and those in which it is not.

Per Lamont J.: Defendant must be taken to have intended the natural and probable consequence of his utterance, which was that all persons of normal hearing who were within the carrying distance of his voice would hear what he said. When, therefore, it was established that W. did hear what he said, a *prima facie* case of publication was made out, and, to displace that *prima facie* case, the onus was on defendant to satisfy the jury, not only that he did not intend that anyone other than plaintiff should hear him, but also that he did not know and had no reason to expect that any of the staff or any other person might be within hearing distance, and that he was not guilty of any want of care in not foreseeing the probability of the presence of someone within hearing range of the speaking tones which he used.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) allowing the plaintiff's appeal from the judgment of Adamson J., who, on motion made on behalf of the defendant at the close of the plaintiff's case in the trial of an action for damages for alleged slander, non-suited the plaintiff, discharged the jury, and dismissed the action, on the ground that there was no evidence of publication of the slander complained of. The Court of Appeal (1) ordered a new trial.

The material facts of the case are sufficiently stated in the judgment of Anglin, C.J.C., now reported. The appeal to this Court was dismissed with costs.

H. A. Bergman, K.C., for the appellant.
Ward Hollands, K.C., for the respondent.

The judgment of Anglin, C.J.C., and Rinfret and Cannon, JJ. was delivered by

ANGLIN, C.J.C.—I take the following statement of facts from the Appellant's factum in this case:

"The plaintiff (respondent) had leased a store on Portage avenue, in the City of Winnipeg, from A. R. McNichol

(1) 39 Man. R. 442; [1931] 1 W.W.R. 814.

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Limited, where she carried on a drug store and tea shop business in the name of a Limited Company. The defendant (appellant) was the Managing Director of the landlord company. On or about the 27th day of March, A.D. 1930, a fire occurred in the basement of the drug store, or of the building in which the store was, following which an interview took place, on or about the 4th day of April, A.D. 1930, between the defendant and the plaintiff in the dispensary of the drug store, at which interview the defendant is alleged to have slandered the plaintiff in the hearing of one witness, Kathleen Wilson * * * The learned trial judge at the close of the plaintiff's case, on motion to withdraw the case from the jury, held that there was no evidence of publication of the slander complained of, and accordingly withdrew the case from the jury. On appeal to the Court of Appeal for Manitoba (1), the Court of Appeal were unanimous in allowing the appeal and ordered a new trial."

To this, should be added the statement that Kathleen Wilson was assistant manager in the plaintiff's drug establishment.

Upon the occasion in question, she went into the dressing room to hang up her coat and hat immediately after defendant McNichol had come into the building. Her attention was drawn to the conversation between him and the plaintiff by the loud, angry tone in which he spoke. She was interested and then listened carefully and overheard the entire conversation, as she was able to do because of a small hole which had been cut by firemen in the wall between the dressing room and the adjoining dispensary, where the plaintiff and defendant were together, and where the hole was covered by a piece of cardboard hung over it, which effectually concealed its presence. The angry, loud tone in which the defendant made the remarks declared upon as slanderous is emphasized by both the plaintiff and Miss Wilson in testifying, and of this there is no contradiction in the evidence before us. It seems somewhat extraordinary to me, however, that neither the plaintiff's husband, nor a gentleman with him, a chemist named Dodds, who were in the front part of the store, overheard the conversation. The facts that Miss Wilson was in the dressing room, and that a person there would be in a position to

(1) 39 Man. R. 442; [1931] 1 W.W.R. 814.

overhear what was said in the dispensary, were, at the time, unknown to either the plaintiff or defendant.

The question is thus clearly presented whether or not knowledge by the defendant of the ability of the only third person claimed to have been within earshot, to hear a slander alleged to have been uttered by him, is or is not essential to its publication by him. This constituted the first ground of appeal by the defendant from the order of the Court of Appeal, reversing the trial judge and ordering a new trial.

A further ground of the appeal was that the occasion was one of qualified privilege and that the record contains no evidence of the express malice requisite to destroy such privilege.

In view of the disposition which we make of this appeal, we follow our usual practice of referring to and commenting on the evidence only so far as necessary to indicate the ground of our judgment.

Assuming that the occasion was one of qualified privilege, it is perfectly clear that the record affords evidence from which express malice might (we do not say should) be inferred by a jury.

The material part of the cause of action in dispute is not the uttering, but the publication, of the language used (*Hebditch* v. *MacIlwaine* (1), *O'Keefe* v. *Walsh* (2)). "To give a cause of action there must be a publication by the defendant. That is the foundation of the action." (per Bray J. in *Powell* v. *Gelston* (3).

How little may sometimes amount to proof of publication is illustrated in *Duke of Brunswick* v. *Harmer* (4). (But, compare *Osborn* v. *Thomas Boulter & Son* (5)). But, for the purposes of a civil action, the intent of the person uttering the slander may, under some circumstances, be material; yet, we are told that,

> publication can be effected by any act on the part of the defendant which conveys the defamatory meaning of the matter to the person to whom it is communicated. (Gatley on Libel and Slander, 2nd Ed., p. 92.)

Here, communication was clearly by an "act" of the defendant. As Mr. Odgers has said, in illustrating the doctrine, that

(1) [1894] 2 Q.B. 54, at 58, 61, 64.
(2) [1903] 2 Ir. R. 681, at 706.
(3) [1916] 2 K.B. 615, at 619.
(4) (1849) 14 Q.B. 185, at 188-9.
(5) [1930] 2 K.B. 226, at 233-4.

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an accidental or inadvertent communication is a sufficient publication, if it be occasioned by any act or default of the speaker or writer,

I slander the plaintiff, believing I am alone in the room with him. But I speak so loudly that his clerk in the outer office hears what I say. This is a publication by me to the plaintiff's clerk. It is my fault that I speak so loud. (Odgers on Libel, 6th Ed., 137.)

In illustrating the doctrine that the onus lies on the plaintiff to prove publication,—"he must prove a publication by the defendant,"—at p. 134, the same learned author says:

To shout defamatory words on a deserted moor where no one can hear you, is not a publication. But if anybody chances to hear you, it is a publication, *although you thought no one was by.*

A question we might have to consider carefully is how far the limitation put upon the effect of communication to a third person, viz., that the defendant was in some manner at fault in making it, is well founded. Mr. Gatley, at p. 96, says:

The defendant is liable for an involuntary or unintentional publication of defamatory matter to a third person unless he can show that it was not due to any want of care on his part,

and, two sentences further on, he says:

Similarly, A. will be liable if he utters defamatory words in so loud a voice that B. overhears what he says, unless he can show that he did not know and had no reason to suppose that anyone was within hearing,

citing the New Zealand case of *Hill* v. *Balkind* (1).

But where the publication was neither intentional nor due to any want of care on the defendant's part, he will not be liable therefor. (p. 97.)

It will be noted that, in this New Zealand case, the burden of proof was put upon the defendant to establish that he had no reason to suppose that anyone was within hearing, communication in fact having been established. In this case the defence of privilege would seem to have been the chief matter for consideration. In the result, a new trial was ordered on the ground that there was some evidence of express malice, though of very slight value, for the consideration of a jury, and that the issue of malice should have been allowed to go to them.

While "publication" was discussed, no definite conclusion was reached upon the sufficiency of the publication in that case where

defendant's statement (alleged to be slanderous) was overheard by a witness whose presence within hearing was not proved to have been known to defendant or arranged by plaintiff.

(1) [1918] N.Z.L.R. 740.

The headnote merely says:—

Semble, that, if defendant did not know and had no reason to suppose that there was anybody within hearing when he used the words complained of, the words were not published.

For this proposition, *Huth* v. *Huth* (1) is cited by the learned judge. That, however, was entirely a different case from *Hill* v. *Balkind* (2), and also from the case now before us. There, a libellous letter had been opened by a butler in the house of the lady to whom it was addressed. It was opened merely out of curiosity. Admittedly, the butler had no right to open the letter. His wrongful act was, therefore, the cause of publication to himself,—a clear case of *novus actus interveniens*. Referring to the last-mentioned case, Gatley says (at p. 98):

A fortiori, the defendant will not be liable where the defamatory matter is made known by the act of a third person for which the defendant can in no way be held responsible.

It seems unnecessary to determine the question whether or not a defendant, who is not in any way to blame, is responsible for a purely accidental communication to a third person who hears him utter a slander, he having no knowledge of the fact, and no reason to suppose, that any person was within earshot at the time he uttered the slander to the plaintiff. The authorities on the law of libel are quite numerous to the effect that an unintentional or accidental publication of a libel to a third person may be sufficient to create liability. For instance, *Shepheard* v. *Whitaker* (3); *Stubbs* v. *Marsh* (4); *Weld-Blundell* v. *Stephens* (5); *Tompson* v. *Dashwood* (6), where a letter was sent to the wrong person by mistake, publication was held to be established (disapproved of on another ground in *Hebditch* v. *MacIlwaine* (7)).

On the other hand, in many cases it has been held that where, without any apparent fault on the part of the defendant, an accidental publication of a libel on the plaintiff to a third person is made, no responsibility rests upon him. Thus, in *Keogh* v. *Dental Hospital* (8), we find Lord O'Brien, L.C.J., saying:

As to the publication, I think there was no evidence fixing responsibil-

(1) [1915] 3 K.B. 32.
(2) [1918] N.Z.L.R. 740.
(3) (1875) L.R. 10 C.P. 502.
(4) (1866) 15 L.T.R. 312.
(5) [1920] A.C. 956, at 972.
(6) (1883) 11 Q.B.D. 43.
(7) [1894] 2 Q.B. 54.
(8) [1910] 2 Ir. R., K.B., 577, at 587.

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ity upon the defendants. No doubt they may have known that the plaintiff practised dentistry work, but they did not know, nor might they have known, nor was there any presumption that they knew, that the plaintiff had a clerk who, in his absence, was authorized to open letters addressed to him.

Smith v. *Wood* (1), a decision of Lord Ellenborough, cited by Dodd J. in *Keogh* v. *Dental Hospital* (2), seems to be much in point. See, too, *Jackson* v. *Staley* (3), and *Emmens* v. *Pottle et al.* (4), though in this latter case the burden would seem to have been thrown upon the defendant to prove that it was not due to any negligence on his part that he was ignorant that the newspaper contained a libel, and that he had no knowledge, and had no ground for supposing, that the newspaper was likely to contain libellous matter. (*Reg.* v. *Lovett* (5)).

In *Gomersall* v. *Davies* (6), the facts that a letter was opened in the ordinary course of business by a clerk in the plaintiff's employment, and that

to the defendant's knowledge letters addressed to the plaintiff and received in the ordinary course of business would be likely to be opened by persons in the plaintiff's employment,

were held to afford sufficient evidence that there had been publication by the defendant. See, too, *Delacroix* v. *Thevenot* (7), and *Weld-Blundell* v. *Stephens* (8).

In *Powell* v. *Gelston* (9), on the other hand, the fact that a letter addressed to the son of H.W.P. was opened by his father, at whose request the son had written—a fact unknown to the defendant—asking for information, which proved to be libellous, to be communicated to him confidentially, the defendant also being unaware that his letter would be opened by any other than the person to whom it was addressed, was held not to constitute proof of publication by the defendant.

In *Sharp* v. *Skues* (10), it was said by the Master of Rolls that

it would be a publication if the defendant intended the letter to be opened by a clerk or some third person not the plaintiff, or if to the defendant's knowledge it would be opened by a clerk,

and, because these facts had been explicitly negatived by the jury, it was held that there had been no publication.

(1) (1813) 3 Camp. 323.
(2) [1910] 2 Ir.R., K.B., 577.
(3) (1885) 9 O.R. 334.
(4) (1885) 16 Q.B.D. 354.
(5) (1839) 9 Car. & P. 462.
(6) (1898) 14 T.L.R. 430.
(7) (1817) 2 Starkie 63.
(8) [1920] A.C. 956, at 963-4.
(9) [1916] 2 K.B. 615.
(10) (1909) 25 T.L.R. 336, at 337.

Bray J. said, at the conclusion of his judgment in *Powell* v. *Gelston* (1):

The son was asking for an answer that he and he alone would see. The answer of the defendant was intended for the son alone.

(See, too, *McLeod* v. *St. Aubyn* (2)).

The result of all these cases, it may be, is that the weight of authority favours the view that (although, under some circumstances, merely accidental communication to a third person, not intended by the defendant, may suffice to hold him responsible for publication) where communication was not intended by him, and he neither had reason to know or to suspect that any other person was within hearing, when he addressed his slanderous statement to the plaintiff, with whom he thought he was alone at the time, he should not be held to have published to a third person who accidentally overhears, unless he can be charged with some fault leading to the communication to such third person. (Salmond on Torts, 7th Ed., pp. 531-2). But, the cases also would rather seem to support the view that, upon proof of communication in fact, whether consciously or unconsciously, to a third person, by the act of the defendant, the burden is cast upon him to establish innocence of any fault on his part leading thereto; and, in *Emmens* v. *Pottle* (3), the headnote ends with the following *quaere:*

But whether such a person can escape liability for the libel if he knows, or ought to know, that the newspaper is likely to contain libellous matter?

indicating some lingering doubt in the minds of the court,—possibly as to the question of burden of proof. Lord Esher, in the course of his judgment, said:

I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel. * * * Upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. * * * The case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel. (pp. 356-7.)

Bowen L.J. adds:

A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. * * * But I by no means intend to say that the vendor of a newspaper will not be respon-

(1) [1916] 2 K.B. 615, at 620. (2) [1899] A.C. 549.
(3) (1885) 16 Q.B.D. 354.

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sible for a libel contained in it, if he knows, or ought to know, that the paper is one which is likely to contain a libel. (p. 358.)

Interesting, however, as the questions above discussed undoubtedly are, we do not find it necessary to decide them; and we expressly refrain from doing so. Assuming that they should be determined in the defendant's favour, nevertheless, in our opinion, there is here explicit, affirmative evidence of negligence of the defendant, which was proper for submission to the jury, in the fact that the defendant, being angry, raised his voice,—it may be in the belief that no one could hear him, or it may be that he was reckless whether anyone could hear him or not. In this connection, the circumstances of time and place must be borne in mind,—the time being a comparatively busy hour of the day, and the place being alleged to have been one where others were not unlikely to be within hearing. At all events, it must be for the jury to say whether, under the circumstances, such raising of his voice amounted to fault on the part of the defendant so as to make him responsible for Miss Wilson overhearing what was said, as she did.

