1948

CANADA
LAW REPORTS

Supreme Court of Canada

Editors

ADRIEN E. RICHARD, B.C.L.

FRANÇOIS des RIVIÈRES, LL.L

PUBLISHED PURSUANT TO THE STATUTE BY

PAUL LEDUC, K.C., Registrar of the Court

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1949

Published by

PAUL LEDUC K.C. - - THE REGISTRAR, SUPREME COURT OF CANADA
HOWARD R. L. HENRY K.C. THE REGISTRAR, EXCHEQUER COURT OF CANADA

Editors:

SUPREME COURT - - - {ADRIEN E. RICHARD, B.C.L.
{FRANÇOIS DES RIVIÈRES, LL.L.

EXCHEQUER COURT - - - {RALPH M. SPANKIE, K.C.
{GABRIEL BELLEAU, LL.L.

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OF THE

SUPREME COURT OF CANADA

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" " ROBERT TASCHEREAU J.
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" " ROY LINDSAY KELLOCK J.
" " JAMES WILFRED ESTEY J.
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The Right Hon. Louis Stephen St-Laurent K.C.
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The Honourable Joseph Jean K.C.

26682—1½

ERRATA

in Volume 1948

Page 37, at line 2 of caption, for "R.S.C. 1929, c. 144" read "S. of C. 1929, c. 49".

Page 37, at line 4 of caption, for "Rules 57, 72 and 78" read "section 57, Rules 72 and 78."

Page 37, at line 18 of head note, for "1945" read "1947".

Page 101, at line 1 of caption for "chapter 255" read "chapter 266".

Page 102, at line 28 for "255" read "266".

Page 170, fn. read (3) 55 S.C.R.

Page 239, at line 1 of caption, for "conviction" read "trial".

Page 539, following line 26 add:

R. M. W. Chitty K.C. and W. J. A. Fair for appellant.

Geo. T. Walsh K.C. and J. C. N. Currelly for respondent.

NOTICE

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.

Abasand Oils Ltd. v. *Boiler Inspection & Insurance Co.* [1948] S.C.R. 315. Petition for special leave to appeal granted, 26th July, 1948.

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Canadian Pacific Railway v. *Attorney General for British Columbia and Others* [1948] S.C.R. 373. Petition for special leave to appeal granted, 14th July, 1948.

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International Harvester v. *Provincial Tax Commission* [1941] S.C.R. 325. Appeal allowed with costs, 19th October, 1948.

Madawaska Company and Another v. *Arsène Dionne and Another* [1947] S.C.R. 498. Petition for special leave dismissed with costs, 9th February, 1948.

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UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between the 21st of December, 1947, and the 12th of December, 1948, delivered the following judgments, which will not be reported in this publication:—

American Fork and Hoe v. *Lansing Engineering Co.* [1948] 2 D.L.R. 299. Appeal dismissed with costs, 27th April, 1948.

Barbeau v. *Cité de Québec* Q.R. [1948] K.B. 307. Appeal dismissed with costs, 17th November, 1948.

Campbell v. *Travelers Insurance Co.* 14 I.L.R. 124. Appeal dismissed with costs, 25th June, 1948.

Canada Starch Co. v. *The King* (Ex.): Not reported. Appeal dismissed with costs, 5th October, 1948.

Christie v. *British-American Oil Co.* [1947] O.R. 842. Appeal dismissed with costs, 24th March, 1948.

Dennison et al v. *Sanderson et al* [1946] O.R. 601. Appeal quashed upon motion, 23rd February, 1948.

Gaunt et al v. *Jones* [1947] 4 D.L.R. 700. Appeal dismissed. No costs in this Court, 25th June, 1948.

Gootson v. *The King* [1947] Ex. C.R. 514. Appeal dismissed, 25th June, 1948.

Hayward v. *Clowes*, 20 M.P.R. 383. Appeal allowed and judgment of the trial Judge restored, 3rd February, 1948.

Hrycroy v. *The King* (Alta.): Not reported. Appeal dismissed, 19th February, 1948.

Huntsinger v. *Corporation of the Town of Simcoe* [1946] O.R. 203. Appeal dismissed with costs, 13th April, 1948.

Hutchins et al v. *Canadian Pacific Railway Co.* (Ont.): Not reported. Appeal dismissed with costs, 26th November, 1948.

Kieswetter v. *Lee* (Ont.): Not reported. Appeal allowed and action dismissed with costs throughout, 3rd February, 1948.

King, The v. *Bessette* (Ex.): Not reported. Appeal allowed without costs and new trial directed, 22nd December, 1947.

King, The v. *Drenka* (B.C.): Not reported. Appeal allowed, 20th February, 1948.

King, The v. *Lamarre es-qual.* [1948] 3 D.L.R. 248. Appeal allowed with costs, 25th June, 1948.

May et al v. *Hartin et al* (B.C.): Not reported. Appeal dismissed with costs, 3rd February, 1948.

Nichol v. *Nichol* [1947] 4 D.L.R. 305. Appeal allowed and order of trial Judge restored. Cross-appeal dismissed without costs and without prejudice to the right of the Respondent to apply later to the Supreme Court of British Columbia, 27th April, 1948.

Quiring v. *C.P.R.* [1947] 2 W.W.R. 81. Appeal dismissed with costs, 23rd March, 1948.

Toronto Star Ltd. v. *Drew* [1947] O.R. 730. Appeal dismissed with costs, 5th October, 1948.

Toronto Transportation Commission v. *The King* (Ex.): Not reported. Appeal dismissed with costs, 13th April, 1948.

ADDENDA

VOLUME [1948]

The following should be added to "A Table of the Names of the Cases Reported in this Volume", pp. IX and X:

ERRATA

Re Esquimalt & Nanaimo Ry. Co. *et al* v. Attorney-General of B.C., for 329 *read* 403.

Re Smallman v. Moore, for 259 *read* 295.

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THE SUPREME COURT OF CANADA

7th January, 1949.

It is hereby ordered, pursuant to the powers conferred by section 104 of the Supreme Court Act (R.S.C. 1927, ch. 35), that as of the first day of February, 1949, paragraph 2 of Rule 54 of the Rules and Orders of the Supreme Court of Canada be and the same is hereby amended by inserting the words "or for special leave to appeal" after the word "jurisdiction" in the fourth line of that paragraph, so that, as amended, it will read as follows:—

"2. All affidavits and material to be used on a motion shall be filed with the Registrar at least two clear days before the motion is heard. The notice of motion shall set out fully the grounds upon which it is based. In all motions to quash for want of jurisdiction, *or for special leave to appeal,* a copy of the pleadings and judgments in the courts below shall form part of the material filed."

(Signed) T. RINFRET
" P. KERWIN
" ROBERT TASCHEREAU
" I. C. RAND
" R. L. KELLOCK
" J. W. ESTEY
" C. H. LOCKE

COURT SUPRÊME DU CANADA

le 7 janvier 1949.

En vertu des pouvoirs conférés par l'article 104 de la Loi de la Cour Suprême (ch. 35, S.R.C. 1927), il est par les présentes ordonné que, à compter du premier jour de février 1949, le paragraphe 2 de la Règle 54 des Règles et Ordonnances de la Cour Suprême du Canada soit modifié et cette Règle est par les présentes modifiée par l'insertion des mots "ou pour permission spéciale d'appel" après le mot "compétence" dans la quatrième ligne de ce paragraphe, de sorte que, tel que modifié, ce paragraphe se lira comme suit:—

"2. Les affidavits et pièces devant servir à une motion doivent être produits au bureau du registraire au moins deux jours francs avant l'audition de la motion. L'avis de motion doit énoncer au long les motifs qu'elle invoque. Dans les motions en annulation pour défaut de compétence, *ou pour permission spéciale d'appel*, une copie des plaidoiries écrites et des jugements des tribunaux inférieurs doit faire partie des pièces déposées."

(Signé) T. RINFRET
" P. KERWIN
" ROBERT TASCHEREAU
" I. C. RAND
" R. L. KELLOCK
" J. W. ESTEY
" C. H. LOCKE

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

DANIEL WANDSCHEER, GERRIT WANDSCHEER, JACOB WANDSCHEER, BEN WANDSCHEER, WALTER E. KLAUER, CHARLES L. OSTRANDER AND KLAUER MANUFACTURING COMPANY (PLAINTIFFS) ..... } APPELLANTS,

1947
*Feb. 26, 27, 28
Mar. 3
Dec. 22

AND

SICARD LIMITED (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Invention—Novelty—Subject-matter—Utility—Combination to be subject-matter of valid patent must produce useful and operative contrivance—Possess novelty—Be susceptible of fulfilling its purpose, and must enable a person skilled in the art to carry it out.

The Plaintiffs brought action against the Defendant for infringement of Wandscheer Letters Patent No. 309,848 and Curtis Letters Patent No. 253,159, both of which related to snow removers.

In the Exchequer Court [1946] Ex. C.R. 112, Angers J., held that as to the Wandscheer patent, there had been anticipation, and that the claims alleged to have been infringed only required the use of ordinary mechanical skill and did not involve that amount of inventive ingenuity which should be rewarded by a patent; that as to the Curtis patent, its first object offered no novelty but was anticipated by prior patents, and its second object was inoperative and useless and the patent consequently invalid.

Held: That as to the Wandscheer patent, the judgment of the learned trial judge be affirmed and the appeal dismissed.

Held: Per the Chief Justice, Taschereau and Rand JJ. (Kellock and Estey JJ. dissenting) that as to the Curtis patent, the appeal be dismissed.

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*Present: Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

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Per the Chief Justice and Taschereau J.: the Curtis rotating ejector had no usefulness and was not workable. It could not serve the purpose mentioned in the patent. The device patented by the respondent is different and is operative.

A combination may be the subject-matter of a valid patent, even if it is merely the juxtaposition of known elements, but this juxtaposition must produce a useful and operative contrivance which has the indispensable character of novelty. The alleged invention must be susceptible of fulfilling its purpose, and it must enable a person skilled in the art to carry it out.

Per Rand J.: On the evidence a *prima facie* case against utility in rotary discharge by reason of insufficiency in specification has, I think, been made out, but I am unable to say that the onus thus arising has been met by the appellants. On what is before us, I must hold that at best what Curtis presented to the public was both the idea and the task of working it out.

Per Kellock and Estey JJ. (dissenting): The Curtis patent had not been anticipated by prior patents. The combination to be found in the Curtis patent was a new conception and the element of inventive ingenuity required by the authorities was present in the combination claimed by the patent. The invention was an advance on anything in existence at the time, and the specification, which should receive a benevolent construction, was sufficient. While the utility of the equipment was limited, it would appear from the evidence, that whatever it lacked was a matter of trial involving no invention, which could be worked out by any skilful mechanic, and that the respondent had infringed upon the patent.

APPEAL by the plaintiffs from the judgment of Angers J. of the Exchequer Court of Canada (1), holding that as to the Wandscheer patent there had been anticipation; and that as to the Curtis patent, its first object offered no novelty and was anticipated; and its second object was inoperative and useless.

During the hearing, counsel for the respondent was told that the Wandscheer patent was not an invention, lacked subject-matter, and that it was not necessary to hear him on that point.

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

E. G. Gowling K.C. and *J. C. Osborne* for the appellants.

H. Gérin-Lajoie K.C. for the respondent.

(1) 1946 Ex. C.R. 112.

The judgment of The Chief Justice and of Taschereau J. was delivered by

TASCHEREAU J.:—Two patents are involved in the present case, the Wandscheer and the Curtis patents. Both relate to snow removers. The first is an alleged invention consisting in mounting a cutter bar on each side of the casing which houses the spiral conveyor of a snow plow, in such a way that it extends out in front, thus facilitating the cutting of snow banks which reach above the top of the casing. The second is a type of plow which involves the use of one or more spiral snow conveyors which bite into the snow, and which are disposed laterally across the front of a tractor. The rotation of these spiral conveyors, which are mounted in semi-cylindrical casings, moves the snow along towards a fan which ejects it from the machine, in any direction through an outlet pipe.

The plaintiffs alleged in their statement of claim that both patents have been infringed by the respondent, but their action was dismissed. The learned trial judge came to the conclusion that the Wandscheer patent lacked subject-matter, was anticipated by prior patents and the prior use of cutter bars. As to the Curtis patent, he held that the invention was not novel, was anticipated by prior art, was inoperative and useless, and that the combination it covered was a juxtaposition of old and well-known elements lacking of subject-matter.

It is useless to elaborate on the Wandscheer patent. It is, I believe, as the trial judge said, invalid, because it reveals a total lack of inventive ingenuity. This alleged invention is a most simple one, consisting in the installation on the sides of the casing, of two bars for the purpose of cutting the snow. They are described as extending upwardly above the snow removing mechanism, and to be mounted forwardly of the vehicle, so that they may cut into the snow banks exceeding the height of the casing, and enable the snow to fall down ahead of the spirals, and to be disposed of by the snow removing mechanism.

During the hearing, counsel for the respondent was told that this elementary apparatus was not an invention, lacked subject-matter, and that it was not necessary to

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hear him on that point. I am still of that opinion, and for that reason, I believe the Wandscheer patent to be invalid.

Appellants rely only upon Claim 1 of the Curtis patent. It covers a *combination* in a snow plow of the class described, comprising:

1. A horizontally arranged semi-cylindrical casing.

2. A fan casing connected therewith.

3. A spiral conveyor as described above which is mounted in the semi-cylindrical casing.

4. A fan mounted in the fan casing.

5. Means for actuating the spiral conveyor and the fan.

6. An adjustable conduit connected with the fan casing which can be rotated to throw the snow in different directions.

This claim reads as follows:

1. A snow plow of the class described comprising a horizontally arranged semi-cylindrical casing, a fan casing connected therewith, a conveyor in the first mentioned casing, a fan in the fan casing, means for actuating the conveyor and fan, an adjustable conduit connected with the fan casing for rotary movement.

Of course a combination may be the subject-matter of a valid patent, even if it is merely the juxtaposition of known elements. But, this juxtaposition must produce a useful and operative contrivance which has the indispensable character of novelty.

It is not sufficient, in order to obtain a valid patent, as Viscount Cave said in *Permutit Co.* v. *Borrowman,* (1) for a man to say that an idea floated through his brain; he must at least have reduced it to a definite and practical shape before he can be said to have invented a process.

The alleged invention must be susceptible of fulfilling its purpose, and it must enable a person skilled in the art to carry it out.

I agree with the proposition that the rotating ejector pipe is the main feature of the Curtis patent, and that if the Court is not convinced of its novelty, of its operativeness and utility, the appeal must fail. And if it is impossible to find in the combination of old elements as the spirals, the fan casing, the fan itself for ejecting the snow, a new rotating *workable* ejector pipe which will direct the snow in different directions, then the invention is not patentable, and must be held void.

(1) (1926) 43 R.P.C. 356 at 359.

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The informations given by Curtis in his specifications, as to the operativeness of his rotating ejector are more than meagre. He has merely disclosed the bare idea of a chimney throwing the snow in various directions. We find no explanation as to how it will function and it is, as it has been said before "obviously suggestive of experimental or research work". As McLean J. said in *Christiani* v. *Rice* (1) "The patentee is not to tell a man to make an experiment, but to tell him how to do the thing."

The reason for this absence of information in the specifications is that the rotating ejector had no usefulness and was not workable. It could not do what it was intended to do, and could not serve the purposes mentioned in the patent. Curtis admits himself that it was not successful, and that he did not like the operation of it. This type of chimney was never used by Curtis or by anyone else, and other means had to be devised after considerable work and ingenuity, to secure a practical outlet for the snow projected by the fan. This is also the opinion of Mr. Arthur Sicard, and of Mr. Arthur Elie Choquette, who was heard as an expert witness. The latter says:

D. Maintenant, ce que je désire savoir de vous, comme expert, quelle est votre opinion relativement à l'opération d'un appareil dessiné et construit de cette manière? Je désire savoir si cette construction, d'après vous, est opérante ou non, et pourquoi? R. Ce conduit, cette cheminée ou conduit de 10, référence des chiffres 10-12-11, ne peut fonctionner pour la neige. La neige est un corps fondant par pression ou friction, et ne peut être lancée qu'en une certaine ligne parabolique dont la trajectoire est comme une balle, elle ne peut suivre un conduit angulaire ou coudé.

A device had to be found, and the respondent had one patented. It is different from the contrivance found in Curtis' patent, and is operative.

In his patent, Curtis made the same mistake, with respect to the chimney, as all other early workers, by providing his machine with a chimney of the nature of a "stove pipe" with a pronounced elbow-joint. Sicard himself made that mistake in the early years and secured a patent in 1925 in which the same type of unworkable pipe is shown. In Sicard's second patent, the upper part of the chimney, due to a special mechanism, rotates on a vertical axis, thus enabling the snow to be delivered almost at any point

(1) [1929] Ex. C.R. 111 at 116-117.

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within the circle. I do not believe that Curtis ever disclosed a patentable chimney of that type. Sicard's chimney is a comparatively recent development, achieved only in 1936 after years of work and experimentation. For these reasons, I think that the action fails, and that the appeal should be dismissed with costs.

RAND J.:—Although several modes of removing snow are described in the specification, the only one dealt with on the argument is that in which the snow is gathered by right- and left-hand spirals from each side of the front of the machine to the centre where it passes back into the blower chamber from which it is ejected through a conduit rotatable on a vertical axis. The determinative question is whether that combination in the light of the disclosure possesses utility.

The method of snow removal in use in 1919 when Curtis first applied himself to the question was, for streets, the ordinary "V" plow which clears a way by pushing the snow to the sides; but the rapid development of automotive transportation inevitably spread to all year use of highways and following the first Great War, both in the United States and Canada the demand for more effective means became urgent.

The difficulty attending that search was enhanced by the fact that only in winter could practical experiments be made. In the season of 1919-20, Curtis made his first attempts to develop such a machine. He began with a spiral in a partial casing, the latter co-operating in the movement of the snow, and in the result satisfied himself of the sufficiency of that mechanical device for the purposes in view. Delivery of the snow to a side blower was found to swing the machine off its course and he was led to delivery at the centre. His work in the first year did not go beyond that stage, but from it he deduced the complete invention, the application for the patent for which was made in the United States on May 25 of 1920. He conceived not only the conduction of the snow to a central blower, but also its discharge by propulsion through a rotating vertical conduit: but it is important to keep in mind that to this point the latter was wholly theoretical.

In the next year, 1920-21, bringing the snow to the centre, he installed a chute leading from a lower side of the blower casing, offering, probably, by its small angle to the horizontal, the least resistance to the expulsion. By the work of this season, the limitations of a single spiral and the practical necessity of greater flexibility in discharge appear to have been made evident.

In the third winter, 1921-22, he tried out two spirals, one above the other. For the first time, he opened a discharge from the top of the blower casing with a pipe not horizontal but at an angle of 45 degrees, moving apparently only in a transverse plane. The test in this respect was wholly unsatisfactory; the snow would produce "a back pressure" which seemed to "choke the motor", i.e., the blower. His next step was to remove the upper arc of the rounded portion of the blower casing, leaving the vertical sides front and rear intact, and over the opening to insert a plate revolving along the perimeter of the casing through the arc with a discharge orifice to which a conduit could be attached. In this way, the snow could be directed either to the right or the left of the machine in a fixed plane.

Choquette, for the respondent, states the principle of this propulsion to be that of centrifugal force imparted to the snow by the blades of the blower in substantially a parabolic trajectory. He qualified this somewhat by conceding a minor degree of air current, possibly to a slight extent effective on light snow, with the chute at an open angle. But there is no evidence of actual use of the Curtis machine to its latest development in a mode in which the discharge changes its plane of direction after it has entered the conduit.

I come now to the precise claims made by Curtis. In the United States patent, after an enumeration of the elements of the combination, the first claim concludes with the words "and an adjustable conduit connected with the fan casing". That this leads from the top of the casing seems to be clear from the specification. In the second claim the discharge means is described as "an outlet for the fan casing", as broad as could be made.

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Rand J.

On the other hand, in the Canadian patent applied for under date of June 6, 1921, the claim is in these words:

(1) A snow plow of the class described, comprising a horizontally arranged semi-cylindrical casing, a fan casing connected therewith, a conveyor in the first mentioned casing, a fan in the fan casing, means for actuating the conveyor and fan, and an adjustable conduit connected with the fan casing for rotary movement.

Now, it is obvious that once the idea of the introduction of snow into such a blower is reached, some mode of discharge is necessarily involved, and in the circumstances of 1920 the particular mode could be of utmost importance. In working out this feature both Curtis and Sicard passed through the first stage of the simple fixed angular chute and then into that of a trajectory in a transverse plane; but neither Curtis nor the appellants have gone beyond the latter, and it was not until 1937 that a rotatable vertical conduit was offered for sale by Sicard.

The second claim in the United States patent by its inclusion of any mode of discharge in substance protects the combination of conveyor and blower; but notwithstanding this the inventor has by precise language strictly limited the Canadian patent to a particular mode which renders the rotary feature, delivery at any horizontal angle, essential to the combination. The mode of snow removal and not the removal itself is the result sought and here it is by a member with full mobility. The angularity in the Curtis conduit actually in use, Ex. 13, does indeed include the vertical, but not with rotary scope, nor is it an improvement in that feature; it is, as treated, a different mode which is not an equivalent because it produces a different result; and it has not been suggested either in the specification or in any experiment or use that any other than a fixed vertical conduit is susceptible of rotary adjustment.

We are then brought to the question of fact whether Curtis by his specification has given a sufficient disclosure for the construction of a conduit that would possess utility under rotary operation. When Curtis failed in 1921-22 in his experiment with the conduit at 45 degrees and took up the lateral discharge, was it because of the obstacles which confronted him or was he content to pursue what

appeared to him the more direct and simpler means, sufficient for his purposes under the United States patent? Notwithstanding that, having achieved the development of the conveyor and blower factors, he may have considered the discharge as of minor importance, I am unable to avoid the conclusion that his shift was in fact a forced retreat from the rotary conception to a mode which, at no time, has been under a patent restriction in Canada.

Because of this absence of demonstrated usefulness, the appellants were limited to opinion evidence of what might have been done under the disclosure, and there is the statement of Ostrander on re-examination that he did not think he would have any trouble in making a workable means; "I would make them of a sufficient radius and anything else that was necessary to make them". He agreed, however, that such chutes must be "designed for the work" and that they had given rise to various patents of invention. But the striking circumstance is that the appellants in production have confined themselves to the single plane angular discharge. In that field, the parties are in this country in competition with similar machines. In no circumstances would Wandscheer have sold a machine with the rotary attachment either alone or as a severable adjunct to the transverse discharge for the reason, as I must assume, that in any form conceived by him and not adversely patented, it is of no practical use.

On the evidence of Curtis himself and of Choquette a *prima facie* case against utility in rotary discharge by reason of insufficiency in specification has, I think, been made out, but I am unable to say that the onus thus arising has been met by the appellants: *Ehrlich* v. *Ihlee* (1) at p. 441, where Cotton L.J. intimated that it did not lie upon the plaintiff until a *prima facie* case was shown by the defendant: *Patterson* v. *Gaslight and Coke Co.* (2) at p. 834, in which James L.J. declared the plaintiff's evidence was

> utterly valueless as evidence of novelty and utility. The improvements have not been tried by the plaintiff or any of his witnesses, even experimentally, in a laboratory or with models.

(1) (1888) 5 R.P.C. 437.

(2) (1875-6) 2 Ch. D. 812.

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Rand J.

Vidal Dyes Syndicate Ld. v. *Levinstein Ld.* (1) at p. 254, where Fletcher Moulton L.J., in the course of the argument, remarked "A plaintiff always gives evidence of utility." And the statement of Ostrander, contradicted as it seems to be by the whole business course of the appellants, cannot be taken to be sufficient.

I do not overlook the doubtful implication raised by the 1937 patent of the respondent and the reference to the existing art in the preamble to the specification. That patent aggregates severably both rotation of the blower chamber on a transverse horizontal axis, and the stationary vertical conduit adjustable for rotary movement.

It is said by Choquette that the mechanism possesses features that make practicable the idea suggested by Curtis. What precisely they are was not elicited in the evidence, and from an examination both of the specification and the illustrative drawings, I am unable to satisfy myself on the point one way or the other. Nor is any indication given by the appellants of the extent of experiment required—and that some degree is necessary is clear from the experience of Curtis—to produce a workable rotary chute.

On what is before us, I must hold that at best what Curtis presented to the public was both the idea and the task of working it out. In the language of Lindley L.J. in *Lane-Fox* v. *Kensington and Knightsbridge Electric Lighting Co.* (2).

> An invention may be useful as indicating the direction in which further progress is to be expected, and yet that same invention may be useless for any other purpose; useless, that is, as an invention without further developments and improvements which have not occurred to the patentee.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.: This is an action for alleged infringement of a patent of the appellants known as the Curtis patent, the term of which, since this action was instituted, has expired. Prior to the issue of the patent, Curtis had been granted a patent for the same invention in the United States, the date of application for which was May 25, 1920.

(1) (1912) 29 R.P.C. 245. (2) (1892) 3 Ch. 424 at 431.

The invention as claimed relates to new and useful improvements in snow removers. Claim one of the patent, which alone is in issue, reads as follows:

> A snow plow of the class described comprising a horizontally arranged semi-cylindrical casing, a fan casing connected therewith, a conveyor in the first mentioned casing, a fan in the fan casing, means for actuating the conveyor and fan, an adjustable conduit connected with the fan casing for rotary movement.

Figure 8 in the patent illustrates a left and right hand spiral operating in a semi-cylindrical casing which brings the snow to the centre of the machine where it passes through an opening in the back of the casing into the fan casing where it is ejected through a rotatable outlet pipe or chimney connected with the fan casing. The respondent set up that the patent was invalid as lacking in subject-matter and utility. It also alleged that there had been anticipation. All of these objections the trial judge sustained.

With respect to the last mentioned objection the only evidence of anticipation consisted in certain United States patents, printed copies of which were placed in evidence. It was not established that any of the subjects of invention described in any of these patents had even been in use. It is well established that for a prior patent to constitute anticipation, the patent must disclose the same or give information equal in practical utility to that given by the patent in question; *Baldwin International Radio Co. of Canada Ltd.* v. *Western Electric Co. Inc. et al* (1). When the prior patents are examined none of them amount, in my opinion, to anticipation of the patent here in question.

In the Tierney patent, which is dated March 16, 1869, the machine there described had a spiral and a fan, but there any resemblance to the Curtis machine disappears. The Tierney spiral was to be pushed like a drill in front of a railway locomotive, the snow being tossed up above the spiral where, coming in contact with the fan it was dispersed to each side by the fan blades.

The Herran patent discloses two spirals operating in a semi-cylindrical casing and throwing the snow to opposite sides of the road, but nothing else.

The Cutting patent also discloses a spiral conveyor in a cylindrical casing but no fan or fan casing or conduit in

(1) [1934] S.C.R. 94.

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association. In the Yeiter patent there is disclosed a spiral and a fan but no fan casing and no conduit or chimney. On the basis of these patents therefore the requirements of anticipation as laid down in Baldwin's case are not satisfied.

As to the defence on the ground of lack of subject-matter the learned trial judge states:

> Counsel for defendant further argued that there is lack of subject-matter in this patent. The combination submitted by Curtis is, in my view, old and well known and it did not require the exercise of inventive ingenuity. I think that any skilled and competent mechanic could have done it. (1).

As there is no evidence of the use of any of the elements described in the Curtis patent, it is plain that in this finding the trial judge rests his view upon what is disclosed by the prior patents upon which he also based his view as to anticipation. As already pointed out, in none of these "paper" patents is there exhibited the combination which is to be found in the Curtis patent. The Curtis combination was therefore a new conception. On the question as to the presence or absence of invention, it is relevant to quote what was said by Green L.J., as he then was, in *Wood* v. *Gowshall* (2):

> The dissection of a combination into its constituent elements and the examination of each element in order to see whether its use was obvious or not is, in our view, a method which ought to be applied with great caution since it tends to obscure the fact that the invention claimed is the combination. Moreover, this method also tends to obscure the facts that the conception of the combination is what normally governs and precedes the selection of the elements of which it is composed and that the obviousness or otherwise of each act of selection must in general be examined in the light of this consideration. The real and ultimate question is: Is the combination obvious or not?

Fletcher Moulton L.J., as he then was, in *British Westinghouse* v. *Braulik* (3), said at 230:

> I confess that I view with suspicion arguments to the effect that a new combination, bringing with it new and important consequences in the shape of practical machines, is not an invention, because, when it has once been established, it is easy to show how it might be arrived at by starting from somethng known, and taking a series of apparently easy steps. This *ex post facto* analysis of invention is unfair to the inventors, and in my opinion it is not countenanced by English Patent Law.

(1) [1946] Ex. C.R. 112 at 139.
(2) (1937) 54 R.P.C. 37 at 40.
(3) (1910) 27 R.P.C. 209.

In *Non-Drip Measure Co. Ltd.* v. *Stranger's Ltd.* (1), Lord Russell of Killowen said at p. 142:

> My Lords, it is always pertinent to ask, as to the article which is alleged to have been a mere workshop improvement, and to have involved no inventive step, has it been a commercial success? Has it supplied a want? Some language used by *Tomlin J.* in the case of *Samuel Parkes & Coy. Ld.* v. *Cocker Bros., Ld.* (2) may be cited as apposite:
>
> "Nobody, however, has told me, and I do not suppose that anybody ever will tell me, what is the precise characteristic or quality the presence of which distinguishes invention from workshop improvement * * * The truth is that when once it has been found, as I find here, that the problem had waited solution for many years, and that the device is in fact novel and superior to what had gone before, and has been widely used, and used in preference to alternative devices, it is, I think, practically impossible to say that there is not present that scintilla of invention necessary to support the Patent."

On the evidence no one prior to Curtis ever conceived or made a machine of the description in his patent or employed any such machine for the purpose of removing snow. Subject to the question as to utility, which I shall proceed to examine, the element of inventive ingenuity required by the authorities is, in my opinion, present in the combination claimed by the patent. In my opinion therefore this defence also fails.

Coming to the defence of lack of utility, Curtis' first conception occurred during the winter of 1919-1920 when he began his experiments. His equipment consisted of an auger or spiral 16 inches in diameter operating in a semi-cylindrical casing which was carried horizontally across the front of a motor truck. This spiral had right and left hand parts and carried the snow to its outside ends. At one end there was a fan in a casing which partially enclosed it, the opening being toward the front through which the snow, delivered to the fan by the spiral, was thrown off. Curtis says that on these experiments the auger cut the snow and delivered it well to the fan which took it as fast as it was delivered. However, what he described as "sidedraft", or a pulling to one side, was experienced. So it was decided to reverse the augers, putting the fan in the rear of the centre and delivering the snow from the augers to the fan through an opening in the auger casing.

(1) (1943) 60 R.P.C. 135. (2) (1929) 46 R.P.C. 241 at 248.

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On the basis of the above Curtis applied on May 25, 1920, for a United States patent. While a number of the drawings in the patent ultimately granted show a discharge conduit Curtis had not up to this time used a chimney.

In the winter of 1920-21 he used the equipment generally shown in figure 8 of the patent, namely, a single row of spirals with right and left hand parts which delivered the snow through an opening in the centre of the auger casing to the fan or blower in the rear, the auger shaft being driven by a worm gear in the centre from the blower shaft which ran forward from the blower to the auger shaft and back to a connection with the shaft of the truck. The worm gear is shown in figure 9. Instead of a rotating conduit Curtis used a fixed one which delivered the snow to one side of the machine only. As a result of the experience of this winter Curtis discovered that one 16-inch auger was not large enough in deep snow for which, if only one auger was to be used, it had to be larger. He also discovered that in using the motive power of the truck the speed of the truck motor needed to keep the truck at a proper speed forward did not drive the auger at the required speed for it to do its work. He therefore came to the conclusion that a motor mounted on the truck separate from the truck motor was necessary. It was following upon this that in July, 1921, he made application for the patent in Canada.

The question at issue in this appeal is whether the type of rotating chimney described in the first patent, taken as part of the combination which was the subject of the patent, met the test of utility. As to the worm gear by which the auger shaft was driven from the blower shaft, although appellant's witness, Ostrander, stated that this type of shaft and gear would not be *entirely* satisfactory, it was in fact used by Curtis and he says nothing of any difficulty experienced with it. I do not think therefore that this item need be further considered.

The lack of utility which, apart from the worm gear, it is said the Curtis machine lacked is with respect to the rotatable discharge conduit. When the evidence which is relied upon in support of this objection is analysed the attack really is that, construing the specification as though

the drawings included therein were scale drawings, the conduit there shown with its elbow having a right angle is unworkable. This objection reduces itself on the evidence to a charge that the abruptness of the angle of the elbow taken together with its bore on the above basis, must inevitably cause the snow to choke in the conduit so as to be inoperable. The fact that the Curtis conduit rotates on a vertical axis does not in my opinion constitute any part of the respondent's objection. A conduit which is vertical only is neither helped nor hurt by the fact that it rotates about a vertical axis. The rotary feature serves no purpose except in a conduit which at some point departs from the vertical. In such a conduit the rotary movement changes the direction of the discharge outlet with the result that the discharge itself is directed away from the vertical. That this rotating feature does not constitute any part of the respondent's objection is made more clear when the Sicard patent itself is examined, as I shall do later.

As already mentioned, on the important date, namely, May 25, 1920, when Curtis applied for his patent, while he had conceived the machine described in the application, he had not built a complete one. With respect to utility and sufficiency of the specification at that date, what is said by Parke B. in *Neilson* v. *Harford* (1) is relevant, namely:

> if such a person (i.e. a person skilled in the art) would construct an apparatus that would answer some beneficial purpose, whatever its shape was, according to the terms of this specification, then I think that this specification is good, and the patent may be supported so far as relates to that.

It is also to be observed that the protection afforded by a patent is not confined to a device made strictly in accordance with the drawings; *Thomas* v. *South Wales Colliery Tramworks and Engineering Co., Ltd.* (2), per Tomlin J., as he then was, at 27, where he said:

> It is, I think, indisputable that in construing a specification of this kind the figures, unless they are, by express reference, imported into the method which is to be employed, must be taken as illustrations only, and one cannot confine the patent to the particular form indicated in the figures, unless the language of the specification has in terms limited it to that form.

(1) (1841) Web. P.C. 295 at 315. (2) (1924) 42 R.P.C. 22.

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In my opinion the proper light in which the respondent's objection is to be regarded appears when one examines the specification in the respondent's own patent of 1937. It refers to the existing state of the art, *inter alia*, as follows:

> In some instances the blower is provided with a stationary casing having an outlet communicating with either a stationary or rotatably mounted delivery spout through which the snow is delivered to a suitable point of discharge.

Further on it says in describing the respondent's invention:

> As distinguished from these *prior* arrangements, the present invention provides a snow removing appartus in which a rotatably mounted *telescopic* delivery spout is used in conjunction with a blower of the rotary casing type * * * The delivery spout, being rotatably mounted and of *telescopic* construction, may be extended and directed a considerable distance toward either side of the roadway or in the direction of a snow loading vehicle.

From this two things emerge: (1) That the construction of a machine of the Curtis type including the rotatable chimney with an elbow to effect a change in direction of the discharge was then well known, and (2) that the respondent's invention was expressly confined to the telescopic construction of the conduit near its discharge end.

The evidence does not suggest from beginning to end that any machine other than one constructed in accordance with the Curtis patent was in contemplation of the respondent when it made the above application.

The Sicard specification is interesting also from another standpoint, namely, its particularity or rather its lack of particularity in the teachings as to the construction of the discharge conduit it claims. It is completely lacking in any details or measurements as to the bore of the conduit or the angle of the elbow at any stage of its extension or retraction of the telescopic parts forming the elbow. The patentee relies and must rely on the ability of a competent workman to build a conduit of some utility from the general description to which the specification limits itself. It is further to be noted that the elbow depicted in the drawings accompanying the specification passes from almost the vertical through and beyond a right angle. In my opinion it is obvious that if the respondent's patent can be said to be unobjectionable on the ground that a

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skilled mechanic could, without invention built an operable machine of some utility, the same must also be said of the Curtis patent. In my opinion it is properly to be said of both.

That such a mechanic could produce such a machine from the Curtis patent is established by the evidence of the witness Ostrander. It is to be observed that it is not necessary that such a person should be able to do so without trial or experiments so long as the task involved does not require invention. *In Edison & Swan Electric Light Co.* v. *Holland* (1), Cotton L.J. said, at p. 277:

> The objection taken as a whole, was that the specification did not sufficiently show how the invention is to be carried into effect. It is necessary that this should be done so as to be intelligible, and to enable the thing to be made without further invention—not, as was pressed upon us, by an ordinary workman, but by a person described by Lord Ellenborough in *Huddart* v. *Grimshow* (1 Webs. R. pp. 85 to 87) as a person skilled in the particular kind of work or, as said by Lord Loughborough in *Arkwright* v. *Nightingale* (1 Webs. R. p. 60) a person conversant in the subject. But in my opinion it is not necessary that such a person should be able to do the work without any trial or experiment, which, when it is new or especially delicate, may frequently be necessary, however clear the description may be.

See also *No-Fume Ltd.* v. *Pitchford* (2); *Otto* v. *Linford* (3).

The respondent's evidence on this branch of the case was limited to two witnesses, Sicard and Choquette, whose evidence, as already mentioned, as directed against the Curtis conduit was confined exclusively to an elbow with a right angle as depicted by the Curtis drawings. Sicard said that he had not tried a chimney with an elbow of 90 degrees but he did not think it would work. Choquette gave similar evidence except that he said he thought such an elbow would handle light snow.

In *Otto* v. *Linford* (3), *supra,* Jessel M.R., said at page 39:

> I have heard judges say, and I have read that other judges have said, that there should be a benevolent interpretation of specifications. What does that mean? I think, as I have explained elsewhere, it means this: when the judges are convinced that there is a genuine, great and important invention, which, as in some cases, one might almost say, produces a revolution in a given art or manufacture, the judges are not to be astute to find defects in the specifications; but, on the contrary, if it is possible, consistently with the ordinary rules of construction, to put such a con-

(1) (1889) 6 R.P.C. 244.
(2) (1935) 52 R.P.C. 28.
(3) (1882) 46 L.T. 35.

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struction on the patent as will support it. They are to prefer that construction to another which might possibly commend itself to their minds if the patent was of little worth and of very little importance. That has been carried out over and over again, not only by the Lord Chancellor on appeal, but by the House of Lords. There is, if I may say so, and I think there ought to be, a bias, as between two different constructions, in favour of the real improvement and genuine invention, to adopt that construction which supports an invention.

At page 41 he said:

> A specification for improvements in gas-motor engines is addressed to gas-motor engine-makers and workers, not to the public outside. Consequently you do not require the same amount of minute information that you would in the case of a totally new invention, applicable to a totally new kind of manufacture. In this case the inventor says this: "I am going to turn that which was a sudden explosion of gas into a gradual explosion of gas, and I am going to do that by the introduction of a cushion of air in one place between the piston and the combustible mixture." If a man if left without any more information, he asks, "How much air am I to let in?" He lets in a little air, and he finds the thing explodes as before; and he lets in some more, and he finds directly, on the mere regulation of his stopcock, how much is required; and he finds very soon that he has let in enough, and now there is a gradual expansion, and no longer a sudden and explosive expansion. It does not appear to me that that requires invention. It requires a little care and watching, and that is all.

In my opinion the respondent's witnesses, one of them in answer to a series of very leading questions, endeavoured to make a matter of mystery and difficulty out of the construction of a conduit of the Curtis type, but neither gave any details as to the difficulties to be encountered or how they should be met and as already mentioned the specification of the Sicard patent itself gives no details to enable one from the patent to build a successful conduit. In my judgment the Curtis invention was a great advance on anything in existence at the time, and the specification, which should receive a benevolent construction, when taken in connection with the evidence of Ostrander, already referred to, was sufficient.

In the light of the above the respondent is reduced to relying in support of its objection on the course followed by Curtis himself in the winter of 1921-22. That winter he built a plow with two 20-inch augers, one mounted above the other. During this winter he first actually used a conduit with an elbow in it, but this elbow had an angle of 45 degrees. This chimney did not prove to be satisfactory as, to use Curtis' own words, "It seemed to choke

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the motor down too much". There was too much "back pressure". Curtis, instead of proceeding further with a conduit removed it and constructed a double housing over the blower with a hole in it which was adjustable so that the snow could be thrown to one side or the other of the machine. This method of discharge satisfied him. It is to be observed that the type of conduit illustrated by the drawings of the patent was never used with the single auger in connection with which it is described. It had its choking effect on the motor when used with the double row of conveyors which presumably would deliver more snow to the blower or deliver it faster than a single spiral. Instead of making changes in the conduit after he had built the double row of conveyors, Curtis chose to substitute the different mechanism above mentioned.

It is this course followed by Curtis which the respondent says is to be taken as a confession of failure on his part as to the conduit described in the patent, which renders the patent invalid. In my opinion, that is not the conclusion which should be drawn in the light of the whole of the evidence to which I have referred. In my view it is quite consistent with the view that Curtis chose to proceed with what he considered an improved method of discharge. In *Edison and Swan Electric Light Co.* v. *Holland* (1), *supra,* Cotton L.J. said at 277:

* * * a patent is not to be defeated simply because subsequent inventions improve the patented article, or because in consequence of subsequent improvements, no article was in fact made in accordance with the specification.

I am unable to draw any inference adverse to the utility of the Curtis invention from the silence of the evidence as to any machine having been marketed by the appellant with a discharge conduit of the Curtis type. What the fact is does not appear nor the considerations relevant thereto. The fact that Sicard was free, without infringement to market a machine with a conduit of discharge rotating on a horizontal axis may well have evidentiary value on the question of damages, but does not, in my opinion, have any effect on the question of utility.

I think the proper finding on all the evidence is that Curtis had invented the conduit claimed although he had

(1) (1889) 6 P.R.C. 243.

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not constructed a completely satisfactory one which for him, or for any skilled mechanic, was a matter of trial involving no invention. This in my opinion is admitted by the respondent in its specification with which I have dealt.

As I think the respondent has clearly infringed the Curtis patent I would allow the appeal and direct the entry of judgment in favour of the appellant for the relief claimed with costs here and below.

ESTEY J.: The appellant (plaintiff) Klauer Manufacturing Co. Ltd. manufactures snow removal equipment and is the assignee of two patents: Curtis Patent No. 253159 and Wandscheer Patent No. 309848, issued respectively September 1, 1925, and March 31, 1931. In this action it claims that the snow removal equipment manufactured by the respondent in 1936 constitutes an infringement of the foregoing patents.

The learned trial judge in the Exchequer Court dismissed the appellant's action. He held that the essential features of the Curtis patent had been anticipated by prior patents and, therefore, it lacked novelty and subject-matter and, furthermore, it was inoperative and useless.

The Wandscheer patent he held did not constitute valid subject-matter and his judgment with respect to this patent was affirmed at the hearing of this appeal.

The appellant's main contentions are with respect to the Curtis patent. In his specification Curtis included the following:

> This invention relates to snow plows for steam and street railways, trucks and the like and the principal object of the invention is to provide spiral conveyor means for forcing the snow to one or both sides of the track or road.
>
> Another object of the invention is to provide blower means for receiving the snow from the conveyor means for blowing to a distant point.
>
> This invention also consists in certain other features of construction and in the combination and arrangement of the several parts, to be hereinafter fully described, illustrated in the accompanying drawings and specifically pointed out in the appended claims.
>
> * * * * *
>
> In the modification shown in Figures 8 and 9 a double conveyor is used which is so arranged as to feed the snow to the center of the casing * * * The fan shaft is connected in any desired manner with a source of power.
>
> * * * * *

I desire it to be understood that I may make changes in the construction and in the combination and arrangement of the several parts, provided that such changes fall within the scope of the appended claims.

Claim No. 1 upon which the appellant bases his action reads as follows:

A snow plow of the class described comprising a horizontally arranged semi-cylindrical casing, a fan casing connected therewith, a conveyor in the first mentioned casing, a fan in the fan casing, means for actuating the conveyor and fan, an adjustable conduit connected with the fan casing for rotary movement.

Curtis applied for his patent on July 12, 1921, and patent issued September 1, 1925. (In the United States he applied May 25, 1920, and patent issued April 18, 1922). His application discloses an equipment and certain alternatives in parts thereof. That with which we are concerned has the spiral blades so placed in the shaft as to convey the snow to the centre, force it backward through an opening in the semi-cylindrical casing into a fan casing containing a blower or fan which forces the snow into and through a chimney. The lower portion of the chimney is stationary and commences at the fan casing. It extends upward and then outward from an elbow of about 90 degrees. Below the elbow is an equipment for rotating the upper portion of the chimney containing the elbow and thereby the snow may be distributed in any desired direction.

The respondent contends that the Curtis patent is invalid (*a*) for lack of subject-matter and novelty and in particular that it was anticipated by prior patents, (*b*) it is inoperative and lacks utility.

The respondent further contents that if the Curtis patent is valid its own equipment is so different in its construction as to involve no infringement.

The respondent's first contention is that the essential features of the Curtis patent, including the semi-cylindrical casing, spiral conveyor, fan casing, blower and rotary adjustable chimney, were all anticipated by prior patents and that Curtis merely effected a juxtaposition of these earlier patented devices and exercised on his part in so doing no inventive ingenuity and, therefore, that the patent lacks subject-matter or novelty.

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That the component parts appeared separately or in groups in earlier patents is not denied, but it is pointed out that in not one of them are these devices all present and therefore they were never before operating as a unit or in combination. Moreover, in not one of these patented equipments are the spirals operated in a manner to convey the snow to the centre and force it backward through an opening in the semi-cylindrical casing into a fan casing containing a blower from which the snow is forced up and out through a rotary adjustable chimney which distributes the snow in any desired direction. There is not only the new combination but also the disposition of the snow from the centre of the equipment.

The prior patents were issued throughout the period 1869 to 1907. Curtis adopted some of their features, made necessary adjustments and improvements and developed an equipment which was different and possessed limited utility. His equipment is superior in operation and different from any disclosed in the earlier patents. He worked out a new combination and an improved mode of operation that attained the desired result "in a more useful and beneficial way": Lord Cairns quoting the Lord President in *Harrison* v. *Anderston Foundry Co.* (1). He overcame the difficulties that the earlier patents had not solved. It is a combination which exhibits

> a degree of ingenuity * * * which must have been the result of thought and experiment, and is sufficient to make these combinations the proper subject of a patent.

Lord Watson in *Thomson* v. *The American Braided Wire Co.* (2).

In *British United Shoe Machinery Co. Ltd.* v. *A. Fussell & Sons Ltd.* (3) the patented machine was for

> fixing the soles of boots to the welts by means of metallic screws which are screwed in from a continuous screw-threaded wire which is then cut off level with the sole . . . That operation which could, as I say, have been done by hand, has long been capable of being also done by machine. Its merit is that it does this operation at a high speed, and with unvarying accuracy, so that you can work these machines so as to yield a huge output without making wasters.

The validity of the patent was upheld.

(1) (1876) 1 App. Cas. 574 at 577.
(2) (1889) 6 R.P.C. 518 at 525.
(3) (1908) 25 R.P.C. 631 at 645.

Fletcher Moulton L.J. at p. 647:

> The invention is the new group. It is admitted that this is a new group. It did not exist before, and when you compare it with the groups which imperfectly performed this function in the preceding machines, the difference is so great that it is idle to contrast the two * * * It seems to me a great and important change in these machines, producing a vastly improved effect, properly claimed, not by claims for individual parts, for which, in my opinion, it was wholly unsuited, but by a claim for many parts as a group effecting together the one object wanted, and properly claimed as a group, and in no other way.

In *Patent Exploitation Ltd.* v. *Siemens Brothers & Co. Ltd.* (1), Lord Davey stated at p. 547:

> It is sufficient for the validity of the Patent if the combination, being the result of thought or experience, is new, and produces some new result or an old result in a more useful and beneficial way.

See also *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Braulik* (2); *Electrolier Manufacturing Co. Ltd.* v. *Dominion Manufacturers Ltd.* (3) and *Baldwin International Radio Co. of Canada Ltd.* v. *Western Electric Co. Inc.* et al (4).

The cases cited in support of the contention that inventive ingenuity is absent in the Curtis patent because of the prior patents are all distinguishable upon their facts. One particularly relied upon was that of *Durable Electric Appliance Co. Ltd.* v. *Renfrew Electric Products Ltd.* (5), and affirmed in this Court (6). The patent (relating to improvements in portable electric heaters) was held invalid for lack of subject-matter and novelty. Mr. Justice Masten, delivering the judgment of the Appellate Court of Ontario, stated at p. 536:

> Each of the elements in the combination performs exactly the same function as in the earlier patents, and the only difference consists in the slightly different curve which is given at the top and the bottom to the reflecting surface.

In this Court Chief Justice Anglin at p. 9 stated:

> * * * it is a combination the making of which did not involve any inventive ingenuity. Any competent and well-informed mechanic could readily have effected it.

The improvements effected by Curtis in his patented snow removal equipment cannot be reduced to anything so relatively unimportant as a "slightly different curve",

(1) (1904) 21 R.P.C. 541.
(2) (1910) 27 R.P.C. 209.
(3) [1934] S.C.R. 436.
(4) [1934] S.C.R. 94.
(5) (1926) 59 O.L.R. 527.
(6) [1928] S.C.R. 8.

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nor as previously intimated could they have been effected by "any competent and well-informed mechanic". The creation of the Curtis equipment required inventive ingenuity in addition to mechanical skill and therefore it has not been anticipated by the prior patents.

The learned trial judge found the Curtis equipment to be lacking in utility. The Curtis equipment as constructed with a rotating chimney having an angle of 45° (as patented it shows an angle of 90°) it is conceded would work in dry, light snow, but in other types of snow "it seemed to choke the motor down too much." Curtis had therefore perfected and patented an equipment which had some utility. He had not merely demonstrated the possibility of such an equipment but had actually produced it and had at least by way of an experiment tested it. It is this feature that was absent in *United Telephone Co.* v. *Bassano* (1) and which brings this case within the requirements of *The Badische Anilin Und Soda Fabrik* v. *Levinstein* (2).

Then in Terrell on Patents, 8th ed., p. 112, it is stated:

> A very slight amount of utility will be sufficient to support a patent. Alderson, B., in *Morgan* v. *Seaward* (1 W.P.C. 167, at p. 186), said: "I think if it was of different construction from any other steam engine, and of *any use* to the public, then that is sufficient". Again, Jessel, M.R., in *Otto* v. *Linford* (46 L.T. (N.S.) 35, at p. 41), said: "And, as to this question of utility, very little will do."

It was the inventive ingenuity of Curtis that perfected the equipment, and while its utility was limited, it would appear from the evidence that whatever it lacked to make it a commercial equipment could be supplied by mechanical adjustments. Ostrander, a mechanical engineer experienced in the manufacture of snow equipment, stated that he would have no trouble in making a workable ejector from the Curtis drawings. This is in substance what the appellant contends the respondent has effected in regard to the chimney as used in its equipment.

The respondent also stressed that the appellant never did manufacture for sale an equipment with this chimney as patented. Curtis apparently decided that it was sufficient that the snow be discharged upon either side and therefore in lieu of the chimney he adopted two adjust-

(1) (1886) 3 R.P.C. 295. (2) (1887) 4 R.P.C. 449.

able spouts that directed the snow to one side or the other. That fact, however, does not militate against the validity of the patent as it sometimes happens that improvements immediately follow a patent which supersede it in the market, usually because with these improvements it is more efficient or less expensive. Utility does not depend upon marketability. *The Badische Anilin Und Soda Fabrik* v. *Levinstein* (1).

The respondent alternatively contends that its equipment is different in many respects and does not constitute an infringement of any of the main elements of the Curtis patent, namely, (1) a semi-cylindrical casing, (2) a conveyor, (3) an adjustable conduit for rotary movement. Its submissions are that its equipmnt (*a*) does not embody a horizontally arranged semi-cylindrical casing, (*b*) uses baffle plates, (*c*) has an adjustable fan casing, (*d*) the power is supplied to the spiral shaft at the side of the equipment rather than at the centre.

The reason and purpose of the semi-cylindrical casing is that it holds the snow in the spiral while it is moved toward the centre. That this casing should be somewhat semi-cylindrical in shape appears to have been accepted for a long time. Some such casings appeared in the earlier patents, particularly that of Tierney issued in the United States in 1869, and in the Herran patent issued in 1889. The respondent suggests that the semi-cylindrical feature is found only where there is a single spiral and as it never constructed its equipment with but a single spiral, it never had a semi-cylindrical casing. It does, however, have a casing that with the baffle plates serves the same purpose. In fact, the presence of a casing in either the Curtis or the Sicard patent does not add a new feature and whatever is different in the respective casings is but a mechanical adjustment made necessary by the introduction of the additional spiral.

The evidence does not establish that the introduction of baffle plates, being sheets of metal to keep the snow from falling from the top spirals into the lower spirals, is such that it would not occur to any skilled mechanic. The adoption of the two superposed rows of spirals does

(1) (1887) 4 R.P.C. 449 at 466.

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WANDSCHEER ET AL v. SICARD LTD.

Estey J.

not involve a new principle, nor does it appear that the adjustments or alterations necessary are such as to require more than mechanical skill and, therefore, do not involve inventive genius.

In both of these equipments the conduit or chimney is so constructed as to permit of the snow being blown in any direction. The respondent indicates that his chimney is in certain particulars different, but in order to succeed he must go further and show that these differences involve inventive ingenuity. Curtis claimed as above quoted "an adjustable conduit connected with the fan casing for rotary movement." In the Sicard equipment counsel contends that "the upper part of the chimney due to a special mechanism rotates on a vertical axis enabling the snow to be delivered almost at any point within the circle." The evidence discloses that respondent adopted a chimney with a pronounced obtuse angle, or perhaps a curve instead of an angle of 90° as shown in the Curtis patent. It also adopted adjustable sections toward the exit of the chimney and made changes or alterations in its size. These are, however, mechanical changes. Just what was meant by the phrase "a special mechanism" is not clarified by the evidence. Counsel for the respondent also suggested that there was in the operation of respondent's blower an improvement in the force applied to the snow that made the chimney a more useful outlet but the evidence does not support that contention.

The equipment as it appears in the Curtis patent discharges the snow through the chimney. The Sicard equipment discharges the snow through three outlets, the chimney and a spout on either side of the chimney. By an adjustment of the fan casing the snow is directed to and through whichever one of the three outlets that may at any time be desired. It is the existence of these three outlets that makes the adjustable feature of the fan casing necessary and therefore it is a feature separate and apart from the equipment which may be described as the Curtis equipment. These additional outlets, one on either side of the chimney, and the adjustable fan casing, are additions to the Curtis patent but do not affect the purpose or usefulness of the equipment as patented.

It does not help the Respondents, even though it be conceded, that they have made various improvements on the patented apparatus, as for instance in the drip pans and the means of moving the spit-frame backwards and forwards without opening the doors of the casing and the like. For these improvements, assuming they required invention, they might conceivably have taken out a Patent; but without the prior Patentees' consent they would not be entitled to use the original invention. A Patent, even for a combination, cannot be evaded by merely grafting upon it improvements however meritorious. On the whole matter I reach the conclusion that the Complainers are entitled to the interdict they seek.

Lord Salvensen at p. 708 in *Lynch and Henry Wilson & Co. Ltd.* v. *John Phillips & Co.* (1).

Respondent in his equipment provided the power for the spiral shaft at the outer end rather than at the centre, as in the Curtis patent. Both methods appeared in earlier patents. In one of Curtis' alternatives he shows gears at the outer end and in his specification he states: "the fan shaft is connected in any desired manner with the source of power." It therefore seems a mere matter of adoption of alternative methods well known in the art.

With great deference to the opinion of the learned trial judge, it appears to me that the Curtis patent is valid and that the respondent in the construction of its equipment has infringed upon that patent. I would, therefore, refer the matter back to the Exchequer Court for the determination of damages suffered by the appellant because of the respondent's infringement.

The appeal with respect to the Curtis patent should be allowed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Gowling, MacTavish & Watt.*

Solicitors for the respondent: *Lajoie, Gelinas & MacNaughten.*

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(1) (1908) 25 R.P.C. 694.

1947
*May 5, 6
*Dec. 22

HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT,

AND

THE ROYAL BANK OF CANADA (THIRD PARTY) ..... } APPELLANT

AND

MARIE E. RACETTE (SUPPLIANT) ... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—War Loan Bonds—Registered as to principal only—Alleged transfer by owner—Signature of registered owner guaranteed by bank—Owner denying having executed transfer—Liability of the Crown—Liability of the bank—As to the principal—As to the interest or coupons.

The respondent sought to recover the principal and the interest of nine $100 bonds of the *Dominion of Canada* which were registered as to principal in her name. These bonds, maturing in 1937, were purchased in 1917 and were left in custody of a friend, *Father Cotter*. In November, 1921, in consequence of a form of transfer purporting to have been signed by the respondent, witnessed by *Father Cotter* and guaranteed by the *Royal Bank of Canada,* the bonds were made payable to bearer. The respondent alleged that her name appearing on the transfer was a forgery. Judgment was given in the respondent's favour for the sum of $900 with interest at 5½ per cent per annum from November, 1921, to the date of maturity in 1937.

Held, varying the judgment of the Exchequer Court of Canada, that the respondent is entitled to receive from *His Majesty* the sum of $900, but that the interest of 5½ per cent per annum, represented by the coupons attached to the bonds, is not recoverable from *His Majesty*.

Held: There can be no dispute that the document accepted by the *Bank* as a transfer of the registered bonds was not signed by the respondent and that the signature thereon does not purport to be made by a person acting for her. Neither does the evidence support the contention that the purported signature must be presumed to have been written under her authority.

Held: The interest on these bonds was payable by coupons which could have been cashed by anyone. It is impossible to hold that the loss of the interest represented by the coupons was a result of the *Bank* or *His Majesty* acting on the alleged transfer.

Held: No other interest may be allowed against the *Crown* unless there is a statute or agreement providing for it, *Hochelaga Shipping and Towing Co. Ltd.* v. *The King* [1944] S.C.R. 138.

Held: The clause in the judgment *a quo* for recovery by *His Majesty* from the *Royal Bank of Canada* of the principal directed to be paid by the former to the respondent should remain.

*Present: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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APPEAL from the judgment of the *Exchequer Court of Canada, Angers J.*, awarding to the respondent the sum of $900 with interest at 5½ per cent per annum from November 25, 1921, to the date of maturity in 1937. The judgment also directed the *Royal Bank of Canada* to pay *His Majesty the King* the amount of the principal and interest that the latter was to pay the respondent.

Roger Ouimet, K.C. for the appellant: *His Majesty the King.*

Hazen Hansard, K.C. for the appellant: *The Royal Bank of Canada.*

J. P. Charbonneau, K.C. for the respondent.

KERWIN J.: The suppliant, Marie E. Racette, sought to recover the principal of certain bonds issued by the Dominion of Canada and interest thereon and registered as to principal in her name. Her petition of right was dismissed with costs by the Exchequer Court, and the third party proceedings against the Royal Bank were dismissed without costs. That judgment was set aside by this Court (1) and a new trial directed. His Majesty the King was directed to pay the suppliant her costs of that appeal, but the costs of the abortive trial were left to be disposed of in the discretion of the judge at the new trial.

Such new trial was held and it was adjudged that the suppliant was entitled to recover from His Majesty the principal sum of the bonds, $900.00, and interest thereon at the specified rate of 5½ per cent per annum from November 25, 1921, the date of an alleged transfer of the bonds, to December 1, 1937, the due date of the principal. The third party, The Royal Bank, was directed to pay His Majesty the King the amount of the principal and interest that the latter was to pay the suppliant. It was ordered that there should be no costs to any party by virtue either of the earlier or later judgment.

His Majesty the King and The Royal Bank now appeal. There can be no dispute that the alleged transfer of the bonds was not signed by the respondent but it was con-

(1) [1942] S.C.R. 464.

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Kerwin J.

tended that her purported signature should be taken to have been written by her authority. The evidence, all of which is detailed in the reasons for judgment in the Court below, does not support that contention and the Exchequer Court was therefore right in deciding in favour of the suppliant. However, judgment was not only for the principal of the bonds but also for interest at the designated rate from the date of the alleged transfer. While the bonds were registered as to principal in the name of the suppliant, interest thereon was payable by coupons which could have been cashed by any one. The evidence is clear that the suppliant never saw the bonds but left them in a savings deposit box to which she and another had access and no question was raised by her until July 27, 1936, when she inquired if the Department of Finance had any bonds registered in her name. It is impossible to hold that the loss of the interest represented by the coupons was a result of The Royal Bank or His Majesty acting on the alleged transfer and interest may not be allowed against the Crown unless there is a statute or agreement providing for it: *Hochelaga Shipping and Towing Company Limited* v. *The King* (1). The judgment should therefore be varied by declaring that the suppliant is entitled to receive from His Majesty the sum of $900.00.

The trial judge did not allow the suppliant any costs. In view of this and of the fact that the petition of right is dated July 30, 1938, and notwithstanding that the present appeal succeeds in part, there should be no costs in this Court to any party. The clause in the judgment *a quo* for recovery by His Majesty from The Royal Bank of the principal directed to be paid by the former to the suppliant should remain.

TASCHEREAU J.: L'intimée Marie Racette réclame de l'appelant Sa Majesté le Roi, la somme de $900.00 et intérêts au taux de 5½% à compter du 25 novembre 1921. Elle allègue dans sa pétition de droit que depuis le 1er décembre 1917, elle était la propriétaire enregistrée quant au capital seulement, de neuf débentures de $100.00 chacune du Dominion du Canada, avec coupons attachés,

(1) (1944) S.C.R. 138.

et que les dites débentures ont été transférées hors sa connaissance. Elle aurait été ainsi privée à échéance de cette somme.

Une première défense de Sa Majesté le Roi a été accueillie par la Cour d'Echiquier, mais rejetée par cette Cour.(1) Elle était à l'effet que la garantie de la signature de l'intimée par la Banque Royale du Canada, validait le transfert. Cette Cour (1) a décidé que comme conséquence de cette garantie, Sa Majesté le Roi n'était pas exempt de responsabilité dans le cas de faux, mais qu'il conservait son recours contre la Banque Royale du Canada. Le dossier a donc été retourné à la Cour d'Echiquier avec instructions de disposer de l'action au mérite, et avec recommandation de permettre aux parties de compléter l'enquête, si nécessaire. Après la ré-audition, M. le Juge Angers, tout en émettant des doutes sérieux sur la véracité du témoignage de l'intimée, en est arrivé à la conclusion qu'elle n'avait pas signé le transfert, qu'elle n'avait autorisé personne à le faire pour elle, et a en conséquence maintenu la pétition de droit, non seulement pour la somme capitale de $900.00, mais aussi pour les intérêts représentés par des coupons attachés aux dites débentures.

La preuve révèle qu'en effet, dès 1917, l'intimée était la propriétaire enregistrée de ces débentures, mais le 25 novembre 1921, comme résultat d'un transfert, supposé signé par l'intimée, elles ont été faites payables au porteur. C'est cette signature de l'intimée qui est garantie par la Banque Royale, et attestée par le Révérend Père Cotter, qui depuis 1914 voyait dans une certaine mesure à l'administration des biens de l'intimée. Le Père Cotter quitta Montréal en 1921 pour aller résider à Fort William, et décéda dans le cours de l'année 1936.

Il avait apparemment placé ces débentures dans un coffre de sûreté de la Banque Royale du Canada, dont il avait donné à l'intimée un double de la clef. L'intimée ne reçut jamais les intérêts, et elle dit dans son témoignage, qu'elle ne s'en préoccupa jamais, vu qu'elle désirait les laisser accumuler jusqu'au moment de l'échéance du capital.

(1) [1942] S.C.R. 464.

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A tout événement, elle n'a reçu ni capital ni intérêts, et ce n'est qu'après la mort du Père Cotter qu'elle a commencé à s'inquiéter et à s'informer auprès de l'appelant. Elle écrivit à l'endroit où le Père Cotter était décédé, elle se rendit à la Banque Royale du Canada, s'informa au bureau du trésor, et c'est là qu'elle aprit que ses débentures avaient été faites payables au porteur en 1921, et on lui fournit même un photostat du document dont s'était autorisé le gouvernement pour effectuer le transfert.

Il semble surabondamment prouvé, comme d'ailleurs le dit M. le Juge Angers, que l'intimée n'a jamais signé ce transfert. Elle le jure positivement, un expert en écriture confirme sans hésitation son témoignage, et d'ailleurs l'examen du document démontre clairement l'absence complète de similitude entre la signature qui y est apposée, et celle qui est véritablement la sienne. L'appelant n'a apporté aucune preuve pour contredire celle de l'intimée, et la seule conclusion possible est celle à laquelle est arrivé le juge au procès.

Mais on prétend que si c'est le Père Cotter qui a ainsi signé le nom de l'intimée, il était autorisé à le faire par l'intimée elle-même. Cette prétention me paraît inadmissible, et rien dans la preuve ne peut la supporter. Il est vrai que l'intimée et le Père Cotter ont ouvert un compte conjoint à la Banque de Montréal, que ce dernier a ouvert pour l'intimée un autre compte à la Banque Royale du Canada, et qu'il a acheté les débentures avec l'argent de Mlle Racette. Mais je ne vois rien dans ces faits qui puisse être interprété comme une autorisation au Père Cotter de signer le nom de l'intimée sur un document, afin de rendre payables au porteur, des débentures enregistrées au nom de l'intimée, et déposées dans un coffret de sûreté, où tous les deux avaient accès. D'ailleurs, si véritablement le Père Cotter avait l'autorisation que l'on prétend, pourquoi aurait-il déguisé sa propre signature? Il lui eût été facile de dévoiler cette autorisation que la Banque Royale, d'après le témoignage de son comptable, n'aurait pas mise en doute. Cet effort évident pour décevoir n'est sûrement pas l'acte d'un mandataire autorisé expressément ou même tacitement.

Mais, la situation me paraît différente, en ce qui concerne les intérêts. Les débentures étaient enregistrées quant au capital, mais les coupons d'intérêts étaient payables au porteur, et je ne crois pas que l'acte de l'employé du gouvernement qui s'est basé sur un document forgé pour opérer le transfert des débentures, ait été la cause de la perte des intérêts. En payant ces coupons au porteur, le gouvernement était libéré.

Le jugement rendu par la Cour d'Echiquier doit donc être modifié en ce sens que l'intérêt au taux de 5½% représenté par les coupons annexés aux débentures, doit être retranché. Aucun autre intérêt ne peut être accordé à l'intimée depuis 1937, vu la décision de cette Cour dans la cause de *Hochelaga Shipping* v. *The King* (1). Devant cette Cour, chaque partie paiera ses propres frais.

RAND J.: It is not disputed that the document accepted by the bank as a transfer of the registered bonds was not signed by the respondent, and the signature does not purport to be made by a person acting for her. The Crown argues that, in the circumstances, the signature must be presumed to have been written under her authority. But the evidence gives no support to that contention.

The judgment in the Exchequer Court, however, includes interest from the date of the so-called transfer. The bonds were registered only as to principal and the interest coupons were payable to bearer; and even if the bonds were surrendered in 1924 in exchange for others of larger denomination, it cannot be said that the consequence of acting on the forged transfer was the loss of that interest.

The principal of the judgment below will, therefore, be reduced to $900.00. There will be no costs in this Court.

The judgment of Kellock and Estey JJ. was delivered by

KELLOCK J.: The respondent alleged that she was the owner of nine $100.00 bonds of the Dominion, maturing in 1937, which she had left in custody, in Montreal, of the Reverend Father Cotter, and which were not forthcoming at his death in May, 1936. The bonds had originally been registered as to principal in the name of the respondent but on November 25, 1921, in consequence

(1) [1944] S.C.R. 138.

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of a form of transfer purporting to have been signed by respondent, witnessed by Father Cotter and guaranteed by the appellant bank, they were made payable to bearer. Respondent alleged that the name "Marie E. Racette" appearing on the transfer was a forgery. The apparent signature of the respondent on the form of transfer was found by the learned trial judge to have been forged, although he disbelieved the respondent's evidence on certain other specific matters as to which he found her guilty of wilful perjury. In the result judgment was given in the respondent's favour for the sum of $900.00 with interest at 5½ per cent from November 25, 1921, to the date of maturity in 1937.

It appears from the evidence that Father Cotter undertook to handle the financial affairs of the respondent for her and that in fact he did all her business from 1914 until 1921, when he moved away from Montreal to Fort William. The bonds were always in his custody from the time she gave him the money to buy them for her in 1917. After 1921 respondent says she looked after her own affairs and although she corresponded with Father Cotter until his death, she had never asked him for the bonds.

There is no ground in my opinion upon which the finding that the signature on the form of transfer is a forgery can be successfully attacked. No witness says the signature is genuine. The officer of the appellant bank who authorized the guarantee of the signature has no recollection of the matter and says in his evidence that at the relevant period he would have acted on the assurance of Father Cotter that the matter was regular. From a mere comparison of the disputed signature with the genuine signatures on other documents, including that on the note, Exhibit R-3, taken with the denial of the respondent, it is obviously impossible for the court to find the disputed signature to be genuine. It must be taken therefore that the appellants have failed on this branch of the case.

It is next contended for the appellants that the learned trial judge should have found that Father Cotter, by whose hand, according to the evidence submitted by the respondent, the respondent's name was in fact placed upon the

transfer, had been authorized by the respondent to do so. The burden of establishing this is upon the appellants.

The evidence of the respondent is to the effect that she entrusted Father Cotter with the money to invest for her and was subsequently told by him that he had bought Victory Bonds for her, (which was the fact) and had lodged them in his safety deposit box to which he gave her a key, which she says she never used and in fact lost. She says she never asked him either for the bonds or the interest.

There is no inference as to the principal from the authority to receive the interest, taking that fact by itself. The other facts in evidence that are relied upon do not advance the matter. Father Cotter opened a bank account for the respondent in the Royal Bank and the two of them had a joint account in the Bank of Montreal and he retained the bank books in his possession. None of these facts, separately or together, however, would permit of the assumption on the part of the appellants, or either of them, that Father Cotter had authority from the respondent to deal with the principal of the bonds.

The respondent, on her examination for discovery explained her failure to enquire from Father Cotter as to the interest on the ground that he had told her to allow the interest to accumulate until her old age. At the trial, however, she said the reason was that she was waiting for the bonds to mature. Even if it be now assumed that neither explanation is the true one, none of this has any bearing on the question of authority to deal with principal and no inference with regard thereto can be drawn from the respondent's conduct however much suspicion it may arouse. Further, nothing in the nature of estoppel can be raised by either appellant. They knew nothing about any arrangements between the respondent and Father Cotter. In my opinion therefore the appeal must fail as to the principal.

The learned trial judge gave judgment in favour of the respondent not only for the principal of the bonds but also for interest at the contract rate from the date of the forged transfer. It is to be borne in mind that the bonds, while registered as to principal, had bearer coupons attached

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covering the interest. Whether, therefore, the respondent believed the interest was accumulating until her old age or until the maturity of the principal is immaterial. Had it been established that the particular bonds with coupons had been surrendered to the Crown and new bearer bonds with coupons issued therefor on the strength of the forged transfer, it might have been necessary to consider whether the appellant could take the position that in paying the coupons attached to the substituted bonds it had paid the original coupons. The evidence however is not in my opinion sufficient to raise the point and I mention it so that nothing herein may be taken as deciding anything in reference to such a case should it arise.

The coupons here in question, being payable to bearer, the respondent has not established that, as to any one of them, payment was, as against her, made improperly; *Young* v. *MacNider* (1); *Connolly* v. *Montreal Park and Island Railway Co.* (2); *Edelstein* v. *Schuler* (3). The respondent's notice of her loss in 1936, while before the due date of the last coupon, was ineffective. I think therefore that the judgment below is erroneous with respect to the coupon interest. Had any interest other than that covered by the coupons been claimed, *The King* v. *Roger Miller & Sons* (4), would have been an answer.

The appeal must therefore be allowed and the judgment reduced to the amount of the principal of $900.00 only. As success is divided there should be no costs in this court.

Appeal allowed and judgment varied; no costs to any party.

Solicitors for the appellant: His Majesty the King: *Roger Ouimet.*

Solicitors for the appellant: the Royal Bank of Canada: *Montgomery, McMichael, Common & Howard.*

Solicitors for the respondent: *Charbonneau, Charbonneau & Charlebois.*

(1) 25 S.C.R., 272.
(2) 20 S.C. (Que.) 1.
(3) (1902) 2 K.B., 144.
(4) (1930) S.C.R., 293.

EX PARTE FONG GOEY JOW ALIAS FONG SHUE ALIAS FONG GOEY SOW

1947
*Dec. 10
*Dec. 22

Habeas Corpus—Criminal law—Alien—Convicted of offence under section 4 of Opium and Narcotic Drug Act, R.S.C. 1929, c. 144—Warrant for commitment not stating reasons—Deportation Order—Amendment to warrant—Immigration Act, R.S.C. 1927, c. 93—Rules 57, 72 and 78 of the Supreme Court of Canada.

In August 1947, Mr. Justice Kellock directed that all parties concerned attend before him to show cause why a writ of habeas corpus should not issue directed to the District Superintendent of Immigration at Vancouver. A return was made, not by the District Superintendent, but by the Commissioner of Immigration, stating that the applicant was held by him for deportation under a warrant of commitment dated September 13, 1945. This warrant was signed by the Commissioner and was directed to the District Superintendent or any Canadian Immigration officer, and it followed form G in the schedule to the Immigration Act with the important exception that it did not recite as the form provides: "And whereas under the provisions of the Immigration Act an order has been issued for the deportation of the said . . . . .".

A copy of a deportation order, dated September 8, 1945, was produced before Mr. Justice Kellock, although objected to by the applicant because it was not made part of the return. Then Mr. Justice Kellock permitted the filing of a new return which was dated September 15, 1945, was signed by the Commissioner and had attached to it a copy of the same warrant of September 13, 1945, and a copy of the same order for deportation of September 8, 1945.

Subsequently the respondent again filed a new return dated September 15, 1947, this time signed by the Acting District Superintendent and which had attached to it a copy of the same warrant of September 13, 1945 and a copy of an order for deportation of September 8, 1945, which contained a statement that the applicant was an alien and had been convicted of an offence under paragraph (*d*) of section 4 of the Opium and Narcotic Drug Act, 1929.

Then Mr. Justice Kellock directed that in view of the statement of facts found, as appears in the order attached to the last return, the application for a writ of habeas corpus should be dismissed.

The present appeal is from the decision of Mr. Justice Kellock.

Held: The appeal to this Court should be dismissed.

Per The Chief Justice, Kerwin, Taschereau and Rand JJ.: The words in section 26 of the Opium and Narcotic Drug Act, 1929, "in accordance with the provisions of the Immigration Act relating to inquiry, detention and deportation", require us to examine the provisions of the Immigration Act relating to inquiry, detention and deportation.

The officer named in the warrant must be able to justify his detention of the accused. It clearly appears that such a warrant depends upon an order for deportation and this is borne out by the fact that the form of warrant in the Schedule to the Act, Form G, provides for the recital of such order. The warrant for commitment and the order for deportation may be read together.

*PRESENT:—Rinfret C.J., Kerwin, Taschereau, Rand and Estey JJ.

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The original order was defective because it did not state the facts upon which the board of Inquiry acted. But a proper order being subsequently produced, effect should be given to it and the applicant detained in custody. The Acting District Superintendent is now able to justify the applicant's detention and the Court will not on a habeas corpus proceeding such as this inquire into any irregularity in his caption.

Per Estey J.: If the warrant is issued without a sufficient reference to the order for deportation, it is to that extent defective or incomplete. It would appear that the requirements of the Statute are satisfied by setting out in the warrant such description or identification of the order for deportation that either the accused or the party detaining him may identify same.

Warrants defective because of omissions both as to substance and to form have been before the Courts and where they have recited a conviction or order which exists in fact, permission to amend the warrants has been granted. Opportunity to amend the warrant should be given in this case.

Neither the provisions of section 43 nor Form G contemplate the setting forth of the term of imprisonment for the offence under section 4 (*d*) of the Opium and Narcotic Drug Act, 1929.

The question as to the right to appeal cannot be dealt with upon an application for habeas corpus where the issue is confined to determining the legality of the applicant's retention in custody, and this right is not affected by the result of such application.

APPEAL from the judgment of Kellock J. dismissing petition for a writ of habeas corpus.

The material facts and the grounds of the petition are stated in the above head-note and in the judgments now reported.

Denis Murphy, for applicant.

R. Forsythe, K.C., for the Commissioner of Immigration.

The judgment of the Chief Justice and of Kerwin, Taschereau and Rand JJ. was delivered by

KERWIN J.: On August 27, 1947, on an application made under section 57 of the *Supreme Court Act,* Mr. Justice Kellock, in accordance with this Court's Rule No. 72, directed that all parties concerned attend before him to show cause why a writ of habeas corpus should not issue directed to the District Superintendent of Immigration at Vancouver, British Columbia, to have the body of the applicant before a judge of this Court forthwith to undergo and receive all and singular such matters and things as

such judge should then and there consider of concerning him in this behalf. A return was made, not by the District Superintendent, but by the Commissioner of Immigration, stating that the applicant was held by him for deportation at the Immigration Building in Vancouver under a warrant dated September 13, 1945, a copy of which was annexed to the return. This warrant was signed by the Commissioner of Immigration and was directed to the District Superintendent of Immigration at Vancouver, or any Canadian immigration officer. It recites that the applicant a subject of China, had become an inmate of Oakalla Prison Farm; that being an alien he had, after his entry to Canada, been convicted on March 27, 1945, of an offence under section 4, paragraph (*d*) of *The Opium and Narcotic Drug Act, 1929*, and was sentenced to imprisonment, and that an application had been made to the Minister of Justice for an order addressed to the Warden of the Oakalla Prison Farm commanding him "to detain and deliver (the applicant) into your custody after expiry of his sentence with a view to his deportation under the provisions of the said Act." The warrant then orders the District Superintendent, or any Canadian immigration officer, to receive the applicant and safely keep and convey him through any part of Canada and deliver him to the transportation company which brought him to Canada, with a view to his deportation to the port from which he came to Canada. This warrant follows Form G in the Schedule to the *Immigration Act, R.S.C. 1927, c. 93*, as amended by *1 Geo. VI, c. 34*, with the important exception that it does not recite as the form provides:—"And whereas under the provisions of the *Immgiration Act* an order has been issued for the deportation of the said ..... ".

The Opium and Narcotic Drug Act is chapter 49 of the *Statutes of 1929* and the reference in the warrant to paragraph (d) of section 4 thereof is explained by section 26 which reads as follows:—

26. Notwithstanding any provision of the Immigration Act, or any other statute, any alien, whether domiciled in Canada or not, who at any time after his entry into Canada is convicted of an offence under paragraphs (*a*), (*d*), (*e*) or (*f*) of section four of this Act, shall, upon the expiration or sooner determination of the imprisonment imposed on such conviction, be kept in custody and deported in accordance with the provisions of the Immigration Act relating to enquiry, detention and deportation.

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The words "in accordance with the provisions of the *Immigration Act* relating to enquiry, detention and deportation" cannot be neglected as was pointed out by Duff J., as he then was, in *Samejima* v. *The King* (1), in dealing with the phrase "in accordance with the provisions of this Act,—meaning, in connection with the case there under advisement, in accordance with the provisions of the *Immigration Act*. They, therefore, require us to examine the provisions of the *Immigration Act* relating to enquiry, detention and deportation.

Subsections 1 and 2 of section 43 thereof, as enacted by *c. 34, sec. 13,* of *the Statutes of 1937,* provide:—

43. (1) Whenever any person other than a Canadian citizen, or a person having Canadian domicile, has become an inmate of a penitentiary, gaol, reformatory or prison, the Minister of Justice may, upon the request of the Minister of Mines and Resources, issue an order to the warden or governor of such penitentiary, gaol, reformatory or prison, which order may be in the Form F in the Schedule to this Act, commanding him after the sentence or term of imprisonment of such person has expired to detain such person for, and deliver him to, the officer named in the warrant issued by the Director or the Commissioner of Immigration, which warrant may be in the Form G in the Schedule to this Act, with a view to the deportation of such person.

(2) Such order of the Minister of Justice shall be sufficient authority to the warden or governor of the penitentiary, gaol, reformatory or prison, as the case may be, to detain and deliver such person to the officer named in the warrant of the Director or the Commissioner of Immigration as aforesaid, and such warden or governor shall obey such order, and such warrant shall be sufficient authority to the officer named therein to detain such person in his custody, or in custody at any immigrant station, until such person is delivered to the authorized agent of the transportation company which brought such person into Canada, with a view to deportation as herein provided.

It will be seen that the order of the Minister of Justice is addressed to the Warden of a penitentiary, gaol, reformatory or prison in which a person other than a Canadian citizen or a person having Canadian domicile is an inmate, commanding the Warden after the sentence or term of imprisonment of such person has expired to detain such person for and deliver him to the officer named in the warrant issued by the Director or Commissioner of Immigration with a view to the deportation of such person. The Minister of Justice's order is sufficient authority to the Warden to deliver the described person to the officer named in the warrant but when the latter is called upon,

(1) [1932] S.C.R. 640 at 641.

he must justify his detention of such person. It clearly appears from the provisions of the *Immigration Act* that a warrant to such officer depends upon an order for deportation and this is borne out by the fact that the form of warrant in the Schedule to the Act, Form G, provides for the recital of such an order.

If the matter rested there, I would say that the return made by the Commissioner of Immigration was insufficient because there was no such recital in the warrant, which was the only document attached to the return. However, a copy of a deportation order dated September 8, 1945, was apparently produced before Mr. Justice Kellock, although objected to by counsel for the applicant because it was not made part of the return. That order merely recited that the applicant had been examined by an officer acting as a board of inquiry and had been ordered deported to China under section *42, ss. 3, of the Immigration Act,* in accordance with section *26 of The Opium and Narcotic Drug Act, 1929,* and amendments thereto. Mr. Justice Kellock permitted the filing of a new return and the amendment of the order "so that the facts as found by the Board may be specifically set forth." A new return was thereupon made, dated September 15, 1947, again signed by the Commissioner of Immigration, to which was attached a copy of the same warrant of September 13, 1945, and a copy of the same order for deportation of September 8, 1945. Mr. Justice Kellock gave leave for further argument in writing, of which counsel for the applicant availed himself, but no further argument was submitted on behalf of the respondent. Instead, the latter filed a new return, dated September 15, 1947, this time signed by the Acting District Superintendent of Immigration at Vancouver and attached to which was a copy of the same warrant of September 13, 1945, and a copy of an order for deportation of September 8, 1945, which contained a statement that the applicant was an alien and that he had been convicted of an offence under paragraph (*d*) of section *4 of The Opium and Narcotic Drug Act, 1929.* Whether, as contended by counsel for the applicant, no prior authority for the filing of this return had been granted, it must be taken that Mr. Justice Kellock authorized it as he directed that in view of the statement of

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facts found, as appears in the order attached to the last return, the application for a writ of habeas corpus should be dismissed.

Section *43 of the Immigration Act* provides that the warrant "may" be in the Form G in the Schedule and while it is not directly apposite, section 78, providing that no conviction on proceedings under the *Act* shall be quashed for want of form, is not without importance, and the warrant and order may, therefore, be read together. As Lamont J. points out in *Samejima* v. *The King* (1), the *Immigration Act* contemplates that an order for deportation will show the reasons. It is true that the remarks in that case were made in connection with section *33* of the *Immigration Act*, in subsection 5 of which appears a reference to Form C which has a space for the reasons for the rejection of a person seeking entry into Canada, but the same reasoning applies in the present case and the original order was, therefore, defective because it did not state the facts upon which the Board of Inquiry acted. However, the question to be resolved is whether a proper order now being produced, effect should be given to it and the applicant detained in custody. The answer must be in the affirmative because the Acting District Superintendent is now able to justify the applicant's detention and the Court will not on a habeas corpus proceeding such as this inquire into any irregularity in his caption: Anglin J., as he then was, and Osler J. A., speaking for the Ontario Court of Appeal in *Rex* v. *Whitesides* (2).

The appeal must therefore be dismissed but without prejudice to the right of the applicant to appeal under section *19* of the *Immigration Act* to the Minister of Immigration from the order for his deportation.

ESTEY J.: This is an appeal under section *57(2)* of *the Supreme Court Act (1927 R.S.C., c. 35)* from a decision of Mr. Justice Kellock dismissing an application for a writ of *habeas corpus*.

The accused was convicted under section *4 (d)* of *The Opium and Narcotic Drug Act (1929 S. of C., c. 49)* and his consequent term of imprisonment expired September 8, 1945.

(1) [1932] S.C.R. 640 at 646. (2) (1904) 8 O.L.R. 622.

Section *26* of *The Opium and Narcotic Drug Act* provides in part that any alien convicted under section *4 (d)*

> shall, upon the expiration or sooner determination of the imprisonment imposed on such conviction, be kept in custody and deported in accordance with the provisions of the *Immigration Act* relating to enquiry, detention and deportation.

The Minister of Mines and Resources, acting under section *22 (2)* of the *Immigration Act (1927 R.S.C., c. 93, and amendments thereto)* authorized H. Crump, an immigration officer, to hold an enquiry with respect to the accused. The enquiry was held and under date of September 8, 1945, H. Crump issued an order that the accused be deported.

Then the Commissioner of Immigration under section *43 (1) of the Immigration Act* issued his warrant directed to the District Superintendent of Immigration, Vancouver, B.C., authorizing him to receive, hold and deliver the accused to the transportation company which brought him to Canada. This warrant under section 43 (2):

> . . . shall be sufficient authority to the officer named therein to detain such person in his custody, or in custody at any immigrant station, until such person is delivered to the authorized agent of the transportation company which brought such person into Canada, with a view to deportation as herein provided.

The application for the writ of habeas corpus alleges that this warrant is invalid because it fails to disclose (*a*) that a deportation order was made against the accused, and (*b*) the term of imprisonment imposed upon the accused.

Mr. Justice Kellock under Supreme Court Rule 72 directed that a summons issue and upon the hearing thereof objections were taken by counsel for the accused to the return made. The learned Judge under Rule 78 granted leave to amend and in accordance therewith amendments were made to the return and order for deportation, and no objections are now urged as to the contents of these documents as now filed. The warrant of commitment was not amended.

This warrant made no reference to the order for deportation, notwithstanding that Form G, as set out in the Schedule to the Act, contains the following:

> And whereas, under the provisions of the Immigration Act, an order has been issued for the deportation of the said.....

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The statute provides that the warrant may be in Form G and therefore it is not necessary that either the language used or the sequence of items as therein set out must be adopted, but it does not follow that one or any of its essential requirements should be ignored. The order for deportation is the basis and justification for the issue of the warrant. If, therefore, the warrant be issued without a sufficient reference to the order for deportation, it is to that extent defective or incomplete. Counsel for the accused contended that the warrant should set out the reasons embodied in the order for deportation. This is not required by either the statute or Form G. It would rather appear that the requirements of the statute are satisfied by setting out therein, as the form suggests, such description or identification of the order for deportation that either the accused or the party detaining the accused may identify same.

Warrants defective because of omissions both as to substance and to form have been before the Courts and where they have recited a conviction or order which exists in fact permission to amend the warrants has been granted. This practice has been followed even where it was necessary to have a writ of *certiorari* issued in order to bring the record before the Court. In this particular case the record has been placed before the Court by way of a return and the order for deportation as amended is upon its face competently made, in fact its competence is not challenged, and must, therefore, be accepted as a valid adjudication.

Under these circumstances it would seem that an opportunity should be given to amend the warrant. *The King* v. *Barre* (1); *The King* v. *Morgan* (2); *The King* v. *Morgan,* (No. 2) (3); *The King* v. *MacDonald* (4). *In the matter of Clarke* (5).

In *In re Timson* (6) the principle of permitting amendments was accepted but because of the particular circumstances of that case the amendment was refused. See also *The King* v. *Venot* (7).

That an amendment should be permitted in this case would seem to follow, particularly as under other sections

(1) [1905] 11 C.C.C. 1.
(2) [1901] 5 C.C.C. 63.
(3) [1901] 5 C.C.C. 272.
(4) 16 C.C.C. 121.
(5) [1842] 2 Q.B. 619; 114 E.R. 243.
(6) [1870] L.R. 5 Ex. 257.
(7) [1903] 6 C.C.C. 209.

of this *Act* the order for deportation serves the dual purpose of evidencing the adjudication and justifying the retention of the party to be deported, and it may be amended. The basis for amending the order for deportation in such a case was discussed in *Samejima* v. *The King* (1), where Mr. Justice Lamont, with whom Duff, J. (later Chief Justice) and Cannon, J. agreed, stated at p. 647:

> If the Board of Inquiry made a deportation order defective on its face, it could, in my opinion, recall it and substitute therefor an order in proper form, so long as the defective order had not been acted upon. Even after it has been served on the person in custody and constitutes the return made to a writ of *habeas corpus*, it may still, in my opinion, by leave of the court or judge, be amended, or another order substituted for it, so as to make it conform to the finding of the Board.

The other objection that the warrant does not disclose the term of imprisonment is not supported by either the provisions of section 43 or Form G. Neither of these contemplate the setting forth of the term of imprisonment for the offence under section *4 (d) of The Opium and Narcotic Drug Act* and this objection cannot be supported.

Counsel for the accused raised a point with respect to his right to appeal, which cannot be dealt with upon an application for *habeas corpus* where the issue is confined to determining the legality of the applicant's retention in custody. *Vasso* v. *The King* (2); *In re Henderson* (3); *Ex parte Macdonald* (4); *In re Trepanier* (5). Whatever his rights may be with respect to any appeal they are unaffected by the results of this application.

The appeal should be dismissed with a direction that the warrant be amended to include a sufficient reference to the order for deportation made in this matter and dated September 8, 1945.

Appeal dismissed.

Solicitor for the applicant: *Denis Murphy.*

Solicitor for the Commissioner of Immigration: *F. P. Varcoe.*

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(1) [1932] S.C.R. 640.
(2) [1933] S.C.R. 36.
(3) [1930] S.C.R. 45.
(4) [1897] 27 S.C.R. 683.
(5) [1885] 12 S.C.R. 111.

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*Nov. 28, 29
*Dec. 1 and 2
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*Feb. 3

THE COMMISSIONER OF PATENTS (RESPONDENT) ..... APPELLANT;

AND

WINTHROP CHEMICAL COMPANY INCORPORATED (APPELLANT) ... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Claim for patent for substance prepared or produced by chemical process and intended for food or medicine, must include claim for patent for process by which substance prepared or produced—Meaning of words "claims", "described and claimed", "claimed"—The Patent Act, Statutes of Canada, 1935, c. 32, ss. 34, 35, 37 (2), 40 (1), (2), (3).

The respondent applied for a patent for an invention relating to a substance prepared by a chemical process and intended for medicine but did not claim for the process by which it was produced. The Commissioner of Patents rejected the application on the ground that by section 40 (1) of the *Patent Act*, claims for substances covered by it must be accompanied by claims for the processes by which they are prepared.

The respondent appealed to the Exchequer Court of Canada (1). The appeal was allowed. On appeal to this Court

Held: A claim for a substance alone, cannot under section 40 (1) of the *Patent Act*, be entertained. The applicant's specification should describe the method or process by which the substance is prepared or produced and claim a patent therefor in the manner specified in section 35.

Per the Chief Justice and Estey J.: There appears no reason to conclude other than that Parliament intended these words "claims" and "described and claimed" should have the same meaning and significance in section 40 (1) as in sections 34, 35 and 37 (2) of the Act, so construed it meant that the applicant's specification should describe the method or process and claim a patent therefor in the manner specified in section 35.

Per Taschereau and Kellock JJ.: There appears to be no reason for giving the word "claimed" (as used in section 40 (1) of the Patent Act) other than the ordinary meaning of the word. (Short *v.* Weston, 1941 Ex. C.R. 69 at 95) and (Winthrop Chemical Co. *v.* Commissioner of Patents, 1937 Ex. C.R. 137) followed.

Per Rand J.: Considering the language of section 40 (1), I think it quite impossible to say that it has not a plain and ordinary meaning which is quite consistent with the remaining provisions of the Act and is wholly without incongruity or absurdity. So reading the words "claims" and "claimed", the subsection clearly denies any right to a patent for a substance unless there is, in addition, a claim in its technical sense for the mode or process of producing it.

*PRESENT:—Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

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APPEAL by The Commissioner of Patents from the judgment of Thorson J., President of the Exchequer Court of Canada (1) holding that, section 40 (1) of the *Patent Act*, Statutes of Canada, 1935, chapter 32, is complied with if in a claim for a substance to which it applies the process of its manufacture is described in the disclosure of the specification and so defined in the claim as to be made an essential element thereof so that the claim is restricted to the substance as produced by the process so defined, even if such process is not a patentable one. There is no need of a separate claim for the process.

Cuthbert Scott and *W. R. Meredith* for the appellant.

Christopher Robinson for the respondent.

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

ESTEY J.: The Commissioner of Patents rejected the respondent's application Serial No. 465,721 for a patent entitled "Basic Double Ethers of the Quinoline Series". His decision was reversed by a judgment in the Exchequer Court and this is an appeal from the latter judgment. (1).

The appellant's (Commissioner's) refusal was based upon his construction of section 40 (1) of *The Patent Act* (1935 S. of C., c. 32):

> 40. (1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

The appellant's contention is that an application for a patent of a substance must include a claim for a patent of the process by which that substance is produced. The respondent, on the other hand, contends that this section 40 (1) is complied with by a recital, in both the description and claim portions of the specification, of the process by which that substance is produced, but that it is not necessary to claim a patent for that process.

These respective contentions involve a construction of section 40 (1) and particularly the word "claimed" as it

(1) 1947 Ex. C.R. 36.

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appears in that section. The appellant would construe "claimed" to mean, or as equivalent to, "the subject of a claim", while the respondent would construe it as "defined in the claim so as to be made a constituent element of the claim".

The language of section 40 (1) construed according to the grammatical and ordinary sense in which the words are used indicates that a patent for the substance separate and apart from the method or process by which it was produced could not be granted unless the word "claimed" is construed to have a meaning such as that suggested by the respondent.

Sections 34 and 35 under the heading "Specifications and Claims" set forth the requisites which an applicant must include in his specification. In the main there are two parts to the specification under these sections. That under section 35 (1) may be referred to as the description and that under section 35 (2) the claim. The description portion discloses the invention and its operation and use and such details as required in 35 (1). Section 35 (2) provides:

> The specification shall end with a claim or claims stating distinctly and in explicit terms the things * * * in which he claims an exclusive property or privilege.

These sections 34 and 35 provide for and indicate the reason, purpose and meaning of both the description and the claim portions of the specification. The claim sets forth precisely the subject and the limits of the "exclusive property or privilege" or the protection desired in the patent. These provisions indicate the meaning and purpose of the claim, and the word so used and understood cannot mean merely as "defined in the claim so as to be made a constitutent element of the claim" as the respondent submits.

In section 37 (2) the phrase "describes and claims" appears, and again these words are used in the same sense as in section 35 and their separate significance is again apparent.

There appears no reason to conclude other than that Parliament intended that these words "claims" and "described and claimed" should have the same meaning and

significance in section 40 (1). So construed it appears that when Parliament adopted in section 40 (1) the words

> the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed,

it meant that the applicant's specification should describe the method or process and claim a patent therefor in the manner specified in section 35. Under this section 40 (1) therefore a claim for "an exclusive property or privilege" with regard to the method or process by which the substance is produced may be accompanied by a claim for a patent with respect to that substance but a claim for a patent with respect to the substance alone cannot be entertained.

Moreover, this construction of section 40 (1) is consonant with the use of the phrase "patented process" in 40 (2). In this subsection Parliament is raising a presumption in favour of a plaintiff with respect to one of the essentials that must be proved in an action for infringement of his patent under section 40 (1). In this regard Parliament speaks only of the "patented process", which emphasizes the construction already placed upon section 40 (1). These subsections read together contemplate among the possible actions one for an infringement with respect to the process in which the substance is new but not patented but do not contemplate a patent for a substance only.

The respondent sought to draw a conclusion favourable to its point of view from the history of section 40 (1) and of 38A in the British statute. Section 38A was enacted into the British Act in 1919 (9 & 10 Geo. V, c. 80) in order to check the doubtful practice of patenting a substance separate and apart from the process by which it was produced. While the Canadian Act is not modelled on the British Act, in 1919 an amendment was made to the Canadian Act enacting section 17 (1) (1923 S. of C., c. 23) in language identical to that in section 38A except that the word "or" in the phrase "processes or intended" in the British Act was "processes and intended" in the Canadian Act. The British section as drafted was construed to mean that the patent of a substance could not be granted apart from the process which itself had to be

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new, patentable and claimed. *In re M's Application* (1); *In re W., K.-J., and W. Ld.* (2) and *Sharp & Dohme Inc.* v. *Boots Pure Drug Company Ld.* (3).

The British Act was amended in 1932 by striking out the word "special" where it appeared and inserting the word "particularly" between the words "manufacture" and "described", and by deleting the word "claimed" and substituting therefor the word "ascertained." The word "special" had been emphasized in the decisions just mentioned. The section as amended in 1932 has not been, upon the point here under consideration, judicially construed. The matter has been considered by learned authors who do not go so far as to say that the substance may be patented apart from the method or process by which it is produced. Indeed, in the most recent work, Meinhardt on Inventions, Patents and Monopoly at p. 193 states:

> In the case of inventions relating to substances intended for food or medicine, no patent can be granted for the substance as such; a patent can, however, be obtained for a particular method or process for preparing or producing the substance.

See *Terrell on Patents*, 8th ed., p. 64; *Haddan's Compendium of Patents and Designs*, p. 94.

In the British Act, unlike in the Canadian Act, that part of the specification requiring the description of the invention uses the phrase "described and ascertained" and it may be that in amending section 38A by striking out the word "claimed" and inserting the word "ascertained" it was bringing section 38A in line with the phraseology of section 2 (2) of that Act. At the outset there was an important difference in these sections as enacted in Great Britain and Canada. These amendments have made them so different that a construction of the one is of little, if any, help in construing the other.

It is, however, significant that when the *Canadian Patent Act* was amended and consolidated in 1935 section 17 (1) was amended as in section 38A of the British Act by striking out the word "special" and inserting the word "particularly", but the word "claimed" was not struck out and the word "ascertained" inserted in lieu thereof. The retention of the word "claimed" in the Canadian Act is significant and important. It continues what is in section

(1) (1922) 39 R.P.C. 261.
(2) (1922) 39 R.P.C. 263.
(3) (1928) 45 R.P.C. 153.

35 contemplated—a specification the first portion of which is description and the second portion claim. The former describes and makes known the nature of the invention and the second sets out the subject and the limit of the monopoly asked.

Moreover, section 40 (1) in its present form was enacted into the Canadian Act in 1935 and the foregoing construction has been intimated in the Exchequer Court in both *Winthrop Chemical Company Inc.* v. *Commissioner of Patents* (1) and *J. R. Short Milling Co. (Canada) Ltd.* v. *Geo. Weston Bread & Cakes Ltd.* (2), and notwithstanding these decisions no further amendment has been made.

The history of section 40 (1) appears to support the construction already indicated rather than that suggested by the respondent.

The appeal should be allowed with costs.

The judgment of Taschereau J., and Kellock J. was delivered by

KELLOCK J.:—This appeal involves the construction of Section 40, subsection 1 of the *Patent Act* of 1935, which is as follows:

> In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

The learned President in the court below held that the word "claimed" was to be construed as meaning "defined in the claim" and that therefore the appellant had been in error in refusing claims limited to the substance only, although the process by which it was produced was defined in the claim but was not itself the subject of claim. This conclusion was reached upon a review of the history of the Canadian and the corresponding English statutes. As pointed out by the learned President the predecessor of Section 40 (1) was Section 17 (1) of *Cap.* 23 of the 1923 statutes which followed *ipsissima verba* Section 38A of the Patents and Designs Act of the United Kingdom of 1919. The subsection then had the word "special" before the word "methods" but did not have the word "particularly"

(1) [1937] Ex. C.R. 137. (2) [1941] Ex. C.R. 69.

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before the word "described". In 1932 the English statute was amended by striking out the word "special" and inserting "particularly" and also by striking out the word "claimed" and substituting "ascertained".

When the Canadian statute came to be revised in 1935 the substitution in the English Act of the word "claimed" for "ascertained" was not adopted. It should also be pointed out that at all times the Canadian statute applied only to substances prepared or produced by chemical processes "and" intended for food or medicine, while the English Act applied to substances prepared or produced by chemical processes "or" intended for food or medicine. It is also to be observed that what is now subsection 2 of the Canadian Act was formerly a proviso to subsection 1. The same is true of the English statute.

The learned President was of the opinion that the object of the English statute was to prevent the grant of a patent for a substance *per se*. He pointed out that by reason of the construction placed upon the word "special" in England the process itself had formerly to be a patentable process. In his view since the amendments of 1932 in England

> a claim for a new substance is valid if restricted to the substance as produced by the process of manufacture defined in the claim as an integral part thereof, even if such process is not a patentable one, and that it is no longer necessary to the validity of the claim that the inventor of the new substance should also be able to claim the process of its manufacture.

In his opinion the retention of the word "claimed" in the Canadian statute, while "ascertained" had been substituted in the English Act, was without significance.

Whatever may be the correct view of the English statute it does not, I think, with respect, necessarily follow that the situation is the same under the Canadian Act, where Parliament, apparently deliberately, has not chosen to follow the course of the legislation in England.

It is admitted by counsel for the respondent that the meaning attributed by the learned trial judge to the word "claimed" is not the one which it ordinarily bears, but it is contended that as used in the subsection it should be interpreted as the learned judge below has interpreted it, particularly as what is contended to be the object of the legislation, namely, the preventing of the patenting of substances *per se*, would be attained by such a construction.

Turning to the subsection itself, it provides that in the class of case to which it relates, the claim or claims in respect of a substance may not be for a substance *per se,* but as prepared or produced by the methods or processes "particularly described and claimed".

According to the Oxford Dictionary "describe" means, *inter alia,* "to give a detailed or graphic account of" (which is said to be the ordinary current sense); "to set forth in delineation"; "to delineate". "Particular", by the same authority, means, *inter alia,* "relating to or dealing with the separate parts, elements or details of a whole; detailed, minute, circumstantial"; "a minute account, description or enumeration".

To construe the word "claimed" therefore as merely "defined in the claim" ("define" by the above mentioned dictionary, meaning "to state precisely", "to specify", "to set forth or explain the essential nature of") would not appear to add anything to the words "particularly described" but to reduce the statute to mere repetition. I see no compelling reason for so doing. On the contrary, there are in my opinion indications in the statute itself that such a meaning was not intended.

By subsection 2 it is provided that in an action for infringement of a patent where the invention relates to the "production" of a new substance, any substance of the same chemical composition and constitution is, in the absence of contrary proof, to be deemed to have been produced by the *patented* process. If the respondent is right in its contention as to the construction of subsection 1, subsection 2 would have no application to a substance within subsection 1 produced by a process not itself the subject of patent. I think it unlikely that such a result was ever intended but rather that the provisions of the two subsections are supplementary.

Again when one turns to subsection 3, the same consideration appears. It provides that in the case of a patent for an invention intended for or capable of being used "for the preparation or production" of food or medicine, the Commissioner of Patents has power to grant a licence to an applicant therefor limited to the "use of the invention for the preparation or production" of food or medicine (i.e. the process) and it is declared that in settling the

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terms of the licence regard shall be had to the desirability of making the food or medicine (i.e. the substance) available to the public at a proper price. Under this provision it is the *invention* which is to be the subject of the licence and it is the *process* which is referred to by the subsection as the invention. If, therefore, subsection 1 is to be interpreted as applying to a substance produced by a process which need not be patentable, no licence could be obtained under subsection 3 for its production. In my opinion no such effect was intended by the legislation.

In the result therefore there appears to be no reason for giving other than what counsel for the respondent admits is the ordinary meaning of the word.

Maclean J. in *Short* v. *Weston* (1) took the same view of subsection 1 as that to which I have come as also did Angers J. in *Winthrop Chemical Company* v. *Commissioner of Patents* (2). There is nothing in the judgment of this court in the *Short* case (3), which is in the contrary sense. Indeed in that case the patents in question included the substance and the process and section 40 (1) was held to have no application as the process was not a chemical process.

As pointed out by my brother Taschereau on the argument, it is impossible to give to the word "revendiqués", which is the corresponding word in the French text, any such meaning as "defined in the claim". This fact "markedly emphasizes what I have already indicated", to borrow the language of Sir Lyman Duff, C.J.C., in *The King* v. *Dubois* (4), at 403, where the French text of section 19 (*c*) of the Exchequer Court Act was similarly of assistance in the construction of the English version.

I would therefore allow the appeal with costs.

RAND J.:—Mr. Robinson has said all that can be said in support of the view on which the President of the Exchequer Court proceeded, and its insufficiency results, I think from the nature of approach to interpretation which it involves. What has been called the Golden Rule of construction is that the language of a statute should be given its grammatical and ordinary sense unless that would

(1) [1941] Ex. C.R. 69 at 95.
(2) [1937] Ex. C.R. 137.
(3) [1942] S.C.R. 187.
(4) [1935] S.C.R. 378.

lead to absurdity, repugnancy or inconsistency, in which case that sense may be modified so as to avoid the absurdity or inconsistency but no further; *Grey* v. *Pearson* (1), and if in any circumstances, a statute enacted by another legislature, even though it were the prototype enactment of the particular subject-matter, could be resorted to as an aid to interpretation, that must at least be only when the language is found balanced in doubt or ambiguity.

But the converse assumption seems to lie at the bottom of the judgment from which this appeal has been taken. The approach is on the footing that the Canadian Act has been patterned after its English counterpart and that as the amendment to the latter in 1932 was followed by a somewhat similar amendment in this country in 1935, the conclusion follows that what is deemed to be the obvious meaning of the English Act should be taken to be that of the Canadian enactment. Apart from the question of such a method, there is the added objection here that the subject-matter of Section 40 in the Canadian Act is not strictly the same as that of Section 38A of the English Act. Section 40 deals with inventions "relating to substances prepared or produced by chemical processes *and* intended for food or medicine". The English Act deals with inventions "relating to substances prepared or produced by chemical processes *or* intended for food or medicine". That itself is sufficient to indicate the greatest danger of associating the amendments of the one with those of the other; and I should add to this that although the meaning of the amended section in the English statute is taken to be beyond doubt, it has not yet been construed by a court.

Considering then the language of Section 40 ss. (1), I think it quite impossible to say that it has not a plain and ordinary meaning which is quite consistent with the remaining provisions of the Act and is wholly without incongruity or absurdity. It is in these words:

> 40. (1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

I observe, first, as Mr. Robinson conceded, that the primary meaning of the word "claim" or "claimed" in the

(1) (1857-59) 6 H.L. 60 at 106.

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statute is the specific assertion of invention for which a patent is sought by the application. Then there is the word "include" in the fourth line, the sense of which is said to be that of "contain", but which in the first instance at least, I feel bound to take, in the particular context, as implying that the claim for the substance is one of a plurality of claims including that for the method or process. So reading these words, the subsection clearly denies any right to a patent for a substance unless there is, in addition, a claim in its technical sense for the mode or process of producing it.

The secondary meaning of "claim" or "claimed" suggested, that of "defined", arises out of the initial assumption that the intendment of the statute is to restrict the patented substance to the mode of production described or included in the specification whether or not itself patentable or claimed, the presumed effect of the corresponding English section: but, apart from the meaningless repetition of such a sense in the collocation of the word with "described", this is really an argument in policy.

Subsection (2) confirms the plain meaning of the words; it creates a procedural privilege or advantage to the holder of a patented process where the new substance is found produced by someone other than the patentee. The same confirmation arises from ss. (3) where authority to grant licenses to use the patented mode or process is conferred upon the Commissioner of Patents.

I agree that ss. (2) could, as a matter of words, be construed to have only a partial application, limited to those cases in which the process itself is patented; but why, if under ss. (1) the process may be old, in the juxtaposition of the two subsections, the procedural benefit should not have been extended to the patentee of a substance restricted in production to an old process, has not been made apparent. I agree, also, that under ss. (3) a license for the process may be deemed to imply a license for the substance itself where that likewise is the subject of patent; but if the substance could be patented along with an old process, it would be a distortion of language to say that a license could issue for the substance alone and the declared purpose of the subsection would be defeated. In both cases we are asked to displace the ordinary meaning

of language by one that is to some degree strained and artificial; in each, it is an endeavour to show that the language used can support a presumed intention. But the intention of a legislature must be gathered from the language it has used and the task of construing that language is not to satisfy ourselves that as used it is adequate to an intention drawn from general considerations or to a purpose which might seem to be more reasonable or equitable than what the language in its ordinary or primary sense indicates.

I would allow the appeal with costs in this Court.

Appeal allowed with costs.

Solicitors for the Appellant: *Ewart, Scott, Kelley & Howard.*

Solicitors for the Respondent: *Smart & Biggar.*

HIS MAJESTY THE KING.....APPELLANT;

AND

ALFRED H. RICHARDSON AND JAMES HAROLD ADAMS..... } RESPONDENT.

*1947
April 30
May 1
1948
*Feb. 3

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Master and servant—Relationship between Crown and member of armed forces of Canada settled by statute—Crown entitled to action per quod servitium amisit—Measure of damages—Section 50A the Exchequer Court Act retroactive—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (c), 30 (d), 50A. The Militia Act, R.S.C. 1927, c. 132, ss. 48, 69. —The Ontario Highway Traffic Act, R.S.O., 1937, c. 288, s. 60(1).

Held: (Reversing the judgment appealed from). The relationship of master and servant between the Crown and a member of the armed forces of His Majesty in the right of Canada is definitely settled by section 50A of the *Exchequer Court Act* and entitles the Crown to bring an action *per quod servitium amisit* the same as any other master.

Held: the language of section 50A makes it clear that it applies to proceedings already commenced at the time it came into force.

On the measure of damages, the Court was of the unanimous opinion that the Crown's claim for disbursements for medical and hospital expenses was properly allowable.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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As to the Crown's claim for pay and allowances:

Held: per Kerwin, Taschereau, Rand and Estey JJ. (Kellock J. dissenting in part) that this item was properly allowable as the fact of such payment was some evidence, and therefore sufficient evidence, of the value of the services that were lost to the Crown.

Held: per Kellock J. (dissenting). If amounts paid for wages have any revelance in an action such as this, it must be for whatever evidenciary value they have as to the value of the lost services which form the subject matter of the claim. It is for the plaintiff to prove the value of the services lost. Proof of payment of pay and allowances of the soldier without more is not sufficient to entitle the appellant to recover in respect of pay and allowances as such. The Crown may however recover the cost of the soldier's maintenance after his discharge from hospital and before his return to duty.

APPEAL from a judgment of the Exchequer Court of Canada, (1), dismissing an Information filed by the Attorney General of Canada on behalf of His Majesty the King against the respondents.

The Crown sought to recover as damages the pay and allowances, and medical and hospital expenses paid by it to, or on behalf of, 2nd Lt. John Howard MacDonald, an officer of His Majesty's Canadian Forces, following injuries sustained by him while a passenger in a motor car which was in collision with a motor car driven by the respondent Adams and owned by the respondent Richardson.

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

F. P. Varcoe K.C. and *A. J. MacLeod* for the appellant.

John E. Crankshaw KC for the respondent.

The judgment of Kerwin and Taschereau, JJ., was delivered by

KERWIN J.: This is an appeal from a judgment of the Exchequer Court (1) dismissing an Information filed by the Attorney General of Canada on behalf of His Majesty the King against Alfred H. Richardson and James Harold Adams. Second Lieutenant John Howard MacDonald, a member of the Military Forces of His Majesty in right of Canada, was a passenger in a motor vehicle on a highway in the Province of Ontario, driven by one Swan, which motor vehicle came into collision with another driven by

(1)[1947] Ex.C.R. 55.