For this reason alone, we affirm the judgment of the Court of Appeal, which set aside the dismissal of the action by the learned trial judge and directed that it must go back to the jury for a new trial. The appeal will, accordingly, be dismissed with costs.

DUFF, J.—I agree that there must be a new trial. Publication takes place where the defamatory matter is brought by the defendant or his agent to the knowledge and understanding of some person other than the plaintiff; but when the communication is intended only for one person, and in fact, the defamatory matter is, without any intention on the part of the defendant, communicated to another, the responsibility must, generally speaking, depend upon the answer to the question whether communication to the last-mentioned person or to somebody in a similar situation ought to have been anticipated. Where the communication is the direct result of the defendant's act, it seems reasonable, as well as in consonance with the general principles of liability, that the burden should be upon the defendant to show that the communication which is the subject of complaint was not the result of his negligence; and that, I think, is the rule.

A question may possibly arise whether, where the act of the defendant in uttering the defamatory words is malicious in the sense of the law of defamation, the defendant is to be taken to have acted at his peril, and is responsible for communication in fact, even in the absence of negligence.

There is no authority establishing a distinction, as regards proof of publication, between cases in which express malice is proved and those in which it is not. Such a distinction might tend to confuse a jury, the tribunal prescribed by law, in most of the provinces, for actions of defamation. I think the law recognizes no such distinction.

LAMONT, J.—I concur in the conclusion reached by my Lord the Chief Justice that this appeal should be dismissed, and will state shortly my reasons for thinking there was evidence to go to the jury on the question of publication.

In an action of slander the onus is upon the plaintiff to prove publication in fact by the defendant, in this sense, that it is publication for which the defendant is responsible. Where statements defamatory of a plaintiff have been uttered by a defendant and overheard by a third person the first inquiry in determining the defendant's responsibility is: Did he intend that anyone but the plaintiff should hear his defamatory utterances? In ascertaining his intention we must proceed in accordance with the fundamental principle referred to by Swinfen Eady, L.J., in the case of *Huth* v. *Huth* (1), that a man must be taken to intend the natural and probable consequences of his act in the circumstances. In that case the defendant sent through the post in an unclosed envelope a written communication which the plaintiffs alleged was defamatory of them. The communication was taken out of the envelope and read by a butler who was a servant in the house at which the plaintiffs were staying. The butler did this out of curiosity and in breach of his duty. It was held that there was no publication by the defendant and that the case was properly withdrawn from the jury by the trial judge. The basis of the decision was that, although there had been publication to the butler, it was not publication for which the defendant was responsible, because there was no evidence that he knew or had reason to suspect or should have contemplated

(1) [1915] 3 K.B. 32.

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that a letter addressed to the plaintiffs and enclosed in an envelope "but unsealed and unstuck down" would, in the ordinary course, be likely to be opened by the butler or any other servant before being delivered to the defendant's wife. In his judgment Bray J., at page 46, said:—

> In my opinion it is quite clear that, in the absence of some special circumstances, a defendant cannot be responsible for a publication which was the wrongful act of a third person. He cannot be said, except in special circumstances, to have contemplated it. It was not the natural consequence of his sending the letter, or writing, in the way in which he did.

To the same effect was the decision in *Powell* v. *Gelston* (1). There a communication containing libellous matter was addressed by the defendant to F.W.P. in answer to inquiries made by him. It was opened by F.W.P.'s father on whose behalf the inquiries had been made but of this the defendant was unaware. The communication was not seen by F.W.P. It was held that there was no publication by the defendant to the father because the jury found that the defendant did not "know or expect that the letter might probably be opened or seen by a third person other than the person to whom it was addressed."

The same principle was applied in *Keogh* v. *Dental Hospital* (2), where, at page 587, Lord O'Brien, L.C.J., stated the ground for determining the defendant's responsibility in the following words:—

> I think there was no evidence fixing responsibility upon the defendants. No doubt they may have known that the plaintiff practised dentistry work, but they did not know, nor might they have known, nor was there any presumption that they knew, that the plaintiff had a clerk who, in his absence, was authorized to open letters addressed to him.

On the other hand, there is a long line of authorities represented by *Delacroix* v. *Thevenot* (3) and *Gomersall* v. *Davies* (4), in which it has been held that, where a defendant, knowing that the plaintiff's letters were usually opened by his clerk, sent a libellous letter addressed to the plaintiff which was opened and read by the clerk lawfully and in the usual course of business, there was publication by the defendant to the plaintiff's clerk. In *Powell* v. *Gelston* (5), Bray J. said:—

(1) [1916] 2 K.B. 615.
(2) [1910] 2 I.R., K.B., 577.
(3) (1817) 2 Starkie, 63.
(4) (1898) 14 Times L.R. 430.
(5) [1916] 2 K.B. 615, at 619-620.

Several cases were cited—*Delacroix* v. *Thevenot* (1), *Gomersall* v. *Davies* (2) and *Sharp* v. *Skues* (3). They show that where to the defendant's knowledge a letter is likely to be opened by a clerk of the person to whom it is addressed the defendant is responsible for the publication to that clerk. As Lord Ellenborough said in *Delacroix* v. *Thevenot* (4), it must be taken that such a publication was intended by the defendant. On the other hand, in *Sharp* v. *Skues* (5) Cozens-Hardy M.R., said: "It would be a publication if the defendant intended the letter to be opened by a clerk or some third person not the plaintiff, or if to the defendant's knowledge it would be opened by a clerk; but the jury had negatived this in the clearest terms, and under these circumstances it was impossible to hold that some act done by a partner or a clerk of the plaintiff by his direction and for his own convenience when absent from the office could be a publication."

Then we have the further line of cases which shew that where a letter containing defamatory matter concerning the plaintiff has been negligently dropped by the defendant and picked up and read by a third person, the defendant will be held responsible for publication to the person picking it up and reading it. *Weld-Blundell* v. *Stephens* (6). Also where a letter intended for one person was by mistake sent to another. *Tompson* v. *Dashwood* (7). The defendant in these cases was held responsible because the publication was directly due to his want of care.

The facts in the case at bar clearly distinguish it from the case of *Huth* v. *Huth* (8) upon which the appellant relied. There the publication to the butler resulted from a breach of duty on his part which the defendant could not reasonably be called upon to foresee; while in the case before us the publication to Kathleen Wilson took place while she was performing her duties in the usual course of business, and was not brought about by any improper act of hers.

Then can it be said that the defendant's ignorance (if he was ignorant, for he did not testify) of the presence of Miss Wilson in the dressing room, affords any answer to the plaintiff's claim? Applying the principles set out in the above authorities, we must take it that he intended the natural and probable consequences of his act. The natural and probable consequence of uttering the words used was that all persons of normal hearing who were within the

(1) (1817) 2 Starkie, 63.
(2) (1898) 14 Times L.R. 430.
(3) (1909) 25 Times L.R. 336, at 337.
(4) (1817) 2 Starkie, 63.
(5) (1909) 25 Times L.R. 336, at 337.
(6) [1920] A.C. 956.
(7) (1883) 11 Q.B.D. 43.
(8) [1915] 3 K.B. 32.

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Lamont J.

carrying distance of his voice would hear what he said. When, therefore, it was established as a fact that Miss Wilson did overhear him utter the slanderous statements charged against him, a *prima facie* case of publication by him was made out and, in order to displace that *prima facie* case the onus was on him to satisfy the jury, not only that he did not intend that anyone other than the plaintiff should hear him, but also that he did not know and had no reason to expect that any of the staff or any other person might be within hearing distance, and that he was not guilty of any want of care in not foreseeing the probability of the presence of someone within hearing range of the speaking tones which he used.

Appeal dismissed with costs.

Solicitors for the appellant: *Aikins, Loftus, Aikins, Williams & MacAulay.*

Solicitors for the respondent: *Bonnar, Hollands & Philp.*

1931

*March 9, 10

*May 26.

A. B. COLEMAN (DEFENDANT).....APPELLANT;

AND

Q.R.S. CANADIAN CORPORATION, LTD. (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Landlord and tenant—Lease—Interpretation—Conduct of premises by lessee—Closing of part of hotel premises in winter—Whether breach of agreement by lessee.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1).

The plaintiff claimed from the defendant the sum of $2,500 and interest, which sum of $2,500 had been deposited by the plaintiff with the defendant as a guarantee for the full and proper performance by the plaintiff of all the conditions of a certain lease made by the defendant to the plaintiff of certain hotel premises. The defendant alleged

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1930) 65 Ont. L.R. 462.

in defence that the plaintiff did not carry out the terms of the lease, and counterclaimed for damages, in an amount much exceeding the plaintiff's claim, for alleged violation by plaintiff of provisions of the lease.

McEvoy J., the trial judge, found against the defendant's counterclaim, except for certain items aggregating $102.50, and gave judgment for the plaintiff for $2,500 and interest, less said sum of $102.50. The defendant's appeal to the Appellate Division was dismissed (Fisher J.A. dissenting) (1), and the defendant appealed to this Court.

The question before this Court was, whether or not the closing by the plaintiff, for much of the winter period, of what was called the "Main Inn," was, under the circumstances, a violation of the clause in the lease that the plaintiff

will continually conduct and carry on the business of a high-class Inn, to reasonably meet the requirements of its patronage and will use every reasonable means to secure all business possible for the success of the business.

After hearing the arguments of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs. Written reasons were delivered by Lamont J., with whom Newcombe, Rinfret and Cannon JJ. concurred (Duff J. held that the appeal should be dismissed with costs, but gave no written reasons), holding that, considering the question of the intention of the agreement in the light of the conduct of the parties, and on the facts and circumstances in evidence, the closing in question did not constitute a breach of the provisions of the lease.

Appeal dismissed with costs.

Norman Somerville K.C. for the appellant.

W. R. Wadsworth K.C. for the respondent.

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(1) (1930) 65 Ont. L.R. 462.

1931

*Feb. 4.
*April 28.

BLISS *v.* MALMBERG

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Motor vehicles—Accident—Liability—Duty to sound horn—The Vehicles and Highway Traffic Act, ss. 40 and 66 (1).

APPEAL by the plaintiff appellant from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J., and dismissing the appellant's action

The respondent was sued for damages arising from injuries sustained by John Douglas Bliss, a boy of the age of nine years, who, on the 12th day of November, 1927, was struck by a motor truck owned and operated by the respondent and for expenses incurred by the appellant Harold B. Bliss by reason of such injuries. The Honourable Mr. Justice Ives, at the trial, gave judgment for the appellant; but his judgment was unanimously reversed by the Appellate Division of the Supreme Court of Alberta. The trial judge found that the respondent had failed to discharge the onus cast upon him of proving no negligence under section 40 and 66 (1) of *The Vehicles and Highway Traffic Act*. The Appellate Division, even assuming that the trial judge considered that no warning had been given, and, if given, it had been insufficient, thought that the circumstances of the case were such at the time of the accident, having in mind the limited rate of speed of the truck, as to dispense with the necessity for any warning and that consequently no negligence can be attributed to the respondent and that he had discharged the onus cast upon him by the Act.

The Supreme Court of Canada was of the opinion that the respondent failed to prove that the damage did not arise through his negligence and therefore, allowed the appeal with costs, restored the judgment of the trial judge, whose assessment of damages was not found to be excessive.

Appeal allowed with costs.

A. M. Sinclair K.C. for the appellant.

S. B. Woods K.C. for the respondent.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1929) 24 Alta. L.R. 334.

TRUST GENERAL DU CANADA *v.* ST. JACQUES

1931

*Feb. 26.
*May 11.

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

Negligence—Liability—Accident—Master—Insufficient lighting—Art. 1053 C.C.

APPEAL by the defendant appellant from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Désaulniers J. and maintaining the plaintiff respondent's action in damages.

The respondent, an old man 69 years of age, was, prior to the 5th December, 1928, in the employ of the appellant as a night watchman at the factory formerly occupied by the Canadian Footwear Co., Limited, which was then in liquidation. Among the respondent's ordinary duties was that of carrying the ashes out of the boiler room and depositing them outside the building in a shed adjoining. For this purpose it was his custom to make use of a wheelbarrow, and he was obliged, after crossing the main room in the basement, to mount an inclined gangway about 18 inches wide to reach the platform on which the ashes were to be dumped. Early in the morning of the 5th of December, the light which should have illuminated the inclined gangway had failed, and in attempting to push his barrow up this inclined plane to the platform, the respondent, owing to the lack of light, misjudged his position; the wheelbarrow toppled from the gangway and precipitated the respondent to the floor. As a result of his fall he suffered a broken leg, which has left him permanently crippled. The trial judge found that the accident was due to the failure of the electric light which should have been kept in good condition, and that the appellant's failure to do so imposed upon it the liability for the respondent's injuries, which he fixed at the sum of $3,000; which judgment was affirmed by the appellate court.

The Supreme Court of Canada dismissed the appeal, but was of the opinion that it was a case for division of dam-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1930) Q.R. 50 K.B. 18.

1931

TRUST GÉNÉRAL DU CANADA v. ST. JACQUES.

ages, the appellant to bear four-fifths; the respondent, however, to bear his own costs of both appeals, but to be entitled to the costs of the action.

Appeal dismissed.

Alex. Gérin-Lajoie K.C. for the appellant.

C. A. Archambault K.C. for the respondent.

1931

*Oct. 6, 7.

SALE *v.* EAST KOOTENAY POWER COMPANY

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—High tension transmission line—Right of way through land—Trespasser coming into contact with wire through steel fishing rod—Injury—Damages—Liability.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of Macdonald J. and dismissing the plaintiff appellant's action in damages.

The respondent company was given the right of way through a ranch by the owners on which to carry an electrical transmission wire which was in operation at the time of the injury sued for. The wire carried 66,000 volts of electricity and was strung on poles on the right of way about ten feet above the ground. The infant plaintiff appellant was walking under the wire with a steel fishing pole in his possession when it is supposed to have come in contact with the wire and he suffered severe injury. The jury found that the wire at the point of contact was negligently low and they awarded damages to the appellant; but the trial judge dismissed the action, which judgment was affirmed by the Court of Appeal.

The Supreme Court of Canada, after hearing counsel for the appellant and counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed with costs.

J. B. Barron for the appellant.

R. M. Macdonald for the respondent.

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) (1931) 44 B.C. Rep. 141.

COLLETTE *v.* PONTON

1931

*May 15.

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

Evidence—Marriage—Motor vehicle—Accident—Failure to fyle marriage certificate—Art. 159 C.C.

APPEAL by the defendant appellant from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Loranger J., and maintaining the respondent's action.

The appellant was the owner of a motor truck which was parked in front of his grocery store. One Mrs. Marie Anne Carreau, the alleged wife of the respondent, was standing on the sidewalk just behind the motor truck and when the street car she was waiting for came along she left the sidewalk to reach the street car, but, before reaching the street car, she was hit by the truck of the appellant suddenly started on reverse in order to avoid another accident. She was thrown on the pavement and she suffered a broken wrist. The respondent alleged that he was married to Mrs. Carreau, in the province of Quebec and that they passed a marriage contract stating that they would be in community as to property, and he therefore took alone the action in damages against the appellant for $15,537.10.

The appellant, by his contestation, declared that he was ignorant of the alleged marriage between the plaintiff and Mrs. Carreau and declined responsibility on the ground that the accident was due to the negligence of Mrs. Carreau herself. Judgment was given in the Superior Court by Loranger J. for $3,087.10, which judgment was affirmed by the appellate court.

The grounds of appeal were that the alleged marriage between the respondent and Mrs. Marie Anne Carreau had not been legally proven and, therefore, the respondent had absolutely no ground of action; the appellant submitted that article 159 C.C. made it imperative on the respondent to file the certificate of his marriage with Mrs. Carreau, and that even the appellant had no right to make an

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) (1930) Q.R. 49 K.B. 566.

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COLLETTE v. PONTON.

admission of their marriage, because such admission would be against public order. The other ground was that the amount of the judgment had been arrived at on an erroneous basis, and that it was therefore exorbitant, arbitrary and most exaggerated and far in excess of the damages which had been suffered by Mrs. Carreau.

The first ground was set aside by the appellate court for the reason that marriage had been proved as a result of the questions put by the appellant's counsel to the respondent upon his examination on discovery and that there was no question of public order; and, on the second ground, the appellate court affirmed the amount of damages.

The Supreme Court of Canada, after hearing counsel for the appellant and for the respondent, delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Ls. St-Laurent K.C. and *M. Delage K.C.* for the appellant.

L. E. Beaulieu K.C. for the respondent.

1931

*Oct. 7, 8.

SOLLOWAY, MILLS & COMPANY *v.* SUNDERLAND

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Stock brokers—Conversion—Sale of customer's shares after order to sell cancelled—Evidence

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, M. A. Macdonald J. (2), and maintaining the plaintiff respondent's action.

The plaintiff respondent was a customer of the stock brokerage company appellant and he brought an action in damages against that firm for selling shares of his after he had cancelled the order given to sell the shares. The trial judge, upon the evidence, found in favour of the respondent, which judgment was affirmed by the Court of Appeal.

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) [1931] 2 W.W.R. 393

(2) (1930) 43 B.C. Rep. 297; [1930] 3 W.W.R. 641.

1931

SOLLOWAY, MILLS & Co. v. SUNDERLAND.

The Supreme Court of Canada, after hearing counsel for the appellant and counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed with costs.

J. W. de B. Farris K.C. for the appellant.

J. A. MacInnes for the respondent.

COHEN *v.* DOMINION ATLANTIC RY. CO.

1931

*May 11.
*June 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Contract—Evidence failing to establish.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *en banc* (1) which reversed the judgment of Graham J. in favour of the plaintiff, and dismissed the action.

The action was for damages for breach of an alleged parol contract to supply from 12 to 15 large flat cars for carriage of Christmas trees.

Graham J. found that there was such a contract and gave judgment for plaintiff, with provision for assessment of damages.

In the Court *en banc*, Ross J. held that there was no contract binding the defendant to supply the cars in question; and, moreover, that the plaintiff as an undisclosed foreign principal could not sue on the alleged agreement, the agreement, if any, having been made with the plaintiff's agent Harlow, who did not represent himself as an agent, and there never having been any intention on the part either of Harlow or of the defendant to establish any privity of contract between the parties to this action; that, although this latter point was not taken before the trial judge or raised by defendant in its pleadings, it was competent for defendant to urge this ground on the appeal, and that there was no question even of costs involved, especially as there was no allegation in the statement of claim that the plaintiff entered into the contract through an agent in Nova Scotia.

*PRESENT:—Newcombe, Rinfret, Lamont, Smith and Cannon JJ.

(1) 31st January, 1931, not as yet reported.

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Mellish J. concurred with Ross J. Paton J. concurred in that portion of the judgment of Ross J. deciding that plaintiff as an undisclosed principal was unable to maintain the action, but on the other point (as to a contract having been made), agreed with the conclusion of the trial judge. Carroll J. concurred in allowing the defendant's appeal. Chisholm J. held that a contract was made, and that, if the law as to the right of an undisclosed foreign principal to sue on an agreement defeated the plaintiff's action, the dismissal of the action ought to be on terms. In the result, the defendant's appeal was allowed with costs, and the action dismissed with costs.

On the appeal to the Supreme Court of Canada, after hearing the arguments of counsel, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs. Written reasons were delivered by Newcombe J., with whom the other members of the Court concurred, in which, after reviewing the evidence, and pointing out that the judgment of the trial judge did not rest upon any finding adverse to the defendant relating to credibility, but rather upon his interpretation of what was said, and inferences drawn from the material facts which were not in dispute, he stated that, after carefully examining the proof, he was, "with all due respect to the learned judges who think otherwise, in full agreement with the learned judges *en banc* where they deny any evidence in the case upon which it can justly be found that the respondent (defendant) contracted an obligation to supply the large flat cars that Mr. Harlow failed to obtain"; and that, having reached this conclusion, it was unnecessary to consider the other point concerning the plaintiff's alleged incapacity as an undisclosed foreign principal.

Appeal dismissed with costs.

J. L. Ralston K.C. for the appellant.

W. N. Tilley K.C. for the respondent.

CORPORATION OF THE CITY OF CUMBERLAND *v.* CUMBERLAND ELECTRIC LIGHT COMPANY

1931

*May 4.
*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Agreement—Franchise to electric light company from city—Fifty-year term subject to right of city to take over—Arbitration as to value—Profits of unexpired term included in award—"Undertaking, property rights and privileges"—Meaning of—Appeal.

APPEAL by the appellant from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the Supreme Court, Macdonald C.J., which in turn had dismissed an appeal from the award of two arbitrators.

An arbitration was held under the authority of *The Arbitration Act,* R.S.B.C., 1924, c. 13, and was to determine the price which the city of Cumberland was to pay for the undertaking, property rights and privileges of the Cumberland Electric Light Company Limited. On the 19th of December, 1901, the city of Cumberland entered into an agreement with the Cumberland Electric Light Company giving the company the right to instal and operate an electric light plant within the municipality, such rights to exist for a period of fifty years, subject to the right of the municipality to purchase the undertaking, property rights and privileges of the company at any time at a price agreed upon, or in default of agreement, as found by arbitration. In 1929 the municipality decided to take over the undertaking, and as the parties could not come to terms as to price, arbitrators were appointed and made an award, fixing the value of the undertaking, property rights and privileges of the company at $74,000, and they found that of this sum of $74,000 the sum of $36,000 was the value of the physical assets, the "physical assets" being defined as made up of the "fixed assets and supplies on hand."

The Court of Appeal held that the agreement was giving the city the right to purchase the whole undertaking; that the submission was to assess the value of the "undertaking, property rights and privileges of the company," and that the price to be paid should represent the value of the whole

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

(1) (1931) 43 B.C. Rep. 525.

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undertaking and was not restricted to the "physical assets" of the company.

The grounds of appeal submitted to the Supreme Court of Canada were that the judgment of the Court of Appeal was erroneous, in point of law, in that by the notice of purchase dated the 30th day of July, 1929, the franchise to supply electric light to the inhabitants of the municipality did in fact and in law terminate on that date; that being so, there was no period for which the arbitrators could allow $38,000 or any sum for prospective loss of profits. The agreement should be construed in the light of the fact that the appellant corporation had no power to buy back and pay for the franchise granted. The appellant corporation was the creature of the statute, R.S.B.C., 1924, c. 179, and as such had no power to deal in its own franchises to that extent.

The Supreme Court of Canada, after hearing counsel for the appellant and for the respondent, reserved judgment; and, later, dismissed the appeal with costs.

Appeal dismissed with costs.

N. H. McDiarmid for the appellant.

J. W. de B. Farris K.C. for the respondent.

1931

*May 26, 27.
*June 12.

CANADIAN INTERNATIONAL PAPER CO. (DEFENDANT) ..... } APPELLANT;

AND

SOPER ET AL (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Sale of goods—Goods rejected by purchaser as not being the kind ordered —Construction of agreement—Parol evidence to shew meaning intended by the parties of description in written orders—Whether parties ad idem.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which allowed the plaintiffs' appeal from the judgment of Kelly J. (2) dismissing the plaintiffs' action.

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Smith and Cannon JJ.

(1) (1931) 39 Ont. W.N. 452. (2) (1930) 38 Ont. W.N. 429.

The action was for the price of two snow ploughs. The defence was that the ploughs delivered were not as ordered or represented and were not accepted by the defendant.

On the appeal to this Court, after hearing the arguments of counsel, the Court reserved judgment, and on a subsequent day delivered judgment allowing the defendant's appeal with costs in this Court and in the Appellate Division, and restoring the judgment of the trial judge. Written reasons were delivered by Anglin C.J.C. (with whom Rinfret J. concurred), by Newcombe J., and by Smith J. (with whom Cannon J. concurred).

Anglin C.J.C. (Rinfret J. concurring) stated that, on the evidence, he was convinced that the trial judge was entirely right in his findings. He pointed out that, the moment it appeared that the description, in each of the written contracts, of the ploughs sold was equivocal, that opened the door for the admission of parol evidence to identify the subject matter intended by the parties—if, indeed, such evidence is not always admissible to identify the true subject matter, when in dispute. After reviewing the evidence at length, he held that, on the whole evidence, it was very apparent that the differences between the ploughs bought and those furnished were quite sufficient to justify the rejection by the defendant of the two ploughs sent out by the plaintiffs; as the case was put by appellant's (defendant's) counsel,—either the parties were *ad idem* as to the subject matter of the contract and, if so, it clearly was two ploughs the same as that seen in the City of Ottawa garage by Leclair (the defendant's representative), and suitable for work on bush roads, which could be attached to a Linn tractor in such a manner as not to interfere with the loading of supplies on the tractor platform (if need be, the written contracts should be reformed to evidence this arrangement, the testimony in the record being quite sufficient to justify that being done), or the parties were never *ad idem,* Leclair ordering two ploughs of the above type and Soper thinking that he was ordering two Frink "V" type ploughs with standard Linn attachments; in any case, the action fails.

Newcombe J. held that the parties were not *ad idem,* and that, without attempting to distribute the responsibility for this, the plaintiffs must fail.

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Smith J. (Cannon J. concurring) held that the trial judge's finding as to the kind of ploughs intended by the parties was justified by the evidence; that evidence was admissible to shew the meaning that both parties attached to the description of the article appearing in the written orders; and that the outfits delivered were entirely different from the outfits described, according to the understanding of both parties as to the meaning of that description at the time it was used.

Appeal allowed with costs.

W. F. Chipman K.C. and *A. C. Hill K.C.* for the appellant.

G. F. Henderson K.C. and *D. K. MacTavish* for the respondents.

1931

*Apr. 29, 30.
*Oct. 6.

OVERN *v.* STRAND

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages—Alleged seizure of goods and chattels—Conversion—Solicitors—Authority to act—Ratification—Supreme Court action tried by consent in county court—Validity of judgment—Effect of as award—Execution—Liability of sheriff and purchaser.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Morrison C.J.S.C., on a verdict of a jury in favour of the plaintiff appellant.

In this action the plaintiff appellant, Mrs. Overn, claimed damages for loss suffered by reason of the wrongful sale of her goods and chattels. She claimed against the defendants respondents, Wilson & Wilson, a firm of solicitors at Prince George, British Columbia, because, purporting to act as her solicitors, they consented, on her behalf without authority from her, to have an action which was brought in the Supreme Court of British Columbia tried by a judge of the County Court of Cariboo. She claimed against the defendant Strand, who was plaintiff in the

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

(1) (1930) 44 B.C. Rep. 47; [1931] 1 W.W.R. 694.