Adams and owned by Richardson, who was present in the car with Adams. MacDonald was injured and confined to hospital and while he was incapacitated the plaintiff continued to pay him his military pay and also paid for his medical and hospital treatment. The former amounted to $565.23 and the bills for the latter to $767, making a total of $1,332.23, and the Information asked that the defendants pay the plaintiff this amount, together with the costs of the action, on the ground that the accident was caused by reason of the negligence of the defendants and that as a result of the negligence, His Majesty sustained damages in respect of the said sum. It was also alleged that Richardson, as owner of the car driven by Adams, was liable for damages under subsection 1 of section 47 of the Ontario *Highway Traffic Act,* R.S.O. 1937, c. 288.

Since the proceedings were in the Exchequer Court and since the collision took place in the Province of Ontario, the trial judge quite properly proceeded to discuss the question of negligence in accordance with the laws of that province. He found that the collision was caused solely by Adams' negligence in failing to turn out to the right from the center of the highway so as to allow Swan's vehicle one-half of the road free in accordance with section 39 of the Ontario *Highway Traffic Act.* He also found that Richardson was the owner of the car driven by Adams, that he was present in the car at the time of the accident and had authorized Adams to operate it, and that by reason of subsection 1 of section 47 of the same Act he would be liable for damages. He dismissed the Information, however, on the ground that the services of members of the Naval, Military and Air Forces of His Majesty in right of Canada are so different from those in private employment that an action *per quod servitium amisit,* such as the present, could not succeed.

The action is based upon section 50A of the *Exchequer Court Act* as enacted by 7 George VI, chapter 25, which received the Royal Assent on July 24, 1943, and which reads as follows:—

50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and

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thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

On the appeal, three questions were raised by the respondents that may be dealt with immediately. It was said, first, that the Exchequer Court did not have jurisdiction to hear and determine the controversy under the only relevant enactment, section 30 (*d*) of the *Exchequer Court Act*, R.S.C. 1927, c. 39:—

The Exchequer Court shall have and possess concurrent original jurisdiction in Canada.

* * * * *

(*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

In *Attorney General of Canada* v. *Jackson* (1), this Court decided that section 50A places the Crown in a recognized common law relation and that its rights are those arising from that relation under the rules of that law. The loss of services is the gist of the action *per quod* or, as it is put in Robert Marys's Case 2 (2):

And therefore, if my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz. *per quod servitium*, etc. *amisit;* so that the original act is not the cause of his action, but the consequent upon it, viz. the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action.

But, as determined in the *Jackson* case (1), if there is no wrong to the servant, the act is innocuous toward the master and it therefore became necessary as a step in the proceedings to prove the breach of a duty by the defendants towards MacDonald. In determining whether a particular act was negligent vis à vis a member of the Forces, the Crown is not limited to its rights at common law as distinguished from those under a provincial statute, and in connection with its claim of negligence against Adams may, therefore, rely upon the provisions of the Ontario *Highway Traffic Act*. So far as Richardson is concerned, it is sufficient that he was in the car with Adams and that

(1) [1946] S.C.R. 489.
(2) 9 Co. Rep. 110B; 77 E.R. 895 at 898-899.

(1) [1946] S.C.R. 489.

he had the right of control: *Samson* v. *Aitchison* (1). The only point of jurisdiction of the Exchequer Court raised by the respondents therefore fails.

The second contention on behalf of the respondents to be noticed at this time is that since the accident happened on June 29, 1941, before the Act of 7 George VI was assented to (July 24, 1943), and before the Information was filed (January 28, 1943), section 50A of the *Exchequer Court Act* does not apply. The relevant principle is set forth by Lord Reading in *Rex* v. *Southampton Income Tax Commissioners ex parte Singer* (2), where he says at p. 259:

> I cannot accept the contention of the applicant that an enactment can only take away vested rights of action for which legal proceedings have been commenced if there are in the enactment express words to that effect. There is no authority for this proposition, and I do not see why in principle it should be the law. But it is necessary that clear language should be used to make the retrospective effect applicable to proceedings commenced before the passing of the statute.

The decision of the Divisional Court upon this point was affirmed by the Court of Appeal although reversed on another point: (3). The language of section 50A makes it clear that it applies to proceedings already commenced at the time it came into force.

The last of the three contentions of the respondents referred to was that since, by subsection 1 of section 60 of the Ontario *Highway Traffic Act,* Lieutenant MacDonald was barred of any action for recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time the damages were sustained, the claim of the Crown was therefore barred. This argument was disposed of in *Norton* v. *Jason* (4).

It now becomes necessary to consider the ground upon which the trial judge dismissed the Information. In view of the definiteness of section 50A, it is unnecessary to consider the correctness of any of the decisions to which we were referred, which hold that at common law the relation of master and servant did not exist between the Crown and a member of the armed forces. The existence of that relationship being settled by statute, why should not the Crown be entitled to bring an action *per quod,* the same as any other master? The mere fact that Parliament has provided that in proceedings by His Majesty, a member

(1) [1912] A.C. 844.
(2) (1916) 2 K.B. 249.
(3) (1917) 1 K.B. 259.
(4) (1651) 82 E.R. 809.

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of the Forces should be deemed to be a servant of the Crown indicates to me that it contemplated the bringing of such an action. Although the services to be performed by a member of the Forces differ in kind from those expected from the servant of a private employer, that circumstance, in my opinion, affords no ground for denying to the Crown the benefits of a form of action established many years ago and constantly allowed ever since. It may be anomalous, as stated by Lord Porter and Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika* (1), but that it still persists cannot be gainsaid. Any opinion of these learned judges is entitled to the greatest respect but their observations as to the action not lying at the suit of the Crown are *obiter* and, with respect, I find myself unable to agree with them. On the particular point with which I am now dealing, the decision of McKinnon J. in *Attorney General* v. *Valle-Jones* (2), is not of assistance as there it was admitted, page 213:—"It is not denied that an action for loss of the services of a servant by the tortious act of a third party is available to the Crown as an employer as well as to a subject", but the dissenting opinions of Chief Justice Latham and Williams J., in *The Commonwealth* v. *Quince* (3), express the same conclusions as that at which I have arrived.

What are the damages to which the Crown is entitled? In this class of case the damages have always been more or less at large and I conceive that, granting the right to maintain the action, there is really no dispute that the medical and hospial expenses are properly allowable. There would appear to be a difference of opinion as to pay. On this point the decision in *Attorney General* v. *Valle-Jones* (2), is of importance and the opinion expressed in 52 L.Q.R. 5, that the conclusion reached in that case was obviously a desirable and reasonable one may, I think, in view of the eminence of the commentator be placed in the balance. In my opinion the problem was placed in its proper perspective by McKinnon J., and also by Chief Justice Latham in the *Quince* case (3) where he says, at p. 239:—

(1) [1917] A.C. 38.
(2) [1935] 2 K.B. 209.
(3) (1944) 68 C.L.R. 227.

The question which arises in relation to pay is whether it was reasonable to pay these moneys, for which no service was received, and whether they were so paid, that is, paid without services being rendered, in consequence of the defendants' tort.

The opinion of Williams J. was to the same effect. Rich J., one of the majority, expressed no opinion, while Stark J., at page 246, says:—

> Assuming, however, that the Commonwealth can maintain this action, the damages for loss of service might I think include the moneys paid to the airman for a period from the date of the injury until his return to duty could no longer be reasonably contemplated and also for the hospital and medical expenses. The decision in the *Amerika* case (1) can be distinguished.

The third judge forming the majority, McTiernan J., was of a contrary opinion.

Under section 48 of the *Militia Act*, R.S.C. 1927, c. 132, a soldier is entitled to his pay and although his right may not be enforceable by action in the Courts, the fact that he received his pay is some evidence (and therefore sufficient evidence) of the value of his services that were lost by the Crown. I am content to decide the matter on that basis. Many of the cases cited to us on this branch are not in point but certainly there is no case to which we were referred, or that I have been able to find, that decides anything to the contrary. *Flemington* v. *Smithers* (2), 2 Car. & P. 292; 172 E.R. 131; may be deemed to be of some slight assistance. The action was by a father for loss of his son's services. Apparently the only defence was that there was no negligence in the defendant's servant and it is with reference to the contention of counsel for the plaintiff that mere loss of service ought not to be the measure of damages that Chief Justice Abbott's charge to the jury is reported:—

> With regard to the amount of damages, I should tell you, that this action is brought to recover such sum as you (the Jury) may think the plaintiff entitled to for the loss of the services of his son. You ought, therefore, if you find for the plaintiff, to find for such reasonable sum as to you appears proper for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he must have been put to by his being out of his place, and also some small compensation for his mother going to visit him as she did. But beyond those things, it appears to me, that you ought not to go in your estimate of damages.

(1) (1917) A.C. 38.

(2) (1826) 2 C. & P. 292; 172 E.R. 131.

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This extract does show, however, that the matter of damages is at large. The mere difficulty of assessing damages does not free a court of its duty.

The appeal should be allowed and judgment entered for the Crown for $1,332.23 with costs throughout.

RAND J.:—I agree that section 50 (*a*) of the *Exchequer Court Act* assented to by the Governor General on July 24, 1943 must be taken to apply to these proceedings: *Rex* v. *Southampton Income Tax Com., Ex parte Singer* (1). What remain are the damages.

The items of medical attention and hospital services are appropriate, in the circumstances, to an action *per quod*; and as furnished, they lend themselves to estimation by ordinary methods; but for services lost while the officer was incapacitated, the question is not free from difficulty. Damages ordinarily repair injury to economic interests in which the loss is measurable in monetary units. Other interests, however, by their nature, are incapable of being so measured. In temporary pain, suffering, insult, no attempt is or can be made to estimate their ultimate effect upon the economic life of the claimant; and damages in money furnish a subjective satisfaction only.

A similar embarrassment is presented here. The injury is to the executive government. It consists of the deprivation of the service of a person engaged in the guardianship and protection of the country's entire life, including its social and political institutions. It is impossible to measure in monetary units the value of national liberty or the maintenance of social order and well-being; and it was that fact that led O'Connor J. to hold that damages for such deprivation could not be recovered. I agree that such a consideration is pertinent to the question whether at common law the relation of Crown and soldier is that of master and servant for the purposes of a *per quod* action; but because of the statute, that question does not arise here. But I see no distinction in principle between the deprivation of such services and the deprivation of the use of property that could not be given commercial employment; and as the allowance for the latter is well settled,

(1) (1917) 1 K.B. 259.

The Greta Holme (1), it would seem to follow that, generally, lawful objects and purposes which the services of men or the use of things are designed to achieve are interests, the wrongful and injurious affection of which must be answered in damages.

This is confirmed by the law laid down in the case of vessels of war. In *Admiralty Commissioners* v. *S.S. Chekiang* (2) and *Admiralty Commissioners* v. *S.S. Susquehanna* (3), the House of Lords had to consider the question of damages for deprivation of the use of such vessels during repairs necessitated by collision. The House, on the principle of *The Greta Holme* (1) held them to be recoverable. It also brought itself measurably nearer commitment to standards to be applied in determining the amount; and the basis used by the Registrar, interest on the then capital value of the vessel, ascertained by a depreciation of the original cost, and pay and allowances of officers and crew, was found to be not objectionable in law. But it was clearly indicated that no hard and fast rule could be laid down and that the consideration of all the circumstances must support any standard in any case adopted.

It follows then that the loss of the services of the officer here is an injury to the Crown for which it is entitled, under the rule of master and servant, to recover against the wrongdoer.

Now, it would be impossible to measure that loss in terms of accumulated minutiae of inconvenience, and any rule applied must be somewhat arbitrary. The consideration is not irrelevant that if the injured person was paid only for actual service, he could recover for the time lost on the basis, having regard to all likely contingencies, of his remuneration. Where, as here, by the reasonable and invariable practice, remuneration continues regardless of incapacity, whether time lost could be excluded from any claim made by him need not be considered because it has not in fact been included: and the recovery by the master would apparently exhaust the item: *Osborn* v. *Gillett* (4). As in the case of the war vessel, therefore, I see no reason why, prima facie at least, the value to the Crown of the services lost, to the benefit of which, in the circumstances, and without more, the Crown was at all times exclusively

(1) [1897] A.C. 596.
(2) [1926] A.C. 637.
(3) [1926] A.C. 655.
(4) (1873) L.R. 8 Ex. 88.

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entitled, should not be measured by the remuneration; and on that basis, there is nothing here to qualify its ordinary application, the estimate of the services lost by reason of the accident at the probable rate.

I would, therefore, allow the appeal and direct judgment against the respondents for the sum of $1,332.23 with costs throughout.

KELLOCK J.:—The first question which arises is as to whether or not Section 50A of the *Exchequer Court Act*, 7 Geo. V, cap. 25, which received royal assent on July 24, 1943, applies in the case at bar, the accident having occurred on the 29th of June, 1941, and the Information of the Attorney General of Canada having been filed on the 28th of January, 1943, prior to the coming into force of the amending statute.

The section reads as follows:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

In my opinion by the plain wording of the statute it was intended to have a retrospective operation to June 24, 1938. It is objected on behalf of the respondents that, in any event, it should not be held to apply to proceedings taken before its passing. The only result of giving effect to such a consideration would be that the appellant would be entitled to discontinue the action and commence a new one, there being no limitation period intervening in the meantime. I do not think however that the objection is well taken as I think that the intention of the staute is that it is to be applied by the courts in all circumstances which have arisen since the date it mentions, to which it is relevant. In view of the express language of the statute I do not think resort to any authority is necessary but if authority be needed it is to be found in *Attorney General* v. *Theobald* (1).

In the court below the learned trial judge rejected the appellant's claim on the ground that the services of an officer in the armed forces in time of war are of such a

(1) (1890) 24 Q.B.D. 557.

nature that they do not support an action *per quod servitium amisit* and that the value of such services cannot be ascertained in money and therefore their loss cannot be the subject of an action for damages.

As pointed out by Lord Sumner in *Admiralty Commissioners* v. *The Amerika* (1), the action here in question is an anomaly. Section 50A above, "does not purport to create a direct and specific right in the Crown; it places the Crown in a recognized common law relation only, and its rights are those arising from that relation under the rules of that law;" *Attorney General* v. *Jackson* (2) at 493. It is important therefore to ascertain the extent of those rights. They are not to be extended beyond what the authorities have marked out. I turn therefore to a consideration of the authorities.

In *Flemington* v. *Smithers* (3), the plaintiff's son, who was in fact his servant, engaged in delivering parcels in the business of his father, was injured by the negligence of the defendant's servant. As a result of the accident he was taken to hospital where he was supplied by his mother with necessaries not there provided. Abbott C.J., instructed the jury with regard to the amount of damages that they should find for such reasonable sum as appeared to them proper for the loss the plaintiff had sustained in being deprived of the assistance of the son and also the expense he must have been put to "by the son being out of his place" and also "some small compensation for his mother going to visit him as she did."

In *Hodsoll* v. *Stallebrass* (4), 113 E.R., 429, the plaintiff brought action for damages sustained by reason of a dog owned by the defendant having bitten the plaintiff's servant whereby the latter was unable to continue for the time being to perform services for the plaintiff. The action was for the loss of the future services of the servant and for the expense sustained by the plaintiff in endeavouring to cure the servant and it was alleged that the plaintiff, under the apprenticeship articles in question, was obliged to continue to maintain the servant. The only objection to the action raised by way of defence was that it was contended that no damages could be recovered subsequent to action brought but this objection was overruled.

(1) [1917] A.C. 38 at 60.
(2) [1946] S.C.R. 489.
(3) (1826) 2 C.P. 292; 172 E.R. 131.
(4) (1840) 11 A. & E. 301; 11 E.R. 429.

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In *Martinez* v. *Gerber* (1), the action was brought in respect of an injury to the servant of the plaintiffs who was thereby disabled from continuing to serve and a substitute was engaged. On a motion in arrest of judgment it was argued that the declaration was defective in failing to state that the injured servant was employed at a yearly salary or that the plaintiffs were bound to pay or did pay him any salary. It was held that it was sufficient to allege that the injured servant was still the servant of the plaintiffs and that there was no necessity to state that he was hired at any wages or salary. In a reporter's note it is stated that

> the damage would be the same whether the services of the disabled servant were gratuitous or paid for, supposing the masters to be obliged to hire another, or to do the work themselves, or to leave it undone. The allegation that Goss (the injured servant) was and still is the plaintiffs' servant, shows that whilst paying Gassiot, (the substitute) they were entitled to the services of Goss.

In *The Amerika* (2), the Admiralty sought to recover the capitalized value of certain pensions payable to relatives of seamen who were drowned when one of His Majesty's submarines was run into and sunk by the respondent ship. It was held that the claim failed on two grounds, only one of which requires mention here, namely, that the pensions were voluntarily paid. In the view of Lord Parker, however, even if the pensions and allowances had been contractual they could not have been recovered as they would constitute deferred payment for services already rendered and have no connection with any future services of which the Admiralty had been deprived. Lord Sumner pointed out that the damages recoverable in this form of action must be measured by the value of the services lost and not by the incidents of remuneration under the terms of the contract of employment. At page 61 he said,

> a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant.

We have also been referred to the decision of the High Court of Australia in *The Commonwealth* v. *Quince* (3). In that case, in which there was no statute similar to Section 50A of the *Exchequer Court Act*, it was the view of the

(1) (1841) 3 M. & G. 87 at 89.
(2) [1917] A.C. 38.
(3) (1944) 68 C.L.R. 227.

majority that as between an airman and the Commonwealth of Australia there was no master and servant relationship and that accordingly an action *per quod* would not lie. Only one member of the majority dealt with the matter of damages assuming that such a relationship did exist, namely, Starke, J., and it was his view (page 247) that assuming that the Crown was entitled to the services of its airman, it was a natural and reasonable result of the defendant's act that the Crown should attempt to cure its servant and maintain him in its service for a reasonable period, giving him, without obligation to do so, pay and allowances and that therefore pay and allowances would form an item of damage as well as hospital and medical expenses. Latham, C.J., who dissented, was of a similar view as to this point, see p. 239.

Section 50A, in my opinion, precludes inquiry as to the existence in the case at bar of the relationship of master and servant as between the appellant and the injured soldier and that relationship must be taken as existing. The sole inquiry is as to the damages proved. The authorities all show that the damages recoverable in this form of action fall under two heads, (*a*) the value of the future services of the injured servant which have been or will be lost to the master, and (*b*) expenses incurred by the master in connection with the cure of the servant, such as for hospital and medical services, etc.

The claim in the instant case is for pay *and allowances* actually disbursed and hospital and medical expenses. Recovery in the case of the latter is supported by such decisions as *Dixon* v. *Bell* (1) and *Flemington* v. *Smithers* (2), *supra,* and the appeal should be allowed to the extent of $767 claimed in respect of these items.

As to pay *and allowances* the question arises as to whether such items fall within either category of damage. I have been unable to find in the authorities, apart from *Bradford* v. *Webster* (3), and *Attorney General* v. *Valle-Jones* (4), with which I shall deal, any support for a contention that wages as such are a recoverable head of

(1) (1816) 1 Stark. 287; 171 E.R. 475.
(2) (1826) 2 C.P. 292; 172 E.R. 131.
(3) (1920) 2 K.B. 135.
(4) (1935) 2 K.B. 209.

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damage, and if they are not recoverable when paid under the terms of a contract, (per Lord Sumner, *supra,*) they cannot be recovered as such if paid voluntarily.

In *Webster's* case (1) a municipal corporation recovered as damages wages paid to a constable who had been injured by the negligence of the defendant, and also an amount in respect of pension. The case was decided by A. T. Lawrence, J. who held in accordance with the view later expressed by Latham, C.J., and Rich, J., in *Quince's* case (2), that it was reasonable to continue to pay the constable his wages for a period subsequent to the accident in order to ascertain whether he might not recover sufficiently to resume duty; that the corporation was bound to make the payments by the terms of the contract of employment and that it accordingly was entitled to recover.

In *Valle-Jones'* case (3), MacKinnon, J., allowed recovery by the Crown of the pay and allowances, not on the ground of expense but as evidence of the value of services lost. At p. 216 he said:

> It is well settled that when by the tort of a third party a master has lost the services of his servant he can recover damages in respect of that loss of service. The amount of his damages is, of course, dependent upon the facts of the particular case. If he has got a substitute to do the work of the servant, his damages may be the extra cost to which he has been put over and above the payment he makes to the servant who is incapacitated. If he has put an end temporarily to the contract of service of the injured servant and pays him nothing, his damages would be the amount, if any, that he has to pay to the substitute. The payment, if any, that he makes to the substitute may of course be equal to, more than or less than the wage of the injured servant. On the other hand, where he does not employ a substitute, if he continues to pay the wages to the injured servant, he clearly loses any benefit arising from that payment, because he is getting nothing in return for it. In that case, therefore, his damages are, prima facie, the amount of the wages that he has thus paid for nothing. This case is of that last mentioned class, and the damages claimed on behalf of His Majesty are the amount of the wages paid to these men during their incapacity. There is no evidence to show that while these men were in fact being paid during their incapacity any extra men were recruited to take their place, or that any payment was made to any other person for doing their work. Therefore, prima facie, damage has been suffered to the extent of the wages thus paid to them for nothing. So much for the claim in respect of wages.

The later discussion of the learned judge with respect to the reasonableness of the action on the part of the Crown in paying the wages was in reference to the argu-

(1) (1920) 2 K.B. 135.
(2) (1944) 68 C.L.R. 227.
(3) (1935) 2 K.B. 209.

ment for the defence that recovery could not be had because the wages had been a mere voluntary payment.

In my opinion the decision in *Webster's* case (1) should not be followed as it is not supported by any earlier authority. However logical it might be to treat the payment of wages to an injured servant during convalescence as just as reasonable an expense as that for hospitalization and medical care, there is no warrant in the earlier cases for so doing and as it is doubtful upon what principle the action was originally based (per Lord Sumner in *The Amerika* case (2) at p. 54) it is not permissible to proceed beyond the limits determined by the actual decisions. If therefore, amounts paid for wages have any relevance in an action such as this, it must be for whatever evidenciary value they have as to the value of lost services. In the case at bar there is no other evidence as to the value of the services which form the subject matter of the claim.

In a case of this character it is for the plaintiff to prove the value of the services lost. In Blackstone, Vol. 3, p. 142, the following occurs:

> The master also, as a recompense for his immediate loss, may maintain an action of trespass, *vi et armis;* in which he must allege and prove the special damage he has sustained by the beating of his servant *per quod servitium amisit*: and then the jury will make him a proportionable pecuniary satisfaction.

I find myself unable to accept the view that proof of payment of the pay and allowances of the soldier here in question, without more is sufficient.

In the case of an ordinary servant, if the master be able to substitute another servant, his loss, assuming the substituted servant renders service equal in value to that of the injured servant, may be the additional amount, if any, the master has to pay to the substitute over and above what he pays the injured servant. In such a case the amount paid to the injured servant is only an item in an account. If no substitute is hired and the master performs as well as he can the duties of the injured servant, the damage, if any, is the value by which the services of the injured servant exceeded the value of the efforts of the master himself. If the master did not hire a substitute and did not attempt himself to fill the shoes of the injured servant the loss would be the value to the master of the services

(1) (1920) 2 K.B. 135. (2) [1917] A.C. 38.

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unperformed but the amount continued to be paid to the injured servant would not constitute any part of the damage and would have no relation to it.

In *Webster's* case (1) in the course of his consideration of the claim in respect of pension, the learned trial judge said at p. 144:

> The cost of the services to the plaintiff Corporation was pay, plus the plaintiff's contribution to the pension fund. No ground has been suggested for holding that the services were not worth that which was paid for them. If this be so the services which were lost were worth pay, plus right to pension.

MacKinnon, J., in the passage from his judgment already quoted, appears to take a similar view.

This seems to reverse the onus and to throw upon a defendant the obligation of showing that the value of the services was less than the wages paid. It may be that this is the correct view in the case of an ordinary servant engaged in commercial pursuits but I find myself unable to apply it in the present case without evidence of something more than mere payment. It may well be that in particular instances, by reason of any work upon which a soldier may be engaged at the time of his injury, a value can, upon proper evidence, be put upon his services. One may, however, conceive cases in which, by reason of misconduct, for instance, a particular individual may be, at times, a liability to the Crown rather than the producer of valuable service. I do not think that a soldier's pay as provided for by statute is based upon the value of the service performed. Further the amount of the allowances made to a soldier vary with his status as a married or an unmarried man and the number of his children. In the case of two soldiers engaged in identical duties, the value of their service would vary with the amount of the pay and allowances paid to each, if pay and allowances may be taken as evidence of that value. I cannot accept such a contention. In my opinion it was incumbent upon the appellant to establish by evidence the value of the lost services, beyond the mere payment of the items claimed. When such evidence is adduced the jury, according to the authorities, award "a proportionate pecuniary satisfaction". I think there-

(1) (1920) 2 K.B. 135.

fore that the evidence is insufficient to entitle the appellant to recover in respect to pay *and allowances* as such.

There is however, in my opinion, a basis upon which the Crown is entitled to recover the cost of maintenance of its soldier during the period it is attempting to restore him to service, but this would not include maintenance of dependents. As already pointed out, the claim in *Hodsoll* v. *Stallebrass* (1), included the expense of maintenance of the servant which fell upon the master under the apprenticeship articles. This was regarded as a proper head of claim and has never been questioned. I think therefore that it warrants recovery in the case at bar of the actual expense incurred by the Crown in the maintenance of the injured soldier during the period claimed, namely, June 29, 1941, to November 9, 1941. This will not include any maintenance already covered by the hospital account but will include any amount paid to the soldier after his discharge from hospital and before his return to duty for maintenance or its equivalent, as distinct from maintenance of dependents. For the purpose of ascertaining the proper amount to be awarded under this head I would refer the proceedings to the court below.

I would therefore allow the appeal to the extent indicated with costs in the court below. As success is divided there should be no costs in this court.

ESTEY J.:—The Attorney General of Canada asks damages for the loss of services of 2nd/Lt. MacDonald, a member of the armed services, during the period the latter was incapacitated and absent from duty because of an injury suffered June 29, 1941. On that date 2nd/Lt. MacDonald was injured when an automobile in which he was a passenger collided with an automobile driven by respondent Adams and owned by respondent Richardson.

The learned trial Judge in the Exchequer Court (1) found "the collision was caused solely by the negligence of the Defendant Adams." No exception is taken to this finding of fact nor is it questioned that as a result of the injury 2nd/Lt. MacDonald received medical and hospital treatment from appellant at a cost of $767, and the amount paid to him as pay during his incapacity in the sum of

(1) (1840) 11 A. & E. 301; 11 E. R. 429.

(1) [1947] Ex. C.R. 55.

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$565.23, a total of $1,332.23. Judgment is asked for this total amount as damages in this an action *per quod servitium amisit.*

The learned trial Judge stated:

> The value of the services of an officer in His Majesty's forces serving his country in time of war cannot be ascertained in money and conversely the loss of such services cannot be ascertained in money.

and concluded:

> * * * so different both in its nature and its incidents is the service of members of the naval, military and air forces of His Majesty in right of Canada from the service of those who are in private employment, that an action *per quod servitium amisit* cannot, in my opinion, be brought at all.

The learned trial Judge accordingly dismissed the action and this appeal is taken from his judgment.

The master's action for loss of services, technically known as *per quod servitium amisit,* is separate and distinct and in addition to that which the injured servant has against the same wrongdoer. It is, however, essential that the relationship of master and servant exists and that if for his injury the servant has no action for the recovery of damages, the master cannot recover: *Attorney General of Canada* v. *Jackson* (1).

There is no question but that 2nd/Lt. MacDonald had an action against both respondents for the injury he suffered as a consequence of respondent Adams' negligence.

In Canada, for the purpose of determining liability in actions by or against His Majesty, Parliament has enacted that a member of the military, naval or air forces shall be deemed to be a servant of the Crown. This was enacted by inserting section 50A into the *Exchequer Court Act* (1943 S. of C., c. 25, s. 1):

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

In view of the contentions of respondents it is important to observe that the language of section 50A is wide and inclusive and enacted without qualification. Moreover, it was enacted in 1943 immediately after the decision in *McArthur* v. *The King* (2), holding that a member of the

(1) [1946] S.C.R. 489. (2) [1943] Ex. C.R. 77.

armed forces was not "an officer or servant of the Crown" within the meaning of section 19 (c) of the *Exchequer Court Act* (1927 R.S.C., c. 34).

Section 69 of The *Militia Act* (1927 R.S.C., c. 132) adopts "The Army Act for the time being in force in Great Britain" in so far as it is not inconsistent with its provisions or the regulations made thereunder. It may therefore be observed that in England in 1935 the Attorney General brought an action against a party whose negligent conduct injured two members of the Royal Air Force and recovered for hospitalization, service pay and rations: *Attorney General* v. *Valle-Jones* (1). That the action *per quod servitium amisit* was available to His Majesty at common law was not questioned in the *Valle-Jones* case.

The Parliament of Canada in enacting section 50A overruled the *McArthur* decision and in effect enacted the principle of the *Valle-Jones* decision. In the United States the *Valle-Jones* case was followed in *United States* v. *Standard Oil Co.* (2).

In *Commonwealth of Australia* v. *Quince* (3), the majority of the learned Judges of the High Court of Australia held the Crown could not recover under circumstances raising identical issues as in the case at bar and the *Valle-Jones* case. No such enactment as 50A obtained in Australia which determines in favour of the Crown the issues in Canada upon which the majority of the learned Judges in the *Quince* case decided the relation of master and servant did not exist between the Crown and members of the armed services.

The observation of Lord Sumner, quoted by the learned trial Judge, as well as his own observation above set out, that the nature and incidents of the service in the armed forces of his Majesty are different from that which obtains in the ordinary relationship of master and servant are well founded. Indeed, Parliament appears to have recognized that fact in providing that "for the purpose of determining liability" a member of the armed forces "shall be deemed" to be a servant of the Crown. It is this statutory provision which for the purpose specified creates the relationship and makes the action *per quod* available to his Majesty.

(1) [1935] 2 K.B. 209.
(2) (1945) 60 F. Supp. 807.
(3) (1944) 68 C.L.R 227.

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The respondents submit that even if the relationship of master and servant is established, as it is by the statute, the damages claimed are indirect and remote and therefore not recoverable. The two items of damages claimed are (1) medical and hospital treatment $767; (2) pay $565.23.

In support of their submission respondents quote Anglin, C.J. in *Regent Taxi & Transport Co.* v. *Congregation des Petits Frères de Marie* (1), where at p. 663 he states:

> As to what is "indirect" damage not recoverable, see 43 Rev. Crit. de Leg. (1914), pp. 229 and seq. and S. 1911, 1,545. It is damage of which the fault (fait) of the defendant has been merely the occasion, not the cause.

The learned Chief Justice, with whom Mr. Justice Smith concurred, after making this statement with respect to indirect damages, was of the opinion, in that action under the Quebec Civil Code and similar in character to that at bar, that the plaintiff should recover damages covering medical treatment and attention as well as general damages for loss of services. The majority of the learned Judges under the facts of that case allowed only damages for medical care and attention. This judgment was upon other grounds reversed in the Privy Council (2).

The military authorities were under an obligation to provide medical care and hospitalization to 2nd/Lt. MacDonald. Invariably the cases have allowed for these disbursements where they have been incurred by the master, and I do not think it was suggested that if this action existed on behalf of the Crown that this item should not be allowed. In principle they are a direct consequence of the negligence of the respondent Adams, who should reimburse the master for his expenditure in providing same.

The appellant has supported his claim of $565.23 for loss of services by evidence only as to the fact of service, the injured officer's rank and the actual disbursements as pay made to him during his absence because of injury suffered.

In *Admiralty Commissioners* v. *S.S. Amerika* (1), His Majesty's submarine B 2 was sunk in Dover Strait by the negligence of the *"Amerika"* and all of the crew of the B 2 except one officer, were drowned. The Admiralty Com-

(1) [1929] S.C.R. 650.
(2) [1932] A.C. 295.
(1) [1917] A.C. 38.

missioners took action against the owners of the *"Amerika"* when the latter admitted negligence and agreed to pay 95 per cent of the damages as assessed. The items claimed by the Admiralty Commissioners included that of £5,140 being the capitalized amount of pensions and grants to the relatives of the men drowned. This item was disallowed. In the House of Lords all of the learned lords followed the rule of *Baker* v. *Bolton* (1), that in a civil court the death of a human being cannot be complained of as an injury and disallowed the item upon that basis. Lord Sumner, because it had been so argued, also dealt with the case as if the action had been brought by a master for the loss of a servant's services. At the outset he pointed out at p. 51 that:

> No claim has been made and no evidence has been given relating to damage sustained by the appellants in losing the further services of those who were drowned * * *

At the conclusion of his judgment he stated at p. 61:

> In any case the contract would have been a contract with the deceased man, and the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy (*Bradburn* v. *Great Western Ry. Co.*, (1874) L.R. 10 Ex. 1), and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead.

Lord Sumner is throughout dealing with the possibility of a claim for loss of service on the part of a master whose servant's death has been caused by the wrongful act of another. In such a case the contract for the personal services, and thereby the essential relationship of master and servant, has been terminated by the death of the servant, while in the case at bar the contract continues. This distinction was clearly expressed by Mr. Justice Gwynne in *Monaghan* v. *Horn* (2). His remarks were subsequently approved by Sir Gorell Barnes, P. in *Clark* v. *London General Omnibus Co. Ltd.* (3). Lord Sumner, after pointing out that the action *per quod servitium amisit* is an anomaly in the common law, continues to deal throughout

(1) (1808) 1 Camp. 493.
(2) (1882) 7 S.C.R. 409 at 460.
(3) (1906) 2 K.B. 648 at 662.

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his judgment with the possibility of damages being allowed to the master for loss of services after the event of the servant's death. He refers to *Monaghan* v. *Horn, supra,* and the explanation given by Mr. Justice Gwynne, and continues at p. 55:

> For my own part I think it is sound in this sense, that whether or not it be the theory on which those who introduced these causes of action would have justified them, as indeed we may be sure it is not, it at any rate provides, though somewhat imperfectly, an intelligible basis for the existing rule sufficient to prevent your Lordships from interfering with long-standing decisions on the plea that they are insensible or arbitrary.

The statements of Lord Sumner in the *"Amerika"*, when read in relation to the problem he was there discussing, do not negative the conclusion which appears to be justified by the authorities that the payment of wages to an injured servant is some evidence of the value of that servant's services to his master.

In *Flemington* v. *Smithers* (1), the father sued for loss of his son's services. Evidence was adduced to the effect that the son received one half the parcel money as wages from his father. Abbott, C.J., in summing up stated:

> * * * this action is brought to recover such sum as you (the Jury) may think the plaintiff entitled to for the loss of services of his son. You ought, therefore, if you find for the plaintiff, to find for such reasonable sum as to you appears proper for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he must have been put to by his being out of his place, and also some small compensation for his mother going to visit him as she did.

Damages for loss of services were recovered in *Martinez* v. *Gerber* (2); *Attorney General* v. *Valle-Jones* (3); *United States* v. *Standard Oil Co.* (4). In these cases evidence was accepted as to the wages paid to the servant or a substitute, and in some, judgment was given for the amount paid. It is not suggested that the amount paid is to be accepted as equivalent to the value of the loss of services. It may or may not be. These authorities, however, do support what appears to be found in reason and principle, that in the ordinary case payment to the servant by way of remuneration is some evidence of the value of the

(1) (1826) 2 C. & P. 292; 172 E.R. 131.
(2) (1841) 3 M. & G. 87; 133 E.R. 1069.
(3) (1935) 2 K.B. 209.
(4) (1945) 60 F. Sup. 807.

services he rendered. The weight or effect of that evidence will vary and each case must be determined upon its own facts.

Moreover, in this case the evidence establishes that throughout the period in question 2nd/Lt. MacDonald was on active service and received his pay. Under The *Militia Act* the officer on active service receives rations, shelter, pay and allowances. He receives allowances for clothing and other items and his pay is intended to provide to the officer personal essentials and perquisites not otherwise provided. In other words, the Crown here asks reimbursement for a part of its maintenance cost during the period 2nd/Lt. MacDonald was absent from duty. Such appears to have been included as a proper item in determining loss of services and in my opinion should be allowed in this case.

The respondents submit that the appellant has no right of action, because any action that 2nd/Lt. MacDonald, as the injured servant had, was extinguished before this action was commenced by virtue of the provisions of section 60 (1) of the Ontario *Highway Traffic Act,* R.S.O. 1937, c. 288. They cite in support of this contention *Attorney General* v. *Jackson* (1). In that case the servant, by virtue of the statutory provisions, never did have a claim against the party who caused his injuries; while here the servant has an action but which, under the provisions of section 60 (1) of the Ontario *Highway Traffic Act,* he cannot maintain "after the expiration of twelve months from the time the damages were sustained." That provision does not bar the master's action. This distinction is particularly noted in the *Jackson* case, where it is stated at p. 493:

> The case of *Norton* v. *Jason* (1), cited by Mr. Varcoe, decides only that the bar of the Statute of Limitations against the servant cannot be raised against the master.

Moreover, this statutory provision enacted by the province does not specifically mention His Majesty and therefore would not be effective against His Majesty in the right of the province and much less against His Majesty in the right of the Dominion. The extinguish-

(1) [1946] S.C.R. 489. (1) (1651) 82 E.R. 809.

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ment of 2nd/Lt. MacDonald's action by the provisions of section 60 (1), *supra,* is not a bar to this action brought on behalf of His Majesty.

The respondents submit that section 50A is not retroactive and not applicable to this action commenced prior to its enactment. This section specifically provides that "a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight" a member of the armed services "shall be deemed to have been at such time a servant of the Crown." The language clearly indicates that Parliament intended to establish the relationship retroactive as of June 24, 1938. It is as stated in Maxwell on Interpretation of Statutes, 9th ed., p. 230:

> Whenever the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed.

The clarity of the language makes such a construction necessary in this case. Parliament had amended section 19 (*c*) of the *Exchequer Court Act* in 1938, which had been assented to and become effective as of the 24th of June, 1938. As that amendment dealt with claims against the Crown arising out of death or injury to persons or property, it was apparently deemed desirable to make this amendment effective as of the same date.

The further contention that section 50A is applicable only in determining liability as between the Crown and the injured servant is not tenable. The express words of the section are "for the purpose of determining liability in any action or other proceeding by or against His Majesty * * *" These words do not restrict the application of the section to an action or proceeding between His Majesty and a member of the armed services, but is expressly made applicable to any action or proceeding by or against His Majesty.

This action was brought under section 30 (*d*) of the *Exchequer Court Act.* It was submitted on behalf of the respondents that under this section 30 (*d*) the Exchequer Court had no jurisdiction to entertain the action because as against both defendants it was founded upon the statutory provisions of the Ontario *Highway Traffic Act,* R.S.O. 1937, c. 288. Quite apart from the statutory pro-

visions, the finding of negligence on the part of respondent Adams was sufficient at common law to support the judgment against him. Then upon the facts of this case the judgment against respondent Richardson is also well founded in the common law. The evidence establishes that respondent Richardson owned and was riding in the automobile at the time of the accident; that he, himself had driven it from Montreal to Prescott; that his friend Adams and others accompanied him and Adams had driven from Prescott to the point of the accident. Adams was driving the automobile but Richardson's evidence indicates that he retained control in the sense that he had the authority to direct how it should be used or whether it should be used at all. His own evidence discloses that he was observing the course of the automobile. He deposed that as the appellant's automobile approached them he "figured there was enough clearance."

In *Samson* v. *Aitchison* (1), Lord Atkinson states that the learned trial Judge laid down with perfect accuracy the law upon this question in the following passage:

> 'I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver, 'Do this,' or 'Don't do that.' The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver.'

Richardson had given the steering wheel to Adams but in all other respects he remained in possession and control of the automobile and, under all the circumstances as pleaded and contended by the appellant, must be held liable to the appellant. (See also *Pratt* v. *Patrick* (2)).

Neither can respondents' submission that section 50A should be read as an adjunct to section 19 (*c*) of the Exchequer Court Act be maintained. It seems obvious that section 50A must be read in relation to all of the sections of the Exchequer Court Act and, moreover, is

(1) [1912] A.C. 844 at 849. (2) [1924] 1 K.B. 488.

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applicable not only to actions brought in the Exchequer Court, but also to actions in other courts. *Attorney General* v. *Jackson* (2).

The appeal should be allowed and judgment entered in favour of the appellant (plaintiff) for medical and hospital treatment $767, and pay $565.23, or a total of $1,332.23, with costs throughout.

Appeal allowed with costs throughout.

Solicitor for the appellant, *Auguste Angers.*

Solicitors for the respondents, *Asselin, Crankshaw, Gingras & Trudel.*

1947

*Oct. 21, 22

1948

*Feb. 3

JEAN CHARBONNEAU AND PAUL CHARBONNEAU (DEFENDANTS) .. } APPELLANTS;

AND

ALPHIDIME DUBÉ, (PLAINTIFF).....RESPONDENT.

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

Negligence—Motor vehicle—Collision between motor vehicle and bicycle —Presumption of fault created by section 53 of the Quebec Motor Vehicles Act—Bicycle turning left without signaling—Horn of overtaking vehicle sounded—Responsibility for accident—Quebec Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53.

The respondent, while riding his bicycle on Ste Marguerite Street, in Three Rivers, Quebec, was struck down and injured by a truck owned by one of the appellants, Jean Charbonneau, and driven by his son and employee, Paul Charbonneau, the other appellant. The accident occurred around 7 o'clock in the morning; it was still dark, but the lights of the truck were on and the visibility was good. Both the truck and the bicycle were proceeding in the same direction, the truck following the bicycle. Suddenly, without warning or signal, the respondent turned left to cross the road to his house. He was hit by the truck which was about to overtake him after having sounded its horn 3 or 4 times. The respondent sought to recover from the appellants, jointly and severally, the sum of $10,252.25. The trial judge awarded him the sum of $4,572.25, but the Court of King's Bench reduced it to $2,236.13, on the ground that there was contributory negligence.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

(2) [1946] S.C.R. 489.

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Held: The appeal must be allowed.

Held: The appellants have rebutted the presumption of fault created by section 53 of the Quebec Motor Vehicles Act. The appellants committed no fault, and the determining cause of the damage was the imprudent act of the respondent in turning suddenly to his left without having given any previous indication of his intention so to do.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, varying the judgment of the Superior Court, Fortier J., and reducing the amount of damages awarded.

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

F. J. Laverty, K.C. for the appellants.

J. Marchildon, K.C. for the respondent.

The judgment of the Court was delivered by

TASCHEREAU, J.—Le demandeur réclame conjointement et solidairement des deux défendeurs, la somme de $10,-252.25. Il allègue dans son action que le 17 janvier 1945, alors qu'il était sur sa bicyclette, et qu'il s'apprêtait à rentrer dans sa résidence sur la rue Ste-Marguerite, aux Trois-Rivières, il fut frappé par le camion du défendeur Jean Charbonneau, conduit à ce moment-là par son fils et employé, Paul Charbonneau.

Les défendeurs soutiennent que ledit accident est entièrement dû à la faute du demandeur, à son imprudence et sa négligence. Selon eux, le demandeur qui était à droite de la rue, et qui filait dans la même direction que le camion, voulut subitement traverser la chaussée sans donner aucun signal, et serait venu se jeter lui-même sur le camion. Le conducteur aurait donné le signal d'approche, conduisait à une vitesse modérée, et la responsabilité des défendeurs ne pourrait en conséquence être engagée.

L'honorable Juge de première instance a maintenu l'action jusqu'à concurrence d'une somme de $4,572.25, mais la majorité de la Cour d'Appel a conclu qu'il y avait faute contributoire et a réduit ce montant de la moitié. M. le Juge Marchand dissident, aurait rejeté l'action in toto. Les

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défendeurs appellent de ce jugement et demandent que l'action soit rejetée complètement; quant à l'intimé, il a logé un contre-appel afin de faire rétablir le jugement de l'honorable Juge de première instance.

Il y a certains faits essentiels de cette cause, sur lesquels tous les témoins sont d'accord. Ainsi, il ne fait pas de doutes, qu'à l'heure où s'est produit cet accident, vers 7 heures du matin, il faisait encore noir, mais les lumières du camion étaient allumées, et la visibilité était bonne. Le demandeur filait dans le même sens que le camion, à droite de la rue, et subitement, sans donner aucun signal, il tourna à gauche pour traverser la chaussée afin de rentrer dans une ruelle voisine de sa résidence. Il explique dans son témoignage: "On a l'habitude de mettre la main, mais là, suffit qu'il était de bonne heure le matin, j'ai rien que regardé un peu, et la camionnette est arrivée".

Le camion qui procédait à une vitesse moyenne, inclina légèrement vers la gauche, pour dépasser la bicyclette, mais ne put l'éviter à cause de ce mouvement subit opéré par le demandeur-intimé.

Il incombait aux défendeurs d'établir que la présomption de faute édictée par l'article 53 de la loi des véhicules moteurs ne s'applique pas. Je suis d'opinion qu'ils ont réussi, et que le présent appel doit être maintenu. Il en serait autrement, si le conducteur du camion n'avait pas signalé son approche, comme le croit le Juge de première instance, mais je ne pense pas que l'on puisse en arriver à une semblable conclusion. D'ailleurs, la Cour d'Appel ne reproche pas cette violation des règlements aux défendeurs.

Seul, le demandeur prétend que le conducteur du camion n'a pas signalé son approche. Celui-ci jure qu'il a fait fonctionner son appareil sonore au moins trois fois, la dernière fois à environ 50 pieds de la bicyclette, et il est corroboré par deux témoins qui étaient dans le camion avec lui. L'un de ceux-là dit que Charbonneau a signalé son approche une dernière fois à 35 pieds de la bicyclette.

L'honorable Juge de première instance dit ceci:

"Mais d'un autre côté, le demandeur et son fils Léo, disent que le chauffeur n'a pas klaxonné et surtout deux témoins indépendants qui étaient sur les lieux et qui ont vu l'accident, Lionel Lefebvre et Gérard Savoie, déclarent que le camion n'a pas klaxonné. Le poids de la preuve

à ce sujet est en faveur de la demande et cette preuve établit que le chauffeur du camion n'a pas sonné quand il a tenté de dépasser le bicycliste et a causé l'accident".

Or, telle n'est pas la preuve. Léo Charbonneau n'a pas vu l'accident. Il était dans la ruelle; et les deux autres n'ont pas vu davantage. Tous trois ne jurent pas que le conducteur n'a pas signalé. Ils jurent qu'ils n'ont pas entendu. Or, comme le dit M. le Juge Marchand avec raison:

"Je ne puis dire, comme le fait le savant juge, que la preuve établit que le chauffeur du camion n'a pas sonné son klaxon avant de s'engager pour faire son dépassement. C'est pour moi l'évidence, au contraire, qu'il a bien donné l'avertissement que la prudence et les règles de la route lui commandaient. En effet, l'appelant Paul Charbonneau, son frère Lucien, Gilbert Dugré, plus à même tous trois de voir, d'entendre, de savoir ce qu'a fait le chauffeur, que tous autres, jurent positivement que l'appareil sonore a été actionné; ils précisent que le klaxon a sonné trois ou quatre coups; ils le savent et le disent parce qu'ils ont vu et entendu, et de tout près.

"Je ne puis voir comment on peut faire disparaître de la cause une preuve aussi formelle, aussi précise, aussi complète. Et cependant, pour l'écarter, on ne peut s'aider que des dépositions de trois témoins (Léo Dubé, Lefebvre et Savoie) qui se limitent, *honnêtement*, à dire qu'ils n'ont pas vu ni entendu, qui ne nient pas le fait mais disent qu'ils ne l'ont pas perçu: et de la déposition de l'intimé lui-même qui nie bien son existence, mais de la même haleine que son affirmation qu'il n'a pas vu la voiture quand il a tourné la tête avant de virer".

Je ne puis voir où serait la faute des défendeurs. Le conducteur conduisait avec prudence, à une vitesse raisonnable; ses phares étaient allumés, et il a signalé son approche à trois ou quatre reprises, le dernier signal étant donné alors qu'il était à 35 pieds de la victime. Je ne puis me convaincre qu'il ait manqué à ses devoirs de chauffeur prudent, parce qu'il n'aurait pas signalé davantage, comme le lui reproche la Cour d'Appel.

Au contraire, le demandeur a agi avec imprudence, en tournant ainsi subitement vers la gauche, sans donner aucune indication du mouvement qu'il avait l'intention de faire. C'est lui qui est venu se jeter sur la route du camion, et il est en conséquence l'auteur de sa propre infortune. La preuve révèle que le mouvement a été fait avec tant de rapidité, qu'il était impossible d'appliquer les freins à temps, pour éviter ce malheureux accident. L'acte du demandeur est la seule cause déterminante, la causa causans des dommages dont il a été la victime.

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Toute circulation serait pratiquement interdite aux véhicules automobiles sur les routes publiques, s'il fallait tenir les défendeurs responsables de cet accident. Il est vrai que les automobilistes doivent faire preuve d'une grande prudence dans la conduite de leurs voitures, mais leur responsabilité ne peut pas être engagée, quand un cycliste ou un piéton surgit inopinément, et se jette imprudemment devant le véhicule, quand aucune faute ne peut être reprochée au conducteur.

Je suis d'opinion que l'action doit être rejetée; que le présent appel doit être maintenu avec dépens devant toutes les cours, et que le contre-appel doit être rejeté également avec dépens.

Appeal allowed with costs.

Solicitor for the appellants: Laverty, Hale and Laverty.

Solicitor for the respondent: Joseph Marchildon.

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*Oct. 22, 23, 24, 27, 28

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*Feb. 3

DAME MARIE LEONTINE THERIAULT, ES QUAL (PLAINTIFF)..... APPELLANT;

AND

H. HUCTWITH, ET AL (DEFENDANTS)....RESPONDENT.

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

Motor vehicle—Negligence—Collision—Intersection of public highways—Right of way—Liability—Duties of both drivers—Joint negligence—Quebec Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 36, ss. 7—Notice of appeal—Continuance of suits—Joint and several obligations—Payment by one of the joint and several debtors—Subrogation—Intervention—Arts. 1117, 1118, 1156 cc.—Arts. 269, 271, 273 C.C.P.—Supreme Court Rule 60.

A ten ton truck driven by one of the respondents, Brandon, and belonging to the other respondent, Huctwith, collided with an automobile driven by the appellant, Miss Thériault. A passenger in the automobile, Alphonse Jongers, was injured and sued Miss Thériault and the two respondents jointly and severally. The trial judge held the three defendants to be jointly and severally liable and awarded the sum of $8,500. The two respondents appealed to the Court of King's Bench, but did not serve the notice of appeal upon Miss Thériault who did not appeal. Before the case was heard by the

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Locke JJ.

Court of Appeal, Miss Thériault paid to Jongers the full amount of the judgment, namely $8,500. Jongers died subsequently, but still before the hearing of the case by the Court of Appeal, and in his will appointed Miss Thériault as his testamentary executrix and universal legatee, with the result that Miss Thériault continued the suit as respondent es-qual in the Court of Appeal and as appellant es-qual before this court, but is not personally before this court. The Court of Appeal maintained the appeal and dismissed the action in toto.

The accident occurred in the evening and both vehicles had their lights on. Miss Thériault was driving northerly on a road known as "Montée des Sources". She was in the act of crossing the concrete strip, some 22 feet in width, occupying the northerly section, (which alone was in use) of the Metropolitain Boulevard, a highway running east and west, and her car had reached the asphalt shoulder to the north with only the rear wheels remaining on the concrete when she was struck on the right rear by the right front of the respondent's truck, then travelling west. There was on the Boulevard a warning sign located some 560 feet east of the intersection requiring the speed of vehicles at that point to be reduced to 20 miles an hour and also another sign indicating the intersection itself. Respondent's truck covered a distance of 200 feet after the impact with his brakes on before coming to a stop. The appellant stopped before entering the Boulevard.

Held: The appeal should be allowed with costs and the judgment of the trial judge restored.

Per The Chief Justice and Taschereau J.: The accident was the result of the common fault of the three defendants. Subsection 7 of section 36 of the Quebec Motor Vehicles Act does not exempt the driver of the dominant car from exercising proper care and attention.

After the payment made by Miss Thériault, which payment also benefited to those who were with her jointly and severally liable, Jongers was entirely disinterested from the case and could not further exercise any claim against the three defendants, but Miss Thériault could recover from the other defendants the share and portion of each of them, though she was specially subrogated to the rights of Jongers. As her cause of action against the other two resides in the judgment of the trial judge, and as a party cannot be deprived of its rights without being called properly in the case, the notice of appeal should have been served upon her. She only continued the suit as testamentary executrix and universal legatee to protect and defend the rights of the original plaintiff Jongers.

The appeal here is merely to find if there is a joint and several liability between the tort feasors. Miss Thériault is the only person with sufficient interest, who may claim that the Court of Appeal erred when it deprived her of her rights, without her being present in the case as a party, to ask that the judgment of the trial judge be upheld. As the English doctrine of equitable title and trustee with legal title is unknown in the law of the Province of Quebec, Miss Thériault should be made a party in this case.

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Per Kellock and Locke JJ.: The respondents ought to have served Miss Thériault with the notice of appeal, as she was the only person interested in maintaining the judgment. It is therefore proper that she should now be added.

The fact that Brandon had the statutory right of way, as provided for in ss. 7 of s. 36 of the Quebec Motor Vehicles Act, does not, in the circumstances, absolve him from his failure to act as he could and should, had his inattention and probably also his excessive speed not prevented his so doing.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the Superior Court, Loranger J., and dismissing the appellant's action in toto.

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

Philippe Brais, K.C. and *Angus Ogilvie, K.C.* for the appellant.

Gustave Monette, K.C. and *A. M. Watt* for the respondents.

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

TASCHEREAU, J.:—On the 15th of October, 1941, Alphonse Jongers, a widely known artist of the city of Montreal, was a gratuitous passenger in an automobile of which Miss Léontine Thériault was the registered owner. Both were driving in a south-northerly direction on a road called "La Montée des Sources", and which is the dividing line between the towns of Pointe-Claire and Dorval. At the intersection of the Metropolitain Boulevard, near the station of the Canadian National Railways at Strathmore, a heavy truck with semi-trailer, driven by one of the defendants Brandon, and belonging to the other defendant Huctwith, collided with Miss Thériault's automobile. As a result of this accident Mr. Jongers was severely injured, and claimed from Miss Thériault, Brandon and Huctwith jointly and severally a sum of $15,998.02.

Mr. Justice Loranger of the Superior Court of Montreal held that the accident was due to the common fault of

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Miss Thériault and of the two other defendants, and condemned them jointly and severally to pay the sum of $8,500 plus interest and costs. Although his statement was a mere obiter dictum, the learned judge expressed the opinion that Miss Thériault was responsible for this accident in a proportion of 20 per cent, and that 80 per cent should be borne by the two other defendants.

Dissatisfied with this judgment, the defendants Brandon and Huctwith appealed to the Court of Appeal of the Province of Quebec, but did not serve the notice of appeal upon the other defendant Miss Thériault, who had filed a separate defence. Before the case was heard by the Court of Appeal, Miss Thériault paid to Mr. Jongers the amount of the judgment, namely $8,500 plus interest and costs, and obtained from Mr. Jongers a subrogation of his rights against Brandon and Huctwith. Later, but also before the hearing of the case, Mr. Jongers died appointing by his Will Miss Thériault as his *testamentary executrix* and universal legatee, with the extraordinary result that Miss Thériault who was the defendant before the Superior Court, but who was not personally a party before the Court of Appeal, having merely continued the suit, is now plaintiff-appellant es-qual. before this Court.

The Court of Appeal (1) maintained Brandon's and Huctwith's appeal and dismissed the action in toto. The Court came to the conclusion that only Miss Thériault was to be blamed for this accident, and absolved completely Brandon and Huctwith. Mr. Justice St-Jacques, dissenting, would have dismissed the appeal confirming the judgment of Mr. Justice Loranger, and Mr. Justice Marchand who is also dissenting, would have allowed the appeal, but merely in order to reduce the amount of the judgment a quo from $8,500 to $6,036.02. He expressed the opinion that Miss Thériault was not negligent, and that the accident was entirely due to the fault, negligence and imprudence of the driver of the truck.

I had the advantage of reading the reasons of my brother Kellock and I fully agree with him in his conclusions on the merits of the case. As he does, I think that this unfortunate accident is the result of the common fault of the three defendants. I also believe that he has

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given the proper interpretation to subsection 7 of section 36 of the Motor Vehicles Act, which to my mind, does not exempt the driver of the dominant car from exercising proper care and attention. I would like however to add the following considerations on another aspect of the case.

As I have already stated, Mr. Justice Loranger maintained the action for $8,500 against the three defendants Miss Thériault, Brandon and Huctwith, jointly and severally.

It happened, however, for a reason of which we are not aware, that when Brandon and Huctwith appealed to the Court of King's Bench of the Province of Quebec, they did not serve their notice of appeal upon Miss Thériault, serving it only upon Mr. Jongers' solicitors. It was some time after the case had been brought before the Court of Appeal that Miss Thériault, personally or through her insurers, paid to Mr. Jongers the full amount of $8,500 plus interest and costs. This payment to my mind benefited not only to Miss Thériault, but also to those who were with her jointly and severally liable. Section 1103 c.c. is clear:—

> 1103. There is a joint and several obligation on the part of the codebtors when they are obliged to the same thing, in such manner that each of them singly may be compelled to the performance of the whole obligation, and that *the performance by one discharges the others toward the creditor.*

It necessarily followed that Mr. Jongers who was paid, was entirely disinterested from the case, and that he could not further exercise any claim against Miss Thériault nor against Brandon and Huctwith. Mazeaud says in his "Traité de la responsabilité civile, délictuelle et contractuelle", Vol. 2 p. 753:—

> Mais il va de soi qu'elle (la victime) ne saurait se faire payer le tout par chacun; on sait que la victime ne peut obtenir autre chose que la réparation du dommage qu'elle a subi; une fois qu'elle est indemnisée par l'un *son action se trouve donc éteinte contre les autres.*

By the payment that she made, Miss Thériault in view of section 1118 C.C. could recover from the others the share and portion of each of them, though she was specially subrogated in the rights of Mr. Jongers. She, therefore, instituted proceedings before the Superior Court of Montreal, claiming from Brandon and Huctwith an amount proportionate to their liability which she, following Mr.

Justice Loranger's suggestion, estimated to be 80 per cent. Her *cause of action* in this second action taken by her against Brandon and Huctwith, resides in the judgment given by Mr. Justice Loranger. This is clear under section 1118 C.C., and she was obviously the main interested party in the Court of Appeal (1), and I have no doubt that the notice of appeal should have been served upon her. She had acquired the right to recover against Huctwith and Brandon as a result of the judgment of Mr. Justice Loranger, and I fail to see how she can lose this right, which is the basis of her action, by this judgment of the Court of Appeal (1), when she had ceased to be a party in the case. The Court of Appeal (1), having allowed the appeal, made this cause of action disappear, and Miss Thériault's second action will necessarily fail, there being no more debt to be apportioned between her and Brandon and Huctwith. It is a rule of law universally admitted by the courts of the Province of Quebec, and reaffirmed by this Court on many occasions, that a party cannot be deprived of its rights without being called properly in the case. *Vide Burland* v. *Moffatt* (2); *La Corporation de la Paroisse de St-Gervais* v. *Goulet* (3); *Christin* v. *Piette* (4).

It has been submitted that Miss Thériault, having been allowed, after Mr. Jongers' death, to continue the suit "en reprise d'instance" in the Court of Appeal, was properly in the case, not solely for the purpose of asserting the rights of the original plaintiff Jongers, but also to assert her own personal rights. With this proposition, I cannot agree, and I am of opinion that when she continued the suit as *testamentary executrix and universal legatee,* it was merely to protect and defend the rights of the original plaintiff Jongers. Under Mr. Jongers' Will she was made *testamentary executrix,* and it is in that *quality* that for the purpose of the execution of the Will, she was seized as legal depositary of the moveable property of the estate.

It follows that the Court of Appeal could not deprive her of her personal rights because she was not a proper party in the case, but it follows equally that, as representing Mr. Jongers, she has no more interest in the present appeal

(1) Q.R. [1946] K.B. 564.
(2) 11 S.C.R. 76 at 89.
(3) [1931] S.C.R. 437.
(4) [1944] S.C.R. 308.

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than Mr. Jongers would, to ask this Court to set aside a judgment of the Court of Appeal, which declares that she has lost her *cause of action* in her suit against Brandon and Huctwith. Her only interest es-qual. is that Jongers was ordered by the Court of Appeal to pay the costs in both courts.

The litigation here is merely to find if there is a joint and several liability between the tort feasors, and when this has been determined, it may not be raised again in the second action between Miss Thériault and Brandon and Huctwith, where only the apportionment of the liability will have to be established. Miss Thériault is the only person with sufficient interest, who may claim that the Court of Appeal erred when it deprived her of her rights, without her being present in the case as a party, to ask that the judgment of the trial judge be upheld.

Under the English system, a similar situation would not arise because Jongers, having subrogated Miss Thériault in all his rights would be a trustee having the legal title, while Miss Thériault would have the equitable title. He would, therefore, represent her before the Court as a party and she would be properly in the case. But, this conception is unknown in the law of the Province of Quebec. This is a case, I believe, where in view of our rules giving us wide powers, Miss Thériault's application to be made a party should be allowed. Her interest is surely sufficient to permit her to intervene in this appeal between other parties, and to pray that the judgment of the Court of Appeal be set aside. As the matter has been fully argued by all parties, it seems quite unnecessary to hear any further argument on the point.

I would allow the appeal and restore the original judgment with costs. But in view of the special circumstances of the case, there should be no costs in the Court of Appeal to either party, and no costs of the application to be added in this Court.

RAND J.:—I would allow the appeal and restore the judgment at trial with costs to go as proposed by my brother Taschereau.

The judgment of Kellock J. and Locke J. was delivered by

KELLOCK, J.:—This is an appeal from a judgment of the Court of King's Bench, Appeal Side, of the Province of Quebec, dated the 26th of June, 1946 (1), reversing a judgment of the Superior Court. The action was brought by one, Jongers, against both the appellant and the respondents for damages for personal injuries sustained by Jongers on the evening of October 15, 1941, in a collision between a truck owned by the respondent Huctwith and driven by the respondent Brandon and an automobile owned and driven by the appellant in which the plaintiff was a passenger, the plaintiff alleging negligence on the part of both drivers. Judgment was given against the defendants jointly and severally for $8,500 and costs. Although the learned trial judge did not expressly so find, for the reason that there was no issue on the point between the defendants, he expressed the opinion that the degrees of negligence as between Brandon and Miss Thériault were 80 per cent and 20 per cent respectively.

The respondents appealed to the Court of King's Bench and pending the appeal the plaintiff Jongers died, leaving Miss Thériault his executor and universal legatee. This had the effect, under Article 269 of the Code of Civil Procedure, of a stay. The respondents, who had not served their notice of appeal upon Miss Thériault, their co-defendant in the action, thereupon took the necessary proceeding in pursuance of Article 273, and in answer thereto Miss Thériault, upon petition pursuant to Article 271, obtained an order permitting her to continue.

Pending the appeal also, and prior to the death of the plaintiff, Miss Thériault, or her insurers, paid the judgment and costs in full and obtained an assignment. She also commenced a new action in the Superior Court against the respondents for the recovery of 80 per cent of the judgment debt. Following upon the judgment of the Court of Appeal in this action the respondents moved in the second action to be allowed to amend their defence by alleging that the judgment of the Court of King's Bench constituted chose jugée as against the appellant. When the present appeal was opened before this

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court the question arose as to the effect of the payment of the judgment upon the rights of the parties to this appeal and I proceed to consider that matter first.

It is common ground between the parties that the obligation of the defendants toward Jongers under the judgment at trial was joint and several. Accordingly, by reason of Article 1107 of the Civil Code Jongers had the right to enforce the judgment in full against any of the judgment debtors, but by reason of Article 1117 each of the defendants as between themselves was liable for his proper share which, in the circumstances here present, would be governed by the respective degrees of negligence. Under Article 1118 provision is made entitling one of a number of joint and several debtors who has paid in full to recover the proper shares of the others.

Miss Thériault having paid the judgment in full became entitled under Article 1155 to a conventional subrogation which she in fact obtained and she also became subrogated to the position of Jongers by operation of law under Article 1156, paragraph 3. Accordingly, had there been no appeal Miss Thériault, having paid, could have relied upon the judgment as establishing the amount of the judgment debt as between herself and her co-defendants and also as a basis for recovery, in another proceeding of course, of contribution pursuant to Article 1118. In that state of affairs the present respondents appealed but did not make her a party.

In my opinion the respondents ought to have served the appellant with notice of the inscription in appeal. She was an "opposite" party within the meaning of Article 1213 of the Code of Procedure and entitled, even before payment of the judgment, to be heard in opposition to the appeal. On payment, she would still, in my opinion, having acquired the rights given her by Article 1118 of the Civil Code, have been entitled to oppose the appeal, for the reason that she, and she alone, was then interested in maintaining the judgment. The rights acquired by the appellant, however, merely by reason of the death of Jongers, were no higher than those of the deceased himself with respect to the judgment. Her testator had ceased to be interested in the judgment prior to his death and had no interest to pass on to her under the judgment then.

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I take the law to be, as stated by my brother Taschereau, that the appellant did not acquire status to rely on her rights under Article 1118 by the continuance of the suit. It was therefore necessary for the appellant to become a party to the appeal in her personal capacity in order to assert those rights. As the respondents should have made her a party in the first instance, it is proper that she should now be added under the provisions of Rule 60.

Turning to the merits, the accident out of which this litigation arises took place on the evening of the 15th of October, 1941, at a time when it was sufficiently dark to require the use of lights by both the automobiles involved. The appellant was driving northerly on a road known as Montée des Sources. She was in the act of crossing the concrete strip, some 22 feet in width, occupying the northerly section, (which alone was in use) of the Metropolitain Boulevard, a highway running east and west, and her car had reached the asphalt shoulder to the north with only the rear wheels remaining on the concrete when it was struck on the right rear by the right front of the respondent's truck, then travelling west.

In the Superior Court the learned trial judge was of opinion that the appellant was negligent in that without knowing the exact speed of the approaching truck she ventured across, miscalculating both the distance which the truck was away and its speed. He was also of opinion that the respondent, Brandon, driver of the truck, was negligent in failing to pay any attention to a warning sign located some 560 feet east of the intersection requiring the speed of vehicles at that point to be reduced to 20 miles an hour and also in disregarding another sign indicating the intersection itself. He held that the fact that Brandon was approaching from the appellant's right did not relieve him from all obligation with respect to other drivers, such as the appellant, who might require to cross the boulevard at the intersection and that he had proceeded without regard to such obligation and the signs, at such a great speed that, upon observing the appellant's automobile 90 feet in front, he was unable to avoid a collision. The learned judge found that Brandon lost control of his truck on seeing the appellant's car and that he had travelled a distance of 200 feet after the impact with his brakes on

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before coming to a stop. He concluded that had Brandon been driving at the rate of speed permitted by law and required by prudence in the circumstances he would have had time to stop or to slow up sufficiently to pass behind the appellant's car which had in fact nearly completed its crossing.

The Court of Appeal by a majority allowed the appeal, being of opinion that the negligence of the appellant was the sole cause of the collision, Brandon having the right-of-way. The formal judgment proceeds upon the basis of an assumed admission of the appellant that she did not stop before entering upon the cement strip as required by law but had stopped at a point some 120 feet to the south and that she did not look to her right from that point at any time before entering on the concrete.

The appellant has, in my opinion, clearly established that the judgment is founded upon a misconception of the evidence with respect to the place where she stopped. In fact Gibsone J., who with McDougall and Barclay, JJ., compose the majority, finds as one of the admitted facts that the appellant stopped at the cement strip. This misconception has apparently arisen due to the fact that the Metropolitain Boulevard, when completed, will consist of two cement strips with a substantial intervening space and that entry to the boulevard will be protected by a stop sign to be located south of the southerly strip. At the time of the accident however, as already stated, the northerly strip alone had been constructed and the stop sign was located a few feet to the south of its south edge. It was at this stop sign that the appellant in fact stopped.

The respondents' truck consisted of a tractor and a semi-trailer weighing, with load, approximately ten tons. According to Brandon his truck was about 90 to 100 feet from the intersection when he first saw the appellant who was then, he said, about 100 feet south of the concrete. At that time he sounded his horn. Seeing that the appellant was not going to stop he swerved to the left, striking the appellant's car on the right rear with the righ front of his truck. He says that he got over on to the soft shoulder on the south side of the highway and ultimately got back on the cement, coming to a stop at the point where his truck was found by the police some 200 feet west of the

intersection. He stated that he was approximately 50 feet from the intersection when he applied his brakes, his speed being about 30 miles per hour. He has no idea of the speed at which the appellant was travelling. He would only say that her car was in motion.

Evidence accepted by the learned trial judge establishes that the respondents' truck left skid marks commencing approximately at the point of impact and continuing some 200 feet to the truck in the position which it ultimately came to a stop. The learned judge does not accept Brandon's evidence that he went off on the south shoulder nor his evidence as to the speed at which he was travelling. I find it impossible to reconcile the evidence of Brandon that the appellant's automobile was approximately 100 feet south of the pavement when he first saw it, his own truck being at that time an equal distance from the intersection, with the evidence that the appellant's car subsequently and immediately before entering upon the pavement came to a stop but was nonetheless almost across the pavement when struck by Brandon. Leaving aside for the moment the effect of the statute to which I shall refer, there was ample evidence in my opinion upon which the learned trial judge could reach the conclusion that Brandon was negligent in the respects found and that such negligence was a contributing cause of the accident. The finding of negligence against the appellant by the learned trial judge has not been appealed against.

There remains for consideration the effect upon the facts of this case of subsection 7 of section 36 of the *Motor Vehicles Act*, R.S.Q., 1941, c. 142. So far as material it provides that:

> At bifurcations and at crossings of public highways, the driver of a vehicle on one of the roads shall give the right-of-way to the driver of a vehicle coming to his right on the other road.

It is contended on behalf of the respondents that the effect of the subsection is to place a duty upon the driver of the servient car to yield the right-of-way which is "absolute" and from which "nothing in the conduct of the dominant car can possibly excuse it". The decision of this court in *Swartz* v. *Wills* (1), is relied upon as establishing this proposition. In that case the court had to consider

(1) [1935] S.C.R. 628.

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in relation to the facts of the case there under consideration, a section of the Highway Act of British Columbia to somewhat the same effect but which included a provision, not in the Quebec legislation, that the provisions of the section should not excuse any person from the exercise of proper care at all times.

In *Carter* v. *Van Camp and Anderson* (1), the motor car of the respondent Anderson proceeding south came into collision at a street intersection with an automobile driven by the appellant, proceeding west.

In delivering the judgment of himself and the present Chief Justice, Anglin J., as he then was, said at page 161:

> An outstanding fact is that the defendant Carter was to blame for an admitted violation of s. 35 (1) of the Highway Traffic Act (R.S.O. 1927 c. 251) and was, therefore, guilty of fault causing the collision, either solely or *jointly with his co-defendant*.

The subsection in question provided that where two people in charge of vehicles approach a cross-road or intersection at the same time, the person to the right hand of the other vehicle should have the right-of-way.

It will be observed that in the passage to which I have referred Anglin J. is dealing with negligence causing "the collision". This passage is quite inconsistent with the view that the statutory right-of-way was "absolute" in the sense contended for by the present respondents.

Duff J., as he then was, whose judgment in the *Swartz* case (2) is chiefly relied upon by the respondents in the case at bar, said also in the same case (1) at page 165:

> Moreover, the considerations advanced by Grant, J. A., seem quite adequate to support the conclusion that Anderson, if he had been driving with proper circumspection, must have realized that, in proceeding as he did, he was incurring grave risk of a collision, if one accepts the testimony of the witnesses who speak to the facts mentioned by Grant, J. A., as the learned trial judge did. I cannot perceive any ground upon which this finding of the learned trial judge, whose province it was to evaluate the testimony of the witnesses, can be set aside or disregarded.

This also is quite inconsistent with the respondents' contention. Therefore when the court in the *Swartz* case (2), proceeded to inquire "whether the defendant, although he had the right-of-way, exercised proper care", cannot be taken to have done so merely because of the presence in the British Columbia statute of the words already referred to.

(1) [1930] S.C.R. 156. (2) [1935] S.C.R. 628.

Further, in *Royal Trust Company* v. *Toronto Transportation Commission* (1), Davis, J., delivering the judgment of himself, Duff, C.J.C., and Cannon, J. (who had delivered the judgments in the *Swartz* case, Davis J. himself having concurred with Cannon J.) said at page 674:

> But the existence of a (statutory) right-of-way does not entitle the motorman on the street-car to disregard an apparent danger that confronts him.

This was said with reference to a right-of-way in favour of a street-car but that does not in my opinion affect the point under consideration. In that case the operator of the street-car and the driver of the automobile which collided with each other were both held guilty of negligence contributing to the accident, a result which could not have been reached had the right-of-way of the street-car been regarded as of the nature for which the respondents here contend. Davis J. applied to the circumstances of the case before him the test laid down by Lord Dunedin in *Fardon* v. *Harcourt-Rivington* (2):

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

He then concluded:

> In my view, had either the motorman on the street-car or the driver of the automobile used due care or caution, the collision would not have taken place; and that was substantially the view taken by the learned trial judge.

Applying the above to the case at bar, it is evident that Brandon was oblivious to other traffic, such as the appellant, whom, notwithstanding what he says, he did not see as he ought to have seen, and whom had he been paying proper attention, he could have avoided, if by no other means, by the slightest deviation of his vehicle to the south. This in effect is the finding of the learned trial judge, and therefore the fact that he had the statutory right-of-way does not, in the circumstances, absolve him from his failure to act as he could and should, had his inattention and probably also his excessive speed not pre-

(1) [1935] S.C.R. 671.

(2) 48 T.L.R. 215 at 216.

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vented his so doing. I am therefore of opinion that the learned trial judge was right in the conclusion to which he came.

The respondent pleaded that there existed at the time of the accident the relation of master and servant as between Jongers and the appellant, and that Jongers was entitled to judgment for an amount proportionate only to the negligence of Brandon. The learned trial judge was of the opinion that the question was concluded by the ownership of the automobile being in Miss Thériault and therefore gave judgment for the whole amount. I do not think, with respect, that the fact of ownership concluded the inquiry, but as a determination of the issue will affect the amount of recovery only and as that is now the subject of the second action now pending, I think it will be more satisfactory to leave the matter to be there determined.

With respect to the damages awarded I do not think it is possible to question the amount awarded, even if I were of the view that I should not have been disposed to allow as much.

I would therefore allow the appeal with costs, set aside the judgment of the court below and restore the judgment at trial. There should be no costs in the Court of Appeal or of the application of the appellant to be added in this Court.

Appeal allowed with costs and judgment of the trial judge restored.

Solicitors for the appellant: *Brais & DeGrandpré.*

Solicitors for the respondents: *Foster, Hannen, Watt & Stikeman.*

CENTRAL JEWISH INSTITUTE (DEFENDANT) ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (PLAINTIFF) ..... RESPONDENT.

1947
*Dec. 3, 4
*1948
*Feb. 3

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal Law—The Municipal Act, R.S.O. 1937, chapter 255, as enacted by the Statutes of Ontario, 1941, chapter 35, section 13—Part of building and lands appurtenant used for school purposes on date of passing of by-law setting up restricted area—Whether exempt from by-law under provisions of section 406 (2) of the Municipal Act.

Held: On the date of the passing of the by-law the building and the lands appurtenant, were being used for a purpose not permitted by the by-law and therefore under the provisions of The Municipal Act, section 406 (2), the by-law did not apply.

Held: In considering the application of subsection 2 of section 406 of The Municipal Act, the important date is the date of the passing of the by-law, and not the date such by-law is approved by the Municipal Board. If on the date of the passing of the by-law a part of a building is used for a purpose prohibited by the by-law, the building as a whole is exempt.

Toronto Corporation v. *Roman Catholic Separate Schools Trustees* [1926] A.C. 81 and *Re Hartley and the City of Toronto* (1925) 56 O.L.R., 433, considered and distinguished.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Barlow J. (2) in favour of the respondent.

The facts are not in dispute. The only question raised on the appeal is whether or not the city by-law, prohibiting the use on Avenue Road of any land for any purpose except a detached one-family dwelling house or the office of a physician or dentist located on the first floor of a detached one-family dwelling house used by such physician or dentist as his private residence, applied to the property owned by the Central Jewish Institute when the by-law was passed and on which it purported to carry on a school. Under the Act empowering the city to pass such by-law it would not have applied if the premises on the date of the passing of the by-law were in fact used for school purposes.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

(1) [1947] O.R. 425. (2) [1947] O.W.N. 318.

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The trial judge held that on the date of the passing of the by-law the appellant only used a very small portion of the premises for a summer school for small children and the actual use of the premises on that date was as a residence and guest house. The Court of Appeal, held that the building was used to a very limited extent for school purposes and the principal use was that of a rooming or guest house. Both courts held that the use made by the appellant of the premises did not come within that contemplated by subsection 2 of section 406 of The Municipal Act.

J. R. Cartwright K.C. and *S. Allen* for the appellant.

F. A. A. Campbell K.C. and *J. N. Herapath* for the respondent.

The judgment of Kerwin and Locke, JJ. was delivered by

KERWIN J.:—The appellant, Central Jewish Institute, is the defendant in an action brought by the respondent, the Corporation of the City of Toronto, claiming an injunction restraining the appellant from using certain premises known as 561 Avenue Road, in the City of Toronto, as a school or as a nursery school, contrary to the provisions of By-law 16654, passed by the Council of the Corporation on July 24, 1946, and approved by the Municipal Board, September 24, 1946. This by-law was passed and approved in conformity with the provisions of section 406 of *The Municipal Act,* R.S.O. 1937, chapter 255, as enacted by the Statutes of Ontario, 1941, chapter 35, section 13. As thus enacted, section 406, so far as pertinent, is as follows:—

406 (1) By-laws may be passed by the Councils of local municipalities—

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within any defined area or areas or abutting on any defined highway or part of a highway.

2. For prohibiting the erection or use of buildings, for or except for such purposes as may be set out in the by-law, within any defined area or areas or upon land abutting on any defined highway or part of a highway.

(2) No by-law passed under this section shall apply to any land or building which, on the day of the passing of the by-law, is used or erected for any purpose prohibited by the by-law, so long as it continues to be used for that purpose * * *

(3) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board.

The appellant had for some years operated on University Avenue in the City of Toronto what is described in the evidence as a "progressive" school for children from two to ten years of age. According to one of the teachers, the term "progressive" indicates that the children "are allowed to progress at their own speed, they are allowed a little more freedom." The classes ran from nursery, pre-school (junior kindergarten and kindergarten) to grade school. No summer school had ever been held there. It became necessary for the appellant to acquire new premises for its school and by a written document of June 25, 1946, the appellant offered to purchase the premises known as 561 Avenue Road, Toronto, from one Greenhill with the purpose of carrying on its school there. This offer was accepted on June 27, 1946, at which date the property was not subject to any restrictions nor was the use to which it might be put limited in any way by any by-law. Greenhill was then using the house on the premises as a boarding house or rooming house, described in the evidence as a guest house. One thousand dollars was paid as a deposit, a mortgage of $26,500 was to be assumed, and the balance was to be paid on September 1, 1946, when possession was to be taken.

Presumably hearing of an agitation by adjoining owners to have the council of the Corporation pass a restrictive by-law, the appellant, on July 12, 1946, made a supplementary agreement with Greenhill by which the deposit on the property was increased by $5,000, which was immediately paid. Clauses 2, 3 and 4 of the supplementary agreement provide as follows:—

2. Possession of the whole of the premises without prejudice to the rights of the Parties to be given to the Purchaser July 15, 1946, with right to re-model in its discretion; provided that the present occupants of the premises may be allowed to remain undisturbed until the 1st day of August, 1946.

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3. Mr. Greenhill to be allowed the use and occupancy of one room and kitchen and garage apartment for his personal use and such space in addition as he may require for furniture, etc., until the 31st day of August, 1946.

4. Date for closing this transaction to be August 31, 1946.

In accordance with clause 2 of this supplementary agreement, a number of children and three teachers went on the property on July 15, 1946, and from then until the by-law was passed, the grounds and part of the building were used by teachers and children as a nursery school for very young children. As the trial judge finds, at least five children were brought to the premises, although some witnesses put the attendance between the relevant dates as high as fifteen or eighteen, and what was conducted was really a summer school—most of the time being spent outdoors and only inside when the weather was inclement. The trial judge states:—

> Certain of the defendant's witnesses gave evidence to the effect that prior to the 24th of July, 1946, the kitchen and a ground floor room was used. Their demeanour, however, does not impress me. Furthermore, during this time the vendor was still carrying on a guest house with a full complement of furniture in the house.

There is no doubt that Greenhill still had a considerable part, if not all, of his furniture in the house but he was disposing of it from time to time and, at the most, there were only about three to five guests and they were under notice to leave. Furthermore, in addition to the witnesses for the appellants, Mrs. Ferguson, called by the respondent, testified that when it rained she thought there was a basement to which the children went.

The appellant argued that the use made by the appellant of the premises should be taken to be that of the date of the approval of the by-law by the Municipal Board. If that contention were sound, it would be sufficient to dispose of the matter and allow the appeal because it is not denied that by September 24, 1946, the date of the Municipal Board's order, the appellant was using the premises for every kind of a school conducted by it. It has been assumed in all the cases to which we were referred that the important date was the passing of the by-law. That this is the proper conclusion is apparent in my view from a comparison of the provisions of subsection 2 and

subsection 3 of section 406 of the Act. The former refers to the use of any land or building on the day of the *passing* of the by-law, while the latter provides that no part of any such by-law passed under the section shall *come into force* without the approval of the Municipal Board.

The trial judge (1), and the Court of Appeal (2), seem to have proceeded on the ground that the principal use of the premises on July 24, 1946, the date of the passing of the by-law, was as a residence and guest house and that, therefore, the appellant was not within the exception in subsection 2, section 406, of *The Municipal Act*. Mr. Justice Hogg, speaking for the Court of Appeal, states:—

> The building, number 561 Avenue Road, was used to a very limited extent for school purposes on July 24, 1946; the principal use of the house was, on that date, that of a rooming or guest house.

In my view this is not the determining factor. The extent of the user of premises as a school would vary from time to time and in the months of July and August it is well-known that the pupils in the ordinary classes are on vacation. It is true that the appellant had not conducted a summer school on University Avenue but there was nothing to prevent it commencing such a school as part of its curriculum. According to the evidence, a nursery school is part of the course provided by the appellant and the mere fact that no grade classes were held on the Avenue Road premises prior to the date of the passing of the by-law does not prevent the application of subsection 2 of section 406 of *The Municipal Act*. It is not necessary that the entire premises, that is every room in the building, be used. While a bona fide intention to use is not sufficient, as has been decided by the Judicial Committee in *Toronto Corporation* v. *Roman Catholic Separate Schools Trustees* (3), it is an important element in considering the evidence as to actual user. There is no doubt, in the present case, as to the purpose of the appellant in purchasing the premises nor, I think, is there any real doubt on the evidence as to what it did. This is not a case of disturbing concurrent findings but of accepting the facts as found and of drawing the proper legal conclusions therefrom. The appellant took steps during the summer vacation,

(1) [1947] O.W.N. 318.
(2) [1947] O.R. 425.
(3) [1926] A.C. 81.

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in an endeavour to bring itself within subsection 2 of section 406 of the Act and, in my opinion, has succeeded in so doing. It actually used the premises as a school and the mere fact that it was a nursery summer school does not prevent the appellant increasing the number of pupils or enlarging the scope of its activities so as to conduct classes not in operation at the relevant time. We are not concerned, in the present appeal, with any question of erecting new buildings.

A similar result was arrived at by Middleton, J., in *Re Hartley and City of Toronto* (1), and his decision was affirmed by the Court of Appeal for Ontario (1925) 56 O.L.R. 433. It is argued that this decision is in conflict with that of the Privy Council already mentioned but I am satisfied that this is not so. The *Separate Schools* case had also been decided in the first instance by Middleton, J., and his judgment had been affirmed by the Court of Appeal (1923) 54 O.L.R. 224, when the *Hartley* case came before him and he found no conflict. Later, the decision in 54 O.L.R. was reversed in this Court (1924) S.C.R. 368, and to some extent at least the decision of the majority of the Court of Appeal in the *Hartley* case, delivered by Hodgins, J. A., was based upon the reasons for judgment of this Court. This latter judgment was subsequently reversed by the Judicial Committee. However, there is no conflict between the judgment of the Privy Council and the decisions of the trial judge and the Court of Appeal in the *Hartley* case and in my opinion the latter were correctly decided. In any event, I can find nothing inconsistent between what I have suggested is the proper construction of the word "used" in subsection 2 of section 406 of the *Municipal Act* and the reasoning and decision of the Judicial Committee. In fact the latter were concerned with a separate piece of property that was fenced off from the remainder of what had been purchased by the Trustees, and that was in the separate possession of a third party and that had not been used at all at the relevant time by the Trustees.

There remains but to add that in my view the decisions referred to in the judgment of the Court of Appeal as to

(1) (1924) 55 O.L.R. 275.

the meaning of the words "actually used and occupied" in various Assessments Acts have no application to the present case. The appeal should be allowed and the action dismissed with costs throughout.

TASCHEREAU J.:—I agree that this appeal should be allowed and the action dismissed with costs throughout.

RAND J.:—The facts of this case, for the purposes of decision, are virtually identical with those in *re Hartley and City of Toronto* (1). But the Court of Appeal has held that that judgment, based, as it is said, on reasoning of this Court in *Board of Trustees of Roman Catholic Separate Schools* v. *City of Toronto* (2), rejected by the Judicial Committee, [1926] A.C. 81 was, in effect, by the last judgment reversed; and whether that conclusion is sound is a question raised at the threshold of the appeal.

In the earlier case, the issue was whether the school board was within the exemption that applied "to any building in course of erection, the plans for which have been approved by the City Architect prior to the date of the passing of the by-law". The school board had purchased two adjoining lots with a building on each. Plans had been prepared for the construction of one school building on both lots. They were submitted to the City Architect on September 15, 1921. On September 20th, a mandamus to the Architect was sought for the issue of a permit for the building. On September 26th the restrictive by-law was passed. The question was this: for the purposes of the exemption, assuming the "right" to the permit as being intended to be preserved, was the Court to take as done what should have been done and treat the situation as if the permit had issued before the passing of the by-law? Speaking for the majority in this Court, Duff, J. (as he then was) at p. 374, used this language:

> The right of the owner of land, therefore, to make use of it, subject to the existing by-laws, in the erection of such buildings upon it as he thinks proper to erect, is preserved inviolate down to the point of time when the restrictive by-law is actually passed, and thereafter, in the limited degree prescribed, in the special cases mentioned. That right, as Mr. Justice Middleton held in the case already cited, includes the right to receive the necessary permit for the erection of a building

(1) (1925) 56 O.L.R. 433. (2) [1924] S.C.R. 368.

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proposed to be erected in conformity with the law in force for the time being. It is quite manifest that in the result, if effect be given to the judgments of the Ontario courts, this right is denied the appellants.

In the Judicial Committee, Lord Chancellor Cave at p. 86 comments on this:

With the greatest respect for the opinion of the learned judges composing the majority of the Supreme Court, their Lordships are unable to concur in this reasoning. No doubt it is true that, unless and until a by-law restricting the building upon any land is passed, the owner of the land has a right, subject to the existing by-laws, to erect upon it such buildings as he may think proper. But the whole object and purpose of s. 399A is to empower the city authority, acting in good faith, to put restrictions upon that right with a view to the protection of neighbour owners against that "grave detriment and hardship" to which the learned judge referred; and the "status" or proprietary right of the owner is limited by the powers of the city to be exercised for the protection of his neighbours. If the reasoning of the learned judge is to be taken literally, then in every case the "status" of the building owner is to prevail, and that whether he has or has not deposited plans with a view to building upon his land; and even if the sentences quoted refer only to a case where plans have been deposited before the by-law is passed, they yet go beyond the express terms of the statute.

What the Judicial Committee held was that notwithstanding the wrongful refusal to issue a permit, the fact that the plans had not been approved when the by-law was passed rendered the exemption unavailable to the owner.

In *re Hartley and Toronto* (1), Hodgins, J.A., with whom Magee J.A. concurred, begins his reasons with the excerpt from the judgment of Duff, J. already quoted and the additional sentence:

The protection of the existing status is a substantive element in the purpose of the enactment.

Then he proceeds:

The application of this reasoning may create difficulties in the future for the municipality, and it assumes that the city architect is bound and entitled to act irrespective of any instructions to the contrary given to him by the city council. Into that phase of the question it is not necessary to enter, as it does not arise in concrete form here. But the broad principle that the *status quo* is protected may stand irrespective of that point, and it is our duty to adopt and apply it in the present case, nowithstanding that the user of a building and not its erection is in question.

The case before us is "use" and I see nothing in the language of Duff, J. used as it was by Hodgins, J.A. as a general statement of the intendment of the statute, which is misleading in relation to that particular exemption.

(1) (1925) 56 O.L.R. 433 at 434.

What is emphasized uniformly in the Ontario court, including the judgments in this case, is that it is the actual use at the moment of the by-law, the "status quo" in the use, as Hodgins, J.A. would say, that is preserved: and the reasoning of Duff, J. goes no further. In this respect I see not the slightest difference in the reasoning of the Court of Appeal in the two cases. In both the same enquiry was made: what was the actual use at the critical time? The case of *re Hartley* remains then untouched by the judgment of the Judicial Committee; but it is, of course, open to be considered whether the mode of applying the exemption in that case was a proper one.

The precise language of the statute is important:

> No by-law passed under this section shall apply to any land or building which, on the day of the passing of the by-law, is used or erected for any purpose prohibited by the by-law * * *

It will be seen that the exemption is not to the existing use but to the building; and there is no implication that it is the whole of the building that must be so used or that the use must be the sole use. The language would be satisfied by a partial use as if, for instance, an owner was carrying on a grocery store on the ground floor and using the second storey for his home: could it seriously be questioned that the use of the lower floor in such a case would be protected by the exemption? If that same business were extended to the upper storey, could it be said that the exemption did not continue or was lost? The building would still be used on the ground floor for the prohibited purpose; the building as a whole would be exempt; and I think it would necessarily follow that no such extension could bring about a forfeiture of the exemption. In any case the question is whether a real use, in good faith, is being made of the building, a use not merely incidental to some other use, but possessing an individuality of its own. That view of the statute seems to me to underlie the decision of both Middleton J. and the Court of Appeal in *re Hartley,* and I think it sound.

There is substantially no conflict of evidence as to the use here. The appellant purchased the premises for the school activities that were then being carried on in other premises. They consisted of the training of the

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children from two to ten years of age, and the different stages are denominated nursery or junior kindergarten, kindergarten and grade. Admittedly they had not before been carried on in summer, and I will assume that what was done here in July when the grade department was on holiday, was done to establish rights ahead of the move then under way to bring about the restriction. That was precisely the case in *re Hartley* and it was treated as the unobjectionable exercise of rights of an owner. But it was part of the existing or intended school establishment, carried on appropriately to the season, and obviously it is not necessary that there be use of all departments contemporaneously.

Mr. Cartwright raised also the point that the by-law itself contains a clause to the effect that it "shall come into force upon receiving the approval of the municipal board". That, in substance, is the language of the statute providing that "No by-law passed under this section shall come into force or be repealed or amended without the approval of the *Municipal Board*". What *The Municipal Act* contemplates is the "passing" of the by-law by the municipality and its "coming into force" upon the approval of the Municipal Board. Here, the by-law itself contains an endorsement, "(Passed July 24, 1946)". That shows on its face the distinction between "passing" and "coming into force" and I cannot agree that the clause containing the latter is intended to suspend the time when the by-law is to be deemed to be "passed".

I would, therefore, allow the appeal and dismiss the action with costs throughout.

KELLOCK J.:—On June 27, 1946, the appellant entered into an agreement with the then owner, one Greenhill, to purchase premises, described as street number 561 Avenue Road in the City of Toronto. Those premises consisted of a substantial dwelling and lands occupied therewith. The agreement provided for the closing of the purchase on or before September 1, 1946, on which date vacant possession was to be given to the purchaser.

On June 27th the premises were occupied by Greenhill, his family and certain roomers, as he conducted on the

premises what is described in the evidence as a "guest house". On July 12th, no doubt in view of the imminence of the passing of the by-law subsequently passed, the appellant and Greenhill executed a further agreement in writing which provided, inter alia, as follows:

1. The deposit to be increased by $5,000, payable forthwith.

2. Possession of the whole of the premises without prejudice to the rights of the Parties to be given to the Purchaser July 15, 1946, with right to re-model in its discretion; provided that the present occupants of the premises may be allowed to remain undisturbed until the 1st day of August, 1946.

3. Mr. Greenhill to be allowed the use and occupancy of one room and kitchen and garage apartment for his personal use and such space in addition as he may require for furniture, etc., until the 31st day of August, 1946.

4. Date for closing this transaction to be August 31st, 1946.

The appellant had been conducting elsewhere in the city what is referred to in the evidence as a "progressive" school for children from two to ten years of age and acquired the premises here in question with the intention of transferring this school to it. In its original premises the scope of the appellant's school was a "nursery school, pre-school and grade school."

On July 15th the appellants brought from its other premises certain of its school furniture and equipment and began to operate in the new premises a summer school for the younger children and it is this use being made of the premises on July 24th which is relied upon as bringing the case within subsection 2 of section 406 of *The Municipal Act*.

The by-law passed on July 24th and subsequently approved by the Municipal Board on September 24th, provided:

1. No person shall use any land within the areas of the City of Toronto hereinafter described, for any purpose except a detached one-family dwelling house or the office of a physician or dentist located on the first floor of a detached one-family dwelling house used by such physician or dentist as his private residence * * *

2. No person shall erect or use upon any land within the areas described in section 1, any building for any purpose except a detached one-family dwelling house or the office of a physician or dentist located on the first floor of a detached one-family dwelling house used by such physician or dentist as his private residence.

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Section 406 of *The Municipal Act*, as enacted by 5 Geo. VI, cap. 35, section 13, as amended by 7 Geo. VI, cap. 16, section 11, is as follows:

406—(1) By-laws may be passed by the councils of local municipalities:

Restricted Areas

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within any defined area or areas or abutting on any defined highway or part of a highway.

2. For prohibiting the erection or use of buildings, for or except for such purposes as may be set out in the by-law, within any defined area or areas or upon land abutting on any defined highway or part of a highway.

* * *

(2) No by-law under this section shall apply to any land or building which, on the day of the passing of the by-law, is used or erected for any purpose prohibited by the by-law, so long as it continues to be used for that purpose, nor shall the by-law apply to any building the plans for which have prior to the day of the passing of the by-law been approved by the municipal architect or building inspector, so long as the building when erected is used for the purpose for which it was erected.

(3) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board, and such approval may be for a limited period of time only, and the Board may extend such period from time to time upon application made to it for such purpose.

Under the amending agreement of July 12th the possession retained by Greenhill of that part of the premises which he continued to occupy was exclusive and this possession was of right and in no sense permissive. The extent to which the appellant had obtained possession from him is clearly defined in the evidence of the respondent's witness, Klebanoff, who testified:

Q. Now carrying on from the 15th July, 1946, to the 24th July, 1946, what part of the building was occupied from time to time during that period by the school?

A. The lower floor and the kitchen.

Q. Was there any reason for that?

A. Well, as Mr. Greenhill moved out, we occupied the rooms that he moved from.

The "lower floor" was the basement. The kitchen was on the ground floor.

It is to be observed also that the amending agreement of the 12th of July, 1946, was expressly made "without prejudice to the rights of the parties". This provision

was made no doubt to protect the right of the appellant, under the main agreement, to rescind the purchase by reason of any objection to title it had raised which the vendor might be unable or unwilling to remove, which right would be lost by taking possession. Had such a situation subsequently developed out of any requisitions on title made by appellant, it could hardly have been said that Greenhill in such circumstances would have lost his right under the statute to carry on his business in the premises which he in fact continued to use on July 24th for the purpose of a guest house. Different parts of the premises here in question were actually being used for two distinct purposes not permitted by the by-law on the day of its passing. This is by no means an unusual situation. In my opinion, with respect, there is no warrant under the legislation for any inquiry as to which is, as between two or more actual uses of different parts of any given premises, the predominating or most substantial and to ascribe the entire use to the latter.

I agree with the view of the statute taken by my brother Rand that the use being made of the building here in question on the day of the passing of the by-law was sufficient to bring it within the very words of section 406 (2) and as the building and the lands appurtenant were being used by the appellant for a purpose not permitted by the by-law, the by-law does not apply to them.

As said by Middleton, J. in the *Separate Schools* case (1), at 519:

> Paragraph (*a*) (now s. 406 (2)) defines precisely the effect of the by-law upon the situation existing at the date of its passing, and leaves nothing to the discretion of the council or of the Court.

I think there is nothing in the *Separate Schools* case, 1926 A.C., 81, which is to the contrary of the view of the statute above expressed. The building and the lands of No. 14 and that part of No. 18, which was fenced off, were being used on the day of the passing of the by-law for school purposes, while the building on No. 18, together with the remainder of the land, was being used for the purposes of a boarding-house. Consequently the by-law affected neither with respect to these particular uses. Of

(1) (1922) 22 O.W.N. 518.

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course neither the building nor the remainder of the lands of No. 18 could be later converted to school purposes. Neither was being so used at the critical date.

In the *Hartley* case, 56 O.L.R., 433, the view taken of the facts seems to have been that the purchaser was really in possession of the whole building. That was not the situation on the facts in the case at bar, but in my view that makes no difference in the result.

I do not think that the use made of the premises by the appellant after the school term recommended in September was for a different purpose within the meaning of the statute from the use being made of them on July 24th. On the latter date the appellant was in possession of the parts of the premises already referred to, including the appurtenant land, with its furniture and equipment and was operating therein and thereon one department of its school, the other scholars being on holidays. In my opinion that was sufficient to entitle the appellant to continue to use the premises on July 24th and subsequently for its school.

Counsel for the appellant further submitted that the critical date was not July 24th, when the by-law was passed, but the 24th of September of that year, when the by-law was approved by the Municipal Board and came into force pursuant to the provisions of subsection 3 of section 406. In my opinion this submission is not entitled to prevail. The language used in subsection 2 is perfectly plain by itself and when contrasted with the language used in subsection 3 it is clear, I think, that the legislature intended the language used in subsection 2 to have its prima facie meaning.

For these reasons I would allow the appeal and dismiss the action with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Samuel Cohen.*

Solicitor for the respondent: *W. G. Angus.*

OXFORD PAPER COMPANY (RESPONDENT) ..... APPELLANT;

AND

THE MUNICIPALITY OF THE COUNTY OF INVERNESS (APPELLANT) ..... RESPONDENT.

1947
Oct. 15
1948
Feb. 3

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Assessment Act, Statutes Nova Scotia, 1938, c. 2—Assessment of companies —No incompatibility between s. 10 and s. 28—S. 28 not an exclusive code for assessment of companies—Company a person under s. 10 and neglect of company to comply with assessor's demand under s. 10 entails penalty under s. 15 of loss of right of appeal—N.S. Assessment Act, 1938, c. 2, ss. 2, 10, 12, 13, 15, 28-30 and 38.

Section 10 of *The Assessment Act,* Statutes of Nova Scotia, 2 Geo VI, 1938, chapter 2, requires every person to give all necessary information to the assessors if required by them, for the purpose of enabling them properly to assess him.

Section 15 provides that every person, who—

(*a*) refuses to give the assessors information by them reasonably required; or

(*b*) refuses to furnish any particulars required by this Act or by the forms prescribed thereby; or

(*c*) neglects to fill up and return the form referred to in Section 10 of this Act after being requested by an Assessor to do so,

shall not be entitled to appeal from the assessment of his property or income.

Section 28 (1) provides that in assessing the property of any joint stock company, other than a banking company, and its agencies, the assessors shall, before the assessment for the whole municipality is made up, notify in writing the managers or resident agents of the several joint stock companies in the town or municipality of the value at which they estimate the property of such companies, and require such manager or agents, if they object to such valuation, to severally furnish to such assessors * * * written statements, under oath * * * of the actual value of the real property and of the personal property of such companies * * *

Sub-section (2) provides after service of the notice upon any such manager or agent 14 days shall be allowed him to furnish the assessors with such written statement, under oath * * *

Section 29 provides where the manager or resident agent delivers such written statement * * * the assessors shall adopt the valuation sworn to, which shall be binding, subject only to appeal by the clerk under the provisions of this Act.

*PRESENT: The Chief Justice and Taschereau, Rand, Estey and Locke JJ.

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Section 30 provides that if such statement is not furnished within the time and in the manner prescribed, the assessors shall proceed upon their own original valuation, and such valuation shall then be binding, subject only to appeal under the provisions of this Act.

Held: There is no incompatibility between the subject matter of section 10 and section 28. The former provides information on which the assessors' valuation is in large measure based, and which is in fact a prior necessity under section 28. The latter section does not embody an exclusive code for the assessment of companies. A company is therefore a "person" within the meaning of section 10.

Held: Since the right of appeal given companies under section 30 lies only "under the provisions of this Act"; neglect by a company to comply with the provisions of section 10, an obligation placed on all ratepayers, entails the penalty under section 15, of the loss of the right to appeal from the assessors' valuation.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), reversing the judgment of the County Court and confirming the decision of the Board of Revision and Appeal.

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

F. D. Smith K.C. and *J. G. Fogo K.C.* for the appellant.

W. C. Dunlop K.C. for the respondent.

The judgment of the Chief Justice, Taschereau, Rand and Estey JJ. was delivered by:

RAND J.:—This appeal involves the assessment of the Oxford Paper Company in the Municipality of the County of Inverness. From the original assessment made by the assessors, the company took an appeal to the Board of Revision and Appeal. The Board held the company to have lost its right to appeal by the effect of section 15 of The *Assessment Act,* through its neglect to comply with a notice given by the assessors under section 10 (1), requiring particulars of its property within the Municipality. A further appeal was then taken to the County Court which purported to set aside the order of the Board on the view that the right had not been lost. On a further appeal to the Supreme Court (1), the order of the County Court was reversed and the case is now brought here.

(1) (1947) 20 M.P.R. 281; [1947] 3 D.L.R. 415.

Sections 10 and 15 are as follows:

10. (1) Every person shall give all necessary information to the assessors if required by them, for the purpose of enabling them properly to assess him, and for this purpose, the assessors may, before the first day of October in every year, cause to be delivered to any ratable person from whom such information is required, within the town or district within which such assessors are acting, a notice which may be in the form (A) in the second schedule to this Act, or which may be varied so as to disclose, when completed, any further or other information required by the assessors in order to enable them to make a proper assessment of the person to whom the notice is delivered.

(2) The assessors shall have the right at all reasonable times to enter upon any lands or premises and to inspect the same, or any property thereon, for the purpose of making a proper assessment.

15. Every person, who—

* * * * *

(c) neglects to fill up and return the form referred to in Section 10 of this Act after being requested by an assessor to do so, shall not be entitled to appeal from the assessment of his property or income.

Form "A" in the second schedule is headed "A statement of taxable property and income of * * * for the year * * *". In five columns are to be entered the details of all ratable real and personal property, the ratepayer's valuation of each item, the assessor's valuation, exemptions, and finally the net valuation, with the first two to be filled out by the ratepayer.

The contention is that section 10 does not apply to a joint stock company by reason of sections 28, 29 and 30 which read:

28. (1) In assessing the property of any joint stock company, other than a banking company, and its agencies, the assessors shall, before the assessment for the whole municipality is made up, notify in writing the managers or resident agents of the several joint stock companies in the town or municipality of the value at which they estimate the property of such companies, and require such manager or agents, if they object to such valuation, to severally furnish to such assessors, within fourteen days from the dates of the service of such notices upon them, written statements, under the oath of such managers or agents, of the actual value of the real property and of the personal property of such companies, not including any undisturbed minerals.

(2) After service of the notice upon any such manager or agent fourteen days shall be allowed him to furnish the assessors with such written statement, under oath, of the actual value of the real and personal property respectively of such companies.

29. Where the manager or resident agent of any such joint stock company delivers such written statement under oath to the assessors within such fourteen days, the assessors shall adopt the valuation sworn to, and such valuation shall be binding, subject only to appeal by the clerk under the provisions of this Act.

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30. If such statement is not furnished within such fourteen days by such manager or agent, the assessors shall proceed upon their own original valuation, and such valuation shall then be binding, subject only to appeal under the provisions of this Act.

In acting under section 28, the assessors have already made a valuation on the basis of information which section 10, as one means, is designed to enable them to obtain: that estimate they present to the company for acceptance or for such other valuation as the company may see fit, under the oath of one of its representatives, to make. As is seen, if no action is taken by the company, the valuation of the assessors stands, subject by section 30 "to appeal under the provisions of this Act."

The word "person" is defined in section 2 to include "firm, company, association and corporation" and in section 10 (1) "every person" prima facie embraces a joint stock company. It is only, therefore, if section 28 can be deemed to constitute an exclusive code for dealing with the property of such a company that any question arises as to the latter's inclusion in section 10 (1). But between the subject matter of section 28 and section 10 there is no incompatibility whatever: the latter provides information on which the assessor's valuation is, in large measure, based, information which is in fact a prior necessity to action under section 28. Considerable stress was laid upon inferences to be drawn from a history of the legislation; but the significant fact is that in the earlier form, the provisions of the present section 10 were specifically applicable to corporations, notwithstanding a section identical with section 28.

The further question is also raised whether section 30 provides an absolute appeal to the exclusion of the provisions of section 15. Since the appeal lies only "under the provisions of this Act", I see nothing to take the company out of the penalty of section 15. The obligation to furnish the information under section 10 is a basic requirement, placed upon the whole body of ratepayers. A company is conceded a special privilege under 28 by which it can, in effect, reject the assessor's valuation, make its own assessment and place upon the municipality the onus of appeal against it. Once it is found that section 10

applies, the penalty becomes operative and an appeal "under the provisions of the Act" must necessarily be governed by that fact.

I agree, therefore, with the Court of Appeal and would dismiss the appeal with costs.

LOCKE J.:—I cannot agree with the contention of the appellant that secs. 10, 12, 13 and 15 of the *Assessment Act* do not apply to the joint stock companies referred to in secs. 28, 29 and 30. I see no ambiguity in the language of these sections. The word "person" is stated by sec. 2 of the Act to include "firm, company, association and corporation"; unless the context or subject matter otherwise requires. Sec. 10 imposes upon every person the obligation to give all necessary information to the assessors, if required, and authorizes them to deliver to any ratable person from whom such information is required a notice in the Form (A) in the Schedule to the Act varied in such manner as the assessors deem necessary to enable them to make a proper assessment. Sec. 12 provides that any ratable person to whom this notice is delivered shall fill up the form annexed to the notice with a true statement of the particulars required and sign and, within fifteen days after receipt thereof, return it to the assessors. Sec. 13 provides that statements so furnished by the ratepayer shall not bind the assessors but authorizes them to assess such person for such amount as they believe to be just and correct. Sec. 15 states in terms that every person who, *inter alia,* neglects to fill up and return the form referred to in sec. 10 shall not be entitled to appeal from the assessment of his property or income.

It is, however, said that none of these requirements apply to joint stock companies other than banking companies or their agencies since secs. 28, 29 and 30 constitute what is in effect a code for the assessment of such companies, so that the "appeal under the provisions of this Act" referred to in sec. 30 is unaffected by the provisions of sec. 15. It is further contended that an examination of the sections analogous to secs. 10, 12, 13 and 15 in previous enactments of the *Assessment Act* shows that the term "person" should be interpreted as referring to individuals only.

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Dealing with the first of these contentions: secs. 9 to 15 are grouped in the *Assessment Act* under the heading "Duties of Assessors": sec. 9 requires the assessors before the first day of November in each year to ascertain "by diligent inquiry and examination the names of all persons liable to be rated within the town or district for which they are appointed, their ratable property and income and the extent, amount and nature of the same". The obvious purpose of secs. 10 to 15 inclusive is to enable the assessors to obtain the information which is essential to enable them to prepare the assessment roll in the manner required by secs. 16 and 17. Sec. 16 requires that the roll be prepared showing the names of all persons, firms, companies, associations and corporations liable to be rated with the description of the property assessed, the value and a concise description of each separate piece of real property and the personal property, the amount of the ratable income of each person and such other particulars as the council may direct. The manner in which the roll is to be prepared is defined in more detail by the rules contained in sec. 17 and it is to be noted that property partially or wholly exempted from taxation under the Act is to be valued and entered on the assessment roll in the same manner as taxable property, though under a separate heading. The information obtainable by the assessors by the use of Form (A) would appear to be an almost indispensable aid to them in discharging their duties under secs. 16 and 17.

The purpose of secs. 28, 29 and 30 which, in a substantially similar form, have been in the statute for a very long time is to enable joint stock companies other than banks or their agencies to state in advance of their being assessed whether they object to the valuation assigned to their taxable property by the assessors and, if they do object, to file a written statement under the oath of their manager or agent of the actual value of the real and personal property of the companies. If this is done, the assessors are required to adopt the companies' own valuation of their property and unless an appeal is taken by the clerk of the municipality such valuation is binding. I see no conflict between the provisions of these sections and

those of secs. 10 to 15 inclusive. In the case of individuals, firms, associations and ratepayers other than the joint stock companies referred to in sec. 28, the onus of appealing from the assessment is cast upon the ratepayer; in the case of these companies they are enabled at their election to cast that onus upon the clerk. The statement under the oath of the manager or agent of the company is not in substitution for, or in lieu of, the information required by all ratepayers to be supplied by sec. 10. The statement under sec. 28 is not required to be a detailed statement of the various assets of the company but would be satisfied by a simple statement as to the value of all the company's real and personal property. The notice referred to in sec. 28 is to be given by the assessors after they have obtained the information deemed by them to be necessary as to the assets of the company and have made their valuation of such assets in the manner prescribed by sec. 17.

Sec. 30 provides that if the sworn statement is not furnished within fourteen days by the manager or agent the assessors shall proceed upon their own valuation and "such valuation shall then be binding, subject only to appeal under the provisions of this Act". The reference to the appeal in this section appears to me to be simply to qualify the absolute nature of the immediately preceding words. The purpose is to reserve the right of appeal: however, the appeal is an appeal "under the provisions of the Act" and is that given by sec. 38 and the succeeding sections and is not a substantive right given to these companies.

The appellant urges further that an examination of what might be called the legislative history of secs. 10, 12, 13, 15, 28, 29 and 30 indicate that where the word "person" appears in secs. 10, 12, 13 and 15 it should be interpreted as excluding joint stock companies other than banks and their agencies. I assume the contention that we may resort to this aid to interpretation is based upon the theory that the concluding words of sec. 30 cast such doubt upon the meaning of the term in sec. 15 that we are entitled to examine these earlier enactments upon the principle stated

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by Bramwell L. J. in *Attorney General* v. *Lamplough* (1), even though there be no ambiguity in the language of secs. 10, 12, 13 or 15.