Supreme Court action referred to, because he issued execution on what purported to be a judgment made by the judge of the County Court of Cariboo, which judgment she alleged was a nullity, and also because he caused her goods to be seized and sold to satisfy an execution which he had against one John Weisner. She claimed against the defendant respondent Peters, because, as sheriff of the county of Cariboo, he wrongfully seized and sold her goods and chattels; and she claimed against the Hudson's Bay Company, also respondent, because, having received her goods from the sheriff, they converted them to their own use. The relevant facts are: In the spring of 1908 one John Weisner, who for many years had been trading with the Indians in northern British Columbia, decided to give up business and to sell his river outfit. On April 9, 1928, he entered into the following agreement with Mrs. Overn:—

This is to certify

That I

John Henry Weisner have on this ninth day of April nineteen twenty-eight sold and delivered over to Elizabeth Overn, White River B.C. all my interest in building and business situated on the east side of Finly River two hundred yards west of White River, one boat forty feet long eight feet beam & one Kermath Marine engine 35 horse power, two Johnson Kicker eight horse power, one Lockwood Kicker, one small boat, for the sum of one thousand dollars, good canadian money, $1,000.00

J. H. Weisner.

Witness
J C Hasler

Mrs. Overn states that she paid the $1,000 in cash and there is no evidence to the contrary. She also states that she received no goods whatever from Weisner except those specifically mentioned above. After purchasing his river outfit Mrs. Overn employed Weisner to run the boats for her. In May, 1928, she took the boats to Prince George. While there Weisner introduced her to his solicitors, Wilson & Wilson, whom she consulted as to necessity of having the document of April 9th registered as, on the way out, Weisner had been served with a writ of summons at the instance of one Strand who claimed that Weisner owed him $2,286. On May 20th Mr. J. O. Wilson drew up a new bill of sale from Weisner to Mrs. Overn which was registered, and also an agreement in which Weisner authorized her to use his

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name in her business. She then purchased from the wholesale houses in Prince George and Edmonton goods to the amount of some six or seven thousand dollars for trading purposes. These she assembled in Prince George during the first half of June and placed them on board the boats. Shortly afterwards she started north. Some days later she and Weisner were served with writs of summons in an action by Strand to set aside the bill of sale. On June 29, Weisner, who could not read and who could only write sufficiently to sign his name, had Mrs. Overn draft a letter for him to his solicitors, Wilson & Wilson, asking them to act for him in the action. On the same day Mrs. Overn wrote a letter to the same solicitors in which she said:—

Mr. Weisner have instructed me to write you I am not takin this case up with any lawyer in Prince George.

Mrs. Overn then went to the Post on White Water River, arriving there on July 15. The goods which she brought up she put in new buildings which she had erected for the purpose. On July 26, Wilson & Wilson wrote to Weisner, as follows:—

We have your letter, also Mrs. Overn's letter and from what she says we take it she does not wish us to defend this action on her behalf. You might point out to her that if she does not defend the action, she will have no chance of defending it by way of an appeal later, as there is no appeal from a default judgment.

* * * * *

We would like to have a word as to when you could possibly be here for trial, and whether Mrs. Overn wishes us to defend the action on her behalf.

This letter Mrs. Overn admits reading but says she did not consent to have Wilson & Wilson act for her. Weisner then went to Prince George and, according to Mr. Wilson, told him that Mrs. Overn wanted his firm to act for her as well as for himself. Wilson, however, because of Mrs. Overn's former letter, would not take the responsibility of acting on her behalf without something from her. Weisner then brought in Charles Overn, husband of Mrs. Overn, who, according to Mr. Wilson, told him his wife desired he should act on her behalf. Believing this, Mr. Wilson, on August 21, signed the following consent:—

The plaintiff, by his solicitor, Mr. E. J. Avison, and the defendants, by their solicitor, Mr. P. E. Wilson, do hereby agree that the County Court of Cariboo, holden at Prince George, and His Honour Judge Robertson, the judge of that court, shall have jurisdiction and power to try this action; but this agreement shall not prejudice or effect any right of appeal of any of the parties.

The trial took place the following day with the result that the bill of sale from Weisner to Mrs. Overn was set aside as fraudulent. The formal judgment, after declaring the sale set aside, contained the following paragraph:—

> And this court doth declare that all stock-in-trade in the possession of the defendant, Elizabeth Overn, is in law the property of the defendant, John H. Weisner, and subject to the claims of his creditors.

On September 14th Strand issued execution against the goods of Weisner for $2,705.63 and the following day he issued execution against the goods of Mrs. Overn and of Weisner for $497.25 being the costs taxed against them in the action setting aside the bill of sale—costs of execution and poundage. These writs were handed to the sheriff who forwarded them to J. D. McIntosh, his agent, who, on September 28, against the protests of Mrs. Overn, seized not only the river outfit but all the stock-in-trade which she, two months before, had brought to the Post and which, she says, were there worth $12,000. Next morning she left for Prince George. On October 4th McIntosh sold all the goods to the Hudson's Bay Company by private sale for $4,850. Some days later Mrs. Overn reached Prince George and called upon the defendants, Wilson & Wilson, and asked them for the papers in connection with the action, and a copy of the evidence. At this time these defendants knew she was on her way to Vancouver to consult her solicitors in reference to the matter. Next morning she went to Vancouver, consulted solicitors, and, on their advice, brought an appeal from the judgment of Judge Robertson. The Court of Appeal held that the appeal did not lie. Mrs. Overn then brought this action. It was tried before Chief Justice Morrison and a jury. The jury brought in a general verdict for the plaintiff giving her $10,000 for loss of stock-in-trade, and $1,000 general damages. Judgment was accordingly entered for her for $11,000. The defendants appealed and the Court of Appeal allowed the appeal and set aside the judgment below as to all defendants, except the defendant Strand, who did not appear to prosecute his appeal.

The Supreme Court of Canada, after hearing counsel for the appellant and counsel for the respondents, reserved judgment; and, later on, rendered judgment allowing the appeal with costs and restoring the judgment of the trial

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judge, with the following variations: judgment against the respondents Wilson & Wilson to be restricted to the sum of $497.25 and the judgment against the other respondents, the sheriff Peters and the Hudson's Bay Company, for the balance of the sum of $11,000, and the amount for which judgment will be entered against the two last mentioned respondents to be settled by the Registrar if the parties differ as to same.

Anglin C.J.C., in his reasons for judgment, stated that, on the evidence, it appeared that the plaintiff appellant "never knowingly consented to any adjudication by the County Court of Cariboo, or by His Honour Judge Robertson, upon the validity of the Bill of Sale given to her by Weisner, and that she never knowingly or willingly acquiesced in, or ratified, the course taken by Messrs. Wilson & Wilson, who purported to represent her. The implied findings to that effect of the jury before which this action was tried, based, as they were, on a fair charge, to which the respondents took no exception at the trial, and of which they cannot now complain, are conclusive on this aspect of the case, the questions of original authority and ratification, primarily questions of fact, having been properly submitted for its determination; and, in so far as ratification may involve a question of law, in my opinion it has been satisfactorily dealt with by Lamont J. That being so, it follows that the judgment of Robertson Co.J., was pronounced without jurisdiction."

Lamont J., after having given his opinion on the questions of facts in this case, added the following remarks:

"The main defence of Wilson & Wilson, however, was that the appellant had, after full knowledge of what had been done in her name, ratified their acts.

"To constitute a binding adoption or ratification of an act done without previous authority in the name of a supposed principal, it must be established that the principal unequivocally adopted the act after full knowledge of all essential facts relating to the transaction, unless the circumstances warrant the clear inference that the principal was assuming all risks from the acts of the agent. The onus of proving such ratification rests upon the person al-

leging it who must also prove full knowledge on the part of the principal. *Wall* v. *Cockeril* (1). Ratification of an act may be express or implied. It will be implied whenever the conduct of the person on whose behalf the act was done is such as to shew that he intends to adopt or recognize the unauthorized act. Bowstead on Agency, 7th ed., 59. Ratification must be intentional. By it the principal is bound because he intends to be bound. If that intention cannot be shewn to exist no ratification can be held to have been established. In most cases the intention of the principal is to be gathered from his conduct and statements rather than from any express declaration of ratification. There are, however, certain classes of cases in which the courts have held that the conduct of the principal raised, in point of law, a conclusive presumption of his intention. Where goods have been wrongfully taken and sold the owner may either treat the taker as a tortfeasor and sue him for damages for wrongful conversion, or he may treat him as his agent to make the sale and sue him for the purchase price as money had and received.

"If he adopts this latter course and the taker pays over the purchase money received by him, the courts hold the owner to have elected conclusively to waive the tort and to treat the taker as his agent, and he cannot afterwards treat him as a wrongdoer. In *Smith* v. *Baker* (2), Bovill C.J. said:—

> The law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so and bring his action for money had and received for the proceeds of goods wrongfully sold.
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> * * *
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> But if an action for money had and received is so brought that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way. The principles which govern the subject are very well illustrated in the case of *Buckland* v. *Johnson* (3), where it is held that the plaintiff having sued one of two joint tortfeasors in tort could not afterwards sue the other for money had and received. There may be other instances where an act may amount to a conclusive election in point of law to waive the tort. But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law.

(1) [1863] 10 H.L.C. 243. (2) (1873) L.R. 8 C.P. 350, at 355.
(3) (1854) 15 C.B. 145.

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"With this statement of the law A. L. Smith L.J. in *Rice* v. *Reed* (1), said he entirely agreed.

"In the case at Bar the respondents rely on two acts of the appellant as conclusively establishing ratification. They are:

(1) That when she came out to Prince George in the early part of October, after the seizure of her goods, and obtained the papers relating to the action from Wilson & Wilson, she did not repudiate the acts done in her name or intimate that she did not consent thereto, and

(2) That she took an appeal from Judge Robertson's order without setting up any want of authority on the part of Wilson & Wilson.

"As to the failure of the appellant to disavow the solicitor's acts on the ground of want of authority, it is, on the evidence, in my opinion, very doubtful if she had any clear comprehension of what had been done or of how the seizure of her goods had come about. Further, it has not been established that she had the necessary information to enable her to form any just conception of her rights. She had been in the wilderness, four hundred miles north of Prince George among the Indians, where there was not even a justice of the peace and where mail was delivered only once in every two or three months. She says that when her husband and Weisner came to White Water River, after the trial, they told her the case had been dismissed. She evidently learned that her husband had employed Wilson & Wilson but the respondents knew before she came down that she repudiated her husband's right to do this and also knew that when she did arrive she was on her way to consult solicitors in Vancouver as to her position and to ascertain by what right her goods had been taken. Wilson & Wilson were not under any impression that she was approving of what they had done; nor were they in any way misled.

"In support of their contention on this point counsel for the respondents referred to the language by Blackburn J. in *Reynolds* v. *Howell* (2), where, at page 400, that learned judge said:—

> I may add that, in my opinion, if a plaintiff after action brought in his name by an attorney without authority hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's acts.

(1) [1900] 1 Q.B. 54, at p. 66. (2) (1873) L.R. 8 Q.B. 398.

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"This rule, without doubt, is applicable to cases where, in the absence of repudiation, the solicitor and the other parties to the action would assume that authority had been given and that it was being continued, but it is not applicable, in my opinion, to cases where the work which the solicitor undertook, without authority, to do has been completed without the knowledge or consent of the principal. In *De Bussche* v. *Alt* (1), Thesiger L.J., said:—

> If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.
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> * * *
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> But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal.

"The appellant's failure to disavow the acts of Wilson & Wilson in signing the consent of August 21, cannot, in my opinion, as a matter of law be said to indicate an intention on her part to adopt as her own an act against which she has always protested as the cause of her trouble.

"Then can it be said that we are obliged upon any rule of law to hold that, by appealing to the Court of Appeal against the order of Judge Robertson, without setting up a want of authority on the part of Wilson & Wilson, the appellant has conclusively elected to ratify the consent given in her name?

"As already pointed out there are cases in which the taking of judicial proceedings by a principal, after knowledge of the unauthorized act of a person purporting to act as his agent, is conclusive of an election to ratify the act of such agent. The principle upon which these cases have been decided, as I read the authorities is that the principal by his judicial proceedings is held to have ratified the agent's act because the rights claimed by the principal in these proceedings can only be predicated upon the existence of the relationship of principal and agent, and could not be justified upon any other hypothesis. There are other cases, however, in which the taking of judicial proceedings,

(1) (1878) 8 Ch. D. 286, at 314.

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do not necessarily imply an intention to ratify the act of the agent. In these cases the question of intention is dealt with rather as a question of fact for the jury than as a question of law for the court.

"In *Morris* v. *Robinson* (1), a cargo of indigo had been improperly sold under an order of the Vice Admiralty Court and the proceeds paid into court. The owner of the cargo through his agent applied to have the money paid out to him. It was held that the application for payment out did not in law bar the owner from bringing an action in trover against the purchaser of the indigo. In his judgment Bayley J. pointed out that the application had not been successful and the owners were, therefore, in the same position as if no application had been made to the court.

"In *Rice* v. *Reed* (2), the plaintiff's servant had wrongfully sold the goods of his master to the defendant who knew that the servant was improperly dealing with them. The servant paid the proceeds of the sale into his account at his bank. The owner brought an action against the servant and the bank, claiming, as against the servant, damages for the conversion of the goods and in the alternative for money had and received; and, as against the bank, an injunction to restrain them respectively from drawing out the sum of £1,500 then standing to the servant's credit at the bank. The plaintiff applied for and obtained an interim injunction but no further steps in the action were taken. An agreement was arrived at between the owner and the servant that £1,125, out of the £1,500 in the bank, should be paid over to the owner in full settlement of all his claims against the servant, but without prejudice to his claim against the defendant. The owner then brought an action against the defendant for conversion. It was held that the owner had not by obtaining an interim injunction in the former action and by his dealing with the servant elected to affirm the sale and to waive the tort, and the action against the defendant was maintainable. In his judgment Lord Russel C.J., at page 64, said:—

> This case would seem to establish the proposition that an application of a judicial kind to a judicial court to obtain the proceeds of goods improperly converted is not conclusive proof of election to affirm the sale. In the present case there was no application by the plaintiff to have the money in the bank paid out to him.

(1) (1824) 3 B. & C. 196; 107 E. R. 706.

(2) [1900] 1 Q.B. 66.

In *Ewing* v. *Dominion Bank* (1), Lord Davey said:—

Whether the circumstances were such as would raise either an estoppel against the petitioners, or would amount to what Lord Blackburn in *McKenzie* v. *British Linen* (2) calls a "ratification for a time" by the supposed makers of the note of their signature, is, in the opinion of their Lordships, absolutely a question of fact.

"In the circumstances of the case at Bar the taking of the appeal does not, in my opinion, necessarily imply an intention to ratify the unauthorized acts of Wilson & Wilson. The order appealed from contained a clause which, taken by itself, would amount to a holding that all the stock-in-trade in possession of the appellant no matter how or from whom obtained, was the property of Weisner. And it may well be that the appellant's advisers thought that until the order was set aside on appeal that clause would be a bar to any action brought to recover the value of her goods. As this construction of the clause received support in the court below and was urged upon us, it is not unreasonable to say that the appeal may have been brought to set aside the order without any intention of ratifying the consent given by Wilson & Wilson. Ratification, not being necessarily implied from the taking of the appeal, the question of the appellant's intention was a question of fact for the jury and they negatived any such intention. The defence of Wilson & Wilson therefore fails, and they must be held liable for the loss suffered by the appellant by reason of their act. This loss, it is contended, was only the damage caused by the issue of the execution directing a levy on her goods for $497.25, and that the liability of these respondents should be limited to that item. In my opinion this contention is right. *Marsh* v. *Joseph* (3); *Jones* v. *Woodhouse* (4).

"The defence of the sheriff is:—

"(1) That in seizing and selling the property in question he was merely carrying out the direction of the court, and

"(2) That in any event all the goods seized and sold were the goods of Weisner.

"The sheriff seized under two writs of execution, one commanding him to make out of the goods of Elizabeth

(1) [1904] A.C. 806.
(2) (1881) 6 App. Cas. 82, at p. 101.
(3) [1897] 1 Ch. 213.
(4) [1923] 2 Ch. 117.

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Overn and John H. Weisner the sum of $497.25; and the other to make out of the goods of John H. Weisner the sum of $2,705.63. Both writs were issued out of the Supreme Court Registry.

"It has long been established law that where a sheriff seizes and sells property under a writ of execution which is regular on its face and was issued out of a court of competent jurisdiction, he is protected by the writ unless the goods are not in fact the goods of the execution debtor. This protection he enjoys even although the order in which the writ is founded may, subsequently, be set aside for irregularity or is in fact a nullity.

"In *Barker* v. *Braham* (1), the Lord Chief Justice stated the rule as follows:—

> A sheriff, or his officers, or any acting under his or their authority, may justify themselves by pleading the writ only, because that is sufficient for their excuse, although there be no judgment or record to support or warrant such writ; but if a stranger interposes and sets the sheriff to do an execution, he must take care to find a record that warrants the writ, and must plead it; so must the party himself at whose suit an execution is made.

"Whether the judgment or order justifies the issuing of the writ is in each case a question to be determined by the court issuing it, and not by the sheriff.

"In *Ramanathan Chetty* v. *Meera Saibo Mariker* (2), the Privy Council said:—

> A distinction must be drawn between the acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorized the seizure, the seizure is lawful, and no action will lie in respect of the seizure, unless the person complaining can establish a remedy by some such action as for malicious prosecution. If, however, the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice.

"The writ against the appellant's goods for $497.25 was regular on its face and the Supreme Court of British Columbia was competent to issue it. The sheriff was, therefore, justified in realizing out of her goods the amount called for by that writ. In doing so he was acting with judicial sanction and no action lies against him therefor. He, however, proceeded to sell the balance of the appellant's goods under an execution directing him to levy on the goods of John H. Weisner. The goods sold to satisfy this execution were the stock-in-trade of the appellant, pur-

(1) (1773) 95 E.R. 1104. (2) [1931] A.C. 82.

chased with her own money and situate in her own buildings. These goods could not in any way be said to be the goods of Weisner. In this statement of claim the sheriff seeks to justify the sale of these goods on the ground that in the order of Judge Robertson of August 22, all goods in the possession of the appellant had been declared to be the property of Weisner and, therefore, when he seized and sold them he was selling Weisner's goods.

"I find it difficult to believe that Judge Robertson intended to hold that all the stock-in-trade in the appellant's possession, no matter by whom it was in fact owned, was the property of Weisner. To reach that conclusion the judge would have to be satisfied that the business she was carrying on was the business of Weisner, or that the money with which she purchased the stock-in-trade was Weisner's money. The appellant has explained that she obtained the money to make payments on the stock-in-trade she purchased in 1928, by taking over, in 1927, trading supplies which Weisner had brought to Ingenika but which, through illness, he was unable to trade with the Indians. These supplies she took to the White Water Post under an agreement in writing with Weisner and traded them through the fall of 1927 and the winter of 1927-8, making a profit thereon. Neither in this action nor in the action before Judge Robertson has anyone challenged the bona fides of that transaction, or alleged that the profit which she obtained from such trading was not rightfully her money. In the case before Judge Robertson all the allegations in the statement of claim and all the evidence given at the trial (Exhibits in the present case), were directed against the bill of sale, and, in the examination of Weisner for discovery put in evidence by counsel for Strand, the questions impliedly admit that the goods taken north in 1928 were the property of the appellant. For example:—

Q. In the spring of 1928 did you buy considerable goods and get them to Summit Lake, for Mrs. Overn and take them out to Whitewater?

A. Yes, sir.

* * *

Q. What weight of freight did you take up for Mrs. Overn in the spring of that year?

A. All goods. I think there was 16 tons, might have a little over or under.

"The only statement before Judge Robertson which is apparently not consistent with the evidence that the money

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with which the goods were bought was the appellant's money, is that of Weisner who thought she made the original purchase in 1927 for her husband's business, which was that of trapping. The husband, however, said that "Practically Mrs. Overn owns the business." In view of the allegations and the evidence it is, to my mind, hardly conceivable that Judge Robertson intended to make the sweeping declaration contained in the clause in question in his order, although no doubt the language used, if taken by itself apart from the context, is sufficiently wide to carry the construction sought to be put upon it. The clause to my mind should be construed in accordance with the well known maxim that general words may be aptly restrained to the subject matter with which the speaker or writer is dealing. *Broom's Legal Maxims,* page 415; Willes J., in *Chorlton* v. *Lings* (1); *Moore* v. *Rawlins* (2). Construing it thus the declaration would apply only to the contents of the bill of sale. If, however, the language of the clause be given its broad and literal meaning it still affords no protection to the sheriff for the declaration, as well as the rest of the order in which it is found, is, as I have already pointed out, a nullity having been made without jurisdiction and, as such, cannot support or justify anything purporting to be done under it. It is from the writ of execution and not from the judgment or order on which it is founded that the sheriff derives his protection. Moreover there is no evidence that the sheriff had any knowledge of the existence of the order. What he had was a letter from Strand asking him to instruct his deputy to seize all the goods and chattels of Weisner and the appellant, including the goods in the appellant's store. There was nothing in the writ of execution indicating that the goods in the possession of the appellant belonged to Weisner, so that in carrying out the instructions in Strand's letter the sheriff was not following the directions in the writ, but was acting as Strand's agent. The goods sold not being the property of Weisner he sheriff is equally liable with Srand for their conversion.

"It was also argued that as the sheriff was entitled to seize and sell the appellant's goods under the execution against her, the sale of all her goods was valid even if excessive because no claim had been expressly made for ex-

(1) (1868) L.R. 4 C.P. 374, at 387.

(2) (1859) 141 E.R. 467, at 480.

cessive seizure. The claim that he had no right to seize or sell any of the appellant's goods is, in my opinion, sufficient to cover a claim for excessive seizure. The sheriff's duty was to sell sufficient of the appellant's goods to satisfy the execution against her. When he had done that she was entitled to immediate possession of the remainder.

"In *Batchelor* v. *Vyse* (1), it was held that:

If the sheriff sells under an execution more goods than are sufficient to satisfy the debt and costs he is liable in trover in respect of the excess.

To the same effect is the case of *Stead et al* v. *Gascoigne* (2), where Dallas C.J., with whom the other members of the court concurred, said:—

A sheriff has no right to sell more than is necessary: the defendant in this case has, in my opinion, committed a tortious act; and trover is the proper action.

"In the present case there was no occasion to sell the appellant's goods in bulk—they consisted of groceries, dry goods, hardware and tobacco, and were, therefore, saleable in small packages.

"The defence of the respondents, the Hudson Bay Company, is that they were *bona fide* purchasers for value from the sheriff of goods sold by him under execution.

"A sale by a sheriff is not a sale in market overt and the purchaser acquires thereby only the interest in the goods which the sheriff has the right to sell. Unless, therefore, the goods sold are the goods of the execution debtor, the sheriff does not, by his writ, acquire any right to sell them and cannot transfer any right to a purchaser as against the real owner.

"The rights of a purchaser at a sale under execution were discussed by the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh* (3), and it was pointed out that if the court issuing the execution had jurisdiction, a purchaser was not bound to inquire into the correctness of the order or judgment upon which the execution issued. A purchaser, therefore, at a sale under execution is under no obligation to go behind the writ, but, in order to make sure that he will acquire title to the goods he buys, he must see that the court issuing the writ had jurisdiction to do so; that the writ is

(1) (1834) 4 Moore & Scott 552. (2) (1818) 129 E.R. 488.
(3) (1875) 3 Indian Appeals 106.

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regular on its face, and that the goods sold by the sheriff are the goods of the execution debtor.

"The writ for $497.25 against the appellant's goods, as I have already pointed out, fulfilled these requirements. The title to the goods sold to satisfy that writ, therefore, passed to these respondents and no action lies against them for their conversion. They, however, unfortunately for themselves, did not see that the remainder of the goods which they purchased were the goods of the execution debtor mentioned in the writ under which they were sold. And as they were not his goods these respondents obtained no title whatever to them and, having taken possession of them, must account to the appellant for their value. I am, therefore, of opinion that the respondents are liable for the loss suffered by the appellant, but I do not think each of the respondents is liable for the whole loss.

"For the reasons I have given, the respondents, Wilson & Wilson are responsible for the loss caused by the sale of the appellant's goods to satisfy the writ for $497.25; the other respondents are liable for the balance. The total damage suffered was $11,000; the amount of the two writs was $3,202.88. The liability of each respondent is, therefore, a matter of calculation. If the parties do not agree as to the amounts the matter may be referred to the Registrar for computation.

"The appeal will therefore be allowed as to all the respondents; the judgment below set aside, and the judgment of the trial judge restored but modified in the way I have indicated as to the amount for which each respondent is liable. The appellant is entitled to her costs throughout against all the defendants."

Appeal allowed with costs.

J. A. MacInnes for the appellant.

J. W. de B. Farris K.C. for the respondents Wilson et al.

D. H. Laird K.C. and *D. N. Hossie* for the respondent The Hudson Bay Co.

E. Pepler for the respondent Peters.

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Court, this Court lacked jurisdiction to hear the appeal because, in their view, the grounds of dissent below were not on any question of law, but only on matters which it was competent for the jury to pass upon and which depended entirely upon an appreciation of the weight of evidence in regard to the points discussed. But the ground taken (unanimously) for dismissal of the appeal was that it failed on the merits, as the reasons for dissent below did not, on examination of the matters dealt with therein and of the trial judge's charge as a whole, shew justification for setting aside the conviction. STEINBERG *v.* THE KING... **421**

4 —— *Municipal by-law authorizing works—Action by ratepayer—Annulment—Contractors mis-en-cause in trial court—Not joined in the proceedings before appellate court—Judgment in appeal annulling contract—Nullity—Res judicata.*] The respondent, a ratepayer, brought an action against the appellant municipal corporation for the annulment of a by-law and contracts authorizing the construction of three bridges; and he joined in the case the contractors to whom were awarded the contracts. The trial judge having dismissed the action, the respondent appealed from that judgment but only against the municipal corporation. The appellate court declared the by-law valid, but annulled the contracts.—*Held* that an appellate court, the same as the trial judge, cannot pronounce the nullity of a contract when all the contracting parties have not been called before the court; that in this case the contractors were not made parties in the proceedings before the appellate court; that it is now impossible to order that they should be joined in proceedings before this court or the appellate court as the decision of the trial judge has acquired the authority of *res judicata* as to them. Therefore, the appellate court could not validly render a judgment annulling the contracts, and the judgment appealed from must be reversed. LA CORPORATION DE LA PAROISSE DE ST.-GERVAIS *v.* GOULET..... **437**

5——*Bankruptcy—Application to judge of Supreme Court of Canada for special leave to appeal—Time for application—Extension of time—Jurisdiction—Bankruptcy Act, R.S.C.*, 1927, *c.* 11, *ss.* 174, 163 (5), 2 (*l*), 152; *Bankruptcy Rules* 72, 68.] The Supreme Court of Nova Scotia *en banc* cannot, nor can a judge of the Supreme Court of Canada, extend the time fixed by Bankruptcy Rule 72 for an application to be made to a judge of the Supreme Court of Canada for special leave to appeal to this Court.—By its decision made on February 7, 1931, and order

dated February 28, 1931, the Supreme Court of Nova Scotia *en banc* dismissed an appeal from an order of Chisholm J., sitting in bankruptcy, setting aside an order of the Official Receiver for the sale to appellant of certain of the bankrupt's stock in trade. On March 10, 1931, said Court *en banc* made an order extending the time for application to a judge of the Supreme Court of Canada for leave to appeal, to 60 days from February 7, 1931. The application came before Cannon J. on April 2, 1931, who dismissed it, holding that he had no jurisdiction, as the application was not made within the period (30 days from pronouncement of the decision complained of) fixed by Rule 72, and the order extending the time was made without jurisdiction.—*Bankruptcy Act*, R.S.C., 1927, c. 11, ss. 174, 163 (5), 2 (*l*), 152; Bankruptcy Rules 72, 68, considered. *In re Gilbert*, [1925] Can. S.C.R. 275, at 278, 277; *Eastern Trust Co.* v. *Lloyd Mfg. Co.*, 3 C.B.R. 710, at 713-714, referred to. IN RE WEBBER; VALINSKY *v.* BACON..... **498**

6——*Right of appeal—Order "made with the consent of parties" (Judicature Act, Ont., R.S.O.*, 1927, *c.* 88, *s.* 23)—*Exclusion of evidence at trial—New trial.*] In the course of a trial (and after the trial judge had ruled out certain evidence which plaintiff was offering) plaintiff's counsel expressed a wish to have the record withdrawn on plaintiff undertaking to pay costs. In the course of the discussion which followed, defendant's counsel remarked "I cannot consent to anything but the dismissal with costs" (which was all defendant could get if successful in the action), but his attitude throughout was against defendant being a party to any settlement, his insistence being on dismissal with costs as a matter of right. The trial judge endorsed the record: "This action is dismissed with costs," and added, as requested by plaintiff's counsel, "by consent of the plaintiff." Defendant's counsel then asked for and got permission to take out his exhibits. The formal judgment recited: "and the plaintiff by his counsel consenting," but was silent as to consent by defendant.—*Held* (Anglin C.J.C. and Cannon J. dissenting): The judgment was not an order "made with the consent of parties," within the meaning of s. 23 of the Ontario *Judicature Act*, R.S.O., 1927, c. 88, and plaintiff was not precluded by that section from appealing from the judgment. Judgment of the Appellate Division, Ont., on this point (65 Ont. L.R. 53) sustained.—A judgment by consent within s. 23 is a judgment determining an issue between parties to the litigation with the consent of the parties to the issue so determined. It is only when the "parties"