Provisions substantially the same as those now contained in secs. 28, 29 and 30 of the *Assessment Act* appeared as secs. 73, 74 and 75 of cap. 58 R.S.N.S. 1884. By sec. 8 of that Act the assessors for the municipality appointed by the Municipal Council were required to "proceed to ascertain by diligent inquiry the names of all the taxable inhabitants and also all taxable property within the same, its extent, amount and nature". Thereafter they were required to prepare the assessment roll containing detailed information of the taxable property of the ratepayers. In 1888 the Act was amended and consolidated by *cap.* 2: sec. 11 declared it to be the duty of every ratable person to give all necessary information to the assessors and such persons were required, if requested by the assessors, to furnish details of their real and personal property and income in the form prescribed by sec. 12 of that Act: the nature of the information to be furnished corresponded closely to that now required by Form (A) of sec. 10 of the present Act. Sec. 15 provided that any person who, after request by the assessors, should decline to give the required information should not be entitled to appeal in respect of overvaluation. Neither this Act nor *cap.* 58 of the Revised Statutes of 1884 defined the word "person" but, by sec. 7 of *An Act for the Construction of Statutes, cap.* 1, R.S.N.S. 1884, it was provided that " 'Person' may extend to bodies politic and corporate as well as to individuals" unless otherwise provided for or such construction would be inconsistent with the manifest intention of the legislature or repugnant to the context. By *cap.* 15 of the Statutes of 1889 secs. 10, 11 and 12 of the 1888 Act were repealed and new sections 10 and 11 were enacted. The former required the assessors to deliver to each ratepayer a copy of Schedule B to the Act with a notice similar to that provided for by sec. 12 of the 1888 Act. The new section 11 declared that it should be the duty of "every ratable person, co-partner or corporation to fill up or cause to be filled up the said schedule with a true statement of the

(1) (1878) 3 Ex. D. 214.

particulars thereby required of his or their taxable personal property and income and sign the same" and return it to the assessors within fifteen days after its receipt. Sec. 15 was not amended. In the revision of 1900, *cap.* 73 R.S.N.S. sec. 2 declared that unless the context otherwise required "person" should be construed as including firm, company, association and corporation. Sec. 8 amended sec. 10 as enacted by *cap.* 15 Statutes of 1889 by substituting for the words "each ratepayer", where the same first appeared in that section, the words "every person ratable within the town or district", and sec. 10 which corresponded to sec. 11 of the 1889 amendment substituted for the word "co-partner" the word "firm" and added a penalty clause whereby "every person" who failed to fill up and return the form was made liable to a fine. Sec. 14 of the 1900 revision which dealt with the contents of the assessment roll amended sec. 15 of the 1895 consolidation by substituting for the words "ratable persons", where the same appeared in that section, the words "all persons, firms, companies, associations and corporations liable to be rated". By *cap.* 5, 1918 sec. 12 the obligation to fill up and return the form sent by the assessors was imposed upon "every ratable person" rather than upon "every ratable person, firm or corporation" as in sec. 10 of the 1900 Act, and the penalty clause was omitted. Sec. 16 reenacted sec. 14 of the 1900 Act with an immaterial change. With minor changes designed to clarify the meaning of the sections, the present sections 10 to 15 inclusive correspond with those sections in the 1918 consolidation.

The appellant contends that the change made by sec. 11 of the Act of 1889, whereby it was declared that it should be the duty of "every ratable person, co-partner or corporation" to deliver the particulars required by sec. 10 while sec. 15 was not amended, indicates that it was the intention of the legislature that from thenceforth sec. 15 should be held to apply to individuals only. The word "person" which by sec. 7 (*p*) of *cap.* 1 R.S.N.S. 1884 might be interpreted as extending to bodies corporate was clearly to be so construed in secs. 9 to 15 inclusive of the 1888 Act and should be assigned that meaning in the corresponding sections of the Act as amended in 1889 so that it was un-

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necessary to mention corporations in sec. 11 in order to include them: it was equally unnecessary, it may be added, to mention co-partners. The obligation to make the return imposed for the first time by sec. 11 of the 1888 Act was imposed upon all ratepayers including these companies and all of them were subject to the penalty of losing the right to an appeal upon failure to give the assessors the information or the statement requested. If the argument that naming corporations in sec. 11 of the 1889 Act, when it was unnecessary to do so, exempted them from the operation of sec. 15 is carried to its logical conclusion, the amendment made in 1900 which struck out the word "co-partner" and substituted the word "firm" would have the effect of exempting partnerships from the operation of sec. 12 of that Act which reenacted sec. 15 and continued the use of the term "person", since sec. 2 which defined that expression in the 1900 statute specified in terms that it should include firms.

I am unable to draw any inference favourable to the contention of the appellant from the amendments made by the consolidation of 1918 when by sec. 12 the legislature reverted to the expression used in sec. 11 of the 1888 Act "ratable person" and eliminated the words "firm or corporation": the most reasonable explanation is, I think, that it was done to eliminate words that were unnecessary and to make uniform the language of secs. 9 to 15 inclusive falling under the heading "Duties of Assessors". The fact that in the same consolidation they did not amend sec. 14 of *cap.* 73 R.S.N.S. 1900, or change other sections of the Act where the expression "persons, firms, companies, associations and corporations" is used where the word "person" would suffice does not afford any evidence in my opinion that the word "person" in sec. 12 should be interpreted in any other manner than that defined by the interpretation section of the Act. An examination of the entire statute shows that there has been little uniformity in the manner in which the word "person" has been used alone or in conjunction with the words "firm, company, association and corporation". Thus in sec. 35 of the 1918 Statute under the heading "Appeals from Assessment" the

right of appeal is given to any "person" and it is under sec. 38 of the present Act, which is in similar terms, that the appellant asserts its right of appeal, and in many other sections the term is used when the obvious intention is to include all ratepayers.

In the dissenting judgment of Graham J., mention is made of the fact that Form (A) in the second schedule of the Act and which is referred to in sec. 10 is inapt for use by an ordinary joint stock company and that it is unlikely that the Act intended that two statements of the same matter should be required of such a company. It is, however, to be noted that the information required to be given by a ratable person under the Act of 1888 required substantially the same information and it is conceded that secs. 10 to 15 inclusive of that Act applied to companies as well as to individuals. The present form, as did the form required in 1888, asks details of the income of the ratepayer and this the municipality does not seek to tax but as the assessment roll is to exhibit and value all of the property of the ratepayer within the municipality, including that which is exempt, I think no significance is to be attached to this fact. While Form (A) might be worded in more appropriate terms for the use of companies I think it is intended, as was the 1888 form, for general use by all ratepayers with appropriate changes if any were necessary. I agree that it is unlikely that two statements of the same matter would be required of such a company: but the Form (A) in sec. 10 and the sworn statement that these companies are permitted to file under sec. 28 are quite different in their nature, as has been pointed out.

Had the Legislature intended to relieve these companies of the penalty under sec. 15 when amending the Act in 1889 I think the approriate change in the latter section would have been made. No other penalty applicable to companies was provided then or thereafter for failure to supply the information required for the preparation of the assessment roll, though the 1889 amendment did not relieve them of their obligation to give it and no reason has been suggested for their exemption from that imposed

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by sec. 15. I find nothing in the history of these sections nor in the context in the present Act to indicate that the word "person" in secs. 10, 12, 13 and 15 should be construed otherwise than as defined by sec. 2 and as including firms, companies, associations and corporations.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. J. Burchell.*

Solicitor for the respondent: *W. C. Dunlop.*

1947

*Oct. 3

1948

*Mar. 22

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

DAME JULIETTE CARROLL, ET AL (SUPPLIANTS) . . . . . RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Retired judge receiving a pension—Appointed Lieutenant-Governor—Whether entitled to both salary and pension—Interest against the Crown—Judges Act, R.S.C. 1927, c. 105, s. 27—British North America Act.

In 1921, upon resigning as a judge, the late Mr. Justice Carroll was entitled to a pension of $6,000. During the years 1929 to 1934, as Lieutenant-Governor of the province of Quebec, at a salary of $10,000 a year, he received only $10,000 annually, the appellant withholding the sum of $6,000 each year. The respondents sought to recover from the appellant the sum of $30,000 and interest, and the Exchequer Court, [1947] Ex. C.R. 410, awarded them $30,000 but without interest. Appellant appealed to this Court and respondents cross-appealed on the question of interest.

Held: The appeal and cross-appeal should be dismissed with costs.

Held: There can be no recovery of interest against the Crown unless provided by contract or statute.

Per the Chief Justice and Taschereau and Estey JJ.:—The functions of a Lieutenant-Governor are in respect of the Government of the Province for which he is appointed.

Per Kellock and Locke JJ.:—The office of Lieutenant-Governor cannot be described as an office under the Governor General in Council.

*PRESENT:—Rinfret C.J. and Taschereau, Kellock, Estey and Locke JJ.

APPEAL and Cross-Appeal from the judgment of the Exchequer Court of Canada, Angers J. (1), awarding to the respondent the sum of $30,000 without interest.

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

F. P. Varcoe, K.C. for the appellant.

Fernand Choquette, K.C. for the respondents.

The judgment of the Chief Justice and of Taschereau and Estey JJ. was delivered by

TASCHEREAU J.:—The respondents are the daughters of the late Mr. Justice Carroll, who from 1908 until 1921 was a Puisne judge of the Court of King's Bench of the Province of Quebec, and from 1929 until 1934, was Lieutenant-Governor of the same province.

The Honourable Mr. Carroll upon resigning as a judge was entitled to a pension of $6,000, and when he was appointed Lieutenant-Governor, his statutory salary was $10,000 per annum. However, while in office as Lieutenant-Governor, the Honourable Mr. Carroll did not receive the sum of $16,000, as the appellant withheld for a period of 5 years a sum of $6,000, paying only $10,000 annually. The appellant contended that the Honourable Mr. Carroll was not entitled to both his pension and his salary, and based its refusal to pay, on the following provision of the *Judges Act* (R.S.C. 1927, chap. 105) which reads as follows:—

27 (1). If any person become entitled to a pension after the first day of July, one thousand nine hundred and twenty, under this Act, and become entitled to any salary in respect *of any public office under His Majesty in respect of his Government of Canada,* such salary shall be reduced by the amount of such pension.

By their Petition of Right, the respondents claim the sum of $30,000 and interest, namely $6,000 per year, from 1929 to 1934. By order of the Honourable Mr. Justice Angers of the Exchequer Court, dated 21st June, 1944, the following question of law was set down for hearing before trial, upon the application of the appellant:—

Assuming that the Honourable H. G. Carroll became entitled on February 18, 1921, to a pension under the Judges Act at a rate of $6,000

(1) [1947] Ex. C.R. 410.

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per annum and was entitled to receive the same during and in respect of the period from April 2, 1929, to May 3, 1934, and that during the said period he occupied the office of Lieutenant Governor of Quebec to which office there was attached the salary of $10,000 per annum and assuming that he received payment out of the Consolidated Revenue Fund of Canada in respect of the said pension and of salary as Lieutenant Governor during the said period at the rate of $10,000 per annum, are the suppliants entitled to the relief sought by the petition of right?

The judgment of the Exchequer Court (1) ordered and adjudged that the said question of law be answered in the *affirmative,* namely that the suppliants were entitled to the sum of $30,000 without interest. This appeal is from the aforementioned order of the Exchequer Court.

The main question to be determined is whether the office of Lieutenant-Governor is or not "a public office under His Majesty *in respect of his Government of Canada*".

If it is, the appeal must succeed, if not, it must fail.

It cannot be, and it is not disputed that the office of Lieutenant-Governor is a public office under His Majesty, that the Lieutenant-Governor is appointed by the Governor General in Council, that he may be dismissed by the same authority, that his salary, which is paid out of moneys forming part of the Consolidated Revenue Fund of Canada, is fixed by the Parliament of Canada. It is also common ground that the Lieutenant-Governor receives instructions from the Governor General, that he may reserve a bill for the signification of the Governor General's pleasure, and that an act that he has sanctioned may be disallowed by the Governor General in Council.

It has been submitted that this alleged subordination of the Lieutenant-Governor to the Governor General, the Parliament of Canada, and the Governor General in Council, has the effect of making the office of Lieutenant-Governor "a public office under His Majesty *in respect of his Government of Canada*", and that as a consequence *section 27 (1) of the Judges Act* applies.

With this contention, I am with deference, unable to agree, and I come to that conclusion, because I do not think that it can be said, that the functions of a Lieutenant-Governor are *in respect of the Government of Canada.* They are, I believe, *in respect of the Government of the Province* for which he is appointed.

(1) [1947] Ex. C.R. 410.

The Lieutenant-Governor of a Province is constitutionally the head of the Executive of his Province, as the Governor General of Canada, is the head of the Executive of the Dominion. In section *10 of the B.N.A. Act* the Governor General is described as "an officer *carrying on the Government of Canada,* on behalf and in the name of the Queen", while in section 62 of the same Act, the Lieutenant-Governor is referred to as "an officer carrying on *the Government of the Province*".

Under the scheme of the *British North America Act,* the Dominion, and the nine provinces forming part of the Confederation have been assigned certain rights and obligations, and in the exercise of these rights, and the fulfilment of these obligations, they are, as it has been often said, sovereign in their respective fields. They have each their own government, empowered to enact and enforce laws, and as Viscount Haldane said *In Re The Initiative and Referendum Act* (1):—

> The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

In the *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (2), the late Lord Watson had previously said:—

> The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers, executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions and that the remainder should be retained by the provinces for the purposes of the Provincial Government.

(1) (1919) A.C. 935 at 942. (2) (1892) A.C. 437 at 441.

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Although the words "on behalf of and in the name of the Queen" are absent in *section 62 of the B.N.A. Act,* "it is now" says Clement (Canadian Constitution, 3rd ed., p. 844) "authoritatively settled that a Lieutenant-Governor when appointed, is as such the representative of the Crown for all purposes of *Provincial Government,* as the Governor General himself is for all purposes of Dominion Government."

This distinction is clearly made by Lord Watson in *Liquidators of the Maritime Bank of Canada* (1) when he says:—

> There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the Governor General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion government.

Vide also: *Bonanza Creek Gold Mining* (2) where Viscount Haldane expresses the following opinion:—

> Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor General has been dispelled by the decision of this Board in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1). It was there laid down that "the act of the Governor General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion government."

As Viscount Haldane also said in *The Initiative and Referendum Act* case (3), the Lieutenant-Governor who directly represents His Majesty, *"is a part of the Legislature"* fulfilling therefore a function in respect of the Government of the Province.

As a consequence of these judicial pronouncements, the nature of the federal and provincial legislative and executive powers is clearly settled, and a Lieutenant-Governor, who "carries on the Government of the Province", manifestly does not act in respect of the Government of Canada. All the functions he performs are directed to the affairs of the Province and are in no way connected with the Government of Canada, and it is the functions that he performs

(1) (1892) A.C. 437 at 443.
(2) (1916) 1 A.C. 566 at 580.
(3) (1919) A.C. 935 at 943.

that must be examined in order to determine the nature of his office. It is only if the functions are in respect of the Government of Canada, that *section 27 (1) of the Judges Act* applies.

It has been argued that the Honourable Mr. Carroll came within the provision of the Act, because he was appointed by the Governor General in Council, and because his salary was paid out of the Consolidated Fund of Canada. The Governor General in Council is of course the instrumentality through which, in view of the *B.N.A. Act,* a Lieutenant-Governor is appointed to represent directly His Majesty. And the Dominion Government is also, under a provision of the same *Act,* obligated to pay the salary of the Lieutenant-Governor. But I fail to see how this can affect the nature of the functions performed. That the Lieutenant-Governor is appointed and paid by the Dominion, does not alter the essentially provincial character of his office, which is to carry on the Government of the Province.

The additional provisions of the Constitution, namely, that the Lieutenant-Governor receives instructions from the Governor General, that bills may be reserved for the signification of the Governor General's pleasure, that an Act that has been sanctioned, may be disallowed by the Governor General in Council, and finally that the Lieutenant-Governor may be removed from office by the same authority, have I think, no important signification.

The framers of our Constitution have reserved to the Governor General in Council the necessary authority to interfere, in a certain way, in provincial matters, but the exercise of these powers, contemplated to be for the better government of the provinces, does not modify the legal status of the provincial executives, and does not purport to make them act, on behalf of the Federal authority. Their functions remain unaltered. These interferences may of course limit the powers of a Lieutenant-Governor, and even in certain cases prevent him from exercising them, but his jurisdiction nevertheless remains entirely within the provincial field. His authority is obviously curtailed

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when these constitutional powers are exercised by the Governor General in Council, but I do not think that it can be said, that it changes in character.

For these reasons, I believe that the learned trial Judge was right (1), in answering the question submitted in the affirmative. The main appeal should therefore be dismissed with costs.

The respondents have cross-appealed, and claim that the learned trial Judge (1), erred in dealing in his judgment with the question of interest. It is argued that it was not submitted in the question of law, and alternatively, if it were, it should have been answered in the affirmative.

The question submitted to the learned trial Judge, after assuming certain facts, is concluded as follows: "Are the suppliants entitled to the relief sought by the petition of right?"

In their petition, the suppliants claim *$30,000 and interest*. Both items are claimed in the petition, and I therefore think that the learned trial Judge was right in dealing with interest, and I also believe that he reached the proper conclusion in refusing to allow it. It is settled jurisprudence that interest may not be allowed against the Crown, unless there is a statute or a contract providing for it. (King *v.* Miller (2)); (Hochelaga Shipping *v.* The King, (3)); (The King *v.* Racette (4)). In the present case, there is no statutory provision and no contractual obligation in support of the suppliants' claim.

The cross-appeal should be dismissed with costs.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK J.:—This appeal involves the construction of *Section 27 of the Judges Act, R.S.C., Cap. 105.* Appellant contends that the words "and became entitled to any salary in respect of any public office under His Majesty in respect of his Government of Canada" applies to the salary paid to the late H. G. Carroll during the period April 2, 1929, to May 3, 1934, when the deceased was Lieutenant-Governor of the Province of Quebec. It is common ground that "Government of Canada" means, as used in the above section, the Governor General in Council. It is also not

(1) [1947] Ex. C.R. 410.
(2) [1930] S.C.R. 293.
(3) [1944] S.C.R. 138.
(4) [1948] S.C.R. 28.

disputed that the office occupied by the deceased is a "public office" within the meaning of the section. What is in dispute is as to whether such office is a public office "under" the Governor General in Council.

It is the Crown's first contention that the office described by the section is any office, the salary of which is paid by His Majesty in right of Canada. It is further contended that even if the test is not the hand by which payment is made, nevertheless the office occupied by the deceased, having regard to appointment, tenure of office, duties, responsibility, as well as payment of salary, was such an office as to be included in the section.

It is first to be observed that whatever may have been in the mind of the draftsman, the words used in the section are not simply "any salary paid by" the Government of Canada. It may well be that such was the intention of the draftsman but the question here is whether the language used is appropriate to effectuate that intention.

Mr. Varcoe referred to a number of sections of the *B.N.A. Act,* including, among others, *Section 58,* which provides for the appointment of a Lieutenant-Governor by the Governor General in Council under the Great Seal; *Section 59* under which the Lieutenant-Governor holds office during the pleasure of the Governor General; *Section 60,* by which the salary is to be fixed and provided by Parliament; *Section 67* under which the Governor General in Council may appoint an administrator to execute the office during inability of the Lieutenant-Governor; as well as to *Section 90,* which in turn refers to *Sections 55, 56* and *57* and substitutes therein the Lieutenant-Governor for the Governor General, and the latter for the Queen and for a Secretary of State, as well as the province for Canada. Our attention has also been called to the instructions accompanying the commission given to the Lieutenant-Governor and it is submitted that where these instructions or any further instructions which might be given are applicable, the Lieutenant-Governor would be obligated to follow them rather than the advice of provincial ministers. It is accordingly argued that the office of Lieutenant-Governor is an office under His Majesty in respect of the Government of Canada.

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In The Liquidators' case (1), it was contended that the effect of the *B.N.A. Act* was "to sever all connection between the Crown and the provinces (and) to make the government of the Dominion the only government of Her Majesty in North America". In rejecting this contention their Lordships point out that the act of the Governor General in Council in appointing a Lieutenant-Governor is, under the *Act,* the act of the Crown itself and the Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as is the Governor General for all purposes of Dominion Government.

In the Bonanza Creek case (2), it was pointed out that the *Act* had made a distinction between the Dominion and the provinces which extends not only to legislative but to executive authority and that the grant of executive in substance follows the grant of legislative authority. The form of commission by which a Lieutenant-Governor is appointed was also referred to with its reference to instructions and it was considered that this commission was in accord with the view taken in the Liquidators' (1) case as to the relationship between a Lieutenant-Governor and the Crown.

In the Initiative and Referendum Act (3), Viscount Haldane said at p. 943:

> For when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the sovereign that so gives or withholds assent.

Under the combined provisions of *Section 55* and *90* the act of a Lieutenant-Governor, whether he assents to a provincial bill or withholds his consent, or reserves the bill for the signification of the Governor General's pleasure is "the act of the Crown by the Crown's representative"; the Disallowance Reference (4), per Duff C.J.C. at 76. This is so notwithstanding that in each case the Lieutenant-Governor is, by the statute, subject to the instructions of the Governor General. At page 77 of the same report the Chief Justice said further (4):

(1) (1892) A.C. 437.
(2) (1916) 1 A.C. 566.
(3) (1919) A.C. 935.
(4) [1938] S.C.R. 71 at 76.

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There is nothing, however, in all this in the least degree incompatible . . . in the disallowance of an act of the Legislature by the Governor General acting on the advice of his Council who, as representing the Sovereign, constitutes the executive government for Canada.

On these authorities therefore, in my opinion, notwithstanding the matters to which Mr. Varcoe has called our attention, which were all before their Lordships, it is not possible to describe the office of Lieutenant-Governor as an office under the Governor General in Council. By reason of *Section 71* the Lieutenant-Governor is a part of the Legislature for Quebec and that Legislature "was to retain its independence and autonomy and to be *directly under the Crown* as its head"; per Viscount Haldane (1).

I would accordingly dismiss the appeal and cross-appeal, both with costs. There can be no recovery of interest against the Crown apart from contract or statute; The *King* v. *Racette* (2), and cases therein referred to.

Appeal and Cross-Appeal dismissed with costs.

Solicitors for the appellant: *F. P. Varcoe and D. H. W. Henry.*

Solicitor for the respondents: *Fernand Choquette.*

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*Feb. 3, 4, 5
*Mar. 23

JAMES LAIRD NORTHEY, PAUL MALCOLM NORTHEY, ARCHIBALD JOHN NORTHEY..... APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Conspiring to defraud—Effect of reception of inadmissible evidence—Appeal from conviction—Onus on Crown under section 1014 (2) of Criminal Code—Trial by judge alone—Trial judge's report under section 1020 of Criminal Code—Substantial wrong and miscarriage of justice—New trial—Section 444 of Criminal Code—Department of Munitions and Supply Act, 1940 Statutes of Canada, c. 31—Interpretation Act, R.S.C. 1927, c. 1.

*PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

(1) (1919) A.C. 935 at 942. (2) [1948] S.C.R. 28.

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The three appellants were convicted on a charge of conspiring to defraud the Crown contrary to section 444 of the Criminal Code. The charge was that they had entered into an unlawful agreement to evade payment of income tax. At the trial, the Crown introduced statements made by the accused at an inquiry held under the provisions of the Department of Munitions and Supply Act, section 19 of which prohibited their disclosure as was unanimously decided by the Court of Appeal. The majority of the Court of Appeal held that there had been no miscarriage of justice notwithstanding the improper reception of the statements. The accused appealed from this judgment.

Held: reversing the judgment appealed from ([1947] 2 W.W.R. 289), Kerwin J. dissenting, that the onus of the Crown to satisfy the Court that there would without doubt have been a conviction had the illegal evidence been excluded, has not been discharged.

Per Kerwin J. (dissenting):—The appellants had a fair trial even though the inadmissible evidence was introduced and the trial judge could not have failed to convict on the admissible evidence.

APPEAL and Cross-Appeal from the judgment of the Court of Appeal for British Columbia (1), affirming (Sloan C.J. and Robertson J.A. dissenting) the conviction of the appellants on a charge of conspiring to defraud His Majesty the King in the right of the Dominion of Canada, contrary to section 444 of the Criminal Code.

Hon. J. W. deB. Farris, K.C. and *John L. Farris* for the appellants.

G. L. Fraser, K.C. for the respondent.

KERWIN J. (dissenting):—While relying upon the dissenting judgment of the Chief Justice of British Columbia (1), Mr. Farris preferred to state his proposition in a wider form and to treat the cases referred to by the Chief Justice as mere examples. His argument was that if the Wilson evidence, which the Court of Appeal (1) unanimously held to be inadmissible, is put aside, the accused never really had a fair trial because his counsel was in effect prevented from cross-examining upon the balance of the evidence. I am unable to assent to that contention because in circumstances such as are present here, counsel have to take the responsibility as to cross-examination upon all the evidence adduced by the Crown in respect of the charge.

(1) [1947] 2 W.W.R. 289.

On the point as to whether there was a miscarriage of justice, I have come to a conclusion without regard to the report made by the trial judge although I am unable to say, as the Court found it possible to decide in *Baron* v. *The King* (1), that this was not a report within *section 1020* of the *Criminal Code*. No report had been made by the trial judge and it was only after the case had been argued for two days, and after the Court of Appeal (2) had unanimously decided that the Wilson evidence had been improperly admitted, that the Court (2), at the request of counsel for the accused, requested the trial judge to send in his report. Some of the provisions of *section 1020* may be considered archaic as in practically all cases the evidence is now taken down and transcribed by a short-hand reporter so that the direction in the section that the trial judge shall furnish in the Court of Appeal his notes of the trial appears to be meaningless. I quite agree that the proper time to comply with the section is before any appeal from the judgment is heard but it seems rather strange that, after the report had been furnished at the time and in the manner I have indicated, complaint is now made to its reception and its contents.

In jury cases, the test is the same where inadmissible evidence has been allowed as in cases of misdirection; that is, could a reasonable jury have failed to convict on the remainder of the evidence? I have not overlooked the decision in *Allen* v. *The King* (3), but each case must depend on its own facts. The present case was tried by a judge without a jury and in my opinion he could not have failed to convict each of the appellants on what the Court of Appeal decided was admissible evidence and the appeal should be dismissed. The Criminal Code limits the cases in which an Attorney-General or accused may come to this Court and there was therefore no authority for the cross-appeal by the Crown, which is dismissed.

TASCHEREAU J.:—The appellants were found guilty by His Honour Judge Lennox on a charge of conspiring together, by deceit or falsehood or other fraudulent means, to defraud the Crown contrary to *section 444* of the *Criminal*

(1) [1930] S.C.R. 194.
(2) [1947] 2 W.W.R. 289.
(3) (1911) 44 S.C.R. 331.

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Code. It is suggested that the appellants entered this alleged unlawful agreement for the express purpose of evading the payment of income and excess profit taxes.

In 1942, the West Coast Shipbuilders Limited was engaged in building at Vancouver for the Dominion Government, fifty-five 10,000 ton ships. The J. L. Northey & Sons Limited, of which the principal officers and shareholders were the three appellants, contracted for the construction of the ships' furniture, and during the same year, this contract was assigned by J. L. Northey & Sons Company Limited, to a newly formed company known as the Millwork Industries Limited, and of which the appellants were also the only directors and shareholders.

It was the contention of the Crown at the trial, that the appellants attempted to defraud the Dominion Government by means of falsification of invoices. Each of the appellants had other companies in which they were interested and which they owned and controlled. For instance, appellant J. L. Northey, father of the two other appellants, was particularly interested in J. L. Northey Company Limited and in Millout Homes & Lumber Company. An other appellant, Paul Northey, was president of Paul Northey Homes Limited, and the third appellant, Archibald Northey, was the owner of Northey Construction Company Limited. These three companies were indebted to other companies for merchandise sold.

It is the Crown's submission that the appellants paid some of their personal accounts and also some of the accounts of the companies they controlled out of the funds of the Millwork Industries Limited. Invoices would be falsified so that in the books of the Millwork Industries Limited, the amounts of the cheques were charged to the costs of the operation of that company. As a result of this procedure, the debts of the other companies would be reduced and the profits of Millwork Industries Limited would be diminished, with the result that the Crown would lose income and excess profit taxes.

Before the charges were laid against the appellants, a Dominion investigator, Mr. James C. Wilson, conducted an inquiry under the provisions of the *Department of Munitions and Supply Act—1940, Statutes of Canada,*

chap. 31. He interviewed the three appellants, and the statements made by them were introduced at the trial before His Honour Judge Lennox. The Court of Appeal (1), the Chief Justice and Mr. Justice Robertson dissenting, dismissed the appeal, but during the hearing, the Court unanimously decided that the "Wilson evidence" had been improperly received by the trial judge, because of the prohibition against its disclosure found in *section 19* of the *Department of Munitions and Supply Act.* Notwithstanding the fact that this evidence was ruled out, the majority of the Court held in effect that there had been no miscarriage of justice, affirmed the conviction and denied to the accused a new trial.

The dissent of the Chief Justice, in which Mr. Justice Robertson concurred, is based on the ground that the improper reception of the "Wilson evidence" was so prejudicial, that the accused did not have a fair trial. They held that with the evidence that was left, it was not for the Court of Appeal to determine the guilt or innocence of the appellants, and that it would be to assume the role which is reserved to the jury or to the trial judge, if they attempted to weigh that evidence and to come to any conclusion.

During the argument before this Court, Mr. G. L. Fraser, K.C., counsel for His Majesty the King, who has filed a cross-appeal, argued that the Court of Appeal (1), was wrong in excluding the evidence given by Mr. Wilson. It seems quite unnecessary to deal with the right which the Crown may have to cross-appeal, or with its right to ask without cross-appeal that the judgment of the learned trial judge be affirmed, even for reasons other than those given by the Court of Appeal, as I come to the conclusion that on this point, the decision of the Court below was sound.

Section 19 of the *Department of Munitions and Supply Act, as amended by section 12 of Chap. 31, Statutes of Canada, 1940,* says:—

19. (1) No information with respect to an individual business which has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business:—

(1) [1947] 2 W.W.R. 289.

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Provided that nothing in this subsection shall apply to the disclosure of any information—

(a) to a government department, or any person authorized by a government department, requiring such information for the purpose of the discharge of the functions of that department; or

(b) for the purposes of any prosecution for an offence under this Act, or, with the consent of the Minister, for the purposes of any civil suit or other proceeding at law.

(2) If any person discloses any information in contravention of this section, he shall be guilty of an offence under this Act.

As the present prosecution is under *section 444* of the *Cr. Code* and not under the *Department of Munitions and Supply Act,* the proviso contained in *section 1 (b)* does not apply.

Moreover, the contention of the Crown is that the power of the Minister of Munitions and Supply, to direct that an inquiry be held, was not given until 1943, when the *Department of Munitions and Supply Act* was amended to so provide. Therefore the prohibition against disclosure of information would apply only to information obtained under the provision of the *Act* as it was enacted in 1940, and not to information obtained at an inquiry held by virtue of the 1943 amendment.

I believe that this proposition is unsound in view of the provisions of *section 22* of the *Interpretation Act of 1927, R.S.C. Chap. 1.* This section is as follows:—

22. An amending Act shall, so far as is consistent with the tenor thereof, be construed as one with the Act which it amends.

It seems clear, that the prohibition contained in *section 19* against disclosure of information obtained by virtue of the *Act,* applies to all information obtained by virtue of any section of the *Act,* whenever passed.

The grounds of appeal are stated as follows in appellants' factum:—

1. It is submitted that the majority of the Court of Appeal were wrong in refusing a new trial based on the ground that no miscarriage of justice was caused by the wrongful admission of the Wilson evidence because in their Lordships' opinion the remaining admissible evidence conclusively established the guilt of the appellants. It is submitted that the decision has denied to the accused a fair trial because a conviction following improperly admitted evidence of a confession of guilt *is no trial at all,* and a conviction without a trial necessarily constitutes a miscarriage of justice.

2. In the alternative, it is submitted that the majority of the Court of Appeal were wrong in finding that the trial judge was bound to convict on the evidence which remained after excluding the Wilson evidence and the hearsay evidence wrongfully admitted.

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When evidence has been improperly admitted, as in the present case, the Court of Appeal, in view of *section 1014* of the *Criminal Code,* may dismiss the appeal if, notwithstanding that it is of opinion that the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred. This section of the Criminal Code has been examined by the courts in England where the law is similar, and by many courts in this country.

In Allen *v.* Rex (1), Chief Justice Sir Charles Fitzpatrick said at page 336:—

> The underlying principle of both (the English and Canadian Section) is that, while the Court has a discretion to exercise in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no substantial wrong and to occasion no miscarriage of justice; and what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here—the existence of previous threats—and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner? It may well be that our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free unbiased verdict of the jury that the accused was entitled to have.

And further (1) at page 339 he also expressed the following views:—

> It was argued that the Section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities *are so trivial that it may be safely assumed that the jury was not influenced by it.* If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitae.* To say that we are in this case charged with the duty of deciding the extent to which the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused

(1) (1911) 44 S.C.R. 331.

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in a capital case of the benefit of a trial by jury. The law on this express point was laid down by the Privy Council in *Makin* v. *A.G. for New South Wales* (2) (citing therefrom).

And in *Makin* v. *Attorney-General for New South Wales* (1), the Lord Chancellor said at page 69:—

> The point of law involved is, whether where the judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted and that the accused was guilty of the offence with which he was charged.
>
> It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

And again at page 70, he said:—

> Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at a verdict matters which ought not to have been submitted to them.
>
> In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of the Jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.
>
> Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence.

The same principles were reaffirmed by this Court in *Gouin* v. *The King* (2), in *Brooks* v. *The King* (3), and recently in *Schmidt* v. *Rex* (4).

It is also a well established principle that the burden is upon the Crown to satisfy the Court that the verdict would *necessarily* have been the same, if the charge had been correct, or if no evidence had been improperly admitted. (*Schmidt* v. *Rex* (4)).

(1) [1894] A.C. 57.
(2) [1926] S.C.R. 539.
(3) [1927] S.C.R. 633.
(4) [1945] S.C.R. 438.

The principles enunciated in the above cases must be applied and govern the present case. Illegal evidence of a very damaging character was admitted at the trial, which was highly prejudicial to the accused. It is quite problematical to value all the effects of the admission of this illegal evidence, but it may safely be said, I think, that it may have seriously affected the cross-examination of the Crown witnesses, held out other evidence, and possibly changed the whole strategy of the defence. It may also, and this is quite natural and understandable, have seriously influenced the learned trial judge, in the reaching of his conclusions, as it would have undoubtedly impressed unfavourably upon the minds of twelve jurors.

The learned trial judge made his report to the Court of Appeal (1) during the argument, only after the "Wilson Evidence" had been ruled inadmissible. In view of the decision of this Court in *Baron* v. *The King* (2), this report cannot be considered as having been given within the meaning of *section 1020* of the *Cr. Code,* and should therefore be ignored.

It is possible for this Court to dismiss the present appeal, only if the irregularities are so *trivial* that it may be safely assumed that the trial judge was not influenced by them, or as it was said in the *Schmidt case* (3), "that the verdict *would necessarily* have been the same", if the illegal evidence had not been admitted.

With deference, I cannot come to that conclusion without entering the field of hypothesis and conjecture. As there will be a new trial, I shall not attempt to discuss the evidence given, but I may say that it is not sufficiently convincing to allow me to think, that had this evidence not been introduced, the result would have been the same. This Court is not the proper forum where the guilt or the innocence of the appellants is to be determined.

I entirely agree with the following statement of Chief Justice Sloan in his dissenting judgment: (1)

> The function of this Court is not to retry the accused and to decide upon his guilt or innocence. This Court is a Court of Review, and the issue before us, in this case, is not the guilt or innocence of the accused, but whether or not the accused has had a fair trial on proper evidence.

(1) [1947] 2 W.W.R. 289.
(2) [1930] S.C.R. 194.
(3) [1945] S.C.R. 438.

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If we did come to one conclusion or another, after weighing the evidence that remains, we would substitute ourselves to the trial court, and deprive the accused of his indisputable right to be tried by a jury or a trial judge who have the advantage of seeing and hearing the witnesses.

I agree that the appeal should be allowed, the conviction quashed, and a new trial directed. The cross-appeal should be dismissed.

RAND J.:—The accused, father and two sons, were charged with conspiracy to defraud the Dominion Government in relation to income tax. They were interested in the furniture and housing industries. A company wholly controlled by the father had obtained a contract which ultimately involved the supply of furnishings to fifty-five 10,000-ton ships constructed in British Columbia. To carry out this work the three organized a company named "Millwork Industries Limited" to which for a commission the contract was assigned. At this time two other companies, controlled one by each of the two sons, were being pressed by their creditors.

It was established by a mass of evidence that in the course of the operations of the Millwork Company and in several hundred items, the moneys of that company paid out by cheque were applied to debts of these outside companies as well as to private debts of the three shareholders; and, in certain cases, they were alleged to have been used to pay accounts owing by a third brother who was not interested in the Millwork Company.

As it was a family company, this use of the company's funds, as such, certainly so far as the Crown was concerned, would be unobjectionable. But it did not end there. These disbursements were represented in the company's records either by altered invoices originally directed to the other companies or to the individuals or by fictitious invoices and the whole charged against one or more of the expense accounts of the Millwork Company. It is, therefore, in a conspiratorial connection in one form or another between the accused and these manipulations that guilt lies.

Prior to the prosecution, an inquiry had been held under *section 22* of *The Department of Munitions and Supply Act* as enacted in 1943 which gives the Minister the power to cause such an inquiry to be made "into and concerning any matter relating to or incidental to a contract for the manufacture or production of munitions of war or supplies or for the construction or carrying out of a defence project, and may appoint a person or persons by whom the inquiry shall be conducted." Under *section 19 (1)* passed in 1940 "No information with respect to an individual business which has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business." Certain exceptions to that prohibition are not material here. Before the commissioner, all three of the accused made statements self-incriminatory which, over objection, were admitted in evidence by the trial judge.

On an appeal from conviction, the Court of Appeal (1) during the argument unanimously decided that the admission of this evidence had been improper. They then proceeded to deal with the appeal under *ss. (2)* of *section 1014* of the *Criminal Code* and a majority, O'Halloran, Smith and Bird, JJ. A. with Sloan, C.J. and Robertson, J.A. dissenting, came to the conclusion that "no substantial wrong or miscarriage of justice" had actually occurred; and the case comes here on the point of that dissent.

The finding of guilt was preceded by a short statement of the trial judge in the course of which he made these remarks:

> It is true that the law of conspiracy is somewhat difficult to prove, and it is also true that in the proof of conspiracy, one act or two acts taken out of the general practice would not, of course, prove or allow the court to infer conspiracy on those isolated acts. But this is also true, that the general practice shown by those individual examples might, with the congregation of those items, be sufficient and properly sufficient in law, and in every other way, to come to the conclusion that the conspiracy is proved. * * * I find that I cannot come to any other conclusion on the evidence before me but that the charge is proved.

The "evidence before me" included the admissions that had been improperly accepted, and the question is whether in that situation it can be said that no substantial wrong or miscarriage of justice can have taken place.

(1) [1947] 2 W.W.R. 289.

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The Crown relies on the interpretation laid down in *Stirland* v. *Director of Public Prosecutions* (1), that the proviso "assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict", language that was quoted with approval in *Schmidt* v. *The King* (2). It was pointed out by Lord Simon that the trial judge, in his summing up, advised the jury to disregard entirely the impeached questions, but the words "after being properly directed" seem rather to refer to a direction than to advice.

Assuming that view has been accepted by this Court and applying it to the facts here, I think it impossible to say that on the evidence bearing upon the connection of the father and the son Paul with the tainted invoices and book entries, together with any inferences that could possibly be drawn from the payment transactions themselves, the trial judge, rejecting the objectionable evidence, must have come to the same decision of guilt, or that, conversely, a verdict of acquittal would have been perverse.

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

ESTEY J.:—The three accused, J. L. Northey, father, and his two sons, P. M. Northey and A. J. Northey, were the principal shareholders and officers in Millwork Industries Limited which, during the period in question, manufactured ship furnishings at Vancouver.

The three accused were charged that between January 1, 1942, and December 31, 1944, they conspired to defraud His Majesty The King in the right of the Dominion of Canada, contrary to *section 444* of the *Criminal Code*. The three accused were tried under the speedy trial provisions of the Criminal Code and found guilty.

The evidence divides itself into two parts: (*a*) that given by the three accused as witnesses at an inquiry with respect to the business of Millwork Industries Limited before Jas. C. Wilson under the *Department of Munitions & Supply Act, 1939* (*2nd Sess.*) *S. of C., c. 3,* and *amendments* thereto. This evidence was put in at the trial by calling Mr. Wilson,

(1) [1944] A.C. 315. (2) [1945] S.C.R. 438.

and it is hereafter referred to as the "Wilson evidence". (*b*) That of the bookkeeper of Millwork Industries Limited with respect to the practice in that office, particularly dealing with certain items showing alterations of actual invoices and writing up of fictitious invoices, the proceeds of which benefited one or other of the three, and which were under one heading or another charged up to cost of supplies and expenses, with the result that the net revenue and consequent income taxes were greatly reduced. The balance of the evidence was that of indivduals outside of this company relative to the invoices and credits given for cheques received and drawn upon the accounts of Millwork Industries Limited.

The Court of Appeal (1) unanimously decided that under *section 19* of the *Department of Munitions & Supply Act, 1939,* as *amended* by *section 12, 1940 S. of C., c. 31,* the evidence taken at the inquiry was at the trial improperly received. The majority of the learned Judges were of the opinion that, notwithstanding the improper reception of this evidence no substantial wrong or miscarriage of justice had actually occurred within the meaning of *section 1014 (2)* of the *Criminal Code* and affirmed the conviction. The minority of the learned Judges were of the opinion that there was a substantial wrong or miscarriage of justice and that a new trial should be had.

1014. (2) The Court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

The Wilson evidence was important and material in that it constituted admissions by each of the accused parties of complicity in the offence of conspiracy to defraud His Majesty as charged. The learned trial Judge, in the course of his brief reasons, made no reference to the Wilson evidence and concluded:

I find that I cannot come to any other conclusion on the evidence before me but that the charge is proved.

In *Allen* v. *The King* (2), the accused was charged with murder. Evidence suggesting a motive was improperly introduced during the cross-examination of the accused. The majority of the learned Judges in the Appellate Court

(1) [1947] 2 W.W.R. 289.
(2) (1911) 44 S.C.R. 331.

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held this evidence inadmissible but that it was not more than a trivial irregularity and under *section 1019* (as it then read—now *section 1014 (2)* of the *Criminal Code* affirmed the conviction. In this Court a new trial was directed. Sir Charles Fitzpatrick, C.J., (with whom Duff, J., later Chief Justice, agreed), at p. 335 stated:

> My difficulty is to say to what extent the jury, or any one of them, may have been influenced by the questions put to the prisoner on cross-examination by the Crown prosecutor.

Then at p. 339, referring to section 1019:

> I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitae*. To say that we are in this case charged with the duty of deciding the extent to which the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused in a capital case of the benefit of a trial by jury.

At p. 363 Anglin, J. (later Chief Justice) stated:

> "A substantial wrong" is "occasioned thereby on the trial" when counsel for the Crown improperly places before the jury, as having been sworn to, statements which may influence them adversely to the accused upon a material issue.

In *Gouin* v. *The King* (1), the learned trial Judge misdirected the jury. In this Court, after commenting upon *Allen* v. *The King* (2), my lord The Chief Justice (then Rinfret, J.) in writing the judgment of the Court stated at p. 544:

> In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the improper direction and therefore the conviction cannot stand.

In *Schmidt* v. *The King* (3), the accused was convicted of murder. Two items of misdirection were considered. With respect to the first the learned trial Judge had failed to comply with "advisable practice" but had not violated any absolute rule. As to the second, while his illustrations "were not apt", it was pointed out "that later in his charge the trial Judge stated the law correctly but he did not apply the law to the evidence as fully as he might have

(1) [1926] S.C.R. 539.
(2) (1911) 44 S.C.R. 331.
(3) [1945] S.C.R. 438.

done." It was under these circumstances held that the conviction should be affirmed. Mr. Justice Kerwin, writing the judgment of the Court (1), stated:

In this case a reasonable jury on a proper direction would have undoubtedly convicted Schmidt and the appeal is therefore dismissed.

Stirland v. *Director of Public Prosecutions* (2): In this case certain questions were asked relative to credibility in cross-examination. Counsel for the appellant did not object to the questions and in his summing up the Common Serjeant advised the jury to take the appellant as being of good character. The House of Lords held the evidence inadmissible but that it occasioned no substantial miscarriage of justice. Viscount Simon, with whom the other lords concurred, stated at p. 320:

Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the appellant. When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied.

Then in *Kelly* v. *The King* (3), Duff, J. (later Chief Justice) discussed *section 1019* (now as amended *1014 (2)*):

In these circumstances there was obviously no "miscarriage"; and assuming there was some *technical "wrong"* there can be in my judgment no "substantial wrong" from the admission of inadmissible evidence if it must be affirmed that relatively to the whole mass of admissible evidence that which is open to exception is merely negligible and that in the absence of it the verdict could not have been otherwise. This conclusion is in no way inconsistent with the acceptance of the criterion suggested in *Makin's Case,* (4). In such a case the impeached evidence cannot in any practical sense be supposed "to have had any influence upon the verdict."

The Wilson evidence improperly received was neither "trivial" nor "merely negligible" when considered "relatively to the whole mass of admissible evidence". On the contrary it was, relative to the whole, important and implicated each of the accused parties in the offence charged to a degree that it would be impossible to conclude but that it may have influenced the decision. Indeed, having regard to its content, it may well have been a determining factor. It is therefore not a case in which

(1) [1945] S.C.R. 438 at 440.
(2) [1944] A.C. 315.
(3) (1916) 54 S.C.R. 220 at 260.
(4) [1894] A.C. 57 at 70 and 71.

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it can be concluded "that no substantial wrong or miscarriage of justice" has actually occurred as that statement has been construed in the *Allen* (1) and other cases, *supra*.

The reasons of the learned trial Judge in finding the accused guilty indicate that he so concluded upon all the evidence before him. There is no suggestion that any part thereof was disregarded, and in so far as his report under *section 1020*, made some time later and after an illness, suggests otherwise, the former should be accepted.

In any event, under the circumstances of this case it appears to be impossible to conclude that no substantial wrong or miscarriage of justice has actually occurred, and therefore a new trial must be had.

The appeal should be allowed and a new trial directed.

LOCKE J.:—In this matter the dissent of the Chief Justice of British Columbia and of Mr. Justice Robertson is expressed in the formal judgment (2) as being upon the ground that as a matter of law the provisions of *section 1014 (2)* of the *Criminal Code* ought not to be applied in the circumstances of this case. The Court of Appeal (2) had during the hearing unanimously decided that what has been called the Wilson evidence, which had been taken during an enquiry under the provisions of the *Department of Munitions and Supply Act*, had been improperly admitted at the trial, and the reasons for judgment of the learned Chief Justice refer to the fact that part of the other evidence received had been inadmissible as hearsay. In consequence of the admission of this evidence the learned Judges who dissented were of the opinion that the accused had not had a fair trial and that accordingly the powers conferred upon the Court by the *Code, section 1014 (2)*, should not be exercised.

I agree with the finding of the Court of Appeal (2) as to the Wilson evidence and I am further of the opinion that a considerable amount of the evidence tendered by the Crown for the purpose of proving that goods paid for by Millwork Industries Limited had in fact been purchased by and delivered to one or other of the accused, or to the companies controlled by one or other of them, was

(1) (1911) 44 S.C.R. 331. (2) [1947] 2 W.W.R. 289.

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inadmissible as hearsay. Eliminating the evidence so improperly admitted, the matter to be decided is as to whether upon the remaining evidence the verdict would necessarily have been the same (*Schmidt* v. *The King* (1), Kerwin, J. at 440). Since there is to be a new trial it is undesirable that there should be any extended comment on the evidence. The onus is upon the Crown to satisfy the Court that there would without doubt have been a conviction had this evidence been excluded and, in my opinion, that onus has not been discharged in this case. I have come to this conclusion upon consideration of the evidence alone as I think the report of the learned trial Judge which, owing to his unfortunate illness, was not made until some months had elapsed from the date of the trial and at a time when the appeal had been partly heard cannot be considered.

The conviction should be quashed and there should be a new trial.

Appeal allowed, conviction quashed and new trial directed. Cross-appeal dismissed.

Solicitors for the appellants: *Farris, McAlpine, Stultz, Bull & Farris.*

Solicitors for the respondent: *Fraser, Paine & Edmonds.*

1948
*Feb. 27
*Mar. 23

IN THE MATTER OF THE ESTATE OF SHIRLEY GERTRUDE BERWICK, DECEASED

ALEXANDER RAYMOND BERWICK (DEFENDANT) ..... } APPELANT;

AND

THE CANADA TRUST COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Gift contingent on legatee's survival of testatrix by ten years—Legatee given power of appointment by will only—Gift over in event of death meanwhile without exercise of power—Whether absolute vested gift—Whether legatee entitled to demand immediate payment—Power of appointment by will only distinguished from power exercised by will, deed or otherwise.

*PRESENT:—Kerwin, Rand, Kellock, Estey and Locke JJ.

(1) [1945] S.C.R. 438.

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IN RE BERWICK ESTATE

BERWICK v. CANADA TRUST CO.

The testatrix devised and bequeathed all her estate to trustees upon the following trusts: (1) to pay to her son as soon as possible one-half of the residue; (2) to invest the other half and to pay the said son as long as he should survive the testatrix the income therefrom, and at the end of 10 years from her death to convey to the said son the remainder of her estate; (3) in the event of the son dying within 10 years of her death the share which he would have received had he survived the 10 years to be distributed as he should by his last will appoint, and in default of appointment to be distributed in the same manner as if the share had formed part of the son's estate whether he died testate or intestate.

The testatrix died in January 1946. The son, having received the first half, now demands the other half. The trial judge found that this was an absolute vested gift, but the Court of Appeal ruled that he was not entitled to receive now the entire residue of the estate.

Held: When a gift is contingent upon the legatee surviving the testator by ten years and the power of appointment can only be exercised through the medium of his will, which is a limited power as distinguished from a power which might be exercised by will, deed or otherwise, the legatee has not an absolute vested gift and cannot therefore demand the immediate payment of the gift.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the Court of King's Bench, Doiron J. (2), and ruling that the appellant was not entitled to receive now the residue of the estate in the hands of the trustees.

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

David M. Tyerman for the appellant.

Gordon W. Forbes, K.C. for the respondent.

The judgment of the Court was delivered by

ESTEY J.:—The late Shirley Gertrude Berwick by her will appointed the respondent to be the executor and trustee and to hold all her property, real and personal, in trust to be disposed of as directed. The will provides for certain specific legacies and as to the residue her trustee is to convert it and immediately pay one-half to her son, Alexander Raymond Berwick. No question is raised in these proceedings as to any of the provisions except that which disposes of the second or remaining half of the residue.

(1) [1947] 2 W.W.R. 799. (2) [1947] 2 W.W.R. 566.

The testatrix died January 6, 1946; letters probate were granted February 12, 1946, and these proceedings by way of an originating notice are dated the 30th of May, 1947, well within the hereinafter mentioned ten year period.

The trustee asks the following question:

Is Alexander Raymond Berwick, beneficiary named in the said Will, entitled to receive now the entire residue of the estate in the hands of the Trustee?

The provisions of her will relative to the foregoing question are:

As to the remaining one half of the residue of my estate I direct my trustees to invest moneys realized therefrom in Dominion of Canada Bonds or securities and to pay to my said son so long as he continues to survive me the free annual income therefrom and at the expiration of ten years from the date of my death to pay, convey, assign and make over the remainder of my estate to my said son for his own use absolutely if he then be alive.

If my said son should predecease me or if he should survive me and die within ten years after my death the share or shares of my estate which my said son would have received had he survived me or the said period of ten years as the case may be shall be distributed by my trustees in such manner as my said son shall by his last will appoint and in default of such appointment the same shall be distributed by my trustees in the same manner as the same would have been distributed had such share or shares formed part of my son's estate at the time of his death whether testate or intestate and had he died without owing any debts.

The Court of Appeal for Saskatchewan (1) construed the provisions as providing a gift to the son contingent upon his surviving the testatrix by ten years; that if he did not do so and did not by his will exercise the power of appointment, then there was a gift over and that the son was not entitled to receive now the entire residue (the remaining half above referred to).

The appellant's contention is that the provisions of this will give to him an indefeasible interest in this remaining half and therefore he is now entitled to receive the entire residue or remaining half.

In the first of the above quoted paragraphs there are no words of a present gift but rather a gift only "at the expiration of ten years" and then only "if he then be alive".

In *Knight* v. *Knight* (2), the will provided:

I likewise give and devise to each of the daughters of Thomas Knight lawfully begotten, as soon as they attain the age of twenty-one years, the sum of £2,000 . . .

(1) [1947] 2 W.W.R. 799. (2) (1826) 2 Sim. & St. 491.

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IN RE BERWICK ESTATE

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It was held that the interests of the daughters were contingent. The Vice-Chancellor stated at p. 493:

> The expressed intention must prevail; and there is no gift, either of principal or interest, until the daughters attain twenty-one.

Halsbury, Vol. 34, p. 374, para. 418:

> A gift to a person, "at", "if", "as soon as", "when", or "provided" he attains a certain age, without further context to govern the meaning of the words, is contingent, and vests only on attainment of the required age, this being a quality or description which the donee must in general possess in order to claim under the gift.

The next of the above quoted paragraphs from the will gives to the son, with respect to this half of the residue, a power of appointment to be exercised by his will, and in the event of his not so appointing then the testatrix by her will directs that:

> . . . in default of such appointment the same shall be distributed by my trustees in the same manner as the same would have been distributed had such share or shares formed part of my son's estate at the time of his death whether testate or intestate and had he died without owing any debts.

The power of appointment here given to the son can be exercised only through the medium of his will. It is a limited power as distinguished from a power which might be exercised by will, deed or otherwise, and in default of the exercise of that power the property remains to be disposed of by the testatrix's own will. As stated by Sir W. Grant in *Bradly* v. *Westcott* (1):

> . . . if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment, in order to entitle that person to anything.

See also *Bull* v. *Vardy* (2); In *re McNeill Estate* (3).

In *In re Mewburn Estate* (4), the will directed that the power of appointment might be exercised "by deed or will", and therefore, notwithstanding the intention of the testator, the life interest together with the unqualified power of appointment was equivalent to an absolute interest and entitled the legatee to a transfer of the corpus.

The Will of Shirley Gertrude Berwick provides that her son can exercise his power of appointment only by a provision in his will. It is a qualified power and distinguishes this case from that of *In re Mewburn Estate* (4).

(1) (1807) 13 Ves. Jun. 445 at 453; 33 E.R. 361 at 364.
(2) 1 Ves. Jun. 270; 1 Ves. Jun. Supp. 115.
(3) [1920] 1 W.W.R. 523.
(4) [1939] S.C.R. 75.

Under both of the above paragraphs the son has but a right to the property if he lives the period of ten years and can exercise his power of appointment only through the medium of his will. The position is as Mr. Justice Macdonald, speaking on behalf of the Court of Appeal (1), stated:

> There is thus a gift over, for if the son does not outlive the testatrix by ten years and does not make an appointment by will those then entitled would take, not through devolution by law, but through the will of the testatrix.

Alexander Raymond Berwick has not under the will of his mother "an absolute vested gift" and therefore his request does not come within the rule of *Saunders* v. *Vautier* (2), as explained by Lord Davey in *Wharton* v. *Masterman* (3), where it is stated at p. 198:

> That principle is this: that where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit.

The appeal is dismissed with costs. The respondent is entitled to its solicitor and client costs out of the estate after giving credit for party and party costs.

Appeal dismissed, costs as per judgment.

Solicitors for the appellant: *MacPherson, Milliken, Leslie & Tyerman.*

Solicitors for the respondent: *Cross, Jonah, Hugg & Forbes.*

M. A. F. DE MARIGNY (PETITIONER).....APPELLANT;

AND

J. M. LANGLAIS (RESPONDENT).....RESPONDENT.

1948
*Mar. 8, 9.
*April 7.

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

Habeas corpus—Immigrant—British subject—Temporary permit—Application to remain in Canada permanently—Board of Inquiry—Right to be present or represented on appeal to the Minister—Deportation

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Kellock JJ.

(1) [1947] 2 W.W.R. 799.
(2) 4 Beav. 115; 49 E.R. 282.
(3) [1895] A.C. 186 at 198.

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order—"To the place whence he came or to the country of his birth or citizenship"—Service of order on transportation company—Extra-territoriality—Immigration Act, R.S.C. 1927, c. 93—Orders in Council P.C. 23, 695, 1413, 3016—Statutes of Canada, 1932-33, c. 39.

The appellant, a British subject, born on the Island of Mauritius, landed in Canada from Cuba on or about 15 March, 1945, as member of a crew of a ship which went into dry-dock and was ultimately sold in Canada. He was granted a temporary permit to enter Canada which expired on 15 May. A Board of Inquiry, on 17 May, 1945, refused him permanent admission on grounds which were read and explained to him. An appeal taken to the Minister was dismissed. On 10 August, 1945, he was allowed thirty days in which to arrange his departure voluntarily and on 27 September, 1945, he was granted an extension of stay until October 13. He did not leave Canada as he says that he could not find shipping accommodation to either England or Cuba and in the meantime he made application to the Department of Immigration for further indulgence but without success. Finally, on 29 April, 1947, the Commissioner of Immigration issued a warrant for his "arrest, detention and deportation" upon which he was detained. He obtained a writ of habeas corpus and the Superior Court, affirmed by the Court of King's Bench, Appeal Side, refused to order his discharge. He appealed to this Court.

Held: The appeal should be dismissed with costs.

Per The Chief Justice and Kerwin, Taschereau and Kellock JJ.:—The *Immigration Act* does not lay down any requirements as to form in the case of a warrant.

The contention that the order for deportation was incapable of being acted upon because it did not contain the reasons for the decision and was not served upon the transportation company, cannot be upheld. The order, although in two documents, was served upon appellant. The transportation company is the one to raise the objection of lack of service upon it.

In the circumstances here present, the only country authorized by the *Act* to which he could be deported was the country of his birth or citizenship and not whence he came.

There is nothing in evidence to support the argument that the right to enforce the order has been lost by failure to act upon it immediately.

An appellant has no right to appear personally or to be represented on the appeal to the Minister.

Per Rand J.:—The contention that the order for deportation was not sufficient, cannot be upheld. In the administration of the *Immigration Act,* what is to be looked for and required is a compliance in substance with its provisions.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, Province of Quebec (1), affirming the judgment of the Superior Court, Lazure J., and quashing

(1) Q.R. [1947] K.B. 741.

and dismissing a writ of Habeas Corpus issue against a warrant of the Immigration authorities for appellant's detention and deportation.

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

M. Gaboury, K.C. and *John E. Crankshaw,* K.C. for the appellant.

Gustave Adam, K.C. and *Guy Favreau* for the respondent.

Charles Stein, K.C. for the Attorney-General of Canada.

The judgment of the Chief Justice and of Kerwin, Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—This appeal arises upon the refusal of the Superior Court, affirmed by the Court of King's Bench, Appeal Side (1), to order the discharge of the appellant on the return to a writ of habeas corpus. The appellant, a British subject, born on the Island of Mauritius, arrived in Canada on or about the 15th of March, 1945, from Havana, Cuba, as a member of the crew of a ship which, because of the necessity of repairs, went into dry-dock and was ultimately sold in Canada. On arrival in Canada the appellant was granted a temporary permit to enter which expired on the 15th of May. Desiring to gain permanent admission to the country he, on May 17th, 1945, presented himself before a Board of Inquiry under the provisions of the *Immigration Act* and was refused entry. An appeal taken to the Minister pursuant to the provisions of the *Act* was dismissed. Notification of this decision was given to the appellant by letter of the 10th of August, 1945, in which he was also told that he would be allowed thirty days in which to arrange his departure voluntarily. Subsequently, on September 27th of the same year, a letter was written to him by the immigration inspector in charge at Montreal advising him that he had been granted an extension of stay in Canada until October 13th.

(1) Q.R. [1947] K.B. 741.

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The appellant did not in fact leave the country. He says in his evidence that he endeavoured to find shipping to England in 1945 but could not do so. He also says that there was no transportation to Cuba available in either 1945, 1946 or 1947. In the meantime he made application to the *Department of Immigration* for further indulgence but without success. Finally, on the 29th of April, 1947, the Commissioner of Immigration issued a warrant for his "arrest, detention and deportation" upon which he was detained. This detention gave rise to these proceedings.

On the 18th of June, 1945, the Board of Inquiry embodied its findings in the following document, Exhibit 6:

MOVED BY MEMBER DEMERS.

SECONDED BY MEMBER LEFEBVRE.

WHEREAS THE EVIDENCE SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY was born at Mauritius Island, British Colony, on the 29th day of March, 1910, and is not a Canadian citizen or a person having Canadian domicile, but is a citizen of Mauritius and a British subject of the French race.

WHEREAS THE EVIDENCE FURTHER SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY came to Canada, having arrived at the port of Halifax, Nova Scotia, approximately on the 10th or the 12th day of March, 1945, ex the S.S. "Kelowna Park", as a member of the crew, and is now being examined as to his right to land in Canada.

WHEREAS THE EVIDENCE FURTHER SHOWETH THAT MARIE ALFRED FOUQUEREAUX DE MARIGNY does not comply with the provisions of P.C. 695 of the Immigration Act which prohibits the entry to Canada of immigrants of all classes and occupations, with certain exceptions, he not coming within the admissible classes as defined therein.

WHEREAS THE EVIDENCE FURTHER SHOWETH THAT MARIE ALFRED FOUQUEREAUX DE MARIGNY does not comply with the provisions of P.C. 23 of the Immigration Act as he came to Canada otherwise than by continuous journey from the country of his birth or citizenship and upon a through ticket purchased in that country or prepaid in Canada.

WHEREAS THE EVIDENCE FURTHER SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY does not comply with the provisions of P.C. 3016 of the Immigration Act as he is not in possession of a passport bearing the visé of a Canadian Immigration Officer or the visé of a British Diplomatic or Consular Officer.

WHEREAS THE EVIDENCE FURTHER SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY does not comply with the provisions of P.C. 1413 of the Immigration Act as he is seeking a landing in Canada for the purpose of working as Sales Manager for the Industrial Wares Limited, 705 Drummond Building, 1117 St. Catherine Street, West, Montreal.

WHEREAS THE EVIDENCE FURTHER SHOWETH that MARIE ALFRED FOUQUEREAUX DE MARIGNY is prohibitive of entry to Canada under Section 3, subsection "C" of the Immigration Act as he has been certified by Dr. R. D. Gurd, Immigration Medical Officer, as suffering with post operative abdominal adhesions.

THEREFORE, I do hereby, in accordance with the provisions of the Immigration Act, reject the said MARIE ALFRED FOUQUEREAUX DE MARIGNY and order his deportation to the place in the country whence he came or to the country of his birth or citizenship.
DISSENTING—NIL.

The transcription of the proceedings contain the following:

The above decision was explained to Marie Alfred Fouquereaux de Marigny, who was advised of his right of appeal:

Q.—Do you wish to appeal?

A.—Yes.

A further document, Exhibit 4, as follows, was also issued:

DEPARTMENT OF MINES AND RESOURCES
IMMIGRATION BRANCH

Montreal, June 18th, 1945.

ORDER FOR DEPORTATION

The Immigration Act, Section 33

To Marie Alfred Fouquereaux de Marigny of Mauritius

This is to certify that you have this day been examined by a Board of Inquiry at Montreal, Quebec, a port of entry, and it having been established that you are not a Canadian citizen or a person holding Canadian domicile, you have been rejected (ordered deported) for the following reasons:

P.C. 23—Continuous Journey Regulation,
P.C. 695—Occupational Regulation,
P.C. 3016—Passport Regulation,
P.C. 1413—Contract Labour Regulation,
Section 3, ss. "C"—Physically Defective—

(Immigration Act and Regulations)
L. A. Chevrier
Chairman of the Board of Inquiry

Dated at Montreal, Que.,
this 18th day of June 1945.

This bears at its foot the following:
Received Order for Deportation
M. A. F. de Marigny.

In proceedings such as this the court is precluded from reviewing the findings of fact made by the Board of Inquiry; section 23; *Samejima* v. *The King* (1), per Lamont, J., at 650. But equally the applicant for a writ of habeas corpus may show that the proceeding of which he complains "has not been had, made or given in accord-

(1) [1932] S.C.R. 640 at 650.

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ance with the provisions of the Act"; ibid, page 647. Appellant before us attacked the above mentioned section on the ground that it was ultra vires Parliament, but we intimated on the argument that this submission was not, in our view, well founded.

It was contended for the appellant that if, as to any one of the five grounds mentioned in the above documents, such ground had no basis in fact or law, regardless of the validity of any other ground, it must be held that his detention is illegal. This contention is without weight. In my opinion if any ground exists which disentitles the appellant to entry, upon which the Board based its decision, this is sufficient.

By section 3 of the Act it is provided that:

No immigrant, passenger, or other person, unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to enter or land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called "prohibited classes":—

(i) Persons who do not fulfil, meet or comply with the conditions and requirements of any regulations which for the time being are in force and applicable to such persons under this Act;

By section 38 the Governor in Council is authorized whenever deemed necessary or expedient to:

(*a*) prohibit the landing in Canada or at any specified port of entry in Canada of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country, or prepaid in Canada;

By *P.C. 23,* passed on the 7th of January, 1914, it was provided that:

From and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen and upon a through ticket purchased in that country or prepaid in Canada.

Upon the expiration of his temporary permit appellant became an "immigrant" within the meaning of section 2 (h) of the statute.

It is not pretended that the appellant could comply with the provisions of this Order-in-Council or that he was a Canadian citizen or had Canadian domicile. In my opinion, therefore, the Board of Inquiry had good ground for ordering the deportation of the appellant.

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Appellant attacks the warrant under which his arrest was actually made on the ground that it is an informal document and does not comply with the formalities of the *Criminal Code*. No effect can be given to this contention. The *Immigration Act* does not lay down any requirements as to form in the case of a warrant.

The main contention on behalf of the appellant before us was that the document delivered to the appellant on the 18th of June, 1945, (Exhibit 4) is alone to be considered as the order for deportation and that it is in form insufficient and incapable of being acted upon for that reason as well as for the reason that it was not served upon the transportation company which brought the appellant to Canada as required by the provisions of section 33, s.s. 5, of the Act.

The subsection referred to provides that an order for deportation by a Board of Inquiry may be in form C in the schedule to the *Act* and that a copy of the order shall forthwith be delivered to the person affected and a copy served upon the representative of the transportation company which brought such person to this country. It is manifest that the document delivered to the appellant does not sufficiently contain the reasons for the decision, but when taken together with Exhibit 6, as I think may be done, the want is supplied.

It is objected however, although this ground was not pleaded, that as the one document only was delivered to the appellant, this was not sufficient service under the statute.

In considering this objection it is important to consider what took place at the conclusion of the taking of evidence before the Board. The appellant called the Chairman of the Board as his witness before the judge of first instance and through him placed in evidence both documents. The witness deposed in direct examination:

Q.—Voulez-vous déposer comme 1-4 une copie certifiée par vous de la décision rendue par le Comité d'enquête dans ce cas-là?

EXHIBIT 6—Decision of Board of Inquiry, dated June 18, 1945.

R.—Oui.

Q.—Maintenant cette décision-là est-ce que les conclusions auxquelles en est arrivée cette cour d'enquête ont été *lues* à de Marigny?

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R.—Oui.
Q.—Est-ce que l'ordre de déportation a été *lu* à de Marigny?
R.—Oui.

The "ordre de déportation" referred to in the last question above, is Exhibit 4. It is to be noted that the appellant's notice of appeal states that "I hereby appeal from the decision of the Board of Inquiry . . . whereby my application to land in Canada has been rejected, and I have been ordered to be deported *to the place in the country whence I came or to the country of my birth or citizenship*". It is Exhibit 6 and not Exhibit 4 which contains the *underlined* words.

It is plain therefore that in addition to the document actually delivered to him, the appellant had before him the second document when preparing his notice of appeal. In these circumstances I think there was sufficient service upon the appellant.

In *Samejima's* case (1) the appellant, a Japanese subject, had been taken into custody under an order of the Deputy Minister of Immigration on a complaint made that the appellant had effected entry "contrary to the provisions of section 33, subsection 7, of the said Act". An inquiry was held by a Board of Inquiry but neither the complaint nor a copy was before the Board or had been served upon the appellant. At the conclusion of the hearing an order of deportation was made, not in the statutory form, the reasons being stated in the same form as in the complaint mentioned above. On habeas corpus proceedings this order was quashed and the appellant released but he was subsequently re-arrested without further hearing on a later order of the Board, sufficient in form. The appellant again took habeas corpus proceedings but it was held by the judge of first instance and the Court of Appeal for British Columbia that he was legally detained. The appeal to this court was allowed and it was held that the Board was without jurisdiction to make the second or amending order once the first order had been quashed, although before that time the original order might have been amended to comply with the actual decision of the Board. In the circumstances of that case the majority of the Court was of opinion that while the appellant was still liable to

(1) [1932] S.C.R. 640.

proceedings under the *Act*, he had suffered prejudice before the Board in not having known what the ground of complaint against him was. The case is therefore obviously distinguishable from the case at bar.

As to the objection of lack of service of the order of deportation upon the transportation company, that, in my opinion, is an objection to be raised by the transportation company and not by the person seeking entry. Failure of such service cannot affect the validity of the order of deportation so far as it affects a person in the position of the appellant.

The appellant next complains that in Exhibit 6 he was ordered "to be deported to the place in the country whence he came or to the country of his birth or citizenship." He contends that by reason of section 39 the only place to which he could legally be deported was Cuba, whereas in fact at the time these proceedings were commenced he was being held for deportation to Great Britain and thence to Mauritius.

As to the alternative form of the order it is sufficient to say that the statutory form, Form C, so provides. Furthermore, by section 46 it is provided that every person ordered to be deported who has been brought to Canada by ship shall be conveyed "free of charge by the transportation company which brought him to Canada to the place in the country whence he was brought or to the country of his birth or citizenship". By section 39 it is provided that when any immigrant or other person is rejected or ordered deported and such person has not come to Canada by continuous journey from the country of which he is a native or naturalized citizen, but indirectly through another country "which refuses to allow such person to return or be returned to it" then the transportation company shall convey him to the country of which he is a native or naturalized citizen whenever so directed by the Minister or other official mentioned. Again, by section 45 it is provided that any person held at an immigrant station pending final disposition of his case and rejected shall "if practicable be sent back to the place whence he came on the vessel, railway train or other vehicle by which he was brought to Canada".

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It was obviously impossible in view of the disposition of the ship on which the appellant came to Canada, as mentioned above, to return him to Cuba on such ship and therefore section 45 cannot apply. Further, on his own evidence transportation to Cuba was not available and in addition the evidence for the respondent indicates that Cuba refused to accept his return. Accordingly, section 39 cannot apply. In the circumstances here present therefore the only country authorized by the Act to which the appellant could be deported was Mauritius and the instructions to consign him to that country are proper. There can be no room for objection to the statutory provisions themselves on any ground of extra-territoriality; 1932-33, cap. 39; *Co-operative Committee* v. *Atty.-Gen.* (1).

As to the appellant's contention that the right to enforce the order of deportation had been lost by failure to act upon it immediately, reliance is placed upon *In re Poll* (2), and *In re Ferenc* (3). I do not think it necessary to discuss either of these cases. Assuming they were rightly decided the facts in the case at bar do not bring it within anything decided in either of those cases. I see nothing in the evidence which supports the argument, if indeed such an argument would be tenable.

The only other contention of the appellant which requires notice is the submission that the appellant had the right to appear personally on the appeal to the Minister and that this was not accorded him. In my opinion the appellant had no such right. The difference between the statutory provisions as to the original hearing before the Board of Inquiry and those with regard to the appeal demonstrate this. It is clear under section 15 and 16 that the immigrant has the right to appear personally, to be represented by counsel and to adduce such evidence as he desires. When it comes to the appeal, however, it is provided by section 20 that the immigration officer shall forward within forty-eight hours after the filing of the Notice of Appeal, a summary record of the case to the Deputy Minister accompanied by his views thereon in writing. By section 21 the appellant is directed, pending the decision of the Minister, to be kept in custody unless released under bond. It is

(1) [1947] 1 D.L.R. 577 at 588.
(2) [1937] 3 W.W.R. 136.
(3) 71 C.C.C. 58.

quite plain in my opinion that these provisions do not contemplate the personal appearance of the appellant before the Minister.

In the result therefore, the appeal in my opinion fails on all grounds and should be dismissed with costs.

RAND J.:—The applicant is seeking to enter this country and it appears beyond question that his entrance is forbidden by Order in Council P.C. 23 of January 7, 1914 as follows:—

> From and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen and upon a through ticket purchased in that country or prepaid in Canada.

He raises several objections to the steps that have been taken against him, but the only one I think deserving of consideration is that no sufficient order for deportation has been served upon him.

On June 18, 1945 upon the conclusion of the enquiry into his request for admittance, during which the applicant, after declining to avail himself of counsel, disclosed the relevant facts, the Board announced its decision refusing permission on grounds, including that mentioned, which, admittedly, were fully explained to him. At the same time he was served with a formal order in which those grounds were set out in summary headings referring to the authority on which they were based. From that decision he appealed to the Minister, who after consideration on August 10, 1945 dismissed the appeal.

As early as May, 1946, the applicant was represented by counsel. In the pleading presented on the application for habeas corpus the order is challenged not because of any insufficiency in particulars of the grounds but because it did not give the direction for deportation in the precise language of the decision.

In the administration of the *Immigration Act,* what is to be looked for and required is a compliance in substance with its provisions. The case of *Samejima* v. *Rex* (1) shows that this Court will not hesitate to condemn "hugger-mugger" proceedings, as Sir Lyman Duff called them, or proceedings in which a defect in substance appears. In

(1) [1932] S.C.R. 640.

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this case the facts are not in dispute, and in relation to P.C. 23 no answer to the order has been suggested. That order has been at the disposal of counsel for almost two years, during which efforts have been made both to have it rescinded on considerations of "fairness" and to enable the applicant to obtain transportation or entry to the United States or to Great Britain. In these circumstances it would be trifling with the serious administration of such a law to hold that a lack of formal statement of particulars, if there is any, at this time constitutes a defect of substance in the proceedings. I have no hesitation in holding that such a ground is not now open to the applicant.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Marcel Gaboury* and *John E. Crankshaw.*

Solicitors for the respondent: *Gustave Adam* and *Guy Favreau.*

Solicitor for the Attorney-General of Canada: *Charles Stein.*

1948

*Nov. 18

1948

*Mar. 22

LEONARD JONES (DEFENDANT).....APPELLANT;

AND

JOHN MERLIN SHAFER, ADMINISTRATOR ESTATE JOHN SHAFER, DECEASED (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Negligence—Motor vehicle—Reasonable user of highway—Lighted flares set out on highway to mark broken down truck—Flares stolen after driver left for help—Police turned on marker lights—On coming motor car collided head-on in fog—Whether truck driver negligent—Whether nuisance created—Standard of care—Proximate cause of accident act of third party—Public Service Vehicles Act, R.S.A. 1942, c. 276, Reg. 1-10-2.

Held: reversing the judgment of the Appellate Division (1947 2 W.W.R. 49; 1947 4 D.L.R. 294) (Rand J. dissenting) that the appeal should be allowed.

*PRESENT:—Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

Per the Chief Justice and Estey J.: the appellant was properly using the highway when his truck broke down and he did not act contrary to law in leaving it with sufficient warning of its presence to the public. His duty was to exercise the care of a reasonable man under all the circumstances. He put out what upon the evidence was reasonable protection for those using the highway; that protection was deliberately removed by some person who had no regard whatsoever for the safety of the public. No duty is imposed upon a person to anticipate such contemptible conduct unless the circumstances justify that conclusion. They do not in this case.

Per Taschereau and Locke JJ.: It was not the failure of the appellant to take reasonable care which was the direct or proximate cause of the accident, rather was it (subject to what there is to be said as to the negligence of Shafer) the act of the thief "the conscious act of another volition" of the nature referred to by Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins,* 1909 A.C. 640 at 646.

Per the Chief Justice, Taschereau, Estey and Locke JJ.: If a nuisance was created and existed at the time of the accident it was created by the act of the unknown third party.

Per Rand J. (dissenting) The individual user of a highway is limited by what can be accorded all persons in similar circumstances and by the reconciliation of convenience in private and public interests. The truck, at the time of the accident was a nuisance dangerous to persons using the highway in the ordinary manner. If instead of removing it, means were taken to guard against the danger, they must be maintained at all events and be as effective as removal itself. When the exigencies of modern traffic bring about an unavoidable but exceptional use of the highway, the risk of potential danger becoming actual which it creates must be circumscribed in time and a duty arises to act reasonably, with modern aids, to prevent its realization. The duty here, was shown not to have been discharged.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming (O'Connor J. A. dissenting) the judgment of the trial judge (2) in favour of the plaintiff.

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

R. L. Fenerty for the appellant.

J. V. H. Milvain K.C. for the respondent.

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

ESTEY J.:—On the evening of December 7, 1945, the appellant was driving his truck, loaded with gasoline, northerly along the Calgary-Edmonton highway. Near

(1) [1947] 2 W.W.R. 49; [1947] 4 D.L.R. 294.

(2) [1947] 2 D.L.R. 449.

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the hamlet of Netook north of Olds he suddenly realized his left wheel was coming off. He directed his truck toward the east and came to a stop in about 75 to 100 feet and some 3 or 4 feet from the east shoulder of the road. Upon examining his truck he found the outer bearing of his left wheel gone, the brakes could not be operated and the truck could not be moved under its own power. Then with respect to the possibility of its being otherwise moved the learned trial Judge found:

> . . . I do not think under the circumstances here that the defendant could have secured the necessary equipment to do so (that is to move the truck), at least until the next morning.

The road at this point was about 27 feet from shoulder to shoulder and the truck as stopped left about 15 to 17 feet for the passage of vehicles on the westerly side thereof. Under these circumstances the appellant decided to go back to Calgary, procure the necessary parts and return the next morning. He put out two flares, one to the north and the other to the south of the truck, as required by *The Public Service Vehicles Act* and Regulations thereunder (1942 R.S.A., c. 276, Reg. 1-10-2). The evidence indicates that so long as these flares were burning they provided adequate warning. There is no suggestion that they were unsuitable for the purpose nor carelessly placed upon the highway. The learned trial Judge stated:

> With regard to the flares put out by the defendant, no doubt so long as they burned they provided a warning to motorists.

These flares were removed some time between 10 and 11 o'clock that night (between 2 and 3 hours after they had been put out) by some unknown person. The policeman and the appellant made a careful search to find any trace of these flares but none could be found. There is no question upon the evidence but that these flares were put out. They were seen burning by others after the appellant left the truck until some time around 10 o'clock. It was this contemptible act by one who had no regard for the safety of persons upon the highway that made the truck a dangerous hazard.

Sergeant Dunlop, a member of the R.C.M.P. from Olds who had been notified of the presence of this truck upon the highway without flares or lights, examined it at 11.30 p.m. He turned on the marker lights and left it that way

as he believed this provided sufficient protection to the travelling public. They were still burning when Sergeant Dunlop returned the next morning after the accident. Many persons had during the night passed the truck in question assisted by these marker lights.

The accident occurred on the morning of December 8th, as the learned trial Judge stated "before sunrise * * * in very foggy and frosty weather when visibility was poor." The deceased Shafer, driving alone, collided with the truck and was found dead in his automobile as a result of this collision.

It has been suggested the appellant might have done more than put out the flares. Something to like effect may often be said. The test, however, is not what might have been done, looking back after the event, but what a reasonable man would have done under the same circumstances as that in which Jones found himself. It was a cold clear night when Jones left the truck, and upon the evidence these flares had they remained in the position in which Jones placed them were, as found by the learned trial Judge, an adequate warning. The removal of the flares by the unknown person created a dangerous condition upon the highway and that act was the direct cause of this unfortunate accident.

The majority of the Appellate Court held that the appellant should have anticipated that these flares might have become ineffective either by accident or design. The appellant used due care in placing these flares upon the highway. He had heard of their being struck by vehicles "if they were left out too far" and he provided against that possibility by placing them "roughly two or three feet in from the centre line". There is no finding of fact, nor does a perusal of the evidence support such a finding, to the effect that a reasonable man in the circumstances would have anticipated the removal of these flares by either accident or by some person acting in complete disregard of human safety.

In *Rickards* v. *Lothian* (1), a tenant on the second floor sued the landlord for damage to his stock in trade caused by the plugging of a lavatory waste pipe on the fourth floor. The waste pipe had been maliciously plugged by

(1) [1913] A.C. 263.

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Estey J.

some unknown person. It was contended that "the defendant ought to have foreseen the probability of such a malicious act and to have taken precautions against it, and that he was liable in damages for not having done so." The Privy Council held that such was a question of fact in which there was no finding and that in any event the record disclosed no evidence to support such a finding.

In *Toronto Hydro-Electric Commission* v. *Toronto R.W. Co.* (1), a street car left by the defendant's servants standing upon a track was set in motion by some unknown person. Mr. Justice Middleton, with whom Riddell, J. agreed, stated at p. 472:

> Here the action of the trespasser who entered the car and set it in motion was "a fresh independent cause," which, under the circumstances, the defendants had no reason to contemplate.

In *Doughty et al* v. *Twp. of Dungannon* (2), the plaintiff's action against the municipality was founded upon his truck being injured when he attempted to cross a culvert on a slightly used and unimproved road. The day before the accident a driver, whose truck became mired in the mud near this bridge, took certain poles from the culvert to assist him in releasing his truck and did not replace them in the culvert. Middleton, J., after pointing out that the trial Judge had dealt with the case as turning upon the negligence of the defendant and the contributory negligence of the plaintiffs, at p. 685 stated:

> In the view I take of this case it is not necessary to consider either of these questions. The accident complained of by the plaintiffs was caused solely by the misconduct of the truck driver. It broke the chain of causation between the defendant's negligence, if there was negligence, and the accident to the plaintiffs, and so affords a defence to this action.

In *Geall* v. *Dominion Creosoting Co.* (3), the finding of the jury was to the effect that the employees of the Dominion Creosoting Company had negligently left four cars of the B.C. Electric Railway in such a position that they either anticipated or should have anticipated that the boys from a nearby school might do just what they did, release these cars and thereby cause damage. Under these circumstances the company was held liable.

The foregoing authorities emphasize again the principle that the intervening conscious act of a third party will

(1) (1919) 45 O.L.R. 470.
(2) [1938] O.R. 684.
(3) (1917) 55 C.R. 587.

break the line of causation and relieve the party who may be otherwise negligent of liability, unless to a reasonable man in the same circumstances that conscious act would have been foreseeable.

The case is distinguishable from *Clarke* v. *Chambers* (1), in that there the defendant acted without authority in wrongfully erecting a barrier across the road. This was removed by an unknown third person who left it in a position where the plaintiff passing along at night was injured. Cockburn, C.J., at p. 338 stated:

> For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen * * * If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible.

The appellant Jones was properly using the highway when his truck broke down and he did not act contrary to law in leaving it as above indicated with sufficient warning of its presence to the public.

It is not suggested that there is an absolute liability resting upon the appellant. His duty was to exercise the care of a reasonable man under all the circumstances. He put out what upon the evidence was reasonable protection to those using the highway; that protection was deliberately removed by some person who had no regard whatsoever for the safety of the public. The foregoing cases do not impose a duty upon a person to anticipate such contemptible conduct unless the circumstances justify that conclusion. The circumstances do not do so in this case.

Whether due care has been exercised remains in every case a question of fact, and compliance with the statutory requirement may or may not be sufficient. In this case the finding of fact, supported by the evidence, is to the effect that what the appellant did was sufficient at the time, but that it was later interfered with by a contemptible act of an unknown person which created the dangerous situation.

Nuisance is not pleaded nor was it dealt with at the trial. However, in the Appellate Division and in this Court the respondent contended that the appellant's truck upon the

(1) (1878) 3 Q.B.D. 327.

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highway constituted a nuisance. I do not think the law justifies the conclusion that one whose truck suddenly breaks down, as that of the appellant upon the night in question, and because it cannot be removed is left guarded by flares sufficient to warn a person exercising due care in the use of the highway, and which would have continued to burn throughout the night, creates a nuisance.

In *Moore* v. *Lambeth Waterworks Co.* (1), a fire-plug was lawfully placed about level with the asphalt. In the course of time by the wearing down of the asphalt the fire-plug protruded to a point that it caused the plaintiff to fall. Lord Esher, M.R. at p. 465 stated:

> Now the argument for the plaintiff really amounted to this, that whoever puts into a highway that which becomes from any cause a nuisance or dangerous to persons going along the highway, is liable to make compensation if it occasions injury to any person. But, to my mind, that doctrine has always been applied only where a thing has been put without authority in the highway.

See also *Maitland* v. *Raisbeck* (2).

It cannot be contended that the appellant acted contrary to law. He was lawfully using the highway when his truck broke down. He, with reason, concluded that it could not be moved and placed the flares as above described. These were removed. If a nuisance was created and existed at the time of the accident it was created by the act of the unknown third party.

The appeal should be allowed and the plaintiff's claim dismissed, with costs throughout.

The judgment of Taschereau and Locke JJ. was delivered by:

LOCKE J.:—There is but little dispute as to the facts in this case. On the evening of December 7, 1945, at about 7 o'clock the appellant was driving a Diamond T. oil truck heavily laden with gasoline and oil in a northerly direction on the public highway en route from Calgary to Innisfail: the weather was cold and clear: when he reached a point some 5½ miles north of Olds he discovered that the left rear wheel of his truck was coming off and brought the truck to a stop after endeavouring to place it as far as possible to the right of the centre of the highway: upon examination it was disclosed that the difficulty was

(1) (1886) L.R. 17 Q.B.D. 462. (2) [1944] 1 K.B. 689.

caused by the crushing of an outer bearing and other damage consequent upon this. It was impossible to move the truck further under its own power and the appellant proceeded to jack up the axle and place on the roadway two flares of the kind required to be used upon such occasions by regulations passed under *The Public Service Vehicles Act, cap.* 276, R.S.A. 1942. The flares used were of heavy 22 gauge metal having a capacity of 34 fluid ounces of oil and being 5 inches in diameter and of the same height and designed to burn from 13 to 16 hours; these were placed on the highway, one of them 100 feet to the rear of the truck and some 2 or 3 feet in from the centre line of the road, and one at the same distance in front of the truck and both were filled with kerosene taken from the load by the appellant before being placed there. While there was an elevator operator's house situate some 250 yards away, the appellant did not communicate with the people living there nor did he notify the police at Olds or take any other steps to warn traffic of the position of the truck upon the road: having obtained a lift he left the scene shortly before 8 o'clock and arrived in Calgary about 10 o'clock that night. There is ample corroboratory evidence of the placing of the flares: in addition to the evidence of other witnesses the wife of the elevator operator at Netook who was at her home observed them burning at 8 o'clock and again at 10 o'clock: at 11 o'clock, however, they had disappeared. On this point the learned trial Judge made the following finding:—

> The evidence satisfies me that Jones did put out flares as the Statute requires in such cases, but I am also satisfied that at the time Dench arrived on the scene at 11 p.m. the flares were not burning, and furthermore when the police officer arrived on the morning of the 8th no trace of the flares could be found, the presumption being that some person removed them from the highway before 11 o'clock. I think the evidence is clear that the flares disappeared before 11 o'clock on the night of the 7th.

And again:—

> With regard to the flares put out by the defendant, no doubt so long as they burned they provided a warning to motorists.

The witness Dench said that he had passed the truck at about 11 o'clock and at that time the flares were not there, the truck standing unlighted upon the roadway: he thereupon notified the R.C.M.P. at Olds, telephoned to the branch of his company at Red Deer in an endeavour to warn other traffic on the highway, and also left word

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at a coffee shop south of Olds where truckers were apparently in the habit of stopping. The evidence shows further that the police officer proceeded to the scene arriving there about 11.30 p.m. and found the position of the truck to be with its wheels straddling the most easterly of the shallow ruts which were on the most easterly half of the highway, the wheels on the right side of the truck being some 3 or 4 feet from the east shoulder of the road which was 27 feet in width. The officer broke into the truck and turned on the marker lights, these consisting of two red lights on the back, two on the front and three green ones over the cab, and in this condition the truck remained upon the highway until some time after the accident. While, according to the appellant, the night was clear when he left the scene it later became foggy and at the time Sgt. Dunlop of the R.C.M.P. arrived at the scene that night it was very foggy and the visibility was poor. At about 9.30 o'clock of the following morning one Rindall driving south came to the scene and found a Chevrolet coupe facing south upon the highway a short distance in front of the truck and in it the body of John Shafer. He reported the matter to Sgt. Dunlop who returned to the scene and found that the front of the coupe was approximately 8 feet distant from the front of the truck, the front end of the former vehicle was driven in, the radiator broken, two fenders smashed and there was other damage: apparently there had been a straight head-on collision of the car and the truck and the impact had driven the latter back from its former position a distance of some 8 feet: there were no skid marks but, from the fact that the wheels of the coupe were straddling the most easterly of the ruts on the easterly half of the highway, the officer inferred that Shafer had been driving on that side of the road and had pulled slightly to the left immediately before the collision. He, it appears, had stopped overnight at a hotel in Red Deer which lies some distance to the north but there was no evidence available either as to the time he left that place or as to the exact time of the accident. From the fact, however, that when Sgt. Dunlop arrived at the scene at 9.30 o'clock he found the body to be quite warm, it may be inferred that it was not long prior to this that the accident had occurred. The fog had apparently continued during

the night and when the officer arrived at the scene on the following morning it was still foggy but the marker lights were burning and he could see the truck at a distance of from 200 to 300 feet. The officer thought there had been more fog earlier in the morning: however, the distance at which the truck with its marker lights would have been visible to Shafer at the time of the accident is left to conjecture.

The learned trial Judge in finding that the appellant had been guilty of negligence causing the accident said that he was satisfied that "the defendant could have done more than he did" but, with respect, this is hardly the true test in deciding the question of his liability: it was the duty of the defendant to take reasonable care under the circumstances to avoid acts or omissions which he could reasonably foresee would be likely to cause injury to persons driving upon the highway. The dangers which the defendant was required to take steps to avert were those which, in the language of Lord Wright in *Hay* v. *Young,* 1943 A.C. (1) at p. 111, "the reasonable hypothetical observer could reasonably have foreseen": or, as expressed by Blackburn, J. in *Smith* v. *London & South Western Ry. Co.* (2) at p. 21, what the defendant ought to have anticipated as a reasonable man. The question is not whether the appellant did everything that was possible but rather whether he omitted to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would have done or did something which a prudent and reasonable man would not do (*Blyth* v. *Birmingham Water Works* (3), at 764, Alderson, B.). There is no suggestion here that the breakdown of the truck was due to any fault of the appellant: when it occurred he succeeded in guiding the vehicle into a position where the most easterly wheels were some 3 or 4 feet from the easterly extremity of the roadway: the hard surface of the road was 27 feet wide and the west side of the truck was some 15 or 17 feet distant from the westerly side of the roadway, so that there was ample room for other vehicles to pass. The surface of the road was covered with snow but this was

(1) [1943] A.C. 92.
(2) (1870) L.R. 6 C.P. 14.
(3) (1856) 11 Ex. 781.

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hard-packed and was only one or two inches in depth. In these circumstances the appellant placed the flares in a position where they would give adequate warning to traffic in either direction. It was clear at the time and he says that he did not encounter any fog while en route to Calgary: however, the flares were admittedly effective as a warning to persons driving on the highway during a fog. They were freshly filled with oil and would have burned for from 15 to 16 hours and, assuming that the accident occurred around 8 o'clock on the following morning, would have been burning at that time had they not been removed in the meantime. In fact the flares were stolen at some time between 10 o'clock that evening, when they were seen to be burning by Mrs. Brownell, and 11 o'clock, when Dench arrived at the scene. It is not suggested by the evidence that there was any reason why the appellant should have anticipated the theft. It was foggy between 10 and 11 o'clock of the night in question and at that time the marker lights on the truck were not burning, so that it would be apparent to a thief that the act of removing the flares would endanger the safety of any person driving north upon the highway. The cost of the flares was apparently $4.00 when purchased new. That anyone would jeopardize the lives of people upon the highway by stealing articles of such slight intrinsic value is a contingency which, in my opinion, the appellant could not reasonably have foreseen. It was not the failure of the appellant to take reasonable care which was the direct or proximate cause of the accident, rather was it (subject to what there is to be said as to the negligence of Shafer) the act of the thief, "the conscious act of another volition" of the nature referred to by Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins* (1) at 646.

It is contended for the respondent that the appellant could have taken other steps such as moving the truck further to the right side of the road, notifying the mounted police officer at Olds and leaving word as to the position of the truck at the coffee shop south of Olds so that other travellers might be warned. As to the former, the loaded truck was some 12 tons in weight and slightly in excess of 7 feet wide and there was no equipment available to remove

(1) [1909]) A.C. 640.

it from the highway. The evidence does not disclose the distance from the easterly boundary of the travelled portion of the roadway to the ditch, but I would infer that to have removed the truck completely from the travelled portion would have involved running it in to the easterly ditch and that anything short of this would have left a substantial portion of the vehicle upon the travelled roadway, so that the accident would not have been thus averted. As to the failure to notify the police officer, this was done by Dench at about 11.30 p.m.: he also notified the people at the coffee shop and telephoned a warning to Red Deer: nothing, therefore, resulted in consequence of the appellant's failure to do any of these things.

I think that the damages occasioned by the criminal act of a third person under the circumstances of this case are too remote for recovery.

As pleaded the action is one for damages for negligence and it was dealt with by the learned trial Judge in this manner. However, when the matter came before the Appellate Division the respondent as an alternative to the claim in negligence contended that in any event there was liability in nuisance. This issue, in my opinion, is not raised by the Statement of Claim: the allegation is that the defendant "unlawfully, negligently and recklessly" parked and abandoned the truck. The essence of a claim in nuisance such as is now sought to be asserted is a wrongful obstructing of the highway, thereby depriving the plaintiff of some right of passage which he is entitled to assert. An allegation that the defendant "unlawfully" parked and abandoned the truck does not properly raise the issue and the course of the trial, during which no mention was made of a claim in nuisance, confirms my view that it was not intended to assert such a claim. The matter was, however, raised before the Appellate Division: Harvey, C. J. A. mentions it but as he agreed with the trial Judge that the defendant was liable in negligence found it unnecessary to deal with the question. If I were of the opinion that the defendant would have tendered further evidence had the issue of nuisance been raised by the pleadings I would not consider that I was at liberty to deal with it: as it is I think nothing further could be added to the evidence which would assist in determining the issue.

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In determining whether there was here an actionable nuisance, it is necessary to determine whether the use to which the highway was put by the defendant was reasonable under the circumstances, and this question is to be distinguished from the question as to whether the defendant took reasonable care which must be determined on the count for negligence. As pointed out by Lord Greene, M. R. in *Maitland* v. *Raisbeck* (1) at 693, if the case of *Ware* v. *Garston Haulage Co.* (2) decided that when a vehicle broke down on a public highway a nuisance was ipso facto created it cannot be supported. In *Herring* v. *Metropolitan Board of Works* (3) at 525, Byles J. said in part:—

> As a general rule, all the Queen's subjects have a right to the free and uninterrupted use of a public way: but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, re-building, or repairing houses abutting on the public way in populous places, hoardings are frequently erected inclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances.

This statement of the law was criticized by Fletcher-Moulton, L.J. in *Lingké* v. *Christchurch Corporation* (4) at 608, but in *Harper* v. *Haden* (5) Romer, L.J. at 318 expressed the view that the statement quoted was an accurate statement of the law and at p. 319 he expresses his agreement with the statement of Vaughan Williams, L.J. in *Lingké's* case at p. 602, to this effect:—

> But if the user that you are making is of such a character that the people generally who use that road will find it necessary to do this, that, and the other, whether it is to stop for a time on the highway, or any of the other matters which are mentioned by Byles J. in his judgment, this is no legal obstruction. You must remember these instances begin with carts and waggons stopping at the doors of shops and warehouses. Then he takes coal-shoots; then he takes what to my mind is a very much wider instance but equally true: "So, for the purpose of building, rebuilding, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way." These are the sort of things that it is recognized people may do in

(1) [1944] 1 K.B. 689.
(2) [1944] 1 K.B. 30.
(3) (1865) 19 C.B. (N.S.) 510.
(4) [1912] 3 K.B. 595.
(5) [1933] 1 Ch. 298.

respect of the highway which, although they physically obstruct, do not constitute an obstruction of the King's highway either for the purpose of indictment or for the purpose of civil action.

In *Harper's case* at p. 317 Romer L.J. points out that no member of the public has an exclusive right to use the highway: he has merely a right to use it subject to the reasonable user of others and if that reasonable user causes him to be obstructed he has no legal cause of complaint. It was, in my opinion, a reasonable user of the highway on the part of the appellant in the circumstances to leave his truck drawn up on the easterly side of the road amply protected by warning lights while he went for the necessary repairs, even if this entailed leaving it there overnight. It cannot, I think, be suggested that in these circumstances if the driver of another vehicle had collided with the standing truck at any time prior to the time at which the flares were stolen he could have recovered in nuisance against this appellant. The truck so protected was not a danger to anyone nor was the use of the highway obstructed, except to the extent that vehicles travelling north would require to draw to the left of the truck in passing. It was again the act of the thief in stealing the flares that rendered the truck dangerous to persons lawfully using the highway. In *Salmond on Torts,* 10th Ed. p. 234, commenting on the decision in *Ware's* case, the learned author says:—

> It may be doubted, however, whether a man who lawfully brings his vehicle on to the highway in a roadworthy condition can be properly said to have created a nuisance by a positive act of misfeasance if through no fault of his the vehicle breaks down and after he has parked it by the roadside the lights go out without fault on his part. Such a case would seem analogous rather to those cases with which we shall deal later which come under the head of continuance of a nuisance.

A case of the nature referred to is *Barker* v. *Herbert* (1). In *Sedleigh-Denfield* v. *O'Callaghan* (2) at 904, Lord Wright said in part:

> Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise.

(1) [1911] 2 K.B. 633. (2) [1940] A.C. 880.

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But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it.

The appellant did not become aware that a thief had made away with the flares until after the accident had occurred on the following morning and as he could not, in my opinion, reasonably foresee in the circumstances of this case that they would be stolen, it cannot be said that he should have become aware of it in time to abate the nuisance (if indeed the truck with its numerous marker lights could be so classified) before the accident occurred.

The appeal should be allowed and the action dismissed: if the appellant asks for costs they should follow the event.

RAND J. (dissenting):—The question raised in this appeal is two-fold: had the truck, left on the highway overnight from 7 p.m. until 11 a.m. the next morning, become a nuisance at the time of the collision; and if not, had the owner exercised the care he should have during that period?

The highway is primarily for the purpose of passing and re-passing; for automobiles it is neither a storage place nor a garage. The individual user is limited by what can be accorded all persons in similar circumstances and by the reconciliation of convenience in private and public interests.

It must then be within the standard of reasonableness. As Lord Greene in *Maitland* v. *Raisbeck* (1) at p. 691 put it:

> Every person who uses the highway must exercise due care, but he has a right to use the highway, and, if something happens to him which, in fact, causes an obstruction to the highway, but is in no way referable to his fault, it is wrong to suppose that ipso facto and immediately a nuisance is created. A nuisance will obviously be created if he allows the obstruction to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot turn it into a nuisance. It must depend on the facts of each case whether or not a nuisance is created.

In the circumstances here, the owner of the truck should, I think, have shown clearly that the fifteen hours during

which this large vehicle occupied the narrow travelled portion of an icy roadway was not an unreasonable length of time to enable him either to remove it or to get it back into ordinary use on the highway. But so far from that, the facts prove the contrary. There was a telephone within 300 yards, the parts needed for the wheel were small and available in Calgary, they could have been brought to the truck, at the most, in three or four hours, and they could have been put in place and the wheel made fit for service as was done the next morning in the course of minutes. This, no doubt, would have taken a bit of effort and trouble outside the ordinary course. But is reasonableness in such conditions to be measured in terms of the ordinary rhythm and schedule of things? The driver would have had to walk 250 yards and endure probably the slower tempo of a rural telephone connection; instead of that he hailed a truck and was driven to Calgary; he would have been at a cold job out of doors and awake possibly for the greater part of the night before reaching a parking place, a garage or his destination; instead of that, he went home and took his ordinary sleep: there would have been some scurrying around in Calgary to get the stock room, where such parts were sold, opened, perhaps even some persuasion of the supply man to do that, but the latter too was left to follow his nightly habit without disturbance: and there would have been the expense of sending the parts out by automobile at night, perhaps greater than in the morning: all these and other equivalent deviations were avoided. But reasonable people meet emergencies by resorting to just such practical and homemade means and where the public danger of these days from obstructions in highways is balanced against such relatively paltry inconvenience of the individual, I cannot doubt that the individual must give way.

The truck, then, at the time of the accident constituted a nuisance dangerous to persons using the highway in the ordinary manner. It was the duty of the owner to have it removed, but if instead of that, means were taken to guard against its danger, then those means must be main-

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tained at all events, and it is no answer that a third person removed them; they must be kept as effective as the removal itself would be.

Viewing the question in the second aspect, the concept nuisance as here used embodies the ideas of both an unwarranted interference with the exercise of rights of passage on a highway and an unwarranted condition of danger to that exercise. In the latter sense, time is a material ingredient in the original situation out of which the danger arises: the longer it continues the greater the number of persons exposed, and the greater the possibility that a harmful characteristic will emerge or be aggravated, as exemplified here. When, therefore, the exigencies of modern traffic bring about an unavoidable but exceptional use of the highway, the risk of potential danger becoming actual which it creates must be circumscribed in time and a duty arises to act reasonably, with the aids which the same modernity has brought into existence, to prevent its realization. Apart from the steps already mentioned, the driver, for instance, could either by himself or by a person in the neighbourhood have kept an indoor watch on the flares and have set up substitute warnings on the roadway when they had disappeared. All night driving is ordinary and usual in these days and the enhanced danger of obstructions especially in winter road conditions cannot be offset by a tender regard for the amenities of regularity in personal habits. The duty, therefore, resting upon the driver, was shown not to have been discharged.

I would dismiss the appeal with costs.

Appeal allowed and action dismissed with costs throughout.

Solicitors for the appellant: *Fenerty, Fenerty & McGillivray.*

Solicitors for the respondent: *Shouldice, Milvain & MacDonald.*

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GUARANTY TRUST COMPANY OF NEW YORK. CHARLES E. ROACH, SIDNEY MATTISON (PETITIONERS) } APPELLANTS;

*Oct. 29, 30, 31.

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AND

*April 8

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

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

Will—Succession duties—Property transmitted in trust—Net revenues to life beneficiaries—Usufruct—Life rent—Endowment—Quebec Succession Duty Act, S.R.Q. 1941, c. 80, s. 3 (8), 13—Arts. 443, 449, 486, 981a, 1787, 1788, 1901, 1902 cc.

The appellants are the trustees of the estate of the late C. B. Roach, of New York of which approximately one-third was situated in the Province of Quebec. By his will, the testator conveyed to the trustees the ownership of his estate and gave the net revenues to three life beneficiaries. After the death of the three beneficiaries, the revenues are to be paid to charitable institutions. The Province of Quebec assessed the duties payable as if the three beneficiaries were receiving as owners. The Superior Court held that this was a case of life rent and reduced the amount of duties (s.s. 8 of s. 3). The majority of the Court of King's Bench held the view that this was a case of usufruct and that the duties payable should be calculated as if the usufructuary received as absolute owner (s. 13).

Held: The appeal should be allowed with cost.

Per Rand, Estey and Locke JJ.:—This is not a case of usufruct as the beneficiaries have only a personal right against the trustees and not a real right in the property.

Under sec. 3 of the Quebec Succession Duty Act, what is transmitted is the ownership, usufruct or enjoyment, but what is liable to duties is each individual transmission of whatever nature it may be.

The contention that once any form of enjoyment is transmitted, the property out of which it arises, in its entirety, becomes liable to the tax, and that it is the first enjoyment that controls the rate of taxation, rejected. When these bequests of the revenue from the sums set aside are made to the legatee, each legacy becomes a subject of taxation, and the periodic payments must by some means of estimation be brought to an attributed capital value.

Semble, it is a life rent within the meaning of ss. 8 of sec. 3, for what is to be looked for is the genus of the particular modes of enjoying the property mentioned which is intended to be brought within the scope of the subsection.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

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Per The Chief Justice and Taschereau J. (dissenting):—This is not a case of a life rent because the amount is not certain, fixed and determined.

It is not a case of usufruct as the beneficiaries have not a real right in the property. They have neither the possession nor the administration and therefor do not have to draw an inventory, to give security and cannot bring action for the preservation of the property.

The beneficiaries have only a personal right in the revenues, which constitutes a simple legacy of revenues.

Section 13 of the Quebec Succession Duty Act indicates only by whom and how the duties will be payable and it does not affect the provisions of sec. 3 which stipulates that the duties payable are not based on the value of the enjoyment but are imposed on the total value of the property transmitted.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, province of Quebec (1), reversing (Barclay and McKinnon JJ. dissenting) the judgment of the Superior Court.

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

W. B. Scott, K.C. and *Jacques Courtois* for the appellants.

Antoine Rivard, K.C. and *Guy Hudon, K.C.* for the respondent.

The dissenting judgment of the Chief Justice and of Taschereau J. was delivered by:

TASCHEREAU, J.—Les appelants sont les exécuteurs testamentaires et fiduciaires de Charles Belden Roach, de New-York, décédé le 25 juillet 1942. Ce dernier a laissé une fortune considérable, évaluée à $1,574,908.78, dont $502,-825.24 dans la province de Québec. Son testament, en date du 1er juillet 1942, et signé devant témoins, à New-York, comprend plusieurs legs particuliers, mais les clauses les plus importantes, qui font l'objet du présent litige sont les suivantes:

FOURTH: I give and bequeath to my Trustees hereinafter named: the sum of THIRTY THOUSAND ($30,000.) DOLLARS IN TRUST, to invest and reinvest the same and collect the income therefrom, and pay over the net income quarterly during her lifetime, to MARGARET MORRISROE who has been employed in my family for many years, in appreciation of her faithful services. If in any year the net income from this Trust Fund shall be less than TWELVE HUNDRED ($1,200)

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DOLLARS, then I direct my Trustees in addition to the income, to pay to the said MARGARET MORRISROE such portion of the principal of this Trust Fund as shall be necessary to bring the total payments to her in each year to the sum of TWELVE HUNDRED ($1,200) DOLLARS. Upon her death, I direct that the principal of this Trust as it shall then be constituted, shall be added to and administered as part of the principal of the JOHN ROACH TRUST FUND and the income therefrom paid and distributed in accordance with the provisions of the Trust created by ARTICLE TWELFTH of my Last Will and Testament.

FIFTH: I give and bequeath to my Trustees hereinafter named, the sum of THIRTY THOUSAND ($30,000) DOLLARS IN TRUST, to invest and reinvest the same and collect the income therefrom, and pay over the net income quarterly during her lifetime, to KATE CONLON who formerly for many years was in the employ of my family, in appreciation of her faithful services. If in any year the net income from this Trust Fund shall be less than TWELVE HUNDRED ($1,200) DOLLARS, then I direct my Trustees in addition to the income, to pay to the said KATE CONLON such portion of the principal of this Trust Fund as shall be necessary to bring the total payments to her in each year to the sum of TWELVE HUNDRED ($1,200) DOLLARS. Upon her death I direct that the principal of this Trust Fund shall be added to and administered as part of the principal of the JOHN ROACH TRUST FUND and the income therefrom paid and distributed in accordance with the provisions of the Trust created by ARTICLE TWELFTH of this my Last Will and Testament.

ELEVENTH: All the rest, residue and remainder of my estate, real and personal wheresoever situated, including any of the foregoing bequests which may lapse (excepting therefrom however, the money and property in the possession of the Trustees under the Will of Sarah E. McPherson which assets are hereinafter given and appointed to my Trustees for the purposes of the JOHN ROACH TRUST FUND) I give, devise and bequeath to my Trustees hereinafter named in trust, to invest and reinvest the same and collect the income therefrom and to pay the net income therefrom semi annually or oftener, to CHARLES EDWARD ROACH (son of my deceased cousin, JOHN N. ROACH) of Akron, Ohio, during his lifetime and upon his death, the principal thereof as it shall then be constituted shall be added to and administered as part of the principal of the JOHN ROACH TRUST FUND and the income therefrom paid and distributed in accordance with the provisions of the trust created pursuant to ARTICLE TWELFTH of this my Last Will and Testament.

TWELFTH: It is my desire to create a Trust Fund for benevolent, charitable and educational purposes to be known in memory of my grandfather as the JOHN ROACH TRUST FUND the net income of which shall be disbursed as hereinafter in this Article Twelfth provided. To that end:

A) I appoint, give, devise and bequeath to my Trustees hereinafter named, to be held by them in Trust upon the trusts and for the uses and purposes hereinafter in this Article Twelfth set forth, all property, investments and money over which I have the power of appointment under the Will of my dear aunt Sarah E. McPherson and all the property and money which shall, prior to my death, have become distributable to me out of the principal or income of any trusts under the said Will of Sarah E. McPherson but which shall, at the time of my death, be in the possession of the Trustees under said Will; and

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B) I direct that after the deaths of the respective life tenants, my Trustees hereinafter named, shall continue to hold in Trust upon the trusts and for the uses and purposes hereinafter in this Article Twelfth set forth, the principal of the Trusts created pursuant to the foregoing Articles FOURTH, FIFTH and ELEVENTH of this my Last Will and Testament.

THIRTEENTH: I hereby nominate, constitute and appoint as Executors of and as Trustees under this, my Last Will and Testament, GUARANTY TRUST COMPANY OF NEW YORK, CHARLES EDWARD ROACH of Akron, Ohio, and SIDNEY MATTISON of Great Neck, Long Island, New York.

FOURTEENTH: To my Executors as such, and to my Trustees as such, I give full power to sell and dispose of any and all real and personal property of which I may be possessed to the time of my death, at public or private sale, at such prices and upon such terms as to cash or credit as to them may seem best, and to deal with, and otherwise dispose of the same. I further authorize my Executors and my Trustees to retain any real estate or any securities belonging to me at the time of my death which may come into their hands hereunder, or, in their discretion, to sell the same or any part thereof. I particularly give to my Executors complete discretion as to the time, place and manner of sale of any jewelry or other valuable articles of personal property which I may own and of any undivided interest which I may own in real estate.

FIFTEENTH: I direct that my Trustees hereunder shall not be limited to any class of securities or investments provided by any statute or rule of court for the investment of trust funds provided, however, that their investments shall be governed by the following rules:

(*a*) No investment shall be made in the securities of any company which has not been in existence for at least two years preceding investment;

(*b*) Not more than two per cent (2%) of the principal of the total trust funds as they shall at the time of investment be constituted, shall be invested in the securities of any one company;

(*c*) Not more than ten per cent (10%) of the amount of the principal of the total funds as they shall at the time of investment be constituted, shall be invested in companies coming within any one of the following classifications, namely: chemical, transportation, mining, oil, mercantile, textile, manufacturing, building, supplies, steel metallurgical (other than steel), banking, food-stuffs, automobile manufacturing, rubber, automobile accessories, amusement, railroad equipment, household equipment and not more than ten per cent (10%) in companies of any other classification of industry.

(*d*) Investment may be made only in common stocks of companies of the United States of America or a country of the British Empire.

SIXTEENTH: I direct that no one of my Executors or Trustees shall at any time or place be required to give any bond or other security for the proper performance of his duty as such Executor or as such Trustee and I direct that each of my Executors and Trustees shall be liable only for his own wilful wrongful act, and not for any error of judgment or for the act or omission of any co-Executor or co-Trustee.

Parmi l'actif du testateur, se trouvaient dans la province de Québec, 10,000 actions communes de l'International Nickel Company; $157,481.79 en dépôt à le Banque de

Montréal, à Montréal, et $50,343.75, également en dépôt à la Banque de la Nouvelle-Ecosse, à Montréal.