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consent that the right of appeal is taken away. It is not for the court to extend the scope of the section so as to deprive a litigant of a right to appeal unless he comes within the express language of the Act.—*Per* Anglin C.J.C. and Cannon J. (dissenting): The judgment was a consent judgment. Defendant's counsel must be taken to have consented to it, having regard to its effect, and to what took place in the discussion at the trial. The authority of counsel to consent may be assumed; it would not have been competent for the Appellate Division (nor for this Court) to pass upon that question; the fact that the judgment of the trial court had been formally completed distinguishes this case from *Shepherd* v. *Robinson*, [1919] 1 K.B. 474, and *Neale* v. *Gordon Lennox*, [1902] A.C. 465, and similar cases; once a final judgment by consent has been formally drawn up, signed, sealed and entered, as here, unless by agreement of the parties, it may be set aside only in a fresh action brought for that purpose; especially must that be so where such an issue as consent or no consent must be decided on controversial evidence. (*Harrison* v. *Rumsey*, 2 Vesey Sr. 488; *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673; *Firm of R.M.K. R.M.* v. *Firm of M.R.M. V.L.*, [1926] A.C. 761, at 771; *Kemp-Welch* v. *Kemp-Welch et al.*, [1912] P. 82; *Kinch* v. *Walcott*, [1929] A.C. 482, cited). The fact that the judgment does not show on its face the explicit consent of the defendant (who got by it all he could get in the action), or the fact that his consent was not formally given, does not prevent its being a consent judgment. (*Hadida* v. *Fordham*, 10 T.L.R. 139; *Holt* v. *Jesse*, 3 Ch. D. 177, and other cases referred to). The statement, as to what constitutes consent, in Daniell's Chancery Practice, 8th Ed., p. 1110, discussed and explained in the light of the cases there cited (*Davis* v. *Chanter*, 2 Phillips, 545; *Aldam* v. *Brown*, [1890] W.N. 116; *Hadida* v. *Fordham*, *supra*); Annual Practice (1929) at p. 2141, (1930) at p. 2139, (1931) at p. 2139, also referred to and discussed in this connection.—*Held* further (unanimously) that, on the merits (which were argued, subject to determination of the other question), there should be a new trial, as one of the grounds on which the trial judge ruled out certain evidence was clearly wrong and would have the effect of preventing the plaintiff (who had other witnesses yet to be called) from offering further evidence on matters on which he was entitled to adduce evidence; under all the circumstances, plaintiff should be given an opportunity to place all his evidence before the court. Judgment of

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the Appellate Division, Ont., on this question (38 Ont. W.N. 122) reversed. LUND *v.* WALKER..... **597**

7——*Jurisdiction—Petition in revocation of judgment (requête civile)—Judgment maintaining it—Whether it is a "final judgment" or a judgment "directing a new trial"—Supreme Court Act, s.* 2 (*e*) *and s.* 36 (*a*) *and* (*b*)*—Arts.* 1177 *et seq. C.C.P.*] A judgment of the Court of King's Bench, maintaining the "rescindant" conclusions of a petition in revocation of judgment (*requête civile*) and annulling the judgment of the Superior Court, so as to place the parties in the same position as they were before that judgment and continue the suit, is not a "final judgment" within section 36 (*a*) and 2 (*e*) of the *Supreme Court Act* nor a "a judgment * * * directing a new trial" within section 36 (*b*). HUDON *v.* TREMBLAY..... **624**

8——*Jurisdiction—Matter in controversy (sole question, one as to jurisdiction of Ontario Railway and Municipal Board)—Title to land—Future rights—Supreme Court Act, R.S.C.*, 1927, *c.* 35, *s.* 41. CITY OF TORONTO *v.* SAUNDERS..... **650**

9——*Bankruptcy—Application to judge of Supreme Court of Canada for special leave to appeal—Power of bankruptcy judge to extend time for application — Bankruptcy Act, R.S.C.*, 1927, *c.* 11, *ss.* 163 (5), 174; *Bankruptcy Rule* 72*—Appeal to the Court from decision of judge in chambers on application for leave to appeal.*] The judge sitting in bankruptcy from whose decision an appeal was taken to the Appeal Court under s. 174 of the *Bankruptcy Act* has power, under s. 163 (5) of the Act, to extend the time limited by Bankruptcy Rule 72 for applying to a judge of the Supreme Court of Canada for special leave to appeal to this court (under s. 174 (2)) from the Appeal Court's decision. Judgment of Cannon J., *ante*, p. 503, reversed.—The rule established by *Williams* v. *Grand Trunk Ry. Co.* (36 Can. S.C.R. 321) and other cases, that a decision by a judge of this court in chambers granting or refusing, on the merits, an application for leave to appeal is not appealable to the Court, does not extend to a case where the judge has granted leave to appeal in disregard of some essential statutory condition of the right of the applicant to have his application for leave heard and passed upon, or to a case where the judge, owing to a misunderstanding touching the effect of a statute, decides that an applicant for leave to appeal is not entitled to have his application heard, although in truth he has complied with all the statutory and other prerequisites of such an application.

COMPANIES AND CORPORATIONS —*Joint stock company—Debentures—Trust deed—Hypothec—Pledge—Transfer of property—Whether absolute or as warranty—Bankruptcy—Ownership—Difference between civil and common laws as to "trust"—Joint Stock Companies Act, R.S.Q.*, 1909, *s.* 6119a; *R.S.Q.*, 1925, *c.* 223—*Special Corporate Powers Act, R.S.Q.*, 1925, *c.* 227, *ss.* 10, 11, 12, 13—4 *Geo. V., c.* 51, *s.* 1—10 *Geo. V., c.* 72, *s.* 1—14 *Geo. V., c.* 63, *s.* 1—*Bankruptcy Act, s.* 45 (3); *rule* 173—*Arts.* 94, 358, 944, 981*a*, 1966, 1967, 1968, 1969, 1970, 1972, 1983, 2016, 2022, 2037, 2053 *C.C.*—*Art.* 1185 *C.C.P.*] The words contained in a trust deed, to the effect that the debtor "*cède, transporte et donne en gage*" (cedes, transfers and gives in pledge) a certain property to the trustee, do not constitute an absolute transfer but indicate that the intention of the parties was to hypothecate the property as security for the bonds. The words "en gage" modify not only the word "donne," but also the words "cède" and "transporte", so that the instrument should be read as if "en gage" were after each word. Smith J. dissenting.—The words "to cede and transfer", in s. 13 of the *Special Corporate Powers Act*, R.S.Q., 1925, c. 227, do not imply an absolute transfer, but merely a transfer in warranty, in view of the addition of the words "for the same purposes", thus referring to the words "purposes therein set forth" immediately preceding, which purposes are to *secure* any bonds, etc. Anglin C.J.C. and Smith J. *contra.*—*Per* Duff, Newcombe, and Rinfret JJ.—The modification effected in the existing civil law, as to hypothec and pledge, by 4 Geo. V, c. 51, when it inserted articles 6119a, 6119b and 6119c into the *Joint Stock Companies Act* of 1909, has been merely to extend the principle of conventional hypothec to moveables and future property and to make future property susceptible of being pledged; but the main change was to enact that "the mortgagor or pledgor (will) be permitted by the trustee to remain in the possession and use of the property so mortgaged or pledged" (art. 6119b)—The translation of the words "nantir" and "nantissement" by "mortgage" and "mortgaging", in the English version of the statute, is not appropriate and may be misleading; there is no connection between the "nantissement" of the civil law and the "mortgaging" of the

English common law. Therefore that statute should not be interpreted according to the rules governing "mortgage" of the English common law; and the power given to the debtor by the statute to hypothecate and pledge his property as security for the payment of the bonds does not constitute a "trust" within the meaning of the equity jurisprudence, the idea of "trust" never having found place in the civil law in Quebec.—*Per* Duff, Newcombe and Rinfret JJ.—The system of civil law in Quebec does not admit the notion of the English common law as to beneficial ownership residing in one person and legal title in another. In Quebec, both are invariably united upon the same head, the right of ownership being indivisible.—*Per* Smith J. (dissenting).—The words "cede and transfer" imply the passing of the ownership to the transferee, with power to take possession and sell, according to the ordinary meaning of the words. These words in Art. 6119a must be given the same interpretation; otherwise they do not add anything to the words, "hypothecate, mortgage and pledge" which immediately precede them. —Judgment of the Court of King's Bench Q.R. 48 K.B. 390) aff., Smith J. dissenting. LALIBERTÉ *v.* LARUE..... 7

2 — *Ownership of shares or stock—State of war—War legislation—Canada and United States allied Powers—Seizure by Alien Property Custodian of United States of certificates of shares or stock, physically situate in United States, but issued by Canadian companies or corporations, and beneficially owned by alien enemies—Vesting orders obtained in Canada by Canadian Custodian—Conflicting claims between Canadian Custodian and United States Custodian—Consolidated Orders respecting Trading with the Enemy*, 1916 (*Can.*)—*Treaty of Peace (Germany) Order*, 1920 (*Can.*)—The United States Alien Property Custodian, under powers conferred by Act of Congress, seized, between March 27, 1918, and April 27, 1919, certain share or stock certificates, then physically situate in New York, but issued by Canadian companies or corporations. The securities were, at the seizure dates, beneficially owned by alien enemies. The said certificates were: (1) share certificates and special investment note certificates issued by C.P.R. Co., the securities being registered in its branch registry office in New York and transferable there only; (2) bearer share warrants issued by I. Co. and transferable by delivery without anything further having to be done to perfect title; (3) certificates for City of Montreal debenture stock, transferable only on the City's books by the registered holder or by attorney duly constituted; (the certificate stated that it "shall not constitute the title to the stock, which title shall consist exclusively in registry in the Debenture Stock Register of the City"); (4) certificates for debenture stock issued by T. Co. and transferable on its books either in London (Eng.) or in Canada; the stock in question was on the Toronto register. All said certificates (except the bearer share warrants) were transferable by assignment in writing in common form, and the registered owner had executed the usual assignment and power of attorney, in most cases in blank. The securities were listed and dealt in on recognized stock exchanges. The said Custodian had the assigned certificates presented to the issuing companies and himself or his nominee registered as owner; as to the T. Co. securities, this was not done until a time later than the vesting orders hereinafter mentioned. The Canadian Custodian, in October, 1919, under the authority of s. 28 of the Consolidated Orders respecting Trading with the Enemy, 1916 (put into force under the *War Measures Act*, 1914, Can.) obtained Canadian court orders (except as to the City of Montreal stock) purporting to vest in himself the shares and stock in question. He brought the present actions in 1926, and the question in issue was, which of the two custodians was entitled to the securities.—*Held* (affirming judgment of Maclean J., President of the Exchequer Court of Canada, [1930] Ex. C.R. 75), that the United States Custodian was entitled to the securities.—*Per* Rinfret, Lamont and Smith JJ.: The Canadian Consolidated Orders, 1916, did not intend or effect prevention of an allied Power from validly seizing shares of Canadian companies the certificates for which were physically situate in the allied country. The seizures by the United States Custodian (having regard to the terms of the authorizing U.S. law) vested in him, as against the enemy nationals, not only the possession of the paper certificates, but every property right and interest to which the beneficial owners thereof would have been entitled had a state of war not existed. Both by Canadian and by United States law, share certificates endorsed in blank by the registered owner give the right to the lawful holder thereof to be registered as owner (*Colonial Bank* v. *Cady*, 15 App. Cas., 267, at 277; *Disconto-Gesellschaft* v *U.S. Steel Corp.*, 267 U.S. 22, affirming 300 Fed., 751); and this right existed in the United States Custodian (*Disconto* case, *supra*) and was, prior to and at the time of the Canadian court vesting orders, a "property, right or interest" in him, to the exclusion of any such in an enemy, in respect of the securities in question.