Le 11 février 1943, les appelants, en leur qualité d'exécuteurs testamentaires et fiduciaires ont reçu du percepteur des droits de Succession, un compte au montant de $163,926.83. En établissant ce compte, le Gouvernement de la province de Québec a prétendu que le montant des droits successoraux devait être payé, comme si Margaret Morrisroe et Kate Conlon recevaient *comme propriétaires,* chacune la somme de $30,000 ($33,000 en fonds canadiens) dont elles ne doivent toucher cependant que le revenu durant leur vie; et comme si Charles Edward Roach recevait, comme propriétaire également, le résidu de la succession, quand en réalité, en vertu des termes du testament, il n'en a que la jouissance.

Les appelants ont payé ce montant sous protêt, et au cours du mois de novembre 1943, ils ont institué des procédures contre l'intimé, pour réclamer la somme de $80,601.36, qu'ils allèguent avoir été illégalement perçue par le Gouvernement de la Province.

L'honorable Juge Sévigny a maintenu la Pétition de Droit, jusqu'à concurrence d'une somme de $62,313.17, mais la Cour du Banc du Roi (1) (messieurs les Juges Barclay et MacKinnon dissidents), a rejeté la réclamation.

La Cour Supérieure en est arrivée à la conclusion que les légataires Morrisroe, Conlon et Charles Edward Roach étaient des crédit-rentiers, ayant droit à un revenu viager, et que la taxe devait être payée suivant les dispositions de la *Loi des Successions, Statuts 1941, chap. 80,* art. 3, para. 8, qui se lit ainsi:

> Les rentes, viagères ou autres, et dotations seront capitalisées et estimées au montant requis, à la date du décès, par une compagnie d'assurance sur la vie, pour assurer une rente ou dotation de pareille somme.

C'est-à-dire, qu'au lieu de taxer les légataires comme propriétaires absolus du capital dont ils jouissent, le Gouvernement de la province de Québec, vu les termes du testament, aurait dû, en obtenant le chiffre d'une compagnie d'assurance, capitaliser le montant requis pour payer les rentes respectives, en tenant compte de l'âge des héritiers.

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Ceci évidemment aurait substantiellement réduit le montant des droits. Mais la Cour d'Appel (1) a vu dans les dispositions testamentaires du défunt, non pas une *rente* payable aux légataires, mais des *usufruits,* qui justifiaient le Percepteur du Revenu, de calculer les droits exigibles, comme si les usufruitiers recevaient en qualité de *propriétaires absolus. (S.R.Q. 1941, chap. 80, art. 13.)*

La question qui se pose est donc de savoir quelle est la nature exacte des legs faits aux trois héritiers, par les termes mêmes du testament. S'agit-il de rentes, d'usufruits, ou d'autres formes de legs sujets au prélèvement d'un impôt?

Il est important de signaler en premier lieu, que ce testament, quoique fait à New-York, où s'est aussi ouverte la succession, doit être cependant interprété suivant les lois de la province de Québec, car la loi étrangère n'est ni alléguée, ni prouvée. Il peut se résumer ainsi: Le *de cujus,* après avoir pourvu à quelques legs particuliers, abandonne, cède et transporte sa fortune à des fiduciaires, qui sont les appelants dans la présente cause, et leur enjoint de payer le *revenu net* de $30,000 à Margaret Morrisroe, ainsi que le *revenu net* d'une pareille somme à Kate Conlon, mais dont le minimum ne devra jamais être inférieur à $1,200 annuellement. Si l'intérêt de l'argent était insuffisant, les fiduciaires sont autorisés à combler à même le capital. A la mort des deux bénéficiaires, le revenu du capital, dans les deux cas, est distribué comme le reste du *corpus général* de la succession. Quant au résidu de la totalité du revenu, il doit être versé par les fiduciaires à Charles Edward Roach, jusqu'au moment de son décès, date où il doit être distribué à des institutions de charité, le capital restant toujours entre les mains des fiduciaires.

Les fiduciaires sont investis de pouvoirs quasi-illimités. Ils ont seuls le droit de vendre les biens légués dont ils sont les dépositaires, par vente publique ou privée, aux prix et aux termes qu'ils le jugeront à propos; sauf quelques restrictions, ils ont la liberté la plus complète de placer tous les biens de la succession; et à leur discrétion, ils sont les seuls maîtres de l'administration du capital qui leur est confié.

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Ils ne sont pas obligés de fournir de cautionnement, et ils ne peuvent être tenus responsables que de leurs fautes volontaires. En un mot, ils gèrent sans l'intervention de quiconque, l'actif qui leur est confié, et peuvent même refuser au légataire le privilège de s'immiscer dans la conduite du patrimoine, qu'ils sont seuls chargés de rendre productif. Au contraire, les droits des légataires sont bien restreints. Ces derniers pourraient sans doute intervenir, si par la faute volontaire des fiduciaires, les revenus auxquels ils ont droit étaient mis en péril; mais là se limitent leurs droits, en outre de celui de réclamer la part annuelle qui leur échoit.

Cette part qui revient aux légataires, peut, évidemment, varier d'année en année. Leur revenu n'est pas fixe, déterminé, précis. Il est naturellement soumis à diverses contingences, et il augmentera ou diminuera selon que les placements rapporteront davantage, ou donneront un moindre rendement. Le choix des valeurs fait par les fiduciaires, la variation et l'instabilité des conditions financières et économiques dans le monde, sont autant de facteurs qui influenceront, et modifieront dans un sens ou dans l'autre, le montant dont les légataires pourront bénéficier chaque année.

La situation de ces héritiers peut-elle donc être assimilée à celle de crédit-rentiers? Peut-on dire qu'au sens des lois de la province de Québec, le testateur a voulu qu'une *rente* leur fût servie leur vie durant, comme le prétendent les appelants?

Je ne le crois pas, et je ne puis trouver dans ces libéralités du testateur les caractéristiques que la loi, la jurisprudence et les auteurs ont attachées à la *rente viagère.* Il est bien vrai, tel que l'autorise l'article 1901 C.C. que le montant fait payable aux bénéficiaires, l'a été par testament, et que, tel que le veut également l'article 1912 C.C., l'obligation qu'ont les fiduciaires de payer s'éteindra à la vie naturelle des personnes qui reçoivent les paiements; mais ces deux conditions ne sont pas suffisantes pour qu'il y ait *rente viagère.* Il faut que le montant versé aux récipiendaires soit *certain, fixe* et *déterminé.* Le *Code* ne le dit pas expressément, mais ses articles contiennent implicitement cette condition essentielle, et il est d'ailleurs conforme à l'économie de la loi qu'il en soit ainsi. La rente viagère est une créance

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personnelle du crédit-rentier contre le débiteur, et elle peut être constituée non seulement à titre gratuit comme dans le cas qui nous occupe, mais aussi à titre onéreux. Dans l'un ou l'autre cas, dit l'article 1910 C.C., elle peut être stipulée payable d'avance, ce qui suppose nécessairement, un montant déterminé. En vertu de l'article 1914 C.C., lorsqu'un immeuble hypothéqué au paiement d'une rente viagère est vendu par un décret forcé, les créanciers postérieurs ont droit de recevoir les deniers provenant de la vente, en fournissant des cautions suffisantes que la rente continuera d'être payée. Si ces cautions ne sont pas fournies, le credit-rentier a droit de toucher une somme égale à la valeur de la rente, au temps de la collocation. Et, nous dit l'article 1915 C.C., le valeur de la rente viagère est estimée à un montant qui doit être suffisant pour acquérir d'une compagnie d'assurance sur la vie, une rente viagère de *pareille somme*. Comment une compagnie d'assurance pourrait-elle indiquer un montant nécessaire, étant donné l'âge du crédit-rentier, pour racheter une rente, sans connaître le montant annuel de cette rente?

Que le montant annuel versé au crédit-rentier doit être fixe, ne me semble pas faire de doutes. C'est d'ailleurs ce qu'enseignent les auteurs. Je n'en citerai que quelques-uns, ainsi qu'une décision de la Cour de Cassation:

M. Proudhon, dans son Traité "du Domaine de la Propriété et de la Distinction des Biens", Vol. 1, dit ce qui suit à la page 250:

> La rente viagère est communément l'effet d'un contrat synallagmatique et aléatoire (1964) par lequel celui qui veut l'acquérir livre un capital en argent, ou des choses soit mobilières, soit immobilières (1968), sous la condition que celui qui les reçoit paiera au bailleur, et durant la vie de celui-ci seulement, un *intérêt annuel au taux qu'il plaît aux parties de fixer.*

Boileux, tome 6, page 545, exprime l'opinion suivante:

> Le débi-rentier doit payer les arrérages de la rente tels qu'ils ont été *fixés* par le contrat de constitution, et selon les modes qui ont été convenus.

Troplong, dans son "Droit Civil Expliqué" au Volume du Dépôt et du Séquestre et des Contrats Aléatoires, dit ce qui suit à la page 387:

> C'est que la rente viagère, sous le rapport de la qualité du revenu qu'elle procure, est absolument semblable à la rente constituée, si ce n'est qu'elle est périssable, tandis que la rente constituée est perpétuelle. Ainsi

donc, de même que la rente perpétuelle, elle doit consister en *une somme fixe en argent,* ou en *une quantité déterminée de fruits,* annuellement payable en un ou plusieurs termes Le mot 'rente', bien que la grammaire le fasse dériver de *reditus,* qui embrasse d'une manière générale tout revenu quelconque des choses, n'a pas une signification si étendue dans la langue du Droit. Il se prend en jurisprudence pour une redevance ou une prestation périodique et cessible, réduite à une quantité *fixe, précise, déterminée.*

Le même auteur, à la page 443 dit aussi ce qui suit:

De ces mêmes principes découle une autre conséquence inverse de celle-ci: c'est que le créancier doit se contenter de la *rente fixée a priori,* quand même l'événement viendrait à prouver plus tard, par le déclin précipité de sa santé, que la rente aurait pu être réglée à un taux plus élevé.

Paul Pont, Droit Civil "Des Petits Contrats", Vol. 1, 2è éd., s'exprime ainsi à la page 375:

Les arrérages, ici, de même que ceux de la rente perpétuelle, doivent consister en une *somme déterminée en argent ou en une certaine quantité de fruits, payable à des termes périodiques*: tel est, dans la langue juridique, le sens du mot 'rente', qui, bien que dérivant de *reditus,* et exprimant dans le langage économique le revenu de toutes choses, se prend ici *pour une prestation périodique consistant en une quotité certaine et déterminée.* Il ne faudrait pas considérer comme une rente viagère la convention par laquelle un individu vend un immeuble, à la charge par l'acquéreur de le nourrir, loger, chauffer et éclairer jusqu'à son décès: c'est une vente soumise aux principes généraux, et non aux règles particulières de la rente viagère.

A la page 367, l'auteur a expliqué déjà que les prestations périodiques en argent ou en denrées prennent le nom d'"arrérages".

Lefort, "L'Assurance sur la vie", définissant la rente viagère, dit à la page 104:

C'est le contrat qui met à la charge d'une individualité prenant le nom de débi-rentier, en retour d'un capital dont le quantum est fixé d'après les bases scientifiques, l'obligation de verser dans un laps prévu par les parties une prestation périodique ou rente à la personne assurée ou crédi-rentier tant qu'elle vit. Dans la réalité, c'est une sorte de placement à fonds perdus. (V. pour les notions techniques Dormoy: Théor. mathém. des assur. sur la vie, t. 1, p. 294 et s.; Béziat d'Audibert: Théor. élé., des assur. sur la vie, p. 72 et s.; Laurent: Théorie et prat. des assur. sur la vie, p. 86 et s.; Maas: Théor. élém. des annuités viag. et des assur sur la vie, 2è édit., févr. 1868, p. 19 et s.—Comp. Vermot, 11è part., vo Rente; Broggi, op. cit., pp. 179, etc...) La personne qui veut en profiter abandonne pour toujours une certaine somme et, en échange, elle touchera, sa vie durant, une *rente déterminée.*

Et il ajoute à la page 107:

Au contraire, quand il intervient un contrat de rente viagère, quand il s'opère un échange de valeurs entre les parties, le crédi-rentier confiant une somme, le débi-rentier recevant une créance pour les annuités, la

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somme remise au premier représente, non le prix du risque, mais exclusivement le prix des annuités; enfin, par cela seul qu'il signe un contrat de rente viagère, le crédi-rentier acquiert immédiatement une *valeur actuelle, certaine* qui, dans son patrimoine, remplace le capital dont il s'est déssaisi au profit du débi-rentier.

de Lorimier, section 1901, Vol. 16, définit ainsi la rente viagère:

> On peut définir ce contrat, 'un contrat par lequel l'un des contractants vend à l'autre une rente annuelle, et dont la durée est bornée à la vie d'une ou de plusieurs personnes, de laquelle rente il se constitue envers lui le débiteur pour une *certaine somme* qu'il reçoit pour le prix de la constitution'.

Après avoir signalé la différence qu'il y a entre le contrat d'Assurance et le contrat de Rente la Cour de Cassation (25 mai 1891, Sirey 1892, p. 33), a dit ce qui suit:

> Le contrat d'assurance a pour but essentiel de garantir contre les conséquences d'un risque éventuel; au contraire, dans le contrat de rente viagère, le capital versé n'est pas le prix d'un risque, mais le *prix des annuités.*

Il résulte de ces autorités que le montant annuel versé au crédit-rentier, doit être fixe et déterminé, pour qu'il y ait *rente viagère* au sens du *Code Civil* de la Province de Québec. Et de ce principe découle logiquement, que quelle que soit l'appréciation du capital, nécessaire au service de la rente, le crédit-rentier n'en bénéficie pas; pas plus qu'il n'est exposé à perdre, si le capital devenait insuffisant pour produire le versement annuel. Le créancier a droit d'exiger la rente déterminée d'avance, pas plus, pas moins. Dans le cas qui nous occupe, il est clair que le capital peut varier, et il est même probable, à cause des fluctuations monétaires, qu'il ne soit jamais le même.

D'ailleurs, il semble bien que c'est ainsi que le législateur a compris la signification des mots "rentes viagères", quand il a rédigé la loi des successions. L'article 8 en effet dit:

> 8. Les rentes, viagères ou autres, et dotations seront capitalisées et estimées au montant requis, à la date du décès, par une compagnie d'assurance sur la vie, pour assurer une rente ou dotation de pareille somme.

Les mots *"pareille somme"*, indiquent clairement qu'il doit nécessairement s'agir d'un montant fixe, autrement, il serait, comme dans le cas de l'article 1915 C.C., impossible de déterminer quelle est la *"pareille somme"* qui pourrait être produite par un capital donné. Le même raisonnement doit s'appliquer aux *autres* rentes qui ne sont pas viagères,

et aux *dotations*. Dans ces cas que la loi assimile à la rente viagère, le montant doit être nécessairement fixe et déterminé.

J'en viens donc à la conclusion que les montants que reçoivent chaque année les trois bénéficiaires ne sont pas des rentes viagères au sens du *Code Civil*, et de la *Loi des Successions*. On a suggéré, mais sans insister, qu'on pourrait peut-être distinguer entre le revenu que reçoivent Margaret Morrisroe et Kate Conlon, de celui qui est versé à Charles Edward Roach. En effet, dans le premier cas, un montant minimum est stipulé, tandis qu'il ne l'est pas dans le second. Je ne crois pas, cependant, que ceci puisse permettre de distinguer la nature des libéralités du testateur. La rente doit être *"déterminée"*, et la fixation d'un minimum suppose nécessairement que le versement annuel peut être plus élevé, qu'il peut être variable; et cet élément d'incertitude exclut la possibilité d'assimiler à la *"rente viagère"* les montants dont Mlles Morrisroe et Conlon sont les bénéficiaires.

L'intimé prétend qu'il s'agit d'usufruits, ce qui lui permettrait d'imposer les taxes dont il a réclamé le paiement. En effet, dans ces cas, la taxe est exigible comme si les usufruitiers recevaient comme propriétaires absolus, le capital dont ils n'ont que la jouissance.

En vertu des termes du testament, nous sommes bien en présence d'une double libéralité simultanée: la jouissance des biens aux bénéficiaires, et la propriété aux appelants, qui ne détiennent cependant qu'en leur qualité de fiduciaires. Il ne fait pas de doutes, non plus, ce qui est l'une des caractéristiques de l'usufruit, que Mlles Morrisroe et Conlon ainsi que Charles Edward Roach, pourront bénéficier de toute augmentation de revenus, comme ils devront d'autre part subir les conséquences de toute diminution qui pourrait se produire.

Domat, Vol. 1, page 312. disait en effet:

> L'usufruit s'augmente ou se diminue, en proportion de l'augmentation ou diminution qui peut arriver au fonds sujet à l'usufruit; et comme l'usufruitier souffre la perte ou la diminution de son usufruit, si le fonds périt, ou est endommagé par un débordement, par un incident ou autre cas fortuit, il profite aussi des changements qui peuvent rendre le fonds meilleur ou plus grand.

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Mais, ce ne sont pas là les seuls éléments de l'usufruit. L'usufruit, nous dit l'article 443 C.C. "est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance". Cet article correspond à l'article 578 du *Code Napoléon* qui est rédigé dans des termes identiques, ce qui nous permet évidemment de nous inspirer de la jurisprudence et des auteurs français.

L'usufruit, il est presque inutile de le souligner, peut être établi par la loi, ou par la volonté de l'homme, sur les biens meubles ou immeubles. L'usufruitier a le droit de jouir de toute espèce de fruits, soit naturels, comme ceux qui sont le produit de la terre, soit industriels, obtenus par la culture ou l'exploitation, soit civils, comme les intérêts des sommes d'argent. Il a droit à la possession de la chose dont il a l'usufruit, et à moins qu'il n'en soit dispensé, il doit faire inventaire et donner caution, avant d'entrer en possession.

Beudant, Seconde édition, Vol. 4 (Les Biens), page 457, dit:

> L'usufruitier a deux attributs de la propriété: les droits d'usage et de jouissance. Les autres attributs, droits de disposition et d'accession restent au propriétaire, appelé nu propriétaire.

Et à la page 504, le même auteur dit:

> Dans l'usage ordinaire, l'usufruitier a la garde de la chose, comme détenteur pour le compte du propriétaire, qui doit pouvoir se reposer sur lui. C'est à l'obligation de veiller à la conservation des droits du propriétaire que se réfère l'article 601 en disant que l'usufruitier donne caution "de jouir en bon père de famille".

Il peut exercer diverses actions relatives aux choses comprises dans son usufruit, et il peut en réclamer la possession.

En effet, Planiol et Ripert (Traité Elémentaire de Droit Civil), Vol. 1, page 939, disent ce qui suit:

> L'usufruitier peut exercer aussi diverses actions relatives aux choses comprises dans son usufruit. Ainsi, lorsqu'un immeuble dont la jouissance lui appartient se trouve aux mains d'un tiers qui le détient sans droit, il peut le réclamer au moyen de l'action confesssoire d'usufruit, action réelle pétitoire, qui lui appartient de son chef. On admet même qu'il pourrait, le cas échéant, recourir à la forme plus simple de l'action possessoire appelée "complainte". Sans doute peuvent seuls exercer l'action possessoire ceux qui sont possesseurs à titre non précaire, et l'usufruitier est un de ceux qui, suivant l'expression de l'article 2236, détiennent précairement la chose du propriétaire et qui, par suite, ne peuvent prescrire. Mais si

l'usufruitier est détenteur précaire en ce qui concerne la propriété, il ne l'est pas quant à l'usufruit; il a de son chef, un droit réel de jouissance qui lui permet de posséder la chose et qui lui donne l'action possessoire.

Clément (Etude sur l'Usufruit), à la page 67, s'exprime ainsi:

L'usufruitier a une action personnelle dite en délivrance contre le nu propriétaire pour se mettre en possession de la chose sur laquelle porte son droit d'usufruit. Si ce droit résulte d'un testament, quelle que soit la quotité de l'usufruit, totale, partielle ou particulière, l'usufruitier sera toujours tenu de demander la délivrance. Car un usufruit même total n'est qu'un legs à titre particulier; le bénéficiaire ne peut jamais avoir aucune aptitude à toute la propriété. Dans tous les cas où l'usufruitier trouve son droit dans un testament, il doit toujours demander la délivrance comme tout légataire.

L'usufruit constitue un droit réel et par conséquent opposable à tous.

Et à la page 68:

Pendant la durée de sa jouissance et pour conserver son droit, l'usufruitier peut intenter toute action possessoire, en bornage, et toutes actions réelles. Il peut exercer ces actions en ce qui concerne son droit d'usufruit, comme le nu propriétaire peut les exercer en ce qui concerne son droit de nue propriété.

C'est donc dire que l'usufruit est essentiellement un droit réel, car il est le droit de jouir d'une chose. Il met l'usufruitier en rapport direct avec cette chose, ce qui est le caractère distinctif du droit réel.

C'est la doctrine enseignée par tous les auteurs, et voici ce que disent quelques-uns:

Baudry-Lacantinerie (Droit Civil), Vol. 6, page 301:

L'usufruit est un droit réel. L'article 543 le dit à peu près explicitement, et l'article 578 le donne à entendre, en disposant que l'usufruit est le droit de jouir d'une chose..... Le législateur s'exprime tout autrement, quand il définit le contrat de louage, qui ne confère au locataire ou mieux au preneur qu'un droit personnel de jouissance.

Planiol et Ripert (Traité Elémentaire de Droit Civil), Vol. 1, page 921:

Une personne peut avoir la jouissance d'une chose dont une autre a la propriété. Cette jouissance se présente sous deux formes différentes: tantôt comme simple créance, tantôt comme droit réel. Ainsi, l'emprunteur dans le prêt à usage, le locataire d'une maison, le fermier d'une terre, n'ont aucun droit réel sur la chose qui leur est confiée. Ils n'en sont que détenteurs: leur droit de jouissance n'existe que sous la forme d'une créance, qu'ils ont contre leur prêteur ou bailleur, qui est leur débiteur, tenu de leur procurer sa chose et de leur permettre de s'en servir. Mais la jouissance d'une chose peut aussi appartenir à quelqu'un à titre de droit réel. C'est ce qui a lieu dans l'usufruit et dans l'usage.

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Clément (Etude sur l'Usufruit), dit ce qui suit à la page 8:

Il ne faut pas confondre la jouissance de l'usufruitier avec celle du locataire... celui-ci a le droit de jouir des choses comme le propriétaire lui-même... mais la différence capitale est que l'usufruit est un droit réel... au contraire dans le cas de bail, le propriétaire est soumis à l'obligation de faire jouir paisiblement le fermier. Ces deux droits sont donc d'une nature toute différente.

Planiol et Ripert (Droit Civil), Vol. 3, page 713, disent aussi:

Le Code définit l'usufruit: "le droit de jouir d'une chose dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance". Cette définition est incomplète, car la loi oublie de dire que la jouissance de l'usufruitier est essentiellement viagère et qu'elle s'exerce à titre de droit réel. Ce sont là pourtant deux des caractères spécifiques de l'usufruit; le premier le distingue du droit de jouissance qui appartient à l'emphytéote, le second le distingue du droit de jouissance qui appartient au locataire et au fermier. La définition suivante nous paraît donc préférable: "l'usufruit est un droit réel de jouissance qui s'exerce sur une chose appartenant à autrui, à la charge d'en conserver la substance, et qui s'éteint nécessairement à la mort de l'usufruitier".

Il s'ensuit nécessairement que l'usufruit est un démembrement de la propriété, et que le nu propriétaire n'a qu'une propriété mutilée, dépouillée de ses principaux avantages qui sont l'usage et la jouissance. (Beudant, Seconde édition, Vol. 4, Des Biens, p. 457; Baudry-Lacantinerie, Droit Civil, Vol. 6, Des Biens, p. 297; Planiol et Ripert, Traité Elémentaire de Droit Civil, Vol. 1, p. 921).

Car si le véritable propriétaire a le *jus utendi, fruendi* et *abutendi,* il est privé pour la durée de l'usufruit des deux premiers droits, c'est-à-dire du droit à l'usage du bien et à la jouissance de ses fruits. (Voir Mignault, Droit Civil Canadien, Vol. 2, p. 529):

Nous avons vu, supra, p. 477, que toutes les facultés réunies dans le droit de propriété se résument en trois principales savoir:

1. Le *jus utendi,* ou le droit de se servir de la chose en l'employant à un usage susceptible d'être renouvelé plusieurs fois;

2. Le *jus fruendi,* ou le droit de percevoir les fruits qu'elle produit;

3. Le *jus abutendi,* ou le droit d'en disposer, c'est-à-dire d'en faire un usage définitif, qui ne se renouvellera plus, au moins pour le propriétaire qui le fait, droit de la consommer, de la transformer, de la dénaturer, de la détruire, et enfin de l'aliéner en la transmettant à un autre.

Les deux premiers de ces attributs, le *jus utendi* et le *jus fruendi,* composent le droit d'usufruit; le *jus abutendi* n'y est pas compris. *Usus-fructus est jus utendi atque fruendi.* SED NON ABUTENDI.

Marcadé (Explication du Code Civil, septième éd., p. 456), dit également:

455. On a vu précédemment que le domaine que l'homme peut avoir sur les choses, c'est-à-dire le droit de propriété, comprend plusieurs droits élémentaires; que, d'après la théorie logique et vraie, ces droits sont au nombre de trois principaux, parfaitement distincts et séparables, savoir: 1. le droit de se servir de la chose, *usus* ou *us utendi;* 2. le droit d'en recueillir les produits, *fructus* ou *jus fruendi;* 3. le droit d'en disposer en l'employant à un usage définitif, *abusus* ou *jus abutendi.* Mais on a vu aussi que notre Code, considérant sans doute qu'en fait les deux premiers de ces trois droits n'existent jamais l'un sans l'autre, les présents comme un droit unique, *ususfructus,* un droit de jouissance qui peut être plus ou moins étendu, mais qui est toujours, sous quelque nom qu'il se présente, un *jus utendi* et *fruendi simul.*

Ces droits sont sous la jouissance de l'usufruitier, qui peut comme nous l'avons vu déjà, exercer toutes les actions nécessaires à leur conservation.

L'usufruit confère l'"usus" et le "fructus"; ce sont les deux éléments qui le composent et qui lui ont valu son nom. Les Romains, nous disent Planiol et Ripert, déclinaient séparément ces deux mots, qui ont fini par s'agglutiner en un seul pour former le mot usufruit.

L'"usus" suppose nécessairement la possession. Etant un droit réel, un droit sur la chose, l'usufruit pourrait se concevoir difficilement, si l'usufruitier n'avait la possession du bien qui fait l'objet de son droit. Le jus "utendi" c'est le droit de se servir de la chose comme le véritable propriétaire.

Planiol (Droit Civil, Vol. 1, p. 871), dit:

L'usufruit confère un double droit: le droit *d'user* de la chose, et le droit d'en percevoir les fruits.

Et Aubry et Rau (Cours de droit civil, Vol. 2, p. 632) s'expriment ainsi:

L'usufruit de sa nature, suppose la possibilité *d'user* ou de jouir de la chose qui s'y trouve soumise, tout en conservant la substance.

Marcadé (Explication du Code Civil, 7è éd., p. 458):

11—459. 2. L'usufruit est le droit de jouir, et non pas seulement le droit de contraindre le propriétaire à faire jouir.—Quand je suis usufruitier, j'ai le droit à mon propre, absolu, et indépendant de toute relation avec quelque personne que ce soit, de me servir de la chose et d'en recueillir les fruits; il n'y a jamais pour moi ni l'obligation ni la faculté non plus de faire intervenir aucune personne, pas plus le propriétare qu'un autre.

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Jur.-Cl. civ. art... 578-584, verbo "usufruit", page 2, rapporte ce qui suit:

2.—L'usufruit comprend le droit de se *servir* de la chose (*jus utendi*), et le droit d'en recueillir les fruits (*jus fruendi*), c'est-à-dire l'*usus* et le *fructus*, d'où l'expression usufruit. Seul, le troisième élément du droit de propriété, le *jus abutendi* reste au propriétaire: celui-ci, n'ayant plus qu'une propriété dépouillée de ses principaux avantages, est appelé nu propriétaire (Toullier, III, n° 389.—Proudhon, Traité de l'usufruit, 1, n° 5.—Laurent, VI, n° 323.—Demolombe, X, n° 218.—Aubry et Rau, 5e éd., 11, n° 226.—Beaudry-Lacantinerie et Chauveau, 2e éd., Les biens, n° 434.—Colin et Capitant, 4e éd., 1, p. 79).

3.—L'usufruit est un droit de jouissance qui s'exerce sur des choses dont un autre a la propriété; il s'ensuit que la jouissance qu'un propriétaire exerce sur sa propre chose ne peut être qualifiée d'usufruit, car nul ne peut avoir une servitude sur sa propre chose: *nemeni res sua servit* (Laurent, VI, n° 323.—Demolombe, X, n° 222.—Baudry-Lacantinerie et Chauveau, 2e éd., Des biens, n° 436).

Traitant du caractère de l'usufruit, le Jur.-Cl. civ. page 3, n° 17:

17.—Par contre, l'usufruit est indivisible en ce sens que les deux éléments qui le composent, l'*usus* et le *fructus*, ne peuvent pas être séparés et résider sur deux têtes différentes. (D. Rép., Vo Usufruit, 65.—D. Supp., eod., Vo 20).

On concevrait difficilement un usufruit sans l'"usus". Etant détenteur pour le compte du propriétaire, l'usufruitier doit conserver la substance (C.C. 443), et il serait illogique de lui imposer cette obligation, s'il n'avait la possession; comme il serait illusoire de lui donner un droit de renvendication, et d'exercer les actions nécessaires à la conservation de la chose, s'il n'en avait pas la maîtrise. Quel serait le but de la loi, de l'obliger à faire inventaire, et pourquoi le forcer à donner caution "de jouir en bon père de famille" (C.C. 464) afin de garantir qu'à l'extinction de l'usufruit il remettra les biens au propriétaire, si le droit de se servir de la chose n'est pas un élément essentiel à la structure juridique de son usufruit? Sans doute, l'"usus" ou la possession ne doivent pas être confondus avec la simple détention physique; car il est élémentaire que l'on peut posséder pour soi-même, en ayant le contrôle physique d'une chose, ou par l'intermédiaire d'un tiers, qui détient pour celui qui y a droit. La possession suppose un fait et un droit: le fait de

la détention réelle d'une chose, et le droit de la contrôler et d'en jouir. C'est d'ailleurs ce que dit le *Code Civil*, article 2192:

> La possession est la détention ou la jouissance d'une chose ou d'un droit que nous tenons ou que nous exerçons par nous-mêmes, ou par un autre qui la tient ou qui l'exerce en notre nom.

Mais si cette détention physique est entre les mains d'un tiers, encore faut-il que l'usufruitier en ait le contrôle, et que la possession par un autre soit pour son bénéfice et avantage.

Et ceci nous conduit nécessairement à la conclusion qu'il faut pour qu'il y ait usufruit, que l'usufruitier ait l'administration des biens soumis à l'usufruit. Le droit à l'usage suppose nécessairement le droit d'administrer. En imposant des obligations à l'usufruitier, on lui reconnaît ce droit d'administrer, et l'obligation d'administrer "en bon père de famille". Comment en effet un usufruitier peut-il être responsable vis-à-vis le nu propriétaire de la conservation de la chose, qu'il ait même l'obligation d'instituer des procédures légales, pour empêcher la prescription de certaines créances dont il a la jouissance, (Beudant, seconde éd., Vol. 4, Les Biens, p. 504) (Planiol et Ripert, Traité Elémentaire de Droit, Vol. 1, p. 943) et que cependant, il ne soit pas essentiel qu'il ait l'administration des biens. Les auteurs n'entretiennent pas de doutes sur ce point.

Huc (Commentaire du Code Civil, Vol. 4, p. 258), dit ceci:

> Le droit de jouissance appartenant à l'usufruitier implique naturellement le *droit d'administration*. L'usufruitier administre pour son compte et non pour celui du nu propriétaire qu'il ne représente pas, si ce n'est pour les actes relatifs à la conservation de la chose.
>
> Dans le cas où l'usufruit est constitué par testament, le testateur ne pourrait pas séparer l'administration de la jouissance pour l'attribuer à une personne autre que l'usufruitier, quand même ce dernier serait mineur. Au nom de qui, en effet, cet administrateur administrerait-il? Au nom du testateur défunt? Ce n'est pas possible. Au nom de l'usufruitier majeur? Mais une personne ne peut être représentée que par un mandataire constitué par elle-même. Quant à l'usufruitier mineur il n'a d'autres représentants que ceux que la loi lui donne. L'usufruitier a donc nécessairement le droit d'administrer; il a par conséquent le droit de passer des baux.

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Clément (Etude sur l'usufruit), dit aussi à la page 69:

Le droit de jouissance de l'usufruitier implique nécessairement des *actes d'administration;* de plus, la loi l'autorise à céder son droit à titre gratuit ou à titre onéreux.

Mais il semble bien que le Conseil Privé a définitivement résolu la question, dans la cause de Laverdure v. Du Tremblay (1). Après avoir examiné un acte de donation, où les donataires n'avaient ni la possession ni l'administration des biens, Lord Maughan, parlant pour le Comité Judiciaire, a dit ce qui suit:

Their Lordships will now proceed to deal with the three questions above defined. On the first of them their Lordships entertain no doubt. The children of the donor are not usufructuaries under the deed of gift. All they have is a right as beneficiaries to share in certain "fruits and revenues" distributed from time to time by the trustees. Plainly they have no direct interest as shareholders, and neither a right of attending meetings, nor of voting. And, as St. Germain J. points out in his judgment, a donee or legatee of a usufruct has a real right in respect of the property, whilst the donee or legatee of the income paid or payable by trustees has only a personal action against the trustees. On the other hand, it has not been contended that the donor did not retain, as he plainly stated he did, a usufruct in relation to the 7,400 common shares *with the full right of enjoying that property.*

Comme cette cause n'est pas rapportée dans les rapports de la Cour du Banc du Roi, nous n'avons pas le bénéfice des notes de M. le Juge St-Germain.

Evidemment, l'absence de certaines conditions essentielles pour créer un usufruit, n'annulle pas l'acte, (que ce soit un testament ou une donation) mais il résulte qu'il n'y a pas d'usufruit. Il y a une autre relation légale.

Proudhon (Traité des droits d'usufruit, Vol. 1, p. 585), disait:

L'usufruit n'est point une chose de pure convention: sa nature est fixée par la loi: il consiste dans le droit ou la faculté qui est accordé à quelqu'un de jouir du bien d'un autre: il ne peut être que cela.

Et s'inspirant de cet auteur, Demolombe (Cours de Droit Civil, Vol. 10, Distinction des Biens, (2) p. 205) dit à son tour:

Telle est aussi la disposition impérative et absolue de l'article 617; et Proudhon remarque avec beaucoup de vérité, que l'usufruit n'est pas une chose de pure convention et que sa nature est fixée par la loi.

L'examen du testament de Charles Belden Roach démontre clairement, il me semble, que les legs faits à Mlles

(1) [1937] A.C. 666 at 678-679.

Morrisroe et Conlon et à son petit neveu Charles Edward Roach, n'ont pas les caractéristiques de l'usufruit. Ainsi, les bénéficiaires n'ont pas à donner caution, ni à faire inventaire; leur droit n'est pas un droit réel sur le bien légué, et ils n'ont pas l'"usus" au sens de la loi; ils ne peuvent exercer aucune action pour la conservation de la chose; ils ne peuvent pas jouir comme le propriétaire lui-même; ils ne peuvent réclamer la possession; ils n'ont ni le contrôle, ni l'administration des biens.

Ils n'ont qu'une créance personnelle contre les fiduciaires, pour réclamer les fruits civils qui leur sont légués. Et cette créance n'a pas évidemment les caractères de l'usufruit. Ce droit personnel qu'ils ont de jouir des fruits seulement constitue à mon sens, un simple *legs de revenus,* que tous les auteurs reconnaissent, et qui est bien différent de l'usufruit lui-même.

A la page 54 du "Traité des droits d'usufruit", Proudhon faisait déjà la distinction nécessaire:

> Léguer à quelqu'un, en totalité ou en partie, les revenus d'un domaine, n'est donc pas lui léguer le droit d'en jouir par lui-même, mais seulement celui d'exiger de l'héritier une prestation annuelle correspondant à la valeur totale ou partielle du produit net.
>
> Le legs des revenus et celui de l'usufruit d'un fonds diffèrent donc essentiellement:
>
> 1o. En ce que, par le legs des revenus, on n'impose aucune servitude personnelle sur le fonds, comme par celui d'usufruit;
>
> 2o. En ce que le legs des revenus est totalement mobilier; tandis que celui d'usufruit d'un immeuble est imobilier dans son objet;
>
> 3o. Dans le legs d'usufruit l'héritier n'a qu'une chose à livrer, c'est la jouissance du fonds même; dans celui des revenus au contraire, l'héritier à le choix ou de livrer les fruits du fonds en nature ou de payer annuellement la valeur estimative du produit net de l'héritage; et en ce dernier cas, le legs de revenus n'est plus, dans son exécution, qu'un legs de fruits civils qui échoient jour par jour.
>
> 4o. Le legs du revenu n'emporte aucun démembrement de propriété, et n'est conséquemment pas susceptible d'être hypothéqué dans son objet, comme celui d'usufruit;
>
> 5o. Dans le cas du legs d'usufruit, l'héritier ne peut disposer que de la nue propriété de fonds; tandis que dans le cas du legs des revenus, l'héritier n'étant chargé que d'en servir la rente, peut aliéner à son gré le fonds en plein domaine;
>
> 6o. En exécution du legs de revenus le légataire ne peut pas exiger la jouissance du fonds, comme il le peut dans le cas d'usufruit;
>
> 7o. Dans le cas du legs de revenus, le légataire n'étant pas mis en possession du fonds, n'est point tenu de le réparer comme s'il en était usufruitier; etc...

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Salviat, dans son traité de l'usufruit, Vol. 1, page 7, partage la même opinion:

Il ne faut pas confondre le legs d'usage avec le legs simple des fruits. Les effets en sont bien différents.

1o. Le légataire de l'usufruit fait cultiver les fonds et en perçoit le revenu par lui-même, tandis que le légataire des fruits, sans être tenu de la culture, reçoit les fruits des mains du propriétaire.

2o. Le légataire de l'usufruit a l'action directe contre tout tiers possesseur; le légataire des fruits ne l'a que contre le propriétaire.

3o. Le légataire de l'usufruit de tous les biens a droit d'habiter la maison; le légataire des fruits n'a pas le même avantage.

Le legs des fruits n'est pas le droit d'usufruit, mais des fruits eux-mêmes en nature. *Non jus, sed corpus.*

Demolombe (Cours de Droit Civil, Vol. 10, Distinction des biens (2), p. 189), dit aussi:

Les développements qui précèdent nous ont assez fait connaître le caractère juridique de l'usufruit pour qu'il soit désormais facile de le distinguer des autres droits, en vertu desquels une personne peut prétendre aux fruits d'un bien dont la propriété est à un autre.

Le terme d'"usufruit" n'est pas, bien entendu, sacramentel; et on peut créer un véritable droit d'usufruit sans en prononcer le mot, si d'ailleurs tous les caractères de l'usufruit se rencontrent dans l'espèce de droit qui a été établi; mais il est alors indispensable que les caractères essentiels de ce droit s'y rencontrent.

De même qu'il serait possible que le disposant ou les parties contractantes eussent improprement appelé du nom d'usufruit le droit par eux créé, qui n'en aurait pas les caractères.

Que l'usufruit ne peut pas être confondu avec un simple fait, serait évident.

Et à la même page, l'auteur dit également:

Et il faudrait pareillement se garder de confondre avec un legs d'usufruit le simple legs des revenus d'un fonds.

Ces deux sortes de droits ont cela de commun, sans doute, qu'ils sont viagers et qu'ils s'éteignent par la mort du légataire. Mais il existe d'ailleurs entre l'un et l'autre des différences capitales que les jurisconsultes romains avaient soigneusement détaillées.

C'est ainsi par exemple qu'ils enseignaient:—

1o. Que le legs des revenus ne confère au légataire qu'une créance purement personnelle et mobilière;

2o. Que le légataire ne peut pas demander à être mis en possession de la chose et à jouir par lui-même;

3o. Qu'il n'acquiert aucun droit réel, et que par suite rien ne fait obstacle à ce que l'héritier du testateur hypothèque ou aliène la pleine propriété du fonds.

Demolombe, page 190 (déjà cité):

A plus forte raison, un simple legs d'annuités ne constituerait-il pas un usufruit. Et si, par exemple, ce legs avait été fait à une commune ou un établissement public, les annuités devraient être servies non pas seulement pendant trente ans, d'après l'article 619, mais pendant toute la durée de la commune ou de l'établissement.

Genty (Traité des droits d'usufruit), à la page 6:

L'usufruit est un droit; ce n'est pas un fait. Il ne faut donc pas confondre l'usufruit avec l'usage et la jouissance qui ne sont que des faits. Il se peut qu'en fait, quelqu'un use et jouisse d'une chose, sans en avoir effectivement le droit, et partant, sans être usufruitier et qu'à l'inverse, celui qui est usufruitier, et a par conséquent le droit d'user et de jouir n'use ni ne jouisse.

Laurent (Droit Civil Français, Vol. 6, p. 416):

De même il y a une différence fondamentale entre le legs d'usufruit et le legs des revenus d'un fonds. En apparence, les droits des deux légataires sont identiques, l'un et l'autre profitant des fruits pendant toute leur vie; mais le légataire de l'usufruit a un droit réel dans le fond; il jouit par lui-même, il a un droit immobilier qu'il peut céder, hypothéquer, tandis que le légataire des revenus n'a qu'une action personnelle contre le débiteur du legs; la toute propriété du fonds, sans démembrement aucun, appartient à l'héritier, lequel peut par suite vendre cette toute propriété et l'hypothéquer; le légataire n'a qu'un droit de créance.

Jur.-Cl. civ. No. 44:

44.—(*c*) DIFFÉRENCES AVEC LE LEGS DE FRUITS OU DE REVENUS D'UN FONDS.—L'usufruitier a un droit réel sur la chose, objet de son droit; le *légataire de fruits* n'a qu'un droit de créance à l'égard de l'héritier, propriétaire de l'immeuble. A la différence de l'usufruitier, le légataire de fruits ne peut ni se mettre en possession de la chose pour jouir par lui-même, ni hypothéquer son droit (Demolombe, t. X, n° 229.—Laurent, t, VI, n° 326.—Baudry-Lacantinerie et Chauveau, 2e éd., Les biens, n° 442).

Planiol et Ripert, (Traité Elémentaire de droit civil, Vol. 1, p. 921):

Une personne peut avoir la jouissance d'une chose dont une autre a la propriété. Cette jouissance se présente sous deux formes différentes: tantôt comme simple créance, tantôt comme droit réel. Ainsi l'emprunteur dans le prêt à usage, le locataire d'une maison, le fermier d'une terre, n'ont aucun droit réel sur une chose qui leur est confiée. Ils n'en sont que détenteurs: leur droit de jouissance n'existe que sous la forme d'une créance, qu'ils ont contre leur prêteur ou bailleur, qui est leur débiteur, tenu de leur procurer sa chose et de leur permettre de s'en servir. Mais la jouissance d'une chose peut aussi appartenir à quelqu'un à titre de droit réel. C'est ce qui a lieu dans l'usufruit et dans l'usage. On dit alors que la propriété est démembrée, et le droit mutilé qui reste au propriétaire, étant séparé de la jouissance et comme dépouillé, s'appelle nue propriété.

Planiol et Ripert (Droit Civil, Vol. 3, No. 757, p. 713) disent aussi:

757. Définition—Le Code définit l'usufruit: "le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance" (art. 578). Cette définition est incomplète, car la loi oublie de dire que la jouissance de l'usufruitier est essentiellement *viagère* et qu'elle s'exerce à *titre de droit réel.* Ce sont là pourtant deux des caractères spécifiques de l'usufruit; le premier le

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distingue du droit de jouissance qui appartient à l'emphytéote, infrà n° 1000), le second le distingue du droit de jouissance qui appartient au locataire ou au fermier. La définition suivante nous paraît donc préférable: l'usufruit est un droit réel de jouissance qui s'exerce sur une chose appartenant à autrui, à la charge d'en conserver la substance, et qui s'éteint nécessairement à la mort de l'usufruitier.

Cette définition permet de distinguer l'usufruit, non seulement de l'emphytéose ou du bail comme il vient d'être dit, mais aussi de la donation ou du legs portant sur les fruits ou revenus, qui ne donnent naissance qu'à un droit de créance, ou du droit de superficie, qui est perpétuel, et ne peut s'éteindre par le non-usage, réserve faite d'ailleurs des difficultés qui peuvent s'élever sur le point de savoir si les parties ont entendu constituer un usufruit ou établir un droit de jouissance différent.

L'unanimité que l'on rencontre chez les auteurs, fait bien voir la distinction qui existe entre l'*usufruit* et le *legs des revenus*. J'en suis venu à la conclusion que cette distinction doit être faite dans la présente cause, et que nous ne sommes pas en présence d'un usufruit, mais d'un simple *legs de fruits*.

Au cours de l'audition, on a longuement discuté afin de savoir quelle est dans la province de Québec, la situation juridique des fiduciaires. On a invoqué en premier lieu la cause de *Masson* v. *Masson*, (1) où cette Cour eut à interpréter un testament fait en 1845, c'est-à-dire avant la promulgation du *Code Civil*. Cette Cour (1) a décidé qu'il y avait fiducie, et non substitution, et que le titre à la propriété reposait sur la tête des fiduciaires; solution que signale M. le Juge Rinfret dans Valois v. de Boucherville (2). Et il cite ce passage de Sir Charles Fitzpatrick (page 270):

> On the other hand, the Quebec law says that a testator may name legatees who shall be merely fiduciary, or simply trustees for charitable or other lawful purposes within the limit prescribed by law, and by taking advantage of that provision it was open to the testator to vest his estate in the appellants, (fiduciary legatees), who are merely heirs for a special purpose, and to charge them, as mere trustees, to administer his property and to employ it, in accordance with his will. And that is what, in my opinion, the testator has done.

On a cité également la cause de *Curran* v. *Davis* (3), où il a été décidé que:

> A trust created by a trust deed under the provisions of Art. 981a C.C. is perfect and complete after it has been accepted by the trustee; acceptance by the beneficiary is not necessary to make the stipulation in his favour effective and irrevocable, unlike cases of donation under article 755 or of contracts under article 1029 C.C.

(1) (1913) 47 S.C.R. 42.
(2) [1929] S.C.R. 234.
(3) [1933]) S.C.R. 283.

Dans ce jugement (1), à la page 305, M. le juge Rinfret dit:

Il est évident que les fiduciaires sont tout autre chose que des dépositaires ou des administrateurs ordinaires. En fait, ils possèdent à peu près tous les droits du propriétaire sans en avoir le titre; et il serait oiseux de démontrer que le titre du dépôt, du code civil, n'a qu'une bien lointaine analogie avec la situation créée aux "trustees" par le chapitre de la fiducie.

Quant aux bénéficiaires, il est clair qu'ils ne sont pas des donataires ou légataires comme on les comprend habituellement. Ils sont, à tous égards, des tiers au profit desquels le créateur du trust a fait une stipulation. Et ce que nous venons de dire de la fiducie en général s'applique tout particulièrement au contrat en litige.

On s'est appuyé également sur un article publié en 1933-1934 par M. le Juge Mignault, dans la Revue du Droit, et voici ce qu'il dit à la page 76:

Pendant la fiducie, qui est propriétaire des biens donnés?

Assurément, pas le donateur, qui, dans une donation, doit se déssaisir de son droit de propriété en la chose donnée. S'il s'agit d'un testament, le testateur n'existe plus à l'époque où le testament prend effet, et ses héritiers légaux sont sans droits, car la succession testamentaire exclut la succession légale (art. 597). Dans les deux cas, il doit y avoir transport au fiduciaire de la chose donnée ou léguée, partant, le droit de propriété ne repose plus sur la tête du disposant.

Ce droit de propriété n'appartient pas, non plus, au bénéficiaire, à qui la chose n'est pas transportée par la donation ou le testament. Le plus souvent, le bénéficiaire sera un simple créancier de revenus, quelquefois, il n'est pas encore né, et il peut y avoir des bénéficiaires successifs, au dernier desquels le fiduciaire remettra les biens. Ce bénéficiaire ne deviendra propriétaire que lorsqu'à l'expiration de la fiducie, le fiduciaire lui transportera la propriété tenue en fiducie, conformément à l'article 981 1.

C'est sur ce point que j'ai changé d'avis. Voyez mon tome V, p. 155. Pour cette raison, il m'incombe de motiver solidement mon nouveau sentiment.

Il est indubitable que le législateur s'est inspiré dans ce chapitre du droit anglais, ainsi que la Cour suprême le reconnaît (p. 302 du rapport de la cause *Davis*) (1). Il pouvait donc faire reposer le titre de propriétaire sur la tête du fiduciaire pendant la fiducie, comme en Angleterre. Il n'est pas nécessaire pour cela de suivre le législateur anglais dans la distinction qu'il fait entre la propriété légale et la propriété équitable, il suffit d'accepter le résultat que la loi anglaise consacre.

Or, je le répète, le disposant n'est plus propriétaire, le bénéficiaire ne l'est pas encore. Il ne reste que le fiduciaire, car nous ne pouvons supposer que le titre de propriété ne soit nulle part. Les biens compris dans la fiducie constituent un patrimoine, et ce patrimoine se rattache nécessairement à une personne. Toutes les traditions du droit français, disent Planiol et Ripert (Droit Civil, tome III, p. 26, dernière ligne), "l'éloignent de l'idée d'un patrimoine qui n'appartiendrait à personne".

Quelle que soit la véritable solution à apporter à cette question, il n'en reste pas moins vrai que dans la présente

(1) [1933] S.C.R. 283.

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cause, en vertu des termes de l'article 981, para. a, b, *C.C.*, les fiduciaires ont la *saisine des biens meubles et immeubles,* et sont les débiteurs en qualité des fruits que produisent des capitaux de la succession Roach. Ils sont les fiduciaires des biens, pour les bénéficiaires éventuels, et non pas pour les premiers légataires des fruits, dont ils ne sont que les simples débiteurs. Qu'en vertu des lois de la province de Québec, ce testament qui ordonne aux fiduciaires de distribuer à perpétuité les revenus de la succession à la mort des trois bénéficiaires, à des institutions charitables, soit légal ou non, c'est une question qui, ne nous ayant pas été soumise, ne peut être décidée ici. Il n'y a rien dans les plaidoiries qui puisse nous autoriser à nous aventurer sur ce terrain. Ce qui est suffisant de déterminer, c'est la relation qui existe entre Mlles Morrisroe, Conlon et C. E. Roach, d'une part, vis-à-vis ces trois fiduciaires, d'autre part, et je suis satisfait que la situation juridique qui leur est créée pour les fins de taxation, est celle de créanciers et débiteurs des fruits des biens administrés.

Il reste à examiner quelle est la taxe payable à l'intimé.

Ce dernier a soumis que si aucun usufruit n'a été créé, la taxe doit tout de même être computée de la même façon, car Mlles Morrisroe et Conlon et Charles Edward Roach perçoivent tout de même les fruits légués par le testateur. La loi, (cependant, maintenant modifiée) mais telle qu'elle existait au moment de l'ouverture de la succession, imposait une taxe variant avec les montants des biens transmis. L'article 3 dit en effet:

> Tout bien mobilier ou immobilier, dont la propriété, l'usufruit ou la jouissance est transmis par décès en ligne etc., etc., etc.—est frappé des droits suivants calculés sur la valeur totale des biens transmis.

C'est cet article qui impose la taxe. Dans une cause de *Lamarche* v. *Bleau* (1), l'honorable Juge Rinfret disait en parlant de l'article 1375 qui est maintenant l'article 3, paragraphe (3):

> Les droits de succession sont imposés uniquement par l'article 1375 du Statut.

La loi ne mentionne pas seulement la transmission de la propriété, ou l'usufruit, mais elle ajoute également que la

(1) [1930] S.C.R. 198.

jouissance de tous biens mobiliers ou immobiliers sera frappée de droits calculés sur *la valeur totale des biens transmis.* Dans cette cause de *Lamarche* v. *Bleau* (1), il a également été décidé que la taxe n'est pas basée sur la valeur de la jouissance ou de l'usufruit mais qu'elle est imposée sur les biens. L'honorable Juge Rinfret parlant pour la Cour (1) disait à la page 200:

> En son essence, ce n'est pas une taxe personnelle. Les droits "frappent" les biens. Et ils les "frappent" sur la valeur du bien transmis. Cela veut dire: sur la valeur du bien lui-même et non sur la valeur de la propriété, de l'usufruit ou de la jouissance de ce bien. C'est le bien qui, par le fait de sa transmission, est "frappé". La loi, pour imposer la taxe ou en déterminer le taux, ne s'occupe pas du caractère du droit (propriété, usufruit ou jouissance) de celui auquel le bien sera remis par suite de sa transmission.
>
> Telle est, suivant nous, la nature de la taxe imposée par cette loi de Québec relative aux droits sur les successions (4 Geo. V, c. 9).
>
> Il en résulte que c'est une taxe qui frappe le capital. Elle impose des droits qui doivent provenir du bien transmis.

Les appelants prétendent que c'est le second paragraphe de l'article 13 qui doit s'appliquer. Il se lit ainsi:

> Dans le cas de transport de propriété avec usufruit ou substitution, le montant payable est calculé comme si l'usufruitier ou le grevé recevait comme propriétaire absolu, et les droits ne sont payés qu'à même le capital des biens transmis.

Il s'ensuivrait d'après eux que la taxe ne serait calculée sur la valeur totale des biens transmis, que lorsqu'il y a transport de propriété avec usufruit ou substitution. Il suffit de référer à l'origine de la loi pour voir que cette contradiction est plus apparente que réelle.

En effet, les *Statuts Refondus de la Province de Québec de 1925, (Loi sur les droits de succession, chap. 29)* stipulent à l'article 3, que la *propriété,* l'*usufruit* ou la *jouissance* d'un bien mobilier ou immobilier est frappé de droits sur la *valeur du bien transmis.* L'article 13, tel qu'il était dans le temps, disait que dans le cas de transport de propriété avec usufruit ou substitution, les droits étaient *payables* par l'usufruitier ou le grevé.

C'est après le jugement dans cette cause de Lamarche v. Bleau (1), où le sens du mot "payables" a été précisé par cette Cour, que la législature a décrété que dans le cas d'usufruit et de substitution, les droits ne seraient payés

(1) [1930] S.C.R. 198 at 200.

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qu'à même le capital des biens transmis. Réalisant que l'usufruitier ou le grevé, n'ayant que la jouissance d'un revenu étaient souvent incapables de payer la taxe de leurs propres deniers, le législateur a amendé la loi en 1930, et a déterminé que le grevé et l'usufruitier ne seraient pas tenus de payer la taxe personnellement, mais qu'elle ne serait payable qu'à même le capital des biens transmis. Cet article 13, tel qu'il existe aujourd'hui, ne fait qu'indiquer par qui et comment seront payables les droits, mais n'affecte en aucune façon les dispositions de l'article 3, qui stipule clairement que dans le cas où la propriété, l'usufruit ou la jouissance d'un bien est transmis, les droits payables sont basés sur *la valeur de la succession.* Or, dans le cas qui se présente, qu'il s'agisse d'*usufruit* ou de *jouissance* d'un bien, les droits ont été calculés sur la valeur de la succession. Or, comme Mlles Morrisroe et Conlon ont droit à la jouissance chacune d'une somme de $30,000 ($33,000 fonds canadiens) il s'ensuit qu'elles doivent être taxées suivant la computation qui a été faite par le département. Le même raisonnement s'applique quant au cas de Charles Edward Roach.

La taxe imposable dans le cas d'usufruit ou dans le cas de simple jouissance des fruits d'un bien est la même en vertu du statut. Il suffit de multiplier le montant du capital qui produit la somme dont les héritiers sont bénéficiaires par 32 p. 100 qui est le taux du droit exigible, de multiplier le résultat obtenu par la valeur des biens situés dans la province, et de diviser enfin le grand total par la valeur globale de la succession. Le résultat donnera dans chaque cas le montant de la taxe payable.

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

The judgment of Rand, Estey and Locke JJ. was delivered by

RAND, J.—The terms of the will purport to convey to the trustees the ownership of the funds from which arise the net revenues to be paid to the three life beneficiaries. The latter have the right only to have these revenues paid over to them as directed. As to the possession or administration

of, the exercise of privileges or powers annexed to, the sale or other dealings with, and generally the effective dominion over, either the funds or the property or securities in which they may be invested, the beneficiaries are excluded. That such a mode of enjoyment of property is authorized by articles 981 (*a*) and following of the *Civil Code* has been placed beyond controversy by the judgment of the Judicial Committee in *Laverdure* v. *Du Tremblay* (1), the effect of which is that the property passes to the trustees subject to a personal right against them on the part of the beneficiaries, vesting in the latter an interest in the nature of a creance.

The view of the majority in the Court of King's Bench (2) was that such an interest constituted the usufruct of the property so conveyed, but in the case cited (1) that contention was made and rejected. Lord Maugham (1), delivering the judgment, refers to the definition of usufruct in the Roman law: "usufructus est jus in alienis rebus utendi fruendi salva rerum substantia"; and observes that the *Civil Code* preserves that meaning in Article 443 taken from Article 578 of the *Code Napoléon,* in these words:

> L'usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance.

He points out (1) that usufruct is recognized as a real right in the property, as contrasted with the purely personal right of these beneficiaries. I agree, therefore, with the view taken by Sevigny, C. J. in the Superior Court and Barclay and McKinnon, JJ. in the King's Bench (2) that it is not a case of usufruct.

It is then said that these life interests are not "life rents or other rents and endowments" within the meaning of ss. 8 of sec. 3 of the *Successions Duties Act;* that a "rente" in French law requires the amount in money to be specific; that only a fixed amount can be the basis of capitalization by an insurance company, and that as here the net income may, and in all probability does, from year to year fluctuate, the essential requirement is absent. But "rentes" can be of

(1) [1937] A.C. 666.
(2) Q.R. [1947] K.B. 656.

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articles or things in kind, as farm products or other kinds of moveable property, which though specific in quantity, are not so in value. A bequest, for instance, of one hundred bushels of wheat per annum for the lifetime of the legatee is admittedly a life rent and admittedly within the language of ss. 8: but its capitalization under that subsection would involve the estimate of both the probable life of the legatee and the average value of wheat during that period.

Subsection 8 expressly includes "dotations" or in the English version "endowments". The French word is defined in part in the Dictionnaire Encyclopédique, Quillet, as follows:

> *DOTATION:* Action de constituer un revenu à une personne déterminée, à une association. Ce revenu lui-même. On nomme aussi dotation le don fait à un établissement public, à un hôpital, à un corps, à une compagnie, etc. pour faire face aux charges que leur impose leur destination, et la masse des fonds ou des revenus de toute nature assignée à cet effet....

To "endow" is defined by the Oxford Dictionary: "to provide by bequest or gift a permanent income for a person, society or institution"; and it necessarily involves a fund or capital from which the income arises.

Now, in interpreting ss. 8, the question is not so much the precise determination of what under the civil law are "rentes, viagères ou viagères et dotations" but what is the genus of the particular modes of enjoying property mentioned which is intended to be brought within the scope of the subsection, the method for ascertaining the tax on which is by it prescribed.

Section 3 of the Act is the charging section, and ss. 1 reads in part as follows:

> All property, moveable or immoveable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, in the direct line, ascending or descending; between consorts; between father- or mother-in-law and son- or daughter-in-law or between stepfather or step-mother and stepson or stepdaughter,—shall be liable to the following duties calculated upon the aggregate value of the property transmitted:

Subsections 2 and 3 contain the same comprehensive language of description but provide for transmission to persons in other degrees of relationship to the deceased with different rates of taxation. What is transmitted is "ownership, usufruct or enjoyment", but what is in the mind of the

draftsman as being that which "shall be liable to the following duties" is embodied in the conception of "property transmitted", meaning any interest in property, and transmitted in one of the categories mentioned; but it is quite obvious to me from secs. 3 and 13 in particular that the taxation is of each individual transmission of whatever nature it may be. The language of the main paragraph of ss. 1, 2 and 3 of sec. 3, "calculated upon the aggregate value of the property transmitted," provides simply the basis for the rates thereafter shown; it has no relevance whatever to the subject matter of the taxation.

It was argued by Mr. Rivard that the language means this: once you have any form of "enjoyment" transmitted, the property out of which it arises, in its entirety, becomes liable to the tax, and that it is the first enjoyment that controls the rate of taxation; here, the life beneficiaries must be held to "enjoy" the investment in the hands of the trustees, and since their enjoyment is first in time, and as their relationship is within ss. 3, it follows that the tax is computed at the rate provided by that subsection against the capital value of the property.

The effect of such a construction is well exemplified in this case. The residuary beneficiary is a charity, exempt from taxation under section 12. On the argument made, and as held by the judgment below, the charity is in fact taxed under ss. 3: but if the testator had as the initial provision bequeathed the income to the charity for any length of time, no tax whatever regardless of subsequent legacies out of the same funds would have been payable upon any part of the transmissions. Either result I cannot but consider quite absurd. The same anomaly would be present whenever the rate applicable to the future succession differed from that applicable to the first.

Further light is cast upon section 3 by the second paragraph of section 13 which reads:

> In the case of transfer of property with usufruct or substitution, the amount payable *shall be calculated as if the usufructuary or the institute received as absolute owner* and the duties shall be paid only on the actual capital of the property transmitted.

In the French version, the last line is: "et les droits ne sont payés qu'à même le capital des biens transmis", from which

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I take it that the taxes are to be paid "out of the capital" rather than "on the actual capital". Here the conception is the transfer of ownership "with usufruct or substitution"; all interests are dealt with as a single whole, and the implication is clear that the provision is special. If the suggested interpretation were sound, there would be no occasion whatever for the first part of this paragraph: the usufruct, though carrying a different rate from the naked ownership, as the first enjoyment in time, would determine the tax on the corpus of or the totality of interests in the particular property passing; and the fact of a special provision implies a different intention underlying section 3.

Similarly ss. 8 is on the footing that on each such legacy a separate levy is made, and on a basis other than the capital of which the rents are the fruits; and its effect seems simply to be a requirement that certain factors of capitalization in such cases shall be those used by life insurance companies. If the subsection were not in the Act,—and it was not enacted until 1938—that basis would be at large.

On the foregoing considerations and in the light of the other provisions of the Act, I am unable to interpret section 3 as Mr. Rivard asks us to do. When these bequests of the revenue from the sums set aside are made to the legatees, each legacy becomes a subject of taxation, and for the purpose of calculating the amount, the periodic payments must by some means of estimation be brought to an attributed capital value.

I am disposed, moreover, to the view that ss. 8 is intended, and by its general language is sufficient, to embrace within its scope such life interests in revenues from funds held by trustees as we have in this case, and that the capitalization is to be determined in the manner prescribed. But even if we treat the legacies as not strictly within the subsection, then for their taxation under section 3, some method for estimating the capital value must be resorted to, and, by analogy, the basis indicated by ss. 8, appropriate as it is, is that which should be adopted.

It is urged that such a conclusion is in conflict with the judgment of this Court in *Lamarche* v. *Bleau* (1). There,

(1) [1930] S.C.R. 198 at 200.

on the death of a husband, the widow, by virtue of her marriage contract, became the general usufructuary of the estate with her children as proprietors. She had paid the amount of duties calculated at the appropriate rate, which was common to all interests, on the total value of the property and then brought action against the proprietors for reimbursement. It was held that in such a situation the usufructuary was personally liable only for the duties in respect of her interest, but that she was obliged to remit to the collector the duties for which the proprietors were liable by way of taking or realizing them from the corpus of the property in her possession. Although under the *Civil Code* there is no authority in the usufructuary to dispose of corpus, in such a case it was necessarily implied by the *Succession Duty Act*. The amount of the corpus so taken is deemed to meet the duty payable by the usufructuary in the loss pro tanto of interest or enjoyment and that of the proprietor as of the time when the property comes into his possession.

In the reasoning of the Court (1) this language appears:

> Cela veut dire: sur la valeur du bien lui-même et non sur la valeur de la propriété, de l'usufruit ou de la jouissance de ce bien. C'est le bien qui, par le fait de sa transmission, est "frappé". La loi, pour imposer la taxe ou en déterminer le taux, ne s'occupe pas du caractère du droit (propriété, usufruit ou jouissance) de celui auquel le bien sera remis par suite de sa transmission.

Whether that was intended to meet all cases including those in which the rate of taxation against, say, the usufructuary is different from that against the proprietor or, as here, where one of the interests is exempt from duty, need not be considered. It is a salutary rule which I shall observe here that the reasons of a court in rendering a decision must be taken secundum subjectam materiam. Under the law as it stood in 1921 there was a special provision in the second paragraph of Article 1380 in these words:

> Dans le cas de transport de propriété avec usufruit ou substitution, les droits sont payables par l'usufruitier ou le grevé, et ne sont exigibles d'aucun autre bénéficiaire.

and the decision revolved about the interpretation of that paragraph. But here we have a life interest, not usufruct,

(1) [1930] S.C.R. 198.

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in income with the interest in the corpus exempt from tax. The beneficiary has no contact with much less possession of the corpus and the duty of the trustee under section 13 is to deduct the tax from property in his hands belonging to the person liable for it. To deduct tax in respect of the property of the charity would be in the face of the exemption. No such question was involved in the decision.

There is this to be added. In 1930 subsequent to the judgment the present second and third paragraphs of section 13 dealing with the case of usufruct or substitution were enacted, the former prescribing the basis of calculation of the tax and the source from which it shall be paid and the latter conferring power to appropriate the corpus to payment. In 1938 ss. 8 of section 3 was introduced, dealing with life rents and endowments which I have already considered. If, therefore, the language of the decision is to be taken as a view of the interpretation of section 3 applicable in all cases under the law then in force, I must treat it as having been superseded by subsequent legislation which specifically and in the clearest manner indicates the mode in which successive interests of the sort we have here are to be dealt with.

I have considered the case on the assumption that the legatees within the meaning of the Act are the beneficiaries and not the trustees. That in fact has been the assumption upon which both courts below have proceeded, and in the light of the different provisions of the *Civil Code* for conveyances in trust, Articles 981 (*a*) et seq, and the provisions of the Act, it is, I think, unassailable.

I would, therefore, allow the appeal and restore the judgment at trial with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Scott, Hugessen, Macklaier, Chisholm & Hyde.*

Solicitors for the respondent: *Rivard, Blair & Gobeil.*

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HIS MAJESTY THE KING on the information of the Attorney-General of Canada (PLAINTIFF)..... APPELLANT;

*Feb. 25, 26
*Apr. 13

AND

GAS AND OIL PRODUCTS, LIMITED (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs Tariff Act, R.S.C. 1927, c. 44, s. 35, Schedule A, Item 710 (a), (b), (bb), (c), (d), (e), (f)—Gasoline imported in drums—Packaging charges—Whether duty payable on packaging charges—"Packing"—Fair market value of fluid as packaged.

The respondent agreed to purchase Ethyl fluid from the Ethyl Corporation, a company carrying on business in the United States, either in tank cars f.o.b. Ethyl's plant or in drums. If the fluid was shipped in drums, Ethyl would credit the respondent with a freight allowance based on the weight of the fluid content of the drums and at the prevailing tank car rate, and the respondent agreed to pay Ethyl "a per drum packaging charge which will be established from time to time by Ethyl." From October 1942 to September 1945, the respondent imported a certain quantity of fluid in drums, and, on each importation, duty was paid upon a declared value marked on the invoice and showing merely the cost of the fluid at the price agreed upon between the parties but not the packaging charge. The Crown took proceedings to recover the duty on the charges for packing the fluid. The Exchequer Court dismissed the action.

Held, reversing the judgment appealed from, [1947] Ex. C.R. 452, that there were packaging charges imposed on respondent by Ethyl.

Held: The contention that the word "packing" in paragraph (*f*) of Item 710 does not describe the placing of a liquid in containers such as drums, cannot be upheld.

Held: The fair market value of the fluid as packaged is the invoice price of the fluid plus the actual amount charged for packaging.

Held: Even if the packaging charge had been charged separately on the invoice, it would not have taken the lower rate applicable to the fluid itself.

APPEAL by the Attorney-General of Canada from the judgment of the Honourable Mr. Justice O'Connor of the Exchequer Court of Canada (1), dismissing the action brought by His Majesty The King on the information of the Attorney-General of Canada against the present respondent in which the Crown claimed the sum of $898.28 customs duty on packaging charges of fluid in drums.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

(1) [1947] Ex. C.R. 452.

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

F. P. Varcoe, K.C. and *W. R. Jackett* for the appellant.

Redmond Quain, K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.:—This is an appeal by the plaintiff from the dismissal by the Exchequer Court (1) of an Information exhibited by the Attorney-General of Canada to recover from the respondent $898.28 customs duty on packaging charges made by Ethyl Gasoline Corporation, hereinafter called Ethyl, against the respondent in connection with various shipments, in drums, by Ethyl to the respondent, of an anti-knock motor fluid known as Ethyl fluid. These charges are alleged to be dutiable under item 710(*b*) in Schedule A to the *Customs Tariff, R.S.C. 1927, chapter 44,* and amendments thereto. In order to appreciate the various arguments advanced on behalf of the parties, it is necessary to reproduce the whole of item 710:—

710. Coverings, inside and outside, used in covering or holding goods imported therewith, shall be subject to the following provisions, viz.:—

(*a*) Usual coverings, containing free goods only; usual coverings, except receptacles capable of holding liquids, containing goods subject to a specific duty only, n.o.p.

(*b*) Usual coverings containing goods, not machinery, subject to any ad valorem duty, when not included in the invoice value of the goods they contain.

(*bb*) Usual coverings containing machinery subject to any ad valorem duty, when not included in the invoice value of the goods they contain.

(*c*) Provided that usual coverings containing goods subject to any ad valorem duty, if included in the invoice value of the goods they contain, and not charged separately on the invoice, shall be subject to the same rate of duty ad valorem as the goods they contain, and may be combined with the goods for valuation and duty on the Customs entry;

(*d*) Provided further that receptacles capable of holding liquids, when containing goods subject to a specific duty, shall be charged with the rate of duty to which the same would be subject, if imported separately, except when the coverings and the goods contained therein are rated together in the tariff item;

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(*e*) Provided further that usual coverings designed for use other than in the bona fide transportation of the goods they contain, shall be charged with the rate of duty to which the same would be subject if imported separately;

(*f*) Provided also that the term coverings in this paragraph shall include packing boxes, crates, casks, cases, cartons, wrapping, sacks, bagging, rope, twine, straw or other articles used in covering or holding goods imported therewith and the labour and charges for packing such goods, subject to regulations prescribed by the Minister.

The information was tried on an agreed statement of facts and on the evidence of a customs appraiser for the appellant and that of the respondent's accountant. The respondent company was incorporated under the laws of the Province of Alberta and operated a refinery in that province, which, however, was not situate on any railway. It agreed to buy Ethyl fluid from Ethyl, a company carrying on business in the United States of America, either in tank cars f.o.b. Ethyl's plant or in suitable drums. If shipments were made in Ethyl's tank cars, that company agreed to absorb the freight from its plant to the respondent's refinery. If the fluid was shipped in drums, the respondent was to pay the full freight charges but Ethyl would credit the respondent with a freight allowance based on the weight of the fluid content of the drums and at the prevailing tank car rate. The respondent also agreed to pay Ethyl "a per drum packaging charge which will be established from time to time by Ethyl."

Because of its lack of railway facilities the respondent was forced to purchase the fluid in drums, which drums it also purchased from Ethyl. Upon the first entry of these drums into Canada, the appropriate customs duty thereon was paid and, while the drums went back and forth, no further duty was claimed with respect thereto. From October 13, 1942, to September 19, 1945, the respondent imported a certain quantity of Ethyl fluid in these drums and, on each importation, an invoice was made out and also a customs declaration showing merely the cost of the fluid at the price agreed upon between the parties. Duty was paid upon such declared value. These proceedings were taken to recover the duty on the "charges for packing" the fluid as being brought by paragraph (*f*) of Item 710 within the term "coverings" in paragraph (*b*).

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It is contended by the respondent that although the agreement between it and Ethyl describes the charge made by Ethyl as a "packaging charge", it does not fall within the description of "labour and charges for packing" in paragraph (*f*), because "packing" does not properly describe placing a liquid in containers such as drums. This contention cannot be supported. The term "coverings" is stated in (*f*) to include casks or other articles used in holding "goods" imported therewith, and "goods" must include liquids in view of the wording of paragraph (*d*) and the reference therein to receptacles capable of holding liquids. In the last part of paragraph (*f*), the phrase is "labour and charges for packing *such* goods" and "goods" must there also include liquids. Furthermore, in the agreed statement of facts, it is stated that the charge "is in essence a service and labour charge for filling the drums with the said product to be imported."

The trial judge (1) did not deal with this contention because he proceeded on the ground that there was no charge for packaging the drums but that on the contrary what was done between the respondent and Ethyl was merely a method of equalizing the cost to the respondent between a shipment by tank car and a shipment in drums. This conclusion is opposed to the very terms of the agreement by which the respondent agreed to pay "a per drum packaging charge" and, with respect, for other reasons I am unable to agree with that view. The respondent always paid the freight charges and no duty was payable on these charges. Any credit given by Ethyl to the respondent under the terms of the agreement in connection with the freight could therefore not be taken into account, and the fact that the credit notes were reduced by the packaging charges instead of a separate account being sent for such charges by Ethyl to the respondent cannot alter the fact that there were "charges for packing such goods" within paragraph (*f*) of Item 710 of the *Customs Tariff*.

Section 35 of the *Customs Act, R.S.C. 1927, chapter 42*, and amendments provides that the value for ad valorem duty imposed on any goods imported into Canada shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence

(1) [1947] Ex. C.R. 452.

and at the time when the same were exported directly to Canada. It was argued that there was no evidence of the fair market value of the fluid as packaged. However, the declaration by an officer of Ethyl, attached to each invoice, fulfils the requirements of this section in so far as the fluid itself is concerned. Section 45 provides:—

> No deduction from the value of goods in any invoice shall be made on account of charges for packing, or for straw, twine, cord, paper, cording, wiring or cutting, or for any expense incurred or said to have been incurred in the preparation and packing of goods for shipment, and all such charges and expenses shall, in all cases, be included as part of the value for duty.

The last part of this section, "and all such charges and expenses shall, in all cases, be included as part of the value for duty", indicates that the actual amount of the packaging charge should have been included in the invoice and, if that had been done, the appropriate rate would be found in the provisions of the *Customs Tariff*. The invoice did not include the packaging charge but the very terms of the agreement between Ethyl and the respondent, and the statements in the agreed statement of facts that such charge "is in essence a service and labour charge for filling the drums with the said product to be imported", and that the total of such charges "is in effect the aggregate of the charges so described by the Ethyl Corporation as packaging charges" is sufficient evidence, in the absence of anything to the contrary, to determine that the fair market value of the fluid as packaged is the invoice price of the fluid plus the actual amount charged by Ethyl for packaging.

It was finally contended that, in any event, the duty was not 20 per cent as prescribed in item 710 (*b*) but only 10 per cent, and reliance is placed upon section 45 of the *Customs Act* quoted above. In the first place, as we have seen, the invoices sent from time to time did not include the labour and charges for packing and, in any event, this section does not set the rate which is dealt with in the *Customs Tariff*. The proviso in paragraph (*c*) of item 710 in the Schedule to the latter shows that, even if the packaging charge had been charged separately on the invoice, it would not have taken the lower rate applicable to the fluid itself, and the same result must follow where, as here, the charge was not even known to the customs authorities.

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The appeal should be allowed and judgment directed to be entered for the appellant for the amount claimed with costs throughout. In order to obviate the necessity of any further application, the judgment may provide that the money paid into the Exchequer Court with the defence may be paid out to the appellant and applied on the amount owing under the judgment.

Appeal allowed with costs.

Solicitors for the appellant: *F. P. Varcoe and W. R. Jackett.*

Solicitors for the respondent: *Helman, Mahaffy and Barron.*

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*Feb. 19, 20.
*Apr. 13.

BENJAMIN LOPATINSKY.....(APPELLANT);

AND

HIS MAJESTY THE KING.....(RESPONDENT).

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Evidence of accomplice—Corroboration—Nature of evidence required for corroboration—Circumstantial evidence—Recent possession—Remarks of trial Judge in passing sentence—Cr. Code s. 1002, 1014—Charge of retaining stolen goods under Cr. Code s. 399.

The Court of Appeal for Alberta affirmed the conviction of the appellant who had been found guilty by a judge, presiding without a jury, of retaining in his possession, knowing them to have been stolen, sixteen tires, the property of the Government of Canada. These tires were stolen from the R.C.A.F. in Edmonton by one L.A.C. Ward. The accused agreed to sell them for Ward and they were delivered by Ward to the accused at the Low Level Service Station in Edmonton in a truck bearing the letters R.C.A.F. on the door. The six tires sold by the accused were recovered and all the others were recovered either at his house or at the service station.

Held: This was not a conviction on the uncorroborated evidence of an accomplice.

Held: The conduct of the accused and the circumstances under which he received and disposed of the tires established his guilt, and even if the trial judge's direction lacked that precision which the law contemplates, no substantial wrong or miscarriage of justice had occurred under section 1014 Cr. Code.

*PRESENT: Taschereau, Rand, Kellock, Estey and Locke JJ.

Held: The remarks made by the trial judge in the course of his passing sentence, even if he had them in mind when considering his verdict, would not, in the circumstances, warrant a setting aside of the conviction.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, affirming (Ford and Macdonald JJ. A. dissenting) the conviction of the appellant on a charge of retaining in his possession, knowing them to have been stolen, sixteen tires, the property of the Government of Canada, contrary to section 399 of the Criminal Code.

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

A. W. Beament, K.C. for the appellant.

H. J. Wilson, K.C. for the respondent.

The judgment of the Court was delivered by

ESTEY J.:—The accused was convicted before a judge presiding without a jury of retaining in his possession, knowing them to have been stolen, sixteen tires, the property of the Government of Canada. The Appellate Division in Alberta affirmed the conviction, Ford and Macdonald, JJ. A., dissenting.

The first ground of dissent is that the learned trial Judge misdirected himself by disregarding the rule of practice that it is dangerous to convict upon the uncorroborated evidence of an accomplice.

It must be conceded that LAC Ward as a witness was in relation to the accused an accomplice. He deposed that on September 16, 1947, he and two others stole the tires from the R.C.A.F. in Edmonton, that on the same day he made an arrangement with the accused to sell the tires for them, and delivered the tires to him at the Low Level Service Station in Edmonton. *Rex* v. *Robinson* (1); *Rex* v. *Galsky* (2); *Rex* v. *Joseph* (3).

The accomplice is a competent witness but his implication in the crime and the possible motives that may

(1) (1864) 4 F. & F. 43.
(2) 67 C.C.C. 108.
(3) 72 C.C.C. 28.

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influence him in giving his evidence are such that it is dangerous to found a conviction thereon unless it be corroborated. It need not be corroborated, however, in every detail. It is sufficient if there be found corroboration of a material fact in independent evidence which implicates the accused in the commission of the crime.

In *Rex* v. *Baskerville* (1), Lord Reading, C.J., in delivering the judgment of the Court of Criminal Appeal in England reviewed the authorities upon the corroboration of the evidence of an accomplice and stated in part at p. 667:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

This Court in *Hubin* v. *The King* (2), followed *Rex* v. *Baskerville* (1) and stated at p. 444:

> The corroboration must be by evidence independent of the complainant and it "must tend to show that the accused committed the crime charged."

In *Regina* v. *David Birkett* (3), the accused was found guilty of receiving sheep knowing that they had been stolen. One of the two persons involved in the theft deposed as to the theft and of the delivery of one of the sheep by the other party involved in the theft to the accused who had taken it into the house where he and his father lived. Evidence as to the finding of a quantity of mutton in that house, which had formed parts of two sheep corresponding in size with those stolen, and the finding of the skins in the same place constituted corroboration. This case was approved in *Rex* v. *Baskerville* (1).

Against the accused the Crown did not rely entirely upon the evidence of Ward but called as witnesses Taylor, the investigator, and Congdon who purchased six of the tires from the accused.

Flight Sergeant Taylor, R.C.A.F. investigator, on September 19th located some of these tires at the Low Level Service Station. He then located the accused and with

(1) (1916) 2 K.B. 658.
(2) [1927] S.C.R. 442.
(3) (1839) 8 C. & P. 732.

him went to the latter's house where three of the tires were recovered. Then they went to the Low Level Service Station where six more tires were recovered. Finally they went to Congdon's Transfer where six more were recovered. The manner in which these tires were recovered leaves no doubt but that they were the tires that two days before the accused had received from Ward.

Moreover, before or on the morning of the 18th some of these tires were removed from the Low Level Service Station to the home of the accused. On that morning, Congdon deposed, the accused offered for sale some tires which he inspected at the home of the accused. That afternoon the accused took six of the tires (four new 900 x 20 and two used of the same size) to Congdon's Transfer where a sale was concluded of these tires for $300, approximately one-half of their market value.

The foregoing evidence of Taylor and Congdon corroborates that of Ward, both as to the place of delivery of the tires, and the fact that the accused had received and retained them for the purpose of effecting a sale. This is not, therefore, a case in which a conviction has been made upon the uncorroborated evidence of an accomplice. Moreover, neither this corroborative nor any other part of the evidence was contradicted.

The learned Judges who dissented were also of the opinion that the learned trial Judge disregarded the rule of law as to the effect of circumstantial evidence. This rule is set forth in the oft quoted passage in *Hodge's Case* (1), where, in addressing the jury, Alderson, B., stated that they must be satisfied:

> . . . not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

The accused was first approached with regard to these tires by LAC Stubbart, who met the accused on the 17th at the Low Level Service Station and as to that he stated:

> When I got there I met Mr. Lopatinsky and asked him if he was still interested in tires; he said he would like to see them.

Stubbart denied any knowledge of the theft but why he was associating himself in the matter was left entirely a

(1) (1838) 2 Lewin C.C. 227 at 228.

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matter of conjecture. Stubbart then waited at the Low Level Service Station until Ward, driving a truck, arrived with the fifteen tires. This truck had the letters "R.C.A.F." on the doors. Stubbart introduced Ward to the accused and a conversation followed between them which Stubbart did not hear. Ward deposed that he asked the accused "if he could sell the tires for me or buy them himself", to which the accused replied "he couldn't buy them himself, he didn't have the money; he said he would try and sell them for me". While the accused looked or glanced at the tires as they remained in Ward's truck, he did not examine them, but as a result of the conversation these tires were removed by Ward, Stubbart and another airman, from the truck driven by Ward, and placed in part into another truck at the service station and in part into the service station. These fifteen tires were of different sizes, 1100 x 20, 1000 x 20 and 900 x 20, some were retreads and some were new. Ward said he would like to get $600, and that appears to be all that was said about the price. No questions were asked with regard to where these tires came from. In cross-examination Ward did depose that the accused had inquired about a bill of sale but accepted a statement that they would try to give him one later. On that date the accused advanced to Ward $100 and the next day he gave Stubbart $50, which Stubbart handed to Ward.

It is not suggested that any of the parties were engaged in the business of selling tires nor was the transaction itself conducted as one in the normal course of business. From the moment Stubbart met the accused and asked "if he was still interested in tires", the matter proceeded with a minimum of conversation and an absence of discussion as to Ward's acquisition of the tires, the use and condition of the tires and the value of them or other items that normally enter into such a transaction.

Under these circumstances, the disposition of the tires at approximately one-half of their market value is significant. It was this fact, or it together with the other circumstances that caused Congdon to take the serial numbers of these tires and before concluding the purchase to communicate with the police and ascertain if these tires were listed as stolen.

Throughout the evidence of both Taylor and Congdon there is no suggestion that any explanation was offered on the part of the accused as to the circumstances under which he was in possession of these tires which had been stolen but two or three days prior thereto.

The evidence of guilty knowledge in this as in so many cases is not directly deposed to. The unexplained fact of recent possession is evidence thereof.

Rex v. *Schama* (1).

Wills on Circumstantial Evidence, 7th Ed., 93.

Taylor on Evidence, 12th Ed. sec. 140.

In this case, however, the Crown had not relied upon the mere fact of recent possession but has adduced evidence of conduct upon the part of the accused, both with respect to his reception and disposition of the tires and as to the sale of a portion thereof. These facts were all adduced in evidence and no explanation tendered in regard thereto. As disclosed in this record they admit of no doubt as to the guilt of the accused.

The learned trial Judge did not record the reasons upon which he founded his verdict of guilty and it may be that he did not direct himself upon the foregoing points with that precision which the law contemplates. However, the facts and circumstances of this case are such that no substantial wrong or miscarriage of justice has actually occurred within the meaning of section 1014 of the *Criminal Code*.

The other ground of dissent was based upon the learned trial Judge's reference to the thieves as "children" and that the accused was a "garageman". All of the parties were before him and while there is no evidence as to their respective ages, it was open to him to form his opinion. The evidence indicates that the accused was driving a truck. But what interest or association if any he had with the Low Level Service Station is left a matter of conjecture. It was there he received delivery of the tires on September 17th, and six of them were recovered from that station on the 19th by Flight Sergeant Taylor. These remarks were made by the learned trial Judge in the course

(1) (1914) 11 C.A.R. 45.

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of his passing sentence upon the accused, but even if he had them in mind when considering his verdict they would not, in the circumstances, warrant a setting aside of the conviction.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Cairns, Ross, Wilson & Wallbridge.*

Solicitor for the respondent: *H. J. Wilson.*

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*Feb. 17, 18
*April 27.

WILLIAM FRASER ROBERT HENDERSON ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Law—Accused charged of murder entitled to have all his defences adequately put to jury by trial judge—Appellant conspired with two others to hold up and rob bank, when block away turned back, were intercepted by police and appellant disarmed—Companion attempting to escape killed policeman—Whether appellant party to offence of murder within meaning of S. 69 (2) Criminal Code, or had abandoned common intention to prosecute unlawful purpose—Whether such common intention was (a) attempt to rob bank; (b) to resist arrest by violence and assist each other in doing so; or (c) conspiracy to rob bank—Whether trial judge erred in charging jury appellant guilty of an attempt to rob bank within meaning of S. 72 (2) of Criminal Code.

The appellant together with one M and C, each having provided himself with a revolver and ammunition, proceeded in a motor car to hold up and rob a bank. The police having learned of the plot had parked a police car near the bank. When the trio were a short distance from it they turned the car about, abandoned it about a mile away, and walked to some railway tracks. They were there intercepted by two policemen in plain clothes who escorted them back to a detective also in plain clothes. The latter after asking the appellant his name and receiving no reply, noticed the appellant's revolver and took it from him without resistance, objection or protest. At this moment the suspects, who were standing in line, sprang in different directions, the police giving chase. M in his flight turned and shot his pursuer. The police returned the fire. As a result of the shooting, C and the two policemen were killed, M and the

*PRESENT: Kerwin, Taschereau, Kellock, Estey and Locke JJ.

detective, wounded. The appellant took no part in the shooting but in his flight joined M and was subsequently arrested while hiding with him. M and the appellant were charged jointly with the murder of the policeman shot by M, but were tried separately, and both found guilty. M was executed and the present appeal is from the conviction of the appellant.

Held: The appellant was entitled to have each of his defences adequately put to the jury by the trial judge, and since this was not done with regard to his principal defence, that of abandonment (Kerwin J. dubitante), there should be a new trial.

Per Kerwin, Estey and Locke JJ.: There was evidence upon which the jury might properly find that there had been an attempt to commit an offence within the meaning of S. 72 of the *Criminal Code.*

Per Kerwin J.: Such offence constituted an attempt to rob the bank and in leaving the question to the jury, the trial judge did not prejudice the accused.

Per Taschereau and Kellock JJ.: The question was, whether on the evidence the trio had sufficient reason for thinking they had rendered themselves liable to arrest and had determined to resist to the extent of using violence if necessary. It was open to the jury on the evidence to conclude that the appellant at the time of the shooting was a party to the prosecution of an unlawful purpose; it was also open to them to come to a contrary conclusion, if they were of opinion that even had there been an earlier unlawful intention, it had, so far as the appellant was concerned, been abandoned. Before the appellant could be convicted it was essential that these alternatives should have been put to the jury by the trial judge from the standpoint of the Defence as well as the Crown, which was not done.

Per Taschereau J.: The conspiracy to rob the bank was complete and this in itself was a crime, but the subsequent facts revealed by the evidence did not show the essential ingredients of an attempt to rob the bank within the meaning of S. 72 of the *Criminal Code.* An intent, an act of preparation, and an attempt, must not be confused. A mere intent is not punishable in criminal law, even if coupled with an act of preparation. *Reg.* v. *Eagleton,* Dears C.C. 515; It cannot be held that the mere fact of going to a place where the contemplated crime is to be committed, constitutes an attempt. There must be a closer relation between the victim and the author of the crime; there must be an act done which displays not only a preparation for an attempt, but a commencement of execution, a step in the commission of the actual crime itself.

The trial judge erred in charging the jury that "they could be prosecuted for attempting to rob a bank" and "the attempt is complete when they take any steps in connection with it." This confused the issue and was prejudicial to the accused. The question of whether the bandits were guilty of an attempt is foreign to the case. Their common unlawful purpose to hold up and rob the bank and to assist each other in the prosecution of that purpose, having been frustrated, was obviously not pursued, and it was not therefore in the prosecution of such purpose that the murder was committed.

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It was for the jury to say, if in view of the evidence the appellant had been a party to a conspiracy, if such conspiracy was ever formed; and it was also within their exclusive province to find, after having been properly instructed, that he had detached himself from any further association with the other conspirators.

APPEAL by the accused from the judgment of the Court of Appeal for British Columbia (1) (O'Halloran J. dissenting) dismissing his appeal from his conviction, at a trial before Manson J. and a jury, on a charge of murder. The appeal was on the grounds of dissent taken by O'Halloran J.A. (who held that there should be a new trial.)

John Groves Gould for the appellant.

Alfred Bull K.C. for the respondent.

KERWIN J.:—Attention should first be directed to the question as to whether in law what was done with the intent to rob the bank was, or was not, only preparation for the commission of that offence and too remote to constitute an attempt to commit it as provided by subsection 2 of section 72 of the *Criminal Code*. This subsection sets forth the considerations that are to govern in deciding this question of law and, with respect, I find very little assistance in considering the circumstances in other reported cases and I do not find it conducive to the solution of the problem to attempt to paraphrase the wording of the subsection. It is necessary to determine this point first, because if the proper conclusion be that there was no attempt, then Mr. Bull admitted that as the case was put to the jury by the trial judge on the basis of their being an attempt as well as on the basis of his wider proposition, it would be impossible to say upon what ground the jury proceeded and, therefore, for that reason there would have to be a new trial. In leaving the question to the jury, the trial judge certainly did not prejudice the accused because the circumstances in this case satisfy me that as a matter of law what was done falls within the provisions of the subsection so as to constitute an attempt. I do not detail these circumstances because on another ground there is to be a new trial.

If upon such new trial there is evidence of a common intention to rob and to escape with violence, the question

(1) [1948] 1 W.W.R. 1.

should specifically be left to the jury as to whether the accused had desisted from participation in such common intention. And if it be claimed by the Crown that, irrespective of any agreement to rob, there was a common intention to flee from the police officers using force, then a defence that Henderson was not a party to such common intention should also be put to the jury. These defences were raised by the accused at his trial and while in discussing the Crown's case the trial judge did refer to those features, he did not specifically deal with them when he came to charge the jury as to what the defences were. With some hesitation I am unable to dissent from the view of those members of this Court who find that these defences were not adequately put to the jury.

TASCHEREAU J.:—The appellant Henderson and one Harry Medos were jointly indicted at Vancouver, B.C. for the murder of Charles Boyes, a police officer. The two accused were given separate trials, as a result of which Medos was found guilty and executed, and Henderson who was tried before Manson, J. was also convicted.

It appears from the evidence that the appellant, Medos, and one Carter conspired together to commit a holdup at the premises of the Royal Bank of Canada, on the east side of Renfrew Street, directly opposite the Java Inn at Vancouver. The next day, the three men were seen in a maroon Mercury car, coming west, on 2nd Avenue. It was observed that the car turned into the first lane facing south, and backed out to 2nd Avenue again, and then went east, from whence it had come, and proceeded to the stop sign at Renfrew Street, and turned north on Renfrew Street in the direction of the bank, but proceeded only about two car lengths when it swerved to the right, making a U turn and proceeded at a fast rate of speed east on 2nd Avenue. The bandits who were on their way to the bank to commit the intended hold-up, had obviously detected a Police car that was parked in front of the Java Inn facing south, and found that the occasion was not favourable to carry out their plot. After having made this U turn, they proceeded in their car for about a mile and a half, and then abandoned it on Kitchener Street, and walked west towards the Great Northern Railway yards.

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They had admittedly been under close observation by the police, for when they arrived in the yards, Officers Boyes and Ledingham drove their car into the yards near the roundhouse, and accosted them on the railway track where all five crossed the line of tracks they were on, to another set of tracks. A few seconds later, Detective Sergeant Hoare arrived, and standing directly opposite the appellant, he said: "Who are you fellows anyway?" and coming nearer the appellant, Hoare said: "What is your name?" These two questions remained unanswered, and looking at the appellant, Hoare saw a gun tucked in the top of his overalls which he pulled out. He had just taken this gun, when the whole line of men broke up and the appellant, Medos and Carter sprang in different directions. Medos who was the first to move was pursued by Officer Boyes, Ledingham going after Carter. Medos had hardly ran six or seven steps whe he turned and shot Boyes, and Carter fired at Ledingham. Medos then aimed at Hoare. Unfamiliar with appellant's revolver, and therefore unable to use it, Hoare moved rapidly towards a pile of steel plates, trying to reach for his gun, but a bullet struck him in the left thigh and he fell to the ground. He however tried to get his gun out of the holster, but was at that same moment struck by another bullet in the upper part of his right arm, and another shot passed by the left side of his face. He succeeded in sitting up, and he saw Boyes lying dead on the ground, and Medos still running. He then raised his gun on his right knee, and aimed at Medos, but seeing Carter running in a north-westerly direction, he transferred his aim to Carter and shot him to the ground. He then aimed at Medos who fell. He fired another shot which killed Carter, and a second shot at Medos.

As a result of the shooting, Officer Boyes and Ledingham and Carter were killed. Medos succeeded in escaping with the appellant, but both were discovered soon after in the basement of a house on 5th Avenue where they were arrested. In the interval, appellant had changed his outer clothing, and later Medos' gun was found in the basement containing one live shell. The gun taken from Henderson by Detective Sergeant Hoare was fully loaded with live shells, and in appellant's pocket were found also five other live shells which fitted his gun.

It is the contention of the Crown that Henderson, together with Medos and Carter, formed a common intention to commit a crime by violence, viz. to hold up and rob the Royal Bank of Canada on Renfrew Street, and to assist each other therein, and that it was a part of the common intention to overcome all resistence by force of arms, either in the bank or outside the bank, and to resist lawful apprehension by the police, and if pursued to shoot if necessary. The Crown further states that such common intention *was at no time abandoned* by appellant, that the common design was frustrated by the police and that it was only the presence of a Police car immediately across the street from the bank, which caused the bandits to change their mind, so that instead of continuing their unlawful purpose, they then directed their attention to resisting lawful apprehension.

The Crown further submits that in view of section 69 (2) of the *Criminal Code*, which reads as follows:—

> 2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

the jury being properly instructed by the learned trial judge, could find that such a common intention was formed, and that in the *prosecution* of such common purpose one or more of the trio shot and killed Officer Boyes, and that the commission of that offence was or ought to have been known to be a probable consequence of the *prosecution* of such common purpose.

The Crown also submits and it was put to the jury by Crown counsel, that even if the jury could not find that the common purpose was as comprehensive as was put to them, there was another view which could be taken, namely, that when the trio abandoned the motor car on Kitchener Street, they had already committed a crime, that is to say, they had *attempted* to hold up and rob the bank, within the meaning of section 72 of the *Code* which is in the following words:—

> 72. Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

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2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

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It is said that these three men, when their attempt to hold up the bank was frustrated, formed a common intention to resist lawful apprehension, which is in itself an unlawful purpose within the meaning of section 69, and that during the *prosecution* of such common purpose, murder was committed by one of their number.

The Court of Appeal for British Columbia dismissed Henderson's appeal, Mr. Justice O'Halloran dissenting (1). The points of dissent are the following:—

(1) The jury were left in a state of confusion by three inconsistent directions given by the learned judge apparently in purported compliance with *Code* S. 72 (2).

(2) The jury were not instructed under Code S. 72 (2) upon the distinction in law between acts of preparation as such and acts which could constitute an attempt to hold up the bank; and further, following what the learned judge ought to have instructed them in law upon the distinction between "preparation" and "attempt" (but which he did not do), the jury were not instructed that it was for them to find whether there was evidence to support an attempt or merely acts of preparation within the meaning of what the learned judge ought to have told them constituted "attempt" and "preparation" respectively. Instead the learned judge decided the facts as well as the law and instructed the jury an attempt in law had occurred;

(3) The learned judge misdirected both himself and the jury upon the legal meaning of attempt;

(4) The learned judge erred in law in directing the jury that what occurred constituted an attempt in law to hold up the bank;

(5) The learned judge in legal effect took away from the jury Henderson's defence of abandonment of the common intention under S. 69 (2) to hold up the bank;

(6) Alternatively, the learned judge erred in law in directing the jury that an attempt to hold up the bank excluded any defence of abandonment of the common intention to hold up the bank;

(7) Alternatively, the learned judge did not leave it to the jury to decide whether any common intention under S. 69 (2) existed after the virtual arrest of Henderson *et al* by officers Boyes and Ledingham;

(8) Alternatively, the learned judge did not leave it to the jury to decide whether Henderson, disarmed before the gun battle in which he took no part, had any common intention with Medos within the meaning of S. 69 (2), to take part in the gun battle in which the murder occurred;

(9) The learned judge, having put the Crown's case to the jury with great power, did not present Henderson's case so as to bring out its full force and effect. Read as a whole, the charge points always to guilt and nothing but guilt;

(1) [1948] 1 W.W.R. 1.

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(10) The learned judge, in the course of presenting Henderson's defence, did not bring to the jury's attention the importance of reasonable doubt when related to (*a*) common intention regarding abandonment of the hold-up; (*b*) absence of any common intention in Henderson to escape after his virtual arrest by officers Boyes and Ledingham; and (*c*) absence of any common intention in Henderson to take part in the gun battle in which the murder occurred;

(11) The learned judge ought to have instructed the jury the Crown had not made out a case in law to convict Henderson of constructive murder.

I would like first to deal with the contention that the three conspirators while on their way to the bank, were guilty of *an attempt* to commit a hold-up and rob the Royal Bank of Canada. With deference with other views expressed, I cannot agree with this submission. Of course, the conspiracy to rob the bank was complete and this in itself was a crime, but I do not believe that the subsequent facts revealed by the evidence show the essential ingredients of an attempt, within the meaning of section 72 of the *Criminal Code.*

An intent, an act of preparation, and an attempt must not be confused. A mere intent is not punishable in criminal law, even if coupled with an act of preparation. As it was said in *Regina* v. *Eagleton* (1) at p. 538:—

> The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are * * *

It was Sir James Stevens in his *Digest of the Criminal Law,* who defined an attempt as follows:—

> An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.

In *Principles and Practice of the Criminal Law* 14th ed., Harris at page 11 says:—

> Through a mere intention is not punishable if no steps are taken to carry it into effect, an *attempt* to commit either a felony or a misdemeanour is itself a crime, and therefore the subject of punishment. An attempt may be said to be the doing of any of the acts which must be done in succession before the intended object can be accomplished, with the limitation that it must be an act which directly *approximates to the offence,* and which, if the offence were committed, would be one of its *actual causes,* as distinct from a mere act of preparation.

(1) [1855] Dears. C.C. 515; 169 E.R. 826 at 831.

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Mr. Justice Blackburn once observed (*Roscoe's Criminal Evidence,* 15th ed., p. 415):—

> There is no doubt a difference between the preparation antecedent to an offence and the actual attempt, but if the actual action has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.

In *Roberts Case* (1) Jervis, C.J. says:—

> It is difficult and perhaps impossible * * * to define what is, and what is not such an act done, in furtherance of a criminal intent, as will constitute an offence * * * Many acts, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder, and is seen *to walk towards the place* of the contemplated scene, that would not be enough.

In *Rex* v. *Harry Robinson* (2) which I believe is the leading case, the accused was convicted of the offence of attempting to obtain money by false pretence. The Court of Criminal Appeal held that there was no attempt to commit the offence, but only a preparation for the commission thereof, and quashed the conviction. At page 1152, Lord Reading said:—

> Now in this case the real difficulty consists in this, that there is no evidence that anything done by the appellant ever reached the ears of the underwriters. They were the persons whose minds must be induced to part with the moneys payable under the policy; they were the persons from whom the money was to be obtained . . . There must, however, be some further act on the part of the appellant before it can be said that the attempt to commit the offence for which he has been indicted is complete. Applying the test laid down by Baron Parke, (In *Regina* v. *Eagleton*) we come to the conclusion that, in order to constitute an attempt to commit the offence, the act relied on must be an act directly *connected* with the commission of the complete offence.

I entirely agree with what Mr. Justice O'Halloran says in his dissenting judgment (3):—

> For an act to be an attempt, it must take place between the attemptor and the attemptee and be proximate to the crime about to be committed.

Here, the trio were seen in an automobile in the direction of the bank; but the plot was frustrated by the presence of the police. There was nothing done by the trio, no overt act *immediately connected* with the offence of hold-up and robbing. Although it may be said that no one could doubt the express purpose of the bandits, I do not believe that it can be held that the mere fact of going to the place where the contemplated crime is to be committed, consti-

(1) (1855) Dears. 539 at 550.
(2) [1915] 2 K.B. 342; 83 L.J.K.B. 1149.
(3) [1948] 1 W.W.R. 1 at p. 12.

tutes an attempt. There must be a closer relation between the victim and the author of the crime; there must be an act done which displays not only a preparation for an attempt, but a commencement of execution, a step in the commission of the actual crime itself.

If any further authority is needed on this question, *vide*: *Rex* v. *Rump* (1) at p. 40; *Rex* v. *Labourdette* (2); *Rex* v. *Woods* (3); *Rex* v. *Singh* (4); *Rex* v. *Linneker* (5); *Rex* v. *Punch* (6).

Section 72, para. 2 of the *Criminal Code* says that the question whether an act done or omitted with intent to commit an offence, is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

The jury were told by the learned trial judge that:

> they (trio) could not be prosecuted for robbing a bank, but they could be prosecuted for attempting to rob a bank * * * the attempt is complete when they take any steps in connection with it.

This statement of law, is, I think, erroneous. The jury might have thought that it was while trying to escape, after having committed an act, which they were told was *a crime*, that the bandits started the shooting as a result of which the killing ensued. This obviously confused the issue and was prejudicial to the accused.

I further believe, however, that the question whether or not the bandits were guilty of an attempt, is entirely foreign to the case.

There is no possible doubt that the three accused in view of the evidence produced, were guilty of conspiracy. The common unlawful purpose was to hold up and rob the Royal Bank of Canada, and it is also common ground that they intended to assist each other in the prosecution of that purpose. But, their common purpose having been frustrated, was obviously not pursued, and it was not therefore in the *prosecution* of such common purpose that Officer Boyes was killed.

(1) (1929) 41 B.C. 36.
(2) (1908) 13 B.C. 443.
(3) (1930) 22 C.A.R. 41.
(4) (1918) 26 B.C. 390.
(5) (1906) 75 L.J.K.B. 385.
(6) (1927) 20 C.A.R. 18.

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To my mind the real issues are the following:—

Was there at any moment a concerted plot formed by Medos, Carter and Henderson to resist legal apprehension with violence? It may well be that this plot if it did exist, was made originally when it was agreed to rob the bank, or it may be that it was formed after the bandits were frustrated in the prosecution of the hold-up. If such a plot did exist, the shooting being the result of a conspiracy, the two of course might be guilty of murder. The common intention would then be to resist legal apprehension; that would be the unlawful purpose. Each one of the trio would be a party to any other offence, committed by any one of them, in the prosecution of the common purpose, if he had known, or ought to have known, that it was a probable consequence of the original common purpose. It may happen, however, and this was for the jury to determine, that Henderson had ceased to be a party to the conspiracy, and that the shooting which started after he had been disarmed and under virtual arrest, was the spontaneous act of Medos. Then, the act of one, would not have been the act of all.

In order that section 69 (2) may find its application, the co-conspirators must form not only a common intention to prosecute an unlawful purpose, but they must agree also "to assist each other therein", and therefore, if a man is disarmed and made incapable of furnishing the promised assistance, the situation is obviously changed. It is settled law that a person who has been a party to prosecute a common illegal purpose, may disassociate himself with his original co-conspirators. As early as in 1828, in *Rex* v. *Edmeads,* Baron Vaughan said at the Berkshire Assizes (Carrington & Paynes Reports, Vol. 3):—

> If it could be shown that either of them separated himself from the rest, and shewed distinctly that he would have no hand in what they were going, the objection would have much weight in it.

In *Rex* v. *Whitehouse* (1) Mr. Justice Sloan, now Chief Justice of British Columbia, said:—

> After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to disassociate themselves from the con-

(1) (1940) 55 B.C. 420 at 425.

sequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. *That must depend upon the circumstances of each case* but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

In *Rex* v. *Croft* (1) it was held that the agreement may be expressly determined and that if it comes to an end before the crime is committed, the party who has put an end to the agreement is not guilty. The question whether the agreement has been put to an end, must be judged in view of all the circumstances revealed by the evidence, and I have no doubt that it is a question for the jury. It was for them to say, if in view of the evidence the appellant had been a party to the conspiracy, if such a conspiracy was ever formed, and it was also within their exclusive province to find, after having been properly instructed, that he had detached himself from any further association with the other conspirators.

Unfortunately, all these aspects of the case were not dealt with, and these omissions were, I believe, highly prejudicial to the accused. The defence was not presented so as to give it all its force and effect. It is true that no witnesses were called on behalf of the appellant, but it is nevertheless the duty of the trial judge, in his charge to the jury, to explain the exculpatory effect of the evidence, whether it is given by the witnesses for the Crown or for the accused. *Wu.* v. *The King* (2). It was the fundamental right of the appellant, who has been charged of murder, purely by construction of the law, which in this particular case creates a presumptive guilt, to have all the features of his defence adequately put to the jury.

(1) [1944] 1 K.B. 295. (2) [1934] S.C.R. 609.

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I have to come to the conclusion that this has not been done, and that the Crown has not established to my satisfaction that the verdict would have been the same, if the proper direction had been given.

The appeal should be allowed, the conviction quashed and a new trial directed.

KELLOCK J.:—The appellant not having himself taken part in the actual shooting, being unarmed at the time, the Crown rested its case against him upon section 69, subsection 2, of the *Code*.

With respect to the common intention to prosecute an unlawful purpose the Crown put forward two theories. The one, to which Mr. Bull referred as the more comprehensive, was that the three participants, Medos, Carter and the appellant, had planned the armed robbery of the Renfrew Street branch bank and resistance of arrest by violence if necessary. The second theory was that when the would be robbers retreated from the vicinity of the bank upon sighting the police car parked across the street they formed a new agreement of the same character to escape or resist arrest. He contended that such common intention was still operating at the moment of the shooting, and that there was nothing in the evidence indicating any abandonment of such common intention on the part of the appellant, but rather that the evidence indicated the contrary.

The important thing for the Crown to establish to the satisfaction of the jury beyond reasonable doubt, was that at the time of the shooting which resulted in the deaths of the two constables, Boyes and Ledingham, the one having been killed by Medos and the other by Carter, the appellant was a party to a common intention with the other two to escape or resist arrest by the use of violence and to assist each other therein, and that the murder which resulted was or ought to have been known to the appellant to have been a probable consequence of the prosecution of the common purpose.

The state of mind of the three men was therefore the matter to which the attention of the jury had to be directed

on the evidence. Whether or not the three had actually committed a crime or crimes when they turned away in their approach to the bank was to my mind not the basic question, but rather whether the evidence furnished sufficient ground for the jury to conclude that the three had formed a common unlawful intention of the character mentioned above, an important element in which would be the view which the three might reasonably be taken to have entertained as to whether their conduct up to that time had amounted to the commission of a crime or crimes. No doubt they had been guilty of a breach of section 573 of the *Code*. Whether or not it was likely that they realized that and for that reason had determined not to be taken and to use violence to prevent being taken, was for the jury. The same may be said with respect to the offence described in section 464 (*b*) or any others which might be suggested on the evidence including the offence of attempted robbery while armed. The question after all was whether the jury would conclude on the evidence that the men had sufficient reason for thinking they had rendered themselves liable to arrest for matters involving sufficiently unpleasant consequences that they had determined to resist arrest to the extent of using violence if that should prove necessary.

While it was open to the jury on the evidence to conclude that the appellant at the time of the shooting was a party to the prosecution of such an unlawful purpose, it was also, in my opinion, open to them to come to a contrary conclusion if they were of opinion that even had there been an earlier unlawful intention it had, so far as the appellant was concerned, been abandoned. With this Mr. Bull agrees. Before the appellant could be convicted therefore, it was essential that these alternatives should have been adequately presented to the jury by the learned trial judge from the standpoint of the defence as well as from that of the Crown. With great respect I think that was not done.

The learned judge in his summing up, after instructing the jury on matters of general application and the relevant law, laid before them first, the case for the prosecution, then the substance of what had been said by the various

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witnesses and, finally, the case for the defence. On reaching the case for the defence, the learned judge proceeded as follows:

> Now, Mr. Foreman, I have reviewed the evidence pretty fully and it is my duty now to put to you the defence. I gave you the Crown's case as they put it forward; I have reviewed the evidence. Now the defence says this * * *

The learned judge then told them that the defence contended that the Crown had not proved, beyond a reasonable doubt, that the appellant was one of several persons who had formed an intention to prosecute an unlawful purpose and to assist each other therein during the prosecution of which the offence occurred which the appellant knew, or ought to have known, was a probable consequence; that the Crown had failed to establish such common intent affirmatively and that, in addition, the evidence negatived it. He then said that the defence had pointed out that the appellant did not resist; that the movement in the line of the five men, consisting of the three confederates and the two police officers, (which immediately preceded the shooting) had commenced at the end of the line farthest away from the appellant; that it was said that the latter could have done nothing else than run in order to get out of the line of fire; and that immediately prior to his ultimate apprehension he had given himself up. The learned judge also referred to the fact that the confederates had walked slowly on the Flats and that there was no shooting when the two policemen came up with them. I find nothing else material in the charge dealing with the case for the defence.

In my opinion this was not adequate to put before the jury what the appellant was entitled to have put, namely, that should the jury come to the conclusion that any unlawful purpose which they might find to have existed at an earlier time had been abandoned prior to the shooting in such a way that the appellant was no longer involved and that what occurred had arisen without any common unlawful intention to which the appellant was a party, as to which they should give him the benefit of any reasonable doubt, they should acquit. I am not saying that it was necessary that this should have been said in so many

words but the jury should have been clearly instructed on this aspect from the standpoint of the defence.

In *Wu* v. *The King* (1) Lamont, J., in delivering the judgment of this court said at page 616:

> There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is, that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto.

It is a paramount principle of law that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury; *Rex* v. *Dinnick* (2).

In my opinion, therefore, with respect, there is no escape from the conclusion that there should be a new trial.

ESTEY J.:—The accused Henderson's conviction of the murder of Charles Boyes was affirmed by the Appellate Court of British Columbia (1). Mr. Justice O'Halloran, who dissented, was of the opinion that the learned trial Judge had erred in not instructing the jury with regard to the defence of abandonment and in instructing the jury that the accused and his associates were guilty of an attempt to rob the Royal Bank of Canada.

The evidence disclosed that in the evening of February 25th the accused, Medos and Carter agreed that on the following morning they would rob the Royal Bank of Canada on Renfrew Street in the City of Vancouver. About noon on the 26th of February they proceeded to do so but as they approached the bank they observed the presence of the police, turned back and in a short time abandoned their automobile and walked to the Great Northern railway yards where they were met by the police who had pursued them. There the shooting occurred which resulted in the death of two policemen, Boyes and Ledingham, and one of the three parties, Carter.

The evidence established that Medos fired the shot that killed Boyes, but the Crown contends that Henderson, within the provisions of section 69 (2) was a party to, and

(1) [1934] S.C.R. 609.
(2) (1909) 3 Cr. A.R. 77 at 79.
(3) [1948] 1 W.W.R. 1.

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with Medos guilty of the offence of that murder. It is provided by section 69 (2) of the *Criminal Code* that:

> 69. (2) If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

The Crown's contention is that Henderson, Medos and Carter had formed a common intention to prosecute the unlawful offence of robbing The Royal Bank of Canada on Renfrew Street, to assist each other in the course thereof, and after its commission to escape and to do whatever was necessary under the circumstances to effect that escape.

Counsel for Henderson submits that, upon the evidence for the Crown (no evidence was given on behalf of the defence), granting the three parties had a common design to rob the bank, the evidence warranted a conclusion that prior to the shooting the three, or at least Henderson, had abandoned any intention to prosecute an unlawful purpose, that therefore at the time of the shooting each of the three parties was acting upon his own and not pursuant to any previously agreed upon plan or design. The common intention had been abandoned and the conduct of the one did not then involve the others in any responsibility therefor. This defence of abandonment was the principal contention of the accused and was supported by references to specific portions of the evidence upon which, because a new trial must be had, I make no comment.

The learned trial Judge in his charge to the jury reviewed the submissions of the Crown and the evidence. Several times in the course thereof he referred to abandonment, but as incidental to his presentation of the Crown's case and the review of the evidence. Then, having completed that review, the learned Judge stated:

> Now Mr. Foreman, I have reviewed the evidence pretty fully and it is my duty now to put to you the defence. I gave the Crown's case as they put it forward; I have reviewed the evidence.

In what followed the learned Judge referred to certain portions of the evidence particularly stressed by counsel for the accused, but omitted any reference to the defence of abandonment, nor at any point throughout the charge did he discuss abandonment as a defence in relation to the

evidence in support thereof. This was the principal defence raised on behalf of the accused. It is the right of every accused to have his defence fairly presented by a trial judge in his charge to the jury.

A majority of the Court is of the opinion that, in view of the unfortunate failure of the learned trial judge to present to the jury the principal ground of defence put forward by the appellant, his conviction cannot be sustained. *Brooks* v. *The King* (1)

See also *MacAskill* v. *The King* (2).

With deference to the learned trial judge, and to the learned judges who have expressed a contrary opinion, in view of the omission to so present the defence of abandonment a new trial must be had.

Medos had fired the fatal shot. Henderson would only be a party thereto if the evidence established the presence of a common intention within the meaning of section 69 (2) between Henderson and Medos up to and at the moment of the shooting. Among the alternative bases for this common intention the Crown contended that the three parties had gone so far that they had in law committed an attempt to rob the bank, had a common intention to escape and to do whatever was necessary in order to effect that escape, and that such intention had persisted up to and was their intention at the time of the shooting. The learned trial judge held, and the majority of the Court of Appeal, that what the three parties did in this case was beyond preparation and not too remote to constitute an attempt in law.

The evidence is all to the effect that the three parties had concluded their plan to rob the bank in question on the previous night. They had obtained the equipment they deemed necessary, including each a revolver and ammunition, and on the morning in question had set out in an automobile to accomplish their purpose, that they proceeded to the block of Renfrew Street upon which the bank was located and where immediately they would have completed their robbery had the presence of the police not frustrated their effort.

An attempt is defined in section 72 of the *Criminal Code*:

72. Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

(1) [1927] S.C.R. 633 at 634. (2) [1931] S.C.R. 330.

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(2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

Counsel for the accused referred to a number of cases in which the attempted crime was either against the person or that of obtaining by false pretences. He contended that any act not "immediately connected with" the completed crime would be too remote to constitute an attempt. Even under the cases which he cited the accused may still have one or more acts to do, and these be separated by an intervening period of time, in order to complete the offence and yet may be guilty of an attempt. This is illustrated with respect to false pretences by *Rex* v. *John Laitwood* (1) and in a case of murder *Rex* v. *White* (2). In the latter Bray J., in delivering the judgment of the Court of Criminal Appeal, stated at p. 129:

* * * that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing.

Counsel for the accused further submitted that in order to constitute an attempt there must be "some direct association or link between the attemptor and the attemptee", and referred to the case of *Rex* v. *Robinson* (3) where Lord Chief Justice Reading stated at p. 349:

We think the conviction must be quashed, * * * upon the broad ground that no communication of any kind of the false pretence was made to them.

Robinson, with the intention of obtaining money by false pretences from his underwriters, was engaged in procuring the evidence upon which he hoped eventually to induce them to pay him a sum of money. Lord Chief Justice Reading stated that such was preparation and "only remotely connected with the commission of the full offence".

A false representation is one of the essentials in the offence of obtaining by false pretences, but there is nothing comparable to such nor its communication in a robbery such as Henderson and his associates were here engaged

(1) (1910) 4 Cr. App. R. 248.
(2) [1910] 2 K.B. 124.
(3) (1915) 2 K.B. 342 at 349.

upon. No case has been cited with respect to this type of offence by which the parties had in any practical sense covered the distance and in effect reached their objective only to be frustrated by the police. In the type of offence with which we are here concerned, it is the sudden and unexpected show of violence that makes the commission of the crime possible. It seems only proper that such factors should be taken into account when considering the question of remoteness.

In the *Robinson case* Lord Chief Justice Reading quoted at p. 348 as a safe guide the language of Baron Parke in *Rex* v. *Eagleton* (1) at p. 538:

> The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.

Then there is the oft quoted statement of Blackburn, J. in *Rex* v. *Cheeseman* (2).

> There is, no doubt, a difference between the preparation antecedent to an offence, and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime. Then, applying that principle to this case, it is clear that the transaction which would have ended in the crime of larceny had commenced here.

In that case the accused was found guilty of an attempt to steal meat. He had used a false 14-lb. weight in weighing same, which was discovered before the meat had actually been taken away. Notwithstanding that fact, he was found guilty of an attempted larceny.

Henderson and his associates had, with a common intention to rob the Royal Bank, perfected their plan, acquired the equipment they deemed necessary, including their respective revolvers and ammunition. All that completed, they had entered upon a course of conduct for the purpose of immediately accomplishing their object. They had proceeded so far that within sight of the bank they were frustrated by the presence of the police. These circumstances in relation to the nature and character of the offence intended constitute an attempt.

(1) Dears. 515.

(2) (1862) Le. Ca. 140 at 145; 169 E.R. 1337 at 1339.

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HENDERSON v. THE KING

Estey J.

With deference to those who hold a contrary view, I am of the opinion that within the meaning of section 72 the accused Henderson and his associates had committed an attempt to rob the bank.

The appeal should be allowed and a new trial directed.

LOCKE J.:—I agree with Mr. Justice Robertson (1) that the evidence disclosed that what was done by Henderson, Medos and Carter went beyond mere preparation for the robbery and that there was evidence upon which the jury might properly find that there had been an attempt to commit the offence within sec. 72 (1) of the *Code*. I also agree with his conclusion that in spite of the misdirection on this aspect of the matter there was no prejudice to the accused.

I am, however, of the opinion that there should be a new trial on the ground that what appears to me to have been the principal defence of the accused was not adequately put to the jury by the learned trial Judge. It was conceded in argument before us that Henderson, with Medos and Carter, formed a common intention to rob the Renfrew Street branch of the Royal Bank with the aid of firearms and that they were on their way to the bank to carry out this unlawful purpose when they detected the presence of the police car in front of the bank whereupon they left the vicinity. Counsel for the accused, however, disputes the theory of the Crown that it was part of the original unlawful purpose to resist arrest by violence after robbing the bank, or that Henderson was a party to such an unlawful purpose in connection with the attempt, and alternatively contends that if such had been the purpose it was abandoned by the three men prior to or at the time they were taken in charge by the police officers: further it is said that in the case of Henderson his submitting to being disarmed by Detective Hoare and his conduct after Medos and Carter started to run away indicated that, if there was then a continuing unlawful purpose on the part of the others to resist apprehension or to escape from custody by violence, he had disassociated himself from that purpose in such manner that he was no longer responsible in law for the unlawful acts of his former confederates. With

(1) [1948] 1 W.W.R. 1 at 25.

great respect for the learned trial Judge, I have come to the conclusion that his charge to the jury was inadequate to put these vital issues clearly before them. It is true that in the course of dealing with the case for the Crown comment was made on the question of the abandonment of any unlawful purpose by Henderson and that in dealing with the defence the matter was mentioned in the following words:—

> It was pointed out that Henderson did not resist, that the movement started at the south end of the line. It was suggested that Henderson could not do anything else because he was in the line of fire except to run. It was pointed out that he said: "I will not run away, I will give myself up. This is not my gun, it is his." That was at the very end of the chapter. It was pointed out that they were walking slowly on the Flats. It was pointed out that they did not shoot, if they had such common intention, when Boyes and Ledingham came up, that they did not all move together, and that by way of explanation of Henderson's conduct immediately after the shooting you are entitled to take into consideration the fact he is of tender years, that is to say he is a boy of seventeen.

It was, however, of vital concern to the accused that the attention of the jury should have been directed to the actions relied upon by him as evidence of the abandonment of the original unlawful purpose by the three conspirators and of the acts on his part which it was contended indicated that he had so disassociated himself from any unlawful purpose as to relieve him from any criminal responsibility. While no objection was made at the conclusion of the Judge's charge it was the prisoner's right to have the jury instructed upon this feature of the case *MacAskill* v. *The King* (1) Duff, J. at 335.

There should be a new trial.

Appeal allowed, conviction quashed, and new trial directed.

Solicitor for the appellant: *John Groves Gould.*

Solicitor for the respondent: *E. Pepler.*

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(1) [1931] S.C.R. 330.

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IN THE MATTER OF A REFERENCE AS TO THE APPLICABILITY OF THE MINIMUM WAGE ACT OF SASKATCHEWAN TO AN EMPLOYEE OF A REVENUE POST OFFICE.

Constitutional Law—Minimum Wages—Legislative Jurisdiction—Provincial Statute—Postal Service—Employee of a Revenue Post Office—Temporarily Engaged by Postmistress—Whether Employment Subject to Provincial Minimum Wage Act—Post Office Act R.S.C. 1927, C. 161—Civil Service Act, R.S.C. 1927, C. 22—Minimum Wage Act. Sask., R.S.S.1940, C. 310—British North America Act, SS. 91, 92.

Mrs. Graham, postmistress of a revenue Post Office at Maple Creek, Saskatchewan, engaged temporarily one Leo Fleming to work in the Post Office exclusively in connection with the work of the Post Office. The postmistress was prosecuted under the Saskatchewan Minimum Wage Act for paying to Fleming an amount less than the minimum wages prescribed by an Order made under the Act. Her conviction for violation of the Act was affirmed by the Court of Appeal. As the case was not appealable to the Supreme Court of Canada the Governor-in-Council referred the matter to the Court under section 55 of the Supreme Court Act.

Held: The employee became employed in the business of the Post Office of Canada and therefore part of the Postal Service. His wages were, as such, within the exclusive legislative field of the Parliament of Canada and any encroachment by provincial legislation on that subject, must be looked upon as being ultra vires, whether or not Parliament has or has not dealt with the subject by legislation.

Held: It is not competent to a provincial legislature to legislate as to hours of labour and wages of Dominion servants.

REFERENCE by His Excellency the Governor General in Council (P.C. 3945, dated October 1, 1947) to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the Supreme Court Act (R.S.C. 1927, C. 35) of the following question: Was the Saskatchewan Court of Appeal right in holding in its decision in Williams *v.* Graham that the Minimum Wage Act, Chapter 310 of the Revised Statutes of Saskatchewan, 1940, was applicable to the employment of Leo Fleming in the Post Office at Maple Creek, Saskatchewan.

The Order in Council referring this question to the Court is as follows:—

Whereas the Civil Service Commission appointed Mrs. Margaret Ellen Mary Graham, Postmistress of the Post Office at Maple Creek, Saskatchewan on July 10, 1930;

* Present:—Rinfret C.J. and Taschereau, Rand, Kellock, Estey and Locke JJ.

And whereas it was Mrs. Graham's duty as Postmistress, under direction, to take charge of the Post Office, to collect, safeguard and account for the revenue of the office, to hire, supervise and control the staff and issue such instructions as might be necessary to secure prompt and expeditious handling of mail matter, to deal with complaints concerning the service given by the office and make adjustments when found desirable or necessary and to perform other related work as required;

And whereas Mrs. Graham, as Postmistress, took charge of the Post Office at Maple Creek, which at all relevant times has been in a public building that is the property of His Majesty in right of Canada;

And whereas Mrs. Graham's remuneration as Postmistress consisted of a percentage of the revenue derived from the sale of articles of postage stamp issue and money order commissions collected from the public and certain other allowances based on the revenue of the office or the work performed and out of amounts so received, Mrs. Graham was required to pay assistants and to furnish stationery and twine;

And whereas pursuant to the contract of employment so established, Mrs. Graham employed one, Leo Fleming, in the Maple Creek Post Office during the month of December, 1946 exclusively in connection with the work of the Post Office;

And whereas upon an information and complaint dated January 22, 1947, laid by J. H. Williams on behalf of the Government of Saskatchewan, Mrs. Graham was charged, under The Minimum Wage Act, Chapter 310 of the Revised Statutes of Saskatchewan, 1940, with paying Leo Fleming less than the minimum wages fixed pursuant to that Act;

And whereas on February 20, 1947, Mrs. Graham was convicted by a police magistrate of the alleged offence and sentenced to pay a fine of $25.00 and costs and, in default, ten days' imprisonment and was further ordered to pay to the Provincial Deputy Minister of Labour, on behalf of the said Leo Fleming, such sum as might be found owing under the said Act;

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And whereas an Appeal from the said conviction was taken to the Saskatchewan Court of Appeal by way of stated case and was dismissed by an unanimous Judgment of the said Court;

And whereas an Appeal does not lie to the Supreme Court of Canada from the said decision of the Saskatchewan Court of Appeal;

And whereas there are between 11,000 and 12,000 Post Offices and Sub Post Offices in Canada in which Postmasters are employed on terms similar to those applicable to Mrs. Graham;

And whereas the Minister of Justice is informed by the Postmaster General that, if the laws of the various provinces relating to hours of employment and minimum wages are applicable to persons employed in the post offices by Postmasters, the cost of operation of the postal service in certain provinces will be increased or the service in such provinces will have to be reduced;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and under and by virtue of Section 55 of the Supreme Court Act, Chapter 35 of the Revised Statutes of Canada, 1927, is pleased to refer and doth hereby refer the following question to the Supreme Court of Canada for hearing and consideration;

QUESTION

Was the Saskatchewan Court of Appeal right in holding in its decision in Williams *v.* Graham that The Minimum Wage Act, Chapter 310 of the Revised Statutes of Saskatchewan, 1940, was applicable to the employment of Leo Fleming in the Post Office at Maple Creek, Saskatchewan?

A. D. P. HEENEY,
Clerk of the Privy Council.

The respective Attorneys-General of the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskat-

chewan were, pursuant to order of The Right Honourable The Chief Justice of Canada, notified of the hearing of the Reference.

F. P. Varcoe, K.C. and *W. R. Jackett* for the Attorney-General of Canada.

C. R. Magone, K.C. and *E. H. Silk, K.C.* for the Attorney-General of Ontario.

J. C. Treleaven, K.C. for the Attorney-General of Saskatchewan.

H. J. Wilson, K.C. for the Attorney-General of Alberta.

Thomas D. Macdonald, K.C. and *L. D. Currie, K.C.* for the Attorney-General of Nova Scotia.

THE CHIEF JUSTICE:—His Excellency the Governor General in Council on the recommendation of the Minister of Justice and under and by virtue of Section 55 of the *Supreme Court Act* has been pleased to refer to this Court for hearing and consideration the following question:—

Was the Saskatchewan Court of Appeal right in holding in its decision in *Williams* v. *Graham* that the Minimum Wage Act, Chapter 310 of the Revised Statutes of Saskatchewan, 1940, was applicable to the employment of Leo Fleming in the Post Office at Maple Creek Saskatchewan?

This question arose as a result of the conviction of Mrs. Margaret Ellen Mary Graham, the Postmistress at Maple Creek, Saskatchewan, for paying Leo Fleming, a young man she engaged to assist her during the month of December, 1946, in the Post Office at Maple Creek, less than the minimum wages fixed pursuant to *The Minimum Wage Act* of that province. The conviction of Mrs. Graham was affirmed by the Court of Appeal for Saskatchewan.

The Civil Service Commission, under the provisions of the *Civil Service Act*, chap. 22, R.S.C. 1927, appointed Mrs. Graham as Postmistress of the Post Office at Maple Creek on July 10, 1930. Her remuneration as Postmistress consisted of a percentage of the revenue derived from the sale of articles of postage stamp issue and money order commissions collected from the public and certain other allowances based on the revenue of the office or the work performed and, out of the amounts received, she was required

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to pay assistants and to furnish stationery and twine. As already stated, during the month of December, 1946, Mrs. Graham employed Leo Fleming to assist her in the Maple Creek Post Office, exclusively in connection with the work of the Post Office. The Post Office is in a public building that is the property of His Majesty in right of Canada.

The duties of a Postmaster Grade 2, a rank similar to that held by Mrs. Graham, are set out by the "Classification of the Statutes of Canada, 1919, 2nd Session. Under the heading "Definition of Class" it is stated:—

> To have general charge of an accounting post office . . . . . to provide, supervise, and pay the necessary staff of employees.

By Section 6 of the *Post Office Act,* R.S.C. 1927, chap. 161, provision is made for the appointment by the Governor in Council of an officer "who shall be called the Deputy Postmaster General", and sub-section 2 of the same section further provides that "such other officers, clerks and servants as are necessary for the proper conduct of the business of the Department may be employed in the manner authorized by law."

Section 7, para. (w) authorizes the Postmaster General to "make and alter rules and orders for the conduct and management of the business and affairs of the Department and for the guidance and government of the postmasters and other officers, clerks and servants of the post office in the performance of their duties."

In a book entitled "Useful Information for Postmasters in charge of Post Offices on the Revenue Basis", issued by authority of the Postmaster General, there is this very important paragraph:—

> 8. Assistants—Every Postmaster should appoint an assistant so that the office will not be left without a qualified person to perform the duties during his own necessary absence. Assistants must not be under 16 years of age and must subscribe to the oath of office. Subject to age limit, satisfactory character and ability, the Postmaster may employ his own staff, and must engage such assistants as are actually required to satisfactorily carry on the work and adequately serve the public.

Fleming, as assistant, would therefore have to take the oath of office above referred to and which is set out in Section 16 of the Act:—

> 16. Any officer designated by the Postmaster General may require any postmaster or assistant in any post office, mail contractor or other

person in the employment or service of, or undertaking to perform any duty or work for the Canada Post Office, to make and sign before him an oath or declaration in the following form, or to a like effect, that is to say:—

I, (insert the name of the person and the capacity in which he is employed in or by the Canada Post Office), do solemnly and sincerely promise and swear (or declare), (if the person is one entitled to declare instead of taking an oath in civil cases) that I will faithfully perform all the duties required of me by my employment in the service of the Post Office of Canada, and will abstain from everything forbidden by the laws and regulations for the establishment and government of the Post Office of Canada.

It is quite evident that Mrs. Graham's appointment necessarily carried with it the authority "to provide, supervise and pay the necessary staff of employees", and that it was within her competence to engage Fleming to assist her. The relevant section of the *Act* governing employees in the Postal Service is sub-sec. (*c*) of sec. 2 which provides:—

2. In this Act, unless the context otherwise requires,

(*c*) 'employed in the Canada Post Office' applies to any person employed in any business of the Post Office of Canada.

It is not necessary to decide whether Fleming became an employee of His Majesty, or whether there existed between him and His Majesty the relationship of master and servant. Under the statutory provisions quoted above Fleming in the course of his duties as assistant to Mrs. Graham became a person employed in the business of the Post Office of Canada and part of the Postal Service. As such, he was subject to the exclusive control of the Federal Parliament.

By Section 91, sub-sec. 5 of the *British North America Act,* the exclusive legislative jurisdiction with reference to "Postal Service" is conferred on Parliament. No question of ancillary or incidental legislation arises here, and it is not necessary for the Court to inquire whether the field is or is not already occupied by the Dominion. Postal Service is exclusively within the jurisdiction of the Parliament of Canada and any encroachment on the subject by provincial legislation must be looked upon as being *ultra vires,* whether Parliament has or has not dealt with the subject by legislation.

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Such is the effect of what was said by Lord Maugham delivering the judgment of the Judicial Committee of the Privy Council in *The Debt Adjustment Act Reference* (1):

It follows that legislation coming in pith and substance within one of the classes specially enumerated in s. 91 is beyond the legislative competence of the provincial legislatures under s. 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament. The Dominion has been given *exclusive* legislative authority as to "all matters coming within the classes of subjects" enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter, the provinces are competent to legislate is, therefore, unsound.

It has been held by this Court *In the Matter of Legislative Jurisdiction over hours of labour* (2), that Parliament can legislate as to labour of servants of the Dominion, and that as a rule a province has no authority to regulate the hours of employment of the servants of the Dominion Government. I am of opinion that the same thing must be said of the wages of persons "employed in the business of the Post Office of Canada."

Having arrived at that conclusion, I find it unnecessary to discuss in detail the provisions of *The Minimum Wage Act* of Saskatchewan. It is sufficient to say that either the *Act* is not binding upon His Majesty because it is not so expressed (see in Re Silver Bros., Ltd., (3)) or, if it is intended to apply to His Majesty in right of the Dominion, it is *ultra vires*.

For these reasons I am of opinion that the question submitted should be answered in the negative.

TASCHEREAU J.:—By Order of His Excellency the Governor General in Council, the following question was referred to this Court for consideration pursuant to section 55 of the *Supreme Court Act*.

Was the Saskatchewan Court of Appeal right in holding in its decision in *Williams* v. *Graham* that the Minimum Wage Act, Chapter 310 of the Revised Statutes of Saskatchewan, 1940, was applicable to the employment of Leo Fleming in the Post Office of Maple Creek, Saskatchewan.

The facts that give rise to this Reference are the following: Mrs. M. Graham is postmistress of the Town of Maple Creek in the Province of Saskatchewan, and she

(1) [1943] A.C. 356 at 370.
(2) [1925] S.C.R. 505.
(3) [1932] A.C. 514 at 521.

has held that position for nearly fifteen years. One Leo Fleming who was temporarily unemployed, was hired by Mrs. Graham to work as a mail-sorter during the Christmas period at a salary which was satisfactory to both. Mrs. Graham was prosecuted under the *Minimum Wage Act* (a Saskatchewan statute), the charge being that she did fail to pay to Fleming the minimum wages prescribed by an Order made under the *Act*. She was found guilty and fined $25 and costs.

The matter reached the Court of Appeal by way of a stated case, and Gordon, J.A. who heard the case confirmed the conclusions arrived at by Police Magistrate Thompson. As the charge was laid under the Provincial Summary Convictions Act of Saskatchewan, there is no appeal to this Court and, therefore, the matter has been brought here by way of Reference for final determination. Gordon, J.A. held that Fleming was not under the direction or control of the Post Office authorities, that he was not employed pursuant to any statute, but merely as the servant of Mrs. Graham, and that the *Act* applied.

Taschereau J.

Mrs. Graham was appointed postmistress under the *Civil Service Act* of 1918, and her duties were the following: "To take charge of the post office, to collect, safeguard and account for the revenue of the office, to hire, supervise and control the staff and issue such instructions as might be necessary to secure prompt and expeditious handling of mail matter, to deal with complaints concerning the service given by the office and make adjustments when found desirable or necessary and to perform other related work as required." She had no salary, but her remuneration was on a commission basis, and it was her obligation to pay personally her assistants.

The relevant provisions of the *Minimum Wage Act* are that the Board may by order define classes of employment, fix a minimum wage which shall be paid to full time employees in any class of employment, and that any person who fails to comply with any of the provisions of the Act shall be guilty of an offence and liable on summary conviction, to a fine not exceeding $100. The order of the Minimum Wage Board was made applicable to Maple

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Creek where the post office is located, and it is because she failed to pay Fleming the sum of $16 per week as ordered, that Mrs. Graham was prosecuted and convicted.

It is submitted on behalf of the Attorney General of Canada that Mrs. Graham and Fleming were at all relevant times, *in the Postal Service* of Canada which is within the exclusive legislative jurisdiction of Parliament, and that as a consequence, the *Minimum Wage Act* of Saskatchewan can have no application, and further that Mrs. Graham employed Fleming in the course of her employment as a servant of His Majesty and the *Minimum Wage Act* of Saskatchewan is not expressed to be binding on His Majesty.

Under the *B.N.A. Act* (sec. 91, para. 5) "Postal Service" is within the "exclusive" legislative jurisdiction of the Parliament of Canada. The *Post Office Act*, which is Chapter 161 of the Revised Statutes of Canada, was enacted pursuant to the above mentioned authority, and section 2, para. (*c*) reads as follows:—

> (*c*) "employed in the Canada Post Office" applies to any person employed in any business of the Post Office of Canada.

Section 6 provides that the Governor in Council may appoint an officer who shall be called the Deputy Postmaster General, and that such other persons, clerks and servants as are necessary for the proper conduct of the business of the Department may be employed *in the manner authorized by law.* It is provided in section 7, para. (*w*) and (*x*) that the Postmaster General may make regulations for the conduct and management of the business and affairs of the Department, and section 65 reads as follows:—

> 65. Postmasters whose compensation is not fixed by law may be paid by a percentage on the amount collected by them, or by such salary and allowances as the Postmaster General, having due regard to the duties and responsibilities assigned in respect to each post office, by regulation determines in each case.

Rules and orders which have force and effect as if they formed part of the *Act* have been made and the following are of particular interest:—

> 8. ASSISTANTS.—Every Postmaster should appoint an assistant so that the office will not be left without a qualified person to perform the duties during his own necessary absence.
>
> Assistants must not be under 16 years of age and must subscribe to the oath of office.

Subject to age limit, satisfactory character and ability the Postmaster may employ his own staff, and must engage such assistants as are actually required to satisfactorily carry on the work and adequately serve the public.

It is common ground that Fleming was appointed assistant and was paid by Mrs. Graham, but I do not think that this can affect the issue. Although paid in such a way, it remains that Fleming was in the "Postal Service". He was a part of the organization created by Parliament to handle mail, and he was also, as section 2 para. (*c*) of the *Act* says, "a person employed in any business of the Post Office of Canada". The fact that he was paid by Mrs. Graham does not change the nature of the functions that he was called upon to perform. As provided by section 6, para. 2, he was a person employed in the manner authorized by law pursuant to "instructions" (para. 8) where it is said that every postmaster "should appoint an assistant". The mode of payment adopted in the present case is a matter of internal administration, and the contractual relationship of Fleming's employment does not mean that he was not an "employee in the Canada Post Office".

It follows that the fixing of the wages of the Postal employees, is a matter in pith and substance "Postal Service Legislation", upon which the provinces may not legislate without invading a field "exclusively" assigned to the Dominion. (*Reference as to Hours of Labour in Industrial Undertakings* (1)).

It has been suggested that in the absence of a law passed by the Dominion of Canada, in relation to the Postal Service which is inconsistent with the provisions of the said Minimum Wage Act, the Act applies to employees and employers in the circumstances of this case. It is further submitted that there is no Dominion legislation fixing the minimum wage to be paid to employees in the position of the said Leo Fleming.

I am of the opinion that this argument cannot prevail. We have not to deal with the theory of the "occupied field". We are confronted with a question of "competence" to legislate in matters "falling strictly within any of the classes specially enumerated in section 91 of the B.N.A. Act". Here, this "competence" does not exist. As Lord

(1) [1925] S.C.R. 505.

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Herschell said in *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario et al,* (Fisheries case) (1):—

In any view the enactment is expressed 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.

Vide also *John Deere Plow Co. Ltd.* v. *Wharton* (2).

In *Attorney-General for Alberta* v. *Attorney-General for Canada* (The Debt Adjustment Act Reference) (3), Viscount Maugham expressed his views as follows at page 370:—

It follows that legislation coming in pith and substance within one of the classes specially enumerated in s. 91 is beyond the legislative competence of the provincial legislatures under s. 92. In such a case *it is immaterial* whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been *occupied* by the legislation of the Dominion Parliament. The Dominion has been given *exclusive* legislative authority as to "all matters coming within the classes of subjects" enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter, the provinces are competent to legislate is, therefore, unsound.

In a very recent case, the *Alberta Bill of Rights Act Reference* (4), Viscount Simon said at page 10:—

But in any event, it appears to their Lordships to be impossible to hold that it is beyond the business covered by the word "Banking" to make loans which involve an expansion of credit. Legislation which aims at restricting or controlling this practice must be beyond the powers of a provincial Legislature. It is true, of course, that in one aspect provincial legislation on this subject affects property and civil rights, but if, as their Lordships hold to be the case, the "pith and substance" of the legislation is "Banking" (the phrase "pith and substance" can be traced back to Lord Watson's judgment in *Union Colliery Co. of B.C.* v. *Bryden,* (1899) A.C. 580) this is the aspect that matters and Part II is beyond the powers of the Alberta Legislature to enact.

(1) [1898] A.C. 700 at 715.
(2) [1915] A.C. 330 at 337.
(3) [1943] A.C. 356.
(4) [1947] 4 D.L.R. 1.

The result is that the Minimum Wage Act of the Province of Saskatchewan is not applicable to the employment of Leo Fleming in the post office at Maple Creek, and that the Court of Appeal erred when it held in its decision in *Re Williams* v. *Graham* that it did.

The interrogatory should therefore be answered in the negative.

The judgment of Rand and Locke JJ. was delivered by

RAND J.:—This is a reference by the Governor-in-Council of a question arising out of a conviction in the Province of Saskatchewan of a postmistress for failing to pay to an assistant taken into the post office for the month of December, 1946, the minimum wage prescribed by the *Minimum Wage Act* of Saskatchewan under its application by the Minimum Wage Board.

The precise relationship of the postmistress both to the Crown and to the employee is of importance. We have no evidence of the circumstances of the engagement of the latter, but the material facts generally seem to be clear. The postmistress was appointed to the post office at Maple Creek under the *Civil Service Act,* 1918. Her duties are stated to be: "To take charge of the post office, to collect, safeguard and account for the revenue of the office, to hire, supervise and control the staff and issue such instructions as might be necessary to secure prompt and expeditious handling of mail matter, to deal with complaints concerning the service given by the office and make adjustments when found desirable or necessary and to perform other related work as required". Her remuneration was based upon a percentage of the revenue of the office, including commissions on the sale of stamps and money orders, and she was required to pay assistants and to furnish stationery and twine.

Pursuant to this duty, she engaged an assistant to work during the month of December, 1946, exclusively in the work of the post office. For that month he was paid a sum less than the minimum prescribed under the provincial *Act.* Her conviction for a violation of the Act was affirmed by the Court of Appeal.

From the provisions of the *Post Office Act,* it seems to be clear that the staff of the postal service includes persons

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carrying out duties of the service who are not, in a direct contractual sense, employees of the Crown. In section 2 (*c*), "Employed in the Canada post office" is defined as applying to any person employed in any business of the post office of Canada. By section 7 (*q*) regulations are authorized to provide for security being given by any "officer, employee, clerk or servant *employed by or under the Postmaster-General*, or by *any one employed in the Canada post office*, or by any one performing, whether with or without authority, any business of the post office of Canada". The distinction between being "employed by or under the Postmaster-General" and being "employed in the Canada post office" is significant. Subsection (*w*) of the same section empowers the making of rules and orders for the conduct and management of the business and affairs of the department and for the guidance and government of the postmasters and other officers, clerks and servants "of the post office". Section 10 provides for the investigation of complaints or the suspected misconduct on the part of "any person *employed in the Canada post office* or *performing duties in* or in connection with any post office"; and the General Superintendent and others may "suspend from his duties, during the pleasure of the Postmaster-General, any person *employed in any post office*" pending investigation. By section 16, "Any officer designated by the Postmaster-General may require any postmaster or assistant in any office, mail contractor or *other person in the employment or service of*, or undertaking to perform any duty or work for *the Canada post office*" to take an oath "That I will faithfully perform all the duties required by me by my *employment in the service of the post office* of Canada". Finally, section 107 provides that "every officer, clerk and person *employed in the postal service of Canada* shall be deemed and held to be employed in the prevention of smuggling and for the enforcement of the revenue laws of Canada". I take these provisions to envisage different classes of persons actually engaged in carrying on the work of the postal service. The *Act* provides for contracts for the conveyance of mail, and it may be that the relation created is that of independent contractor; but apart from that case, it would seem that every person participating immediately in the service comes within the language

"person employed in the Canada post office". Under a general classification of civil servants approved by section 10 of chapter 10 of the Statutes of Canada, 1919, 2nd Session, the duties of a postmaster of Grade 2 offices, the rank of that at Maple Creek, were defined as including:—

> To have general charge of an accounting post office; . . . to provide, supervise and pay the necessary staff of employees; . . .

Whether the wages of such persons are a charge upon the money receivable by the postmaster is not clear.

This view was confirmed by section 23, first enacted in 1925 as an amendment to the *Civil Service Act*, 1918:—

> 23. When it has been determined by the Governor in Council that any post office, the employees of which do not come under this Act, is to be brought hereunder, any person then employed in such office, who,
>
> (*a*) has had at least two years' postal experience, one of which was in the office in question; and
>
> (*b*) was, at the commencement of his service, within the limits of age prescribed by the Commission; and
>
> (*c*) satisfies the Commission that he possesses the necessary qualifications;
>
> shall be considered eligible for appointment to any position in such office without competitive examination: Provided, however, that any person employed in any such post office on the twenty-seventh day of June, one thousand nine hundred and twenty-five, shall be eligible for appointment, even though he was not, at the commencement of his employment, within the limits of age prescribed by the Commission.

The Civil Service, for the purposes of the *Act*, means all "civil positions under and persons in the civil employ of His Majesty"; from this employees of government railways and ships are excluded, and in 1932 a like exclusion was made of postmasters in revenue post offices, the revenue from which did not exceed $3,000 per annum. It could therefore, be only persons not "in the civil employ of His Majesty" but still "employees of" any post office who could be brought into the Civil Service under section 23.

We were told on the argument and it is stated in the preamble to the Order-in-Council of reference, that the mode of employment exemplified at Maple Creek is widespread; and its usefulness in meeting public convenience seems evident. As in the present case, during the Christmas season there is a great increase in the volume of mail matter handled, and special help is unavoidable. It might well be considered undesirable that such temporary members of the staffs of thousands of small offices be engaged as full fledged Crown employees or be dealt with otherwise than locally.

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The assistant, therefore, entered immediately into the service of the department and became subject to all of the responsibilities provided by law for persons so employed. If the postmistress were not in the Civil Service, but had entered into a contract by which the postal work at Maple Creek could be said to have been farmed out to her as an independent contractor, it might be that any person taken on was engaged in her service. But here she is acting as a government employee; and as she has not undertaken to carry out personally all the postal work at Maple Creek, it cannot be said that the assistant is helping her to do her own work. Once the assistant is engaged, the limited contractual relation of the postmistress to him is supplemented by that of her authority in the post office; he becomes an employee of the Crown for all purposes except remuneration and breach of the engagement. But the latter undoubtedly subjects him to the disciplinary powers of the service including immediate dismissal for cause.

Does, then, the fact that the postmistress is solely responsible for the remuneration, in substance to be paid out of what is allowed her, establish the relation of employer and employee within the meaning of the provincial *Act?* In that statute, the word "employer" includes "Every person, firm or corporation, agent, manager or representative, contractor, sub-contractor or principal and every other person having control or direction of one or more employees or who is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees". "Employee" conversely embraces "any person employed in a shop, factory or other premises to which this Act from time to time applies; and for the purpose of this section, the expression 'person employed in a shop, factory or other premises' includes an employee whose duties or part of whose duties are performed outside of the shop, factory or other premises of the employer but in connection with the operation of the business of the employer". Section 4 empowers the Board to define classes of employment; to determine the number of hours of work in a week which shall constitute a normal work week for employees in any class of employment; to fix the minimum wage for the normal work week;

to fix the period in any day within which the hours of work of employees in any class of employment shall be confined; and to deal with other particulars of the employment as is deemed desirable for the just treatment of employees.

Section 9 authorizes the entrance and inspection of any premises to which the *Act* applies; the inspection and examination of books, payrolls and other records of any employer relating to wages, hours of labour of any "of his employees, or the conditions of their employment"; it obliges the employer to furnish statements respecting wages of all "of his employees, hours of labour and conditions of employment"; to make full disclosure, production or delivery of all records, documents or other writings, and to give information relating to the profit and loss of the employer.

Acting under its powers, the Board by an order declared the *Act* to apply "to every employer and every employee in the town of Maple Creek", introduced the normal work week prescribed by section 3, and fixed the minimum wage for the general class in which the assistant would be included at $16 a week.

I take this legislation to aim at the regulation of the business, occupation or employment in which the work of the employee for which the minimum wage is prescribed is carried out, and which, as well as the employer, is for such purposes within the legislative control of the province. In the case before us, the postmistress has neither business nor service of her own into which the employee is or can be introduced; and the actual employment to which the employee is committed is beyond provincial jurisdiction. The condition for the application of the statute is, therefore, absent. Were the post office operated as a private provincial business, I have no doubt that in the circumstances here the proprietor would be bound by the *Act* as employer and the postmistress as his agent.

I read the decision of both the magistrate and the Court of Appeal to be on the footing that the postmistress was charged as employer and not as "agent, manager, representative" who, by the definition clause, in addition to the employer, are brought within the penalties of the *Act*. But I take the statute in this respect to mean that the agent is

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liable so far only as an alter ego of the employer, and if the latter is outside of the statute, there can be no infringement of its provisions by the agent.

The provincial law, then, deals with the employment of an employee in the business of the employer; here the person charged as employer has in fact no business; the actual work for which the wages are earned is done in the service of the Crown; the Crown in these features of the postal administration is not amenable to provincial legislation; and the postmistress is subject to the provisions of the provincial law neither as employer nor as agent of the employer. I would, therefore, answer the question as follows: Assuming the Saskatchewan Court of Appeal had before it all the factual matter placed before this Court, it erred in holding that the *Minimum Wage Act* of Saskatchewan was applicable to the employment of Leo Fleming in the post office in Maple Creek in that province.

KELLOCK J.:—Under the provisions of the *Civil Service Act,* R.S.C., 1927, cap. 22, one, Margaret Ellen Mary Graham, was appointed postmistress of the post office at Maple Creek, Saskatchewan, on July 10, 1930. This post office was on a revenue basis, which means that the remuneration of the postmistress consisted of a percentage of the revenue derived from the sale of postage stamps, commissions on money orders and other allowances based on the revenue received and the work performed. As provided by the "Classification of the Civil Service", 1919, approved by 10-11 Geo. V, Second Session, cap. 10, section 42, such a postmaster is required "to provide, supervise, and pay the necessary staff of employees". The post office itself was located in a public building, the property of His Majesty in right of Canada. During the month of December, 1946, Mrs. Graham engaged one, Leo Fleming, to work in the post office exclusively in connection with the work of the office.

Upon an information and complaint dated January 22, 1947, Mrs. Graham was charged under the *Minimum Wage Act,* R.S.S., 1940, cap. 310, with paying Leo Fleming less than the minimum wages fixed pursuant to that Act and on February 20th following she was convicted of the alleged offence, which conviction was upheld upon appeal to the

Court of Appeal. His Excellency the Governor General-in-Council has been pleased to refer to this court the question as to whether or not the Court of Appeal was right in holding that the *Minimum Wage Act* was applicable to Fleming's employment.

Under the provisions of section 91 of the *B.N.A. Act,* paragraph 5, "Postal Service" is a matter within the exclusive legislative jurisdiction of parliament. Under the authority thus conferred, the *Post Office Act,* R.S.C., 1927, 161, was enacted. Section 4 provides for the setting up of a Post Office Department for the superintendence and management, under the direction of the Postmaster General, of the postal service of Canada. By section 6, sub-section 2, it is provided that officers, clerks and servants in addition to the Deputy Postmaster General may be employed "in the manner authorized by law". By section 7, paragraph (*w*), the Postmaster General is authorized to "make and alter rules and orders for the conduct and management of the business and affairs of the Department and for the guidance and government of the postmasters and other officers, clerks and servants of the post office in the performance of their duties", and by paragraph (*x*) of the same section he may "make such regulations as he deems necessary for the due and effective working of the post office and postal business and arrangements, and for carrying this *Act* fully into effect".

Under the powers so given the Postmaster General issued "general instructions relating to post offices on the revenue basis". Paragraph 8 reads as follows:

> 8. Assistants—Every postmaster should appoint an assistant so that the office will not be left without a qualified person to perform the duties during his own necessary absence. Assistants must not be under sixteen years of age and must subscribe to the oath of office. Subject to age limit, satisfactory character and ability, the postmaster may employ his own staff and must engage such assistants as are actually required to satisfactorily carry on the work and adequately serve the public.

The oath of office above referred to is set out in section 16 of the *Act,* which requires an assistant in any post office to swear that he "will faithfully perform all the duties required of me by my employment in the service of the post office of Canada . . ." By section 2 (*c*) it is provided that "employed in the Canada Post Office" applies to any person employed in any business of the Post Office of

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Canada. It would therefore appear that Fleming, when engaged by the postmistress, under her obligation so to do, as above set out, was employed "in the manner authorized by law" under section 6 (2). Further, by the provisions of section 7, paragraph (*b*) the Postmaster General is authorized to "remove or suspend any . . . servant of the post office". By paragraph (*q*) of the same section he is authorized to make regulations for security to be given by any one employed in the Canada Post Office. By section 10 also, certain other postal department officers are given power to inquire into complaints or suspected misconduct or mismanagement on the part of any person "employed in the Canada Post Office" and to suspend any such person during the pleasure of the Postmaster General pending such investigation and by section 17, sub-section 3, provision is made by which employees in post offices may, from time to time, be examined on the work of the office.

In my opinion it is clear that under these statutory provisions, a person engaged as was Fleming, became a servant of the Crown. The fact that he was paid directly by the postmistress, although indirectly by the Crown, did not affect his status as an immediate servant of the Crown and subject to its control.

It is against this background that the provisions of the provincial statute are to be considered. The title of the *Act* is "An Act Respecting Minimum Wages, Hours of Employment and Conditions of Labour in Shops, Factories and Other Premises". By section 2 (2) "employee" is defined as any person employed in a shop, factory or other premises "to which this Act from time to time applies"; and by subsection 3 "employer" includes every person, firm or corporation, agent, manager, representative, contractor, sub-contractor or principal and every other person having control or direction of one or more employees or who is responsible directly or indirectly, in whole or in part, for the payment of wages to or the receipt of wages by one or more employees. The first branch of this definition would, taken literally, apply to the Crown.

By clause (*c*) of subsection 7 of section 2, "other premises" means a place to which the *Act* may from time to time be made applicable under the authority of subsection 2 of section 3, which authorizes the Minimum Wage

Board with the approval of the Lieutenant Governor-in-Council to declare that the provisions of the *Act* shall apply to "any industry, business, trade or occupation". By section 5 the Board is required to determine what wages are edquate from the standpoint of the cost of living and as to what are reasonable hours of labour for employees, and by section 6, subsection 1 (*f*) the Board may fix the period in any day within which the hours of work of employees in any class of employment shall be confined. Paragraph (*h*) of the subsection authorizes the Board to fix minimum periods for meals, and by paragraph (*i*) the Board may fix the minimum age at which employees may be employed. Section 9 authorizes any person designated by the Minister of Labour to enter and inspect premises, books, payrolls and records relating to wages, hours or conditions of employment. It requires the employer to make returns under oath as to these same matters and to produce books and documents relating to profit and loss and operating costs. The section also requires employees to produce the books and records of their employer and to make disclosure with respect to wages, hours and conditions of employment. By section 10 every employer is required to keep in his premises a register of the names and addresses, the working hours and the actual earnings of all employees and on request to produce the same. By section 11 the employer is prohibited from discharging any employee because he has testified, or is about to testify, in any investigation or proceedings relative to the enforcement of the Act. Section 12 prohibits an employer from discharging an employee who has been in his service continuously for three months or more except on a week's written notice but the section is not to apply where the master has certain specific grounds for discharge. Section 17 provides for fine and imprisonment for failure to comply with any of the provisions of the Act.

By order effective the second of January, 1946, the Board, with the approval of the Lieutenant Governor-in-Council, under the provisions of subsection 2 of section 3 of the *Act*, extended the *Act* to "all industries, businesses, trades or occupations of whatsoever nature" except agriculture and domestic service. By a further order of the Board effective July 22, 1946, made under the provisions of section 6, made

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applicable to "every employer and employee in . . . Maple Creek," it was provided that every employee, with certain exceptions not relevant here, should be paid a minimum wage of $16 a week, the normal work week being set at 48 hours.

Assuming that the post office at Maple Creek comes within the definition of "other premises" in clause (*c*) of subsection 7 of section 2, which involves the further assumption that "an industry, business, trade or occupation" includes a post office, it is impossible in my opinion to construe the statute as applicable to Fleming's employment. It is sufficient to say that it is not competent to a provincial legislature to legislate as to hours of labour of Dominion servants; *Reference as to Hours of Labour in Industrial Undertakings* (1). The statute must therefore be read as completely inapplicable; *Gauthier* v. *The King* (2).

I would therefore answer in the negative the question referred.

ESTEY J.:—By Order in Council dated October 1, 1947, (P.C. 3945), His Excellency the Governor General-in-Council, under section 55 of *The Supreme Court Act,* 1927 R.S.C., c. 35, referred the following question to this Court:

> Was the Saskatchewan Court of Appeal right in holding in its decision in *Williams* v. *Graham* that The Minimum Wage Act, Chapter 310 of the Revised Statutes of Saskatchewan, 1940, was applicable to the employment of Leo Fleming in the Post Office at Maple Creek, Saskatchewan?

The Saskatchewan Court of Appeal in that case affirmed the conviction of Mrs. Margaret Ellen Mary Graham, the postmistress at Maple Creek, Saskatchewan, for paying to one Leo Fleming, engaged by her as an assistant during the month of December 1946 in the Post Office at Maple Creek, an amount less than the minimum wages prescribed by an order made under *The Minimum Wage Act* of that province.

The *Saskatchewan Minimum Wage Act* is described by counsel for Saskatchewan as an *Act* that "aims to establish a floor for wages, a ceiling for hours and practical machinery for the supervision of the same." Under this *Minimum Wage Act* a Minimum Wage Board is set up with power to define classes of employment and, subject to certain exceptions not material hereto, fix the hours of labour, the

(1) [1925] S.C.R. 505. (2) 56 S.C.R. 176.

minimum wage for employees, the number or proportion of employees who may be classified as apprentices, learners or inexperienced employees or as part time employees, as well as other similar provisions.

The employer is required to keep certain records which may, as provided in the *Act*, be subject to examination, and to supply information as requested "in any way relating to the profit and loss and the production and operating costs of the business carried on by or under the control or direction of the employer." These and other relevant provisions are enacted to assist the board as provided in section 5 to "ascertain what wages are adequate to furnish the necessary cost of living to employees and what are reasonable hours of labour for employees."

Counsel for the Dominion does not question the competency of the province under the *B.N.A. Act*, s. 92 (13) (Property and Civil Rights) to enact this *Minimum Wage Act*, but does contend that it is not applicable to, or that the Postal Service is not subject to, the provisions of this provincial legislation.

Section 91 (5) of the *B.N.A. Act* provides:

> 91. . . . it is hereby declared that . . . 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,—
>
> (5) Postal Service.

This section 91 (5) vests in the Parliament of Canada the exclusive power to legislate with respect to the Postal Service. As stated by Lord Maugham in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1):

> In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament.

See also *Attorney-General for Canada* v. *Attorney-General for Ontario* (2); *Madden* v. *Nelson* (3); *Reference re Waters and Water-Powers* (4).

If, therefore, the said employment of Fleming was within the "Postal Service" as that term is used in the *B.N.A. Act*, his employment was subject to Dominion legislation only.

(1) [1943] A.C. 356 at 370.
(2) [1898] A.C. 700 at 715.
(3) [1899] A.C. 626.
(4) [1929] S.C.R. 200 at 213.

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The phrase "Postal Service" does not appear to have been generally used prior to Confederation, but the business of the Post Office as then conducted, the use of the phrase "Postal business and arrangements" in the *Post Office Act* (Can. 22 Vict., c. 31, s. 14 (16)), indicate that the Imperial Parliament in adopting the phrase "Postal Service",—a phrase of the widest import—in the *B.N.A. Act,* section 91 (5), intended that it should be construed as sufficiently comprehensive to include all the accommodations and facilities provided by the Post Office.

The Parliament of Canada has under the respective *Post Office Acts* (now 1927 R.S.C., c. 161, s. 4) placed the superintendence and management of the Postal Service of Canada under the Post Office Department, which is itself under the direction of the Postmaster General.

Section 6 of the *Post Office Act* provides for the appointment of the Deputy Postmaster General by the Governor in Council, and then continues:

> 6. (2) Such other officers, clerks and servants as are necessary for the proper conduct of the business of the department may be employed in the manner authorized by law.

The Postal Service is a branch of the public service and appointments thereto have been made by the Civil Service Commission under the provisions of the *Civil Service Act,* (1927 R.S.C., c. 22). Mrs. Graham was herself appointed postmistress at Maple Creek on July 10, 1930, by the Civil Service Commission of Canada, her salary "to be based on revenue return, plus usual commissions."

The Parliament of Canada by statute (1919 S. of C., 2nd Sess., c. 10) ratified and confirmed "the classes of positions including the several rates of compensation in the classification of the Civil Service of Canada signed by the Commission and dated the 1st day of October, nineteen hundred and nineteen." This classification and amendments thereto are adopted by section 10 of the *Civil Service Act,* (1927 R.S.C., c. 22). It is provided in this classification that the remuneration of a postmistress in a Grade 2 office shall be an allowance based on the revenue of the office and a commission on the sale of stamps, the handling

of postal notes, money orders and related business, and then after specifying certain of her duties as postmistress, this classification continues:

. . . to provide, supervise, and pay the necessary staff of employees . . .

Mrs. Graham's appointment, therefore, carried with it the authority and responsibility to employ, supervise and pay the necessary staff of the Post Office at Maple Creek. Fleming was employed by Mrs. Graham, acting under her authority as set out in the classification ratified by the Parliament of Canada as aforesaid, as a member of the staff of the Post Office at Maple Creek during the Christmas rush. This was the only purpose of his employment. He was therefore "employed in the Canada Post Office" within the meaning of 2 (*c*).

2. In this Act, unless the context otherwise requires,

(*c*) "employed in the Canada Post Office" applies to any person employed in any business of the Post Office of Canada.

While so employed Fleming was under the immediate supervision of Mrs. Graham as postmistress, but his work was that of a Post Office employee as defined in the *Post Office Act,* and the regulations thereunder (section 7 (*w*) and (*x*)). Moreover, he was subject to the inspection, supervision and suspension provided for in that *Act* and in particular section 10 thereof.

Whether Fleming by virtue of his employment was a member of the Civil Service, or just what may be his precise contractual position in relation to the department or the Postmaster General, we are not here concerned. It is sufficient for the determination of the present issue that he is employed in the Postal Service.

With great respect for those who entertain an opinion to the contrary, Fleming so employed was under and subject to the provisions of the Post Office authorities and was employed in the Postal Service and therefore within the exclusive legislative field of the Parliament of Canada. Even if it be correct that the Parliament of Canada has not enacted legislation with respect to hours of work and minimum wages, it is not, as explained in the above mentioned authorities, with respect to the Postal Service within the competence of the legislature of the province to do so.

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In this view the workmen's compensation, taxation and other cases cited during the exhaustive presentation of this case do not assist the contention of the province. Even if the fixing of hours of employment and minimum wages were deemed to be but legislation necessarily incidental or ancillary these cases are distinguishable; the former because they deal with employees of corporations formed under Dominion statutes and not with respect to the Postal Service or employees of the Government of Canada, and the latter because the imposition of the tax, to adopt the language of Sir Louis Davies, (later Chief Justice), in *Abbott* v. *City of St. John* (1), and adopted by the Privy Council in *Caron* v. *The King* (2), and *Forbes* v. *Attorney-General of Manitoba* (3); Plaxton, 259, "does not attempt to interfere directly with the exercise of Dominion power." It cannot be said that the imposition of minimum wages and maximum hours relative to employees in the Post Office does not attempt to interfere directly with the exercise of Dominion power in respect to the Postal Service.

The question submitted should be answered in the negative.

Question answered in the negative.

Solicitors for the Attorney-General of Canada: *F. P. Varcoe* and *W. R. Jackett.*

Solicitors for the Attorney-General of Ontario: *C. R. Magone* and *E. H. Silk.*

Solicitor for the Attorney-General of Saskatchewan: *J. L. Salterio.*

Solicitor for the Attorney-General of Alberta: *H. J. Wilson.*

Solicitor for the Attorney-General of Nova Scotia: *Thomas D. Macdonald.*

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(1) (1908) 40 S.C.R. 597 at 606.
(2) [1924] A.C. 999.
(3) [1937] A.C. 260.

SHELL OIL COMPANY OF CANADA LIMITED (DEFENDANT)..... APPELLANT;

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*Mar. 15, 16
*Apr. 27

AND

ROMEO LANDRY (PLAINTIFF).....RESPONDENT.

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

Negligence—Motor vehicle—Collision between motor vehicle and bicycle—Bifurcation of two streets—Presumption of fault created by section 53 of the Quebec Motor Vehicles Act—Responsibility for accident—Quebec Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53.

The respondent was proceeding West on St. Paul Street, Quebec, riding his bicycle. As he was attempting to turn left in order to enter Boulevard Charest, he collided with appellant's truck which was proceeding East on St. Paul Street. The accident occurred at a busy rush hour. Appellant admits driving at approximately 20 M.P.H. The trial judge found the respondent solely responsible but the majority of the Court of King's Bench, Appeal side, held that there had been contributory negligence. Respondent did not cross-appeal and the sole question on this appeal is whether the appellant was at fault.

Held: The appeal should be dismissed with costs.

Per The Chief Justice and Taschereau and Estey JJ.:—The appellant has not rebutted the presumption of fault created by section 53 of the Quebec Motor Vehicles Act. It was his duty to slow down his speed in order to have complete control of his truck and to stop if necessary.

Per Rand and Kellock JJ.:—The appellant did not show that the care demanded in approaching this bifurcation at a busy rush hour was exercised by the driver of its truck and that his course of action did not contribute to the accident.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing (Gagné and Pratte JJ. A. dissenting) the judgment of the Superior Court, Coté J., and awarding the respondent the sum of $2,182.40.

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

Jacques de Billy for the appellant.

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

(1) Q.R. [1947] K.B. 738.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

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SHELL OIL COMPANY v. LANDRY

The judgment of the Chief Justice and of Taschereau and Estey JJ. was delivered by

TASCHEREAU, J.—Le demandeur intimé Roméo Landry a été la victime d'un accident d'automobile, survenu le 21 mars 1946, à l'angle de la rue St-Paul et du Boulevard Charest, dans la cité de Québec. Alors qu'il se dirigeait vers l'ouest, et qu'il s'apprêtait à traverser en bicyclette la rue St-Paul, pour s'engager dans le Boulevard Charest, un des camions de l'appelante qui venait en sens inverse sur la rue St-Paul, le frappa et lui causa des dommages, pour lesquels il réclame la somme de $12,613.74. L'honorable juge Côté de la Cour Supérieure de Québec a rejeté l'action avec dépens, mais la Cour du Banc du Roi,(1) MM. les juges Gagné et Pratte dissidents, a conclu qu'il y avait faute commune et après avoir évalué les dommages à $4,364.80 a maintenu l'action pour la somme de $2,182.40 avec dépens.

Il est certain que l'intimé ne peut pas être exonéré de tout blâme. Le juge de première instance lui attribue toute la responsabilité, de même que les honorables juges Gagné et Pratte en Cour du Banc du Roi, et la majorité des juges de cette dernière cour (1) a partagé la faute en parts égales. De cette décision, il n'y a pas de contre-appel logé par l'intimé.

Il ne reste donc qu'à déterminer si le chauffeur du camion de l'appelante a réussi à repousser la présomption de faute établie par l'article 53 de la loi des Véhicules Moteurs.

L'endroit où s'est produit l'accident n'est pas à une intersection où, après s'être croisées, deux rues se prolongent encore. C'est plutôt sur la rue St-Paul même, à quelques pieds de la ligne où commence le Boulevard Charest qui se dirige vers le sud-est, que le camion et la bicyclette sont venus en contact.

Le trafic assez dense à l'heure de l'accident, vient de l'est de la rue St-Paul, soit pour procéder droit vers l'ouest, ou pour tourner à gauche vers le Boulevard Charest; il vient également du Boulevard Charest pour s'engager dans la rue St-Paul, ou encore de l'ouest de la rue St-Paul, pour se diriger vers l'est dans cette même artère. C'est dire que les

(1) Q.R. [1947] K.B. 738.

véhicules, les tramways et les piétons se rencontrent en tous sens, et que l'on doive faire preuve de la plus grande prudence, si l'on veut éviter des accidents.

Le bicycliste qui allait vers l'ouest, et qui devait traverser la rue St-Paul pour s'engager dans le Boulevard Charest, laissa passer deux voitures automobiles qui filaient dans le même sens, et inclina ensuite d'une façon assez prononcée vers la gauche pour passer en avant du camion de l'appelante. C'est alors qu'il était au centre de la voie ferrée, située sur la rue St-Paul, qu'il fut frappé par le camion qui venait dans la direction opposée. Evidemment, il y avait là faute du cycliste en s'aventurant ainsi devant le trafic qui venait de l'ouest, sans donner aucun signal de sa main afin d'indiquer la direction qu'il entendait suivre.

Mais si la faute de l'intimé a contribué à l'accident, je crois avec la majorité des juges de la Cour d'Appel (1) que le chauffeur du camion n'est pas exempt de responsabilité. Il dit lui-même dans son témoignage que le trafic est dense à cet endroit, et cependant, il procède à une vitesse de 20 milles à l'heure, sachant qu'il est sur le point d'atteindre un endroit, où certaines voitures doivent bifurquer à gauche et lui couper la route, tandis que d'autres doivent continuer tout droit. C'était son devoir de réduire sa vitesse de telle façon qu'il ait le contrôle complet de son camion et qu'il arrête si nécessaire. Il a eu tort comme il le dit, d'assumer que le cycliste lui céderait le droit de passage.

Nous ne sommes pas en présence d'un cas où un cycliste surgit inopinément sur la route, et rend l'accident inévitable. Le conducteur du camion voyait ou aurait dû voir le geste de l'intimé; il était à une distance suffisante pour arrêter ou pour incliner à droite, et éviter ainsi l'accident. S'il avait agi en homme prudent, il aurait dû prévoir, étant donné la circulation dense, la probabilité que des véhicules, désireux de procéder sur le Boulevard Charest, inclineraient vers la gauche, comme le cycliste l'a fait.

L'appelant n'a pas détruit la présomption édictée par l'article 53 de la loi des Véhicules Automobiles, et je suis en conséquence d'opinion que l'appel doit être rejeté avec dépens.

(1) Q.R. [1947] K.B. 738.

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Kellock J.

The judgment of Rand and Kellock JJ. was delivered by

KELLOCK J.:—According to the respondent he had been riding his bicycle westerly on St. Paul Street, about five feet from the north rail of the west bound track. Deciding to cross the street to his left to enter Charest Blvd., he allowed two automobiles, travelling a little faster than he, to pass him on his left. Then looking ahead and behind, and seeing nothing, he turned on to the tracks and at that moment saw the appellant's truck approaching from the west about four or five feet from the southerly curb and about forty or fifty feet away.

He says that he had not been able to see this truck before, owing to the fact that there were one or two trucks parked on the south side of the street, although he admits that before he got on the tracks he was able to see about 150 feet to the west on the south side of the street. On seeing the approaching truck the respondent says he applied his brakes but skidded two or three feet without, however, being able to avoid contact, with the result that his front wheel and the left front mudguard of the truck collided. He says he fell to the ground some twelve or fifteen feet from the south curb.

The appellant's driver says that he was travelling in the position the respondent says, at a speed of about eighteen or twenty miles an hour. According to him there was traffic approaching St. Paul Street on Charest Bldv. to his right as well as traffic all along the street on his left, going west, consisting of automobiles and bicycles. None of this traffic turned left or gave any signal of intention to do so. He first remarked the plaintiff when the latter was on the car tracks crossing at a sharp angle about ten or twelve feet in front of him. He immediately applied his brakes but could not avoid the accident which he agrees took place as indicated by the respondent.

Negligence on the part of the respondent was found by the learned trial judge in failing to see the truck and in crossing as he did without looking and without giving any signal. The sole question on this appeal is whether or not the finding of the learned trial judge that the appellant's

driver had met the presumption resting upon him by reason of section 53 of the *Motor Vehicles Act,* is open to attack.

The learned trial judge has accepted the evidence of the appellant's driver as to the speed at which he says he was travelling at the time and finds that it was reasonable in the circumstances. There is, however, the question as to whether or not the appellant's driver ought to have seen the respondent before he in fact did see him. His answer was that while he may have seen him he did not notice him as the respondent gave no indication of desiring to turn to his left and that he seemed suddenly to appear from behind an automobile travelling west.

It therefore appears that the appellant's truck, in the position in the street in which it was, on the evidence of both parties, left some nine or ten feet between it and the southerly rail of the west bound tracks, with the result that at least that distance and probably a foot or two more separated it from the line of traffic going west. Accordingly the appellant's driver had ample opportunity to observe the movements of approaching traffic some distance in front of him. Operators of west bound vehicles had equal opportunity of observing appellant's vehicle.

The learned trial judge rejected the evidence of the respondent that he could not see the approaching truck by reason of a truck parked on the south side of the street and held that he either did not look at all or did not look sufficiently. As to the appellant's driver two things are charged against him: (1) that his speed was in fact greater than he says and, in any event, excessive in the circumstances; (2) that he ought to have seen the respondent before he in fact did and had he done so he could have stopped or deviated had his speed been what it should have been.

I am not disposed to think on the evidence that it is open to this court to disagree with the learned judge's finding as to the actual speed. I think, however, in view of the statutory onus resting upon the driver that it has not been shown, and it was for the appellant to show that the care demanded in approaching the bifurcation here in question

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at a busy rush hour when any of the west bound traffic might turn into Charest Blvd. was exercised by the driver of its truck and that his course of action did not contribute to the accident.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gagnon & de Billy.*

Solicitor for the respondent: *Louis A. Pouliot.*

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*Mar. 12, 15
*Apr. 27

ALFRED MARCOUX (PLAINTIFF).....APPELLANT;

AND

THE HALIFAX FIRE INSURANCE COMPANY (DEFENDANT)..... } RESPONDENT.

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

Insurance—Automobile—Liability for damages caused by a truck to a pedestrian—Delay in giving notice—Reasonable excuse—Impossibility of giving notice—Acceptance of notice without prejudice—Investigation of facts—Waiver of failure to comply with conditions of the policy—Art. 2478 C.C.

Appellant's truck, through an accident to the steering gear, became unmanageable, overturned and struck a pedestrian walking on the sidewalk along Victoria Street, Montreal South. The pedestrian declared that he was not injured and refused to be taken to a doctor or hospital. Appellant did not notify his insurer, the respondent, although a clause of his policy stated that notice was to be given promptly whenever an accident involving bodily injury happened. Two months later, the pedestrian claimed damages for injuries in the amount of $2,204.50. Appellant notified his insurer who accepted to investigate without prejudice. Finally the insurer refused to indemnify the appellant. The Superior Court's rejection of appellant's action against respondent was confirmed by a majority of the Court of King's Bench, appeal side.

Held: The appeal should be dismissed.

Per The Chief Justice and Kerwin, Taschereau and Locke JJ.:—It is not up to the insured to determine the gravity of the damages and to judge whether the insurer should investigate. His obligation is to give notice and failure to do so relieves the insurer from responsibility.

The insurer did not waive his rights when he accepted to investigate without prejudice.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Locke JJ.

Per Rand J.:—There was sufficient to indicate to a reasonable and prudent person that bodily injury had most probably been suffered.

It was not impossible, in the circumstances, for the insured to have given the notice.

The facts had to be ascertained by the insurer before he was in a position to declare himself one way or the other.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), confirming (St-Germain and St-Jacques JJ. A. dissenting) the judgment of the Superior Court, Demers J., and dismissing the appellant's action in toto.

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

J. C. Samson, K.C. for the appellant.

Paul Carignan, K.C. and *Antonio Garneau, K.C.* for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau and Locke JJ. was delivered by

TASCHEREAU, J.—Le contrat d'assurance intervenu entre l'appelant et la Halifax Fire Insurance Company stipule entre autres que la compagnie, dans le cas où l'un des camions de l'appelant causerait un accident entraînant des lésions corporelles ou la mort, indemnisera l'assuré de tous les dommages qu'il pourrait être appelé à payer. Une clause de la police est à l'effet que l'assuré doit donner *promptement avis écrit* à son assureur, avec les renseignements les plus complets qu'il pourra obtenir, dans le cas d'accident causant des lésions corporelles.

Le 24 août 1940, un camion, propriété de l'appelant, et conduit par un nommé Gérard Lefebvre, a quitté la route en approchant du pont Jacques-Cartier dans la ville de Montréal-Sud, est monté sur le trottoir, et a versé. Le conducteur du camion vit alors un homme assez âgé en avant du camion, assis près d'une clôture. Le conducteur lui demanda s'il était blessé, et cet homme lui répondit qu'il avait été frappé par le camion "mais qu'il n'avait rien". Le

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conducteur lui offrit alors d'appeler un médecin ou de le conduire à un hôpital, mais ce dernier refusa disant que ce n'était pas nécessaire, et qu'il préférait aller chez-lui plutôt qu'à l'hôpital. Le conducteur ne s'informa pas du nom de la personne qu'il avait frappée. Il appela ensuite au téléphone son employeur qui est l'appelant dans la présente cause, lui dit qu'il avait frappé quelqu'un mais que ce n'était pas sérieux, que la victime avait refusé d'être conduite à l'hôpital, qu'elle n'avait rien, et qu'elle pouvait retourner chez-elle.

A peu près deux mois après cet accident, l'appelant reçut une lettre en date du 19 octobre 1940, signée par MM. Lamarre et Lamarre, avocats, dans laquelle ils réclamaient au nom d'Alphée Roger la somme de $2,204.50, dommages résultant de l'accident arrivé le 24 août 1940. N'ayant pas obtenu satisfaction, Roger institua alors des procédures légales contre l'appelant au montant de $2,204.50, et comme la compagnie d'assurance refusa de le défendre, il contesta personnellement l'action, mais fut définitivement condamné à payer à Roger la somme de $704.50 avec intérêts et dépens.

Marcoux poursuivit l'intimée et lui réclama cette somme, mais l'honorable juge Philippe Demers rejeta l'action de l'appelant, et ce jugement fut confirmé par la Cour d'Appel (1), MM. les juges St-Germain et St-Jacques dissidents. M. le juge Demers en vient à la conclusion que le demandeur n'a pas donné à son assureur *promptement l'avis de l'accident* comme il y était tenu par la clause de la police, et que son retard à le faire est inexcusable parce que dans les circonstances, un homme d'une prudence ordinaire aurait prévu qu'il pouvait y avoir lieu à une réclamation.

La Cour d'Appel (1) a disposé de l'appel de la façon suivante:

CONSIDERING that there was reasonable ground for both Lefebvre and the appellant to anticipate that bodily injuries to the pedestrian might have resulted from the accident and that if he appellant had taken proper steps to make further enquiries he would have ascertained that Roger had been injured.

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CONSIDERING that appellant has given no reasonable excuse for his failure to report the accident which failure constituted *a breach of the condition of the policy* requiring notice which breach absolved the company respondent from its liability.

CONSIDERING that the investigation of the accident made by the company respondent after receiving notice thereof did not constitute a waiver of its rights under the policy as the notice was accepted without prejudice.

L'appelant appelle de ce jugement et soutient que lui-même et son chauffeur Lefebvre étaient justifiés de croire qu'aucun accident entraînant des lésions corporelles ne s'était produit, et qu'en conséquence, il n'y avait pas lieu de donner l'avis requis par la police. Il soutient en second lieu que même si la compagnie intimée a le droit de se plaindre du retard à donner l'avis, elle a renoncé à se prévaloir de ce moyen en acceptant le risque et en commençant à faire enquête. Je crois que ces deux points soulevés par l'appelant ne sont pas fondés.

Examinons d'abord si l'appelant devait donner l'avis exigé par les termes mêmes de la police. Lefebvre, entendu comme témoin, raconte ainsi les faits qui ont à l'origine fait naître ce litige:

Q. Qu'est-ce que vous avez vu?

R. J'ai vu ça, j'ai vu M. Roger, le petit vieux qui était en avant du camion *assis du long de la clôture*. Je lui ai demandé qu'est-ce qu'il avait. Il m'a dit que c'était moi qui lui *avais touché,* mais qu'il n'avait rien.

Q. Lui avez-vous dit autre chose?

R. Je lui ai demandé pour faire venir le docteur ou le conduire à l'hôpital. Il m'a dit que ce n'était pas nécessaire, qu'il voulait s'en aller chez-lui au lieu de venir à l'hôpital. Je me suis retourné de côté. Il y avait deux polices qui étaient là.

Lefebvre téléphona ensuite à l'appelant pour l'informer de ce qui était arrivé:

Q. Qu'est-ce que vous lui avez dit à votre patron?

R. Je lui ai dit que j'étais renversé avec le camion à Longueuil. Il m'a demandé si je m'étais fait faire mal ou quelque chose. Je lui ai dit que non. Je lui ai dit que ce n'était pas grand chose, que le camion n'avait pas grand chose, et moi, je n'avais rien. *J'ai dit: "J'ai touché à un petit vieux". J'ai dit que ce n'était pas grave,* qu'il était correct qu'il n'avait rien, qu'il était capable de s'en retourner chez-lui.

Et voici comment il nous raconte la conversation qu'il eut avec Roger:

Q. Vous lui avez même offert d'aller le reconduire à l'hôpital s'il y avait lieu?

R. Oui, j'ai dit: "Je vais faire venir l'ambulance ou un docteur?"

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Q. Il avait l'air suffisamment ébranlé?

R. *Il avait l'air d'avoir quelque chose,* comme de raison; mais moi, il m'a dit qu'il n'avait rien, deux ou trois fois.

Q. Vous, tout de même vous avez vu qu'il avait l'air d'avoir quelque chose, à votre connaissance et vous avez jugé à propos de lui offrir de le reconduire chez le médecin ou à l'hôpital?

R. Quand je l'ai vu là, je lui ai demandé ça. C'était du monde, c'était une personne.

Q. Avez-vous dit cela à votre patron que vous vouliez le reconduire à l'hôpital?

R. Oui, *je lui ai dit au téléphone que je lui avais demandé s'il voulait aller à l'hôpital* et qu'il m'avait dit qu'il n'avait rien.

Dans son examen au préalable, le demandeur raconte la conversation qu'il eut avec Lefebvre:

Il m'a téléphoné, il dit: "Je viens d'avoir un accident au-raz le pont." J'ai dit: "Quelle sorte d'accident avez vous eu?" Il me dit "Cela n'est pas un gros accident". Il dit: "Le camion a sauté le trottoir". J'ai dit: "Tu n'as pas frappé personne?" Il dit: *"J'ai juste touché à un petit vieux,* je lui ai demandé s'il avait quelque chose de le conduire à l'hôpital, il m'a dit qu'il n'avait absolument rien". Je ne m'en suis pas occupé, je l'ai oublié, le petit vieux, après cela.

Et au cours du procès, il dit ce qui suit:

R. Mon chauffeur m'a appelé; il m'a dit: "J'ai eu un accident". Je lui ai demandé: "T'es-tu fait faire mal?" Il m'a dit: "Non". Je lui ai demandé: "Est-ce qu'il y a quelqu'un de blessé?" Il a dit: "Non. Il y a seulement un petit vieux que je pense d'avoir touché; *il est tombé à terre;* mais j'ai voulu le mener chez le médecin ou à l'hôpital, et il n'a jamais voulu." Je lui ai demandé: "Es-tu certain qu'il n'est pas blessé?" Il a dit: "Je suis certain qu'il n'est pas blessé; il n'a pas voulu que je le mène nulle part". Là j'ai envoyé mon mécanicien sur les lieux.

La police d'assurance contient la condition suivante:

Advenant un accident entraînant des lésions corporelles ou la mort, ou du dommage aux biens d'autres personnes, l'assuré en donnera promptement avis écrit à l'assureur, avec les renseignements les plus complets qu'il aura pu obtenir à cette époque. L'assuré donnera avis analogue, avec détails complets de toute réclamation faite en raison de tel accident, et tout bref, lettre, document ou avis reçu par l'assuré de, ou de la part de, ou pour tout réclamant seront immédiatement expédiés à l'assureur.

La police d'assurance est un contrat entre les parties. L'intimée s'engage à indemniser l'appelant; mais à une condition, c'est qu'on lui donne *promptement avis* de l'accident. On comprend facilement la raison qui justifie cette clause dans le contrat. C'est afin de permettre à la compagnie d'assurance de faire enquête immédiatement, de contrôler les faits, de s'enquérir des noms des témoins, qui plus tard peuvent être introuvables, et de ne pas être ainsi à la merci du réclamant. C'est une protection juste-

ment réclamée dans le contrat, et dont l'assuré ne peut pas impunément priver son assureur. Dans la présente cause, l'appelant dit que l'accident n'était pas grave, qu'il a été informé par son employé que la victime n'avait rien.

L'appelant ou son employé savait cependant que le camion avait "frappé quelqu'un", qu'il était "tombé par terre", qu'il "avait l'air d'avoir quelque chose" qui justifiait l'offre de faire venir l'ambulance ainsi qu'un médecin. Dans ces circonstances, comme le dit M. le juge Demers, un homme d'une prudence ordinaire aurait prévu qu'il pouvait y avoir lieu à une réclamation.

Ce n'est pas l'assuré qui doit déterminer la gravité des dommages, et qui doit juger si oui ou non la compagnie d'assurance doit faire enquête. Son obligation est de donner avis, la compagnie prendra les mesures qu'elle jugera nécessaires. L'appelant a peut-être agi de bonne foi, mais les événements ont démontré qu'il était dans l'erreur, qu'il a été mal informé, car la preuve a révélé que comme résultat de cet accident, Roger s'est fait fracturer trois côtes, et a subi d'autres lésions corporelles. C'est l'appelant qui doit en subir les conséquences, et non pas l'intimée.

L'avis était une condition préalable à tout recours que l'appelant pouvait exercer contre l'intimée, et comme il ne l'a pas donné, sa réclamation doit être rejetée. C'est la jurisprudence unanime des tribunaux de la province de Québec, et de cette Cour: (*Vide Moineau* v. *Antonessa* v. *Employers Liability Insurance Co.*(1); *Employers Liability Assurance Corp.* v. *Taylor*(2); *Atlas Assurance Co.* v. *Brownell*(3); *Commercial Union Assurance Co.* v. *Margeson*(4).

L'appelant soutient en second lieu que la compagnie intimée a renoncé aux droits qu'elle pouvait avoir de recevoir un avis, en faisant enquête sur les circonstances de l'accident. Je ne puis m'accorder avec cette seconde prétention car, les faits démontrent que lorsque Roger lui a fait parvenir sa réclamation au montant de $2,204.50 par l'entremise de ses avocats Lamarre et Lamarre, il a remis cette lettre à M. Henri Gérin, son agent d'assurance, qui à son tour l'a remise à la compagnie intimée à son bureau

(1) Q.R. [1916] 25 K.B. 334.
(2) 29 S.C.R. 104.
(3) 29 S.C.R. 537.
(4) 29 S.C.R. 601.

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à Montréal. L'ajusteur de la compagnie d'assurance avertit alors Gérin que cette lettre était acceptée sans préjudice, et que la compagnie déciderait plus tard de l'attitude qu'elle devait adopter. Quelque temps après, l'appelant se rendit lui-même au bureau de l'intimée et l'ajusteur de la compagnie lui dit la même chose qu'il avait dite à Gérin. Le 11 novembre 1940, l'ajusteur a de nouveau rencontré l'appelant et lui a demandé de signer ce qu'il appelle un "non-waiver", en vertu duquel la compagnie d'assurance se déclarait prête à continuer à enquêter, mais sans préjudice. Sur le conseil de son avocat, l'appelant a refusé de signer ce document. Le 20 novembre, la compagnie d'assurance écrivit donc à l'appelant une lettre dans laquelle elle l'informait qu'elle avait décidé de ne pas accepter la réclamation, et elle lui retournait la lettre écrite par MM. Lamarre et Lamarre, en date du 19 octobre. Il me semble clair que le simple récit de ces faits, établit sans aucun doute que l'intimée n'a renoncé à aucun de ses droits.

Je suis en conséquence d'avis que le présent appel doit être rejeté avec dépens.

RAND, J—This is an action brought by an insured on a policy of indemnity against liability for injury by automobile to third persons. The appellant's truck, while passing along Victoria Street, Montreal South, in a westerly direction, through an accident to the steering gear, became unmanageable and overturned. In the course of its career it struck a pedestrian walking on the sidewalk. In an action brought against the appellant judgment was recovered for the sum of $704.30 with interest and costs after appeal and it is to recoup the amount of that judgment that the present proceedings have been brought.

In the declaration it is alleged that "le camion frappa une palissade et renversa"; that the truck driver called his employer to advise him of the damage done to the truck "ajoutant qu'un homme avait semblé être touché par le camion mais que ce n'était rien et qu'il n'y avait pas de réclamation;". Then this paragraph:

6°:—Le chauffeur déclara alors au demandeur que la victime de l'accident n'avait subi aucun dommage parce qu'elle s'était relevée elle-même après le choc, avait refusé l'aide offert d'être conduite à l'hôpital, et s'était rendue elle-même à la maison;

The only evidence given in support of these allegations of the facts of the accident was by the truck driver in the following excerpts:

Le "steering" du camion s'est "démanché" et j'ai renversé sur le côté dans la rue.

Q. Qu'est-ce que vous avez vu?

R. J'ai vu ça, j'ai vu M. Roger, le petit vieux qui était en avant du camion assis du long de la clôture. Je lui ai demandé qu'est-ce qu'il avait. Il m'a dit que c'était moi qui lui avais touché, mais qu'il n'avait rien.

Q. Lui avez-vous dit autre chose?

R. Je lui ai demandé pour faire venir le docteur ou le conduire à l'hôpital. Il m'a dit que ce n'était pas nécessaire, qu'il voulait s'en aller chez lui au lieu de venir à l'hôpital. Je me suis retourné de côté, il y avait deux polices du trafic qui étaient là. Ils m'ont dit de relever le camion qui était dans la rue qui bloquait le trafic.

Q. Lui avez-vous demandé son nom à ce monsieur-là?

R. Non, monsieur.

Q. Pourquoi ne lui avez-vous pas demandé son nom?

R. Parce qu'il m'a dit qu'il n'avait rien, je ne voyais pas pourquoi lui demander son nom.

Q. Qu'est-ce que vous lui avez dit à votre patron?

R. Je lui ai dit que j'étais renversé avec le camion à Longueil. Il m'a demandé si je m'étais fait faire mal ou quelque chose. Je lui ai dit que non. Je lui ai dit que ce n'était pas grand'chose, que le camion n'avait pas grand'chose, et moi, je n'avais rien. J'ai dit: "J'ai touché à un petit vieux". J'ai dit que ce n'était pas grave, qu'il était correct, qu'il n'avait rien, qu'il était capable de s'en retourner chez lui.

Q. Vous lui avez même offert d'aller le reconduire à l'hôpital s'il y avait lieu?

R. Oui, j'ai dit: "Je vais faire venir l'ambulance ou un docteur."

There is nothing to show when or how the man got up or moved or was taken away, or where: but it appears that several ribs were broken.

No notice of the accident was given at the time to the insurance company. The eighth condition of the policy provides:

(1) Advenant un accident entraînant des lésions corporelles ou la mort, ou du dommage aux biens d'autres personnes, l'assuré en donnera promptement avis à l'assureur, avec les renseignements les plus complets qu'il aura pu obtenir à cette époque. L'assuré donnera avis analogue, avec détails complets de toute réclamation faite en raison de tel accident, et tout bref, lettre, document ou avis reçus par l'assuré de, ou de la part de, ou pour tout réclamant seront immédiatement expédiés à l'assureur;

The notice is to be given promptly whenever an accident involving bodily injury happens which was the case here. As it took place on the 24th of August and notice was not given until the 24th of October, the question is whether the company has been discharged from its obligation.

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For the purposes of the appeal I will assume, as Mr. Samson contended, that the language of the condition must be interpreted not absolutely but in the background of the ordinary and reasonable understanding of such a requirement on the part of persons who enter into such contractual relations; and that if the truck driver, acting with the intelligence and prudence of the ordinary, reasonable man, in the light of all the circumstances, was satisfied that no bodily injury had been suffered by the person struck, the situation was not one where the notice should at that time have been given. But the appellant must be charged with the appreciation of the circumstances that such a person would have had. It may be that the driver here was dull or unimaginative; but the employer cannot avail himself of that fact for his own advantage. The latter, too, must in learning the bare and sketchy details of an accident be sufficiently alert to imagine likely facts which the report of his employee may not adequately convey. Undoubtedly the injured man, admittedly showing signs of shock, had been struck and knocked some distance and the driver must have inferred as much, and the deprecation of seriousness was the ordinary reluctance to admit weakness that is always to be discounted; and undoubtedly the man was in such a state as to make it clear that the word "touché" would not convey a true description of the contact. That was either an unwarranted minimizing of the impact or the perceptive powers of the driver were unusually sluggish; and so far as the evidence goes he knew nothing of what occurred after he turned around to the policeman and concerned himself with getting his truck out of the street traffic.

On the facts, then, as they have been presented, I feel bound to conclude that there was sufficient to indicate to a reasonable and prudent person that bodily injury had most probably been suffered. The obligation to give notice therefore arose and in that situation it is scarcely disputable that it was not given promptly.

Mr. Samson claims the benefit of Article 2478 of the *Civil Code,* but in the circumstances it cannot be said that it was "impossible" here for the insured to have given the notice as required. Whether in any situation that word

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Rand J.

in the Article would extend to a reasonably based ignorance or absence of belief of the fact of bodily injury I must reserve until the case arises.

It is finally argued that the company has waived the failure to comply with the condition by investigating the facts. But on the interpretation of the condition which Mr. Samson has advanced and which I have accepted, mere lapse of time alone is not a sufficient element to determine compliance or non-compliance; and it was obviously necessary for the facts to be ascertained before the company was in a position to declare itself one way or the other. This in substance is what the adjuster informed the appellant when he spoke of making his enquiries without prejudice.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the Appellant: J. C. Samson.

Solicitors for the Respondent: Paul Carrigan and Antonio Garneau.

1948

*Mar. 3
*April 13

THE J. W. WINDSOR COMPANY LIMITED ..... APPELLANT;

AND

CITY OF CHARLOTTETOWN ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND

Exemption from taxation—Proviso to The City of Charlottetown Incorporation Act, P.E.I., 1931, chapter 31, section 65—"provided that no property in transit or awaiting shipment abroad shall be assessed;"—Goods in stock and held for preparation and disposal prior to shipment excluded from exemption.

The appellant engaged in the buying and selling at wholesale of canned fish, chiefly lobsters. It bought from packers along the shores of the Maritime Provinces, the Magdalen Islands and Newfoundland. The goods were delivered to appellant's warehouse at Charlottetown; here they were tested for defects in canning, graded, labelled, assembled in cases and stored. On receipt of directions from its head office in

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

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Montreal, they were then shipped out of the Province to various points, mostly in carload lots. The City of Charlottetown assessed the goods so stored and the appellant claimed exemption under the proviso contained in The City of Charlottetown Incorporation Act, *21 Geo. V.* (1931) *ch. 31 sec. 65* i.e. "provided that no property in transit or awaiting shipment abroad shall be assessed;" (Reporter's note:—It was common ground that the word "abroad" as used in the Statute meant "out of the Province" and that the canned goods were not "in transit".)

Held: The transitory nature of the "awaiting" envisaged in the words "awaiting shipment" in section 65, City of Charlottetown Incorporation Act, P.E.I., 1931, chapter 31, excludes goods which are in stock and are held for preparation and disposal.

APPEAL from a decision of The Supreme Court of Prince Edward Island (in banco) affirming a decision of the Board of Appeal of the City of Charlottetown in favour of the respondent.

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

Hugh O'Donnell K.C. and *J. O. C. Campbell K.C.* for the appellant.

K. M. Martin K.C. for the respondent.

KERWIN J.:—By section 50 of the City of Charlottetown Incorporation Act, being chapter 31 of the Statutes of 1931 of the Province of Prince Edward Island, all real and personal property within the City limits is liable to taxation except such as are and to the extent only that any may be exempt or exempted under the provisions of the Act. Section 65 provides:—

> The person in possession of personal property at the time of the valuation of the same, shall be deemed the owner of such property in case the real owner has not been assessed therefor, and the property shall be liable for the rates and taxes assessed in his name; provided that no property in transit or awainting shipment abroad shall be assessed; and provided also, that no property shall be assessed unless its value amounts to two hundred dollars.

The canned lobsters and other fish of the appellants in its Water Street premises in Charlottetown were assessed during the latter part of 1945 for the year 1946 at $20,000, and the question in dispute in the present appeal is

whether such goods are exempt by virtue of the first proviso in section 65. It is common ground that "abroad" means outside the Island whether within or out of Canada and that the canned goods are not "property in transit", and, therefore, the neat point for determination is whether under the circumstances the goods are "awaiting shipment". The Supreme Court of the Island, by an equal division, affirmed the decision of the Board of Appeal but gave special leave to the Company to bring the case to this Court.

The Company is engaged in buying and selling at wholesale (among other goods) canned fish, chiefly (in value) lobsters. Its head-office is in Montreal but it has an establishment on Water Street in Charlottetown to which the fish is sent from various packing establishments in the Maritime Provinces and the Magdalen Islands. In Charlottetown its employees grade the products, label the cans, assemble them in boxes and cartons, and stencil the packages. The permanent staff consists of seven, augmented by about twenty girls to assist in labelling, from September to January inclusive. The value of the stock on hand was very substantial from May to December 1946 while, for the remaining months, the value ran from $800 to about $17,000. The orders for the sale of the fish would be taken by the Company in or from Montreal and relayed to its Charlottetown office. To fill these orders, the goods on hand were not necessarily shipped out in the order in which they had been received—the matter of selection depending to a great extent upon the quality demanded. While an occasional order might be received direct from the Island by the Charlottetown office, practically the entire stock would be disposed of "abroad".

Under these circumstances, were the goods "awaiting shipment"? While admitting the onus that rests on a party claiming to fall within an exemption from taxation, the Chief Justice of the Island considered that the "or", before the phrase in question, was distributive, and decided that on the proper construction of the phrase, property is held for shipment abroad if that is the purpose for which the owner or possessor is holding it—and that, whether to a purchaser or broker or storage depot, and whether by

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the first available transport or at such times as favourable markets and storage conditions dictate. On the other hand, MacGuigan J., concluded that the mere intention to export was insufficient and that taking the words in their natural and ordinary meaning, the goods in storage in the Company's warehouse were not "awaiting shipment abroad."

The point is a difficult one but upon consideration I am of opinion that the appellant has failed to bring itself within the tax exemptions. I agree that "or" is distributive (see *In re Diplock* (1) affirmed by the House of Lords sub nom *Chichester Diocesan Fund and Board of Finance* v. *Simpson* (2) and therefore the last leg of the proviso connotes something beyond the meaning to be attributed to the first. However, goods might very well be not "in transit" and also not "awaiting shipment". Section 65, without the second proviso, first appeared in 1885 as section 21 of chapter 8 of that year, at a time when commerce between the Island and mainland was much more difficult than at present, and particularly during the winter months, and it seems reasonable that the legislature had those difficulties in mind in enacting the legislation. Again, the appearance of the proviso in question in a section enacting that the person in possession of personal property at the time of its valuation should be deemed the owner in case the real owner had not been assessed therefor, indicates the transitory nature of the "awaiting" that was envisaged by the legislature which in my view never meant to include such a case as this where, to use the words of the Board of Appeal, there was a "permanency of inventory". The appeal should be dismissed with costs.

The judgment of Taschereau and Rand JJ. was delivered by:

RAND J.:—The appellant has its head office in Montreal and is licensed to carry on what is known as an assembling business in Charlottetown, P.E.I. The assembling is of canned lobsters and fish purchased from packers along the shores of the Maritime Provinces, Newfoundland and the Magdalen Islands. The goods upon arrival in Charlottetown are tested, classified, labelled and stored; under the

(1) [1941] 1 Ch. 253. (2) [1944] A.C. 341.

license, they may be sold to retailers or wholesalers in Prince Edward Island but not to individual consumers. Contracts for sales to points outside of the Province are made at the head office and shipments from Charlottetown follow directions from that office. The fishing season commences in the Spring, and along different parts of the coast continues until late Autumn, and the stocks are generally disposed of by March or April. The storage reaches its maximum about September.

The City of Charlottetown has assessed these goods under section 65 of the charter:—

> 65. The person in possession of personal property at the time of the valuation of the same, shall be deemed the owner of such property in case the real owner has not been assessed therefor, and the property shall be liable for the rates and taxes assessed in his name; provided that no property in transit or awaiting shipment abroad shall be assessed; and provided also, that no property shall be assessed unless its value amounts to two hundred dollars.

The controversy arises upon the interpretation of the proviso "that no property in transit or awaiting shipment abroad shall be assessed".

The contention of the company is that these goods are either in "transit" or are "awaiting shipment abroad"; and that the purpose of the provision is to encourage business abroad, which would be defeated by the taxation in this case.

For the respondent, it is argued that the proviso was introduced into the section in 1887 at a time when shipments from the Island could not be made during the closed season of navigation; and that the goods intended to be exempted are those "awaiting shipment abroad", as the language implies, because of the exigencies of transportation.

I think it impossible to treat the goods as "in transit": Hollingsworth & Whitney Ltd. *v.* Bridgewater (1). What that expression as used here contemplates is a single movement from origin to destination in which the goods are in the control of the carrier. Whether they are "awaiting shipment" presents more difficulty, but I think the conclusion must be the same. The operations in relation to the goods at Charlottetown, as well as the negotiation of

(1) [1929] 1 D.L.R. 481.

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sales and the shipment, constitute together the purpose of their presence there; and in fact the shipment, meaning by this the act of shipping, takes place only when the other requirements have been fulfilled. The goods are not in Charlottetown by reason of transportation: they are held there, as they must be somewhere, for the purposes of commercial functions which are essential preliminaries to transportation: they are there awaiting not shipment, but preparation and disposal.

I would, therefore, dismiss the appeal with costs.

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

KELLOCK J.:—This is an appeal from the judgment of the Supreme Court of Prince Edward Island which on an equal division dismissed an appeal from the Board of Appeal affirming an assessment in respect of the stock of lobsters and canned fish of the appellant company for the year 1946.

The facts are not in dispute. The appellants are dealers in lobsters and other canned fish which they purchase from the packers during the fishing season holding them in their warehouse in Charlottetown until they receive orders from the appellant's head office in Montreal as to the disposition of the same. The goods are eventually shipped out of the province to various points, mostly in carload lots. The stock is low during the winter months but in the summer and fall it is quite large. The largest stock in the warehouse in Charlottetown in 1946 was in the month of September and the value of the canned fish in that month amounted to almost $360,000, while in the month of April the stock was as low as $800. The warehouse in Charlottetown had not general instructions to ship the goods to Montreal or any other outside point but the goods were shipped as and when specific instructions from Montreal were received. The appellant company had a general intention to export the goods from the province but it could change its mind at any time and dispose of the same to dealers in the province.

The relevant legislation is contained in the following sections of Chapter 31 of the Statutes of 1931, being An Act to Consolidate and Amend the Several Acts Incorporating the City of Charlottetown.

Section 50. All real and personal property within the City limits, shall be liable to taxation except such as are and to the extent only that any may be exempt or exempted under the provisions of "The City of Charlottetown Incorporation Act".

Section 65. The person in possession of personal property at the time of the valuation of the same, shall be deemed the owner of such property in case the real owner has not been assessed therefor, and the property shall be liable for the rates and taxes assessed in his name; provided that no property in transit or awaiting shipment abroad shall be assessed; and provided also, that no property shall be assessed unless its value amounts to two hundred dollars.

The controversy turns upon the proper construction of the words "awaiting shipment abroad" in the first proviso to section 65. It is common ground that "abroad" means "off the Island". It is not contended by the appellant that the goods assessed were "in transit" within the meaning of the legislation.

The appellant does contend however, and this contention was accepted by Campbell C.J., in the Court below, that as to property held exclusively for the purpose of shipment off the island, whether before or after sale and whether by the first available means of transport or at such times as favourable markets and storage conditions dictate, the exemption applies. The contention really is that the statute is satisfied if the goods are subject to a general intention on the part of the owner, without limitation in point of time, ultimately to export them from the Island.

It appears that the appellant received these goods into its warehouse in unlabelled cans and that its procedure was then to test them for quality and for defects in canning, that thereafter the goods were labelled either with the appellant's own label or with particular labels of its customers and that they were then held until instructions were received from the head office in Montreal to ship out in specific lots. On this evidence the respondent therefore contends that the goods, on receipt by the appellant, were not goods merely awaiting shipment but were held for the performance of the above operations and until sale or subject to the decision of the appellant to place in another location off the Island without prior sale. He

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contends that when the statutory provision was first enacted in 1885, the legislature had in mind the fact that shipment from the Island being literally by ship in all cases was subject to the inevitable delays consequent upon shipping not being always immediately available. Counsel says that while the words "in transit or awaiting shipment abroad" are disjunctive, nonetheless the collocation of the two phrases lends a colour to the words "awaiting shipment" which they might not have standing alone and the last mentioned words were merely used to cover the case of goods which while not actually in transit would have been so had the commencement of their transit not been delayed because of the fact that transportation for them was not immediately available. It was this view which in essence found favour with MacGuigan J. With this view I respectfully agree.

As the evidence shows, the goods on receipt by the appellant at its warehouse awaited the further action of the appellant in testing, labelling and packing and the decision as to ultimate disposal. While in a general sense, the goods were awaiting their ultimate shipment it is not shown as to any of the stock here in question that it awaited shipment in the sense that it was awaiting suitable means of transportation and in my opinion the appellant has not brought itself within the exempting clause.

To give to the statutory language the effect contended for by the appellant would be in my opinion to strain the language beyond the intention of the legislature as gathered from the language used and the context in which it is found. To take a case suggested on the argument, if a mail order house were to maintain a stock in a warehouse in Charlottetown for the purpose of filling orders by mail received from the mainland or Newfoundland, or elsewhere off the Island, orders from the Island itself being handled otherwise, say for instance by retail from stock maintained in other premises, the mail order stock would be exempt if the appellant's contention were to be accepted. In my opinion while such stock would be in one sense awaiting shipment off the Island, it would not be awaiting shipment in the sense in which those words are used in the statute here in question.

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It is sufficient for the purposes of the present case to hold that the goods here in question have not, upon the evidence, been brought within the exemption. It is not necessary to decide within what particular limits the exemption would apply or whether, e.g., goods held for transportation by a particular conveyance would be outside the exemption because an earlier conveyance could have been obtained. Each case will have to be decided upon its own circumstances.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the Appellant: *J. O. C. Campbell.*

Solicitor for the Respondent: *K. M. Martin.*

CARRIE M. SMALLMAN (PLAINTIFF)....APPELLANT;

AND

NELLIE A. MOORE ET AL (DEFENDANTS)..RESPONDENTS

1947

*Dec. 4, 5, 8, 9

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*Apr. 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Action against deceased's estate for breach of promise to marry—Whether cause of action survives—General damages—Special damages—Whether corroboration of promise sufficient—Whether breach or postponement—Trial by jury—Trustee Act, R.S.O. 1937, c. 165, s. 37—Evidence Act, R.S.O. 1937, c. 119, s. 10, 11.

Held: (Kellock J., dissenting)—That the right of action for damages for breach of a promise to marry survives after the death of the promisor by reason of subsection two of section 37 of *The Trustee Act,* R.S.O., 1937, chapter 165.

Per The Chief Justice and Taschereau, Estey and Locke JJ.: What is to be considered is the nature of the injury rather than the form of the action in which redress may be obtained; and the injury occasioned is a personal injury to the plaintiff. Such an injury is a wrong to the plaintiff "in respect of his person" within the meaning of ss. 2 sec. 37 of the Trustee Act, whether it results from a breach of contract or is occasioned by a tort.

Per Kellock J. (dissenting): The action does not survive, in so far as general damages are concerned, as it is an action for breach of contract.

*PRESENT: The Chief Justice and Taschereau, Kellock, Estey and Locke JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment in favour of plaintiff in an action, tried by Urquhart J. with a jury, for breach of promise to marry.

H. E. Harris K.C. and *P. K. Kerwin* for the appellant.

John R. Cartwright K.C. and *S. MacInnes K.C.* for the respondents.

The judgment of The Chief Justice and of Taschereau, Estey and Locke JJ. was delivered by

LOCKE J.: The question as to whether the right of action for damages survives after the death of the promisor depends upon the construction to be placed upon the words "a wrong to another in respect of his person" where the same appear in ss. 2 of sec. 37 of the *Trustee Act, R.S.O. 1937, cap. 165.*

There can be no doubt that at common law any right of action for general damages for breach of a promise to marry did not survive. As to a claim for special damages in respect of the breach of such a promise, the matter is not free from doubt. The reason that the principle expressed in the maxim *actio personalis moritur cum persona* applied was explained by Lord Esher, M.R. in *Finlay* v. *Chirney* (1888) 20 Q.B.D. 494 at 498, as follows:

> Is an action for breach of promise of marriage a personal action in the sense that the cause of action or complaint or injury is one affecting solely the person both of the promisor and promisee? It is clear that it is not a complaint of anything affecting property, whether personal or real; it is an injury; that is, it is a cause of action purely personal on both sides, personal both to the person to whom and the person by whom the promise is made. It is true that in the old days an action for breach of promise of marriage was in form an action founded on contract, and that even now it is still treated as an action for breach of contract. Formerly an action of tort was almost inevitably a personal action; but it did not follow necessarily that an action was not personal because it was founded on a breach of contract. The complaint in an action for breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behaviour; and the damages may be much enlarged if the conduct of the defendant has been an aggravation of the breach of his promise. A consideration

(1) [1947] 1 D.L.R. 434.

of these facts goes to shew that an action for breach of promise of marriage is strictly personal, and that, although in form it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff.

Of course it is said, and said justly, that the damages recovered in the action affect the property of the respective parties; but that is not the proper test to apply; the true test is whether the cause of action itself is one which affects property. The question is therefore concluded both upon principle and by authority.

Bowen, L. J. in the same case, after tracing the history of the maxim and of its application to an action of this nature, approves (p. 506) the following statement as to its nature taken from Sedgwick on Damages:

This action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections and wounded pride, as well as the loss of marriage.

In *Chamberlain* v. *Williamson* (1), Lord Ellenborough, C.J. said in part:

The general rule of law, is actio personalis moritur cum persona; under which rule are included all actions for injury merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate.

In *Beckham* v. *Drake* (2), Baron Platt refers to an action for breach of promise as one which would not pass to an assignee of a bankrupt because the cause of action relates immediately to the person and not to the estate of the bankrupt, and in the same case at p. 624 Baron Parke says:

It is not disputed that the rights of the assignee under the statute law are not identical with, nor are they so extensive as those of an executor, who stands in the place of his testator, and represents him as to all his personal contracts, and is by law his assignee, and therefore may maintain any action in his right which he himself might. That must be understood to mean any action on a contract, for an executor never could sue for wrongs to his testator "actio personalis moritur cum persona." And with respect to contracts, some exceptions have been introduced by modern decisions; Chamberlaine *v.* Williamson (2 Maule and S. 408), Kingdon *v.* Nottle (1 Maule and S. 355, and 4 id. 53) as explained by Lord Abinger in the case of Raymond *v.* Fitch (2 Cr., M. & R. 588, 599), and the executor cannot sue upon contracts the breach of which is a mere personal wrong.

In Chitty on Contracts, 18th Ed. 627, the authors in dealing with the nature of the action say:

The promise is so far of a personal nature, that the breach of it furnishes no cause of action to the personal representative of the party

(1) 1814) 2 M. & S. 409 at 415. (2) (1849) 2 H.L.C. 580 at 601.

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to whom it was made, or against the personal representatives of the party having made it, unless indeed it be alleged and proved that damage of a particular kind has been incurred in consequence of the breach. In the one case the damage must be damage affecting the estate of the deceased: in the other it must be damage to the property, and not the person, of the promisee.

It is true that the manner in which redress is to be obtained for the injury is by an action for breach of contract but, in considering whether the words "a wrong to another in respect of his person" in sec. 37, ss. 2 of the *Trustee Act* apply, it is I think the nature of the injury rather than the form of the action in which redress may be obtained which is to be determined. That the breach of a contract of this nature is a mere personal wrong is, in my opinion, concluded by authority: the injury occasioned is a personal injury to the plaintiff. Such an injury is, in my view, a wrong to the plaintiff "in respect of his person" within the meaning of the section, whether it results from a breach of contract or is occasioned by a tort. In the *Sussex Peerage Case* (1) (1884), Tindal, C.J. said at p. 143:—

> The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

Assigning to the words "a wrong to another in respect of his person" their natural and ordinary meaning, I consider they include an action in respect of a personal injury of this nature irrespective of the form of the remedy. If this were not clear some assistance in assigning the proper meaning to the words is given by the fact that cases of libel and slander are excepted. If "a wrong to another in respect of his person" was intended to mean a bodily injury or trespass to the person, it would have been unnecessary to except libel and slander where the injury is personal in its nature: the fact that these actions are excepted indicates to me that the intention was that a wider meaning should be given to the expression and that actions for all injuries of a personal nature should be included. If the words of subs. 2 are to be construed as if they read "committed a tort causing injury to another in

(1) (1844) 11 Cl. & F. 86.

respect of his person or property", it would seem that subs. 1 of sec. 37 reading "may maintain an action for all torts or injuries to the person or to the property" would read otherwise and not use both the words "torts" and "injuries" which would at least indicate that the words should not be construed as synonymous. If the language of subs. 2 of sec. 37 is not free from ambiguity so that resort should be had to the earlier enactments to assist in its proper construction, I find nothing that would lead me to assign any other meaning to the subsection than that above indicated. The statute of 1886 (49 Vict. cap. 16, sec. 23) recites that secs. 8 and 9 of the Revised Statutes respecting trustees and executors and the administration of estates are repealed "as regards torts, injuries and wrongs hereafter committed"; the substituted sections while not identical in form use the same phraseology as that above quoted from ss. 1 and 2 of sec. 37. Again the use of the three terms "torts", "injuries" and "wrongs" would indicate that the words were not to be construed as identical in meaning. I note also that the marginal notes to sec. 37 of the *Trustee Act, R.S.O. 1937,* read as to ss. 1 and 2 respectively "Actions by executors and administrators for torts" and "Actions against executors and administrators for torts", but these form no part of the statute and do not, in my view, assist in the interpretation of the section. If it was the intention of the Legislature to restrict the effect of the subsection to causes of action sounding in tort, I think it has failed to express that intention in the language used.

As to corroboration: I have had the advantage of reading the reasons for the judgment of my brother Kellock and I agree with his conclusions on this aspect of the matter. I also agree with him that it was open to the jury upon the evidence to take the view that what was said by the deceased, as related by the plaintiff in the action, amounted to a refusal to carry out the promise to marry her on the date fixed. I have considered the various objections raised by the respondent against the Judge's charge to the jury on the ground of alleged misdirection and non-direction and I find nothing which, in my opinion, would justify the granting of a new trial under the terms of sec. 27 of the *Judicature Act, R.S.C. 1937, cap. 100.*

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The appellant recovered judgment for $100 for special damage, the claim apparently being based upon the fact that the plaintiff had purchased a quantity of clothing in anticipation of the proposed marriage. I find nothing in the evidence to sustain this branch of the plaintiff's claim. Apart from the question as to whether in any event special damages are recoverable in an action of this nature discussed in the judgments of the Court of Appeal in *Quirk* v. *Thomas* (1), the evidence in the present case does not, in my view, sustain a claim for any special damage.

As to the general damages, the amount awarded is very large but I think that having regard to all the circumstances of the case it is not so excessive that no twelve men could reasonably have awarded the amount and I think the verdict should not be disturbed on this ground.

The appeal should be allowed and the appellant should have judgment for the $25,000 general damages awarded by the jury: the claim for special damages should stand dismissed: the appellant should have her costs of this appeal and of the appeal to the Court of Appeal and the costs awarded to her at the trial.

KELLOCK J. (dissenting):—The first question which rises in this appeal, taking it in the order in which it was dealt with in argument, is as to whether or not on the evidence, the requirements of section 11 of the *Evidence Act, R.S.O., 37, cap. 119,* were met. The section reads as follows:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

It was held by the Court of Appeal that there was no evidence corroborative of the appellant's evidence with respect to breach as distinct from the promise itself and that this was insufficient. The position of the respondents is that in an action of this character the main fact is the fact of breach and corroborative evidence which is not corroborative of such fact is insufficient.

(1) (1916) 1 K.B. 516.

While the action is always referred to as an action for breach of promise of marriage, the plaintiff, in such an action, must establish not only the breach but the promise, and section 10 of the *Act* requires corroborative evidence of the promise. Thus, if it can be said that in the view of the legislature one is more important than the other, it would seem to be the promise. However that may be, the section here does not say that every fact necessary to be proved to establish a cause of action must be corroborated by evidence other than that of the interested party but that the evidence of the interested party itself is to be corroborated by *some other material evidence.* I do not think that the word "matter" in the section is to be taken as synonymous with every fact required to be proved in establishing a cause of action and it has never, as far as I am aware, been so construed.

In the leading case in this court, *Thompson* v. *Coulter* (1), Killam, J., said at page 263:

> In my opinion this enactment demands corroborative evidence of a material character supporting the *case* to be proved by such "opposite or interested party" . . . Unless it supports that case, it cannot properly be said to "corroborate" . . . At the same time the corroborating evidence need not be sufficient in itself to establish the case.

Killam, J., approved as applicable to the legislation the following from the judgment of Jessel, M.R., in *In re Finch* (2).

> As I understand corroboration is some testimony proving *a material point* in the testimony which is to be corroborated. It must not be testimony corroborating something else—something not material.

Killam, J., held that in the case then before the court there was not any evidence which could properly be treated as corroborating the defendant on the only point on which the onus was upon him and that except for the defendant's own testimony all the evidence was as consistent with one view as with another. This decision in my opinion is no authority for the proposition for which the respondent contends.

It is clear of course that the corroborating evidence need not be that of a second witness but may be afforded by circumstances; *McDonald* v. *McDonald* (3).

(1) 34 S.C.R. 261.
(2) 23 Chancery Div. 267 at 272.
(3) 33 S.C.R. 145.

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In *McKean* v. *Black* (1), Anglin, J., as he then was, in referring with approval to *Radford* v. *Macdonald* (2), said at page 208:

. . . all that the statute requires is that the evidence to be corroborated shall be "strengthened by some evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to", and as was said in Green *v.* McLeod, 23 A.R., 676, "the material evidence in corroboration may consist of inferences or probabilities arising from other facts and circumstances".

In *Radford* v. *Macdonald* (2), Osler, J.A., at 171 had said:

Then the question arises in what degree, or to what extent? It has long been conceded that it need not be corroborated in every particular. Had that been the intention of the Act, it would have been simpler to enact that the party in such case should not be a competent witness, since the evidence required in corroboration would alone be sufficient. Nor is corroboration required to be directed to any particular fact, or part of the evidence. It is the evidence of the party which is to be corroborated by some other material evidence. If then the evidence in corroboration is not required either to prove the contract itself or any particular fact deposed to by the party, the only test or formula which can be applied to it is that it must be relevant and material and calculated to lead to the belief that the evidence of the party is credible.

In *Radford* v. *Macdonald* (2), Osler, J.A., at 171 had said:

I think, in such cases, the first question is, does it strengthen the evidence given by the party adducing it? If these two questions are answered in the affirmative, I think the evidence answers the requirement of the statute, provided the judge, or the jury, as the case may be, believe it. "Corroborate" means to strengthen, to give additional strength to, to make more certain, and if the evidence helps the judicial mind appreciably to believe one or more of the material statements or facts deposed to by the party, then, I think, it is what is required by the statute.

Burton, J.A., dissented on the ground that the documents relied upon in the case as corroborative did not meet the test of the statute but he does not state the law in different terms from the other members of the court. At page 181 he said:

I quite agree with Chief Justice Armour that, if there is evidence adduced corroborating the evidence of the interested party in support of his claim or defence in *any* material particular, it must be submitted to the jury as sufficient corroboration in point of law . . . That is the well understood rule in all cases, but the question remains what is meant by a material particular.

The above reference is to the judgment of Armour, C.J., in *Parker* v. *Parker* (3). The passage to which Burton, J.A., referred is immediately preceded by the following:

I think, therefore, that the decision in Bessela *v.* Stern, L.R., 2 C.P.D., 265, indicates the true construction to be put upon the provision in our

(1) 62 S.C.R. 290.
(2) 18 A.R. 167.
(3) 32 U.C.C.P. 113 at 128.

Act, and that if the learned Chief Justice, in Orr *v.* Orr, 21 Grant, 397, meant to say that the interested party must be corroborated, as to every issue raised in the cause by some other evidence material to that issue, I think he was putting too narrow a construction upon the provision under discussion.

This, in my opinion, was merely stating what followed in a different way.

The respondent relies upon *Elgin* v. *Stubbs* (1), as establishing a different rule. At page 131 Hodgins, J.A., said:

> In deciding the real meaning of the statute and of the expressions in the decisions upon it, the choice is of course between holding that the end sought by the statute is merely to establish the plaintiff's veracity generally, by requiring that some material or relevant fact stated therein should have support by evidence ab extra, or, on the other hand, that the statute demands that the corroboration must be of something essential to be shewn before the plaintiff can upon his own evidence obtain a verdict, judgment or decision in his favour on the cause of action he is setting up; his case, in other words.

In *Bayley* v. *Trusts and Guarantee Co.* (2), Hodgins, J.A., referred to *Stubbs'* case as insisting "only on the corroborative evidence containing *something* essential to the plaintiff's recovery, and not evidence essential only to the defence set up, and not otherwise supported by any one."

In *McGregor* v. *Curry* (3), the same learned judge had thus stated the law:

> As the statute has been construed in the cases upon the subject, corroborative evidence is not required as to every fact necessary to enable the opposite party to recover. It is enough if sufficient relevant facts and circumstances appear, which tend to prove that the evidence relied on for recovery is true, or probably true, in some material particular. . . . But the respondent's whole testimony, both in proof of his claim and in disproof of the defence, is the *evidence* upon which he recovers. Applying the cases referred to, if *any* part of that whole evidence is corroborated the statute is satisfied. This appears to follow as a proper conclusion.

In the same case Meredith, C.J.O., said at p. 270:

> . . . the corroboration which the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony is true.

I think therefore that the respondents fail in the contention above referred to. In my opinion the law is correctly laid down in the authorities to which I have referred and *Elgin* v. *Stubbs* (1) is not to be taken as at variance

(1) 62 O.L.R. 128.
(2) 66 O.L.R. 254.
(3) 31 O.L.R. 261.