(The C.P.R. Co. shares and notes, registered in the company's New York office in the name of his nominee, and the I. Co. bearer share warrants, were also property in the United States; *Quaere* as to the other securities in this regard). His right to have himself or his nominee registered as the owner of the securities was subject to any assertion by Canada of her paramount legislative power over the companies which had issued the certificates. Canada did assert this power when the shares were vested in the Canadian Custodian by the courts under the Consolidated Orders, but she relinquishes her claim to all vested property which was not enemy property at the time of the vesting (Canadian Consolidated Orders, 1916, ss. 28, 33, 36 (1), and Treaty of Peace (Germany) Order, 1920, ss. 33, 34, 42 (2), (3), particularly considered in this regard).—*Per* Duff and Newcombe JJ.: The Canadian Consolidated Orders, 1916, had no intention or effect of nullifying in Canada proceedings taken by an allied Power to reduce into possession such securities so situated as those in question. The principle of the *Disconto* case (*supra*) applied, and the proceedings taken by the American Custodian had the effect of investing him with the rights of a transferee of the securities, including the right to demand registration. Therefore Order 28, which authorized only the vesting of property "belonging to or held or managed for or on behalf of an enemy," had no application to any of the properties in question. Ss. 33 and 34 of the Treaty of Peace (Germany) Order, 1920, which Order was passed pursuant to the *Treaties of Peace Act*, 1919, and was for the purpose of carrying out the Treaty of Peace and giving effect to its provisions, must be read in the light, and within the limitations, of that purpose; the Treaty, while ratifying the administrative orders of Canada acting within her proper sphere, also contemplated ratification of the administrative orders of the United States acting within her proper sphere; and said s. 34 could not be read as giving such an effect to a vesting order purporting to have been made under the Consolidated Orders as would interfere with the operation of an administrative act by the United States properly done within her sphere. As to the T. Co. securities, assuming that the bare legal title of the enemy owner had not been completely extinguished at the time the Canadian court vesting order was made, yet that bare legal title, vested under the vesting order in the Canadian Custodian, was subject to be devested by the exercise of the rights which the American Custodian had acquired under his proceedings; the effect of the Treaty was that the rights so acquired became

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properly exercisable notwithstanding the existence of the vesting order. SECRETARY OF STATE OF CANADA AND CUSTODIAN *v.* ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES..... **170**

3——*Company incorporated under federal authority—Petition by the Attorney-General of a province for its dissolution—Allegations that the company was violating the law and defrauding the public—Right to take proceedings—exception to the form—Arts.* 978 *and foll. C.C.P.*] The Attorney-General for Quebec instituted proceedings under articles 978 and following C.C.P., invoking irregularities and illegalities in the management of the appellant company, incorporated under the *Companies Act* of the Dominion, also alleging violations of the law or of the Acts by which the appellant was governed with the object of defrauding the public and of endangering the public welfare and further asserting that the proceedings were taken to abate these alleged violations and were instituted and carried out in the general public interest of the people of the province of Quebec in particular. Consequently, the Attorney-General for Quebec asked that the letters patent of the appellant company be forfeited and that the company itself be dissolved. The appellant, by way of an exception to the form, moved for the dismissal of the action on the ground, *inter alia*, that the Attorney-General of Quebec had neither the quality nor the capacity to institute these proceedings against a company holding its powers from the federal authority.—*Held* that the Attorney-General for Quebec was qualified to institute the proceedings and that the exception to the form has been rightly dismissed by the court appealed from. The Crown, as *parens patriae*, represents the interests of His Majesty's subjects, and the Attorney-General for a province, acting as the officer of the Crown, is empowered to go before the courts to prevent the violation of the rights of the public of that province, even if the perpetrator of the deeds complained of be a creature of the federal authority. In other words, the Attorney-General of a province has not only the right, but the duty, to suppress the civil offences committed within the limits of the province.—No opinion is expressed as to the question whether the courts may, at the instance of the Attorney-General of a province, direct the dissolution or winding up of a company incorporated by Act of the Parliament of Canada or by letters patent issued under its authority. Such a question can arise only on the merits of the case and exception to the form is not the proper procedure for that purpose nor

jury—New trial.] The accused appealed from the judgment of the Supreme Court of Nova Scotia (55 Can. Crim. Cas. 51) affirming (by majority) his conviction for murder. It had been contended in his defence that at the time of his act his condition from drink was such that the act could not be murder; and he alleged misdirection by the trial judge to the jury on this question, which involved the law as to what state of incapacity resulting from drink will reduce a crime from murder to manslaughter.—*Held*: In the circumstances of the case, an essential question for the jury was: Given the existence of some degree of capacity in the accused, and assuming the facts deposed to by Crown witnesses (if credited) in describing the accused's act in striking the fatal blow and his conduct and expressions before and after that act, whether or not he was so affected by drink as to be incapable of having the intent to kill or of having the intent (in reckless disregard of the consequences) to cause some bodily injury, "known" to him to be "likely to cause death" (*Cr. Code, S.* 259 (*a*) (*b*)). That question was one upon which the jury must pass in order to enable them to determine the existence or non-existence of the intent in fact. (*Beard's* case, [1920] A.C. 479, at 501-502, referred to). And as the trial judge, while properly directing the jury's attention to the defence as put forward by accused's counsel (that accused was in such a state that his mind was not functioning, that his "mind was gone," that he was incapable of a degree of "thought" enabling him to be aware of the nature of his physical acts), did not direct them to the question above defined, there should be a new trial. MACASKILL *v.* THE KING **330**

3——*Appeal to Supreme Court of Canada —Jurisdiction—Cr. C., s.* 1023—*"Question of law"*]. An appeal from the judgment of the Appellate Division, Ont. (40 Ont. W.N. 129) affirming (two judges dissenting) the appellant's conviction, by Ross, Co. C.J., for stealing an automobile, was dismissed, on the ground that there was no jurisdiction to hear the appeal, the questions raised, and on which there was dissent in the Appellate Division, being all questions of fact, in regard to which there was no right of appeal to this Court under s. 1023, *Cr. C.*—Assuming that the question whether there was any evidence to support a conviction should be deemed a question of law, yet the question whether the proper inference has been drawn by the trial judge from facts established in evidence, is not a question of law but one of fact. GAUTHIER *v.* THE KING.... **416**

4——*Keeping common gaming house— Automatic vending machine—Cr. Code, ss.* 226, 229, 986 (2), 986 (4) (*as amended,* 1930, *c.* 11, *s.* 27)]. Accused had on his premises an automatic vending machine in which customers placed a five cent coin, pulled a lever, and received from the machine a package of candy, with or without "slugs" (varying in number) which had no commercial or exchangeable value but might be used to operate the machine to shew printed legends for amusement only (no candy being emitted). The candy package emitted for the coin deposited was such as that sold over the counter for five cents, and on the sale of the candy emitted the accused made a profit.—*Held* (reversing judgment of the Court of Appeal for Manitoba): Accused was not guilty, under the *Criminal Code,* of keeping a common gaming house. *Cr. Code,* ss. 226, 229, 986 (2), 986 (4) (as amended, 1930, c. 11, s. 27), considered. *Rex* v. *Freedman,* 39 Man. R. 407, overruled. *Rex* v. *Wilkes,* 66 Ont. L.R. 319, approved. ROBERTS *v.* THE KING.. **417**

5——*Appeal to Supreme Court of Canada —Jurisdiction—Cr. Code, s.* 1023—*"Question of law"—Trial judge's charge to jury.*] The general appellate jurisdiction of the Supreme Court of Canada is confined to civil matters; to found an appeal to the Court in any criminal matter, resort must be had to some special statutory provision enacted by the Dominion Parliament. Save for the special case provided for by s. 1025, *Cr. C.*, the only right of appeal to the Court in any criminal cause is that conferred by s. 1023, *Cr. C.* For an appeal to come within s. 1023, the conviction must have been affirmed by the court below and there must have been dissent by some member thereof on a question of law.—The present appeal was from the judgment of the Appellate Division, Ont., [1931] O.R. 222, affirming appellant's conviction for murder, two judges dissenting on what the order of the court declared (apparently in accordance with former subs. 5 of s. 1013, *Cr. C.*, but which subsection had been repealed by s. 28 of c. 11, 1930) to be questions of law. In the opinion of some of the members of this Court, this Court lacked jurisdiction to hear the appeal because, in their view, the grounds of dissent below were not on any question of law, but only on matters which it was competent for the jury to pass upon and which depended entirely upon an appreciation of the weight of evidence in regard to the points discussed. But the ground taken (unanimously) for dismissal of the appeal was that it failed on the merits, as the reasons for dissent below did not, on examination of the matters dealt with therein and of the

NEGLIGENCE— *Negligence—Contributory negligence—"Ultimate" negligence—Motor vehicles—Motor truck striking pedestrian—Restricted vision of driver by reason of car in front—Duty of driver in such case.*] Plaintiff, a pedestrian, who had started to cross a street intersection diagonally, was struck by defendant's truck, which was making a left turn behind a sedan car. The trial judge found that the accident was caused by the truck driver's negligence and gave judgment to plaintiff for damages. This was reversed by the Court of Appeal, Sask., which held that, under all the circumstances, the accident was not attributable to negligence of the truck driver (24 Sask. L.R. 137). Plaintiff appealed.—*Held* (Anglin C.J.C. and Smith J. dissenting): The judgment at trial should be restored. An important finding by the trial judge, which had support in the evidence and should be accepted, was that plaintiff did not move from the moment he stood still to permit cars ahead of the truck to pass him to the moment he was struck. It was therefore obvious that the truck, in making the turn, did not follow the sedan's track but turned further to the right, that is, made a wider curve (towards the plaintiff); in doing so, the truck driver was driving over a portion of the street not shewn by the passing of the sedan to be clear of traffic, and (as he kept his truck only 6 or 8 feet behind the sedan) without having in view the portion of the street where plaintiff stood. There was a duty upon the truck driver not to drive over a portion of the street of which he had, by reason of keeping so close to the sedan, only a restricted vision, and on which he knew pedestrians were in the habit of crossing, except at a rate of speed which permitted him to stop within the limits

of his restricted vision; and that duty he failed to observe. The trial judge's finding that plaintiff was not guilty of contributory negligence could not, on the evidence, be said to be wrong; and, even if his failure to look out for the truck's approach was negligence, it did not contribute to the accident except in the sense that it was a *sine qua non*; the real cause of the accident was the subsequent and severable negligence of the truck driver (*Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A.C. 129, referred to).—*Per* Anglin C.J.C. (with whose conclusion Smith J. concurred) (dissenting): The evidence in support of the trial judge's findings, that defendant's negligence was the sole cause of plaintiff's injuries and that plaintiff was not guilty of contributory negligence, leaves their accuracy doubtful, to say the least. His finding that, even if plaintiff was guilty of negligence, the defendant might, by the exercise of reasonable care, have avoided the consequences thereof (*Tuff* v. *Warmen*, 5 C.B.N.S., 573) was not warranted by the evidence. It appeared from the judgment of the trial judge that, while he took into account "ultimate" negligence of defendant is so far as defendant might *actually* have avoided the consequence of any contributory negligence of plaintiff, his mind had not been directed to an important aspect of the case, namely, that class of "ultimate" negligence considered in *B.C. Electric Ry. Co.* v. *Loach*, (1916] 1 A.C. 719, i.e., disabling negligence anterior in fact to plaintiff's contributory negligence, but of such a character that its effects endured and became operative after such contributory negligence had intervened. The Court of Appeal, while finding, on evidence which could not be said to be insufficient to justify it, that plaintiff was guilty of contributory negligence, did not consider or pass upon the question of "ultimate" negligence. A new trial was necessary in order that all the issues in the action might be fully considered and determined. STANLEY *v.* NATIONAL FRUIT CO. LTD..... **60**

which driver was responsible for injuries caused by the collision. TATISCH *v.* EDWARDS..... 167

4—*Railway—Level crossing—Speed—Thickly peopled place—Railway Act, R.S.C.*, 1927, *c.* 170. *s.* 309. CANADIAN NATIONAL RYS. *v.* POMERLEAU..... 287

5—*Res ipsa loquitur—Burden of proof—Obligation as to particularizing negligence alleged—Boy injured by falling on live electric wire on sidewalk—Interpretation of jury's finding.*] The infant plaintiff was injured by falling, on the sidewalk, on a loose end of a live electric wire of defendant company, which wire had broken loose during a storm, by reason, apparently, of a swaying tree branch bringing two wires together and causing a short circuit. It was in evidence that, at the place of the accident, there was a line of trees which overhung the sidewalk. The jury found negligence by defendant, causing the injury, which negligence they stated thus: "We consider the wire was defective, wires running close to trees should have more thorough inspection."—*Held* (1) The evidence of the wire being on the sidewalk was sufficient to attribute negligence to defendant, in the absence of any other apparent cause or explanation excluding negligence to the satisfaction of the jury (*Scott* v. *London & St. Katherine Docks Co.*, 3 H. of C. 596, at 601, cited). Plaintiffs thus adduced reasonable evidence upon which the jury might find a verdict.—(2) When plaintiffs' counsel, being asked at the opening of the trial (in accordance with a previous application for particulars which had stood over) to specify the negligence upon which he relied, specified, as his main ground, the leaving of a live wire lying on the highway, he was not bound to explain or particularize the facts or negligence which caused or contributed to that, since these were more in the knowledge of defendant; and the case thus appeared to be one in which the occurrence of such an accident in itself justified calling on defendant to prove that it happened without negligence on its part.—(3) The jury's intention was obviously to find defendant's negligence in the defective location of the wire and the inadequacy of the inspection, which permitted the danger incident to contact with the tree branch to remain undiscovered, until advertised by the accident itself.—Judgment of the Appellate Division, Ont. (66 Ont. L.R. 409), sustaining judgment of Kelly J. (*ibid*) for damages to plaintiffs (on the jury's findings), affirmed. OTTAWA ELECTRIC CO. *v.* CREPIN..... 407

6—*Municipal corporations—Councillor of municipality injured while operating municipality's fire extinguisher—Responsibility for injury—Degree of care—Duty of municipality—Duty of councillor operating the machine—Liability—Volenti non fit injuria—Doctrine of Rylands* v. *Fletcher—Expert evidence—Charge to jury—Jury's findings.*] Plaintiff, as a councillor of defendant village, acting under authority of a village by-law, took charge of operation of its chemical fire extinguisher at a fire, turned the crank which broke the sulphuric acid bottle (to generate pressure) and was severely injured by an explosion, which occured because the bolt holding in place the covering of the sulphuric acid chamber was not screwed down. The extinguisher had been kept in a pool room. The village council had appointed the village constable as "fire chief," and required him to keep the extinguisher "in proper working shape." Plaintiff sued the village for damages. The jury found that plaintiff's injury was caused by defendant's negligence in "not having their fire extinguisher properly inspected and kept in perfect working order"; that plaintiff was guilty of contributory negligence "only to the fact that he was a councillor on the date of the fire, but not negligent in the operation of the fire extinguisher at the time of the fire." The Court of Appeal for Saskatchewan (25 Sask. L.R. 65), reversing judgment of Taylor J. (24 Sask. L.R. 198), gave judgment to plaintiff for damages. Defendant appealed.—*Held* (Duff and Newcombe JJ. dissenting) that the appeal should be dismissed.—*Per* Rinfret, Lamont and Cannon JJ.: It was for the jury, on all the evidence, to say whether the proper inference to be drawn was that the acid chamber covering was loose because the fire chief had failed to tighten the bolt when he had last recharged the extinguisher or to inspect it properly afterwards, or that some third person had unscrewed the bolt (as to interference by a third person, the onus was on defendant to establish it, or at least to shew such probability that the jury would infer it: *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640). Also the question of plaintiff's negligence was one of fact for the jury; it was for them to say whether or not, in his operation of the extinguisher, he had failed to exercise the care which a reasonably prudent and careful man would have exercised in like circumstances. Unless plaintiff had reason to suspect that the fire chief had not done his duty as to inspection, the jury was entitled to find plaintiff not guilty of negligence in assuming that he had. There was evidence from which the jury might find that plaintiff's injuries were caused by negligence of defendant, and also that plaintiff's conduct in operation of the extinguisher was free from want of care. The maxim *volenti not fit injuria* did not