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therewith. In that case the facts were not unlike those in *Thompson* v. *Coulter* (1) in that the evidence relied upon as corroborative was as consistent with the one case as the other and therefore not corroborative of either.

It is next said on behalf of the respondents that the appellant's evidence as to the conversation between herself and the deceased relied on as establishing the breach is as consistent with a postponement as with breach and that other evidence submitted by or on behalf of the appellant is inconsistent with there having been any breach.

In my opinion, the true inference to be drawn from the evidence was for the jury. They have taken the view that what was said by the deceased, as related by the appellant, amounted to a refusal and I am not prepared to say that such a view was not open to them. The other evidence relied upon by the respondents is with respect to the conduct of both of the parties after the alleged breach. The fact that they did not quarrel, however, or break off seeing each other, nor the appellant's own conduct, does not in my opinion establish in the circumstances either that the evidence was consistent only with a postponement.

In *Mott* v. *Trott* (2), the trial judge had dismissed the action on the ground that a breach had occurred in 1919, at such a time that the action was barred by the *Statute of Limitations,* although the evidence showed that the parties had continued to associate for many years afterwards. It was held in this court that it was for the jury to conclude upon the evidence as to whether there had been a breach in 1919 or whether the promise was a continuing one thereafter or whether the contract had been mutually abandoned. In my opinion the question of breach or postponement in the case at bar was similarly for the jury.

It is next objected on behalf of the respondents that in so far as general damages are concerned the action does not lie at all where the promisor is deceased; and that there was in fact no evidence of special damages. The appellant contends that the right of action is preserved by section 37 (2) of the *Trustee Act, R.S.O., 1937, cap. 165,* and that it was open to the jury to find that special damage had been proved.

(1) 34 S.C.R. 261.

(2) [1943] S.C.R. 256.

In *Finlay* v. *Chirney* (1), it was held that the action, in so far as general damages were concerned did not lie. All the members of the court were of opinion that the action was an action ex contractu but that the maxim actio personalis moritur cum persona applied to her recovery.

In *Quirk* v. *Thomas* (2), a similar result was reached. Both Phillimore, L.J., and Pickford, L.J., held that the action was ex contractu. The former, had he felt free upon the authorities to have followed his own view would appear to have felt that even with respect to special damage such an action would not lie. The latter was content to assume that special damage could be recovered. Although Swinfen Eady, L.J., at page 527, says that "the action is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff", I do not think he is to be taken as referring to the cause of action as an action in tort, but to the extent of the damages recoverable, as he refers to the action as one within *Baker* v. *Smith* (3), which was an action in assumpsit.

7 Wm. IV, cap. 3, section 2, which is the ancestor of the present Ontario statute was taken from the *Imperial Act, 3 & 4 Wm. IV, cap. 42,* section 2. This section permitted an action of trespass or trespass on the case against an executor in respect of any wrong committed by the testator in respect of the real or personal estate of the person wronged. As late as *R.S.O. 1877, cap. 107,* section 9, the legislation was in much the same form. By *49 Vict., cap. 16,* section 23, relief was extended to wrongs in respect of the person, but while the amending legislation dropped the words "of trespass or trespass on the case", I do not think it can be said that actions for breach of contract were intended to be included. The mere non-performance of a promise is not to be taken as a substantive tort; *Courtenay* v. *Earle* (4), Pollock on Torts, 14th Ed., 428. I think, therefore, that in so far as the present action is for general damages, it is not helped by the statute referred to. The appellant's action must therefore fail, I think as to the general damages found.

I do not think the case *Davy* v. *Myers* (5), is an authority which can be accepted at the present day.

(1) 20 Q.B.D. 494.
(2) [1916] 1 K.B. 516.
(3) [1651] 3 Sty. 295.
(4) 10 C.B. 73.
(5) (1824) Taylor 89.

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The view of the majority was that the maxim had never been applied to an action ex contractu and that as an action for breach of promise was within that category, it was maintainable. This view is sufficiently dealt with by Bowen, L.J., in *Finlay's* case (1). I therefore think the law must be taken to be as laid down in *Chamberlain* v. *Williamson* (2), followed as it was by the latter cases to which I have referred. If any change in the law is, in my opinion, to be made it must be by the legislature; *Hayden* v. *Vreeland* (3).

As to the special damage pleaded, the jury awarded $100. This was all for clothing purchased by the appellant in contemplation of the marriage. The appellant testified that all of it she still had at the trial and that it had been worn. I do not think that, assuming special damage to be recoverable in an action of this character, the evidence is sufficient to establish that any special damage was in fact suffered.

It is not therefore necessary to deal with the other matters argued. I would dismiss the appeal with costs if demanded.

Appeal allowed with costs; claim for special damages dismissed.

Solicitors for the appellant: *Trapnell, Fleming & Harris.*

Solicitors for the respondents: *Raymond, Spencer, Law & MacInnes.*

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Feb. 3

COMMERCIAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANT) } APPELLANT;

AND

RANDOLPH H. DREVER (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Illegality—Whether payment of fee for new real estate agent's licence extends date of expired licence so as to constitute the latter a "subsisting licence" to date of such payment—Whether statutory prohibitions apply to period between date of expiration of old licence and date of issue of new licence and render real estate agent's claim for remuneration illegal—The Real Estate Agents' Licensing Act, R.S.A. 1942, chapter 318, ss. 2 (d), 4 (1), 7, 14 and 15.

PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

(1) 20 Q.B.D. 494.

(2) 2 M. & S. 408.

(3) 37 N.J.L.R. 372 at 379.

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In the latter part of July or early August 1943, the respondent inquired of the appellant's managing director if the appellant wished to sell a certain property it owned in Edmonton. Following this conversation respondent sought to interest the local manager of D'Allaird's Ltd. in the purchase and was referred to its Montreal office. On August 24th respondent forwarded the Montreal office particulars of the property and the purchase price. On August 26th he renewed his real estate agent's licence, which pursuant to *The Real Estate Agents' Licensing Act,* R.S.A. 1942, ch. 318, sec. 7, had expired on June 30th. On Sept. 2nd the Montreal office wrote its local manager to advise respondent it might be interested in making an offer and to secure further information from him. These instructions having been complied with, D'Allaird's Ltd. then wrote the appellant it had been in communication with the respondent with regard to its Edmonton property and thereupon entered into direct negotiations with appellant, and completed purchase of the property in Oct. 1943.

Held: The respondent held himself out as a real estate agent and accepted employment as such in the face of the statutory prohibition. He relied upon a contract to render services which he was prohibited by law from undertaking. The contract was therefore illegal and the assistance of the court will not be given to enforce it. (*Barlett* v. *Vinor* Carth. 252; *Cope* v. *Rowlands* 2 M. & W. 149; *Langton* v. *Hughes* 1 M. & S. 593; *Holman* v. *Johnson* 4 Cowp. 341, applied.)

Per Rand J.: In the presence of the Statute, the entire exchange between the parties up to the moment of the issue of the licence must be treated as void or non-existent.

Held: also, the licence which the respondent obtained dated August 26th, 1943, did not on its face purport to be a renewal of the licence which expired on June 30th, 1943, nor in any other sense to extend the terms of that licence. It was simply a new licence effective as of its date and for the term stated.

Per Rand J.: The word "renewed" (as used in sec. 7) cannot be given a retroactive implication. After the expiration of a licence and until another is obtained the prohibitions of the Statute apply.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1) affirming, Macdonald J.A. dissenting, the judgment at the trial (2) in favour of the respondent.

S. H. McCuaig K.C. for the appellant.

G. H. Steer K.C. and *R. Martland K.C.* for the respondent.

The judgment of the Chief Justice and Taschereau, Estey and Locke, JJ. was delivered by

LOCKE J.:—This is an appeal from the Appellate Division of the Supreme Court of Alberta which by a decision of the

(1) [1947] 1 W.W.R. 390; [1947] 2 D.L.R. 30.

(2) [1946] 3 W.W.R. 119.

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majority of the court dismissed an appeal from the judgment of Ford J. who had awarded to the respondent $2,650 as commission on the sale of a property of the appellant in Edmonton: Macdonald J.A. dissented and would have allowed the appeal and dismissed the action.

The respondent alleged in his Statement of Claim that he had been employed by the appellant for the purpose of effecting a sale of the property and that it had been sold in the month of October, 1943, "as a result of the services of the plaintiff": alternatively to a claim for commission the plaintiff claimed a like amount on the basis of a *quantum meruit*. The plaintiff's evidence was that during the latter part of July or early in August, 1943, he had met Mr. Glenwright, the president of the appellant company, at the site of the property in question and had asked him if the appellant wanted to sell the property then: that Glenwright had said he would consider $80,000 very seriously and that he (the respondent) had then said that he would "look and see if I can interest a party", to which Glenwright had agreed. While Glenwright's account of this conversation did not agree with that of the respondent the trial judge found as a fact that the latter had been employed as an agent to sell the property and this finding has been upheld in the judgment of the Appellate Division. There is evidence to support the concurrent findings on this point.

The real issue in this appeal is as to whether the respondent was entitled to recover by reason of the fact that at the time when the contract of employment is alleged to have been made he was not the holder of a licence as a real estate agent, as required by the provisions of *The Real Estate Agents' Licensing Act, cap.* 318, R.S.A., 1942. Put briefly the contention of the appellant is that as the respondent was not the holder of a licence as a real estate agent at the time of the conversation with Glenwright above referred to, when the employment is said to have taken place and did not obtain a licence until August 26th, 1943, and as the statute prohibited him from either holding himself out as, or acting as, a real estate agent during this period the employment agreement was illegal, and that accordingly no right of action could arise out of it: further

it was contended that any claim for services rendered during the time when the respondent was without a licence was barred by the express terms of the Act.

While it was probably unnecessary to do so by reason of the provisions of Rule 152 of the *Consolidated Rules of the Supreme Court of Alberta* the respondent alleged in the Statement of Claim that he had been at all material times the holder of a subsisting licence as a real estate agent pursuant to the provisions of the statute. This allegation is denied in the Statement of Defence and the question for determination is sufficiently raised by the pleadings.

The respondent, in addition to giving evidence as to his employment by Glenwright, said that he had been engaged in the real estate business in Edmonton for a very long period of years and it would appear that this fact was known to Glenwright at the time of the discussion when the employment is said to have taken place. As part of his case the respondent put in evidence certain licences issued by the Superintendent of Insurance under the provisions of the Act, these showing that on April 14th, 1943, the respondent had been granted a licence as a real estate agent until the 30th day of June, 1943, and that on August 26th, 1943, a further licence had been granted to remain effective until the 30th day of June, 1944, unless it should sooner be revoked or suspended, this latter proviso being apparently a term of all licences issued under the Act. The respondent said that following his conversation with Glenwright at the property he attempted to interest D'Allaird's Ltd. by discussing the matter with Mr. Wickett, the local manager. The date of this interview was shortly prior to August 24th. Wickett asked the respondent to submit the matter to Mr. Parkes, a senior official of D'Allaird's Ltd. at Montreal, and on August 24th the respondent wrote Parkes by airmail offering the property for sale at $80,000. On August 26th the respondent obtained the licence above referred to: on August 27th Parkes wrote from Montreal to Wickett saying that he had received a letter from Drever and asking for further particulars: Wickett replied on August 30th: on September 2nd Parkes wrote to him again asking additional information and Wickett replied on September 8th. The respondent says that he gave certain

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information about the property and the owner's name to Wickett for the purpose of being forwarded to Parkes and this undoubtedly was done after August 26th. There the respondent's active connection with the matter terminated: Parkes entered into direct negotiations with Glenwright and in the result the property was sold to D'Allaird's Ltd. at the price of $75,000.

By sec. 4 (1) of *The Real Estate Agents' Licensing Act* it is provided that no person who is not the holder of a subsisting licence shall either act or hold himself out as a real estate agent or real estate salesman in the Province and the expression "real estate agent" is defined in sec. 2 (*d*) as meaning:

> any person who, for others, and for compensation or profit, or promise thereof, sells, exchanges, or buys, or offers, or attempts to negotiate a sale, exchange, or purchase of real estate.

Persons desiring to carry on this occupation (with certain exceptions that are inapplicable) are required to make written application for licences to the Superintendent of Insurance who is empowered to issue such licences or refuse them if, for any reason, he is of the opinion after due investigation that the licence should not be granted. Sec. 7 of the Act provides that every such licence shall expire on the 30th day of June in each year but may be renewed on due application to the Superintendent on payment of the prescribed fee, unless previously revoked or suspended by the Superintendent. Power is vested in the Superintendent to investigate claims by any person who claims to have been damaged by the incompetency or dishonest dealing of a real estate agent or salesman, and to revoke the licence of any agent or salesman for incompetency or dishonest conduct, and in the case of the revocation of a licence to refuse in his discretion to renew it. Sec. 14 reads as follows:

> No person shall be entitled to recover any compensation for any act done in contravention of the provisions of this Act, or to be reimbursed for any expenditure incurred by him in or in connection with the doing of any such act.

By sec. 15 monetary penalties which may be imposed upon summary conviction are provided for any violations of the Act. It is manifest that the object of this legislation is the protection of members of the public in their dealings with real estate agents. While fees are charged for the

licences issued and monetary penalties may be imposed for breaches of the statute, its object is not merely to protect the revenue, the imposition of these fees and penalties being merely collateral to the main purpose of the Act.

The case put forward by the respondent in the Statement of Claim and supported by his evidence is that he was employed by the appellant to effect a sale of the property and the date of such employment is said to have been at the end of July or early in August, 1943, at a time when the respondent was not the holder of a licence under the Act. It was in the capacity of a real estate agent that the respondent sought employment from Glenwright and he was employed in that capacity. Thus the respondent held himself out as a real estate agent and accepted employment as such and, by his own statement, agreed to act as such in the face of the statutory prohibition. Both the first conversation between the respondent and Wickett and the letter written to Parkes on August 24th were acts on the part of the respondent prohibited by the statute. The only thing done by the respondent in connection with the matter after obtaining the licence on August 26th was to furnish certain details to Wickett for which the latter had been asked by Parkes early in September. These various acts of the respondent were done on his own showing in pursuance of the employment which he says was effected during his conversation with Glenwright.

I think the rule of law applicable to this state of facts is that stated in the maxim *ex turpi causa non oritur actio*. In *Bartlett* v. *Vinor* (1), Holt C.J. said in part:—

> Every contract made in or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words.

The same principle was expressed by Baron Parke in *Cope* v. *Rowlands* (2) at 137 as follows:

> It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition.

(1) (1693) Carth. 252.

(2) (1836) 2 M. & W. 149.

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In *Langton* v. *Hughes* (1) at 596, Lord Ellenborough said: "What is done in contravention of the provisions of an act of parliament cannot be made the subject matter of an action." The test as to whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case—*Simpson* v. *Bloss* (2); *Farmers' Mart, Ltd.* v. *Milne* (3), Lord Dunedin at 113. Here to support a claim for a commission on effecting a sale of the property, or alternatively a claim on a *quantum meruit* for services rendered, the respondent relies upon a contract to render services which he was prohibited by law from undertaking. The contract was, therefore, illegal and the assistance of the court will not be given to enforce any claim said to arise out of it. (*Cornelius* v. *Phillips* (4) Lord Finlay L.C. at 205). No claim was made for services rendered after the date of the issue of the licence on August 26, 1943, as distinct from the services rendered before that date and clearly, in my opinion, no such claim could be sustained since the claim for these services is based upon an illegal contract. In this view of the matter it is unnecessary to consider the effect upon the respondent's claim of sec. 14 of the Act.

It is unfortunate that the services of the respondent, which were an effective cause of the sale, should go unrewarded but, as stated by Lord Mansfield in *Holman* v. *Johnson* (5) at 343:—

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.

Mr. Steer, in his able argument for the respondent, contended that since sec. 7 of the Act which provides that every licence shall expire on the 30th of June of each year speaks of such licence being renewed, that the licence granted to the respondent on August 26, 1943, was really

(1) (1813) 1 M. & S. 593.
(2) (1816) 7 Taunt. 246.
(3) [1915] A.C. 106.
(4) [1918] A.C. 199.
(5) (1775) 4 Cowp. 341.

an extension of the licence theretofore in existence so that the respondent was in fact duly licensed at all relevant times. I think this contention cannot be supported. The licence which the respondent obtained dated August 26, 1943, which was tendered in evidence by him certifies "that R. H. Drever of Edmonton is hereby licensed, within the Province of Alberta, as a real estate agent until the 30th day of June, 1944." This does not on its face purport to be a renewal of the licence which had expired on June 30, 1943, nor in any other sense to extend the term of that licence. It was simply a new licence effective as of its date and for the term stated.

This appeal should be allowed and judgment entered dismissing the action with costs throughout.

RAND J.:—Although in the courts below the word "employed" has been used, I take the arrangement found to exist between the parties to be this: an offer by the owner to the agent to pay compensation for producing a person willing and able to buy the property on the terms indicated. There was no authority to bind the owner to a sale, nor did the agent obligate himself to anything. The offer could have been revoked at any time and did not restrict the sale of the property by the owner through any other agent. The word "agent" in such a case must be taken in a limited sense; at most, he was authorized to furnish information about the property and the terms of sale.

When the offer was made in late July or early August, the agent, not being in possession of a licence, was by section 4(1) of *The Real Estate Agents' Licensing Act* forbidden either to "act or hold himself out as a real estate agent or real estate salesman in the Province". On the 24th of August, he mailed a letter at Edmonton addressed to the purchaser at Montreal; on the 26th of August a licence was issued to him; on the 27th, a letter was written in Montreal in reply to his own; and although some details were later furnished by him, it can be taken that the communication of the 24th brought about the sale. For the purposes of what I consider to be the essential question, I will assume that in point of time the issue of the licence preceded the actual receipt by the purchaser of the letter.

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That question, it seems to me, is simply this: was the agent forbidden by law to receive the offer, including the limited authority, or could it be said to have continued in fact beyond the unlicensed period until the agent's act became effective by the receipt of the letter in Montreal? In the presence of the statute, we must, I think, treat the entire exchange between the parties up to the moment of the issue of the licence as void or non-existent. That seems clearly to be the purpose of the law, and to introduce the refinement suggested would go far to nullify its effects.

It was held in the courts below that from the acceptance of the work of the agent a "confirmation" or some other retroactive relation was established between the parties sufficient to support a contract. But there was no actual communication between them from the time the offer was made until long after the purchaser had been produced, and to impute such an implication would be, in effect, to treat the work as having been done at the request of the owner or in the course of performing the requirement of the offer, which under the statute is excluded; if the work was not so done, then it is as if the agent had acted voluntarily, and it would not be suggested that in that case the owner could not deal with the purchaser without regard of the agent. If the act of the agent can be said to be done on behalf of the owner which the latter by selling to the purchaser ratifies, it would mean that an officious intervention would exclude the owner from selling to conceivably the only person then willing to buy except on terms of paying commission which he never otherwise agreed to do.

Mr. Steer contended that under the statute a licence, once issued, was to be deemed to continue without interruption and if necessary retroactively, upon the payment of each year's fee. Section 7 reads:

> Every licence shall expire on the 30th day of June in each year, but may be renewed on due application to the Superintendent and payment of the prescribed fee, unless previously revoked or suspended by the Superintendent.

It is on the word "renewed" that this argument is made. But the word cannot be given such an implication. It would be rather absurd to speak of revocation or suspension after a licence had expired. All that "renew" can add to

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re-licensing is perhaps dispensing with the preliminary steps to the initial licence: but after the expiration of a licence and until another is obtained the prohibitions of the statute apply.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: *McCuaig & Parsons.*

Solicitors for the respondent: *Cairns, Ross, Wilson & Wallbridge.*

THE BOILER INSPECTION AND INSURANCE COMPANY OF CANADA (DEFENDANT) ..... APPELLANT;

AND

ABASAND OILS LIMITED (PLAINTIFF) .. RESPONDENT.

1947

Nov. 10, 11, 12, 13, 14, 17

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April 13

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION

Insurance—Boiler explosion policy—Use and Occupancy endorsement provided indemnity for each day of total prevention of business caused solely by an accident to insured object but excluded liability if resulting from fire outside of object—Total prevention of business caused by concurrent accident to object and fire outside of object—Whether words "caused solely by an accident" excluded liability.

An insurance company by clause "A" of a use and occupancy endorsement attached to an accident policy, agreed to pay the insured $1,000 for each day of total prevention of business on the premises therein described, caused solely by an accident to an object covered by any of the schedules of the policy, subject to a limit of loss of $100,000 for any one accident.

Clause "G" of the endorsement provided that: "The Company shall not be liable for payment for any prevention of business resulting from an accident caused by fire or by the use of water or other means to extinguish fire (nor for any prevention of business resulting from fire outside of the object, following an accident.) * * *

"Accident" was defined in the policy to include a sudden and accidental explosion of gas within the furnace of the object set out in the schedule. "Object" was defined to mean a boiler as described in the schedule, provided the explosion occurred while the boiler was being operated with gas and oil.

PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

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The policy expired on November 1, 1941, but at the request of the insurance broker of the insured, the company's special agent furnished a "binder", including the use and occupancy endorsement, for the month of November. The loss occurred on November 21. The insured alleged the damage was caused by an explosion followed by a fire. The company contended that there was no explosion but that all the damage was caused by the fire.

Held: (Taschereau and Estey JJ., dissenting)—That the effect of the parenthetical phrase in clause "G"—*i.e.* "(Nor for any prevention of business resulting from a fire, outside of the object, following an accident)"—was to make clear that a fire caused by an explosion was to be deemed to be completely severed from the explosion for the purposes of clause "A". It characterized "accident" in clause "A" by confining it to explosive action. It thus declared the meaning of clause "A": that the word "solely" restricted the cause for which there was liability to purely explosive effects as against a resulting fire.

Per Taschereau and Estey JJ.: The provision limiting liability inserted in clause "G" applied only to total prevention of business resulting from fire outside of the object and could not be extended to prevention of business resulting from damage to the object caused by an accident when the two results were concurrently effected. *Hobbs* v. *The Guardian Fire & Life Assce. Co.* (1886) 12 S.C.R. 631 and *Wadsworth* v. *Canadian R'y. Accident Insce. Co.* (1914) 49 S.C.R. 115 referred to.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Shepherd J. (2), at the trial, by which the plaintiff's action was maintained with costs.

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

L. H. Fenerty K.C. and *R. L. Fenerty* for the appellant.

George H. Steer K.C. and *Roland Hartland K.C.* for the respondent.

The judgment of the Chief Justice and of Rand and Locke JJ. was delivered by:—

RAND J.—The courts below have concurred in the following findings: there was a gas explosion in the furnace which damaged the boiler; as a direct result, a flame, forced out of a small aperature in the furnace, played upon a wooden support and set a fire which spread to the structure of the building and ultimately consumed it; the plant was

(1) [1947] 1 W.W.R. 61; [1947] 2 D.L.R. 109.

(2) [1945] 3 W.W.R. 49.

necessarily idle during the reconstruction of the building; the period of reconstruction was equal to if not greater than that required for the repair of the boiler; the operation of the plant was totally prevented by each during at least one hundred days; and proper notice of the accident had been given to the appellant. On these findings judgment was given for the plaintiff; and although they were challenged by Mr. Fenerty, he was not able to satisfy me, under the well established rule, that they were so clearly wrong as to warrant interfering with them.

Several questions of law are raised, but in view of the conclusion to which I have come on that of the construction of the policy in relation to the effect of the destruction of the building by fire on liability, consideration of the others becomes unnecessary.

The insurance covered two indemnities. The first was for loss of property, and I think it desirable to quote Section I of the general provisions dealing with it:

> To PAY the Assured for loss on the property of the Assured directly damaged by such accident (or, if the Company so elects, to repair or replace such damaged property), excluding (*a*) loss from fire (or from the use of water or other means to extinguish fire), (*b*) loss from an accident caused by fire, (*c*) loss from delay or interruption of business or manufacturing or process, (*d*) loss from lack of power, light, heat, steam or refrigeration, and (*e*) loss from any indirect result of an accident;

and the following:

> It is PROVIDED FURTHER that this agreement is subject to the conditions printed hereon and subject also to the schedules and endorsements issued to form a part hereof. The schedules and endorsements attached to this policy when it is issued are identified as follows: Schedule(s) numbered 1 and 2. Endorsement(s) numbered 1 and 2.

Under the first schedule, explosion in the furnace as "accident" is insured against, and "accident", for the purposes here, is thus defined:

> As respects any object, described in this schedule, for which the word "included" is inserted in the column headed "Furnace Explosion" but not otherwise, "Accident" shall also include a sudden and accidental explosion of gas within the furnace of the object or within the tubes, flues or other passages used for conducting gases from said furnace to the chimney, provided said explosion occurs while the object is being operated with the kind of fuel specified for it in the column headed "Fuel".

An endorsement introduced the second indemnity against prevention of use and occupancy on which this action is brought and the obligation of which is in these words:

> A. In consideration of . . ., the Company hereby agrees to pay the Assured One Thousand Dollars ($1,000) herein called the Daily

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Indemnity, for each day of total prevention of business on the premises described as . . . caused solely by an accident (occurring while this endorsement is in effect) to an object, covered by any of the schedules of this policy . . .; all subject to a limit of loss of One Hundred Thousand Dollars ($100,000) for any one accident * * *

Clause "G" of this endorsement headed "LIMITATION OF LIABILITY" provides:

G. The Company shall not be liable for payment for any prevention of business resulting from an accident caused by fire or by the use of water or other means to extinguish fire (nor for any prevention of business resulting from fire outside of the object, following an accident.) The Company shall not be liable for payment for any time during which business would not or could not have been carried on if the accident had not occurred. The Company shall not be liable for payment for any prevention of business resulting from the failure of the Assured to use due diligence and dispatch in the resumption of business. The period of prevention shall not be limited by the date of the end of the policy period.

And it is the effect which I think must be given to this clause that, in my opinion, decides the appeal.

Mr. Steer's contention is this: the primary obligation embodied in clause "A" is to pay compensation for "total prevention of business * * * caused solely by an 'accident'" as defined. Without more, "accident" would include a fire resulting directly from an explosion; and the cessation of business caused solely by such a fire or solely by explosion and such a fire acting concurrently, would be within the obligation. Then comes clause "G". This is an exception to and not a qualification of "A", within which the plaintiff must bring himself. The phrase in parenthesis, "nor for any prevention of business resulting from fire outside of the object following an accident" means a cessation resulting solely from a fire caused by an explosion. Where, as here, both the disabled boiler and the destroyed building concurred in preventing the business, the case is outside the exception and remains within the primary obligation.

The vital words are "caused solely by an accident". "Accident" under the definition originates in "explosion", whatever may be its antecedents. The words then may mean "solely" with reference to concurrent causes unconnected with "accident", only; or with reference also to causes themselves arising out of "accident", which would involve the limitation of "accident" to explosive effects, as distinguished from new causes resulting from them.

In order to treat clause "G" as an enumeration of exceptions, we must find them included within the generality of "A". Now, the first item of "G" is clearly an exception: "accident" in "A" would not be restricted to a particular origin, and here there is removed from "A" an explosion resulting from a fire or from measures taken to extinguish a fire. There is next the parenthetical provision. Why parenthetical? I think the reason is clear: it is intended to hark back to "A" and to make explicit the implication of the words "solely by an accident"; it makes perfectly clear that a fire caused by an explosion is to be deemed to be completely severed from the explosion for the purposes of "A". It is "fire * * * following an accident". If "accident" in "A" meant explosion and its consequential fire, the word "following" in "G" would be inappropriate; the fire would not follow the accident, it would be embraced within the accident. What the parenthetical phrase does is to characterize "accident" in "A" by confining it to explosive action. It thus declares the meaning of "A": that the word "solely" restricts the cause for which there is liability to purely explosive effects as against a resulting fire: that "solely by accident" means "solely by explosion": if the language had been "caused by explosion" a resulting fire would be included as a cause; "caused solely by explosion" excludes such a fire. This characterization of "A" is confirmed by the second sentence of "G" which excludes unconnected concurrent causes; and finally by the specification of the concurrent cause of failure to use diligence. Apart from the exception at the beginning, the clause makes explicit the meaning of "A".

The view that prevention of business by concurrent explosive effects and resulting fire is within the liability can be tested in conceivable situations. If, for instance, there was an explosion which left the boiler intact but a resulting fire had prevented business, the parenthetical phrase on any construction would exclude liability. If, on the day following that condition, a second explosion had disabled the boiler, the insurance would not attach because of the language of the second sentence, the words, "the accident", in which, meaning that giving rise to the claim. This confirms the conclusion drawn as to the strictly limited area

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of cause for which the policy provides indemnity: but as it is in fact an insurance against explosion, that limitation is not surprising.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

The judgment of Taschereau and Estey JJ. was delivered by:

ESTEY J.:—The respondent was extracting and refining products from bituminous sand at Waterways, when on November 21, 1941, a large portion of the plant and equipment was destroyed by explosion and fire.

The appellant by a contract of insurance, No. 39855-B-Special, dated November 1, 1940, carried accident insurance on three boilers at the plant and the claim for the property damage to the boilers has been settled.

This contract of insurance also contained a Use and Occupancy Endorsement under which the appellant company, subject to the terms thereof, agreed to indemnify the respondent in the sum of $1,000 per day for each day of total prevention of business on the premises at Waterways caused solely by an accident to an object, the object in this case being the boilers. It is the claim under this endorsement that constitutes the subject-matter of this appeal.

The respondent as plaintiff brought this action alleging that it was insured by virtue of this policy for the period including the month of November 1941. The appellant contended that the contract expired on November 1, 1941, after which date a new contract of insurance was concluded and as it was not the subject-matter of respondent's (plaintiff's) cause of action the latter cannot succeed.

That the contract as issued expired on "November 1, 1941, at 12 o'clock noon, standard time * * * at the place where such accident occurs" is not questioned. On that date and before the expiration of the contract, R. C. Brown, respondent's insurance broker at Montreal, requested the appellant company, through its Montreal representative Wilkinson, to renew the insurance. Wilkinson replied that he had no particulars of the contract and would therefore have to communicate with head office, but concluded:

. . . until he got notification he would agree to continue the coverage.

Later the same day Wilkinson communicated with Brown and stated:

* * * the company were undecided as to whether they would renew the use and occupancy feature in the policy but that he would still keep the coverage in force until the decision was made.

Brown requested that the agreement of November 1, 1941, be evidenced in writing, and as a result of that request the appellant issued a binder at Montreal under date of November 19, 1941.

This binder provided for the same coverage and indemnity as the original policy but for a period of 30 days and not for the period as Brown deposed, until the company would arrive at its decision whether they would carry the Use and Occupancy Endorsement. It also contained this provision on the back thereof:

The company accepting this risk acknowledges itself bound by the terms, conditions and limitations of the policy (or policies) of insurance, and of the schedules specified, in current use by the company for the kind (or kinds) of insurance specifically ordered in the application for insurance from the effective date and hour specified therein and the assured accepts this binder under such terms, conditions and limitations.

Then on the face of the binder was a provision reading in part "the applicant is insured in accordance with the binder on the back hereof". These terms were not in the original contract of insurance. It was submitted that the presence of these new and additional terms evidenced an intention to make a new contract rather than to continue the old one. This submission assumed contrary to fact that the parties had agreed upon these new and additional terms. The only agreement arrived at between the parties, apart from the original contract, was that made on November 1, 1941, as deposed to by Brown whose evidence was not contradicted. On that date the agreement was to continue the old agreement, not for 30 days or upon any of these new or additional terms, but until the appellant arrived at its decision with respect to the Use and Occupancy Endorsement. This 30-day period and these additional terms were included in the binder dated December 19, 1941, by the company of its own volition and not by virtue of any agreement, and therefore they are not binding upon the parties. If one assumes that the binder was mailed on the 19th from Montreal, it would be

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doubtful whether this binder would have reached the respondent before the date of the loss, and certainly not within any time sufficient for its examination and repudiation before the loss occurred.

The evidence establishes that on November 1st the parties agreed to continue the original contract varied only as to the date of its termination, *Royal Exchange Assurance* v. *Hope* (1). This contract so varied was the only contract of insurance between the parties at the time the loss was sustained. The pleading, therefore, in the statement of claim is sufficient and the action is brought within the statutory period.

The appellant further submits that respondent's action cannot be maintained because notice was not given in compliance with the terms of the Use and Occupancy Endorsement, which required the notice to be given by telegram or letter to appellant's home office in Toronto or at its office in Winnipeg. It is not contended that a letter or telegram was sent to either of these offices, but that the company accepted and acted upon a notice received by it on December 10, 1941. On that date Wilkinson, the appellant's representative at Montreal, was advised of the loss by Brown, respondent's insurance broker at Montreal, and in the course of the interview Brown gave him all the information he had with respect to the loss and discussed the Use and Occupancy Endorsement. As a result Wilkinson notified the home office of the appellant company and on the same date, December 10th, the company's chief engineer, Gregg, instructed by air mail Hobson, appellant's inspector for its western district which included the Province of Alberta, to investigate the claim. Hobson called at respondent's office in Edmonton on December 12th and visited the plant on December 21st. Under date of December 22nd he made his report to the appellant.

In the meantime, on December 16th, Brown wrote a letter to the appellant's Montreal office marked "Attention Mr. Wilkinson" confirming his interview of December 10th, and explaining that notice had not immediately been given by the assured as the contract was in Montreal in connection with its renewal and respondent was not aware of the requirements with respect to notice.

(1) [1928] 1 Ch. 179.

On January 31, 1942, the respondent submitted its figures relative to the property claim and included this paragraph:

> This covers only the direct damage caused by the explosion, and does not include anything under the use and occupancy clause, for which we shall later make a separate claim.

Moreover, in the course of his examination for discovery the representative of the company admitted that Wilkinson had considered the Use and Occupancy Endorsement in relation to this particular claim by December 16, 1941.

The foregoing indicates that while the respondent did not comply with the terms of the policy requiring notice, the appellant company acted upon the notice of December 10th. Then, notwithstanding Brown's explanation that the notice was not given immediately, and in effect not in the terms of the policy, the appellant took no exception thereto but continued in a course of conduct that indicated its acceptance of the notice given as sufficient. In so far as the record discloses, no objection was ever taken to either the delay in giving or the form of the notice until the defence was filed. I am therefore in agreement with the conclusion of the learned trial Judge that the appellant's conduct amounted to a waiver of the requirements in the contract with respect to notice.

In the furnace under the main boiler respondent used for fuel either crude oil or dry gas or both. The oil was carried by one pipe line and the dry gas by another into the furnace. In the dry gas line was a 10-pound pressure valve so that until the pressure in the dry gas line exceeded 10 pounds no gas flowed through to the furnace. Shortly after the plant started up on the evening in question the employee Hartridge observed an abnormal pressure in the fractionating column and went to the boiler house to ascertain if the dry gas line leading into the furnace was open. On his way he was joined by another employee, Rosychuk, and as they reached a point where they could see the front of the furnace they saw a flame coming through the opening or vent in the front of the furnace and playing on a wooden post. They, with a third employee, endeavoured to close the valve and stop the flow of dry

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gas but the flames and heat made that impossible. The post caught fire, from which it spread and destroyed a large part of the plant.

The learned trial Judge has found, and his finding in this regard was accepted by all of the learned Judges in the Appellate Court, that on November 21, 1941, an explosion occurred in the furnace. Upon this appeal this finding was vigorously contested by counsel for the appellant, who submitted that it was "based on incorrect inferences or misapprehensions of the evidence, or both".

Hartridge and Rosychuk, employees at the plant who discovered the fire, deposed as to the relevant equipment, its operation, the discovery of the fire and as to their observations during and after the fire. Rosychuk in particular stated that after the fire he found cracks from one-half to three-quarters of an inch on both sides of the brick setting of the furnace and that these cracks were not there before the fire. It is upon their evidence that E. H. Boomer and other experts in the main based their conclusions. E. H. Boomer, professor of chemical engineering, stated that in his opinion the increased pressure would cause "liquid droplets or drops or slugs of gasoline" to pass through the dry gas line into the furnace where they would vaporize with great rapidity creating a surplus of fuel in the furnace, and stated:

> It is my opinion that the initial occurrence that took place when the surplus fuel arrived in the furnace was an explosion * * *

He explained in detail the reasons for his opinion and the consequences of an explosion. It is particularly significant that Hobson in his report of December 22, 1941, stated:

> A very short examination of the large boiler setting showed that there had been a furnace explosion of considerable violence.

and later in the same report:

> I believe it certain that gasoline siphoned over through the "dry gas" fuel feed pipe.

These gentlemen arrived at substantially the same conclusion both as to the fact of explosion and the presence of gasoline in the dry gas line. Several of the other witnesses expressed the opinion that an explosion took place and even the witness who expressed the opinion that the injury to the boiler was caused from the outside in effect admitted

that the presence of the cracks was consistent with the fact of explosion. Counsel particularly emphasized the fact that the explosion was not heard. There were two employees called as witnesses who were in the building which housed both the separation plant and the boiler. Neither of them in their description of what took place mentioned having heard an explosion. Neither was asked particularly with regard thereto. Moreover, it is clear there was considerable noise in the building. The fact was stressed that the breeching was not disturbed in the furnace, but the witness who made the most of that fact admitted that it was possible that the breeching would not be disturbed by an explosion sufficient to crack the side walls which were of weaker construction than the end walls. The contention that the cracks were not seen until after four days is not consistent with the evidence of Rosychuk.

There were differences of opinion expressed by the several witnesses and the learned trial Judge had to find as between these differences. His conclusion is supported by the evidence and ought not to be disturbed.

The explosion which occurred in the furnace caused both damage to the boiler and the flame to go through a vent in the front of the boiler setting fire to a post from which it spread and destroyed the separation plant.

It is clear upon the evidence that the boiler was essential to the operation of the plant and that because of the damage from the explosion it could not be used and the necessary repairs thereto were not completed until June 4th. It is equally clear that the plant could not be operated without the separation plant and that the parts essential to the operation thereof were not repaired until June 16th. The plant was therefore closed down from the date of the fire until June 16, 1942. The appellant contends that these facts do not bring the loss due to a total prevention of business within the terms of the Use and Occupancy Endorsement.

The Use and Occupancy Endorsement provides, in para. A, for an indemnity of $1,000 per day (the maximum 100 days) "for each day of total prevention of business on the premises * * * caused solely by an accident * * * to an object, covered * * *" It is conceded that an explosion is

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an accident and the boiler an object within the meaning of this policy. The total prevention of business was caused solely by the explosion which cracked the boiler and set the fire. That the word "solely" applies only to the word "accident" and not to the word "object" is indicated to some extent by the presence of the words in brackets in para. A, but more particularly by the use of both of these words in the first sentence of para. G, where they deal with the cause of the accident and a fire outside of the object following an accident. If para. A alone had to be considered the issue would be concluded upon the principles of causation in favour of the respondent: *Hobbs* v. *The Guardian Fire & Life Assce. Co. of London* (1). In that case the insurance company under the contract of fire insurance was held to be liable for both the damage caused by fire and that by an explosion incidental to the fire. It is, however, open to the parties to limit the liability of the company by inserting appropriate clauses in the contract. In the policy here in question, unlike that in the *Hobbs* case, the parties have inserted para. G under the heading "Limitation of Liability". Para. G reads as follows:

> G. The company shall not be liable for payment for any prevention of business resulting from an accident caused by fire or by the use of water or other means to extinguish fire (nor for any prevention of business resulting from fire outside of the object, following an accident). The company shall not be liable for payment for any time during which business would not or could not have been carried on if the accident had not occurred. The company shall not be liable for payments for any prevention of business resulting from the failure of the assured to use due diligence and dispatch in the resumption of business. The period of prevention shall not be limited by the date of the end of the policy period.

The total prevention of business was caused solely by an accident to an object, but because this accident (explosion) also set a fire which destroyed the separation plant and in itself was sufficient to cause a total prevention of business, the appellant contends it is not liable. In view of the *Hobbs* decision this result can only follow if the circumstances of this case are such as bring it within the provisions for the limitation of liability in para. G.

The first sentence in para. G, apart from that portion in brackets, excludes liability if the total prevention of business is caused solely by an accident as required under para.

(1) (1886) 12 S.C.R. 631.

A, if that accident is "caused by fire or by the use of water or other means to extinguish fire." The accident (explosion) was not so caused in this case. Then we come to the words in brackets in the same sentence, "(nor for any prevention of business resulting from fire outside of the object, following an accident)". The inclusion of these words in brackets is significant and shows an intention to treat them as parenthetical or inserted to explain or clarify the other or earlier portion of that sentence. The clarity of the earlier portion does not eliminate the possibility of the inclusion of these words as abundant caution on the part of the draftsmen. So regarded they can relate only to an accident due to one of the enumerated causes in that sentence and, therefore, do not exclude the liability of the appellant under the circumstances of this case.

If, however, the brackets be disregarded and the words therein be construed not as parenthetical but as they have been construed both in the courts below and at the hearing as constituting a separate sentence to be read "the company shall not be liable * * * (nor) for any prevention of business resulting from fire outside of the object following an accident", they would exclude the liability of the company where an explosion, however caused, did not injure or damage the boiler but which did set fire outside of the boiler and thereby cause a total prevention of business and consequent loss to the respondent.

The explosion in this case effected two results: damage to the boiler and a fire that destroyed the separation plant. Either one of these results was of itself sufficient to cause a total prevention of business. The appellant company in drafting the terms of this policy and the parties hereto in executing this contract must have contemplated the possibility of an explosion in a furnace or thereabouts causing the two-fold effects of boiler and fire damage. They have, however, in drafting this limitation restricted it to fire outside the object and left the liability for the prevention of business caused by damage to the object intact, whether it was accompanied by or concurrent with other results equally effective in causing a total prevention of business. They have not provided a limitation in para. G to the effect that the company shall not be liable when the loss

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from total prevention of business is caused concurrently by an explosion which effects boiler and fire damage either of which is sufficient to cause the total prevention of business.

These clauses of limitation are drafted on behalf of the companies by those familiar with insurance law and where any ambiguity exists they have been construed strictly against the insurer. As stated by Anglin, J. (later Chief Justice Anglin):

> "Clause (G) is a clause of limitation introduced by the company in its own favour and, like a clause of exception, is to be given a strict construction." *Wadsworth* v. *Canadian Rly. Acc. Ins. Co.*, (1914) 49 S.C.R. 115, at p. 133.

The limitation here provided applies only to that total prevention of business resulting from fire outside of the object (boiler) and cannot be extended to prevention of business resulting from damage to the object caused by an accident (explosion) even where these two results are concurrently effected. The total prevention of business here caused is within the provisions of para. A and not excluded by those of para. G. This total prevention of business resulting from damage to the object continued for more than the maximum of 100 days as provided in para. A.

Counsel for the appellant contended that the respondent company failed to use due diligence in effecting the necessary repairs to the boiler. The evidence, however, does not support this contention but rather leads to the conclusion that the respondent company was anxious to complete the repairs and took all reasonable steps under the circumstances to attain that end.

The judgment in favour of the respondent should be affirmed and this appeal dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty & McGillivray.*

Solicitors for the respondent: *Milner, Steer, Poirier, Martland & Bowker.*

ESTHER MINA MEYER.....APPELLANT;

AND

CAPITAL TRUST CORPORATION LIMITED, EXECUTORS OF THE ESTATE OF CHARLES CONRAD MEYER; CHRISTINA BRETHOUR, WILLIAM CONRAD MEYER, CARL ROBERT MEYER, OLGA CLAREY and GORDON CLAREY.. RESPONDENTS.

*1948
April 9,
April 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Dependants' Relief—Provision for Widow—Matters to be considered in determining proper allowance—Impropriety of considering relations between Testator and Applicant—The Dependants' Relief Act, R.S.O., 1937, c. 214 ss. 2, 7 and 9.

Section 7 of *The Dependants' Relief Act*, R.S.O. 1937, c. 214, requires a judge hearing an application to enquire into and consider the matters therein specifically enumerated, including under clause (*g*) "generally any other matters which the judge deems should be fairly taken into account in deciding upon the application."

Held: In the case of an application made on behalf of the widow of a testator, it is sufficient that the appellant is the widow and is not disentitled to relief under the Act by reason of section 9. Any considerations other than those specifically mentioned in section 7 are entirely foreign to a matter arising under the provisions of the Act. (In *Re McCaffrey* 1931 O.R. 512, followed.)

APPEAL from the judgment of the Court of Appeal for Ontario (1), varying an Order of a Surrogate Court judge made on the application of the widow of the testator under the provisions of *The Dependants' Relief Act*, R.S.O., 1937, c. 214. The material facts of the case are stated in the judgment now reported.

W. J. Green K.C. and *T. K. Allen* for the widow appellant.

W. E. Haughton K.C. and *Charles F. Scott* for different groups of beneficiaries, respondents.

Gordon T. McMichael for the Executor.

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

(1) [1947] O.W.N. 312.

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MEYER v. CAPITAL TRUST CORP. LTD.

The judgment of the Chief Justice, Kerwin, Rand, Kellock and Locke, JJ. was delivered by:

KELLOCK J.:—This is an appeal from an order of the Court of Appeal for Ontario (1) varying an order of a Surrogate Court Judge made on the application of the widow of the testator under the provisions of the *Dependants' Relief Act*, R.S.O., 1937, *cap.* 214. The learned Surrogate Court Judge directed that there be paid out of the estate to the appellant the sum of $5,000 less the value of certain assets amounting to some $4,300 in the event that the applicant should, in certain pending litigation, be declared to be the owner thereof. He also directed that there be paid to the applicant a monthly sum of $50 out of the revenue. By the order in appeal the item of $5,000 was struck out and the instalment payments were increased to $100. There is no person within the statutory class of dependants save the appellant who was, at the date of the death of the testator, fifty-one years of age.

A great deal of the record was taken up with the history of the marital relations between the appellant and the testator, including the fact that the testator had been previously married. These considerations evidently affected the decision of the learned Surrogate Court Judge, notwithstanding the decision of the Court of Appeal in *Re McCaffrey* (2) in which it is made very clear that such considerations are entirely foreign to a matter arising under the provisions of the Ontario Statute. This is again pointed out by the Court of Appeal in the present case. On the argument before us, however, these matters were sought to be relied upon by counsel for the respondents. It is therefore necessary to consider the statutory provisions in question.

By sub-section 1 of section 2 it is provided that where it is made to appear to the Surrogate Court Judge that a testator has by his will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants, or any of them, the judge may make an order charging the estate with payment of an allowance sufficient to provide "such maintenance". Sub-section 2 provides that the allowance

(1) [1947] O.W.N. 312.

(2) [1931] O.R. 512; [1931] 4 D.L.R. 930.

may be by way of instalments or of a lump sum or by the transfer of property. Section 10 as it stood at the death of the testator, by *cap.* 34, section 11 of the 1942 Statutes, provides that the value of any allowance ordered shall not exceed the amount to which the applicant would have been entitled on an intestacy.

Section 7 requires the judge hearing the application to enquire into and consider a number of different matters. These are (*a*) the circumstances of the testator at the time of his death; (*b*) the circumstances of the person on whose behalf the application is made; (*c*) the claims which any other person may have as a dependant of the testator; (*d*) any provision which the testator may have made *inter vivos* for the dependant; (*e*) any services rendered by the dependant to the testator; (*f*) any sum of money or property provided by the dependant for the testator for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses; (*g*) "generally any other matters which the judge deems should be fairly taken into account in deciding upon the application".

It is the presence in the statute of the last mentioned clause which formed the basis for the above contention. It is plain, however, that as by section 2 what is to be provided is "such maintenance", namely, adequate provision for the future maintenance of the dependant, clause (*g*) cannot be considered as authorizing the consideration of such matters. This is further emphasized by section 9, which disentitles a wife to relief where at the time of his death she was living apart from her husband under circumstances which would disentitle her to alimony. Conduct of any other character is irrelevant. It is sufficient therefore that the appellant is the widow of the testator.

During the argument on this phase of the matter, as well as with regard to the principles to be applied generally in determining the proper allowance under the statute, we were referred to a number of authorities arising in other jurisdictions, notably, New Zealand and the United Kingdom. In considering such authorities it has to be borne in mind that the statutory provisions of those jurisdictions in the authorities cited differ from those in question in the present litigation. In the case of *The Family Protection*

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Act of New Zealand, 1908, the court is authorized by section 33, sub-section 1, to order that "such provision as the court thinks fit" shall be made and by sub-section 2 the court may attach such conditions 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 the Act. By sub-section 13 also, the court may, after having made an order, discharge or vary it.

The relevant United Kingdom legislation is the *Inheritance (Family Provision) Act, 1938.* By section 1, (1), the court may order such reasonable provision as it thinks fit to be made subject to such conditions or restrictions as it may impose, and by sub-section 6 the court shall have regard to the conduct of the dependant in relation to the testator and otherwise, and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant, to the beneficiaries under the will, or otherwise. By sub-section 7 the court must also have regard to the testator's reasons, so far as ascertainable, for making the dispositions in his will, or for not making any provision or any further provision, as the case may be, for a dependant.

These provisions therefore are sufficient to differentiate substantially the task imposed upon the court under the Ontario Statute from that imposed by the New Zealand and the United Kingdom Statutes. Authorities under such statutes therefore are to be accepted with caution in applying the provisions of the legislation here in question.

In the case at bar the testator, who left a substantial estate of approximately $98,000, made no provision for the appellant. On payment of debts, succession duties and expenses the net estate will be approximately $83,000.

The position with respect to the assets which were taken into consideration by the learned Surrogate Court Judge in connection with the capital amount which he awarded the appellant, is left on the record in an unsatisfactory state. Whether the appellant is or is not the owner is a relevant circumstance to be taken into consideration under both clauses (*b*) and (*d*) of section 7. All of these assets are claimed by the executor. If, therefore, this matter has to be determined now, as all parties desire that it should

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be, consideration has to be given to this claim. The respondents also desire that any allowance in favour of the appellant be by way of periodical payments and not by way of lump sum and I think that that course should be followed.

While the record contains much evidence of the character already referred to, it is devoid of evidence as to such relevant matters as the scale of living of the testator, whether or not he had any income other than from investments, and the amount needed by the appellant to provide sufficient for her maintenance. It does appear that she has some qualifications for earning an income by nursing but the nature of those qualifications is not disclosed.

In all these circumstances, and giving due weight to the competing claims to the assets in dispute, I think the monthly sum of $150 should be ordered to be paid out of the estate to the appellant. I would therefore vary the order in appeal to this extent. The appellant should have her costs of this appeal out of the estate.

Order accordingly.

Solicitor for the appellant: *T. K. Allen.*

Solicitor for the respondents Brethour and Meyer: *Duncan A. McIlraith.*

Solicitor for the respondents Clarey: *Haughton & Sweet.*

Solicitor for the Executors: *May, Martin & McMichael.*

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*June 10
*June 25

HIS MAJESTY THE KING.....APPELLANT;

AND

CHRIS. SCHMIDT.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Incest—Brother and sister—Trial by jury—Evidence of consanguinity—Admissions by accused—Hearsay—Criminal Code section 204.

The accused was found guilty on a charge of having committed incest with his sister. At the trial, the proof of consanguinity was based mostly on two letters which the complainant said she had received

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Kellock JJ.

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from the accused, in one of which he addressed her as "Sis." and the other in which he had signed "Brot. Chris. Smith." The Court of Appeal quashed the conviction on the ground that there was no evidence as to the relationship between the accused and the complainant.

Held: A person accused of incest may admit the relationship and the jury was entitled to treat both letters as admissions against him and to say that a blood relationship was meant by the expressions used.

APPEAL from the judgment of the Court of Appeal for Ontario, (1) quashing (Roach J.A. dissenting) the conviction of the respondent on a charge of incest with his sister, contrary to section 204 of the Criminal Code.

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

W. B. Common, K.C. for the appellant.

H. W. Allen for the respondent.

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

KERWIN J.:—The accused was found guilty on a charge that he, well-knowing the complainant Elsie Schmidt to be his sister, did unlawfully commit incest with her contrary to section 204 of the Criminal Code. Subsection 1 thereof, so far as applicable, provides:— ". . . every brother and sister, . . . who cohabit or have sexual intercourse with each other shall each of them, if aware of their consanguinity, be deemed to have committed incest". By subsection 2 "brother" and "sister", respectively, include half-brother and half-sister. The Court of Appeal for Ontario (1) quashed the conviction, Roach, J.A., dissenting. The two points upon which there is a difference of opinion in that Court are: First, whether there was an admission by the accused of the alleged relationship between him and Elsie Schmidt and, second, even if that be so, whether that admission was evidence upon which the jury might convict. These are the sole points for determination in this appeal.

What is relied upon as admissions appears in two letters written by the accused. The first is dated July 15, 1947, and written from some place in Saskatchewan to Elsie,

(1) [1948] 2 D.L.R. 826.

commencing "Dear Sis" and signed "Chris". The second is dated August 6th, 1947, on the letter-head of the Waterloo County gaol where the accused was at the time incarcerated, having been charged with the crime of which he was subsequently convicted. This letter is addressed "Dear Elsie" and is signed "Brot. Chris Smith". No point is made as to the surname, either "Schmidt" or "Smith" apparently having been used indiscriminately. The majority of the Court of Appeal (1) were willing to assume that the abbreviation "Brot" meant brother but were of opinion that there was no evidence to show in what sense that term and "Dear Sis" were used. Mr. Justice Aylesworth, speaking for himself and Mr. Justice Henderson, put the matter thus:

> "Sister" and particularly "sis or "Brot" (if by the latter is meant brother) are not terms by any means restricted to use between blood relatives. These expressions land themselves with equal facility to many other relationships for example, an adopted child, or a child merely taken into a family and raised therein as a family member, readily turns to their use.

Mr. Justice Roach was of opinion that in view of the background, to which reference will be made later, the jury were entitled to accept these terms as evidence of a blood relationship between the two.

On the second point the majority of the Court of Appeal (1) took the view that if the accused believed he was a brother of the complainant, there was nothing to show that such a belief was founded on anything except hearsay. On the other hand, the dissenting judge believed that what was written by the accused was an admission entitled to be relied upon in the same way, although not necessarily with the same force, as if the accused, while in the witness box and while denying the act of intercourse, had under oath stated that he and Elsie were brother and sister.

The two points may conveniently be considered together. The background referred to by Mr. Justice Roach appears in his reasons and in those of Mr. Justice Aylesworth. What follows is taken from the latter:—

> The complainant, Elsie Schmidt, testified that accused was twenty years her senior and her eldest brother; that neither of the parents (Sophie and Phillip Smith) had "remarried"; that accused was not at home very much; that she saw him for the first time when she was at the home in Saskatchewan and six years of age and for the second time, again in the home, in 1942 when she was twelve or thirteen years of age; that he

(1) [1948] 2 D.L.R. 826.

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returned about September, 1944, some two weeks before she left to attend school in Alberta; that he came again to the home in the spring of 1946 and stayed there until July 1947 when she came to her sister in Kitchener; that the accused came to Kitchener where the offence is alleged to have taken place.

Martha Doherty gave evidence that she was the sister of the complainant and of the accused; that she was sixteen years younger than accused; that she lived at home with her parents in Saskatchewan until 1942 and that up to that time she and all of her sisters and brothers except the accused, (that is to say, Martha, George, Olga and Elsie) lived at home; that the first time she remembered the accused coming to the home she was about ten years of age and that thereafter he was home "off and on" for two or three months at a time; that "our parents told us he was our brother" and "we always felt towards him like he was our brother"; that the attitude of the parents was the same towards the accused as to "The rest of us" that neither of the parents had married "previously"; that all of the children were children of the same parents; that her parents came from Russia and that the accused was born in Russia.

Ordinarily an admission of a fact made by a party is evidence against him of that fact. The statement in section 1053 of the third edition of Wigmore on Evidence that admissions are not subject to the rule for testimonial qualifications of personal knowledge is borne out by the decision, referred to by the author, of the Court of Appeal of Alberta in *Stowe* v. *Grand Trunk Pacific Railway Co.* (1), affirmed in this Court (2). In such a case as this there is no reason why a statement by the accused of his relationship with the complainant is not evidence any more than if he had stated it in the witness box, as referred to by Roach, J. Certainly the accused could have pleaded guilty to the charge and in principle and logic I can find no reason for saying that an admission out of Court is not admissible and relevant evidence. In Evan Jones (3) the Court of Criminal Appeal in England decided that an admission, in writing, of a person charged with incest with his daughter was sufficient to prove the relationship. In argument before us stress was laid on the fact that in that case the accused in his notice of appeal at first asked for leave to appeal against sentence only. That, however, could have had no effect upon the question as to whether at the time of the trial the father's evidence, which was the only evidence, was sufficient to permit the case to go to the jury. The decision of the British Columbia Court of Appeal in The *King* v. *Smith* (4), where the only evidence as to the

(1) [1918] 39 D.L.R. 127.
(2) [1919] 59 S.C.R. 665.
(3) [1932] 24 Cr. A.R. 55.
(4) [1908] 13 C. Cr. C. 403.

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relationship of parent and child in a case of incest was that of the girl, herself, aged eleven years, must be taken as a decision that in the particular circumstances of that case, the Judge in the County Court Judge's Criminal Court was right when he decided that there was not sufficient proof of relationship.

It should be held that a person accused of this offence may admit the relationship. It is suggested that there are reasons why an admission might be taken from a father that would not operate in the case of brother and sister but circumstances may be imagined where some objection might in theory be raised even as to the evidence of the mother who at the time of confinement was in a large hospital. While the guilt of an accused must be proved beyond reasonable doubt, juries are properly charged not to let fanciful ideas take possession of their minds in coming to a conclusion as to whether that onus has been satisfied. With respect, that remark applies to the suggestion in the present case that the terms "Dear Sis" and "Brot" might have been used by the accused even if no blood relationship existed.

In the light of all the circumstances detailed above, the jury were entitled to say that a blood relationship was meant by the expressions used, and the charge of the trial judge being unobjectionable, the appeal should be allowed. However, as other questions were raised by the accused before the Court of Appeal, the proper order is that the case should be remitted to that Court for further consideration as was done in *The King* v. *Boak* (1) and *The King* v. *Duer* (2).

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

KELLOCK J.:—The point of dissent upon which this appeal comes to us is that in the view of the majority there was no evidence as to the relationship between the accused and the complainant, while the view of Roach, J.A., dissenting, was that there was both oral and written evidence upon which the jury properly convicted.

The complainant and her sister, Martha, called on behalf of the Crown, testified in the first place to treatment of

(1) [1925] S.C.R. 525. (2) [1944] S.C.R. 435.

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the accused as a member of the family and the sister testified also to statements made to her by her parents that the accused was their brother. In the third place, there were the two letters which the complainant said she had received from the accused, in one of which he had addressed her as "Sis" and the other in which he had signed "Brot. Chris. Smith".

Dealing first with the letters, I think the abbreviation "Brot." is to be interpreted as having been used as an abbreviation of the word "brother" and the jury were entitled to treat both letters, if they considered the handwriting of the accused to have been proved, as admissions against him.

In *Woods* v. *Woods* (1), there was in question a criminal proceeding for incest against the accused in having intermarried with the daughter of his own sister. The relationship involved in the present case was therefore involved in that case, that is, whether the accused and the mother of the person he had married were brother and sister. Evidence was given as to an admission made by the accused that the person he had married was his own niece. Doctor Lushington at page 521 said:

> The next point is that we have the acknowledgment of George Woods himself of the existence of the relationship between the parties. This is evidence against himself, and similar evidence has been admitted in criminal cases, even where life has been at stake, . . .

As to the evidence secondly referred to above, it is plain that the parents are still alive and living within the jurisdiction. Accordingly, while it was competent for the sisters to testify as to their observation of the treatment of the accused in the family, it was not open to Martha to testify as to statements made to her by her parents when they are still living, there being no explanation for their not having been called. *Pendrell* v. *Pendrell* (2); Taylor on Evidence, 12th Ed., 410.

The situation, therefore, is that the jury have convicted upon a record which contains inadmissible evidence although its admission was not objected to. The lack of objection, however, is immaterial; *Rex* v. *Farrell* (3). I do not think it would be right to allow the conviction to stand on the basis of the admissible evidence including the admissions in view of the nature of the admissions in all the

(1) 2 Curt. 516; 163 E.R. 493.
(2) [1731] 2 Str. 924.
(3) 20 O.L.R. 182 at 187.

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circumstances. Both the words "Sis" and "Brother" are used at times in circumstances where there is no blood relationship and it is for the jury to estimate the weight to be given to them against the background of the other evidence: *Newton* v. *Belcher* (1).

In my opinion, therefore, the appeal should be allowed and we should make the order which the Court of Appeal ought to have made, namely, direct a new trial; *Northey* v. *The King* (2) and cases cited; *Manchuk* v. *The King* (3); *Savard and Lizotte* v. *The King* (4).

Appeal allowed and new trial directed.

Solicitor for the appellant: *W. B. Common.*

Solicitor for the respondent: *John J. Robinette.*

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*June 25

DAME ANTOINETTE GINGRAS (PLAINTIFF) ..... APPELLANT

AND

HENRI GINGRAS ..... (DEFENDANT) RESPONDENT

AND

LORENZO GINGRAS ET AL ..... (MIS-EN-CAUSE)

AND

THE ROYAL BANK OF CANADA ..... (TIERCE-SAISIE).

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

Wills—Form derived from the laws of England—Essential formalities—Acknowledgment by testator—Signature by witnesses—Art. 851, 855 C.C.

The testator, being too sick to write and sign his name, dictated his will to his employee and had him sign as a witness. Later on a second witness was brought to the testator and the document was read in the presence of both witnesses. The testator then acknowledged the document as his will and the second witness signed. The Court of Appeal (Marchand J. dissenting) held that the will was valid, even though some of the formalities had not been strictly followed.

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*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

(1) 12 Q.B. 921; 116 E.R. 1115.
(2) [1948] S.C.R. 135 at 142.
(3) [1938] S.C.R. 341.
(4) [1946] S.C.R. 20.

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Held: The appeal should be allowed.

Held: The disposition of Art. 851 C.C. which requires that the signature must be acknowledged by the testator as having been subscribed by him to his will in presence of at least two witnesses who must then sign, is an essential formality the absence of which is fatal to the will.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, confirming (Marchand J.A. dissenting) the judgment of the Superior Court, Salvas J., 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 judgments now reported.

J. Cohen, K.C. and *E. Leithman* for the appellant.

A. Tourigny, K.C. and *R. Brossard, K.C.* for the respondent.

The CHIEF JUSTICE: Il s'agit d'un testament suivant la forme dérivée de la loi d'Angleterre. Les faits ont été établis d'une façon très précise.

Le testateur a dicté son testament à son employé Desjardins; puis, comme il était trop malade pour signer, il y a apposé sa croix et Desjardins a signé comme témoin.

Ils se sont rendus compte qu'il fallait un second témoin et Desjardins est allé chercher un monsieur Quenneville qui se trouvait dans la maison. Le testament a alors été relu en présence de Desjardins et de Quenneville; le testateur a dit: "C'est exactement cela"; puis Quenneville a signé comme témoin.

L'Article 851 du code civil définit les formalités auxquelles le testament suivant la forme dérivée de la loi d'Angleterre est assujetti. Il exige que la signature ou la marque du testateur soit reconnue "devant au moins deux témoins idoines présents en même temps et qui attestent et signent de suite le testament en présence et à la réquisition du testateur".

La version anglaise s'exprime comme suit: "Two competent witnesses together, who attest and sign the will immediately, etc.".

Ici, les deux témoins n'ont pas signé après que la signature du testateur eut été reconnue devant eux "présents en même temps".

Lorsque le témoin Desjardins a signé, l'autre témoin n'était pas présent et la formalité exigée par l'article 851 ne s'est donc pas trouvée remplie. Au moment de la signature de Desjardins le testament n'avait pas encore la forme voulue. Il s'est trouvé à attester un testament incomplet.

La reconnaissance de la signature du testateur en présence des deux témoins simultanément doit précéder la signature des témoins.

C'est bien ainsi qu'il faut interpréter l'article 851.

D'ailleurs, la majorité de la Cour d'Appel, (1) qui a tenu le testament pour valide, paraît avoir considéré que les formalités exigées par la loi n'avaient pas été strictement suivies dans le cas qui nous occupe, mais elle a cru pouvoir passer outre en déclarant qu'il ne fallait pas insister pour une trop grande rigidité de la loi.

Mais l'article 855 du code civil est bien impératif. Il dit que toutes les formalités "doivent être observées à peine de nullité, à moins d'une exception à ce sujet".

Ici, les formalités exigées par l'article 851 n'ont pas été suivies et aucune exception ne justifie la façon dont on a procédé.

En tout respect, je ne crois pas que le code nous permette de reconnaître comme valide un testament où il manque une des formalités prescrites, et il s'en suit que nous sommes forcés de le déclarer nul. (*Voir* Mignault, vol. 4, p. 265.)

L'appel doit donc être maintenu avec dépens tant dans cette Cour que en Cour Supérieure et en Cour du Banc du Roi.

Mais le testament avait également été attaqué en invoquant le défaut de capacité du testateur. Non seulement la demanderesse-appelante ne réussit pas sur ce point, mais son avocat a même déclaré, lors de l'argumentation, qu'il ne le soulèverait pas. Une grande partie des frais de sténo-

(1) Q.R. [1947] K.B. 612.

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graphie et d'impression ont été encourus par suite du fait que la preuve a été surtout dirigée à l'appui de ce moyen de la contestation.

Rinfret C.J.

Dans les circonstances, je crois certainement que l'intimé ne devrait pas être appelé à supporter tous les frais du litige, et j'adopterais la suggestion de mon collègue, l'honorable Juge Taschereau, quant à la manière dont les frais devraient être partagés.

The judgment of Kerwin, Taschereau and Estey JJ. was delivered by

TASCHEREAU, J.—Jean Gingras, marchand, est décédé à Lachine (Qué.), le 2 décembre 1945. Le 28 novembre de la même année, il avait fait son testament suivant les formes dérivées des lois d'Angleterre. Incapable de signer pour cause de maladie, il avait requis un de ses employés Marcel Desjardins de signer pour lui, après quoi il a apposé sa marque. Le même Marcel Desjardins, et une autre personne du nom de Royal Quenneville, ont signé comme témoins.

En vertu de ce testament, le testateur a laissé à son neveu, le défendeur dans la présente cause, une bague à diamant, une automobile et un magasin. Ernest Gingras et Lorenzo Gingras, deux frères, héritent chacun de $1,000. Le résidu de la succession est partagé entre des nièces, Henriette et Augustine, et son neveu Henri, déjà légataire particulier, à parts égales.

La demanderesse est Dame Antoinette Gingras, sœur du testateur, qui, si le testament est invalide comme elle le prétend, héritera d'un quart de la succession, et les mis-en-cause Henriette et Augustine chacune d'un quart également, de même que le défendeur Henri Gingras.

L'action allègue qu'à cause de nombreuses maladies qui le minaient depuis quelque temps, ledit Jean Gingras était en état de démence, et atteint de troubles psychiques qui le rendaient incapable de faire aucun acte légal valide depuis plusieurs semaines avant sa mort, et que par conséquent, il ne pouvait tester validement le 28 novembre 1945. Il est également allégué que ledit testament n'est signé que d'une croix alors que ledit Gingras savait écrire et signer

son nom, et la demanderesse soutient enfin que le prétendu testament ne remplit pas les formalités exigées par la loi pour un testament fait sous les formes dérivées de la loi d'Angleterre, et qu'il est de ce chef invalide, nul et de nul effet.

Seulement le dernier grief a été soulevé devant cette Cour et il importe donc d'examiner à la lumière du document qui a été produit et de la preuve apportée au procès, si cette dernière prétention est bien fondée.

C'est l'article 851 du Code Civil qui détermine les formes qu'il faut suivre lorsque l'on veut tester suivant la forme dérivée de la loi d'Angleterre. Cet article se lit ainsi:

> 851. Le testament suivant la forme dérivée de la loi d'Angleterre (soit qu'il affecte les biens meubles ou les immeubles) doit être rédigé par écrit et signé, à la fin, de son nom ou de sa marque par le testateur, ou par une autre personne pour lui en sa présence et d'après sa direction expresse (laquelle signature est alors ou ensuite reconnue par le testateur comme apposée à son testament alors produit, devant au moins deux témoins idoines présents en même temps et qui attestent et signent de suite le testament en présence et à la réquisition du testateur.)

Il faut donc que le testament fait suivant la forme mentionnée à l'article, soit rédigé par écrit; il doit être signé par le testateur ou par une autre personne pour lui et en présence de ce dernier, et sous sa direction expresse. Dans le cas qui nous occupe, il est incontestable que c'est ce qui a été fait. Le testateur incapable de signer, a requis l'un de ses employés Marcel Desjardins d'écrire tout le testament d'après ses instructions; il l'a également requis d'y apposer les mots "JEAN GINGRAS" et c'est après que le testateur y a apposé sa croix.

Cependant, l'article 851 exige que la signature du testateur soit reconnue par le testateur comme apposée à son testament, et cette reconnaissance doit avoir lieu devant au moins *deux témoins* compétents *qui sont présents en même temps,* et qui signent ensuite en présence et à la réquisition du testateur.

Malheureusement, ce n'est pas ce qui est arrivé dans le présent cas. A la date où le testament a été signé, le 28 novembre 1945, le testateur a fait venir Desjardins à sa chambre et lui a dit: "Tu vas faire quelque chose, tu vas faire quelque chose pour moi Marcel". Desjardins ré-

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pondit alors: "Cela dépend, dites-moi qu'est-ce que vous voulez, je verrai après". Gingras a ensuite dit: "Si tu veux, tu vas prendre un papier et une plume, et tu vas écrire ce que je vais te dire d'écrire". Et plus loin: "Prends une plume et écris ce que je vais te dire d'écrire". Desjardins raconte que Gingras a ensuite commencé à dicter son testament, et qu'il a couché sur le papier à peu près ce que le testateur lui a dit. Comme Gingras ne pouvait pas signer, il lui a dit: "Ce que tu vas faire, tu vas marquer que tu as signé pour moi et moi, je vais faire une croix au bas, et tu seras capable de prouver que c'est bien moi qui ai fait la croix, avec un autre témoin, il va être capable de prouver lui aussi que je n'étais pas capable de signer, c'est pourquoi je n'ai pas signé". C'est alors que Desjardins a signé pour Gingras, et ce dernier a fait sa marque, et Desjardins a signé ensuite comme témoin.

Dans le magasin en bas, se trouvait un M. Quenneville et celui-ci, à la demande de Desjardins, est monté à la chambre de Gingras. Desjardins a alors lu le testament, et à la fin de la lecture, le testateur a dit: "C'est exactement cela". Quenneville a alors signé comme témoin.

Il me semble clair que les formalités exigées par l'article 851 du Code Civil n'ont pas été suivies. La signature doit être reconnue par le testateur comme apposée à son testament *devant au moins deux témoins,* qui doivent signer après la reconnaissance que fait le testateur. Ce sont les exigences impératives de la loi. Or, la preuve révèle hors de tout doute que le testateur a reconnu sa signature en premier lieu devant Marcel Desjardins, ensuite d'une façon imprécise devant le témoin Quenneville, mais Gingras n'a jamais reconnu sa signature *devant deux témoins présents qui ont signé ensuite.*

L'article 851 est explicite et la jurisprudence de la province reconnaît cette impérieuse nécessité. Dans une cause *Ex Parte Antoine Brule* (1), M. le Juge Stein s'exprime de la façon suivante:

> Et quant au testament suivant la forme anglaise, l'article 851 exige que le testateur signe, ou y reconnaisse sa signature, *en présence de deux témoins simultanément,* lesquels doivent signer en sa présence.

(1) 39 R.P.Q. 183.

Mignault, Vol. 4, page 302, s'exprime ainsi:

> Enfin la reconnaissance de la signature du testateur doit *précéder* la signature des témoins.

Jarman, 7e éd. dit à la page 103:

> It follows from what has been above stated that the will must be signed by or for the testator, and his signature must be acknowledged, *before either of the witnesses signs.*

Sirois, dans son volume intitulé "La forme du testament", édition de 1907, page 318, exprime l'opinion suivante:

> Le testateur doit reconnaître sa signature ou sa marque *devant deux témoins,* et déclarer que le testament qu'il leur présente contient ses dernières volontés. *Cette déclaration est essentielle.*

Dans la cause de *St. George Society* v. *Nichols* (1) il a été décidé:

> The mere acknowledgment by the testator of the signature to a will is insufficient; he must acknowledge, in the presence *of the two witnesses,* the document he has signed, etc., etc.

La disposition de la loi qui exige que la signature doit être reconnue par le testateur comme apposée à son testament devant au moins deux témoins, est une formalité essentielle qui rend l'acte nul si elle n'est pas accomplie.

L'article 855 du Code Civil est impératif à ce sujet. Il se lit ainsi:

> Les formalités auxquelles les testaments sont assujettis par les dispositions de la présente section doivent être observées à peine de nullité à moins d'une exception à ce sujet.

Les exigences de la loi sont une garantie que les intentions du testateur seront respectées et le testament étant un acte solennel, sa forme est, comme le dit M. Mignault, vol. 4, page 265, "de son essence même" ... "sans cette forme l'acte n'est pas seulement annulable, il est radicalement nul". D'ailleurs, c'est bien ce que les codificateurs avaient en vue quand ils ont rédigé l'article 855 qui frappe de nullité tous les testaments où les formalités prescrites ne sont pas remplies. On trouve dans leur rapport, à la page 176, vol. 2, ce qui suit:

> L'article 109 (maintenant 855) déclare la nullité dans tous les cas d'inobservation des formes requises. Cette disposition se trouve aussi au Code français. Elle permet d'omettre dans les articles particuliers la forme prohibitive ou la déclaration spéciale d'une nullité. L'on espère qu'aucune règle dans cette section ne sera trouvée simplement *indicative.*

(1) 5 C.S. 273.

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Cette réflexion des commentateurs indique bien l'importance qu'ils ont attachée aux formes des testaments, et la nécessité qu'il y a de les observer rigoureusement. L'article 855 a été adopté par la législature tel que rédigé par les codificateurs, et je crois, étant donné les dispositions impératives de la loi, qu'il est impossible d'en ignorer la sévérité.

Le Code Napoléon contient un article correspondant à notre article 855, et qui est l'article 1001. Cet article a été commenté par les auteurs français, et voici les opinions exprimées par quelques-uns d'entre eux.

Demante, Code Civil, t. 4, p. 305, dit:

> La disposition finale de cette section contient la sanction des règles, tant générales que particulières, sur la forme des testaments. Les dispositions de dernière volonté tirant uniquement leur force de la puissance du législateur, leur validité dépend essentiellement de l'accomplissement des diverses formalités auxquelles la loi les assujettit; toutes ces formalités doivent donc être observées à peine de nullité.

Duranton, Cours de droit français, t. 9, p. 185:

> Si le législateur a permis aux citoyens de régler la dévolution de leurs biens comme ils l'entendraient, et de faire ainsi en quelque sorte une loi sur leur patrimoine, dont l'exécution n'aurait lieu qu'après leur mort, il n'a voulu du moins sanctionner ce droit qu'autant que ceux qui en useraient rempliraient ponctuellement les conditions et les formalités qu'il a jugées utiles, indispensables même pour attester avec certitude leur volonté à cet égard. En conséquence, il a décidé par l'article 1001 du Code, de la manière la plus absolue et la plus générale, que, "les formalités auxquelles les divers testaments sont assujettis par les dispositions de la présente section et de la précédente, doivent être observées, *à peine de nullité*".
>
> Rien n'est donc laissé aux juges en cette matière. Si l'interprétation des clauses des testaments est, comme de raison, dans leur domaine, d'un autre côté, tout ce qui tient à la forme des actes est resté dans le domaine de la loi, dont ils ne sont que les organes. Leurs fonctions à cet égard se bornent à juger, sans faiblesse et avec discernement, si ces prescriptions ont été toutes observées.

Troplong, Droit civil expliqué (Des donations entre vifs et des testaments), t. 3, p. 286:

> La rigueur avec laquelle le Code prononce la nullité des testaments pour les moindres contraventions aux formalités qu'il prescrit, prouve l'importance qu'il y attache; et, certes, ce n'est pas sans de graves motifs qu'on a cru devoir faire dépendre de solennités extraordinaires, les volontés des mourants. Les législateurs de tous les temps ont senti que ce n'était que par ce moyen qu'on pouvait

empêcher les fausses impressions et les suggestions qui assiègent plus particulièrement ceux qui disposent pour le temps où ils ne seront plus.

Demolombe, Cours de Code civil, vol. 21, p. 436:

487.—Nous réunissons ici quelques dispositions, qui sont, en général, communes aux diverses formes de testaments, que nous venons d'exposer.

488.—1o Tel est d'abord l'article 1001, dont voici les termes:

> Les formalités, auxquelles les divers testaments sont assujettis par les dispositions de la présente section et de la précédente, doivent être observées à peine de nullité. (Comp. art. 893.)

Cette nullité est la conséquence nécessaire du principe, sur lequel ce sujet tout entier repose, à savoir: que la volonté testamentaire n'existe, aux yeux du législateur, qu'autant qu'elle se manifeste suivant les formes, qu'il a déterminées (art. 893; supra, nº 21).

Beudant, Droit civil français, vol. 7, p. 2:

261. *Importance de la forme.*—De même qu'en matière de donations, les formes sont exigées, pour le testament, à peine de nullité (article 1001). Comme la donation, en effet, le testament, envisagé en tant que mode de disposition de biens, est de nature à faire craindre les suggestions intéressées, les abus d'influence, la captation. Plus encore que la donation, le testament est suspect, à cet égard, car il est fait généralement à l'approche de la mort, c'est-à-dire à l'heure où l'affaiblissement physique et moral expose davantage aux entreprises de la cupidité. Par suite, la nécessité s'impose d'autant plus de veiller à assurer l'indépendance du testateur. La plupart des règles de forme s'expliquent par cette considération; elles sont imposées comme protection de la liberté du testateur, comme garantie de l'indépendance de ses décisions.

Saintespes-Lescot, (Donations entre vifs), t. 4, p. 358:

1287.—Le testament nul pour défaut de forme ne peut produire aucun effet, puisque la loi en subordonne l'existence à l'observation de solennités indispensables. Cette absence des solennités qui seules pouvaient lui donner l'être, n'a pas permis à l'acte de se former; il n'a donc aucune valeur, et dès lors on doit lui appliquer la règle quod nullum est nullum producit effectum.

La Cour d'Appel (1) en est arrivée à la conclusion confirmant le jugement de la Cour Supérieure, M. le Juge Marchand dissident, qu'il était nécessaire d'éviter une interprétation trop rigide de l'article 851, et que tout en s'efforçant d'entourer la confection des testaments de toutes les précautions possibles, il ne fallait pas en l'absence de possibilité de fraude, annuler un testament dans des conditions qui se sont présentées dans la cause qui nous est soumise.

Avec toute la déférence possible, je ne puis partager cette vue et je crois qu'il faut, au contraire, s'incliner devant la

(1) Q.R. [1947] K.B. 612.

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rigidité des articles 851 et 855 qui prononcent la nullité d'un testament, si les formalités requises n'ont pas été observées. Sans doute, les règles imposées sont sévères, et leur application peut conduire peut-être à la nullité de testaments qui sont bien l'expression de la volonté d'un testateur, mais la loi est trop claire et trop spécifique pour qu'il soit permis de la mettre de côté. C'est le rôle de la législature d'intervenir dans un cas comme celui-ci, et non pas celui des tribunaux judiciaires.

Pour ces raisons, je suis en conséquence d'opinion que l'appel doit être maintenu, que le testament doit être déclaré nul, et que les conclusions de l'action doivent être accordées avec dépens de toutes les cours. Comme, cependant, presque toute la preuve, qui est assez volumineuse, a porté sur la capacité du testateur de faire le testament attaqué, et que la demanderesse-apppelante ne réussit pas sur ce point, il serait injuste de faire supporter par le défendeur les frais de sténographie en Cour Supérieure, et les frais d'impression en Cour d'Appel et devant cette Cour. Je crois que les fins de la justice seront servis, s'il est accordé à la demanderesse-appelante un quart des frais de sténographie, de même qu'un quart des frais d'impression en Cour d'Appel et devant cette Cour.

RAND J.—Article 851 of the Civil Code requires that the signature to a will, either at the time it is made or subsequently, be "acknowledged by the testator as having been subscribed by him to his will then produced in presence of at least two competent witnesses together, who attest or sign the will immediately, in presence of the testator and at his request"; or as in the French version, "devant au moins deux témoins idoines présents en même temps et qui attestent et signent de suite le testament en présence et à la réquisition du testateur". This means that the witnesses must sign after the acknowledgment to them together; each thereafter attests to the same thing, including the joint acknowledgment prescribed by the Article. Here that formality was not observed. The acknowledgment was first to and in the presence of one witness only, who thereupon signed; and later to both witnesses, the second of whom

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only then signed. Although a testator may acknowledge his signature, the Article does not provide for the acknowledgment of the signature of a witness.

Is the absence of that formality fatal to the instrument? The first paragraph of Article 855 would seem to be conclusive:—

> The formalities to which the will are subjected by the provisions of the present section must be observed on pain of nullity, unless there is some particular exception on the subject.

And it is of some interest that the English rule on this point is to the same effect: *Wyatt* v. *Barry* (1); *Hyndmarsh* v. *Charlton* (2).

The judgment below proceeded on the view that Article 851 requires the witnesses to sign in the presence of each other as well as in that of the testator, but in the circumstances that question does not arise.

The appeal must, therefore, be allowed. The costs will be as proposed by my brother Taschereau.

Appeal allowed, costs as per judgment.

Solicitors for the appellant: *Cohen & Leithman.*

Solicitor for the respondent: *Alfred Tourigny.*

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*May 12
*June 25

EARL PAIGE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal Law—Evidence—Corroboration—Unsworn testimony of child of tender years—Offence, under section 301 (2) of Criminal Code, of carnally knowing girl between the ages of 14 and 16 years—Canada Evidence Act, section 16 (2)—Criminal Code, sections 301 (2), 1002, 1003, 1023.

Held: The corroboration required by section 301 (2) of the Criminal Code cannot be found in the unsworn testimony of a child of tender years, unless this unsworn testimony is corroborated by some other material evidence.

*PRESENT: The Chief Justice and Taschereau, Rand, Estey and Locke JJ.

(1) (1893) L.R. Probate 5. (2) 8 H. of L. 160.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming (Letourneau C.J. and Casey J.A. dissenting) the conviction of the appellant on a charge of carnal knowledge of a girl between the ages of 14 and 16 years.

A. Chevalier, K.C. and *J. J. Bertrand* for the appellant.

P. E. Delaney, K.C. for the respondent.

The judgment of the Chief Justice and of Taschereau, Estey and Locke JJ. was delivered by

ESTEY J.:—The accused was convicted of having carnal knowledge of a girl between the ages of fourteen and sixteen, contrary to section 301 (2) of the *Criminal Code*. The latter part of the foregoing subsection reads as follows:

. . . no person accused of any offence under this subsection shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The Court of King's Bench in Quebec (Appeal Side) (1) affirmed the conviction, but:

Messieurs les juges en chef Létourneau et Casey sont dissidents et feraient droit à l'appel, par le motif que le témoignage de la plaignante, Emélie Gauvin, n'est pas corroboré suivant les exigences des articles 301 et 1002 du Code Criminel du Canada.

The appellant, on the basis of this dissent, appeals to this Court under the provisions of section 1023 of the *Criminal Code*.

The Magistrate presiding in the Court of Sessions of the Peace in finding the accused guilty found the required corroboration of the girl's evidence in that of her brother, a boy at the time of the alleged offence about ten years of age, whose evidence was received without oath (at the trial about three years after the date of the alleged offence) under section 16 of the *Canada Evidence Act*.

The Magistrate in the course of his reasons for finding the accused guilty stated:

It is true that the boy's evidence was unsworn, but in a case of *Rex* v. *Hamlin*, (52 C.C.C. 149) it was decided:— "corroborative evidence of the complainant's evidence on a charge of carnal knowledge, may be found in the evidence of another girl of tender age tendered as a witness, although such evidence was given NOT under oath."

(1) Q.R. [1947] K.B. 404.

If a child of tender years does not understand the nature of an oath, it is provided in section 16 of the *Canada Evidence Act* that the evidence of such child may be received if, in the opinion of the judge trying the case, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Subsection (2) of section 16 provides:

> 16. (2) No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

This statutory provision in section 16(2) and that in section 301(2) requiring corroboration of the evidence of the complainant, as well as the rule of practice requiring corroboration of the evidence of an accomplice, are all based upon the experience that long ago established the danger of accepting the evidence of any of these parties unless it be corroborated. The essentials of corroboration were considered in *Rex* v. *Baskerville* (1), where at p. 667 it is stated:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute.

See also *Hubin* v. *The King* (2).

It is unnecessary to here consider the difference in the language of section 16(2) and sections 301(2) and 1002, as well as 1003, in which there is the identical provision for the reception of the evidence of a child of tender years, more than to observe that it has been held that the language of these sections should be construed to the same effect: *Rex v. Silverstone* (3). The rule of practice with respect to accomplices was stated in *Rex v. Noakes* (4), and has been consistently approved and followed. It has been repeatedly held that the unsworn evidence of a child of tender years will not constitute corroboration of the evidence of another child of tender years whose evidence

(1) [1916] 2 K.B. 658.
(2) [1927] S.C.R. 442.
(3) [1934] 61 C.C.C. 258.
(4) [1832] 5 C. & P. 326.

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is also given without oath. *Rex* v. *Whistnant* (1); *Rex* v. *McInulty* (2); *Rex* v. *Lamond* (3); *Brulé* v. *Regem* (4); *Rex v. Drew* (2), (5); *Rex* v. *Manser* (6).

In Great Britain, where the statutory provisions, (1908—8 Edw. VII, c. 67, sec. 30(*a*), as amended 1914—4 & 5 Geo. V, c. 58, sec. 28 (2)), are similar to section 1003 (2), the unsworn evidence of a child of tender years if not corroborated is entirely disregarded. As stated by Lord Chief Justice Isaacs:

. . . it ought to be pointed out to the jury that they must not act on the evidence of the child alone, but that there must be corroboration of it before they are entitled to regard the child's evidence at all. *Rex* v. *Murray*, (7).

And as stated by Lord Chief Justice Hewart:

In truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated. *Rex v. Manser* (6).

Any suggestion that the corroboration of the brother might be found in that of the complainant was referred to as "mutual corroboration" and rejected in *Rex* v. *Manser* (6). The evidence of each of these parties is possessed of the same inherent danger. The purpose of corroboration is to remove that danger and this cannot be accomplished by evidence which itself cannot alone be acted upon because it is subject to the same danger and objection.

In this case section 301(2) requires that the evidence of the complainant must be corroborated "by evidence implicating the accused." This provision in section 301(2) is identical with that of section 1002 as applied to section 301, where:

The corroboration must be by evidence independent of the complainant; and it "must tend to show that the accused committed the crime charged."

Hubin v. *The King* (8).

Such independent evidence must possess probative value, which is the very quality section 16 denies to the unsworn and uncorroborated evidence of a child of tender years. Such is the effect of the specific provision that "such evidence must be corroborated." It follows that if it is not corroborated it does not possess probative value and

(1) [1912] 20 C.C.C. 322.
(2) [1914] 22 C.C.C. 347.
(3) [1925] 45 C.C.C. 200.
(4) [1930] Q.R. 48 K.B. 64.
(5) [1933] 60 C.C.C. 229.
(6) [1934] 25 Cr. App. R. 18 at 20.
(7) [1913] 9 Cr. App. R. 248 at 250.
(8) [1927] S.C.R. 442.

should be ignored. The decision in *Rex* v. *Hamlin* (1) fails to give effect to this express provision and does not appear to be in accord with the principles underlying the authorities already mentioned.

The Magistrate, in so far as he adopted the statement of the law contained in that decision, misdirected himself and therefore the case should go back for a new trial.

In view of the fact that this case is to be retried, it may not be inappropriate to draw attention to the fact that the record discloses that when Willie Gauvin was called as a witness his evidence was accepted as a matter of course without oath. It does appear that counsel for the Crown at the outset of his examination elicited that he was thirteen years of age, attended school, knew he should not tell a lie in Court and if he did he would be punished, but he did not know what it was "to swear to something." The record however does not disclose that the Magistrate made either one of the two findings required by section 16. The procedure followed was not in accord with the requirement of that section, as explained in *Sankey* v. *The King* (2) where at p. 439 Anglin, C.J., writing the judgment of the Court, stated:

> Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term "child of tender years" is not defined. Of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that he does not understand the nature of an oath.

Some of the learned Judges in the Court of Appeal found the necessary corroboration in the evidence of Mayor Cousins, who deposed as to a conversation at his home with the accused when he came there the same day the child was born. It contains statements made by the accused from which, depending largely upon the conduct and attitude at the time he made same, certain inferences might be drawn therefrom, but that is a matter more particularly for a trial Judge who has an opportunity of hearing the evidence. The Magistrate, however, having

(1) 52 C.C.C. 149. (2) [1927] S.C.R. 436.

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directed himself as already indicated, did not find it necessary to consider or make any finding based on the evidence of Mayor Cousins.

The position is therefore similar to that in *Hubin* v. *The King* (1), where Anglin, C.J., at p. 450 states:

> Unfortunately, however, the trial judge appears not to have considered this evidence or passed upon its sufficiency . . . There is no finding by the trial judge as to the inference to be drawn from the conduct of the accused, already adverted to, nor any adjudication that it affords the requisite corroboration. We cannot, without usurping the exclusive function of the tribunal of fact, make such an adjudication.

The conviction should be set aside and a new trial directed.

RAND J.—The accused appeals from his conviction under section 301(2) of the *Criminal Code*. By that section

> no person accused . . . shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The evidence for the prosecution was given by the girl against whom the offence was charged to have been committed. Her testimony was followed by that of a young brother admitted under section 16 of the *Canada Evidence Act*. No further evidence of the circumstances of the offence was presented.

Subsection (2) of section 16 provides that "no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence." The trial Judge, treating the unsworn evidence of the brother as corroboration of that of the prosecutrix, convicted the accused, and on appeal and on the same ground the conviction was affirmed with Létourneau, C.J. and Casey, J. dissenting (2). There was other evidence given by the mother of the prosecutrix and the mayor of the village which together might have been found to furnish corroboration, but the trial Judge did not deal with it.

The first question is, therefore, whether the corroboration required by section 301 is furnished by the unsworn testimony alone of a witness admitted under section 16. Before the enactment of that section, the only evidence admissible was that given under the sanction of an oath or its equivalent. The introduction of an unsworn state-

(1) [1927] S.C.R. 442. (2) Q.R. [1947] K.B. 404.

ment must then be taken with the conditions annexed to it before it can be looked upon as evidence in the full sense of the term. When under section 301(2) corroboration is required by "evidence" the word is used in that sense and it calls for testimony possessing the essential sanction.

Under section 16 the statement as a condition of its completeness requires like corroboration which means corroboration by evidence satisfying the basic requirement. In the present case that subsidiary corroboration is discovered in the evidence of the prosecutrix itself; but the fallacy involved is perfectly obvious; it would mean that the evidence of the prosecutrix which must be corroborated by testimony formally complete can itself be used to corroborate imperfect testimony necessary to its own corroboration: that it can be used, in other words, to corroborate its own corroboration. That circular treatment is dealt with specifically in *The King* v. *Manser* (1), where the Lord Chief Justice examines "mutual corroboration", as it has apparently been called, and in rejecting it he expresses the view that "in truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated. It clearly was not corroborated by the evidence of the girl Barbara (the prosecutrix)."

The question was considered in *Rex* v. *Cowpersmith* (2), where Smith, J.A., observing that he was not overlooking *Rex* v. *Manser* (1) says:—

> I think the Court there treated the evidence of the complainant in all respects as if it had been unsworn evidence and would appear to have drawn no distinction between the evidentiary value of sworn evidence corroborated by unsworn evidence and that of unsworn evidence corroborated by unsworn evidence.

That judgment followed *Rex* v. *Hamlin* (3) in which the Supreme Court of Alberta came to the like conclusion. The reasoning in both of these decisions does not, in my opinion, pay sufficient regard to the specific requirement, under section 301 (2), of corroboration by evidence carrying the necessary ritualistic obligation. If section 16, in creating a new mode by which evidentiary matter could be introduced into a trial, had intended the statement so presented to be sufficient for corroborative purposes without

(1) [1934] 25 Cr. App. R. 18 at 20.
(2) [1946] 1 Cr. R. (Can.) 314.
(3) [1930] 1 D.L.R. 497.

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its own corroboration, it must, I think, have declared so; I can see no intention of Parliament to stamp the unsworn statement as sanctioned evidence per se and then to require its corroboration for a certain use only, leaving all other use at large. If the statement is competent to corroborate so as to satisfy section 301(2), how can it logically be rejected for the same purpose under section 16? What difference in implication as to the quality of the corroborative evidence can be found between them? And yet the courts have uniformly held that such statements cannot support each other: *Rex* v. *Whistnant* (1); *Rex* v. *Lamond* (2); *Rex* v. *Drew* (3). The two sections must be so read as to render the statement admissible as corroboration only upon the independent performance of the condition annexed to it.

The remaining question arises from the failure of the trial Judge to deal with other evidence which might have furnished the basis of corroboration. I find that in *Hubin* v. *The King* (4), this Court had before it a similar situation, and it was decided that as no finding had been made by the trial Judge as to the "inference to be drawn from the conduct of the accused . . . nor any adjudication that it affords the requisite corroboration" this Court could not, without usurping the exclusive function of the tribunal of fact, make such an adjudication.

The conviction, therefore, should be set aside and a new trial directed.

Appeal allowed, conviction set aside and new trial directed.

Solicitors for the appellant: *J. J. Bertrand and A. Chevalier.*

Solicitor for the respondent: *P. E. Delaney.*

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(1) 8 D.L.R. 468; 20 C.C.C. 322.
(2) 58 O.L.R. 264; 45 C.C.C. 200
(3) [1933] 4 D.L.R. 592; 60 C.C.C. 229.
(4) [1927] S.C.R. 442.

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

LEONARD MURPHY (SUPPLIANT) . . . . . RESPONDENT.

1947
*Dec. 9, 10
1948
*April 13

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Petition of Right—Collision on highway between civilian automobile and blacked-out army transport—Exchequer Court Act, 1927, R.S.C., c. 34, s. 19 (c) amended by 1938, S. of C., c. 28—Highway Traffic Act, R.S.O. 1937, s. 10, ss. 1 and 2—Negligence Act, R.S.O. 1937, c. 115—Militia Act, R.S.C., 1927, c. 132, s. 42.

On the night of Sept. 16, 1943, the suppliant's automobile, proceeding west on Ontario Highway 17 some four miles from Petawawa Military Camp, turned out to pass another car travelling in the same direction and almost immediately collided head-on with a blacked-out field army transport. The transport formed part of a convoy of blacked-out army vehicles engaged in night manoeuvres. The convoy was headed by a motor cycle and station wagon, both fully lighted with regulation lights, followed by a number of blacked-out army transports; a further group of blacked-out vehicles followed at an interval of some 150 yards; a third group, lead by the transport involved in the collision, brought up the rear at a further interval of some 300 yards.

This transport was driven by Lieutenant James Coyle, a member of the military forces of His Majesty in the right of Canada, acting within the scope of his duties. As a result of the accident the suppliant's car was badly damaged, the driver severely injured and the other occupant killed. The transport was slightly damaged.

In an action against the Crown under sec. 19(c) of the *Exchequer Court Act*, the trial judge found there was negligence on the part of both drivers—Coyle in driving the vehicle without lights when he was so far out of his proper position in the convoy; the driver of the suppliant's car in attempting to pass another vehicle going in the same direction without ascertaining the travelled portion of the highway, in front of and to the left of the vehicle to be passed, was safely free from approaching traffic. He apportioned the degree of fault as seventy per cent on the part of the Crown's driver and thirty per cent on the part of the suppliant's driver.

Held: affirming the judgment of the Exchequer ourt of Canada [1946] Ex. C.R. 589 (Kellock and Locke JJ. dissenting)—That the accident was caused by the negligence of both drivers and in the degree designated by the trial judge.

Held: also, that the Ontario *Negligence Act* applied and that the Crown's liability under section 19 (c) of the *Exchequer Court Act* is not confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury.

*PRESENT:—Rinfret C.J. and Kerwin, Kellock, Estey and Locke JJ.

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Per the Chief Justice, Kerwin and Estey JJ.: The effect of the trial judge's finding that Coyle was negligent in driving the vehicle without lights when he was so far out of his proper position in the convoy, cannot be dissipated by saying that Coyle could not change the lighting equipment of the transport driven by him.

Per Kellock and Locke JJ. (dissenting): Where damage ensues to a person by the act of another person who is acting in the pursuance of lawful orders the wrongful act, if any, occasioning the damage is not the act done in obedience to orders, but negligence in the giving of the order itself. *Reney* v. *Magistrates* [1892] A.C. 264; *The Mystery* [1902] P. 115; *Hodgkinson* v. *Fernie* 2 C.B.N.S. 415. On the law thus stated, applied to the case at bar, it cannot be considered that there was any negligence on the part of Coyle either causing or contributing to the accident in question.

APPEAL by the Crown and cross-appeal by the suppliant from the judgment of The Exchequer Court of Canada, O'Connor J. (1), maintaining in part suppliant's claim, made by way of Petition of Right, for damages caused by the alleged negligence of a member of the military forces of His Majesty in right of Canada acting within the scope of his duties. The trial judge found negligence on the part of both drivers and apportioned the degree of fault as seventy per cent to respondent's driver and thirty per cent to the suppliant's driver, and assessed the amount of damages proved accordingly.

The material facts of the case and the questions at issue are stated in the preceding head note and in the reasons for judgment which follow:

J. Douglas Watt K.C. and *J. C. Osborne* for the appellant.

A. E. Maloney for the respondents.

The judgment of the Chief Justice and of Kerwin and Estey JJ. was delivered by:

KERWIN J.:—The petition of right for which a fiat was granted is for a claim against the Crown arising out of injuries to property resulting from the negligence of Lieutenant Coyle, an officer or servant of the Crown, while acting within the scope of his duties or employment and is based upon section 19 (*c*) of the *Exchequer Court Act* as

(1) [1946] Ex. C.R. 589.

enacted by chapter 28 of the Statutes of 1938. It is advisable to reproduce section 50A of the *Exchequer Court Act* as enacted by chapter 25 of the Statutes of 1943:—

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

It is admitted that Coyle was a lieutenant of the Royal Canadian Army and therefore a member of the military forces of His Majesty in right of Canada and that, at the time of the occurrence, he was acting within the scope of his duties or employment. Coyle being the Crown's servant, the decisions which proceed on the ground that certain individuals concerned were not servants are not in point but the question to be determined is whether the damages to the suppliant's car resulted from Coyle's negligence, because the fiat was granted, and the trial conducted, only on the basis of a claim that the damages were so suffered.

A syllabus for the 39th Officers' Re-enforcement Training was filed for the week ending September 18, 1943, from which it appears that on the night in question, the training to be carried out was night driving from 6.30 p.m. to 9 p.m. As a member of the 39th Re-enforcement Officers' quota, Lieutenant Coyle was driving a field army transport forming part of a convoy, proceeding easterly on Highway No. 17, in the Province of Ontario. With him, as an instructor, was Gunner Gould. The army transport had blacked-out lights, that is, the right-hand headlight was completely covered with a disk while the left-hand one had a horizontal slit in the disk about 6 inches long and $\frac{1}{4}$ inch wide, with a small hood above the slit to throw the light downwards on to the road. The only other light on the front of the transport was a pencil light on each of the front fenders. These lights were clearly not in conformity with subsections 1 and 2 of section 10 of the Ontario *Highway Traffic Act*, R.S.O. 1937, chapter 288, which, for the purposes of this case, it is admitted by the appellant, apply to the Crown.

What is contended is that Coyle was under orders to take part in a convoy and that he could not have refused,

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without serious results to himself, to go in this particular transport on Highway 17 at the relevant time, and that, therefore, there could be no personal negligence on his part. When the occasion arises, it will be necessary to examine that argument in the light of the well-known fundamental constitutional principle in our law that, generally speaking, a soldier cannot escape from civil liabilities. In the present case, however, the trial judge has found that Coyle was negligent "in driving the vehicle without lights when he was so far out of his proper position in the convoy." The effect of that finding cannot be dissipated by saying that Coyle could not change the lighting equipment of the transport driven by him. Nor is it necessary to pursue the inquiry whether, even if an infraction of the Ontario statutory provisions referred to may not be negligence in itself, those provisions are evidence of the standard of care to be exercised under the circumstances. Although the evidence is that in every convoy such as the one with which we are concerned, there is an "accordion" or "concertina" effect brought about by changes in speed on the part of the lead vehicle which produces gaps, the distance between Coyle's transport and the preceding vehicle in the convoy was certainly at least 900 feet, as found by the trial judge. Coyle admits that the usual interval ranged from 35 feet to 25 yards and that no orders had been given as to the distance to be kept between the different vehicles of the convoy. My view is that the trial judge properly found that there was negligence on the part of Coyle, knowing the poor lighting of the transport, to permit his machine to be 900 feet in the rear of the preceding one. While Gunner Gould was present to instruct Coyle generally as to night driving, there is no evidence that Gould gave any directions to Coyle to fall so far behind. I am therefore unable to disagree with the finding of the trial judge that the accident was caused by the negligence of Coyle and the driver of the suppliant's car and in the degrees designated by him.

It was argued that the Ontario *Negligence Act*, R.S.O. 1937, c. 115, providing for the apportionment of damages where plaintiff and defendant are both negligent, did not apply and that, therefore, since the driver of the suppliant's car was found to be contributorily negligent, there could

be no recovery. This Court has already dealt with a similar argument in connection with an occurrence in the Province of Quebec: *The King* v. *Laperrière* (1). Mr. Justice Estey and I decided that Crown liability under section 19 (*c*) of the *Exchequer Court Act* is not confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury. Mr. Justice Rand stated that he found it unnecessary to consider the argument but expressed a similar view. The same reasoning applies to a petition of right based upon an occurrence in the Province of Ontario. Prior to June 24, 1938, (the date mentioned in section 50A of the *Exchequer Court Act*) even if Coyle were an officer or servant of the Crown, a petition of right for an occurrence such as is here complained of, could not have succeeded since the negligence was not committed during Coyle's presence on a public work: *The King* v. *Dubois* (2); *The King* v. *Moscovitz* (3). At that date the *Negligence Act* of Ontario was in force. *The King* v. *Toronto Transportation Commission* (4), referred to by counsel for the appellant, was a case of an Information exhibited by the Attorney General of Canada to recover damages.

The appeal should be dismissed with costs and the cross-appeal without costs.

The judgment of Kellock and Locke JJ. was delivered by:

KELLOCK J.:—This appeal arises out of a collision which occurred on Highway 17 near Petawawa, Ontario, at approximately 9.30 p.m., September 16, 1943. An automobile owned by the suppliant being driven westerly turned out to pass another motor car travelling in the same direction, driven by a Captain Callender, and almost immediately collided head-on with a field army transport which formed part of an army convoy proceeding in the opposite direction. As a result of the accident the suppliant's automobile was badly damaged, the driver was severely injured, and the only other occupant killed.

The convoy was led by a motor cycle and an army jeep, both with bright lights. These vehicles were followed by nine field army transports and another vehicle described

(1) [1946] S.C.R. 415.
(2) [1935] S.C.R. 378.
(3) [1935] S.C.R. 404.
(4) [1946] Ex. C.R. 604.

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as a 30 hundred weight, with the rear being brought up by another jeep with normal lights and, some witnesses say, another motor cycle, also lighted. All of the field army transports and the 30 hundred weight vehicle had what is described as blacked out lights, namely, the right-hand head-light of each was completely covered by a disk, while the left-hand one had a horizontal slit in its disk about 6″ long and $\frac{1}{4}$″ wide—the slit having above it a small hood which threw the light downwards on to the road. On each of the front fenders there was what is described as a pencil light, which is self-explanatory, and on the back of each there was a transmission light which enabled the driver behind to see the vehicle in front. When the accident took place the visibility was good, although the moon was under clouds.

The convoy had become broken up into three segments. The first segment consisting of the lighted vehicles in front with a number of the transports was separated from the second by an interval of approximately 150 yards, while the second, consisting of the remainder of the transports, save one, was separated by some 300 yards from the remaining vehicles in the convoy led by the ninth transport. According to the various witnesses, when instructions as to the distance to be kept between vehicles in a convoy are given the distance varies from 35 feet to 30 yards, but on the night in question no instructions had been given as to any definite interval, each driver being told merely to keep in sight of the rear light of the vehicle in front. According to the driver of the transport involved in the accident, who was taking instruction in night driving, this was standard in his experience.

As Captain Callender proceeded west he observed the leading vehicles approaching but before he actually met the convoy he stopped, momentarily, to give some instructions to a soldier in charge of a jeep parked on the north side of the road and then proceeded on his way at about the time when the third vehicle of the convoy was passing him. He had lowered his lights when he first observed the convoy and when all the vehicles but those in the third segment, of which he was not then aware, had passed him, he raised his lights again and observed what he described as the silhouette of other vehicles approaching and recognized that

these were additional vehicles of the convoy. He could see the pencil lights of the leading transport and knew what it was. He does not recall seeing any other lights. Accordingly he slowed down to about 35 miles per hour and again lowered his lights. He was not able to keep the transport in view all the time from the time he first observed it but, as he says, he knew it was there. Another witness who was riding with him explains that there was a depression in the road in front of them in which the lights of the army transport were lost sight of for a time. Captain Callender says that he was not over two car lengths away from the transport when he saw a pair of headlights flashing up beside him and the collision took place. He says that the suppliant's vehicle passed him at from 15 to 20 miles an hour faster than he himself was travelling.

The learned trial judge found the driver of the suppliant's vehicle negligent in attempting to pass another vehicle going in the same direction without first ascertaining that the highway in front of and to the left of the vehicle to be passed was safely free from approaching traffic and that he turned out so fast while travelling at such a high rate of speed he did not, in the language of one of the witnesses, get a true picture of the road ahead of him. The learned trial judge also found the driver of the appellant's vehicle negligent in driving without lights when he was so far out of his proper position in the convoy.

The question for decision on this appeal is, in my opinion correctly stated by the respondent in his factum to be whether or not there is any evidence to support the finding of the learned trial judge that the driver of the army vehicle was negligent. According to the respondent's submission this negligence is said to have consisted in (*a*) that Lieutenant Coyle, the driver of the transport, was inexperienced in night driving; (*b*) the army vehicle itself was about 690 yards behind the vehicles in the convoy immediately proceeding it; and (*c*) the vehicle was being driven with blacked out lights.

With respect to (*a*) it is quite true that Lieutenant Coyle was an inexperienced driver. He was in fact on the night in question taking instruction in night driving from Gould, a gunner in the artillery, who was sitting beside him, having had two previous lessons only. Inexperienced as he was,

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however, he was not unlawfully on the highway but was there in the course of his military duty and his inexperience cannot be described as negligence.

With respect to (*b*) the learned trial judge has found that the vehicle operated by Coyle was 300 yards behind the vehicle in front. This unquestionably did present a potentially dangerous situation to travellers on the highway as the warning of the presence of the convoy on the road given by the lighted vehicles in front would be lost by such a gap. While there is some evidence that the gap was much greater than 300 yards, the learned trial judge has accepted the evidence of Captain Callender on this point and there is other evidence to support it. The question arising under this alleged head of negligence is as to whether the existence of this gap has been shown to have been due to any negligence on the part of Coyle

As already mentioned, he was driving under the instructions of Gould and the only evidence as to the reason for the existence of this gap is that in every convoy, from its very nature, such a result takes place. While the suppliant alleged in his petition of right, as a ground of negligence that Coyle was not driving the army vehicle in a proper position in the convoy, no evidence was given to establish that the gap was due to any negligence of Coyle. In fact in his factum the respondent recognizes that such a result inheres in every convoy. He says:

> It is pointed out in the evidence that in every Army convoy there is an accordion or concertina effect which seems to be brought about by a change in the speed of the first or leading vehicle. This accounts for the variation in the distance or difference in the length of the intervals between the various vehicles in the convoy.
>
> This doubtless also accounts for the fact that on the night in question the convoy appears to have broken up into three segments made up as follows:

The mere existence of the gap in itself cannot therefore, in my opinion, be taken as evidence of negligence on the part of the driver.

If the creation of this gap then was not due to any personal negligence on the part of Coyle, and the onus was upon the respondent to establish such negligence if it existed, was it negligence on the part of Coyle to have continued on in the absence of lights on his vehicle complying with the requirements of provincial law? With

his manner of driving itself there is no complaint and there could not be. Not only did he keep well over to the right hand side of the road, but in encountering vehicles going in the opposite direction he reduced his speed to ten miles an hour, no doubt in order to give such traffic as much time as possible to see his transport. The evidence of Coyle was that in keeping on he was acting in accordance with military orders not to stop but to stay in the convoy and he was also, at the time, driving under the immediate instructions of Gunner Gould who sat beside him and was in charge of the vehicle. The question for decision then becomes one as to whether or not the presence of the particular vehicle on the highway without the equipment as to lights required by the provincial law can, in these circumstances, be said to be negligence on the part of Coyle. It is to be remembered that, owing to the structure of the vehicle, the lights could not be altered in any way by any act of one in the vehicle itself.

Mr. Watt, for the appellant, was content to argue the appeal on the basis that the appellant was subject to the provisions as to lights in R.S.O., 1937, *cap.* 288, section 10, (1), (2). This assumes not only that the legislation extends to the Crown, although not expressly named, but also that provincial legislation could place such an obligation upon the Crown in the right of the Dominion. Parliament has exclusive legislative jurisdiction with respect to "Militia, Military and Naval Service and Defence" and by section 42 of the *Militia Act,* the arms and equipment of the Canadian forces "shall be of such pattern and design as are from time to time prescribed and shall be issued under regulations". To admit the application to an army vehicle of the legislation here in question involves the proposition that such vehicle, issued under section 42, must also comply with the legislation of possibly nine other jurisdictions. I am unable to adopt such a view. This does not mean that the law of negligence is of no application in the case of an army vehicle.

The foundation of liability on the part of the Crown under the provisions of Section 19(*c*) of the *Exchequer Court Act* is the existence of personal negligence shown by the suppliant to have existed on the part of some officer

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or servant of the Crown; *The King* v. *Anthony* (1). An analogous situation exists in England in the case of claims for loss occasioned, for instance, by reason of negligence in the navigation of a King's ship. In such cases the action is brought against the person on the King's ship whose personal negligence was the cause of the damage; *Nicholson* v. *Mouncey* (2). While the Crown is not liable, it does in practice pay the amount of any judgment obtained in such circumstances. It is essential, however, that the plaintiff sue the person actually responsible for the negligent navigation at the particular time; *Adams* v. *Naylor* (3), per Viscount Simon at pages 549-550; per Lord Thankerton at page 551; and per Lord Simonds at page 553.

In my opinion the placing of a convoy such as that here in question on a highway at night without taking reasonable means to protect the travelling public therefrom, might well be construed as negligence on the part of the servant or servants of the Crown who were responsible for this particular convoy being put on the highway or the officer in charge of the convoy. That, however, is a matter with which Coyle cannot be charged and is not the cause of action upon which the present petition of right is founded.

As has been already stated, Lieutenant Coyle was at the time subject to military discipline and obligated by statute to obey any lawful command of his superiors and it was while acting in pursuance of orders that he was on the highway with this particular vehicle and was engaged pursuant to his orders in an endeavour to keep up with the vehicle ahead.

It is not without relevance to observe that an ordinary citizen, acting under orders given by another having statutory authority to do so is not liable for the consequences of an act which, if committed apart from such orders, would entail responsibility in negligence.

In *Reney* v. *Magistrates* (4), the action was brought by a ship owner for damage sustained by the ship for negligence on the part of the respondent's harbour-master in

(1) [1946] S.C.R. 569 at 571.
(2) (1812) 15 East 384.
(3) [1946] A.C. 543.
(4) [1892] A.C. 264.

giving orders in connection with the docking of the ship which the ship's master was bound to obey. Lord Halsbury, L.C., said at page 269:

> The Solicitor-General said that the direction to come on was negligently obeyed, because they came on under a port helm. What was the thing which was being done? If it was what anybody might suppose, from the harbour-master's statements and directions, was intended to be done, I do not see any negligence.

And at page 270:

> Of course, no one supposes that this is a case of wilfully running against an obstruction; but to say that the harbour-master's authority is limited, or that a person is at liberty to disregard the orders of the harbour-master (who has by law power to give orders) because that person may have the idea in his mind that the harbour-master is making a mistake, would be, to my mind, a most dangerous principle to establish. A double authority would probably in many cases be fatal. Those who have the power to give orders have the right to consider that they will be obeyed. It would, to my mind, be a very strong thing to say that a particular direction of the harbour-master, in reference to what a vessel shall do, and who is within his right in giving it, should be disobeyed.

In The Mystery (1), the plaintiff's vessel was entering the defendant's dock under directions of the dock-master. At the same time, another official of the dock company gave an order to another ship to execute a certain manoeuvre, as a result of which it came into collision with the first vessel, causing it damage. An action was accordingly brought by the owners of the damaged ship against the owners of the second ship and in consequence of a defence setting up that the manoeuvre had been executed under compulsion of orders given by the servant of the dock company, the company was added as a defendant. It was held by a Divisional Court that there was no negligence on the part of the owners of the defendant ship. Gorell Barnes J. at page 121 approved of the principle laid down by Dr. Lushington in *The Bilbao* (2), that "no one should be chargeable with the act of another who is not an agent of his own choice."

In *Hodgkinson v. Fernie* (3), the plaintiff brought action against the defendant for damages to a ship of the former arising from a collision with a ship owned by the latter. Both ships had been hired by the Imperial Government and were in tow of different warships in the course of a voyage conveying troops in the Black Sea, and both were

(1) [1902] P. 115.
(2) Lush. 149 at 153.
(3) (1857) 2 C.B.N.S. 415.

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acting in pursuance of orders of the respective captains of the warships. The case was tried by Chief Justice Cockburn and a jury and in the course of his charge the learned trial judge said at page 420:

> The first question, therefore, for you, is, whether the master of the Courier had orders from the commander of the Fury not to let go her anchor, but to hold on by her hawser. Whether that order was right or wrong in point of judgment and seamanship is a matter which, if the order was one that the master of the Courier was bound to obey, it is clear it was not a matter for him to form any judgment about. His duty was, to obey orders, and not to take upon himself to criticize them, and to act upon his own judgment as to their propriety and expediency. There would be an end to all subordination, military or naval, if the officer subordinate in command were to take upon himself to decide upon the merits of the order, before he obeyed it.

And at page 422:

> If, therefore, the defendants in this case, in doing that which they did, and from which damage is said to have resulted to the plaintiff, were acting in obedience to orders given to them by an authority which they were bound to obey, I take upon myself to tell you,—subject to correction hereafter if wrong,—that the defendants are not responsible.

This view of the law was approved on a motion for a new trial.

Accordingly, where damage ensues to a person by the act of a person who is acting in pursuance of lawful orders the wrongful act, if any, occasioning the damage is not the act done in obedience to the orders, but negligence in the giving of the order itself.

On the law thus stated applied to the case at bar, it cannot be considered that there was any negligence on the part of Coyle either causing or contributing to the accident in question. He was in no way responsible for the structure of his vehicle and he was where he was as the result of orders of his superiors, which by statute he was bound to obey. Nor do I think that Coyle is to be fixed with negligence from any other point of view. He was, in my opinion, entitled to assume that his superiors were fully familiar with the proper precautions necessary to be taken to protect the travelling public and would see they were taken.

Were nothing more to be said, it would be necessary, in my opinion, to allow the appeal and dismiss the petition. I would not do so, however, without first giving the respondent an opportunity to obtain the consent of the

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Crown to an amendment so as to permit the setting up, if he be so advised, of what in my opinion, as already indicated, may have been the real negligence which was the cause of his damage. Should the Crown so consent, and the necessary amendments be made, the appeal should be allowed and the case referred back to the court below for the taking of further evidence and the giving of the appropriate judgment. Failing the consent of the Crown the appeal should be allowed and the action dismissed with costs, if demanded. Without such consent the court is powerless to permit the proceedings to be amended; *Hansen* v. *The King* (1).

Appeal dismissed with costs and cross-appeal without costs.

Solicitors for the appellant: *Gowling, McTavish, Watt, Osborne & Henderson.*

Solicitor for the respondent: *James A. Maloney.*

1948

*May 13
*June 25

GASTON BLAIS.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT

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

Criminal law—Theft—Goods valued at less than $25—Summary conviction — Deputy Recorder—Jurisdiction — Magistrate — Cities and Towns Act of Quebec, c. 233 R.S.Q. 1941, sections 647, 648—Summary Convictions Act of Quebec, c. 25 R.S.Q. 1941, section 6—Criminal Code, section 771 (a) (i).

The appellant pleaded guilty to a charge of theft of goods valued at $19 laid under Part XVI of the Criminal Code and was sentenced to six months imprisonment by the Deputy Recorder of the City of Westmount, Quebec. It was argued in appeal that the Deputy Recorder had exceeded his jurisdiction as he was not a magistrate within the meaning of section 771 (*a*) (*i*) of the Criminal Code. The Court of King's Bench, appeal side, affirmed the conviction.

Held: The Deputy Recorder having been clothed with the jurisdiction of two justices of the peace by the provisions of the Summary Convictions Act of Quebec, was within the definition of "other functionary" in section 771 (*a*) (*i*).

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

(1) [1933] Ex. C.R. 197.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming (Pratte J.A. dissenting) the conviction of the appellant by the Deputy Recorder of Westmount, Quebec, on a charge of theft of an object valued at less than $25.

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

J. A. Budyk, K.C. for the appellant.

Rene T. Hebert, K.C. for the respondent.

The Chief Justice: The appeal should be dismissed.

The judgment of Taschereau and Locke JJ. was delivered by

Taschereau, J.—The appellant was charged with the theft of an object of a value of less than $25. He elected a summary trial under the provisions of Part XVI of the Criminal Code, and after having pleaded guilty was sentenced to six months imprisonment by Mr. A. E. Laverty, Deputy Recorder of the City of Westmount.

The Court of King's Bench (1), Mr. Justice Pratte dissenting, confirmed the conviction, and the appellant now appeals to this Court.

Section 771 of the Criminal Code says:—

(*a*) "magistrate" means and includes,

(*i*) in the provinces of Ontario, *Quebec* and Manitoba, *any recorder,* judge of a county court if a justice of the peace, commissioner of police, judge of the sessions of the peace, and police magistrate, district magistrate, or other *functionary or tribunal, invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices,* and acting within the local limits of his or of its jurisdiction.

It is argued that Mr. Laverty, being a deputy recorder, is not a magistrate within the meaning of this section and that, therefore, he exceeded his jurisdiction when he sentenced the appellant.

Under the *Cities and Towns Act,* chap. 233, R.S.Q. (1941), section 647, the recorder may appoint under his hand a deputy recorder, who must be an advocate of five years standing, and, the person so appointed, says section 648,

(1) Q.R. [1947] K.B. 311.

shall possess, for and during the time limited in the instrument containing his appointment, or, if no time be therein limited, then from the date of the registration as aforesaid, until the revocation thereof, the jurisdiction, and be vested with all the rights, powers and privileges, and shall discharge all the duties of the Recorder, to the exclusion, for the time being, of the person so nominating him.

Mr. Laverty was duly appointed "deputy recorder" by the recorder of the City of Westmount, and he was therefore invested with all the powers of the recorder himself. But it is argued, that section 771 Cr. C. gives power only to a "recorder" to hear cases under Part XVI, that the "recorder" is a "persona designata" by the Code, and that therefore a "deputy recorder" although invested with the same powers by the provincial authority, is not a "magistrate" included in paragraph (1) of section 771.

I find it quite unnecessary to determine this point for the reason that Mr. Laverty being a "deputy recorder", has the jurisdiction of two justices of the peace. Section 6 of *The Summary Convictions Act of the Province of Quebec,* chap. 25, R.S.Q. (1941) reads as follows:

> Any Judge of the Sessions of the Peace, Police Magistrate, District Magistrate *or Recorder,* appointed for any territorial division, and any Magistrate authorized to perform acts usually required to be done by two or more Justices of the Peace, may do alone whatever is authorized by an act of this Province to be done by any two or more Justices of the Peace.

Mr. Laverty having the same powers as the recorder himself is a person, as section 771 says, "invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices". He was, therefore, competent to convict the appellant as he did.

The appeal should be dismissed.

The judgment of Rand and Estey JJ. was delivered by

RAND J.—The appellant pleaded guilty to a charge of theft of goods valued at $19 laid under Part XVI of the Code before the Deputy Recorder of the City of Westmount, Quebec and was sentenced to six months' imprisonment. An appeal was taken on the ground that the Deputy was without jurisdiction under that Part but the Court (1), Pratte, J. dissenting, interpreted the words "any

(1) Q.R. [1947] K.B. 311.

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Recorder" in section 771 (*a*) (*i*) defining the word "Magistrate", to include a Deputy Recorder, and rejected the appeal.

Section 771 (*a*) (*i*) in addition to "any Recorder", designates as Magistrate, "any other functionary or tribunal, invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices"; and as I find the Deputy Recorder in this case to be such an "other functionary", it is unnecessary to examine the ground on which the Court of Appeal proceeded.

The charter of Westmount incorporates the provisions of the *Cities and Towns Act,* chap. 233, R.S.Q. (1941) dealing with a Recorder's Court, sec. 648 of which defines the powers of the Deputy Recorder:—

> 648. The person so appointed shall possess, for and during the time limited in the instrument containing his appointment, or, if no time be therein limited, then from the date of the registration as aforesaid, until the revocation thereof, the jurisdiction, and be vested with all the rights, powers and privileges, and shall discharge all the duties of the Recorder, to the exclusion, for the time being, of the person so nominating him.

The Summary Convictions Act of the Province, chap. 25, R.S.Q. (1941) by sec. 6 enacts:—

> Any Judge of the Sessions of the Peace, Police Magistrate, District Magistrate or Recorder, appointed for any territorial division, and any Magistrate authorized to perform acts usually required to be done by two or more Justices of the Peace, may do alone whatever is authorized by an act of this Province to be done by any two or more Justices of the Peace.

And the expression "territorial division" is defined to include a city.

From the foregoing, it is clear that the powers of the Recorder embrace that scope of authority aimed at in section 771 (*a*) (*i*), and with these, in turn, the Deputy Recorder has been clothed; the latter is, therefore, such a functionary as is described in the paragraph and is invested with the jurisdiction of a magistrate for the purposes of Part XVI.

The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant: *J. A. Budyk.*

Solicitor for the respondent: *Rene T. Hebert.*

CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANT;

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA..... RESPONDENT;

AND

THE ATTORNEY-GENERAL OF CANADA ..... INTERVENANT.

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*Feb. 17, 18, 19.

*April 27

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional Law—Application of Hours of Work Act, R.S.B.C., 1936, c. 122, to Employees of C.P.R. Hotel—Whether hotel part of the "undertakings" of a railway—Whether "lines of" includes "railways"—Whether hotel included in the term "railways"—Whether Parliament has made a declaration as to hotels—Property and Civil Rights—Effect of Collective Bargain and P.C. 1003 (Dom.)—The B.N.A. Act, s. 91 head 29, s. 92 head 10 (a) and (c)—The Railway Act, 1868, S. of C., 1868, c. 69, ss. 5 (16), 7 (8) (10)—The Consolidated Ry. Act, 1879, S. of C., 1879, c. 9, ss. 7 (8) (10) Am. 1883, c. 24, s. 6—Canadian Pacific Ry. Act, 1881, S. of C., 1881, c. 1, Schedule "A" s. 17—The Railway Act, 1888, S. of C., 1888, s. 2 (9), Am., 1892, c. 27, s. 1 (q)—Canadian Pacific Ry. Act, 1902, S. of C., 1902, c. 52; ss. 8, 9—The Railway Act, 1903, S. of C., c. 58, s. 2 (s) (w)—The Railway Act, R.S.C., 1906, c. 37, ss. 15), (21), (28), (33), (151) (c) (g)—The Railway Act, 1919, S. of C., 1919, c. 68 ss. 2 (21), (28), 6 (c)—War Measures Act, R.S.C., 1927, c. 206—The Canadian National-Canadian Pacific Act, 1933, S. of C., 1933 c. 33, ss. 3 (g), 27A as enacted by, 1947, c. 28, s. 1—The National Emergency Transitional Powers Act, 1945, S. of C., 1945, c. 25.

An hotel is not an integral part of a railway and therefore does not fall within the meaning of the term "railways" as used in section 92 head 10 (*a*) of the *British North America Act*; nor has the Parliament of Canada made a declaration as to hotels under section 92 head 10 (*c*) of the Act. An hotel therefore does not fall with the class of subjects to which in virtue of section 91 head 29 of the Act, the exclusive Legislative Authority of the Parliament of Canada extends.

(Appeal dismissed and judgment of the Court of Appeal for British Columbia (1) affirmed.)

APPEAL from the judgment of the Court of Appeal for British Columbia dated March 27, 1947, holding that the *Hours of Work Act*, R.S.B.C., 1936, c. 122, is applicable and binding upon the Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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CANADIAN PACIFIC RAILWAY CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

The question referred to the Court of Appeal for British Columbia pursuant to the provisions of the *Constitutional Questions Determination Act,* R.S.B.C., 1936, c. 50, and the relevant statutory provisions are set out in the judgments now reported.

C. F. H. Carson K.C., H. A. V. Green K.C. and *I. D. Sinclair* for Canadian Pacific Railway Co.

J. W. deB. Farris K.C. and *J. Farris* for the Attorney-General of British Columbia.

F. P. Varcoe K.C. and *W. R. Jackett* for the Attorney-General of Canada.

C. R. Magone K.C. for the Attorney-General of Ontario.

T. D. MacDonald for the Attorney-General of Nova Scotia.

H. J. Wilson K.C. for the Attorney-General of Alberta.

A. M. Nicol for the Attorney-General of Saskatchewan.

KERWIN J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia (1), dated 27th March, 1947, answering the following question referred to that Court by Order of the Lieutenant-Governor in Council dated 21st September, 1946, made pursuant to the *Constitutional Questions Determination Act,* chapter 50, of the Revised Statutes of British Columbia, 1936:—

> Are the provisions of the "Hours of Work Act" being Chapter 122 of the "Revised Statutes of British Columbia, 1936", and amendments thereto, applicable to and binding upon Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel, and if so, to what extent?

By its terms, the Act applies, *inter alia,* to some classes of persons that are employed by the Company at the Empress Hotel at Victoria, British Columbia, and, among other things, provides for a forty-four hour week. The majority of the Court answered the question in the affirmative and stated that the whole Act applies. O'Halloran, J.A., dissented and answered the question in the negative.

The Company, incorporated under statutes of Canada, owns and operates in Canada extensive lines of railways from coast to coast, and leases and operates the lines of

(1) [1947] W.W.R. 927; [1947] 2 D.L.R. 723.

the Esquimalt and Nanaimo Railway between Victoria and Courtenay on Vancouver Island. It owns and operates lines of steamships, plying between Victoria, on Vancouver Island, and Vancouver on the mainland, and Seattle in the State of Washington. For the purpose of its lines of railways and steamships and in connection with its said business, the Company built the Empress Hotel at Victoria, which it has operated for over thirty-eight years for the comfort and convenience of the travelling public. The operation of the hotel is a means of increasing passenger and freight traffic upon the Company's lines of railways and steamships but the hotel also caters to public banquets and permits the use of its hotel ball-room for local functions for reward. In addition to these facts, which are set out in the Order of Reference, it was stated on behalf of the Company that the Empress is but one of a chain of hotels throughout Canada, which is an integral part of its transportation system; that all employees of the Railway Company at the hotel are entitled to free transportation on the Company's railways; and that these employees are governed by and enjoy the same pension rules and privileges as other employees of the Company.

Normally the legislation in question comes within the classes of subjects by section 92 of the *British North America Act* assigned exclusively to the legislatures of the provinces—namely, Property and Civil Rights in the Provinces: *In re Legislative Jurisdiction over Hours of Labour* (1); *Attorney-General of Canada* v. *Attorney-General for Ontario* (Labour Conventions Case) (2) at 350. Does legislation in relation to the hours of labour of employees of the Company at the hotel also fall within the legislative powers given by section 91 to the Dominion Parliament.

The Company and the intervenant, the Attorney-General of Canada, contend that it falls within the expression "Railways" in head 10 of section 92, which by force of head 29 of section 91 is transferred to the latter as one of the enumerated heads so as to give the Dominion Parliament the exclusive power to legislate upon the subject: *Montreal* v. *Montreal Street Railway* (1912) A.C. 711. Head 10 reads as follows:—

(1) [1925] S.C.R. 505.
(2) [1937] A.C. 326.
(3) [1912] A.C. 333.

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10. Local Works and Undertakings other than such as are of the following Classes:—

(a) 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:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

The majority of the Court of Appeal, and apparently the dissenting judge, considered that the opening words in (a), "Lines of", refer as well to railways, canals and telegraphs as to "Steam or other Ships", but they are certainly inappropriate to canals and, in any event, the natural reading of the clause is to restrict "Lines of" to "Steam or other Ships". Indeed, while in a proceeding of this nature the Court cannot accept an admission upon a question of law, it may be noted that counsel for British Columbia agreed that this is the proper construction. He also stated that he could not rely upon the decision in *Lancashire and Yorkshire Railway* v. *Liverpool Corporation* (1), referred to in the reasons of the majority of the Court of Appeal, and I agree with his submission that that case is of no assistance.

These matters, however, are merely preliminary to the solution of the question whether undertakings such as railways include the business of an hotel proprietor and operator. The Company may under its special Acts engage in many activities and in fact section 8 of chapter 52 of the Dominion Statutes of 1902 provides:

8. The Company may, for the purposes of its railway and steamships and in connection with its business, build, purchase, acquire or lease for hotels and restaurants, such buildings as it deems advisable and at such points or places along any of its lines of railway and lines operated by it or at points or places of call of any of its steamships, and may purchase, lease and hold the land necessary for such purposes, and may carry on business in connection therewith for the comfort and convenience of the travelling public, and may lay out and manage parks and pleasure grounds upon the property of the Company and lease the same from or give a lease thereof to any person, or contract with any person for their use, on such terms as the Company deems expedient.

But, while " 'Undertaking' is not a physical thing, but is an arrangement under which of course physical things

(1) [1915] A.C. 152.

are used", *In re Regulation and Control of Radio Communication in Canada* (1) at 315, yet, however greatly the operation of the Empress Hotel may contribute to the success of the Company's railway activities, it is impossible to say that an hotel business is part of a railway undertaking within the ambit of head 10.

Merely because the Company has been endowed by its creator, the Dominion, with power to enter into various fields of endeavour, it cannot have been intended by the *British North America Act* that all those fields which the Company might choose to occupy should be merged in its main undertaking—railways. The mere fact that it was enabled to venture into other activities does not permit it to claim that because it integrated these activities with those of its main business, the former thus became part and parcel of its railways. While as to one point the decision of the Judicial Committee in *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (2), is as to the effect of a declaration by Parliament under paragraph (*c*) of head 10 of section 92, the remarks of Duff J., as he then was, speaking on behalf of the Committee, at 207 and 208, are important to the point now under consideration. After pointing out that in 1905, by an Act of Parliament, the "railway" of the Esquimalt and Nanaimo Railway Company was declared to be "a work for the general advantage of Canada" and that the word "railway" in this statute signified by force of s. 2, subsec. 21, of the *Dominion Railway Act* (R.S. Can. 1906, c. 37):

> Any railway which the company has authority to construct or operate, and * * * all branches, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property, real or personal, and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorized to construct.

He continues:—

> Upon the passing of the Act of 1905, in virtue of the enactments of s. 91, head 29, and s. 92, head 10, of the *British North America Act*, 1867, the "railway" of the respondent company passed within the exclusive legislative jurisdiction of the Parliament of Canada and, accordingly, their Lordships think the Legislature of the Province ceased to possess the authority theretofore vested in it under head 10 of s. 92 and head 13 of the same section of that Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada," and to vest that title in another. It does not follow, however, that lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part

(1) [1932] A.C. 304. (2) [1922] 1 A.C. 202.

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of its "railway" or of its undertaking as a railway company were withdrawn from the legislative jurisdiction of the Province in relation to "property and civil rights"; and, in their Lordships' opinion, that authorty was, notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects.

For the same reasons the operation of an hotel is not necessarily incidental to a railway undertaking. Such cases as *Canadian Pacific Railway* v. *Notre Dame de Bonsecours* (1), *Madden* v. *Nelson and Ford Sheppard* (2) and *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (3), dealt with things or circumstances applicable strictly to railways and their operation.

It was next contended that the hotel had been declared to be for the general advantage of Canada so as to bring it within clause (*c*) of head 10 of section 92, and reliance was placed upon sections 5 and 6 of the present *Railway Act*, R.S.C. 1927, chapter 170. Section 5 provides in effect that the Act shall apply to all persons, railway companies and railways (with certain exceptions) within the legislative authority of the Parliament of Canada, and section 6 enacts that the provisions of the Act shall, without limiting the effect of section 5, extend and apply to

> (*c*) every railway or portion thereof * * * and every railway or portion thereof now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby deemed to be a work for the general advantage of Canada.

We were then referred to subsection 21 of section 2 of the *Railway Act*:—

> (21) "railway" means any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway;

The contention that "other structure", or any of the other words, include an hotel cannot prevail as the latter does not fall within the genus of the previously mentioned things which the definition of railway is stated to include. There is no declaration by Parliament under clause (*c*) of head 10 as to hotels and, on this branch of the matter, the decision in *Wilson* v. *Esquimalt*, already referred to, is conclusive.

(1) [1899] A.C. 367.
(2) [1899] A.C. 626.
(3) [1907] A.C. 65.

The hours of work and other working conditions of the Company's employees at the Empress Hotel are included in a collective bargaining agreement negotiated and signed by the bargaining representatives of such employees and the Company and provide, *inter alia*, that the employees shall work a forty-eight hour week. The agreement became effective September 1, 1945, for a period of one year and thereafter subject to termination on thirty days' notice in writing from either party, and no notice has been given. Under Dominion Order in Council P.C. 1003 dated 17th February, 1944, the Wartime Labour Relations Board was established by the Dominion. This Order in Council was passed under the authority of the *War Measures Act*, R.S.C. 1927, chapter 206, and continued in effect under *the National Emergency Transitional Powers Act*, 9-10 George VI (1945) (1st Session) chapter 25, by Order in Council P.C. 7414 and further continued in effect by (1947) 11 George VI, chapter 16. Finally, it was continued in force by Order in Council P.C. 5304, issued December 30, 1947, to March 31, 1948.

In the meantime and in fact prior to the agreement between the Company and its hotel employees, the Province had passed chapter 18 of the Statutes of 1944, by section 4 whereof Dominion Order in Council P.C. 1003, referred to above but called Dominion Regulations in the Act "shall apply in the case of employees whose relations with their employers in matters covered by the Dominion Regulations are ordinarily within the exclusive legislative jurisdiction of the Legislature in respect of their relations with their employers and to the employers of all such employees in their relations with such employees and to trade-unions, employees' organizations, and employers' organizations composed of such employees or employers." It is sufficient to say that whatever view may be taken as to the legal power which originally gave the agreement vitality, the latter may now operate only to the extent that it does not conflict with the *Hours of Work Act* as amended.

Finally, reference is made to chapter 33 of 23-24 George V, providing for co-operation between the Canadian National Railways and the Canadian Pacific Railway system, in which "Pacific Railways" is stated to mean the Canadian Pacific Railway Company as owner, operator, manager and otherwise and all other companies which are

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elements of the Company's transportation, communication, and hotel system. The title of the Act is indicative of its purpose but nothing of importance turns upon its provisions except the words "hotel system" and it is only because of an amendment, chapter 28 of the Statutes of 1947, assented to on June 27th of that year, that the Company suggests the argument now under consideration. By this Act, section 27A (1) is added to the principal enactment and reads as follows:—

27A. (1) The rates of pay, hours of work and other terms and conditions of employment of employees, of National Railways or Pacific Railways, engaged in the construction, operation or maintenance of National Railways or Pacific Railways shall be such as are set out in any agreements in writing respecting such employees made from time to time between National Railways or Pacific Railways, as the case may be, or an association or organization representing either or both of them, on the one hand, and the representatives of interested employees, on the other hand, whether entered into before or after the commencement of this Act, if such agreements are filed in the office of the Minister of Transport.

The agreement above referred to has been filed in the office of the Minister of Transport. It will be noticed that this statute was enacted not only after the date of the reference to the Court of Appeal but also after the question had been answered. However, accepting the view that an answer is desired in the light of the present position of affairs, it follows from what has already been said that the Dominion statute of 1947 is ineffective so far as concerns any employees of the Empress Hotel.

The appeal is dismissed.

The judgment of Taschereau and Estey JJ. was delivered by:

ESTEY J.:—The Government of British Columbia, under the provisions of the *Constitutional Questions Determination Act*, R.S.B.C. 1936, c. 50, submitted to the Court of Appeal of that province the following question:

Are the provisions of the *Hours of Work Act* being Chapter 122 of the "Revised Statutes of British Columbia, 1936", and amendments thereto, applicable to and binding upon Canadian Pacific Railway Company in respect of its employees employed at the Empress Hotel, and if so, to what extent?

The majority of the learned judges of that Court, O'Halloran J.A., dissenting, answered this question in the affirmative. The Canadian Pacific Railway Company appeals from that decision.

The *Hours of Work Act* provides that, subject to certain exceptions, the working hours shall not exceed eight in the day and forty-four in the week. The appellant does not dispute that legislation of this type is intra vires of the province but rather contends that it cannot affect the employees in the Empress Hotel, owned and operated as part of its railway and steamship system.

The respondent on its part concedes that the appellant owns and operates a railway throughout Canada which is subject to Dominion legislation only, but contends that its hotels are not a part of its railway within the meaning of section 92(10) of the *British North America Act*.

The relevant provisions of the *British North America Act* are sections 91(29) and 92(10), reading as follows:

91. * * * 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—

* * *

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.

* * *

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—

* * *

10. Local Works and Undertakings other than such as are of the following Classes:—

(*a*) 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:

* * *

(*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

The appellant's first submission is that hotels are an integral part of its system and included in the term "railway" as that word is used in 92(10) (*a*). The Privy Council has not defined the word "railway" as used in section 92(10) but has indicated in a general way the meaning of the term when defining the jurisdiction of the Parliament of Canada in the field of railway legislation.

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Lord Watson in *C.P.R.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1) at p. 372; 1 Cam. 558 at p. 562, stated:

> The *British North America Act,* whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia,* reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation", strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament.

In *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (2) the Privy Council held that the Dominion Parliament had full power to authorize the taking of provincial Crown lands by the company "for the purposes of this railway." This case was followed in *Attorney-General for Quebec* v. *Nipissing Central Ry. Co.* (3). In *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada* (4), the Privy Council used the phrase "truly railway legislation" and "truly ancillary to railway legislation". In this Court in *In re Alberta Railway Act* (5), Duff, J. (later Chief Justice) at p. 38 stated:

> In that view it seems to follow that when you have an existing Dominion railway all matters relating to the physical interference with the works of that railway or the management of the railway should be regarded as wholly withdrawn from provincial authority.

Throughout the foregoing cases the phrases "legislative control of * * * railway *quâ* railway", " 'railway legislation' strictly so called", "truly railway legislation", "for the purposes of this railway" indicate that, while the meaning of the term "railway" is not restricted to the roadbed and the rails, it cannot be given a meaning sufficiently wide as to include the term "hotel". Moreover, this seems to be in accord with the definition found in the Oxford Dictionary:

> Railway * * *
>
> * * *

(1) [1899] A.C. 367.
(2) [1906] A.C. 204; 1 Cam. 624.
(3) [1926] A.C. 715; 2 Cam. 411.
(4) [1907] A.C. 65; 1 Cam. 636.
(5) (1913) 48 S.C.R. 9.

2. A line or track consisting of iron or steel rails, on which carriages or wagons conveying passengers or goods are moved by a locomotive engine. Hence also, the whole organization necessary for the conveyance of passengers or goods by such a line, and the company or persons owning or managing it.

While it is true that definitions subsequently adopted in railway legislation of Canada cannot affect the meaning of the term "railway" as it appears in the *British North America Act,* it is not without significance to observe that in 1939 the Privy Council referred to the present definition of "railway" (The *Railway Act,* 1927 R.S.C., c. 170, s. 2(21)) as follows:

> "Railway" is defined by the Act (s. 2, sub-s. 21) in such a way as to restrict its meaning, unless the context otherwise requires, to the track and its physical appurtenances. *Montreal Trust Co.* v. *Canadian National Ry. Co.* (1).

It would appear, therefore, that neither in legislation, decision nor in the dictionary has the word "railway" acquired a meaning sufficiently broad and comprehensive to include hotels.

Moreover, the hotel business antedates that of the railway and has generally been regarded as a separate and distinct business. While it is true that for the travelling public hotels are necessary, they are not an essential or an integral part of the means of conveyance. Indeed, it was not until 1902 that the Parliament of Canada enacted The *Canadian Pacific Railway Act, 1902,* (1901-2 S. of C., c. 52) authorizing the company, for the purposes of its railway and steamships and in connection with its business, to acquire and operate hotels.

If in fact the company did operate hotels prior to that date, it did so, as was suggested at the hearing, mainly in the mountain sections, in the days before Pullman and dining cars and on a much smaller and entirely different basis from that which the company's hotels are operated today. Moreover, the material indicates that the Empress Hotel was built about thirty-eight years ago and therefore under the authority of the 1902 enactment. The conclusion appears to be unavoidable that hotels are not included under the term "railway" as used in section 92(10) (*a*).

(1) [1939] A.C. 613 at 625.

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The appellant submits that under section 92(10) (*c*) the Parliament of Canada by enacting section 6(*c*) of *The Railway Act*, (1927 R.S.C., c. 170), has declared the appellant railway "a work for the general advantage of Canada" and that the term "railway" in that declaration includes hotels, and therefore the latter are by virtue of the provisions of 91(29) and 92(10) (*c*) of the *British North America Act* under the legislative jurisdiction of the Dominion. *City of Montreal* v. *Montreal Street Ry.* (1); *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (2). It therefore becomes pertinent to determine whether hotels are included in this declaration.

6. The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to

* * *

(*c*) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company * * * is hereby declared to be a work for the general advantage of Canada.

A somewhat similar declaration has been included in all of the railway Acts since 1888 and although the language in successive enactments has varied, it has always been restricted to a declaration with respect to the railway, indeed, in the earlier enactments to the "lines of the railway", and there is nothing in these statutes to suggest that hotels are included under the term "railway". Nor is there anything in the present section 6 (*d*) to suggest that the word "railway" should be there construed otherwise than as defined in the interpretation section of the present statute, which reads:

2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires—

* * *

(21) "railway" means any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway.

The appellant submits that although hotels are not specifically mentioned, they are included in either of the phrases "and works connected therewith" or "other structure" as they appear in section 2(21). It is important

(1) [1912] A.C. 333; 1 Cam. 711. (2) [1922] A.C. 202; 2 Cam. 244.

to note that both of these phrases were part of the definition in the Act of 1888 and that notwithstanding this, Parliament has added many words since that time.

The word "railway" was first defined in *The Railway Act* of 1868 (31 Vict., c. 68, s. 5(16)):

> 5. (16) The expression "the Railway" shall mean the Railway and works by the Special Act authorized to be constructed.

This definition was substantially repeated until in *The Railway Act*, 1888, (51 Vict., c. 29), "railway" is defined as:

> 2. (*q*) The expression "railway" means any railway which the company has authority to construct or operate, and includes all stations, depots, wharves, property, and works connected therewith, and also any railway bridge or other structure which any company is authorized to construct under a special Act.

In *The Railway Act* of 1892, (55-56 Vict., c. 27) the words "rolling stock" and "equipment" were inserted into this definition after the word "wharfs". In *The Railway Act* of 1903, (1903 S. of C., 3 Edw. VII, c. 58), further additions were made by inserting the words "branches" and "sidings" before the word "stations", the word "stores" after the word "equipment", the words "real or personal" after the word "property" and the word "tunnel" after the word "bridge". Thereafter the definition remained substantially the same until in 1919 (9-10 Geo. V, c. 68, s. 2(21)), the words "and, except where the context is inapplicable, includes street railway and tramway" were added.

This definition is continued in the present Act R.S.C., 1927, c. 170, s. 2(21). It is significant that in 1903 when Parliament deemed it desirable to insert into the definition the words "branches", "sidings", "stores" and "tunnel", it did not include hotels, notwithstanding the fact that in the previous year Parliament had enacted *The Canadian Pacific Railway Act, 1902* (1901-2 S. of C., c. 52), and thereby for the first time authorized the company to acquire and operate hotels.

If Parliament had intended that these phrases should have been so comprehensive in meaning as to include hotels, these same phrases would have included all of the words that have been added since 1888. The history of section 2(21) indicates that Parliament did not entertain any such view and therefore from time to time, and more

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particularly in 1903, inserted the words above mentioned, all of which indicate that these phrases should be interpreted not to include hotels, but rather in accord with the *ejusdem generis* rule under which, having regard to the enumerations, would not include hotels.

The appellant submits that *The Canadian Pacific Railway Act, 1902,* (1901-2 S. of C., 2 Edw. VII, c. 52), and *The Canadian National-Canadian Pacific Act, 1933,* (1932-33 S. of C., 23-24 Geo. V, c. 33), read in association with *The Railway Act* demonstrates that its hotels are included in the railway. The Canadian Pacific Railway Company was incorporated by Special Act of the Parliament of Canada in 1881 (44 Vict., c. 1), and by letters patent under the Great Seal of Canada in the form set out in the schedule of that Act; and by section 17 of *Schedule A* to that Act it is provided that:

> 17. *"The Consolidated Railway Act, 1879"*, in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith.

Then in section 7(10) of *The Consolidated Railway Act, 1879,* (1879, 42 Vict., c. 9), the company is authorized:

> 7. (10) to construct and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of this Act, and of the Special Act.

This subsection appears among a large number of subsections detailing powers of the company and immediately follows authority to erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, etc., to make branch lines and to manage same, and it is suggested that this very general language justifies the inclusion of hotels as an integral part of a railway. Clauses of this type following specific authorizations are obviously intended to authorize some matter closely related and necessary to the authority already given, but do not and are not intended to give authority for the undertaking of works such as hotels.

Since Confederation successive railway Acts have expressly provided that the provisions thereof are to be read into and form a part of the Special Acts, except in

so far as they may be inconsistent with the provisions of the latter. In the present *Railway Act,* 1927 R.S.C., c. 170, it is provided:

> 3. Except as in this Act otherwise provided,
> (*a*) this Act shall be construed as incorporate with the Special Act; and
> (*b*) where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act shall, in so far as it is necessary to give effect to such Special Act, be taken to override the provisions of this Act.

The phrase "Special Act" as used in the above quoted section 3 is defined in section 2(28):

> 2. (28) "Special Act", when used with reference to a railway, means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, whether heretofore or hereafter passed, and includes
> (*a*) all such Acts,
> (*b*) with respect to the Grand Trunk Pacific Railway Company, the National Transcontinental Railway Act, and any amendments thereto, and any scheduled agreements therein referred to, and
> (*c*) any letters patent, constituting a company's authority to construct or operate a railway, granted under any Act, and the Act under which such letters patent were granted or confirmed;

The Canadian Pacific Railway Act, 1902, (1901-2 S. of C., c. 52) is a Special Act within the meaning of sections 2(28) and 3(*a*), *supra,* and therefore *The Railway Act of 1927* "shall be construed as incorporate with" it. Sections 6(*c*) and 2(21), (both already quoted), are therefore to be construed as part of the 1902 Act.

It will be observed that the definition 2(21) applies not only to *The Railway Act* itself, but to any Special Act unless the context otherwise requires. Nothing appears in the context of section 8 of *The Canadian Pacific Railway Act, 1902,* to justify a construction of the word "railway" as therein used other than as defined in section 2(21). Section 8 reads in part:

> 8. The Company may, for the purposes of its railway and steamships and in connection with its business * * * acquire * * * hotels and restaurants * * * and may carry on business in connection therewith for the comfort and convenience of the travelling public * * *

This section permits and empowers but does not obligate the Canadian Pacific Railway Company to acquire and operate hotels as an essential or an integral part of its railway. The language of the section appears to negative that idea. It provides that "the company may, for the

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purposes of * * * in connection therewith". This language negatives the appellant's submission and suggests that these hotels may be operated in association with the railway and "for the comfort and convenience of the travelling public", but not as a necessary or indispensable part of the railway and steamship system. Moreover, in this section the phrase "travelling public" is not restricted to those enjoying the company's lines, and while the statute authorizes these hotels for the purpose of its railway and steamship business and to be located as specified, the statute does not limit or give any preference with respect to the accommodation, and indeed, in practice the hotels cater to the public.

The appellant emphasizes the provisions of *The Canadian National-Canadian Pacific Act, 1933,* (1932-33, 23-24 Geo. V, c. 33), as a Special Act and submits that its provisions support its contention that hotels are included within the term "railway" as used in the declaration embodied in section 6(*c*). It is an Act respecting the Canadian National Railway Company and to provide for co-operation between the Canadian National Railways and the Canadian Pacific Railway system. If we assume that it is a Special Act as the appellant contends, it does not follow that it includes the hotel system of the appellant so as to bring hotels within the terms of section 6(*c*). The Act in section 3(*g*) defines "Pacific Railway" to include the hotel system. It does not follow, however, that this definition, made for the purpose of that Act, alters or changes in any way the definition of the word "railway" in section 2(21) or as it is used in section 6(*c*), both of which are to be read as parts of the *Canadian National-Canadian Pacific Act.* Moreover, a perusal of the 1933 Act, in so far as it affects the appellant company, indicates that its intent and purpose is to assist the appellant and the Canadian National Railways in working out a scheme of co-operation in all of their operations as defined under the respective headings "Pacific Railway" and "National Railway". It does not purport to alter or affect the powers or obligations, nor the general character of the business of the appellant company. It would rather appear that Parliament in 1933 intended that the definition of "Pacific Railways" and "National Railways" should be applied only to the

relevant sections as they are set out in that Act, but not as applicable to the provisions of *The Railway Act,* though they "shall be construed as incorporate" therewith (section 3, Railway Act, *supra*).

The appellant submits that in any event legislation with respect to its hotels is necessarily incidental or ancillary to effective legislation in respect of its railway system and therefore provincial legislation which may be intra vires of the province in general is not applicable to the appellant's hotels. The scope or field of Dominion legislation under this head is indicated in *Attorney-General for Ontario* v. *Attorney-General for The Dominion,* (Ontario Liquor License Act) (1). In that case the Privy Council pointed out that the framers of the B.N.A. Act contemplated that in the exercise of the enumerated powers under section 91 the Dominion would be called upon to pass legislation necessarily incidental to these powers in relation to matters which prima facie were within the exclusive legislative jurisdiction of the province under the enumerated heads of section 92. It was because of this that the concluding part of section 91 was enacted providing that any matter included in one of the enumerated classes under 91 should not be deemed to come within the classes enumerated under section 92. At p. 359 (1 Cam. 490), Lord Watson states:

> It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91.

In the application of the foregoing principle the Privy Council has recognized the impossibility of laying down any general principle which would be applicable to all of the specified heads under 91. *John Deere Plow Co.* v. *Wharton* (2). It has rather indicated that each case must be determined upon its own facts. Notwithstanding this, the judgments already delivered are of assistance in determining the issue in any given case.

As already pointed out, the Privy Council in determining the jurisdiction of the Dominion in respect to railways has used such phrases as "*quâ* railway", "railway legislation strictly so called" and "truly railway legislation". It is

(1) [1896] A.C. 348; 1 Cam. 481 (2) [1915] A.C. 330; 1 Cam. 806

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the railway as a vehicle of transportation that is envisaged throughout and if legislation with respect to hotels is necessarily incidental thereto it must be within the authorities established that the transportation system would be in respect of its passenger service, in any practical sense, ineffective.

Mr. Justice Duff (later Chief Justice) in *B.C. Electric Rly. Co.* v. *V.V. and E. Rly. & Navigation Co. and The City of Vancouver* (1), at p. 120 stated:

> In this view then in every case in which a conflict does arise the point for determination must be whether there exists such a necessity for the power to pass the particular enactment in question as essential to the effective exercise of the Dominion authority as to justify the inference that the power has been conferred. *The City of Montreal* v. *The Montreal Street Railway Co.*, (1912) A.C. 333, at pages 342-345.

The conclusion arrived at by Mr. Justice Duff was accepted by the Privy Council: (1914) A.C. 1067.

In *Attorney-General for Canada* v. *Attorney-General for British Columbia* (2), the Dominion had by legislation required the operator of a fish cannery to obtain a licence. In support of this legislation it was contended that the operation of canneries and curing establishments were both inseparably connected with the conduct of fisheries as contemplated in section 91(12), "sea coast and inland fisheries", or that it was reasonably necessary or ancillary to effective legislation under section 91(12). Both contentions were dismissed by the Privy Council and the legislation held ultra vires. As to the first, it was stated at p. 121, (Plaxton, p. 10):

> In their Lordships' judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "sea coast and inland fisheries."

As to the second, at p. 121-2, (Plaxton, p. 11):

> It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject-matters.

That hotels are from the appellant's point of view desirable and serve a useful purpose may be admitted, but it does not follow that they are essential to the appellant's railway and steamship system in the sense that the latter can only be effectively operated and maintained on the

(1) (1913) 48 S.C.R. 98. (2) [1930] A.C. 111; Plaxton, 1.

basis that legislation with respect to hotels is necessary and incidental to effective railway legislation. That such legislation is necessary and incidental does not appear from the nature and character of the business of the railway and such has not been established as a fact in this particular case.

The foregoing is not affected by the provisions of *an Act to amend the Canadian National-Canadian Pacific Act, 1933,* (1947 S. of C., c. 28), which added section 27A providing as follows:

> 27A. (1) The rates of pay, hours of work and other terms and conditions of employment of employees * * * shall be such as are set out in any agreements * * * made * * * between * * * Pacific Railways * * * and the representatives of interested employees * * *

In the view already expressed to the effect that hotels are not included in the term "railway" nor that legislation in respect to hotels is necessarily incidental or ancillary to railway legislation within section 92(10), this section 27A can have no application to hotels, and in so far as it may purport to do so is ultra vires of the Parliament of Canada. *City of Montreal* v. *Montreal Street Ry. Co., supra*; *B.C. Electric Ry. Co. Ltd.* v. *V.V. and E. Ry. & Navigation Co.*, (1).

I am therefore in agreement with the majority of the learned judges in the Appellate Court that the question submitted should be answered in the affirmative.

RAND J.:—The Canadian Pacific Railway Company was incorporated by Dominion charter under the authority of and with the effect declared by chap. 1 of the Statutes of Canada, 1881. Later on, in 1883, chap. 24 purported to declare the railway as a system, including branch lines, to be a work for the general advantage of Canada. Chap. 52 of the statutes of 1902 enacted that:—

> 8. The Company may, for the purposes of its railway and steamships and in connection with its business, build, purchase, acquire or lease for hotels and restaurants, such buildings as it deems advisable and at such points or places along any of its lines of railway, and lines operated by it or at points or places of call of any of its steamships, and may purchase, lease and hold the land necessary for such purposes, and may carry on business in connection therewith for the comfort and convenience of the travelling public, and may lay out and manage parks and pleasure grounds upon the property of the Company and lease the same from or give a lease thereof to any person, or contract with any person for their use, on such terms as the Company deems expedient.

(1) [1914] A.C. 1067.

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By the Act of 1881 the provisions of *The Consolidated Railway Act, 1879,* are, generally, incorporated into the charter of the company. Section 7 of the Consolidated Act vests the company with authority.

(8). To erect and maintain all necessary and convenient *buildings,* stations, depots, wharves, and fixtures, and from time to time to alter, repair or enlarge the same, and to purchase and acquire stationary or locomotive engines and carriages, waggons, floats and other machinery necessary for the accommodation and use of the passengers, freight and business of the railway;

* * *

(10). To construct and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of this Act, and of the Special Act.

In *The Railway Act, 1919,* chap. 170 of the Revised Statutes, 1927, "Special Act" with reference to a railway is defined as meaning "any Act under which a company has authority to construct or operate a railway or which is enacted with special reference to such railway, whether heretofore or hereafter passed * * * ." By section 6 of this Act its provisions extend and apply to

(*c*) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada * * *; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

Under these powers, the railway has been established throughout the Dominion and with it a number of hotels. One of them was built about 1909 in Victoria, B.C., a point reached by steamship services of the company as well as by its railway system. The company built the hotel "for the purpose of its lines of railway and steamships and in connection with its said business" and it is operated "for the comfort and convenience of the travelling public." It "is available for the accommodation of all members of the public as a public hotel." It "caters to public banquets and permits the use of its hotel ballroom for local functions, for reward." With 573 rooms, it provides accommodation for large numbers of travellers and tourists from Canada, the United States of America and elsewhere. Its operation is a means of increasing passenger and freight traffic upon the company's lines of railway and steamships. Meals

are prepared and served in the hotel by the catering department. There are also hotel clerks, bookkeepers and other persons engaged in clerical work.

The controversy concerns a labour agreement between the employees of the hotel and the company. Under section 6 of the *Wartime Labour Regulations*, made by Order in Council P.C. 1003 dated February 17, 1944, the War Labour Relations Board (National) certified the Canadian Brotherhood of Railway Employees and other Transport Workers, Empress Division No. 276 and certain persons named in the Order, to be the bargaining representatives for the employees except certain of the latter named in the certificate.

Following that action, a collective agreement was negotiated which became effective on September 1, 1945 to continue for one year and thereafter to be subject to termination on thirty days' notice by either party. By this agreement the rates of pay, hours of work and other terms and conditions of employment were dealt with, and it has remained and is now in force.

By chap. 122 of the Revised Statutes of British Columbia (1936) called the *Hours of Work Act* the hours of labour of hotel clerks, including room clerks or persons otherwise engaged in clerical work in hotels, and employees in the catering industry, among others, are prescribed. General administrative powers are given for carrying the provisions of the Act into effect. The question raised is whether or not these provisions apply to and bind the company in respect of such employees and if so, to what extent.

The case for the appellant is put on several grounds. It is said, first, that the hotel is an integral part of the railway; that the relations between the company and the hotel employees are matters essential to the management of the entire enterprise; and that consequently they are within the exclusive legislative jurisdiction of the Dominion. If this is not so, then the regulation of the terms of service of the hotel employees is necessarily incidental to railway legislation and Parliament in the exercise of such powers has occupied the field. Finally it is said that the hotel has been declared to be a work for the advantage of Canada, and is so within the same exclusive jurisdiction.

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The first point involves the view that every authorized activity of the company which may promote the interest of the railway and is carried on under the general administration becomes part of its works and undertaking within the meaning of section 92, (10) (*a*). The company no doubt is bound to furnish reasonable accommodation to persons who travel on its lines. In the long carriage from the Atlantic to the Pacific reasonable provision of facilities for both food and rest and incidental convenience is an integral part of the service it has undertaken toward the public. It is conceivable, also, that dining rooms and sleeping quarters along its lines, certainly in the early days of its operation, might well have come within its public obligations towards passengers and to have been a necessary part of its railway functions. But I think it impossible to bring this hotel within that accommodation. It is a public hotel to which all travellers have a right of access. It may no doubt serve the convenience of patrons of the company's railway, as well as of the steamship and communication services, for all of which it possesses advertising value as well; but it is a distinct and separate business, not different from a score of means by which subsidiary offices having similar effects could be rendered. As a public hotel, the common law obligations would, in the absence of legislation, bind it and it would seem an extraordinary proposition that, so far, the law of innkeepers as the substantive law of this constituent element would now be brought within Parliamentary jurisdiction over railways. But to say that legislation in relation to such collateral adjuncts even in its limited application as here to employees, is railway legislation strictly, is, I think, to confuse the total business of the company with its transportation business. Its corporate organization is a creation of Parliament and under the residual power of section 91 its capacities may be unlimited. But from that source Parliament draws power to deal only with essential corporate incidents; and none of the enumerated heads of section 91 apart from 29 has been suggested as capable of supplementing that power to the extent of supporting any legislation relied on here.

If not railway legislation strictly, can the Dominion enactment dealing with the working hours of these em-

ployees be deemed necessarily incidental to railway legislation as that expression is used in: *Attorney-General of Ontario* v. *Attorney-General of Canada* (1); *Attorney-General of Ontario* v. *Attorney-General of Canada* (2) at p. 360; *City of Montreal* v. *Montreal Street Ry.* (3) at p. 343; *Reference re Natural Products Marketing Act* (4) at p. 414; *Attorney-General of Canada* v. *Attorney-General of British Columbia* (5).

The legislation is section 27(A) of *The Canadian National-Canadian Pacific Act, 1933,* chap. 33 of the Statutes of Canada (1932-33) enacted by chap. 28 of the Statutes of 1947:—

> 27A. (1) The rates of pay, hours of work and other terms and conditions of employment of employees, of National Railways or Pacific Railways, engaged in the construction, operation or maintenance of National Railways or Pacific Railways shall be such as are set out in any agreements in writing respecting such employees made from time to time between National Railways or Pacific Railways, as the case may be, or an association or organization representing either or both of them, on the one hand, and the representatives of interested employees, on the other hand, whether entered into before or after the commencement of this Act, if such agreements are filed in the office of the Minister of Transport.
>
> (2) Nothing in this section shall affect the operation of any other Act of the Parliament of Canada or regulations thereunder.

For the purposes of that section the expression "Pacific Railways" includes the hotels and the hotel department of the company.

No doubt the conception of an articulated organization of many elements all contributing in greater or less degree to a total result is attractive by its symmetry and unity. The analogy of *Toronto Corporation* v. *The Bell Telephone Company* (6) is urged but there the question was simply whether for the purposes of legislation the local telephone services were to be deemed a separate business or whether the entire services were to be taken as one. The true analogy to that case lies in railway operations proper both within and without the provinces. But if a telephone company should embark on the business of manufacturing radio or television receiving sets, a question of a different sort would be presented. As appears from the answers to the Reference on Hours of Labour [1925] S.C.R. 505, general legislation on that subject is prima facie valid

(1) [1894] A.C. 189.
(2) [1896] A.C. 348.
(3) [1912] A.C. 333.
(4) [1936] S.C.R. 398.
(5) [1930] A.C. 111.
(6) [1905] A.C. 52.

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either under head 13 or 16 of section 92, and where, as here, those matters are in relation to a public hotel it would be unique that in effect ownership of the hotel would fix its legislative subjection.

In dealing with this category of Dominion power, it is well to keep in mind the distinction between subject matter and legislation relating to it. Where works or undertakings as such are brought within Dominion jurisdiction, the delimitation of the field for legislative purposes involves the consideration of property and functions which go to make up the specific subject. But the incidental necessity with which we are dealing arises from the exercise of admitted powers and its purpose is to make them effective or to prevent their defeat: that is, that on a fair and reasonable view of the exclusive field, the ancillary provisions are essential to give the main legislation a practical completeness depending on the intimacy of underlying facts and relations: *Grand Trunk Railway Co.* v. *Attorney-General of Canada* (1) where at p. 68 Lord Dunedin says "it cannot be considered out of the way that the Parliament which calls them (railway corporations) into existence should prescribe the terms which were to regulate the relations of the employees to the corporation."

Applying that criterion to the situation of this hotel, I am unable to accept the view that, whether the hotel is considered alone or as one of a chain or system of hotels, and notwithstanding that the central general administration of all under uniform regulations would be practically convenient and advantageous, an ancillary power even restricted to the limited relations of these employees, can be said to be necessary to obtain the full effect of legislation relating to or to secure a like effect of the substantive law applicable to the company's transportation works or undertaking.

The last point is whether the hotel has been the subject of a declaration under section 92, head 10 (*c*). This arises, it is said, from two legislative sources. The first is the declaration of section 6 of *the Railway Act, 1919* and its predecessor provisions. The definition of "railway" in section 2(21) of that Act includes "property, real or personal, and works connected therewith, and also any railway

(1) [1907] A.C. 65.

bridge, tunnel or other structure which the company is authorized to construct". It is argued that the hotel is within either "property" or "works" or "structure". Then, it is said that *The Canadian National-Canadian Pacific Act*, being a special Act and so incorporating the Railway Act of 1919, presents to the provisions of the latter the definition of "Pacific Railways" therein which includes the hotel system; and that the declaration of section 6 of *The Railway Act* automatically embraces that system distributively with the railway proper as a work under section 92(10) (*c*).

The railway as it originated in 1881 was a "work or undertaking connecting two or more provinces", within head 10(*a*). Under 10(*c*) a work must be wholly confined within one province and at the time within provincial legislative jurisdiction to be the subject of a declaration and the so-called declaration of 1883 as well as those later so far as they purport to deal with the railway as a whole have been no more than ineffectual motions. It seems impossible moreover to construe any words in the various definitions of "railway" quoted, such as "property" or "works" or "structures", to include public hotels as such. These words deal with the physical structures of the railway proper; and the legislaiton of 1902, although said to have provided powers more by way of caution than necessity, supports that view. Whatever may have been the actual situation in Great Britain in 1867 of railway hotels, the history of the railways of the United States, which our own development has followed closely, has never associated hotels with railway functions. I am unable, therefore, assuming that a hotel can be a "work" within 10(*c*), to agree that the hotel here has been drawn by any of these declarations into the Dominion orbit; and that in conjunction with the legislation of 1933 such a result could have been brought about is, I think, somewhat fantastic. The expression "Pacific Railways" is nowhere used in the *Railway Act* and could not be connected with any of its provisions. The relation of special Acts to the *Railway Act* arises under section 3 of the latter which provides that "except as in this Act otherwise provided,

(*a*) This Act shall be construed as incorporated with the Special Act; and

(*b*) Where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject matter,

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the provisions of the Special Act shall, insofar as is necessary to give effect to such a Special Act, be taken to override the provisions of this Act.

The purpose of this provision is obvious and it leaves the language of each Act interpretatively unaffected by that of the other.

The appeal should therefore be dismissed.

KELLOCK J.:—The first submission on behalf of the appellant is that by reason of section 91 (29) and section 92(10) (*a*) of the *British North America Act,* the field covered by the provincial statute here in question, is wholly withdrawn from the legislative jurisdiction of the province, the hotels of the appellant being, it is said, included in the term "railways". It is submitted, and I think correctly, that the words "lines of" with which clause (*a*) of section 92(10) begins, apply only to "steam and other ships" and not to the other things enumerated in the clause.

In my opinion there is nothing to support the appellant's contention with respect to the import of the word "railways" in the statute. It is railway legislation "strictly so-called" which is here committed to the Dominion; *C.P.R.* v. *Bonsecours,* (1) per Lord Watson at 372. In the first edition of Murray, "railway" is defined as "A line or track consisting of iron or steel rails on which carriages or wagons conveying passengers or goods are moved by a locomotive engine, hence also, the whole organization necessary for the conveyance of passengers or goods by such a line and the company of persons owning or managing it". Sedgewick J. in giving the judgment of himself and Strong C.J., in *Grand Trunk* v. *James* (2) said at p. 432:

> Everyone knows what the word "railway" ordinarily means; ("a way on which a train passes by means of rails"), quoting Huddleston, B., in *Doughty* v. *Firbank,* 10 Q.B.D., 358 at 359.

Counsel for the appellant sought support for his position in Canadian railway legislation commencing with the Act of 1868, 31 Vict., *cap.* 68. He referred to section 7, subsections 8 and 10, as illustrating that at the time of the passing of the Constitution Act, "railways" were regarded as inclusive of hotels. Those subsections are as follows:

> 7. The Company shall have power and authority:
>
> * * *

(1) [1899] A.C. 367.

(2) (1901) 31 S.C.R. 420.

(8) To erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, and from time to time to alter, repair or enlarge the same, and to purchase and acquire stationary or locomotive engines and carriages, waggons, floats and other machinery necessary for the accommodation and use of the passengers, freight and business of the Railway;

* * *

(10) To construct, and make all other matters and things necessary and convenient for the making, extending and using of the Railway, in pursuance of this Act, and of the Special Act;

For my part I find nothing in these subsections which indicate any legislative intention of the character contended for. The words "necessary for the accommodation and use of the passengers, freight and business of the Railway" in subsection 8 do not, in my opinion, apply to the whole of the subsection but only to those items following upon the word "purchase". In any event there is no evidence that a hotel was a "necessary" building in connection with railways in Canada or elsewhere in 1867 and I think the word "convenient" in subsection 8 is not used in any larger sense than in subsection 10, where it is only what is convenient for the making, extending and using of the "railway" which is authorized. "Railway" is defined in section 5, subsection 16, as "the railway and the works by the Special Act authorized to be constructed." We have no evidence that up to 1868 any special railway legislation had authorized the construction of a hotel, and I find nothing in the Special Act relating to the appellant, 44 Vict. (1881) *cap.* 1, which contains such authority.

In fact it was not until the Act of 1902, 2 Ed. VII, *cap.* 52, section 8, that the appellant was authorized to operate hotels and to "carry on business in connection therewith for the comfort and convenience of the travelling public". It is noteworthy that by the following section, section 9, the appellant was also, in order to utilize its land grant, (which by clause 11 of the Schedule to the Act of 1881, extended for twenty-four miles on each side of the "railway") authorized to engage in general mining, smelting and reduction, the manufacture and sale of iron and steel and lumber and timber manufacturing operations. And by section 11 it was authorized to exercise the powers of an irrigation company. I do not discover in any of this legislation an intention that any of the matters to which the

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legislation of 1902 extended, was intended to be included in the word "railways" as used in the legislation of 1867. I think this contention fails.

It is next contended that appellant's hotels, including the Empress, have been declared to be works for the general advantage of Canada within clause (*c*) of section 92 (10). Counsel for the appellant points first to *The Consolidated Railway Act* of 1879, 42 Vict., *cap.* 9, section 5 (16), which defines "the railway" as meaning "the railway and the works by the Special Act authorized to be constructed". He then refers to clause 17 of Schedule "A" to the Act of 1881 which provides that the Act of 1879 insofar as applicable and not inconsistent with the provisions of the 1881 legislation and save and except as otherwise therein provided, is incorporated therewith. Down to this point of course there was no authority for the construction of hotels. Next followed the Act of 1902 and *cap.* 33 of 23-24 Geo. V. Counsel then refers to section 3(*a*) of R.S.C., 1927, *cap.* 170, which provides that that statute shall be construed as incorporate with the "Special Act", which by section 2 (28) means "any Act under which the Company has authority to construct or operate a railway, or which is enacted with special reference to such railway, whether heretofore or hereafter passed, and includes (*a*) all such Acts". It is argued that the result of this legislation is that hotels have become an integral part of the appellant's "railway" and come within section 6(*c*) of the 1927 Act, which reads as follows:

> 6. The provisions of this Act shall * * * extend and apply to * * *
>
> (*c*) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased or operated by a company wholly or partly within the legislative authority of the Parliament of Canada * * * and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

In my opinion there is infirmity in this argument. It is sufficient to refer to one point. "Railway" is defined by section 2(21) as:

> Any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and

works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway.

Under clause (*c*) of section 92 (10) a declaration may be made only with respect to a work "wholly situate within the province"; *Toronto* v. *Bell Telephone Company* (1) at 60. The "railway" of the appellant company is not so situate. It is, however, sought to read "other structure" in section 2(21) as including a hotel and then to read section 6 (*c*) as meaning "every railway or every hotel thereof", so that there is a declaration not only as to the whole "railway" which would be ineffective, but also as to each "bridge", "tunnel", "hotel", etc.

In my opinion this is not a legitimate interpretation of the statute. Whatever the words "or portion thereof" apply to, they may not, in my opinion, be applied as appellant seeks. I do not think "structure" is to be read as including such things as hotels or mine buildings or an irrigation work. It is to be noted that it is only structures which the company is authorized to "construct" which are included. In the legislation of 1902 the company is authorized not only to "build" buildings for hotels but to "purchase, acquire or lease" them. On appellant's contention a hotel built by appellant would be included in the declaration while one purchased or acquired would not. In my opinion the structures included in section 2(21) are limited *ejusdem generis* to the ones specified in the clause. These are clearly limited, to employ the language of Lord Russell of Killowen in *Montreal Trust Co.* v. *C.N. Ry. Co.* (2) at 625: "* * * to the track and its physical appurtenances", unless the context otherwise requires. I see no such requirement in the context here in question. However the argument is put, it comes back to the question of the proper interpretation of the definition section of the Act of 1927 which, in my opinion is to be interpreted as above indicated.

In *Wilson* v. *Esquimalt* (3) also, Duff J., as he then was, in delivering the judgment of the Privy Council dealt with the definition of "railway" in the *Railway Act,* 1906, R.S.C., *cap.* 37, section 2, subsection 21. After referring to an Act of Parliament of 1905 declaring the railway of

(1) [1905] A.C. 52.
(2) [1939] A.C. 613.
(3) [1922] 1 A.C. 202.

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the respondent company to be a work for the general advantage of Canada, he said at page 207:

> Upon the passing of the Act of 1905, in virtue of the enactments of s. 91, head 29, and s. 92, head 10, of the British North America Act, 1867, the "railway" of the respondent company passed within the exclusive legislative jurisdiction of the Parliament of Canada and, accordingly, their Lordships think the Legislature of the Province ceased to possess the authority theretofore vested in it under head 10 of s. 92 and head 13 of the same section of that Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada," and to vest that title in another. It does not follow, however, that lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part of its "railway" or of its undertaking as a railway company were withdrawn from the legislative jurisdiction of the Province in relation to "property and civil rights"; and, in their Lordships' opinion, that authority was, notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects.

In my opinion therefore there is no basis for the contention of the appellant that with respect to the Empress Hotel such matters as hours of work are within the exclusive jurisdiction of Parliament.

It is, however, submitted that in any event such legislative jurisdiction is nevertheless necessarily incidental to effective legislation by the Dominion on a subject enumerated in section 91 and it is said that the Dominion has by *cap.* 28 of 11 Geo. VI occupied the field.

The authorities on this aspect of the matter are well known and it is not necessary to discuss them at length. In *Montreal* v. *Montreal Street Railway* (1) Lord Atkinson at 344 said with respect to such a contention, "that it must be shown that it is necessarily incidental to the exercise of control over the traffic of a federal railway * * *" that it should have the power in question there. I find no such compelling necessity in the present case. I do not think such legislation is "necessarily incidental to effective legislation by the Parliament of the Dominion" with respect to "railways"; *Attorney-General for Canada* v. *Attorney-General for Quebec* (2) at 43.

If this be so then Parliament may not give itself jurisdiction by enacting legislation such as the Act of 1947, by including in it the employees of the appellant's hotel system and in so far as it purports to do so, the legislation is, in my opinion, ultra vires. We are not called upon to deal with the question of severability, which was not argued.

(1) [1912] A.C. 333. (2) [1947] A.C. 33.

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The only argument addressed to us by counsel for either of the appellants with respect to P.C. 1003 was founded upon the basis that this order depended for its application upon bringing the appellant's hotel employees within section 3(1) (*a*) or (*b*). For the reasons already given this cannot be done and in my opinion therefore the order has no application.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for Canadian Pacific Railway Co., *J. A. Wright.*

Solicitor for The Attorney-General of British Columbia, *H. Alan MacLean.*

Solicitor for The Attorney-General of Canada, *F. P. Varcoe.*

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*Feb. 9, 10, 11, 12, 13, 16
*June 25

IN THE MATTER OF a Reference by His Honour the Lieutenant Governor of the Province of British Columbia in Council to the Court of Appeal of Certain Questions Relative to the Esquimalt and Nanaimo Railway Company Land Grant from the Dominion of Canada on 21st April, 1887.

ESQUIMALT AND NANAIMO RAILWAY COMPANY,

AND

ALPINE TIMBER COMPANY LTD.

AND

THE ATTORNEY-GENERAL OF CANADA .....

} APPELLANTS;

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA .....

} RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Statutory exemption from taxation—Parliamentary contract—Public statute—Severance tax—Levies—Indirect taxation—Interpretation Act, c. 2 of Consolidated Act, 1877, of B.C.—Forest Act, c. 102, R.S.B.C. 1936, s. 123, am. c. 29, Statutes of 1946—Constitutional Questions Determination Act, c. 50, R.S.B.C., 1936.

*PRESENT: Kerwin, Rand, Kellock, Estey and Locke JJ.

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By an Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province, cap. 14, Statutes of British Columbia 1884, sec. 22, it was provided that:—"The lands to be acquired by the company from the Dominion Government for the construction of the railway shall not be subject to taxation unless and until the same are used by the company for other than railroad purposes or leased, occupied, sold or alienated."

Held: answering a question submitted by the Lieutenant-Governor in Council under the provisions of The Constitutional Questions Determination Act, cap. 50 R.S.B.C. 1936, and reversing the judgment of the Court of Appeal, that the Province of British Columbia was obligated by contract to exempt from taxation the lands acquired by the Esquimalt and Nanaimo Railway Company from the Dominion Government and remaining in its hands in the manner provided by the section.

Held: reversing the judgment of the Court of Appeal (except as to Question 4) the further questions submitted should be answered in the manner indicated in the Statement of Facts.

APPEAL from the decision of the Court of Appeal for British Columbia on certain questions relative to the Esquimalt and Nanaimo Railway Company Land Grant from the Dominion of Canada on 21st April, 1887, referred to the Court by His Honour the Lieutenant Governor of British Columbia.

By the Terms of Union which declared the conditions upon which the Colony of British Columbia became part of Canada, the Dominion undertook to secure the commencement within two years and the construction within ten years from the date of the Union of a railway to connect the Pacific sea board with the railway system of Canada. The province agreed to convey to the Dominion in trust, to be appropriated in such manner as the Dominion Government might deem advisable, in furtherance of the construction of the railway, an extent of public lands along the line of railway not to exceed twenty miles on each side of the said line. By Order-in-Council of June 7, 1873, the Dominion fixed Esquimalt as the terminus of the proposed railway, it being then contemplated that the line should cross to Vancouver Island at Seymour Narrows and proceed thence to Esquimalt. Later the Dominion determined that the terminus should be at a place upon Burrard Inlet. The Province contended that the Terms of Union required the construction of the railway on Vancouver Island as a section of the Canadian Pacific Railway but the Dominion

contended that the terminus on Burrard Inlet complied with the said Terms of Union. On August 20, 1883, an agreement was made, subject to the approval of Parliament and the Legislature, whereby Canada agreed to contribute a sum of $750,000 towards the cost of construction of a railroad between Esquimalt and Nanaimo and to convey to a company to be incorporated to construct the railway lands upon Vancouver Island lying between Esquimalt and Seymour Narrows, to be conveyed by the Province to the Dominion for that purpose. A draft of the Act to be passed by the Legislature approved by the representatives of the Dominion and the Province provided that:—

> the lands to be acquired by the company from the Dominion Government for the construction of the railway shall not be subject to taxation unless and until the same are used by the company for other than railroad purposes or leased, occupied, sold or alienated.

On the same date a memorandum of agreement was signed between the Dominion and Robert Dunsmuir et al as contractors for the construction of the railway, which was to bind the parties only upon the passage of the agreed legislation by the Dominion and the Province and which provided, inter alia, for the payment of the sum of $750,000 in instalments and the conveyance by the Dominion to the company to be formed of the lands received by it from the Province upon the completion of the railway. In December 1883 an Act in the form so agreed upon was passed by the Legislature (cap. 14, Statutes of B.C. 1884) which provided for the incorporation of such persons as might be nominated by the Governor General in Council as the Esquimalt and Nanaimo Railway Company and, by cap. 6, Statutes of Canada, 1884, the agreements were approved by the Dominion and thereafter Robert Dunsmuir and his associates were nominated by the Governor General in Council as the persons to be so incorporated. The company constructed the railroad in accordance with its contract and received from the Dominion a conveyance of the lands.

In consequence of a report made by the Chief Justice of British Columbia, acting as a Commissioner under the Public Inquiries Act of British Columbia appointed to inquire into the forest resources of the Province and the legislation relating thereto, and among other matters to

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inquire into and report upon "Forest Finance and Revenue to the Crown from Forest Resources", wherein the Commissioner expressed the opinion that there was no contract between the Province and the company which would be broken by the imposition of a severance tax upon timber cut upon the lands remaining in the hands of the railway company after such lands were sold or otherwise alienated, the Lieutenant-Governor in Council acting under the Constitutional Questions Determination Act (cap. 50, R.S.B.C. 1936) referred the following questions to the Court of Appeal for hearing and consideration:

Question 1. Was the said Commissioner right in his finding that "there never was any contractual relationship between the provincial government and the contractors or the Railway Company in relation to the transfer of the Railway Belt to the Railway Company?"

Question 2. If there was a contract, would any of the legislation herein outlined, if enacted, be a derogation from the provisions of the contract?

Question 3. Was the said Commissioner right in his finding that "There is no contract between the Province and the company," which would be breached by the imposition of the tax recommended by the Commissioner?

Question 4. Would a tax imposed by the Province on timber, as and when cut upon lands in the Island Railway Belt, the ownership of which is vested in a private individual or corporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be ultra vires of the Province?

Question 5. Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:—

(*a*) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land:

(*b*) The tax shall approximate the prevailing rates of royalty per thousand feet of merchantable timber:

(*c*) The owner shall be liable for payment of the tax:

(*d*) The tax until paid shall be a charge on the land.

Question 6. Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:—

(*a*) The tax shall apply only to land in the belt when used by the railway company for other than railroad purposes, or when leased, occupied, sold, or alienated:

(*b*) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, it shall thereupon be assessed at its fair market value:

(*c*) The owner of such land shall be taxed on the land in a percentage of the assessed value, and the tax shall be a charge on the land:

(*d*) The time for payment of the tax shall be fixed as follows:

(i) Within a specified limited time after the assessment, with a discount if paid within the specified time;

(ii) Or at the election of the taxpayer made within a specified time after assessment, by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut during that year bears to the assessed value of the land.

Question 7. Is the Esquimalt and Nanaimo Railway liable to the tax (so-called) for forest protection imposed by section 123 of the "Forest Act," being chapter 102 of the "Revised Statutes of British Columbia, 1936," in connection with its timber lands in the Island Railway Belt acquired from Canada in 1887? In particular does the said tax (so-called) derogate from the provisions of section 22 of the aforesaid Act of 1883?"

The Court of Appeal (Sidney Smith, J.A. dissenting) answered Questions 1, 3, 5 and 6 in the affirmative and Question 2 in the negative. The Court unanimously answered Question 4 in the affirmative. The Court (O'Halloran, J.A. dissenting) answered the first part of Question 7 in the affirmative and the second part in the negative.

Held: reversing the judgment appealed from (except as to the answer to Question 4) as follows:—

Question 1: The Commissioner was right in his finding that there never was any contractual relationship between the Provincial Government and the contractors.

The Commissioner was not right in finding that there never was any contractual relationship between the Provincial Government and the railway company.

Question 2: Yes.
Question 3: No.
Question 4: Yes.
Question 5: No.
Question 6: No.
Question 7: As to the first part, no; as to the second part, yes.

C. F. H. Carson, K.C., J. E. McMullen K.C. and *I. D. Sinclair* for the Esquimalt and Nanaimo Railway Company.

D. N. Hossie K.C. for the Alpine Timber Company Limited.

F. P. Varcoe K.C. and *A. H. Laidlaw* for the Attorney-General of Canada.

J. W. de B. Farris K.C. and *John L. Farris* for the Attorney-General of British Columbia.

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The judgment of Kerwin and Locke JJ. was delivered by

LOCKE J.:—There are two matters to be determined in answering Question 1 and the first of these is as to whether the Commissioner was right in finding that there never was any contractual relationship between the Provincial Government and the contractors. It is common ground that the expression "Provincial Government" is intended to mean His Majesty in right of the Province of British Columbia and that the question is as to whether there is a contract to exempt the lands in question from taxation in the manner provided by sec. 22 of the *Settlement Act*.

It is conceded that there was no written agreement between the contractors and the Province: if there was an oral agreement made on or prior to August 20, 1883, no witness is available to prove it since the then Premier, Mr. Smithe, and Mr. Robert Dunsmuir and his associates are long since dead, and the existence of such a contract if there was one must, therefore, be a matter either of inference from the known facts, or the legal result of the actions of the parties so far as they are now capable of proof:

By the terms of Union the Colony of British Columbia became part of the Dominion of Canada on July 20, 1871, and by sec. 11 the Government of the Dominion undertook to secure the commencement simultaneously, within two years from the date of Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as might be selected, east of the Rocky Mountains, towards the Pacific, to connect the sea board of British Columbia with the railway system of Canada, and to secure the completion of such railway within ten years from the date of the Union: on its part the Government of British Columbia agreed to convey to the Dominion, in trust, to be appropriated in such manner as the Dominion Government might deem advisable "in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia, (not to exceed, however, twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion Government from the public lands in the Northwest Territories and the Province of Manitoba". The section further provided that the quantity of land which might be held

under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion should be made good to the Dominion from contiguous public lands. In consideration of the land to be so conveyed in aid of the construction of the railway, the Dominion agreed to pay to British Columbia from the date of the Union the sum of $100,000 per annum. In addition to other obligations assumed by Canada, it was to guarantee the interest for ten years from the date of the completion of the works on such sum not exceeding £100,000 sterling, as might be required for the construction of a first class graving-dock at Esquimalt.

The failure of the Dominion to commence the construction of the railway and to complete it within the times limited by sec. 11 gave rise to great dissatisfaction in the new Province. With the merits of the various disputes which arose between the Dominion and the Province in consequence, all of which were composed by the *Settlement Act* (Cap. 14, Statutes of B.C. 1884), we are not here concerned. While the Dominion had by Order-in-Council passed on June 7, 1873, fixed Esquimalt as the terminus of the proposed railway and asked for the conveyance of a strip of land twenty miles in width along the east coast of Vancouver Island between Seymour Narrows and the Harbour of Esquimalt, in furtherance of the construction of the railway, and this request had been extended in March, 1875, by a request that the belt of land to be conveyed should be twenty miles on each side of the proposed railway on Vancouver Island, and while the Province had by cap. 13 of the Statutes of 1875 granted to the Dominion Government, in trust, to be appropriated in such manner as it might deem advisable an area of public lands not to exceed twenty miles on each side of the proposed line between Esquimalt and Nanaimo, the Province had considered itself at liberty to rescind the land grant and, by cap. 16 of the Statutes of 1882, the Act of 1875 which authorized the grant was repealed.

While all matters in dispute were settled by the Act of December, 1883, the attitude adopted on behalf of the Dominion and of the Province respectively is of importance in considering the question to be determined. The position taken by the Dominion is summarized in a report of a Committee of the Privy Council approved by the Governor

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General in Council on May 17, 1881, and addressed to the Minister of Railways and Canals, which, stated shortly, was that while it had originally been contemplated that the railway should run by Bute Inlet and an Order-in-Council had been passed declaring that Esquimalt should be the terminus on the Pacific coast, further information had disclosed that this was inadvisable and that it had been determined in October, 1879, that the Western terminus of the road should be on Burrard Inlet, which was a compliance with the terms of sec. 11. As to the terms proposed by Lord Carnarvon, then Secretary of State for the Colonies, made for the purpose of ending the differences which had arisen between the Dominion and the Province and which recommended that the railway from Esquimalt to Nanaimo should be commenced as soon as possible and completed with all practicable despatch, the Government of Canada took the attitude that while entitled to every respect they had never received the sanction of the Parliament of the Dominion and that, on the contrary, a bill to give effect to these terms having been introduced by the Government into the House of Commons, providing for the construction of the Esquimalt and Nanaimo line, though passed by the House was lost in the Senate and, in the words of the report, "consequently Parliamentary sanction refused to the construction of what was regarded by the majority in the Senate as a Provincial work quite unnecessary to the fulfilment of the terms of Union with British Columbia". The report further recited that a contract had been entered into and received the sanction of Parliament for the construction of the railway from the end of the existing system near Lake Nipissing to Burrard Inlet (this referring to the contract made by the Dominion and the persons who became the incorporators of the Canadian Pacific Railway Company, which forms a schedule to cap. 1, Statutes of Canada 1881), that Parliament had not authorized the construction of the Esquimalt and Nanaimo line and that, in view of the large expenditure involved in the building of the Canadian Pacific Railway, it was not probable that it would do so.

The position taken by the Province was as stated in an Order-in-Council passed on February 10, 1883, a copy of which was forwarded by the Lieutenant-Governor to the Secretary of State on that date. Briefly this was that the

Province, upon being advised in 1873 that an Order-in-Council had been passed by the Dominion fixing Esquimalt as the terminus of the Canadian Pacific Railway and deciding that a line of railway should be located between the Harbour of Esquimalt and Seymour Narrows, had first reserved a belt of land twenty miles in width between these two places and thereafter, on the request of the Dominion, conveyed these lands to it for railway purposes, that communications passing between the Province and the Dominion showed that both parties understood that the eleventh section of the Terms of Union required the construction of the road on the Island as a section of the Canadian Pacific Railway and that the Dominion had defaulted in complying with its obligations. The Order-in-Council recited that the reservation of the railway belt on the Island and the withholding of these lands from development or settlement had caused great injury to the commercial and industrial interests of the Province and the Committee recommended as a basis of settlement between the Governments of the railway and railway lands questions

> that the Dominion Government be urgently requested to carry out its obligation to the Province by commencing at the earliest possible period the construction of the Island Railway and complete the same with all practicable despatch, or by giving to the Province such fair compensation for failure to build said Island Railway as will enable the Government of the Province to build it as a Provincial work and open the East Coast lands for settlement.

While the negotiations between the Dominion and the Province which followed resulted in a settlement, it is of importance to note that at the session of the Provincial Legislature in 1882 an Act to incorporate the Vancouver Land and Railway Company had been passed in pursuance of a petition presented by Lewis M. Clement et al, praying for the incorporation of a company for the purpose of constructing and working a railway from Esquimalt Harbour and for a grant of public lands in aid thereof, and that the *Act* of *1875* which authorized the land grant to the Dominion was repealed. The *Act,* cap. 15 Statutes of 1882, (hereinafter referred to as the *Clement Act*) constituted the applicants a body corporate by the above name, and by sec. 9 the company was required to lay out, construct, acquire, equip, maintain and work a continuous line of railway from a point on Esquimalt Harbour to a point on Seymour Narrows; the survey was to be com-

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menced within sixty days after the Government should have notified the company that it was prepared to set apart and reserve to the company the lands referred to, and it was provided that not less than ten miles of the portion of the railway between Esquimalt and Nanaimo should be completely constructed, equipped and in running order on or before July 1, 1883, and the entire railroad was to be constructed and equipped on or before the 1st day of July, 1890. Sec. 17 required the company to give security to the satisfaction of the Government of the Province to the extent of $250,000 for the due construction of the railway in accordance with the terms of the *Act*, and provided that if this was not given within sixty days from the repeal by the Legislature of the *Esquimalt* and *Nanaimo Railway Act* 1875, which had authorized the grant of the railway belt on the Island to Canada, a sum of $10,000 required to be deposited should be forfeited and the provisions of the Act should be "null and void". Sec. 18 provided that upon satisfactory security having been given and "in consideration of the completion and perpetual and efficient operation of the said railway by the company" the Government would set apart and reserve to the company 1,900,000 acres of public land lying on both sides of the proposed line between Esquimalt and Seymour Narrows, and upon completion of the railway, in accordance with the terms of the *Act* should grant the fee simple in the said lands to the company. Sec. 21 provided a limited exemption from taxation for the railway and its properties and the capital stock of the company, and that "the lands of the company shall also be free from provincial taxation until they are either leased, sold, occupied or in any way alienated". Nothing resulted, however, from this legislation: the company did not provide the security stipulated for and its rights under the statute lapsed and the Province was again at liberty to resume its negotiations with the Dominion.

When on February 19, 1883, the Lieutenant-Governor sent to the Secretary of State the copy of the report of the Provincial Executive Council the Dominion Government sent Mr. Trutch to Victoria to negotiate with the Province in an endeavour to settle all matters in dispute. Negotiations were carried on between Mr. Smithe, the Premier of the Province, and Mr. Trutch on behalf of the Dominion.

Sir John A. Macdonald had advised the Premier that the Dominion Government was prepared to submit to Parliament the proposals of the Province, with such modifications as might be settled on with Mr. Trutch and concurred in by the Dominion Government, and stipulated that the Provincial Legislature should legislate first. On May 5, 1883, Mr. Trutch wrote to the Premier making certain proposals on behalf of the Dominion, these including the suggestion that the Province should grant to the Dominion a portion of the lands described in the *Clement Act* and procure the incorporation by Act of the Legislature "of certain persons to be designated by the Government of Canada for the construction of the railway from Esquimalt to Nanaimo", and offering, *inter alia* on behalf of the Dominion to appropriate these lands and the sum of $750,000 to be paid as the work proceeded to the proposed company, provided it gave satisfactory security for the completion of the railway within three and a half years from the date of its incorporation.

On May 7, 1883, an Order-in-Council of the Provincial Executive Committee, which had considered these proposals, after reciting the desirability that the long-standing dispute should be settled and that the Dominion and the Province should unite in a common endeavour to open the country to settlement, recommended their acceptance.

On May 9, 1883, a Dominion Order-in-Council, after reciting the proposals made by the Lieutenant-Governor on behalf of the Province in his communication of February 10, 1883, authorized the making of counter proposals without prejudice, which included the following:

> The Provincial Government shall grant to the Dominion Government the lands in Vancouver Island specified in Mr. Dunsmuir's last proposal for the construction of the Esquimalt and Nanaimo Railway.
>
> That the British Columbia Government shall procure an Act of Incorporation for such parties as shall be designated by the Dominion Government for the construction of the Railway on Vancouver Island.
>
> That the Dominion Government shall appropriate the lands on Vancouver Island and a sum of $750,000 to be paid as the work proceeds, to a Company to be incorporated at their instance by the Legislature of British Columbia, and which Company shall give satisfactory security for the completion of the Railway from Esquimalt to Nanaimo within four years from the date of the Act of Incorporation.

While these matters were taking place the Provincial Legislature was in session at Victoria and on May 12, 1883, passed an Act relating to the Island Railway, the Graving

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Dock and Railway Lands of the Province: cap. 14 Statutes of B.C. 1883, hereinafter referred to as the *May Act*. The text of this statute had been submitted in advance to Mr. Trutch and by him transmitted to the Prime Minister, and on the day the *Act* was passed the former wrote to the Premier pointing out that certain provisions of the *Act*, in particular one which recited that "the Government of Canada agrees to secure the construction of a railway from Esquimalt to Nanaimo", were not in conformity with the proposals made in the letter of May 5th. The Premier took the attitude that the *Act* was in accordance with the arrangements made between Mr. Trutch and himself; the latter said that any position he had taken in the negotiations was expressed to be subject to the approval of the Government of Canada and, by a letter of May 15th, informed the Premier that he had received a message from the Prime Minister directing him to communicate to the Premier that "Parliament long ago refused to build the Island Railway and cannot successfully be asked now to change that policy" and that the Dominion Government had offered to ask Parliament to vote $750,000 "to subsidize a company to construct that railway and to take satisfactory security from such company for the construction of that work", and regretted the offer had not been accepted. On May 23rd the Premier telegraphed to the Prime Minister regarding the matter and on the following day the latter replied:

> Dominion Government greatly regrets that your Act in effect makes Island Railway a Government work, although to enable Government to build it power to use agency of a railway company is given. We never agreed to that provision. Useless to ask Parliament to confirm your Act. We are quite ready to perform conditions telegraphed to Mr. Trutch and accepted by you, and meanwhile will proceed provisionally to carry out such arrangement, to be completed when your Act amended in conformity with agreement.

Negotiations were continued between the two Governments during the latter part of May and in June of 1883, and by an Order-in-Council of June 23rd the Dominion authorized the Minister of Justice, Sir Alexander Campbell, to proceed to Victoria in an endeavour to bring the matter to a conclusion. The instructions to the Minister included the following:

That Sir Alexander Campbell should then communicate with Mr. Dunsmuir or other capitalists who are understood to be desirous of forming a company to construct the railway under the terms of the Provincial Act.

On the arrival of Sir Alexander Campbell he apparently carried on negotiations not only with the Provincial Government, in regard to the amendment to the *May Act* upon which the Dominion insisted, but also with Mr. Dunsmuir and his associates. In these negotiations the Dominion maintained the position it had taken in the Order-in-Council of May 17, 1881, regarding the obligations of Canada in respect to the Island Railway. In a letter addressed by Sir Alexander Campbell to the Premier on August 6, 1883, a copy of a proposed contract for the construction of the railway between the Dominion and Dunsmuir et als was submitted for the consideration of the Provincial Government. What part, if any, the province had taken in these negotiations is not known. The letter, after stating that a copy of the proposed contract (in draft) for the construction of the railway was enclosed and the suggestions of the Premier invited, said in part:

The Government of the Dominion are anxious that in all respects it should meet the just expectations of the Government of your Province. The obligations, so far as regards the Government of the Dominion, are confined, as you will see, to the payment, as the work progresses, of the assistance promised to the Railway by us, and the transfer, after the work is wholly completed of the land grant which the Government of the Province has placed in our hands for that purpose. We assume no responsibility for non-completion, or delay in the progress of the work. The security which the Company will deposit with the Dominion Government will be held, however, by us in trust for this purpose.

We understand that with this contract (involving no other undertaking on our part than those I have mentioned), and the deposit of the security above referred to, the Government of the Province are satisfied that the terms of the Act concerning the Island Railway will have been completely performed on the part of the Government of Canada.

After stating that he proposed on obtaining the approval of the local Government to the contract to execute it and that Mr. Dunsmuir and his friends would be invited to do so, the letter said that after having it executed the writer thought the contract should be placed in the hands of Mr. Trutch "awaiting the change which your Legislature is to make in the *Act* relating to the Island Railway, by striking out any language under which Canada might be

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called upon to construct or secure the construction of the railway, and substituting language involving an obligation simply to take security for such construction to the satisfaction of your Government. The clause in the *Island Railway Act* relating to the sale to actual settlers for four years at a dollar an acre has, I understand, received the assent of Mr. Dunsmuir and his friends". On August 17th Sir Alexander Campbell again addressed the Premier, noting that he had had no reply to the above quoted letter and asking whether the Provincial Government would have any objection to the $250,000 to be deposited by the contractors being invested in approved securities. On the day following the Premier answered, saying that he had carefully considered the proposed contract and had a few suggestions to make and suggested an interview to discuss them: as to the cash deposit being exchanged for approved securities he saw no objection but added that "in the event of the forfeiture of the security by the contractors it ought to be understood that it would be handed over to the Province by the Dominion Government". In a reply written on the same date Sir Alexander Campbell declined to agree to this latter proposal saying that the disposition of the security in case of default "must depend upon the circumstances of the moment, and unless the Dominion should be released from all obligations in the matter they would not hand over the security but retain it for the purpose for which it was given".

On August 20, 1883, a memorandum of agreement was signed by Sir Alexander Campbell and Mr. Smithe providing, inter alia, that the Government of British Columbia would invite the adoption by the Legislature of certain amendments to the *May Act,* such amendments being indicated by red lines in the copy of the proposed new Bill annexed to the memorandum and that the said Government "will procure the assent of the contractors for the construction of the Island Railway to the provisions of clause (*f*) of the agreement recited in the amending Bill". That clause provided that the lands on Vancouver Island to be conveyed to the Dominion should with certain exceptions be open for four years from the passing of the *Act* to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each

such actual settler, and that in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway, and stations, and workshops should be reserved: in the meantime and until the railway should be completed the Government of British Columbia was to be the agent of the Government of Canada for the purpose of administering these lands, for the purposes of settlement, and provision was made for the making of pre-emption records by the Government of the Province and for the deposit of all moneys received by the Province in respect of such administration into the Bank of British Columbia, to the credit of the Receiver General of Canada, and that such moneys, less expenses, should upon completion of the railway be paid over to the railway contractors. The memorandum further stipulated that upon the amending Bill becoming law in British Columbia and the assent of the contractor for the construction of the railway to the provisions of clause (*f*) above referred to being obtained, the Government of the Dominion would seek the sanction of Parliament to enable them to give effect to the stipulations on their part contained in the agreement recited in the amending Bill. On the same day Sir Alexander Campbell, acting on behalf of the Minister of Railways and Canals of Canada, signed a contract for the construction of the Esquimalt and Nanaimo Railway with Robert Dunsmuir and his associates.

In view of the letter of the Premier of August 18, it may be assumed that the terms of this contract were approved by the representatives of the Province. While the Dominion was the contracting party, its representatives had made it abundantly clear in the correspondence that Canada assumed no responsibility for the non-completion or delay in the progress of the work and considered its part in the matter as being restricted to the payment of the $750,000 as the work progressed and the transfer after it was completed of the land grant which the Province had placed in its hands for that purpose. While of importance to the Dominion as a whole, in that the development and progress of the Province would contribute to the welfare of the country as a whole, the Island Railway was after all primarily a matter of Provincial concern: with the exception of the money contribution and the granting

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of foreshore rights it was the Province which was contributing the consideration for the building of the road. As might be expected under these circumstances, the contract imposed upon the contractors not merely the obligation to build and equip the line from Esquimalt to Nanaimo but also to maintain and "work continuously" the said line and a telegraph line throughout and along the railway line (sec. 3) and (by sec. 9) a covenant that they would "in good faith keep and maintain the same and the rolling stock required therefor in good and efficient working and running order; and shall continuously and in good faith operate the same, and also the said telegraph line, and will keep the said telegraph line and appurtenances in good running order". The Bill referred to in the memorandum of agreement signed on the same date by the representatives of the Province and the Dominion, which was to amend the *May Act,* contained in sec. 27 a provision that the Esquimalt and Nanaimo Railway Company

> shall be bound by any contract or agreement for the construction of the railway from Esquimalt to Nanaimo which shall be entered into by and between the persons so to be incorporated as aforesaid and Her Majesty represented by the Minister of Railways and Canals, and shall be entitled to the full benefit of such contract or agreement which shall be construed and operate in like manner as if such company had been a party thereto in lieu of such persons, and the document had been duly executed by such company under their corporate seal.

The necessity for this is apparent: the subsidies were to be given to ensure not merely the construction of the railway and telegraph lines but also their operation in perpetuity. It was apparently considered necessary to obtain the covenant of the contractors as well as that of the company to be formed and in addition to impose the obligation to operate in the statute of incorporation which, by sec. 9, required the company to "lay out, construct, keep, maintain and work the railway and telegraph lines". The contract also referred to the agreement between the two Governments whereby the Province would procure the incorporation "of certain persons to be designated by the Government of Canada" for the construction of the road and the Dominion agreed to grant to the contractors a subsidy of $750,000 and the lands it was to receive from the Province "for which subsidies the construction of the

railway and telegraph line from Esquimalt to Nanaimo shall be completed and the same shall be equipped, maintained and operated.

That Mr. Dunsmuir must have been a party to the negotiations which resulted in the agreement between the Dominion and the Province of August 20th is, I think, apparent. The terms of the proposed *Settlement Act* were, of course, of vital importance to the contractors and the reference to the draft Bill identified by the signatures of Sir Alexander Campbell and the Honourable Mr. Smithe in clause 15 of the contract made with them makes it evident that Mr. Dunsmuir was satisfied with the terms of the proposed *Act* prior to the signing of the memorandum on behalf of the two Governments on August 20th. That memorandum had required the Province to obtain the approval of the contractors to the very material change made in clause (*f*) of the *May Act,* and it was apparently in consequence of this that by a memorandum dated at Victoria on August 22, 1883, Robert Dunsmuir wrote on a copy of the draft which had been signed by Messrs. Campbell and Smithe the following:

> I have read and on behalf of myself and my associates acquiesce in the various provisions of this Bill, so far as they relate to the Island Railway & lands.

By the terms of these documents neither the memorandum signed on behalf of the two Governments nor the contract with Dunsmuir et als were to become binding until both the Legislature of the Province and the Dominion Parliament had acted and meanwhile the documents were held in escrow. In due course the *Settlement Act* was passed by the Legislature in December, 1883 and the agreement with the contractors authorized by Parliament by cap. 6 of the Statutes of 1884, and by an Order-in-Council of April 12, 1884, Mr. Dunsmuir and his associates were named as the persons to be incorporated as the Esquimalt and Nanaimo Railway Company.

While the agreement for the construction of the railway required that the lands should be conveyed to the contractors, the statute passed by the Legislature, as has been shown, provided that the Esquimalt and Nanaimo Railway Company should be entitled to the full benefit of that contract, and all parties understood that it was to

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the company that the conveyance would be made and this was done upon the completion of the road in 1887. While it appears to me to be obvious from the events above recited that Robert Dunsmuir, acting on his own behalf and on behalf of his associates, was a party to the negotiations which resulted in the two agreements of August 20, 1883, the passing of the *Settlement Act* and of the *Dominion Act* of 1884 and the construction of the railway and while it may perhaps be assumed that the Provincial Premier assured him that his Government would pass the *Settlement Act,* I am unable to find sufficient evidence of an agreement between these contractors and the Province of British Columbia that the lands to be granted would be subject to the tax exemption embodied in sec. 22 of the *Settlement Act.* These negotiations took place nearly sixty-five years ago and there is no living witness to testify what took place between the contractors and the Government. I think the proper inference to be drawn from the facts as disclosed by the documents is that Dunsmuir and his associates, having the covenant of the Dominion that the subsidies would be given and the Dominion having agreed with the Province that the Legislature would be asked to pass the *Settlement Act* and Parliament asked to ratify the agreement with the Province and authorize the granting of these subsidies, would be most unlikely to ask the Province to contract with him and his associates for the tax exemption. Being assured on August 20, 1883, that the two Governments proposed to take these steps and being safeguarded by the arrangement that the agreement for the construction of the road would not become binding until the two Governments had legislated, it would, I think, be assumed by Mr. Dunsmuir that the statutory exemption from taxation contained in sec. 22 of the Provincial Act, which undoubtedly was a material part of the consideration to be received from the Province in exchange for the covenant to build, maintain and operate the railway and telegraph line, would protect the company to be formed as amply as if the same terms had been included in a formal agreement with the Province. While the contractors should be assumed to have known that the *Interpretation Act* (cap. 2 Consolidated Acts 1877) by sec. 7 (31) provided that every Act shall be so construed as

to reserve to the Legislature the power of repealing it or amending it or of revoking or modifying any power, privilege or advantage thereby vested in or granted to any person or party whenever the Legislature should deem such modification required for the public good, it would not, I think, occur to these business men nor their advisers that where an exemption such as this was granted as part of the consideration for the construction and operation of the Island Railway such power would be exercised.

I conclude, therefore, that the answer to the first part of the first question is that the Commissioner was right in finding that there was no contract between the Province and the contractors to exempt these lands from taxation in the terms of sec. 22.

As to the second part of the first question: if there was a contract between the Province and the Esquimalt and Nanaimo Railway Company it is either evidenced by the statute itself or must be implied by reason of what occurred between the parties after the passing of the Order-in-Council of April 12th, 1844, which presumably was communicated to the Provincial authorities then or shortly thereafter.

There is, in my opinion, much to be said for the view that the contract is evidenced by the statute. In form it differs materially from that commonly adopted for the incorporation of companies to carry out business enterprises. A comparison with statutes of this nature in British Columbia, both before and after the passing of the *Clement Act,* such as caps. 2 and 3 of the Statutes of 1878, cap. 25 of the Statutes of 1881, cap. 33 of the Statutes of 1883 and cap. 31 of the Statutes of 1884, shows that in the case of companies applying for powers to carry out various enterprises the language used to grant such powers is permissive while in the *Clement Act,* the *May Act* and the *Settlement Act* the sections authorizing the construction and operation of the railway and telegraph lines are mandatory in form. In the case of the *Settlement Act* the language used is:—

> The company and their agents and servants shall lay out, construct, equip, maintain and work

the railway and telegraph lines from Esquimalt to Nanaimo and sec. 27, as has been noted, provided that the

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company shall be bound by the covenants in the construction contract which obligated the contractors to maintain and work continuously the said lines. The word "shall" was by the *Interpretation Act*, cap. 32 Consolidated Statutes of 1887, sec. 6 (and by cap.1, R.S.B.C. 1936, sec 23 (1)) to be construed as imperative "unless it be otherwise provided and there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction". There is nothing in the context to suggest that any other meaning should be assigned to the word in secs. 9 and 27: on the contrary, it is clear that is what was intended, since otherwise the railway company might have simply built the line for the purpose of obtaining the valuable subsidies and discontinued operation if it proved unprofitable. It will be seen that the same language was employed in these sections in the *May Act* and that a similar obligation was imposed by sec. 9 of the *Clement Act* and it appears to me not improbable that the draftsman considered the Act incorporating the Canadian Pacific Railway Company (cap. 1, Statutes of 1881) and the contract forming a schedule to that Act which authorized large grants of money and lands in consideration of the completion and perpetual and efficient operation of the railway in settling the form of the legislation. The *Settlement Act* not only bound the railway company by the covenants of the contractors in this respect but also imposed upon them a statutory duty to build, equip, maintain and operate the line. The Agreement between the Province and the Dominion confirmed by the statute obligated the Dominion to hand the lands over to the contractor and paragraph 15 of the construction contract determined the time when this should be done. While sec. 18 of the *Clement Act* provided that the Province, in consideration of the completion and perpetual and efficient operation of the railway,, should set apart the lands described and convey them to the company on the completion of the railway and sec. 21 provided the exemption from taxation, the plan adopted in both the *May Act* and the *Settlement Act* was that the land should be conveyed to the Dominion in trust and turned over to the company upon the completion of the road: in the result the only difference was that the lands which constituted the main

consideration to be received by the railway company were conveyed by the trustee rather than directly from the Province. The obligation of the Province to exempt the lands from taxation upon the terms of sec. 22 was not to arise unless and until the lands were conveyed by the Dominion to the Railway Company and this, it was contemplated, would be some years hence: no question of taxation was involved so long as the lands remained vested in the Dominion. I think the obligation imposed by sec. 22 was no less an obligation of the Crown than that cast upon it by the section of the *Vancouver Island Settlers' Rights Act,* 1904, considered by the Judicial Committee in McGregor v. *Esquimalt and Nanaimo Railway Company* (1), and referred to by Sir Henri Elzéar Taschereau at p. 467, and that the right to enforce performance of this duty became vested in the railway company. As I see the matter, the statutory obligation of the Province to exempt the lands from taxation upon the terms of sec. 22 continues in perpetuity in the same manner as the obligations of the railway company under secs. 9 and 27, subject of necessity to the right of the Province to repeal the exempting section, a power expressly reserved by sec. 7 (31) of the *Interpretation Act*, (cap. 2 Consolidated Acts 1877: sec. 23 (8) cap. 1, R.S.B.C. 1936).

While the *Settlement Act,* with the exception of the preamble and the first seven sections, relates entirely to the obligations and powers of the railway company, and the status of certain of the assets to be acquired by it in regard to taxation it is not declared to be a private Act and is, therefore, to be deemed a public Act (sec. 7 (37) cap. 2 Consolidated Acts 1877: sec. 23 (7), cap. 1, R.S.B.C. 1936). Unlike private Acts incorporating other companies for the purpose of carrying on business enterprises, it was not passed pursuant to a petition filed by the promoters asking for formation of the company with specified powers but pursuant to the arrangements hereinbefore described. In *Davis* v. *Taff Vale Railway Company* (2), Lord Macnaghten at p. 559 said in part:

> Ever since it has become the practice of promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains

(1) [1907] A.C. 462. (2) [1895] A.C. 542.

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between the promoters on the one hand and Parliament on the other—Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway as well as for the benefit of the promoters.

It may be noted that the expression here used "parliamentary contract" is stated in the Third Edition of Lindley on Partnerships and Companies, p. 155, (published in 1878) to have been the name by which the contract signed by the subscribers when petitioning for incorporation was commonly called. The signing of such a contract by the subscribers, whereby each covenanted to pay a sum set opposite his name either as a part of the estimated expense of the undertaking or of the capital it was proposed to raise, was apparently a pre-requisite of incorporation. In the same case Lord Watson said, p. 552, in part:

> In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement. It was in that sense that in Countess of Rothes *v.* Kirkcaldy Waterworks Commissioners, 7 A.C. at p. 707, I ventured to observe that "such statutory provisions as those of sect. 43 occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature." For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract, for it is nothing more, could, in an English case especially, be carried further.
>
> The provisions of a Railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature.

In an early case, *Sir John Brett* v. *Cumberland* (1), where Queen Elizabeth had by letters patent made a lease of certain mills in which there was a clause binding the grantee and his assigns to repair the mills and leave them in a proper state of repair at the end of the term, the successor in title of the grantee was held liable in an action of covenant though his predecessors had not signed the instrument of grant. In *Lyme Regis* v. *Henley* (2), where the King had granted to the Mayor and Burgesses of Lyme Regis the borough so called and also the pierquay or cob, with all liberties and profits belonging to the same and

(1) (1688) 3 Bulstrode 164. (2) (1834) 2 cl. & F. 331.

willed that they and their successors should repair, maintain and support the buildings, banks, seashore, etc. it was held that having accepted the letters patent the defendants were liable to repair. Park, J. deciding the matter, considering that the decision in *Sir John Brett* v. *Cumberland* (1) was decisive of the matter, said in part (p. 351):

> So in the charter in question, the words are in show the words of the King only, but the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

In *Atkinson* v. *Newcastle Waterworks* (2), Lord Cairns dealing with the question as to when the breach of a public statutory duty might be the basis of an action for damages by an individual said:

> I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the Court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.

It will be noted that the language above quoted is referred to and adopted in *Johnston and Toronto Type Foundry Company* v. *Consumers' Gas Company* (3). In *Milnes* v. *Mayor, etc., of Huddersfield* (4), the Earl of Selborne said (p. 523):

> It is true that this is a case of statutory obligation, not properly of contract; although Lord Eldon and other great judges regarded Acts of Parliament of this class, giving powers to promoters or undertakers who solicit them, and who are to receive remuneration in money for what under those powers they supply, as parliamentary contracts with the public, or at least with that portion of the public which might be directly interested in them.

In *La Ville de St. Jean* v. *Molleur* (5), Idington, J. referred to, without expressly approving, the finding of the Supreme Court of the United States in *Trustees of Dartmouth College* v. *Woodward* (6). In that case the college had been incorporated in the days when what became later the State of New Hampshire belonged to the British Crown and the attempted interference of that State occurred after it had become subject to the constitution of

(1) (1688) 3 Bulstrode 164.
(2) (1877) L.R. 2 Ex. D. 441.
(3) [1898] A.C. 447.
(4) (1886) 11 A.C. 511.
(5) (1908) 40 S.C.R. 629.
(6) 4 Wheat. 518.

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the United States and was thereby prohibited from enacting any "law impairing the obligation of contract": Chief Justice Marshall there said (p. 643):

> This is plainly a contract to which the donors, the trustees and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties.

In the present case we are, however, dealing with a public statute even though in large part it deals with the incorporation and powers of a company, a matter commonly dealt with by private Act. There was here no petition for incorporation nor anything corresponding to the parliamentary contract referred to by Lindley: rather was the statute enacted by the Province in pursuance of its agreement with the Dominion. I have been unable to find any evidence to support a contention that there was an agreement between the Province and the contractors, in advance of the incorporation, that the lands to be received by the company would be entitled to the exemption provided by sec. 22 and, in my opinion, the Act cannot be regarded as a contract between the company and the Crown.

This does not, however, dispose of the matter. It is common ground that following the incorporation of the railway company it proceeded forthwith to construct the railway and telegraph lines and thus became entitled to and received the lands which had been conveyed by the Province to the Dominion in trust for that express purpose. It is clear beyond question that the railway company did this relying upon the exemption held out to it by the Province in sec. 22 of the Act. In *Plimmer* v. *Mayor, etc., of Wellington* (1), the predecessor in title of the appellant had in the year 1848 erected a wharf on the bed and foreshore of Wellington Harbour for the purpose of a wharf and store, this being done by permission of the Crown: in 1855, in order to carry on his business of a wharfinger, he erected a jetty extending to a considerable distance from the shore: in 1856, at the request and for the benefit of the Government, he incurred large expenditures for the extension of his jetty and the erection of a warehouse, and in subsequent years the Crown used, paid for, and, with the consent of the lessor, improved the said land and works: it was held that while the lessor must

(1) (1884) 9 A.C. 699.

be deemed to have occupied the ground from 1848 under a revocable licence to use it for the purposes of a wharfinger, that by virtue of the transactions of 1856 such licence ceased to be revocable at the will of the Government and that the lessor had acquired an indefinite or perpetual right to the jetty for these purposes. Sir Arthur Hobhouse, after saying that the law relating to cases of this kind might be taken as stated by Lord Kingsdown in *Ramsden* v. *Dyson* (1), said in part (p. 712):

> This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing-places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing-place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible.

and at p. 714:

> In this case their Lordships feel no great difficulty. In their view, the licence given by the Government to John Plimmer which was indefinite in point of duration but was revocable at will, became irrevocable by the transactions of 1856, because those transactions were sufficient to create in his mind a reasonable expectation that his occupation would not be disturbed; and because they and the subsequent dealings of the parties cannot be reasonably explained on any other supposition. Nothing was done to limit the use of the jetty in point of duration. The consequence is that Plimmer acquired an indefinite, that is practically a perpetual, right to the jetty for the purposes of the original licence, and if the ground was afterwards wanted for public purposes, it could only be taken from him by the legislature.

The decision, it appears to me, was based on the contract to be implied from the circumstances binding the Crown to permit Plimmer and his successors to occupy the lands in perpetuity. It was interpreted in this way in the judgment of Lord Russell of Killowen in *Canadian Pacific Railway* v. *The King* (2). I think the principle that was applied in Plimmer's case is applicable in the present case: here the Province by holding out the promised tax exemption as one of the inducements offered to the railway company to build, equip and work the railway and telegraph lines must, in my view, be held to have agreed with

(1) L.R. 1 H.L. 129. (2) [1931] A.C. 414 at 428.

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it that upon the performance of this work and the consequent conveyance of the lands by the Dominion they would be entitled to the exemption provided by sec. 22.

On the second branch of the first question, I am of the opinion that the Commissioner was in error in finding that there was no contract between the Province and the Esquimalt and Nanaimo Railway Company to exempt these lands from taxation in the terms of sec. 22.

The tax suggested in the report of the Commissioner is there described as a "severance tax" to be imposed upon all timber cut upon lands of the Railway Company after the same are sold or otherwise alienated by it, to be in an amount approximating prevailing rates of royalty, and not to apply to lands already sold by the company, and the taxes referred to in Questions 4, 5 and 6 are, as I understand it, alternative proposals for carrying this recommendation into effect. In British Columbia all grants of timber lands made by the Crown prior to April 7, 1887, were grants in fee without reservation of any royalty. The lands with which we are now concerned were part of the grant made by the Province to the Dominion by sec. 2 of the *Settlement Act* of 1884, and accordingly, whether in the hands of the railway company or of purchasers from the company, have been treated as exempt from liability for royalty. It appears that from 1887 to 1897 no records of the sale of timber land were kept by the railway company but from April 1898 to July 31, 1944, it disposed of 763,565 acres of land containing 7,000,000,000 feet of timber. As of April 4, 1944, there remained unsold 203,858 acres. Of the lands in the railway belt sold theretofore by the company there remained in 1938 some 336,000 acres of merchantable timber held by owners other than the company and these lands would be free of the proposed tax as well as all other Crown granted timber lands in the Province. As to Crown grants of timber lands made after that date, royalties of increasing amounts have been reserved to the Crown and at the rate fixed by the Forest Act in 1946 averaged $1.10 per thousand feet board measure while the average value of standing timber at that time was $2.00 per thousand.

The wording of sec. 22 is that the lands to be acquired by the company from the Dominion Government for the

construction of the railway "shall not be subject to taxation unless and until the same are used by the company for other than railroad purposes, or leased, occupied, sold or alienated". There are, in my opinion, two agreements in existence between the Province and the Esquimalt and Nanaimo Railway Company and the first of these obligated the Province to exempt the lands from taxation in the manner provided by the section. The agreement made between the principals on May 17, 1912, which was ratified by the *Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act,* provided that the leasing of the railway and the operation thereof by the Canadian Pacific Railway Company "shall not affect the exemption from taxation enacted by the said clause 22 of cap. 14 of the Statute 47 Vict. and notwithstanding such lease and operation such exemption shall remain in full force and virtue."

It, of course, cannot be suggested that either the contract between the railway company and the Crown or sec. 22 relieve these lands when they are used by the company for other than railroad purposes or leased, occupied, sold or alienated, from taxes levied generally upon other owners of Crown granted timber lands. However, that is not what is proposed here. While all other Crown granted timber lands and all such lands in the railway belt alienated by the company up to the present time are to remain exempt from the tax, the remaining fractional portion of the original grant will be affected by it. It is, of course, true that the suggested taxes will be paid directly by the purchaser from the railway company or their successors but it is nonetheless true that the money or substantially all of it will be taken from the coffers of the company. The proposal is that legislation imposing the tax in one of the various forms suggested will be enacted now, with the inevitable result that the value of the remaining stands of timber in the hands of the company will be reduced by approximately the amount of the taxes which the purchasers will be required to pay in exactly the same manner as if the Crown now imposed a lien or encumbrance upon the lands in the amount of the taxes to be paid. Thus while the railway company remains bound by the covenant given by the contractors to operate the railway and tele-

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graph lines in perpetuity by reason of sec. 27 of the *Settlement Act* and under the obligation to so operate these lines imposed by sec. 9 of that *Act*, part of the consideration which it received from assuming that and other obligations will be taken away from the Province.

As to the 1912 agreement I think otherwise: the purpose of the agreement was to ensure to the railway company that the leasing of its lines to the Canadian Pacific Railway Company should not affect the exemption provided by sec. 22. The words "and notwithstanding such lease and operation such exemption shall remain in full force and virtue" are to be construed as meaning that the continuance of the exemption should not be affected by the leasing and cannot be construed as a covenant on the part of the Province not to exercise the power to repeal or amend the section if that were "deemed by the Legislature to be required for the public good" (*The Interpretation Act*, cap. 1, R.S.B.C. 1936, sec. 23(*a*).

The tax referred to in Question 4 is one to be imposed on timber as and when cut upon lands in the Island railway belt and the learned judges of the Court of Appeal are unanimous that such a tax would be ultra vires the Province as being indirect taxation. I agree with Mr. Justice Bird that such a tax would be borne either wholly by the Esquimalt and Nanaimo Railway Company, or in part by that company and in part by the purchaser of the logs. It is, of course, obvious that as between the railway company and other owners of land in respect of which Crown grants were issued prior to April 5, 1887, and which are free both of royalty or of the proposed tax, the former will realize from its timber a lesser amount and that this amount will presumably approximate the amount of the tax to which the railway lands are subject. As between these two owners the railway company is in effect selling timber lands subject to encumbrance while the other owner sells free of encumbrance. In practice the amount of merchantable timber upon the lands offered by the railway company would be ascertained by a cruise and the amount which would become payable as tax, or an amount estimated at the time of sale to be sufficient to pay the taxes as they become due, would be deducted from the market value of the standing timber. Despite the fact that in

this manner the railway company will pay, if not all, at least much the greater part of the amount of the tax to become due, I think it would be found in practice that when the logs were thereafter sold, part at least of the tax and in any event if the tax levied was in excess of the amount estimated at the time of the purchase of the timber, the excess, would be added to the price of the logs and be passed on to the purchaser. John Stuart Mill distinguished direct and indirect taxes by saying that the former is one which is demanded from the very persons who, it is intended or desired, should pay it, while the latter are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. It appears to me to be perfectly clear that this tax would not be borne by the person who would pay it, since he would by the reduction in the purchase price have indemnified himself either wholly or in part at the expense of the railway company if he bought from them directly or, if not, at the expense of the person from whom he purchased the lands and that if not already thus fully indemnified at least the balance of the taxes would be added to the sale price of the logs and enter into the cost of products manufactured by them and thus be indirect.