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apply; plaintiff, who was unaware that the covering was not properly fastened, neither appreciated the danger he was running nor voluntarily incurred the risk (*C.P.R.* v. *Fréchette*, [1915] A.C. 871, at 880, cited). The first part of the jury's finding as to contributory negligence, viewed in the light of the circumstances and the judge's charge, meant that the only negligence of which they found plaintiff guilty was that he shared with his fellow councillors in their representative capacity in not seeing to it that the extinguisher was duly inspected and kept fit for immediate use. As to this, it has long been established law that a person is not liable in his individual capacity for a tort committed in his corporate capacity (*Mill* v. *Hawker*, L.R. 9 Ex. 309, at 321, and other cases cited). The objections by defendant to the judge's charge to the jury were not maintainable. Taken as a whole, it did not direct that there was an absolute duty on defendant to keep its extinguisher from doing harm (Doctrine of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, discussed, and held not to apply, the extinguisher having been brought to the village for common protection of the corporation and its citizens as individuals; *Rickards* v. *Lothian*, [1913] A.C. 263, at 280; *Hess* v. *Greenway*, 48 D.L.R. 630, cited), but impressed upon them that the only basis on which defendant could be charged with liability was negligence; his direction that the care to be observed by defendant must be commensurate with the danger of harm involved, was a proper one. His direction to disregard the evidence of one F., an inspector for the fire commissioner of the province, to the effect that one operating the extinguisher should see that the covering was tight before breaking the acid bottle, was unobjectionable, as the elements did not exist to justify its admission as expert evidence, and the jury were as capable as the witness of forming a correct judgment as to plaintiff's acts. —*Per* Duff and Newcombe JJ. (dissenting): The risk of escape of the liquid to the injury of persons in proximity was one which it was the absolute duty, in point of law, of any person working the machine, to avoid, if reasonably possible. Plaintiff knew of the danger if the covering were not tight, and to ascertain and correct the condition was a simple and quick operation. It was the duty of the municipality, at the time of actual operation, not to release the acid without first seeing that the covering was securely fastened. The acts of plaintiff in his operation of the machine were the acts of the municipality, and its said duty was equally his duty; he owed a duty to it to see that the responsibility resting upon it, in respect of the precautions to be observed in working the machine, were,

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so far as reasonably possible, discharged. He was not entitled to assume that, because of instructions given to the "fire chief," the covering was tight, in view of the facts (known to plaintiff) that the machine had been exposed in a place open to the public, that it could be made unsafe very easily, that, by reason of the fire chief's other duties, a periodical inspection was the utmost that could be expected, and in view of possibility of neglect by the fire chief, the simple nature of the precaution required at the moment of operation, and the magnitude of the danger. The direct and proximate cause of plaintiff's injuries was his own neglect. Further, there were errors in the charge to the jury, as to the extent of defendant's duty, and in withdrawing from the jury F.'s evidence as to the proper, known and recognized method of working the machine; which errors in the charge, were the action not to be dismissed, would be ground for a new trial. KELLIHER (VILLAGE OF) *v.* SMITH.... **672**

7——*Motor vehicle—Accident—Liability—The Vehicles and Highway Traffic Act*, 1924, *Alta.*, *c.* 31, *ss.* 66 (1), 40—*Failure to discharge onus of proof—Duty as to sounding horn.* BLISS *v.* MALMBERG..... **710**

8——*Master and servant—Accident—Liability—Inadequate lighting—Art* 1053 *C.C.—Division of damages—Costs.* TRUST GÉNÉRAL DU CANADA *v.* ST. JACQUES **711**

9——*High tension transmission line—Right of way through land—Trespasser on right of way connecting with wire through steel fishing pole—Injury—Liability—* SALE *v.* EAST KOOTENAY POWER CO. **712**

10——*Railway—Passenger falling off platform—Platforms enclosed by vestibules—Vestibule door left open—Railway Act, R.S.C.*, 1927, *c.* 170, *s.* 390..... **277**
See RAILWAYS 1.

11——*Motor vehicles—Injury caused by motor vehicle—Motor Vehicle Act, Man., C.A.* 1924, *c.* 131, *s.* 62—*Onus of proof as to negligence—Operation of the statutory presumption—Efficiency of brakes* (*s.* 15)—*Inspection—Evidence—Jury's findings—Particularizing of alleged negligence—Pleadings—Rule* 334, *c.* 46, *R.S.M.* 1913. ..... **443**
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12——*See* SLANDER.

PARENT AND CHILD—*Right of father or mother to maintain action for damages occasioned by death of illegitimate child—Art.* 1056 *C.C.*..... **113**
See ILLEGITIMATE CHILD.

2——*See* TESTATOR'S FAMILY MAINTENANCE ACT.

SHIPPING—*Continued*

2 —— *Collision — Speed — Fog — Regulations for Preventing Collisions at Sea*, 16, 19, 21, 22, 23, 27, 29.] The *P. A.*, a passenger steamer, left Vancouver, bound for Victoria in a dense fog. After passing the first narrows, she was running at a rate of twelve knots, on a course of S.W. ⅛ S., which course she kept till the collision was imminent. She stopped her engines about a minute before the collision, upon hearing a signal from a tug to port, and one from a ship to starboard, the *H.*, and which she first saw emerging from the fog at a distance of about 300 feet, and between two and three points on her starboard. The *P. A.* then attempted to clear the *H.* by putting her helm hard astarboard with full speed ahead, but without success, the stem of the *H.* cutting into the *P. A.* on her starboard side, a little ahead of amidships; she was swinging with a speed of about eleven knots. The *H.*, inward bound, passed Point Atkinson at 10.05 a.m. on a course of E. by N. and at a speed of four knots, but seeing the density of the fog decided not to enter the narrows, but to proceed cautiously, by "slow ahead" and "stop" alternatively, to a southerly part of English Bay, and altered her course at 10.25 to E.N.E. Later, at 10.50, hearing signals of other vessels, she changed her course E.S.E. giving proper signals. From 10 o'clock to 11.12 she was proceeding by "slow ahead" and "stop" at close intervals. At 11.12 the *H.* heard the signal from the *P. A.* about 5 or 6 points on her port bow. She stopped her engine, blew the whistle, to which the *P. A.* replied. There followed another exchange of whistles, and while the *P. A.* was whistling for the third time, she emerged from the fog, heading for the *H.* The *H.* then reversed her engine full speed and put her helm hard aport, but too late to avert collision. When they first saw each other the *P. A.* was running at ten knots, and the *H.* at one and a half knots. The collision occurred about half a minute after the two steamships first saw each other.—*Held* (affirming the judgment of the Exchequer Court ([1930] Ex. C.R. 10)) that, on the facts, the navigation of the *H.* was free from blame. In the circumstances of the case, neither by the cases referred to nor by the practice of seamanship was the *H.* required to reverse before the *P. A.* became visible, as she could have come to a standstill within 30 feet. Upon the assumption that the *P. A.* was proceeding at moderate speed and obeying the injunctions of the pertinent collision regulations, the *H.*, while the vessels were out of sight of each other in the fog, had no occasion to reverse the mere steerageway which she carried, while, on the other hand, it was a matter of prudence and good practice that the ship should not be put out of command, the advantages of maintaining steerageway having frequently been recognized by the courts. The cause, which brought about the collision, was the excessive and reckless speed of the *P. A.* in proceeding in the dense fog which prevailed, and in a harbour where ships were so likely to be met, at the immoderate rate of twelve knots, when the visibility was only about 300 feet, and persisting in the maintenance of that speed, when she was aware that a steamship was approaching on her starboard bow, so as to involve risk of collision. S.S. "PRINCESS ADELAIDE" *v.* FRED OLSEN & CO..... **254**

SHIPPING—*Continued*

3——*Collision—Canal navigation—Right of way—Liability—Cause of the damage.*] A collision occurred between the *K.*, which was ascending the Lachine Canal at its western exit and the *O.* which had just begun her descent from Lake St. Louis, about 3.30 a.m., on 5th June, 1927. The *K.*, being light, had moored previously to the south revetment wall of the canal near the place of collision on account of wind and rain, the night being also dark. When the *O.*, approaching the entrance to the canal, came into relation with the *K.*, the weather had cleared so far as to enable the *K.* safely, in the judgment of her master and pilot, to proceed upon her voyage; and, accordingly, her master gave the order to cast off. The *K.* then gave two blasts of her whistle, signalling her desire to pass on the starboard side of the *O.*, a signal which the latter promptly answered in like manner, the two ships thus agreeing that they should pass green to green. The *K.* was shouldering her way along the canal wall and the *O.* was coming down on the opposite side, when suddenly the *O.* gave an alarm or danger signal of five or six blasts and reversed her engine at full speed astern. There was then, according to the findings, ample room, in canal navigation, between the starboard side of the *K.* and the blocks marking the northern side of the channel for the *O.* to pass. The result of the manoeuvre of the *O.* was that her stern struck the *K's.* starboard bow, forcing the *K.* against the south wall, where her stern struck. Both ships sustained damage and there was an action and a cross-action, which were tried together. The Local Judge in Admiralty at Montreal found the *O.* solely to blame. This judgment was reversed by the Exchequer Court of Canada, Audette J., who held that the *K.* was "at fault for a collision which would not have happened had she lain fast at her berth and delayed casting off but a few minutes, * * * with the knowledge (she had) of a downbound

STATUTES—*Continued*

STATUTES—*Continued*

STATUTES—*Concluded*

59——*R.S.B.C.* [1924] *c.* 254, *s.* 2 (*Taxation Act*)..... **435**
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60——*R.S.B.C.* [1924] *c.* 256, *s.* 3 (*Testator's Family Maintenance Act*)..... **94**
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61——(*B.C.*) 17 *Geo. V, c.* 54 (*Produce Marketing Act*)..... **357**
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62——(*B.C.*) 17 *Geo. V, c.* 62 (*Savings and Loan Associations Act*)..... **199**
See CONTRACT 3.

63——(*B.C.*) 18 *Geo. V, c.* 39 (*Produce Marketing Act Amending Act*, 1928).. **357**
See CONSTITUTIONAL LAW 2.

64——*R.S.M.* [1913] *c.* 46, *Rule* 334 (*The King's Bench Act*)..... **443**
See MOTOR VEHICLES 3.

65——*R.S.M.* [1913] *c.* 133, *ss.* 471, 472, 624, 625, 740 (*Municipal Act*)..... **628**
See MUNICIPAL CORPORATION 3.

66——*C.A., Man.* [1924] *c.* 131, *ss.* 62, 15 (*Motor Vehicle Act*)..... **443**
See MOTOR VEHICLES 3.

67——*R.S.N.B.* [1927] *c.* 1, *s.* 6 (*Interpretation Act*)..... **349**
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68——(*N.B.*) 16 *Geo. V, c.* 45 (*Act to incorporate Saint John River Power Co.*) **349**
See ASSESSMENT AND TAXATION 2.

69——(*Sask.*), 17 *Geo. V, c.* 24, *s.* 413 (6) (*Town Act*, 1927)..... **72**
See ASSESSMENT AND TAXATION 1.

70——(*U.S.A.*) *Harter Act*, 1893.... **76**
See SHIPPING 1.

STOCK BROKER—*Orders on New York exchange to Canadian broker—Certificates of stock—Endorsement in blank—Recovery from trustee in bankruptcy—Right to follow proceeds of sale—Not existing in Quebec—Arts.* 1017, 1705, 1709, 1713, 1723, 1730, 1735, 1976, 1985, 1994, 2005*a C.C.*] Orders to sell or to buy shares negotiated on the New York stock exchange, given to a Canadian broker who has no seat on that foreign exchange, must be taken to have been given upon the assumption that the Canadian broker would deal with those shares through New York brokers; and it is an implied condition of the orders that the transactions will be carried out under the rules and customs of the New York Stock Exchange.—The endorsement in blank by the customer of

STOCK BROKER—*Continued*

the certificates of stock is sufficient to confer to the stock broker an apparent authorization to make use of the certificates for all purposes (C.C. 1730).—A customer who, upon giving such orders to a Canadian broker, delivered to the latter his certificates of stock endorsed in blank, has no right to revendicate them from the trustee in bankruptcy, after the Canadian broker became bankrupt, unless the certificates can still be identified in the hands of the trustee; and then, only upon paying the trustee all sums due and disbursed on behalf of the customer.—More particularly has the customer no right to revendicate the certificates when it is shown that they were merged in a credit and debit account between the Canadian broker and the New York stock brokers, in which all transactions on behalf of the Canadian broker's customers were dealt with in the sole name of the Canadian broker.—Under those circumstances, the customer's stock became security for the whole of the New York brokers' account; and, upon that account being liquidated, if there should remain a surplus standing to the credit of the bankrupt Canadian broker, no individual customer may claim, out of this surplus, an amount alleged to represent his stock; but such surplus must be distributed between the customers of the Canadian broker *pro rata* and according to bankruptcy rules.—In Quebec, there exists no right to follow (droit de suivre) the proceeds of the sale of a thing, except under art. 2005a C.C., which deals with a special case. GRONDIN *v.* LEFAIVRE..... **102**

2——*Delivery of shares to broker to sell at certain price — Agreement to return same certificate—Right of customer—Custom and usage—Tender by broker of another certificate—Conversion.*] The respondent, a customer of a broker, delivered to the latter a certificate for 500 shares of a mining company registered in his name with instructions to sell the shares at not less than a certain price and, if not so sold, to return to him the same certificate. The broker, having received from another customer 1,000 shares of the same company represented by two certificates of 500 shares each, sold 1,000 shares for the account of the latter and, in making delivery, used one of the certificates belonging to him and the certificate belonging to the respondent. When the respondent demanded his certificate the broker tendered him another certificate of the same company for the same number of shares in accordance with the custom of the stock exchanges. The respondent refused to accept it and sued for conversion.—*Held*, affirming the judgment of the Court of