I do not overlook that part of the judgment of Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1), where it was said:

> The Legislature cannot possibly have meant to give the power of taxation, valid or invalid, according to its actual results in particular cases.

These remarks formed part of the passage from the judgment in *Lambe's* case quoted by Lord Warrington of Clyffe in *The King* v. *Caledonian Collieries, Ltd.* (2). In *Brewers and Maltsters' Association of Ontario* v. *Atty. Gen. for Ontario* (3), Lord Herschell, referring to the judgment in *Lambe's* case said (p. 236):

> Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.

(1) (1887) 12 A.C. 575.
(2) [1928] A.C. 358.
(3) [1897] A.C. 231.

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He then proceeds:

> In the present case, as in Lambe's Case, their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person.

If legislation imposing a tax of the nature referred to in Question 4 is imposed by the Legislature, I have no doubt that it will be with the intention that the burden of it will fall if not entirely upon the railway company then partly upon it and partly upon the purchaser of the logs and subsequent users of the product and, therefore, it would be indirect taxation.

The tax proposed in Question 5 differs from that in Question 4 since it would be upon the land when used by the railway company for other than railroad purposes or when leased or otherwise disposed of, whereupon "the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land".

Assuming the legislation were to impose the tax in this form, the fact that it was stated to be upon the land would not be decisive of the matter for the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial Statute of 1867 (*Atty. Gen. for Manitoba* v. *Atty. Gen. for Canada* (1), Viscount Haldane at 566). The ground for the decision in *Union Colliery* v. *Bryden* (2), was that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that Province since it prohibited their earning their living in that Province (*Cunningham* v. *Tomey Homma* (3)). Here, as was said by Lord Herschell in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters Case* (4), it is necessary to ascertain whether the Provincial Legislature under the guise of imposing direct taxation is in reality imposing indirect taxation. In considering whether what

(1) [1925] A.C. 561.
(2) [1899] A.C. 577.
(3) [1903] A.C. 151.
(4) [1897] A.C. 231.

is intended is in reality a tax upon the land, it is of some importance to note that the tax is only payable when merchantable timber is cut and severed from the land and that the amount of it is to approximate the prevailing rates of royalty per thousand feet of merchantable timber. The amount of the tax bears no relation to the value of the land and would vary from year to year, depending upon the quantity of timber cut and if the timber was never cut no tax would ever become payable. The land itself, apart from the value of the merchantable timber, is largely worthless: it is a matter of common knowledge that the value of these timber lands depends almost entirely upon the merchantable timber which they contain and, in my opinion, while stated to be upon the land it is upon such timber that it is intended to levy the tax. Whether in respect to the merchantable timber upon the land when purchased from the railway company or such as may become merchantable thereafter, I am of opinion that the burden of the tax will fall upon persons other than the owner of the property from whom it will be demanded.

The tax proposed by Question 6 differs in this respect that when the land is used by the railway company for other than railroad purposes or when it is leased or otherwise alienated it is to be assessed at its fair market value and the owner taxed in a percentage of such value. This tax would be paid at the option of the taxpayer, either within a limited time after the assessment with a discount if paid within such time, or by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut during that year bears to the assessed value of the land. I have no doubt that a calculation could be made under the first of these options which would produce a fair estimate of the present worth of the tax that might become payable under the second of these alternatives but, in view of the various dangers to which standing timber in British Columbia is subject, it seems to me highly improbable that purchasers would adopt any but the second of these optional methods. The destruction of the timber by fire would, of course, mean that, though the assessment had been made, if the owner had elected to pay the tax as and when the timber was cut, no tax would ever become payable in respect of that

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timber. The tax suggested in Question 5 would be at approximately the prevailing rates of royalty: that proposed in Question 6 would be "in a percentage of the assessed value" and under the second option the tax to be paid per thousand feet board measure as the timber is cut would presumably approximate such rates. I think this indicates clearly that what is intended is simply a tax on the timber when severed and the fact that under the first alternative the land owner may compound that tax by paying a lump sum does not alter the true character of the proposed legislation. I think this is indirect taxation for the same reasons that lead me to that conclusion in regard to the tax proposed in Questions 4 and 5.

The Forest Act, cap. 102, R.S.B.C. 1936, by sec. 123 as amended by cap. 29, Statutes of 1946, provides that from the owner of logged, unimproved and timber land there shall be payable and paid to the Crown on the 1st day of April in each year an annual tax at the rate of .06 cts for each acre, and all such payments are to be placed to the credit of the fund in the Treasury to be known as the Forest Protection Fund. Large contributions are made to this fund by the Province and its purpose, as the name implies, is the protection of forest lands in the Province from the various dangers to which they are subject. Question 7 asks whether the railway company is liable "to the tax (so-called)" imposed by this section in connection with the lands in question: the second part of the question asks whether these levies derogate from the provisions of sec. 22 of the *Settlement Act.*

Since the Esquimalt and Nanaimo Railway Company is the owner of timber land it is subject to these levies unless relieved of them by the contract made between the Province and the company when the road was constructed, or by reason of sec. 22 of the *Settlement Act.* The agreement is not in writing but as I am of the opinion that in this respect it obligated the Province to exempt the lands from taxes in the manner defined by sec. 22, the question to be decided is the meaning of that word in the section. The word is to be interpreted in its natural and ordinary sense and, this being so, I am of the opinion that these levies are properly classified as taxes. The Oxford English Dictionary defines a tax as being a compulsory contribution

to the support of the Government levied on persons, property, income, commodities or transactions. In *Lower Mainland Dairy Products Sales Adjustment Committee* v. Crystal Dairy Limited (1), the Judicial Committee held that the levies there under consideration were taxes being compulsorily imposed by a public authority for public purposes and being enforceable by law. The forest lands of British Columbia, whether in the hands of the Crown or of private owners, are one of the most valuable assets of the Province, giving employment to great numbers of persons and yielding large annual revenues for Provincial purposes. These levies are, therefore, in my opinion, made for a public purpose; they are imposed by the Crown and the payment of them is enforceable by action. I consider, therefore, that all the necessary elements of a tax are present and that the levies fall within the meaning of that term, as used in sec. 22.

To impose this tax upon the lands in question unless and until the same are used by the company for other than railroad purposes or leased, occupied, sold or alienated would, in my opinion, be contrary to the provisions of sec. 22 of the *Settlement Act*.

I would, therefore, answer the questions as follows:

1. As to the first part thereof: yes.
   As to the second part thereof: no.
2. Yes.
3. No.
4. Yes.
5. No.
6. No.
7. As to the first part thereof: no.
   As to the second part thereof: yes.

RAND J.—The events leading up to the provincial legislation of December, 1883 have been set forth in the judgments of the Court of Appeal in great detail and I shall do no more than to state the general interpretation which I give to them. Nor would it be profitable to examine the constitutional position from which in substance O'Halloran and Bird, JJ. A. proceeded, i.e. that the construction of the island railway was an obligation

(1) [1933] A.C. 168.

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of the Dominion under the terms of union: even with that as an initial assumption, the conclusions to which the questions invite us, are not, in the view I take of the settlement as a whole, materially affected.

It is evident that at the beginning the Dominion had provisionally fixed the terminus of the transcontinental railway on Vancouver Island. There was delay admittedly in proceeding with the work and it is clear that in 1875 an island terminus had become doubtful, if not ruled out. In that year to settle all matters of complaint on the main project and to assist the Province in constructing the island railway as a local work, the Dominion offered the sum of $750,000, an offer which the Province rejected. Somewhat later the terminus appears still to have been undecided, but this had disappeared when the controversy reached an acute stage in the early '80's.

At that time the Dominion had clearly settled upon the southern route through the Kicking Horse Pass as against the Yellowhead Pass in the north, with the terminus on the mainland at Port Moody: and as the Dominion then viewed the situation, the railway on the island had become a purely provincial matter. But it was recognized that, besides the general delay, the withdrawal from settlement of the railway belt lands between Esquimalt and Nanaimo, made on the request of the Dominion, had retarded the development of the island. Of this legitimate complaint on the part of the Province the Dominion was prepared to negotiate a settlement. In 1882, the Province, concluding probably that with a terminus at Port Moody, there would be difficulty in challenging fulfilment of the constitutional obligation, passed an act authorizing the construction of the Esquimalt line by a private company.

In that situation good sense as well as good faith had become necessary on both sides. The Canadian Pacific Railway Company had been organized to carry through the railway program and with that formidable work under way, it was desirable both that the new constitutional relations be not exacerbated by minor controversies and that the immediate construction of the island line be arranged. So it was then that early in 1883 the Dominion intimated what it would do to clean up the entire matter. Following this and purporting to be a legislative com-

pliance with the terms proposed, a provincial statute was passed in May of that year. But its language was taken to mean the construction of the line on the responsibility of the Dominion, and this the latter refused to accept. Negotiations continued and on August 20th, 1883 the two governments finally agreed upon modifications which were enacted by the Province in December, 1883. Later, in April, 1884, corresponding legislation was passed by the Dominion.

The settlement so far as it is material here was this: the Dominion was to facilitate the construction of the island railway by a cash subsidy of $750,000 and by exemption from customs duties of certain materials to be imported for the purposes of the railway; it was to be the party to contract for its construction; and it was to name the incorporators of the company to be formed. The Province, on its part, would provide for the incorporation of the company; and transfer to the Dominion approximately 1,900,000 acres of land, on a considerable portion of which were valuable stands of timber, which it is recited in the preamble to the statute the Dominion would "hand over" to the company.

Following the legislative confirmation, the railway was built, the construction contract fully performed, the money paid over and the lands conveyed to the company.

The provincial statute by sec. 22 provided:

> 22. The lands to be acquired by the company from the Dominion Government for the construction of the Railway shall not be subject to taxation, unless and until the same are used by the company for other than railroad purposes, or leased, occupied, sold, or alienated.

and on this section the questions raised in large measure depend.

What, then, is the effect of, or the nature of any interest or right of the company under, that section? It is contended by the Province that the provision is legislation merely, i.e. the voluntary act of the legislature, conferring from day to day or year to year a benefit which in no sense is or was intended to or does imply or constitute a contractual right in the company to the exemption according to its terms which would in whole or part be affected or destroyed by the repeal or amendment of the section; that any "right" arising is simply the present effect from

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time to time of the legislation, a benefit not different from what might be conferred by a general statute passed long after the railway had been established, a privilege existing and intended to exist, solely in the indulgence of the legislature.

The answer to that is put in several ways. It is argued that the construction contract provided that the subsidy lands were to carry with them all of the benefits of the provincial legislation including sec. 22, and that in making the contract the Dominion was acting on behalf of itself and the Province; that the Province, having stood by and allowed the Dominion to contract for the transfer of the lands with the benefit of sec. 22, cannot now be heard to say that the company has not a contractual right to the continuance of the tax exemption; that the Dominion in its agreement with the Province was acting as trustee for the promoters in relation to those features with which the provincial legislation dealt; that in the negotiations of August, 1883 when the construction contract, the statement of agreement between the Province and the Dominion, and the draft bill incorporating those changes, were completed, it was in fact, by implication or otherwise, agreed between the promoters and the Province that the tax exemption would continue according to its terms once the railway was constructed and in operation; and finally, as the acceptance of the necessary implication of the provincial legislation itself i.e. that upon performance by the company of the undertaking envisaged, certain provisions of the legislation including sec. 22, constituting inducements held out to the company, would become binding contractually upon the province.

The construction contract stipulates in paragraph 15 that the lands shall be conveyed to the company "subject in every respect to the several clauses, provisions and stipulations . . . contained in the aforesaid Act . . . as they may be amended . . . in accordance with the draft bill now prepared . . particularly to secs. 23, 24, 25 and 26 of the said Act." The question is whether the words "subject to" are appropriate to the benefit of sec. 22; and considering the language of the Dominion Act of 1884, secs. 3 and 7, and that of the conveyance of the land to the

company in 1887, I cannot think they are or that the paragraph was intended to incorporate the provision of sec. 22 as an obligation assumed by the Dominion.

There is next the question whether, apart from the legislation, a contract arose between the two governments and that in any respect or to any extent the Dominion was acting for or representing the promoters. I find myself unable to treat the negotiations as intended to effect obligations between them beyond the legislation contemplated. The fact that the memorandum stipulated for legislative confirmation by both indicates the real intention. What were being framed were political arrangements to be embodied in statutes; and the word "agreement" as used in the memorandum meant simply consensus looking to obligation on another level than that of contract.

Nor am I able to infer the intention of the promoters and the Province to create a binding obligation distinct from the effect of the legislation and much less that any such contract should thereafter coexist with the legislation. The approval of the bill containing the exemption clause by Dunsmuir on behalf of his associates would seem to put the matter beyond doubt. At the highest, any such arrangement would require legislative sanction, in which event it could scarcely be taken that the confirmation was to bind the Province apart from and in addition to the legislation. What both the promoters and the company assumed was that the tax exemption would be effective according to its terms, and they were not concerned to provide collaterally against the consequences of a legislative repudiation.

Is the act, then, of the provincial legislature of such form and matter as had they existed analogously between private persons would have given rise to contractual rights? It is conceded that sec. 22 was held out as an inducement to the company: tax exemption was to be part of the provincial contribution to the work. The legislative intent or implication from the language used can only be that if the company should fulfil the conditions of the statute, the exemption would be maintained according to its terms. Any other interpretation would be a fraud on those committing themselves in part on the strength of it. If the legislation had provided that the land grant should be made direct by

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the Province, could it have been said that the acceptance of incorporation, with the obligations of the construction contract *ipso facto* imposed upon the company, and the construction of the railway, did not draw to the company by fulfillment of the conditions of the legislative promise, a contractual right to receive the lands so held out? I should say that a statutory benefit arising through the performance of conditions laid down in the statute as the quid pro quo of the benefit, is a contractual right: and that upon performance by the company here, the engagement became binding upon the Crown.

Since the Crown, as the symbolic embodiment of the supreme power of the state can, in its executive capacity, enter into a contract with a subject, is there any obstacle to its entering into a similar contract on a higher level? If, as it is established, a "statutory" contract may arise between private persons: *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1); what is there in the nature of things to exclude the Crown, in its legislative capacity, from binding itself in either capacity to the same form of obligation? That the terms of a charter constitute a contract between the state and the corporation created was held in the United States in the case of *Dartmouth College* v. *Woodward* (2), in which at p. 627 Chief Justice Marshall uses this language:

> It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

Having found a contract, he then proceeded to consider whether it was protected by the constitution of the United States and if so whether it had been impaired by certain legislation of the State of New Hampshire; and holding for the corporation in each respect, declared the State legislation ultra vires.

No such constitutional difficulties arise here; undoubtedly the legislature could amend or repeal sec. 22 and thus modify or destroy the right of exemption: but equally so could it affect a contract made by the Crown in its

(1) [1920] A.C. 184. (2) 4 Wheaton 518 at 627.

purely executive capacity. The existence of that legislative power is not incompatible with a relation which both the legislature and the company intended to bring about; and I am unable to make any distinction in principle between the creation of contractual rights arising from incorporation by charter and by legislation. In each case it is the sovereign power acting with the same intent.

The language of Lord Macnaghten in *Davis & Sons* v. *Taff Vale Railway Company* (1), is most pertinent to the case before us:

> Ever since it has become the practice for promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains between the promoters on the one hand and Parliament on the other—Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway as well as for the benefit of the promoters.

If it is to be deemed a parliamentary contract when the benefit is to the members of the public as represented by the legislature, on what ground are we to treat the correlative benefit to the promoters as being in another category? Sec. 22 restricts executive action in relation to statutory taxation; and it is within the language of Lord Macnaghten that sec. 22 should be intended by the legislature to bind the Crown: that the legislature should be taken for that purpose to be representing the Crown or any instrumentality to which taxing powers are given.

But it is said that this conclusion is negatived by clause 31 of section 7 of the *Interpretation Act*, chapter 2 of the Consolidated Statutes, 1877:

> Every act shall be construed as to reserve to the legislature the power of repealing or amending it, and of revoking, restricting, or modifying any power, privilege, or advantage thereby vested in or granted to any person or party whenever such repeal, amendment, revocation, restriction, or modification is deemed by the legislature to be required for the public good.

In 1888 the *Act* was revised, and a new clause in the same language was preceded by general words in section 8 as follows:

> In construing this or any act of the legislature of British Columbia, unless it is otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction:

(1) [1895] A.C. 542 at 559.

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The present provision is to the same effect.

It is difficult to assess the significance or effect of such a clause. It seems to have been introduced into the legislation of this country in 1849 in the *Interpretation Act* of the Province of Canada. In relation to the present matter, the power would exist as fully without the reservation as with it. But what is reserved is a legislative, not a contractual, power, and I am unable to attribute any greater effect by reason of its being express than as constitutionally implied. Its exercise may modify a statutory contract, but that operation is not contractual.

So far, moreover, as it may be relevant in interpretation, only the present form is to be considered. Except in the case of temporary statutes all legislation is looked upon as perpetual and once repealed it is as if it had never existed: *Surtees* v. *Ellison* (1). As under section 22 the exemption is to continue for a specified period, a stronger case could scarcely be imagined of "something in the context indicating a different meaning or calling for a different construction".

It was argued that the contract between the parties entered into in 1912 when the railway, without the lands, was leased to the Canadian Pacific Railway Company, is to be interpreted as binding the Province to a continuance of the exemption even though no such obligation existed before; but I cannot so construe it. What the parties had in mind was an existing and binding statutory exemption: the railway company desired to avoid any question of affecting the conditions on which the exemption rested; and as a consideration for the settlement of all doubts it was agreed that the company should pay a specified annual tax and that the exemption should continue as before. I cannot view it as having added any new form or characteristic to the exemption.

The proposed taxes must next be considered. It will be observed that the legislation would be enacted while the lands are still in the ownership of the railway company and still exempt under sec. 22 although a change of ownership or use would be necessary to its effectiveness. Under question 5 the tax which it is agreed would be the equivalent of what is known as a royalty payable by certain grantees

(1) 9 B. & C. 752.

and lessees of the Crown lands on each 1,000 square feet board measure of timber cut, would arise only at the moment of severance of the trees. But that is not simply fixing the time for payment; the tax is conditioned on severance and if there are no merchantable trees there can be no severance and no tax. That the tax, so potential and contingent, should, when it emerges in esse be charged on the land, is, as to its nature, irrelevant: and I cannot view it other than a tax imposed on personal property at its initial stage of being worked into merchantable lumber.

As envisaged by question 6, the tax is declared to apply only to land and is based on the fair market value of the land. For payment, alternative modes are proposed:

(1) Within a specified limited time after the assessment with a discount if paid within the specified time;

(2) Or, at the election of the taxpayer, made within a specified time after assessment by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut that year bears to the assessed value of the land.

I agree with Mr. Farris that the first mode must be interpreted as a substantial equivalent of the second in which the obvious risks of the latter both to the Province and to the owner are commuted in terms of money. The discount must be sufficient to induce a business judgment to accept it as fairly related to the chances of loss and benefit; and there is no more difficulty in estimating such a sum for taxes than for purchase money. In each case timber is the substance of the value; but in the case of the tax, the attention may be more specifically centered on the future fact of severed timber.

I can see no real differenc either between the second alternative and the tax as proposed in question 5. The tax depends in both cases on severance and only in relation to timber cut is it to be computed. If growing timber is destroyed, the original tax is so far reduced. Taking the assessment of the "fair market value of the land" to mean the value of standing timber at the time of assessment, the discount in the first alternative takes speculative account and the second actual account of capital losses from time to time to be written off the assessed value; and in the result the tax is intended to attach solely to severed timber in the course of commercial production of marketable lumber and the same situation as in question 5 confronts us.

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This brings us to question 4:—"Would a tax imposed by the Province on timber as and when cut upon lands in the island railway belt, the ownership of which is vested in a private individual or corporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be ultra vires of the Province?"

Since in every case supposed, the tax is on severed timber, it is in reality an excise tax which, in its general tendency, is indirect; "Customs and excise duties are, in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted"; *Attorney-General of British Columbia* v. *Kingcome* (1). "The word—(excise)—is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded an excise duty is plainly indirect.": *Atlantic Smoke Shop Ltd.* v. *Conlon* (2).

I do not think this conclusion is at all affected by what I agree with the judges below would be the fact, that the tax would influence the price at which the lands could be sold: that would make it indirect in both aspects. Since the legislation would be sui generis, the incidence of the tax on the company cannot be brought within any general tendency rule except the general and indeed the only tendency of the special case. But the fact that a tax, in its nature and classification, is indirect is not taken out of that category by the further fact that in some part at least its incidence may already have been shifted from the person who actually pays it: *Rex* v. *Caledonian Collieries* (3).

I think it clear, too, that the purchaser of the land or timber is not the person intended or desired to pay the tax and that it is the intention and expectation that it will be passed on to another by him; but regardless of actual intention, where the general tendency of the tax, with or without a like effect in special circumstances, is judicially found, the imputation of the appropriate intent or expectation necessarily follows.

(1) [1934] A.C. 45 at 59.
(2) [1943] A.C. 550 at 565.
(3) [1928] A.C. 358.

As I have already intimated, I think the imposition of the proposed taxes would affect the price or the value of the use of the lands in the hands of the company; I cannot but take that to be the real object of the legislation; there would thus be an encumbrance imposed during what would otherwise be the period of and would so far derogate from the exemption.

The seventh question is whether the company is liable to the so-called tax for forest protection imposed by sec. 123 of the *Forest Act,* and if so, whether the liability derogates from the provisions of sec. 22.

The *Forest Act* enables the establishment of a comprehensive service for the conservation and development of what in British Columbia is a great natural resource. Its scope reaches to all means and measures to prevent damage and destruction by fire and by insects. Although the immediate beneficiaries are the owners or persons interested in forest lands, the interest of the public in the preservation of this vast wealth, the fullest utilization of which is of the highest public importance, is of paramount concern, and the administration provided is the only practicable method by which effective protection can be secured.

Sec. 123 as amended in 1946 provides for the creation of a forest protection fund to be raised by an annual tax of six cents for each acre from the owner of logged, unimproved and timber land as well as from the holders of timber or pulp leases, timber, pulp or resin licenses, or timber berths. To the fund there is contributed annually by the Province the sum of $1,000,000. Provision is made for the assessment of any deficiency in administration expenses and as well for the reduction of the assessment and contribution in the event of an accumulated surplus. The expenditure of these moneys is confined to the purposes of forest protection under Part II of the statute.

In *Shannon* v. *Lower Mainland Products Board* (1), a somewhat similar situation of private and public benefit existed. Under the legislation there considered, the moneys were collected as license fees and they seem to have been the only funds available to a local scheme: sec. 14, authorizing general expenses to be paid from the Consolidated Revenue Fund specifically excepts "the expenses

(1) [1938] A.C. 708.

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of administering" such a scheme. The benefit to the licensee lay in the results of the regulation of his business, and the public interest in its indirect effects. The Judicial Committee held that,

> The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin, C.J. in his judgment on the reference . . . namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by section 92(13) and (16).

In *City of Halifax* v. *Nova Scotia Car Works* (1), the car works company was entitled to an exemption from all "taxation", and the question was whether or not "taxation" included a capital levey on a frontage basis for a part of the cost of a sewer laid as a local improvement along a street adjacent to the company's lands. The balance of the cost as well as maintenance was borne by general taxation. Although the owner of such lands was the direct beneficiary, the public at large was afforded health protection as well as general convenience, to say nothing of esthetic returns. Lord Sumner at page 998 uses this language:

> All rates and taxes are supposed to be expended for the benefit of those who pay them, and some are really so, but the essence of taxation is that it is imposed by superior authority without the taxpayer's consent, except insofar as a representative government operates by the consent of the government. Compulsion is an essential feature of the charge in question. The respondents might have drained their factory for themselves; they might think that it needed no drainage; they might object to the municipal scheme as defective; but the city sewers would be laid and the respondents would have to pay just the same; there is not enough here to differentiate this charge from taxation.

The option to use or not to use the sewer would, in the circumstances, be quite illusory: practically the company must make use of it and necessarily receive its benefit. The same compulsion was present in the *Shannon* case (2); the producer or dealer, continuing in his business, was compelled to accept the benefit of the regulations and to pay the licence fees. The distinction between them is, I think, the fact that in *Shannon* the fund, raised by licence fees, was exclusively for and the only source of means by which the schemes could be carried out. In that sense, it was analogous to a fee for registration.

Here, there is not that sole or exclusive characteristic: general taxation furnishes a substantial portion of the required money just as it did for the sewer for which the

(1) [1914] A.C. 992. (2) [1938] A.C. 708.

company was taxed. In all three cases, there is the immediate and special interest of the owner and the general interest of the public: in two there is both special and general taxation. The compulsion, the public purpose, and the individual liability, are present in all. The language of sec. 123, "an annual tax" indicates the ordinary and I think the proper conception of what is being prescribed. The analogy of the present situation to that of payment for such a service as that of registering a deed, must, I think, be rejected. The public interest is too clearly the paramount object of the legislation, and the imposts carry too fully the indicia of taxation, to permit us to distinguish them from the generality of fiscal provisions.

I would, therefore, answer the questions as follows:

1. To the first part of the question, Yes; to the second, No.
2. Yes.
3. No.
4. Yes.
5. No.
6. No.
7. To the first part of the question, No; to the second, that the tax applied to the company would derogate from the provisions of sec. 22.

KELLOCK J.—In the Dominion Order-in-Council of June 23, 1883, forwarded to the provincial government on the 28th of that month, the following occurs:

> 2nd. That Sir Alexander Campbell should then communicate with Mr. Dunsmuir and other capitalists who are understood to be desirous of forming a company to construct the railway *under the terms of the Provincial Act.*

The "Provincial Act" was of course the *May Act* and the immediately preceding paragraph of the order refers to the necessity of amending it. So far as the exemption from taxation covered by section 22 of the *Settlement Act* is concerned, that provision was already in the *May Act* and it was on those terms that the contractors were willing to execute the contract under which the railway was to be built. Both governments therefore knew that it was on the basis that the lands should "not be subject to taxation, *unless and until* the same are used by the company for

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other than railroad purposes, or leased, occupied, sold or alienated", that the contractors were willing to undertake the works.

On August 6, 1883, the Dominion Minister of Justice, Sir Alexander Campbell, sent to the provincial Prime Minister, Mr. Smithe, a copy of the proposed contract between the Dominion and the contractors. The letter, which accompanied it, contains this sentence:

> I propose, on obtaining the approval of the Local Government to the contract, to execute it, and that Mr. Dunsmuir and his friends shall be *invited* to do so.

The letter concludes:

> I shall be glad to have your approval of the contract and of the several stipulations made in this letter in regard to it.

The contract was the subject of further correspondence between the representatives of the two governments and was ultimately settled by August 20, 1883. By the inter-governmental memorandum of arrangement executed that day, it was provided that the contract should be "provisionally signed by Sir Alexander Campbell on behalf of the Minister of Railways and Canals, but is to be deposited with Mr. Trutch, awaiting execution by delivery until the necessary Legislative authority shall have been given, as well by the Parliament of the Dominion as by the Legislature of British Columbia."

The memorandum also contains the following provision:

> 2. The Government of British Columbia will procure the assent of the Contractor for the construction of the Island Railway to the provisions of Clause F recited in the amending Bill.

The amendments were underlined in red in a copy of the proposed bill which was annexed to the memorandum. The bill by clause (*f*) of the recital, as it was therein amended, together with section 23, enlarged the burdens to which the subsidy lands were made subject by the *May Act* but the amendments did not otherwise affect the interest in the lands which would come to the company on the completion of the works. In my opinion this circumstance, viz., that the contractors' assent was required to be obtained to the change, confirms the accuracy of the statement in the Order-in-Council of June 23, 1883, that it was understood by all concerned then and subsequently that the

contractors were willing to undertake the works only upon the "terms of the Provincial Act" as it was ultimately settled.

The existence of the understanding to which I have referred is made even more clear by the terms of the testimonium of the construction contract:

> . . . and placed in the hands of the Honourable Joseph William Trutch, until the Act passed by the Legislature of The Province of British Columbia in the year 1883 (the May Act) shall have been amended by the Legislature of the Province in accordance with a Draft Bill now prepared, and which has been identified by Sir Alexander Campbell and the Honourable Mr. Smithe, and signed by them and deposited in the hands of the said Joseph William Trutch . . .

as well as by the endorsement on the draft bill produced from the files of the Department of Transport signed by Dunsmuir, which reads:

> I have read and on behalf of myself and my associates acquiesce in the *various provisions* of this Bill, so far as they relate to the Island Railway *and lands*.

The above is the only copy of the draft bill and endorsement which is produced. The note on page 148 of the printed case herein purporting to reproduce an endorsement differently worded is not proved. The case was copied from the case used in the court below which in turn was based upon a compilation of documents headed "In the Matter of Chapter 71 of the Statutes of British Columbia for 1917". That compilation does not contain either the draft bill or the alleged endorsement but there is pinned to page 35 a note in the handwriting of some unknown person, the "note" reproduced in lines 24 to 35 on page 148 of the case in this appeal. Where it came from and whether accurate or not is not shown. The note on page 148 is itself not a true copy of the manuscript note as it omits the words "It was signed" immediately before the signature "A. Campbell". I therefore take the endorsement on the bill produced from the Department of Transport as the one to be considered.

Under the arrangement made, the entire scheme was not to become operative until the legislation had been passed by both jurisdictions. The Dominion Act was last in point of time, receiving the Royal Assent on April 19, 1884. Previously on the 12th of that month by an Order-in-Council of the Dominion, Dunsmuir and his associates

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were named as the persons to be incorporated under section 8 of the Provincial Act, and therefore upon the passing of the Dominion Act the appellant company came into being. The exemption provided for by section 22 was with respect to the lands "to be" acquired by the company. This event, under the terms of the construction contract, would not take place until after the completion of the works to the satisfaction of the Governor-General. The exemption, therefore, inapplicable while the lands were held by the Dominion, could be operative only thereafter when the company had received its conveyance, from which time the lands should "not be subject to taxation, unless and until . . ." The period thereby delimited has not yet elapsed as to that part of the lands still retained by the appellant company.

I do not think that section 7 (31) of C.A. 1877, cap. 2, has the effect of reading into section 22 some such words as "unless and until the legislature otherwise determines" at the beginning thereof. In my opinion it does nothing more than provide that the legislature may do what it might do without such a provision, namely, deal by legislation with civil rights in the province.

There is set forth in the preamble of both the Dominion and provincial legislation terms of an agreement. For convenience I refer to the agreement as contained in the provincial statute. By clause (*b*) of the agreement as recited in the provincial Act the provincial government was to obtain the authority of the legislature to grant to the Government of Canada certain defined lands on the Island of Vancouver. By clause (*e*) the Dominion Government was obliged, upon the passing of the provincial statute, to seek the sanction of Parliament to enable the Dominion to contribute to the construction of the railway the sum of $750,000 and the Dominion Government agreed "to hand over to the contractors who may build such railway the lands which are or may be placed in their hands *for that purpose* by British Columbia". By clause (*f*) the Island lands to be thus conveyed, subject to certain reservations as to coal and other minerals and timber, were to be opened for settlement as therein specified.

By section 3 the lands referred to in clause (*b*) of the recital were granted to the Dominion for the purpose of

constructing and to aid in the construction of the railway and "*in trust* to be appropriated as they may deem advisable". This language followed that of section 3 of the *May Act* but the *May Act* did not contain the undertaking in clause (*e*) of the Settlement Act above referred to, for the handing over of the lands to the builders of the railway, the lands being placed in the hands of the Dominion "for that purpose". Accordingly, in my opinion, clause (*e*) and section 3 are to be read together, with the result that the lands were granted to the Dominion in trust for the company to be formed by incorporation under the same statute, subject of course to the fulfilment by the company of the conditions which would entitle it to a conveyance.

Section 8 makes provision for this incorporation and by section 10 the company thus incorporated is empowered to accept from the Government of Canada any conveyance of lands by way of subsidy or otherwise in aid of construction of the railway and to enter into any contract with that government for or respecting the use, occupation, mortgage, or sale of said lands, or any part thereof, upon such conditions as may be agreed upon between the government and the company.

By section 21 the railway with its workshops, stations, and other necessary buildings and rolling stock, as well as the capital stock of the company, was to be exempt from provincial and municipal taxation for a period of ten years after completion and by section 22 the lands "to be acquired" by the company from the Dominion for the construction of the railway were to be exempted as already mentioned.

The subject matter of these provisions was not specifically mentioned in the recited agreement but the statutory recital concludes as follows:

> And whereas it is expedient that the said agreement should be ratified and that provision should be made to *carry out the terms* thereof.

In my opinion provisions necessary to carry out the terms of an agreement form part thereof. Accordingly, it was the lands, subject to the burdens set out in the statute and with the benefit of the statutory immunity, of which, by section 3 the Dominion was constituted trustee for the appellant.

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It is quite clear to my mind from all relevant writings that all concerned understood that there were three things to be received by the appellant company in return for the execution of its obligations under the construction contract, viz., (1) the cash subsidy of $750,000; (2) the conveyance of the lands; and (3) the exemption from taxation provided by sections 21 and 22. I think all were equally, in the minds of all parties, the inducement upon which the contractors agreed to execute the works.

In my opinion the lands together with the immunity from taxation were the subject of a contractual obligation between the province and the Dominion as to which the latter was a trustee for the company upon fulfilment of the terms by the company which would entitle it to a conveyance. The company as beneficiary would accordingly be entitled to sue the province on the contract, it being necessary only that the Dominion should, in any such action, be made a party; *Vandepitte* v. *Preferred Accident Insurance Corp.* (1); *Harmer* v. *Armstrong* (2). That the agreement recited in the provincial Act was contractual is, I think, clearly established by the decision of the Privy Council in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (3). In speaking of Article 11 of the Terms of Union, Lord Watson said at p. 304:

> . . . it merely embodies the terms of a commercial transaction, by which the one Government undertook to make a railway, and the other to give a subsidy by assigning part of its territorial revenues.

In my opinion if that be so of Article 11, it is equally so of the agreement by which the difficulties which had arisen between the two governments under that Article were composed. See also *Burrard* v. *Rex* (4).

It was also argued that a contract was brought about on the basis of the provincial statute being itself an offer accepted by the company by performance of the works thereby called for. Apart from any question arising from the form of the statute, I would have thought that such a contract had been made out; *La Ville de St. Jean* v. *Molleur,* (5); *Cunningham* v. *New Westminster* (6). The statutes in question in these authorities were, however,

(1) [1935] A.C. 70 at 79.
(2) [1934] 1 CH. 65.
(3) 14 A.C. 295.
(4) [1911] A.C. 87 at 95.
(5) 40 S.C.R. 629.
(6) 14 D.L.R. 918.

permissive. It is to be observed that in the present case, sections 9 and 20 of the statute, which provide for the execution of the works are imperative and the question arises as to whether there existed alongside the statutory obligation, a contractual one; *Great Western Railway* v. *The Queen* (1); *Reg.* v. *The Great Western Railway* (2); and *Reg.* v. *The York and North Midland Rly. Co.* (3); Statutes of British Columbia, 35 Vict., cap. 1, section 6 (2). In view of the conclusion to which I have come, however, it is not necessary to deal with this phase of the matter.

I would, therefore, allow the appeal as to the first question. With respect to the other questions I agree with the reasoning and conclusions of my brother Rand and have nothing to add.

ESTEY J.:—The seven questions submitted by the Lieutenant-Governor in Council arise out of a report made by The Honourable The Chief Justice of British Columbia, as Commissioner appointed under the Public Inquiries Act, 1936 R.S.B.C., c. 131, to inquire *inter alia* as to "forest finance and revenue to the Crown from forest resources."

In the course of the report it was recommended that the Courts be asked (*a*) whether section 123 of the *Forest Act* is applicable to the timber lands on Vancouver Island of the Esquimalt and Nanaimo Railway Company, known as the "Island Railway Belt;" (*b*) whether it was within the competence of the province to enact a severance tax, equal in amount to the royalty paid upon timber cut from Crown lands, to be imposed upon timber cut from these lands after the sale thereof by the railway company.

The report expressed the view that there was "no contract between the province and the company" relative to the lands in the Island Railway Belt and therefore that the imposition of a severance tax would not involve a breach of any contractual obligation.

The Lieutenant Governor in Council, under the provisions of the *Constitutional Questions Determination Act*, 1936 R.S.B.C., c. 50, by Order in Council dated the 13th

(1) 1 E. & B. 874.
(2) 62 L.J.Q.B. 572.
(3) 1 E. & B. 858.

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November, 1946, submitted the seven questions to the Court of Appeal in British Columbia for its opinion. This appeal is from the answers given by that Court.

Question One:

Was the said Commissioner right in his finding that there never was any contractual relationship between the provincial government and the contractors or the Railway Company in relation to the transfer of the Railway Belt to the Railway Company.

Between the governments of the Dominion of Canada and British Columbia in 1883 there were several matters in dispute, including the construction of the Island Railway and the delay in respect to that of the Canadian Pacific Railway. The two governments, commencing in February of that year, sought by correspondence and interviews to effect a settlement and in August The Honourable Mr. A. Campbell, Minister of Justice in the Dominion Government, went to British Columbia where on August 20, 1883, an agreement was concluded upon the matters in dispute, including the construction of the Island Railway.

It is perfectly clear that certain parties (hereinafter referred to as the Dunsmuir group) were familiar with these negotiations at least so far as the construction of the Island Railway was concerned, and on the same date agreed upon terms under which they would, and in fact did, construct that railway. The three parties, Dominion, province and the Dunsmuir group, embodied their agreements on August 20, 1883, in the following documents:

(1) The memorandum of agreement signed by Messrs. Campbell and Smithe on behalf of the respective governments.

(2) The amendments to the *May Act*.

(3) The construction contract signed by A. Campbell, Minister of Justice for the Minister of Railways and Canals in the Government of the Dominion of Canada, and by four parties, of whom Robert Dunsmuir was the first, under the terms of which Robert Dunsmuir and his associates agreed to construct the said Island Railway and telegraph line from Esquimalt to Nanaimo.

(4) Mr. Dunsmuir, on behalf of himself and his associates,

"I have read and on behalf of myself and my associates acquiesce in the various provisions of the Bill so far as they relate to the Island Railway and lands."

"Robert Dunsmuir".

(This latter document, numbered four, may not have been prepared or signed until the following day.)

The agreements would not be binding on any of the parties thereto until the Legislature of British Columbia enacted the *May Act* as amended ratifying the agreement between the Dominion and the province, which it did on December 19, 1883, by an Act entitled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province," (hereinafter referred to as the Settlement Act), and the Dominion would ratify that agreement, which it did April 19, 1884, by an Act (1884 S. of C., c. 6) entitled "An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion," (hereinafter referred to as the Dominion Act). The construction contract, numbered three above, was held as agreed in escrow by The Honourable Mr. Joseph W. Trutch. With the passage of the Dominion Act, April 19, 1884, the agreement and the construction contract became binding upon the parties.

Section 22 of the *Settlement Act* was identical with that of the *May Act* and read:

22. The lands to be acquired by the company from the Dominion Government for the construction of the Railway shall not be subject to taxation, unless and until the same are used by the company for other than railroad purposes, or leased, occupied, sold, or alienated.

It is around this particular sec. 22 that this controversy centres.

The *Settlement Act* provided that appellant company incorporated by that *Act* should be bound by the contract between the persons to be incorporated and Her Majesty, represented by the Minister of Railways and Canals. The appellant railway contends that there was a contract

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between the Province of British Columbia and the Esquimalt and Nanaimo Railway Company of which this sec. 22 is a term, while the respondent denies that any such contract ever existed, but rather it was enacted as a term of the agreement between the Dominion and the province.

The foregoing documents numbered one to four were the only documents prepared on August 20, 1883, embodying the terms of the settlement of all matters then in dispute, including some matters other than the Island Railway, between the two governments, and the construction contract. The appellant railway is therefore confronted with the fact that there is no agreement in writing between the province and the contractors, which, having regard to the fact that the other agreements were reduced to writing, would in all probability have been in writing if in fact it was made. The appellant railway, however, insists that such a contract under all circumstances should be implied. Its contention is that "the contractual relationship resulted from negotiations which commenced in February 1883 and in which the province, the Dominion and the contractors all participated." Between the period February 1883 and August 20, 1883, there were interviews and correspondence between the two governments. As early as May 5, 1883, the Government of Canada, relative to the construction of the Island Railway, offered substantially what was agreed upon on August 20, 1883. The province accepted the terms and enacted the *May Act*. Immediately the Dominion objected to certain of its provisions, in particular statements that the Government of Canada "agrees to secure the construction" of the Island Railway. This was amended as agreed on August 20, 1883, (when all the amendments thereto were agreed upon) and enacted as the *Settlement Act* to the effect that the Government of Canada would seek the sanction of Parliament to enable them to contribute to the construction of the Island Railway. There were other somewhat similar amendments. The Government of Canada had consistently refused to accede to the contention of the province that the construction of this Island Railway was a Dominion responsibility. These amendments were consistent with that view and equally consistent with the settlement made on August 20, 1883, under which both governments contributed and

the Dominion contracted for the construction thereof. These changes do not support the view that there was a contract relative to the construction of the Island Railway between the province and the contractors. In fact throughout these negotiations in 1883 there is no suggestion of a contract between the province and the contractors, while almost from the outset a contract for the construction of the Island Railway is contemplated between the Dominion and the contractors.

Moreover, in 1904 and again 1917 when the appellant railway asked the Dominion Government to disallow certain provincial legislation then enacted relative to these lands, it did not suggest that the province in passing the legislation had violated any agreement made between the appellant railway and the province. On the contrary, in their petition to the Dominion Government dated March 21, 1904, it is stated as follows:

> (20) The Esquimalt and Nanaimo Railway Company made their contract as aforesaid with the Dominion Government, and upon the due completion thereof received a grant of the said lands from the Dominion Government upon the same terms and conditions they were granted to the Dominion Government by the Provincial Government of British Columbia, by Chapter 14 of 1884.
>
> (21) The Esquimalt and Nanaimo Railway Company do not recognize the right of the Provincial Legislature to interfere with the land grant, as the company did not receive the land from the Provincial Government, nor did they enter into any contract with the Provincial Government.

The statements in these paragraphs have a special significance because this petition is signed by James Dunsmuir, who with Robert Dunsmuir, was among those who signed the construction contract of August 20, 1883. Mr. Dunsmuir would be in a position to know if in fact a contract was made on that date with the province and he and his associates in 1904 would appreciate how much of an asset such a contract would have been in their contention that the province in enacting the legislation they were then asking to be disallowed, had acted contrary to its obligations. If such a contract had existed it would no doubt have been urged at that time.

The petition presented to the Dominion Government in 1917 was not made a part of the record before this Court, perhaps because a formal hearing then took place before the Prime Minister, the Minister of Justice and the

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Minister of Public Works, when counsel appeared on behalf of the appellant railway. It may be noted, however, that in the report of the Minister of Justice in 1918 to His Excellency recommending disallowance of the provincial legislation the following is included:

> On the other hand it was urged, and in fact it was not denied, that the Company had received its land grant in pursuance of the agreement of the Government of Canada founded upon legislation sanctioned by the Dominion, and the Province . . .

These submissions made in 1904 and 1917 without any reference to the existence of a contract between the province and the contractors go far to support the contention that such a contract never did exist.

Sec. 22, as well as certain other sections of the *Settlement Act*, would undoubtedly be among the important items which induced the contractors to undertake the construction of the railway. These were embodied in the terms of their construction contract with the Dominion, and the Dominion had placed itself in a position to carry out the terms of its contract by concluding an agreement with the province. Other sections of the *Settlement Act* were referred to in which existing rights of persons or corporations as well as reservations for military and naval purposes were protected, and further provisions relative to the price of coal. These were matters which, under the circumstances, would be present to the minds of the parties and their inclusion does not point to the existence of a contract, such as is suggested, between the province and the contractors.

The document numbered four above may not have been prepared or signed before August 21, 1883. By its terms Robert Dunsmuir does not suggest the existence of any agreement between himself and the province. On the contrary, the word "acquiesce" is used. Under the circumstances, it may well be that those representing the Dominion deemed it desirable that Mr. Dunsmuir should signify his acquiescence in the terms of the *Settlement Act;* more particularly because sec. 15 of the construction contract provided that when conveyed to the company that the said lands would "be subject in every respect to the several clauses, provisions and stipulations referring to or affecting the same respectively, contained" in the *Settlement Act.*

In support of their contention the appellants refer to certain statements subsequently made. In the grant of these lands April 21, 1887, from the Dominion to the appellant railway reference is made to an agreement between the two governments and the company; also that in the recommendation by the Minister of Justice in 1918 for a disallowance of certain provincial legislation in respect to these lands he spoke of the province "as one of the parties to the tripartite agreement". These statements when read in relation to the other portions of the respective documents do not warrant a conclusion that a contract between the province and the appellant railway was made.

Nor can the appellants' contention be supported that the Dominion throughout acted as agent for the province in the negotiation and execution of the construction contract. The fact that the security given by the company had to be satisfactory to the province was pressed as indicating the existence of an agency relationship. The vital concern of the province in the completion of the Island Railway and the quantum of its contribution made it but natural that the Dominion would agree that the security taken should be satisfactory to the province. It may be noted that when the province contended: "In the event of the forfeiture of the security by the contractors, it ought to be understood that it will be handed over to the Province by the Dominion Government;" the latter replied: ". . . they would not hand over the security, but retain it for the purpose for which it was given". Such a provision does not suggest that the Dominion was an agent.

The appellants referred to a communication dated the 16th November, 1885, from The Honourable Mr. Smithe to The Honourable Mr. Trutch dealing with questions arising out of the delay in the issue of patents to the settlers. It is a long letter in which he acknowledges the Dominion to be the principal in this matter. Further on, in setting forth a contention rather than stating a fact, he says that the provincial government are the real principals. Such a statement does not point to the existence of agency in fact.

In effecting the settlement of the various disputes the respective governments were acting as principals. As part

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of that settlement the lands were transferred in trust to the Dominion. The latter as trustee appointed the province to act as agent for administering the lands for the purposes of settlement until the Island Railway would be completed. These are the only relationships existing between the parties as evidenced by the written documents.

The provisions of the *Settlement Act* were part of the terms of the settlement made between the two governments. The tax exemption in sec. 22, as well as the other provisions of the *Settlement Act,* were provided for in the settlement agreement in order that the Dominion might hold out these subsidy lands tax exempt to the Dunsmuir group as part of the consideration under which they might undertake to build the railway. It was in pursuance of that understanding of the agreement that the province transferred the lands in trust subject to those terms to the Dominion for that purpose; as stated in the *Settlement Act* "for the purpose of constructing, and to aid in the construction of a Railway between Esquimalt and Nanaimo, and in trust . . ." The construction contract provided that these lands should be conveyed by the Dominion to the contractors (Dunsmuir group) "upon the completion of the whole work to the entire satisfaction of the Governor in Council; . . . subject in every respect to the several clauses, . . . contained in the aforesaid Act," (*Settlement Act*). When the Dominion and the province by the enactment respectively of the *Dominion* and *Settlement Acts* ratified the settlement made between them, and the Dominion had ratified the construction contract, they had completed what Lord Watson referred to in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), as a "statutory arrangement."

Upon the completion of the railway the lands were conveyed to the company by a grant dated April 21, 1887, "subject nevertheless to the several stipulations and conditions affecting the same hereinbefore recited and which are contained in the Acts of the Parliament of Canada (Dominion Act) and of the Legislature of British Columbia . . ." (Settlement Act). The position of the respondent

(1) 14 App. Cas. 295 at 303.

is therefore analogous to that described in *City of Halifax* v. *Nova Scotia Car Works* (1), where at p. 996 Lord Sumner states:

> 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.

If the province had been contracting with the Dunsmuir group for the construction of the railway a trust would not have been necessary. In order that both governments might make their respective contributions and but one government make the contract for the construction of the Island Railway, the governments with respect to these lands created a trust. The covenant of the province with the Dominion to exempt these lands when conveyed upon the completion of the railway was a term of that trust. The contractual obligations of the province with respect to the exemption provided in sec. 22 are no different from its position had it contracted direct with the railway, except as to questions of enforcement not here in issue.

Question One as framed is specifically restricted to a contract between the province and the contractors or the railway company, and in that restricted sense should be answered no; but as it is plain the province is concerned as to its contractual obligations with respect to sec. 22, associated with this answer should be an intimation of the province's obligations under the terms of the trust.

Question Two:

> If there was a contract, would any of the legislation herein outlined, if enacted, be a derogation from the provisions of the contract?

The respondent supports a negative answer on two bases, one that the exemption from taxation terminates with alienation on the part of the appellant railway and as this tax is imposed only after that alienation, it is not a derogation of the exemption provided for in sec. 22; two, that the lands are not used for railway purposes within the meaning of sec. 22.

The appellant railway acknowledges the right of the province upon alienation of these lands to impose a tax of general application. Its opposition to the present tax is founded upon the basis that the tax proposed is not of general application but imposed upon these lands only

(1) [1914] A.C. 992.

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and while imposed upon the purchaser it can only have the effect of reducing the purchase price realized by the company in competition with other timber limits not subject to the tax and therefore in effect the tax is passed backward and paid by the company.

Quite apart from whether such a tax may ultimately be determined as direct or indirect, if the imposition thereof upon these lands only and therefore not a tax of general application had in fact the effect of reducing the price, rent or other consideration to the appellant that would be a violation of the obligations under the terms of the trust with respect to these lands.

The contention that these lands were transferred for the purpose of financing the railway rather than as consideration for the construction thereof is not tenable. They were transferred in fact as part of the consideration for the railway and subject to the provisions of sec. 22. This section contemplates that so long as the lands remain the property of the appellant company and remain idle or are used for railway purposes only the exemption will obtain, but the exemption is terminated if these lands be otherwise used or alienated.

The answer to Question Two is yes.

Question Three:

Was the said Commissioner right in his finding that "There is no contract between the Province and the company", which would be breached by the imposition of the tax recommended by the Commissioner?

In 1912 the appellant railway desired to lease the Island Railway to the Canadian Pacific Railway Company. In view of the provisions of sec. 22 of the *Settlement Act* it was concerned as to what the effect of such a lease might have upon the exemption therein provided for. They interviewed the Government of the Province, as a result of which an agreement was made under date of February 17, 1912, and subsequently ratified by an enactment of the legislature of the province. This agreement provided that "notwithstanding such lease and operation such exemption shall remain in full force and virtue".

This contract assured to the appellant railway that the obligation of the province thereafter under sec. 22 remained precisely as if the lease had never been made.

The answer to Question Three is no.

Question Four:

Would a tax imposed by the Province on timber, as and when cut upon lands in the Island Railway Belt, the ownership of which is vested in a private individual or corporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be *ultra vires* of the Province?

This question contemplates a sale of the standing timber by the appellant to a purchaser who will cut and market same. The entire operation contemplated is commercial in character. A tax so imposed would in the ordinary course of business enter into the cost of the purchaser's operations and into the computation of his sale price, and as a part thereof would be passed on from vendor to purchaser. It was suggested in the particular circumstances of this case that it could not be passed on but that it must be assumed by the railway because the price to the purchaser from the railway is fixed in open competition. We need not, however, consider the effect of such a contention. It may be true in particular cases. It is not, however, the facts and circumstances in particular cases that determine whether a tax is direct or indirect, but rather the incidence or effect of such a tax in the normal or ordinary transactions of business.

It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity; . . .

Viscount Cave, L.C., in *City of Halifax* v. *Fairbanks' Estate* (1). *City of Charlottetown* v. *Foundation Maritime Ltd.*, (2). *Bank of Toronto* v. *Lambe* (3). *Rex* v. *Caledonian Collieries* (4). *Attorney General for British Columbia* v. *McDonald Murphy Lumber Co.* (5).

The answer to Question Four is yes.

Question Five:

Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on the land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:

(*a*) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land:

(1) [1928] A.C. 117 at 126.
(2) [1932] S.C.R. 589.
(3) 12 App. Cas. 575.
(4) [1928] A.C. 358.
(5) [1930] A.C. 357.

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(*b*) The tax shall approximate the prevailing rates of royalty per thousand feet of merchantable timber:

(*c*) The owner shall be liable for payment of the tax:

(*d*) The tax until paid shall be a charge on the land.

This question as phrased describes the tax as "a tax on the land of the Island Railway Belt acquired in 1887". It is, however, a tax imposed only "as and when merchantable timber is cut and severed from the land". It is payable by the purchaser from the appellant of the standing timber and "shall approximate the prevailing rates of royalty per thousand feet of merchantable timber". It is then stated "the tax until paid shall be a charge on the land". In substance this tax does not materially differ from that in question four except that it creates a charge on the land. This of itself does not make the tax a land tax. In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), it was expressly stated in the enacting statute that "the tax imposed by this Act shall be a direct tax". This was a tax upon every contract of sale of grain for future delivery with specified exemptions, and notwithstanding the express statutory provision to the contrary, was held to be an indirect tax. Viscount Haldane at p. 566 stated:

> For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the Imperial statute of 1867.

The real nature and general tendency of this tax is evidenced by its imposition only when the standing timber has been sold by the railway and the purchaser has cut and severed it from the land. There is here contemplated a series of commercial transactions in the normal course of which the purchaser of this standing timber would seek to recoup himself for the amount of the tax in the price he realizes from the timber. It is therefore a tax which comes within the description of an indirect tax as defined in the authorities.

The answer to this question should be no.

Question Six:

Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:

(1) [1925] A.C. 561.

(a) The tax shall apply only to land in the belt when used by the railway company for other than railroad purposes, or when leased, occupied, sold, or alienated:

(b) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, it shall thereupon be assessed at its fair market value:

(c) The owner of such land shall be taxed on the land in a percentage of the assessed value, and the tax shall be a charge on the land:

(d) The time for payment of the tax shall be fixed as follows:

(i) Within a specified limited time after the assessment, with a discount if paid within the specified time;

(ii) Or at the election of the taxpayer, made within a specified time after assessment, by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut during that year bears to the assessed value of the land.

It is here proposed the owner shall pay a tax computed on a percentage of the assessed value of the land. It is imposed as at the time of the alienation and in that sense has no relation to the actual cutting and severing of the timber. The land, however, has no value apart from the timber and a purchaser thereof contemplates the cutting and marketing of the timber. Therefore, an assessment at its fair market value is really a tax founded upon the fair market value of the timber and a tax so imposed is in reality upon the timber and not the land and would enter into the price, as in Questions Four and Five, and therefore subject to the same objection. In substance it is a commodity and not a land tax. This view is emphasized by the alternative method of payment. The cutting and marketing of the timber is subject to several hazards, including that of fire, and the annual operations are determined by market conditions. Under all the circumstances, the alternative method of payment in d(ii) would be usually adopted.

Mr. Farris pressed that this was a direct tax within the meaning of *City of Montreal* v. *Attorney-General for Canada* (1); and *City of Halifax* v. *Fairbanks' Estate* (2). In both of these cases a provincial tax upon the occupant's interest was held to be a valid direct tax. The difficulty is that this tax is not upon the occupant's interest, but rather upon the specific commodity which will be prepared for and sold upon the market in the course of normal commercial transactions.

The answer to this question is no.

(1) [1923] A.C. 136. (2) [1928] A.C. 117.

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Question Seven:

Is the Esquimalt and Nanaimo Railway liable to the tax (so-called) for forest protection imposed by section 123 of the "Forest Act", being chapter 102 of the "Revised Statutes of British Columbia, 1936", in connection with its timber lands in the Island Railway Belt acquired from Canada in 1887? In particular does the said tax (so-called) derogate from the provisions of section 22 of the aforesaid Act of 1883?

The legislature in enacting this section described the levy as an annual tax. It is compulsorily imposed by the province upon the owner of certain lands and enforceable by law. It is therefore a tax within the meaning of *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1). The amount realized is supplemented by a further sum of one million dollars annually from the consolidated revenue of the province. The latter emphasizes what is perfectly clear, that fire protection afforded to the timber area is in the interest of the public as well as the owners of those areas. The fact that the proceeds are used for the specific purpose of fire protection does not affect the character of the imposition of a tax. As stated by Lord Thankerton:

> The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxation character of the levies made.

Lower Mainland Dairy Products Sales Adjustment Committee v. *Crystal Dairy Ltd.* (2); Plaxton 181 at p. 188.

The circumstances of this case bring it within the principle of *City of Halifax* v. *Nova Scotia Car Works Ltd.* (3), where an exemption from taxation included exemption of an improvement tax.

The answer to the first part of this question is no; to the second part yes.

The answers to the foregoing questions are:

(1) The answer to this question as framed is no; and if the contractual position of the province be treated as a second part, the answer to this part is yes.

(2) Yes.

(3) No.

(1) [1931] S.C.R. 357.
(2) [1935] A.C. 168 at 175.
(3) [1914] A.C. 992.

(4) Yes.

(5) No.

(6) No.

(7) As to the first part, no; as to the second part, yes.

Appeal allowed and Cross-appeal dismissed.

Solicitor for the Esquimalt and Nanaimo Railway Company: *J. A. Wright.*

Solicitors for the Alpine Timber Company Limited: *Davis, Hossie, Lett, Marshall & McLorg.*

Solicitor for the Attorney-General of Canada: *F. P. Varcoe.*

Solicitor for the Attorney-General of British Columbia: *Roy S. Stultz.*

GEORGE W. ARGUE.....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Revenue—Excess Profits—Income derived from personal investments—Whether subject to Excess Profits Tax—Carrying on business—Excess Profits Tax Act, 1940.

The appellant, for the taxation year 1940, derived his revenue from three sources: (*a*) from his fees as manager of the International Loan Company, a real estate mortgage loan company; (*b*) from a small fire insurance agency; (*c*) from personal real property mortgage investments and small loans. The Minister of National Revenue assessed the appellant under the *Excess Profits Tax Act* on the ground that the income received in respect of mortgages held by him constitutes part of the income derived from the carrying on of one or more businesses within the meaning of par. (*g*) of Section 2 of the *Excess Profits Tax Act*. The Court of Exchequer came to the conclusion that the appellant was carrying on a money lending business and therefore liable to the tax.

It is not disputed that the income from the insurance agency would be liable to excess profits taxation if sufficient in amount.

*PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

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Held: No indication can be found in the *Excess Profits Tax Act, 1940*, of an intention to classify as a business the investment of moneys by private individuals under the circumstances of this case and there is nothing in the evidence which justifies the conclusion that the appellant was carrying on business as a money lender or that he was trading in securities or buying and selling them with a view to profit.

As for the income derived from his managing duties, he was a paid servant or employee and therefore not carrying on business.

Robbins v. Inland Revenue Commissioners [1920] 2 K.B. 677; Smith v. Anderson [1880] 15 Ch. D. 247 and South Behar Ry. Co. *v.* Inland Revenue Commissioners [1925] A.C. 476, referred to.

APPEAL from the judgment of the Exchequer Court, Angers J. (1), affirming the decision of the Minister of National Revenue respecting the assessment of appellant under the *Excess Profits Tax Act* for the year 1940.

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

G. S. Thorvaldson K.C. for the appellant.

John L. Ross K.C. and *A. A. McGrory* for the respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from the judgment of Angers J. (1) dismissing an appeal from an assessment made upon the appellant under the provisions of the *Excise Profits Tax Act* in respect of his income for the taxation year 1940.

By an agreement in writing made between International Loan Company and the appellant dated May 31, 1921, the latter agreed "to act as the general agent and manager of the company, manage its business and represent it in all business transactions". His duties were defined as being to look after the investment of the company's funds and the collection of all moneys owing to it on shares, investments, rentals or otherwise, and he was given the exclusive right of selling the company's shares and properties and of acting as its rental and insurance agent. The appellant agreed to provide at his own expense adequate office accommodation and such clerical or other assistance as should from time to time be necessary to carry on the com-

(1) [1947] Ex. C.R. 192.

pany's business: the company on its part agreed to supply the necessary office furniture, stationery and advertising and to pay all business taxes or assessments, auditors' fees, legal fees, remuneration to directors, commissions to brokers or sub-agents for procuring loans, the expense of calling meetings of the shareholders, the cost of any bonds which the company might require from the manager or any person employed by him or by it in the conduct of its business and any expense which might be incurred by reason of the company taking deposits under the provisions of *The Loan Companies Act, 1914*. By a further term it was provided that the directors should pass upon all loans, investments or sales by the manager and that none such should be made without the authority of the Board and that all moneys realized from any of the company's activities should be deposited to the credit of the company in a chartered bank, as required by its by-laws. As remuneration for the sale of shares of the company and of its properties and for the collection of rentals the appellant was to receive stipulated rates of commission, and for all other services to be rendered by him under the agreement commission at an agreed rate upon the invested capital of the company. The agreement also contained the following provisions:—

> The Manager covenants and agrees to faithfully, honestly and diligently perform all the services required by this contract, and that he will not during the currency of this agreement, engage in or be party to the promotion of any other Company or Companies, doing business along the same lines as this Company, and that he will not engage in any business of any nature or kind whatsoever which will conflict with or be detrimental to the Company's business.

The term of the contract was twenty years and it was shown that it had been renewed for a further period.

The appellant filed with his return for the year 1940 a so-called balance sheet showing, inter alia, his income for the year in question and this disclosed that he had received as commission under his contract with the company (after deducting an amount paid to sub-agents) the sum of $18,085.45: as insurance commissions $1,308.89, as interest earned upon moneys of his own loaned upon the security of mortgages of real estate, clear title agreements of sale and promissory notes $6,378.59 and as discounts and bonuses $203.50. Under the heading "Expenses" expendi-

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tures totalling $12,119.28 were shown and the balance of $13,856.95 was classed as "Operating Income". The statement did not indicate to what extent the expenses were attributable to the earning of the insurance commissions but as to these the appellant filed with his income tax return a statement under the *Excess Profits Tax Act,* in which the nature of the business was described as "Insurance Agency" and profits of $903.94 were shown, presumably, therefore, the difference between this figure and the amount of $1,308.89 shown in the auditor's statement represented expenses attributable to that business. The appellant paid the amount of the tax as estimated by him as payable for income tax upon the remainder of his income, including surtax on his investment income and upon the item shown as discounts and bonuses earned, and the excess profit tax as computed by him on the profits of the insurance agency. The assessment made, however, in addition to imposing income tax, assessed the net amount shown by the auditors as having been received from the various activities of the appellant for excess profit tax on the footing that these amounts were the profit of one or more businesses within the meaning of sec. 2(*g*) of the *Excess Profits Tax Act 1940* and, after deducting a salary allowance of $5,000 a tax of 12 per cent was imposed upon the balance.

By the Notice of Dissatisfaction the appellant contended that the income from the mortgage investments was not taxable under the *Excess Profits Tax Act.* Subsequently, by consent, pleadings were filed and the appellant then contended that no part of his income was derived from being in business or from a business, and to this the Minister pleaded without raising the ground that the objection raised by the Notice of Dissatisfaction was limited to the interest from the mortgages alone, and at the trial the matters in issue were treated as defined by the pleadings.

As to the income derived by the appellant from commissions on insurance written by him, there appears to be no dispute. That income was apparently received from an insurance company represented by the appellant and with which he effected insurance not only of property upon which loans were made by International Loan Company

but that of other persons including some of those who had paid off their loans from the company but continued the insurance with him. Considering this aspect of the matter alone and divorced from the appellant's other activities, no question for determination arises since sec. 7(*c*) of *cap. 32, Statutes of Canada 1940,* exempted from taxation the profits of taxpayers whose profits in the taxation year did not exceed $5,000, and it would appear that the payment made under the *Act* in respect of these profits was paid under a misapprehension. The fact, however, that the appellant did act as an insurance agent may have some bearing on the question of his liability to tax in respect of his other income. If the expenses as shown in the auditor's statement, other than the amounts expended in connection with the insurance business, were properly attributable to the services rendered to International Loan Company, the net commissions received by the appellant for managing the affairs of the company and for any sales of shares of real estate and for the collection of rentals approximated some $6,500, so that if this amount is taxable and be added to the amount received as commissions on insurance written some taxation under the *Excess Profits Tax Act* would be involved. Under sec. 2(*g*) of the statute, as enacted in 1940, "profits" means the income of the taxpayer derived from the carrying on of one or more businesses, as defined by sec. 3 of the *Income War Tax Act,* and before any deductions are made therefrom under any other provisions of that *Act.* Sec. 7 provides for certain exemptions and subsec. (*b*) thereof, as made applicable to the taxation year 1940 by sec. 7 of *cap. 26, Statutes of Canada, 1942,* provided that the following profits should not be liable to taxation under the Act:—

(*b*) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed: Provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others or the giving to other persons of advice of a commercial nature in connection with the making of contracts unless the Minister is satisfied that such agent is virtually in the position of an employee of one employer in which case this exemption shall apply and in any case the decision of the Minister shall be final and conclusive.

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The contention made on behalf of the Minister is that in acting as the general agent and manager of International Loan Company, in carrying on the business of a insurance agent and in investing his own moneys, the appellant was carrying on one business and alternatively that each of these three activities should be classified as the carrying on of a business. While the question as to the liability of the appellant's remuneration under the contract of International Loan Company to excess profits tax was placed in issue by the pleadings, the learned trial Judge (1) did not deal with the matter apparently interpreting the arguments addressed to him as treating the sole matter in dispute as being the liability of the income from the investments to such taxation. It cannot be decisive of the question as to whether or not the services rendered to the company by the appellant, under the terms of the contract, constituted a carrying on of business within the meaning of sec. 2(*g*) that he was remunerated by a commission rather than by a salary. The activities of the company consisted of the loaning of moneys upon mortgage, the sale of land acquired by it (presumably by foreclosures) the rental of properties so acquired, the purchase of Dominion Government bonds and the sale of its treasury shares. The agreement provided that the Board of Directors should pass upon all loans, investments or sales and that "no loan, investment or sale of property of any nature whatsoever should be made by the manager without the approval or authority of the Board", and all business was transacted in its name and on its behalf. The services rendered by the appellant to the company were, in my opinion, rendered qua servant and the remuneration received by him was for services rendered in that capacity. The business carried on was the company's business and not his and the rendering of services of this nature in the capacity of a paid servant or employee of a company is not carrying on business (*Robbins* v. *Inland Revenue Commissioners* (2)). The appellant had but one employer, International Loan Company: the covenant that he would not engage in any business of any nature or kind whatsoever which would conflict with or be detrimental to the company's business was apparently interpreted by the parties as requiring him

(1) [1947] Ex. C.R. 192. (2) [1920] 2 K.B. 677 at 683.

to devote all his time to the company's services, other than such small portion thereof as would be taken up by his activities as an insurance agent, and this the contract authorized, and the undisputed evidence is that he did so. Sec. 7(*b*) which excludes from the exemption the profits of a commission agent or person, any part of whose business consists in the making of contracts on behalf of others, does not apply to the activities of the appellant under his contract, in my opinion, other than to that of the insurance agency which he was permitted to carry on and as to which there is no dispute.

There remains the question as to the liability of the appellant to tax in respect of the income received upon his investments. While the appeal to the learned trial Judge (1) concerned the tax imposed upon the appellant in regard to all three of his activities and the appeal was dismissed, the reasons for judgment make it clear that in coming to the conclusion that the appellant was carrying on a business he had considered only the activities of the appellant in connection with the investment of his moneys. The appellant gave evidence that in 1925 or 1926 he had commenced to loan moneys, which represented his personal savings on long term mortgages of real estate. The auditor's report disclosed that as of December 31, 1940, the appellant had a sum of $102,379.24 invested in first mortgages on real property and in what were described in the schedule as clear title agreements, which I understand as meaning that the appellant had acquired by purchase the vendor's interest in certain agreements for sale and clear title to the property sold, or that he had sold real estate to which he had obtained title by foreclosure under agreements for sale. All the mortgages, with one exception, were first charges upon real estate; the exception was a small second mortgage: in addition he had loaned over a period of years a small amount to two persons taking their promissory notes, and about $2,200 to twelve other persons from whom he had taken promissory notes secured collaterally by shares of International Loan Company. The mortgages, agreements for sale and promissory notes all bore interest and this is the source of the amount of $6,378.59 shown as interest earned under the heading of "Revenue" in the auditor's report.

(1) [1947] Ex. C.R. 192.

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The appellant said that he had no short term mortgages and as to the loans made upon promissory notes he said that these had been made, with the exception of the small amount loaned on two unsecured notes, for the accomodation of "clients", apparently referring to shareholders of the Loan Company with whom he had done business on its behalf. According to the appellant he devoted his entire time and energy to the business of International Loan Company and was frequently absent from Winnipeg for two months at a time on its business and a paid secretary looked after any matter requiring attention in connection with his personal investments during his absence. Only the balance owing upon the respective loans is shown in the auditor's statement and such balances varied considerably, the largest being an amount of $7,329.64 and the smallest an amount of $84.16, being presumably the amount remaining unpaid on a larger loan: the average of the balances owing approximated $1,300. In the course of his evidence the appellant had said that he thought he had made only five new loans during the taxation year 1940, whereas in fact there had been fourteen of such loans, an error which was explained in a statement by his counsel at the conclusion of the evidence as having resulted from a mistake made by the secretary in giving the figures to the appellant. Counsel for the Crown accepted the explanation, agreeing that there had not been any intention to mislead the Court, and there is no finding against the veracity of the appellant in the reasons for judgment. It might be pointed out that the learned trial Judge was in error in stating that according to the evidence 18 mortgages or agreements for sale had matured in 1940: the correct number is 14, and this error would nullify the calculation subsequently made in the judgment appealed from. The learned trial Judge, after reviewing the evidence, said:

> Can it be said that the appellant in investing his money in mortgages, agreements for sale, drawing the interest thereon when it became exigible, receiving the capital of his investments when they came to maturity, re-investing his capital in mortgages or agreements for sale constitute a business? If the appellant's activities were limited to that, I would feel inclined to answer the question negatively. Were they so limited? The problem we have to solve narrows down to this question, as I think.

and again, after commenting on the fact that Argue was "generally ignorant of his personal affairs" and that it was

strange that his secretary had not been called as a witness so that she might have given evidence as to the amounts of the securities renewed or replaced in 1940 and that so high a proportion of appellant's securities should have come to maturity in that year, said:—

> Needless to say, if evidence had been adduced regarding the quantity and the value of the securities required in say the two or three years preceding and the two or three years following 1940, the Court would have been in a better position to determine whether the appellant was merely reinvesting his capital as its investments were naturally realized on their respective dates of maturity or whether he was carrying on an investment business, selling securities at a profit and replacing them by others at lower prices in the hope of disposing of them later at increased prices and drawing a benefit therefrom. Perhaps the figures for the years immediately preceding and following 1940 were not favourable to appellant's contention; that may be the reason why no evidence was adduced in relation thereto. In the circumstances, I must rely on the figures for the year 1940 only.

From this I infer that the learned trial Judge considered that the failure of the appellant to produce further evidence as to the manner in which he had carried on these activities in two or three of the years preceding and following 1940 justified the inference that he was selling securities at a profit and replacing them by others at lower prices, in the hope of disposing of them later at a profit, and that accordingly he was not merely investing his moneys in the manner indicated in the passage first above quoted. With respect I am unable to agree with this conclusion. The appellant had in his Statement of Claim alleged that his income for the year 1940 amounted to $12,666.95 and that this was made up of "salary received from International Loan Company, insurance commissions, dividends and interest earned on his real estate mortgages and agreements" and this had been expressly admitted in the Statement of Defence. The respondent did in fact plead that the profits assessed for excess profits tax constituted the income derived by the appellant from the carrying on of one or more businesses but this did not detract from the effect of the admission made. Having this admission in the pleadings counsel for the appellant apparently considered that there were no further facts to be proven by him and in calling the appellant he stated that he did so mainly so that counsel for the Minister might have an opportunity of cross-examining him: as to the failure to call the secretary

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at the conclusion of the other evidence, counsel stated that the secretary was available to give evidence if further particulars were required, apparently considering that he had discharged whatever onus of proof rested on the appellant. Under these circumstances, it can scarcely be suggested that the appellant intentionally held back any facts from the Court: if particulars of the investments made in these other years had been considered of importance the information could readily have been obtained on the cross-examination of the appellant. Where, as in the present case, the appellant had asserted that that portion of his income with which we are concerned was "interest earned on his real estate mortgages and agreements" and this had been expressly admitted on behalf of the Minister, and where as was done here the appellant supplemented this unqualified admission by evidence that this was, with a negligible exception in the case of moneys loaned on promissory notes, interest on long term mortgages and agreements for sale in which he had invested his savings for the purpose of earning income, it was not incumbent upon him further to negative the contention that in investing these said moneys he was carrying on the business of a money lender, which is in effect what the contention of the Crown amounted to. The argument on behalf of the Minister is that the appellant was carrying on a money lending business of a similar character to that carried on by International Loan Company. Neither the word "business" or the expression "carrying on business" are defined in the *Excess Profits Tax Act*. In *Smith* v. *Anderson* (1), Jessel, M.R., in deciding the meaning to be assigned to the word "business" in the *Companies Act, 1862*, s. 4, said that it was a word of extensive use and indefinite signification and one that had a more extensive meaning than "trade". In discussing the subject he said in part (p. 261):—

> So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business.

While the judgment in this case was reversed on appeal, nothing in the judgments of the Court of Appeal cast any doubt upon the accuracy of this statement. James, L.J., in considering the position of the trustees under the trust agreement in question in the action, said in part (p. 276):—

(1) [1880] 15 Ch. D. 247.

In my opinion, nothing that is to be done under this deed by the trustees comes within the ordinary meaning of "business", any more than what is done by the trustees of a marriage settlement who have large properties vested in them, and who have very extensive powers of disposing of the investments, changing the investments, and selling them and reinvesting in other investments, according to their discretion and judgment, with or without the consent of their cestuis que trust. That is not a business.

and see *South Behar Ry. Co.* v. *Inland Revenue Commissioners* (1), Lord Sumner at 485. It may be noted that the *Excess Profits Tax Act, 1940,* by para. (*d*) of sec. 7 expressly exempted from the tax the profits of a personal corporation within the meaning of para. (i) of sec. 2 of the *Income War Tax Act,* provided that the income of such corporation is derived solely from the holding of investments, and by para. (*e*) of sec. 7 the profits of a Non-Resident Owned Investment Corporation within the meaning of para. (*p*) of sec. 2 of the *Income War Tax Act* which elects to be assessed as such under the said Act. I think it cannot have been the intention of Parliament that income of like nature resulting from investments made by an individual of his personal savings should be subjected to the tax, when the income of such companies carrying on the business of making investments was exempt. I find nothing in the evidence in this case which, in my opinion, justifies the conclusion that the appellant was carrying on business as a money lender, or that he was trading in securities or buying and selling them with a view to profit. In *Ormond Investment Co.* v. *Betts* (2), *Lord Atkinson,* dealing with the construction of a section of the *Income Tax Act 1918,* said in part:

It is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so called equitable constructions of them are not permissible.

All questions of this nature must of necessity be decided upon the facts of the particular case under consideration. I find no indication in the *Excess Profits Tax Act, 1940,* of an intention to classify as a business the investment of moneys by private individuals under the circumstances of this case or to subject the income from such investments to excess profits tax.

(1) [1925] A.C. 476. (2) [1928] A.C. 143.

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The appeal should be allowed with costs and the assessment made upon the appellant for excess profits tax set aside: the appellant should have his costs of the proceedings in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: *Andrews, Andrews, Thorvaldson and Eggertson.*

Solicitors for the respondent: *John L. Ross and A. A. McGrory.*

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*May 6, 7, 10.
*June 25

J. A. AUCLAIR (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION OF THE VILLAGE OF BROWNSBURG (DEFENDANT) ..... } RESPONDENT.

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

Municipal Law—Tender for construction of water and sewerage system—Offer submitted and accepted by municipal Council—Acceptation cancelled by Council before formal contract signed by parties—Damages—Municipal Code sections 624, 625, 626, 627.

Tenders were called by the respondent for the construction of a water and sewerage system, and appellant submitted an offer to do the work for a stated sum "conformément aux plans et devis" plus an undetermined amount for the excavation of rock at the rate of $3 a cubic yard. This offer was accepted at a meeting of respondent's Council. At a subsequent meeting of the Council, but before a formal contract before Notary had been signed by the parties, the acceptation of appellant's offer was rescinded. In his action, appellant asked that respondent be forced to sign a contract or pay him damages in the amount of $25,000. When the case came for trial, another contractor had already executed the work, and the Superior Court awarded him $5,000 damages. The Court of King's Bench maintained the appeal and dismissed the action in toto.

Held: The agreement between the parties was, by the requirements of the Municipal Code, dependent on the signature of a contract, and as long as this contract was not signed, one of the parties could back out. More so in this case where the offer submitted and the resolution to accept it were at variance.

*PRESENT: Rinfret C.J. and Kerwin, Rand, Estey and Locke JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Rhéaume J., in which appellant had obtained damages in the amount of $5,000 for breach of an alleged contract for the construction of a water and sewerage system.

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

C. A. Cannon K.C. for appellant.

John Aylen K.C. and *L. L. Legault K.C.* for respondent.

The judgment of the Chief Justice and of Kerwin, Estey and Locke JJ. was delivered by

THE CHIEF JUSTICE: Il s'agit d'un appel du jugement de la Cour du Banc du Roi (en Appel) de la province de Québec (1) qui a infirmé le jugement de la Cour Supérieure par lequel le demandeur-appelant avait obtenu une condamnation en dommages de $5,000.00 contre l'intimée, dans les circonstances suivantes.

L'intimée a demandé des soumissions pour la construction d'un système d'aqueduc et d'un système d'égout pour le village de Brownsburg.

En réponse à cette demande de soumissions l'appelant s'est procuré les plans et devis préparés par les ingénieurs de l'intimée et il a adressé à cette dernière une soumission se lisant comme suit:

Je, (nous) soussigné, ayant pris connaissance et examiné les plans et devis dressés par messieurs Gohier et Dorais, Ingénieurs Conseils, pour la pose de conduite d'eau et d'égout et de différents travaux accessoires, pour le village de Brownsburg, offre d'exécuter tous les travaux, fournir tous les matériaux, tels que tuyaux en fonte, tuyau en béton, valves, bornes-fontaines et autres pièces spéciales en fonte, puisards, regards d'égout, etc., conformément aux dits plans et devis pour la somme de cent quatorze mille cent quarante-cinq piastres ($114,145.00).

Il est entendu de plus que sera payé extra pour le roc au prix de trois dollars ($3.00) la verge cube.

Il est aussi entendu que la série de prix ci-dessous servira de base pour établir le coût de ces travaux et les matériaux additionnels qui pourraient être requis.

(signé) J. A. AUCLAIR.

(1) Q.R. [1946] K.B. 466.

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Le conseil municipal de l'intimée prit connaissance des soumissions à sa séance du 11 septembre 1940, et adopta les résolutions suivantes:

Moved by Counc. Hector Parizeau second by Counc. Lemuel Wilson to accept the tender of Mr. J. A. Auclair for the water and sewerage system at the price of $114,145.00 plus $4,095.00 for the difference to install pressure pipe for 5,850 ft.

Moved by Counc. W. J. Graham second by Counc. G. I. McFaul, and resolved to authorize the Mayor and Secretary to sign the contract for the water and sewerage system at the Notary G. E. Valois.

Remarquons en passant que dans ces résolutions il n'est nullement question du prix extra de $3.00 la verge cube pour le creusage du roc.

Les plans et devis sur lesquels était basée la soumission de l'appelant comportaient entre autres les clauses suivantes:

14.—Les frais du notaire pour la préparation du contrat et de deux copies d'icelui seront à charge de l'entrepreneur.

15.—L'entrepreneur signera le présent contrat sous quatre jours d'avis par l'ingénieur que sa soumission a été acceptée et commencera les travaux aussitôt que l'ingénieur le jugera à propos pour se terminer au plus tard le premier juillet 1941. Pour chaque jour de retard l'entrepreneur sera passible d'une amende de $10.00 par jour.

Il n'appert pas au dossier qu'un avis ait été envoyé par l'ingénieur à l'appelant que sa soumission avait été acceptée; mais, à tout événement, avant qu'aucun contrat ne fut signé, à savoir le 14 septembre 1940, le conseil municipal de l'intimée adopta une nouvelle résolution rescindant celle qui avait accepté la soumission de l'appelant et autorisa l'ingénieur à demander de nouvelles soumissions pour un prix global pour la construction de l'aqueduc et de l'égout.

Dans ces conditions, l'appelant a intenté une action à l'intimée concluant à ce que cette dernière soit condamnée à signer un contrat en sa faveur ou alternativement à lui payer la somme de $25,000.00 de dommages.

Lorsque le litige vint devant la Cour Supérieure les travaux qui avaient été accordés à un autre contracteur avaient déjà été exécutés, et le seul intérêt qui subsistait dans la cause était de savoir si, dans les circonstances, l'intimée pouvait être tenue de payer des dommages à l'appelant.

Une très longue enquête a eu lieu devant la Cour Supérieure pour savoir si réellement l'appelant avait subi des

dommages, et il est malheureux que la conclusion à laquelle nous en arrivons ait pour effet de rendre cette enquête inutile.

Nous croyons en effet que le point de droit soulevé en Cour d'Appel (1) est décisif, et c'est à savoir que lorsque l'intimée a rescindé la résolution par laquelle elle avait accepté la soumission de l'appelant, le contrat entre ce dernier et l'intimée n'était pas encore complété et que l'intimée avait donc le droit de ne pas donner suite à sa résolution du 11 septembre.

Nous signalons de nouveau que, par suite de la divergence entre la soumission de l'appelant et la résolution de l'intimée, il n'y avait pas accord complet entre les deux. Dans les circonstances, cela donne d'autant plus d'importance au point qui a été soulevé par l'intimée, tant en Cour d'Appel (1) que au cours de l'argumentation devant nous.

Ainsi que le fait remarquer M. le Juge Saint-Jacques dans ses notes en Cour d'Appel (1), la première question à envisager et à résoudre était de savoir quelle était la situation juridique de la corporation municipale après l'adoption de la résolution du 11 septembre acceptant la soumission de l'appelant et autorisant la signature d'un contrat notarié.

Les plans et devis envisageaient, comme nous l'avons vu, la signature d'un contrat notarié. Ce contrat était nécessaire pour compléter l'acceptation de la soumission par le conseil municipal. La corporation n'était pas liée d'une façon définitive tant et aussi longtemps que ce contrat notarié n'aurait pas été signé par les deux parties pour déterminer leurs obligations et leurs droits respectifs.

C'est d'ailleurs ce qui semble bien résulter des exigences du code municipal aux articles 624 et suivants.

D'après l'article 624, tous les travaux publics des corporations locales dont l'exécution n'est pas spécialement réglée par les dispositions du code, sont faits par contrat adjugé et passé d'après les règles établies dans les articles suivants. Ils peuvent être faits également à la journée sous la direction de l'inspecteur municipal mais ce cas ne se présente pas ici.

L'article 625 de nouveau parle des travaux "faits à l'entreprise, par contrat, sur résolution à cet effet".

(1) Q.R. [1946] K.B. 466.

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Cela indique la distinction qu'il faut faire entre la résolution et le contrat. Cette distinction se poursuit dans les articles 626 et 627 d'après lesquels l'entreprise est accordée par résolution, mais un contrat doit être passé au nom de la corporation et accepté par le chef du conseil ou par une personne spécialement autorisée.

Il s'en suit, suivant nous, que la convention entre les parties est, d'après le code municipal, subordonnée à la signature d'un contrat et, tant que ce contrat n'a pas été signé, l'une des parties peut se dédire avant la passation de l'acte, même dans le cas où les conditions du contrat avaient été déterminées par accord. (*Compagnie d'Aqueduc du Village de St-Michel d'Yamaska* vs *Riendeau* (1)).

A plus forte raison, dans le cas actuel faut-il décider que les parties ne seraient définitivement liées que lorsque le contrat aurait été signé puisque jusque là, comme nous l'avons vu, la soumission et la résolution du conseil de l'intimée ne s'accordaient pas entre elles.

On peut dire que la convention entre les parties ne devait exister que du jour où le contrat serait intervenu; jusque là il n'était encore qu'un projet qui ne devait se réaliser que lorsque l'acte serait passé. (Voir 24, Laurent, Principes de Droit Civil, n° 129.)

Si la corporation ne devenait liée d'une façon absolue que par la signature du contrat, il est évident que le conseil pouvait, dès le 14 septembre, rescinder la résolution qui avait accepté la soumission de l'appelant.

Dans ces conditions, la rescision de la résolution était légale et ne pouvait donner lieu, à l'encontre de la corporation intimée, à aucune condamnation en dommages.

Pour ces raisons qui sont plus amplement élaborées dans les notes de M. le Juge Saint-Jacques en Cour du Banc du Roi, j'en viens à la conclusion que l'appel doit être rejeté avec dépens.

RAND, J.—This appeal arises out of what is alleged to have been a contract entered into between the appellant contractor and the respondent village for the construction of a water and sewerage system. Tenders were called for and the Contractor, on a form supplied by the engineer of the Village, under date of September 4th, 1940, submitted

(1) 19 R.L.N.S. 457.

an offer to do the work "conformément aux dits plans et devis" for a stated sum plus an undetermined amount for the excavation of rock at the rate of $3.00 a cubic yard. A modification was made by which the fixed sum was increased by $4,095.00. At a meeting of the Council held on the 11th of September, a motion "to accept the tender of" the Contractor was carried, as well as a resolution "to authorize the Mayor and Secretary to sign the contract for the water and sewerage system at the Notary G. E. Valois".

In the specifications were three pertinent clauses:—

14.—Les frais du notaire pour la préparation du contrat et de deux copies d'icelui seront à charge de l'entrepreneur.

15.—L'entrepreneur signera le présent contrat sous quatre jours d'avis par l'ingénieur que sa soumission a été acceptée et commencera les travaux aussitôt que l'ingénieur le jugera à propos pour se terminer au plus tard le premier juillet 1941. Pour chaque jour de retard l'entrepreneur sera passible d'une amende de $10.00 par jour.

16.—Aucune soumission ne sera prise en considération si elle n'est pas faite sur des formules obtenues au bureau de l'ingénieur et accompagnée d'un chèque accepté d'une valeur de 10 p. 100 du montant du contrat. Le chèque sera confisqué si le soumissionnaire accepté refuse de signer le contrat. Ce chèque sera remis à l'entrepreneur après que le contrat aura été signé et sera remplacé par un bon de garantie au montant de $25,000.00.

On the 12th of September, the Contractor and the secretary, at whose instance does not appear, attended at the Notary's at Lachute when instructions were given for the preparation of the contract which was apparently to be signed that day. Shortly after noon, the secretary telephoned Mr. Auclair that there would be a delay of three or four days to confer with the solicitors of the Village. On that day also the secretary sent out a notice of a special meeting of the Council to be held on the 14th of September for the purpose, among other things, "reconsidérer les soumissions d'aqueduc et d'égouts". At that meeting a resolution was passed "to rescind the motion granting a contract to J. A. Auclair for the water and sewerage system of the previous meeting". Later, new tenders were called for and a contract ultimately made with and carried out by another person.

Article 626 of the Municipal Code provides: "The contract for such works (public) must be awarded by resolu-

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Rand J.

tion"; and 627: "The contract is made in the name of the corporation, and accepted by the head of the Council, or by a person specially authorized for that purpose".

It has been held by this Court that the law governing the acceptance of an offer under the Civil Law of Quebec is the same as that of the Common Law of England: *Charlebois* vs *Baril* (1); and that, subject to special circumstances, including terms of the offer or under which the offer has been made, an acceptance becomes effective only when it is communicated to the person making the offer. A tender, such as we have here, is an offer and its acceptance in the present circumstances must have been communicated to the Contractor by the authority of the Council before, in any event, a contract could be said to have arisen. The passing of the resolution was no more than the decision of the Council that it would proceed to a contract on the terms of the tender: it was the formal making up of the mind of the corporation, the act which Article 626 envisages. No authority was given to the secretary to communicate the acceptance and nothing was done by the Council to affect the provision of the specification for notice by the engineer when the contract was ready for execution by the parties. The construction of the Article by which an "award" without more effectuates a contract would conflict and, in the context, quite unnecessarily, with the rule so laid down.

In that background of circumstances and considerations and consistently with Article 627, it is clear, I think, that no binding obligation was contemplated otherwise than under a written contract to be prepared by the Notary. The requirement that the Contractor should sign within four days of notice by the engineer, the authorization to the Mayor and Secretary to sign for the Village, and the absence of any directed communication to the Contractor of the passing of the resolution, all look to that formal embodiment of the consensus reached for the only obligations to arise. The Council's action was the necessary preliminary to them, but no more than that: *Edge Moor Bridge Works* v. *County of Bristol* (2).

(1) [1928] S.C.R. 88. (2) 170 Mass. 528.

The theory of the plaintiff's original conclusions was that the Village had bound itself by a preliminary contract to enter into a written construction contract, but that was not the proposal made by the Contractor; his tender was an offer to do the work, not a proposal of a contract for a contract; and the award, if it had created a lien de droit, must have constituted an acceptance of an offer by which the works contract was brought into full force. A contract so formed might contemplate its own absorption in a subsequent formal instrument, but that is to be distinguished from the conception being considered.

Mr. Cannon urged that the provision for forfeiture of the deposit required an obligation to support it, but I cannot agree that that is so. One of the terms on which the tender would be considered was the voluntary transfer of the equivalent of a certain sum of money by the Contractor to the Village to be returned in a certain contingency but to be retained in another. The condition that if, within the time mentioned, the Contractor refused to sign a written contract, he would lose all right to a return of the money, does not assume or require that there was, at that point, an obligation in law on the Contractor to do an act, the refusal of which was a breach; the power over the deposit was simply a coercive means exacted by the Village to compel the Contractor to take on an obligation. If he were already bound to carry out the work, the Village could, if he refused to proceed, insist on damages for the total loss suffered, unless the provision is one for agreed damages; but for that I can see not the slightest basis in fact.

On the ground, therefore, that the tender was submitted and the resolution to accept made as preliminaries only to the conclusion of a formal contract in writing and that up to that point, no legal obligation to perform or to accept that performance and to pay for it had arisen, the action did not lie and this appeal must be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Legault & Legault.*

1948

*April 9
*June 25

RODERICK W. S. JOHNSTON.....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE...RESPONDENT.

APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Revenue—Income Tax—Whether sub-paras. (a) and (b) of Rule 1, s. 1, para. A of 1st Schedule, Income War Tax Act, are conjunctive—Whether when pursuant to S. 63 (2), pleadings are filed in Exchequer Court, onus of proof is decided by state of such pleadings—Whether such pleadings constitute "an action" or an appeal from taxation—Income War Tax Act, R.S.C., 1927, c. 97, s. 63 (2); Rules 1 and 2 of s. 1, of para. A of 1st Schedule (am. 1944-45, c. 43, ss. 21, 22)—The Exchequer Court Act, R.S.C., 1927, c. 34 (am. 1928, c. 23, s. 4)—Exchequer Court Rule 88.

Held: Rule 2 of Section 1, Paragraph A of the First Schedule of the *Income War Tax Act*, R.S.C. 1927, c. 97, has no relationship to a particular sub-paragraph of Rule 1 under which a person becomes taxable. Rule 1 provides for a certain rate of taxation for persons coming within a number of classes; if among those taxpayers, one is found meeting the description of Rule 2, then the rate is to be as prescribed by that rule.

Held: also,—Locke J. dissenting—Where an appeal under the *Income War Tax Act* has been set down for trial before the Exchequer Court of Canada, such appeal notwithstanding the language of section 63 (2) of the *Income War Tax Act*, is an appeal from taxation, and though pleadings be directed, the burden of proof is not shifted; the taxpayer must establish the existence of facts or law showing an error in relation to the taxation imposed upon him.

Per, Locke J.:—When pursuant to section 63, subsection 2, of the *Income War Tax Act* pleadings have been delivered, then as provided by section 36 of the *Exchequer Court Act*, the question of onus of proof on the various issues to be determined must, in accordance with the practice of the High Court of Justice in England, be decided upon the state of these pleadings. Upon the pleadings in this matter the onus was upon the Minister to prove affirmatively that the appellant supported his wife during the taxation year and, as this was not done, the claim of the Minister failed and the appellant was entitled upon the admissions made to a declaration that he was taxable at the lesser rate provided by Rule 1.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J., (1), dismissing the appeal of the appellant with costs and affirming the assessment made by the respondent under the *Income War Tax Act* for the year 1944.

R. W. S. Johnston for the Appellant.

E. S. McLatchy and *D. W. Mundell* for the respondent.

(1) [1947] Ex. C.R. 483.

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

The judgment of the Chief Justice and of Kerwin and Rand, JJ. was delivered by:—

RAND J.:—This appeal raises a question in the interpretation of Rules 1 and 2 of Section 1 of the First Schedule to the *Income War Tax Act*. These rules, applicable for the year 1944, so far as material, are as follows:—

Rule 1.—A normal tax equal to seven per centum of the income shall be paid by every person whose income during the taxation year exceeded $1,200 and who was during that year:

(*a*) a married person who supported his spouse and whose spouse was resident in any part of His Majesty's dominions * * *

(*b*) a person with a son or daughter wholly dependent upon him for support * * *

(*c*) an unmarried person or a married person separated from his spouse who maintained a self-contained domestic establishment * * *

(*d*) an unmarried minister or clergyman in charge of a diocese, parish or congregation who maintained a self-contained domestic establishment * * *

Rule 2.—If, during a taxation year, a married person described by subparagraph (*a*) of Rule 1 of this section and his spouse each had a separate income in excess of $660, each shall be taxed under Rule 3 of this section: Provided that a husband does not lose his right to be taxed under Rule 1 of this section by reason of his wife being employed and receiving any earned income.

The Exchequer Court confirmed the assessment under which the appellant was held to be liable to the normal tax under *Rule* 3 at the rate of nine per centum per annum instead of under *Rule* 1 at seven per centum, and from that decision the matter is brought here.

In view of the course of the proceedings anterior to the matter becoming an action in the Exchequer Court under sec. 63 (2) of the Act and that no issue of fact in respect of maintenance has been properly raised by the pleadings, Mr. Johnston must be taken to be a married person within the description of paragraph (*a*); but even if we are to take such an issue as raised, on the facts before us there is nothing to justify a reversal of the finding of the Minister or the basis in fact of the assessment that the appellant maintained his wife. At the same time, having three children, he is also within the general language of paragraph (*b*). His contention is that *Rule* 2 applies only to a person who is taxable only under (*a*), and that since he can claim under (*b*) the Rule has no application.

I think this results from a misconception of the effect of *Rule* 2. If its language is carefully examined, it is seen

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to declare that, as a qualification of *Rule* 1, a person coming within a certain description shall, in a certain contingency, be taxed under *Rule* 3: it has no relation to a particular sub-paragraph of *Rule* 1 under which a person becomes taxable. *Rule* 1 provides for a certain rate of taxation for persons coming within a number of classes; if, among those taxpayers we find one meeting the description of *Rule* 2, then the rate is to be as prescribed by that Rule. It is admitted that liability for graduated tax rests upon a similar basis.

The appeal raises also the question of onus. By section 58 any person objecting to the amount at which he is assessed may appeal to the Minister. If the Minister rejects the appeal, under section 60 (1) a Notice of Dissatisfaction may be served on the Minister and the taxpayer shall in it state that he desires his appeal to be set down for trial. By subsection (2),

> The appellant shall forward therewith a final statement of such further facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal as were not included in the aforesaid Notice of Appeal, or in the alternative, a recapitulation of all facts, statutory provisions and reasons included in the aforesaid Notice of Appeal, together with such further facts, provisions and reasons as the appellant intends to submit to the Court in support of the appeal.

Section 61 provides for security for costs by "the party appealing". Section 62 calls for a reply by the Minister to the Notice of Dissatisfaction. Section 63 (1) requires the Minister within two months from the making of the reply to cause to be transmitted to the Exchequer Court (*a*) the income tax return, (*b*) the Notice of Assessment, (*c*) the Notice of Appeal, (*d*) the decision of the Minister, (*e*) the Notice of Dissatisfaction, (*f*) the reply of the Minister, and (*g*) all other documents and papers relative to the assessment under appeal. Subsection (2) declares "the matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing: Provided, however, that should it be deemed advisable by the Court or a judge thereof that pleadings be filed, an order may issue directing the parties to file pleadings." By section 64 the proceeding is to be entitled "In Re The Income War Tax Act, and the appeal of of in the Province of ".

Under section 65 (1) "any fact or statutory provision not set out in the said notice of appeal or notice of dissatisfaction may be pleaded or referred to in such manner and upon such terms as the Court or a judge thereof may direct"; and by subsection (2) "the Court may refer the matter back to the Minister for further consideration".

Notwithstanding that it is spoken of in section 63 (2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

Instead, the taxpayer abstained from making that allegation. As fact it was not raised by the defence although involved in the reference to the rule of the schedule applied by the assessor, but in the reply it was denied as fact. There, then, appeared the first reference to an allegation that should have been in the claim; and on principle I should call it an indulgence to the taxpayer, assuming that he desired to raise that point in appeal, to be permitted so to cure a defective declaration. The language of the statute is somewhat inapt to these technical considerations but its purpose is clear: and it is incumbent on the Court to see that the substance of a dispute is regarded and not its form.

I am consequently unable to accede to the view that the proceeding takes on a basic change where pleadings are directed. The allegations necessary to the appeal depend upon the construction of the statute and its application to the facts and the pleadings are to facilitate the determina-

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tion of the issues. It must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy. But unless the Crown is to be placed in the position of a plaintiff or appellant, I cannot see how pleadings shift the burden from what it would be without them. Since the taxpayer in this case must establish something, it seems to me that that something is the existence of facts or law showing an error in relation to the taxation imposed on him.

The assessment was therefore in order and the appeal must be dismissed with costs.

KELLOCK J.:—There are two questions arising for decision on this appeal. In the first place it is contended by the appellant that as he admittedly falls within clause (*b*) of *Rule* 1 of section 1 of paragraph A of the First Schedule to the Income War Tax Act, he is liable to be taxed under *Rule* 1 and not under *Rules* 2 and 3 and cannot be taken out of the provisions of *Rule* 1 because he may also be within clause (*a*).

In my view this argument is unsound. I think the proper construction of the statute is that a person like the appellant, who may fall within the language of clause (*b*) but also falls within clause (*a*) is, by the express provision of *Rule* 2, taken out of the first rule and becomes liable to tax under the second and third rules. Even though the appellant be within clause (*b*) he is "a married person *described* by subparagraph (*a*) of *Rule* 1" and therefore subject to the provisions of *Rule* 2.

The second contention is that the appellant does not, in any event, fall within clause (*a*) of *Rule* 1 as he is not a person who in fact "supported his spouse" and that therefore, as he comes within clause (b) he remains for taxation purposes within *Rule* 1.

The learned trial judge held that the onus was upon the appellant to establish the facts in support of this contention and that he had failed to do so.

In his return the appellant claimed to be taxable for normal tax at the rate of 7 per cent and claimed "married

or equivalent status" with respect to liability for graduated tax. Item 29 of the return to which the tax payer is referred on the face of the return reads as follows:

29. *Normal Tax*

The rates are to be applied to Item 9C.

MARRIED STATUS

(1) A married person who supported his (her) spouse (other than by payment of alimony or other similar allowance)—except when within (5), (6) or (7) below.

(2) A person who supported (other than by means of the payment of alimony or other similar allowance) a wholly dependent son, daughter, son-in-law or daughter-in-law (See Item 37) except when within (3), (5) or (6) below.

(3) An unmarried person, widow(er) or a married person separated from his (her) spouse who maintained in 1944 a "self-contained domestic establishment" with a dependent relative therein (complete Item 49).

SINGLE STATUS

(4) A single person—except when within (2) or (3) above.

(5) A married man whose wife had an income in excess of $660 from sources other than wages or salary.

(6) A married woman whose husband had an income in excess of $660 from any source.

(7) A married person whose spouse was not resident in Canada, in the British Empire or in an Allied country (See item 38.)

(8) A married person who did not support his (her) spouse, or a married person who paid alimony or other similar allowance to his (her) spouse when living apart—except when within (2) or (3) above.

The Minister rejected the appellant's claim and assessed him in fact under the provisions of *Rules* 2 and 3. The Notice of Assessment gave as the basis for this assessment the following:

You have been assessed as a single person with three dependents, your wife having income from sources other than wages or salary in excess of $660.

thus indicating that in the decision of the Minister the appellant fell within Item 29 (5), namely, a married person who, although supporting his spouse, had an income in excess of $660 from unearned sources.

The appellant appealed to the Minister in pursuance of section 58 of the Act, which by subsection 3 required him to follow the statutory form of Notice of Appeal and to "set out clearly the reasons for appeal and all facts relevant thereto". In his Notice of Appeal, dated 24th April, 1946, the appellant nowhere contended that he was not a person falling within clause (*a*) of *Rule* 1, nor did he set forth any facts with respect to the question of support or non-support.

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In his factum the appellant is frank in stating that this issue which he described as the "secondary issue" was only raised in reply, that is, he did not raise the issue until his appeal to the Minister had been disposed of by the Minister and the appellant had taken the proceedings under sections 60 and 63 by which the appeal found its way into the Exchequer Court and an order for pleadings had been made.

In the Exchequer Court no evidence was called by either party but the following admission of facts was filed:

> For the purpose of this Matter, and without prejudice to the admission of the fact contained in paragraphs numbered 1, 2, 3, 4 and 6 of the Statement of Claim, it is further admitted that in the year 1944:
>
> (1) The Appellant and his spouse occupied the same dwelling.
>
> (2) The Appellant's income exceeded the income of his spouse.
>
> (3) The Appellant and his spouse both contributed to the maintenance of a common household in such dwelling, the operation of which was managed by the Appellant's spouse.
>
> (4) The whole income of the Appellant's spouse was expended for her personal expenses and as a contribution to the expenses of such common household.

As I read the provisions of the statute commencing with section 58, a person who objects to an assessment is obliged to place before the Minister on his appeal the evidence and the reasons which support his objection. It is for him to substantiate the objection. If he does not do so he would, in my opinion, fail in his appeal. That is not to say, of course that if he places before the Minister facts which entitle him to succeed, the Minister may arbitrarily dismiss the appeal. No question of that sort arises here, and I am deciding nothing with respect to it.

I further think that that situation persists right down to the time when the matter is in the Exchequer Court under the provisions of section 63. I regard the pleadings, which may be directed to be filed under subsection 2 of that section, as merely defining the issues which arise on the documents required to be filed in the court without changing the onus existing before any such order is made. In my opinion therefore the learned judge below was right in his view that the onus lay upon the appellant.

I further do not think that the admitted facts establish that which it lay upon the appellant to show. It was admitted that both the appellant and his wife contributed to the maintenance of the common household and that the whole income of the appellant's spouse was expended for

her personal expenses and as a "contribution" to the expenses of the common household. Nothing was shown as to the size of this contribution nor the relationship of that contribution to the amount actually required for her support. I think a husband may continue to support his wife within the meaning of the statute although his wife may supply some money toward meeting the cost of maintenance of the household. It is in each case a question of fact as to whether the wife supported herself or not. Whether this matter were made the subject of allegation in the Statement of Claim, as I think it more properly should have been, or in the reply, it was for the appellant to support it by evidence. He failed to do so and in my opinion therefore the appeal should be dismissed with costs.

LOCKE J.: (dissenting)—The appellant was during the taxation year 1944 a married man resident in Canada, having three children all under the age of eighteen years wholly dependent upon him for support. During the period in question his wife had a separate income in excess of $660 none of which was earned income, and written admissions were filed at the hearing in the Exchequer Court proving that during the period in question the appellant and his wife occupied the same dwelling, both contributed to the maintenance of the common household the operation of which was managed by the wife whose entire income was expended for her personal expenses and as a contribution to the expenses of the household, and that the appellant's income exceeded that of his wife. Upon this state of facts the appellant claimed that under the terms of *Rule* 1(*b*) of the First Schedule to the *Income War Tax Act* he was liable for normal tax at the rate of seven per centum of his income: in addition the appellant claimed other deductions which will be later referred to. The assessment disallowed these claims and assessed the appellant as a single person with three dependents upon the stated ground that his wife had an income from sources other than wages and salary in excess of $660 and on appeal to the Minister the assessment was confirmed. Upon the appellant serving a notice of dissatisfaction, as required by sec. 50 of the Act, the Minister delivered a reply denying the allegations in the notice of appeal and notice of dissatisfaction, in so far as they were incompatible with the statements contained

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in his decision and affirmed the assessment as levied. Upon the Minister complying with sec. 63 of the Act and transmitting the specified documents to the Registrar of the Exchequer Court, an order was issued directing the parties to file pleadings and the appellant filed a Statement of Claim alleging the facts above recited and claiming a declaration that he was liable to be assessed for normal tax at the rate of seven per centum for the taxation period in question and to the other deductions claimed.

By the Statement of Defence the Minister admitted the allegations made in so far as they were allegations of fact and not conclusions of law: as to the claim that the normal tax should be limited to seven per centum the defence alleged:—

> That the appellant was subject to normal tax at the rate of nine per centum as provided by Rules 2 and 3 of section 1 of paragraph A of the First Schedule of the *Income War Tax Act*.

As to the other deductions claimed the appellant's right was expressly denied. *Rule* 2 of sec. 1 of the First Schedule to the Act says that if during the taxation year a married person described by subpara. (*a*) of *Rule* 1 and his spouse each had a separate income in excess of $660 each shall be taxed under *Rule* 3. The married person described by subparagraph (*a*) of *Rule* 1 is one who supported his spouse and whose spouse complied with the requirements of the subparagraph as to residence. *Rule* 3 provides that the normal tax imposed should be at the rate of nine per centum in respect of an income such as that of the appellant. While the Minister had not, as required by *Rule* 88 of the Exchequer Court, stated the material facts upon which he relied to bring the appellant within the purview of *Rules* 2 and 3 but merely stated as a conclusion of law that the appellant was subject to taxation as provided by *Rules* 2 and 3, the appellant filed a Reply and Joinder of Issue in which he denied that he was a married person described by subpara. (*a*) of *Rule* 1 of sec. 1, or by subpara. (*a*) of *Rule* 3 of sec. 2, and joined issue.

Sec. 63, s-s. 1, of the *Income War Tax Act* specifies the documents to be transmitted to the Court by the Minister. S-s. 2 is as follows:—

> The matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing. Provided, however, that should it be deemed advisable by the Court or a judge thereof that pleadings be filed, an order may issue directing the parties to file pleadings.

Sec. 36 of the Exchequer Court Act, as enacted by *cap.* 23, Statutes of 1928, provides that the practice and procedure in suits, actions and matters in the Court shall, so far as they are applicable and unless it is otherwise provided for by the Act or by general rules made in pursuance of the Act, be regulated by the practice and procedure in similar matters in His Majesty's High Court of Justice in England on the first day of January, 1928. At the hearing of what is designated an appeal but which is clearly to be treated in the terms of sec. 63, s-s. 2, of the *Income War Tax Act,* as the trial of an action, the learned trial Judge considering that the onus was upon the taxpayer to establish that the appellant supported his wife or that he did not do so and that the burden was upon him to establish from the "facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal" that the assessment was incorrect, and finding that this had not been done dismissed the appeal. Upon the appeal to this Court we were referred to a decision of the learned President of the Exchequer Court, *Dezura* v. *Minister of National Revenue* (1) at 469, wherein it was said that the onus of proof of error in the amount of the determination rests on the appellant.

With respect, I am unable to agree that this is so in any case where pleadings have been delivered. The decision of the learned trial Judge appears to me to overlook the fact that pleadings defining the issue were delivered and that, in accordance with the practice in the High Court of Justice in England referred to in sec. 36 of the Act, the question of onus on the various issues to be determined must be decided upon the state of these pleadings. It is true that sec. 60, ss. 2, of the *Income War Tax Act* says that the appellant with his Notice of Dissatisfaction shall forward to the Minister a final statement of such further facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal, or in the alternative a recapitulation of all facts, statutory provisions and reasons included in the Notice of Appeal, together with such further facts, provisions and reasons as the appellant intends to submit to the Court in support of the appeal, but when, as provided by sec. 63, ss. 2, the matter is to be deemed an

(1) [1948] 1 D.L.R. 465.

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action in the Court ready for trial or hearing and pleadings have been delivered, the matter is, in my opinion, to be proceeded with in the same manner as any other trial. It cannot be treated both as an appeal to be determined upon the material submitted to the Minister and as a trial upon pleadings where either party may adduce whatever evidence they see fit to call. In my view the statement referred to in sec. 60, ss. 2, is not to be considered otherwise than as an argument: it is clearly not evidence. Whatever may be said for a contrary view, the nature of the proceeding appears to me to be made clear when, as permitted by sec. 63, ss. 2, pleadings are ordered and filed. The parties are then in the same position as other litigants in the Court and the position of the Crown, at least in respect to the burden of proving its case, is the same as that of any other litigant. In this situation the statute has said that the practice of the High Court of Justice governs: what that practice is does not admit of doubt. In *Daniell's Chancery Practice,* 8th Ed. 498, it is said that it may be laid down as a general proposition that the point in issue is to be proved by the party who asserts the affirmative, according to the maxim of the civil law: *ei incumbit probatio qui dicit, non qui negat.* In *Taylor on Evidence,* 12th Ed. (Vol. 1, p. 252), it is said:—

> The burthen of proof lies on the party who substantially asserts the affirmative of the issue. * * * The best tests for ascertaining on whom the burthen of proof lies are to consider first which party would succeed if no evidence were given on either side.

In Odger's *Pleading and Practice,* 12th Ed. p. 129, it is said that as a general rule the burden will lie on your opponent to prove at the trial the facts which you have traversed, but the burden will lie on you to prove the facts which you have alleged by way of confession or avoidance and you will not be allowed to shift the onus of proof by traversing when you should confess and avoid, even where your opponent has given you the opportunity by introducing an unnecessary averment into the preceding pleading. The same author (p. 287) says further:—

> What the issues are appears, or ought to appear, clearly from the pleadings. From the pleadings also it can at once be ascertained on which party lies the initial burden of proof on each issue—though it may soon be shifted to the other party. "The burden of proof" is the duty which lies on a party to establish his case. It will lie on A, whenever A must either call some evidence or have judgment given against him.

As a rule it lies upon the party who has in his pleading maintained the *affirmative* of the issue; for a negative is in general incapable of proof. *Ei incumbit probatio qui dicit, non qui negat.* The affirmative is generally, but not necessarily, maintained by the party who first raises the issue. Thus, the onus lies, as a rule, on the plaintiff to establish every fact which he has asserted in the Statement of Claim, and on the defendant to prove all facts, which he has pleaded by way of confession and avoidance, such as fraud, performance, release, rescission, etc.

Dealing with the question as to which side has the right to begin, Odger says that this depends entirely on the pleadings (p. 302). There is nothing in the Rules of the Exchequer Court which in any way render these principles inapplicable to proceedings such as those under consideration here and, in my view, they apply. The decisions under the English Act to which we were referred, to the effect that the onus is on the appellant to show that the assessment is wrong, do not assist, since there is there no statutory provision corresponding to sec. 60, ss. 2, of the *Income War Tax Act* and pleadings are not delivered.

Here the defence admitted the allegations of fact made by the appellant upon which he relied in support of his contention that he was liable to the normal tax at the lower rate. While admitting these allegations the defence set up certain matters by way of confession and avoidance: the allegations in paragraph 4 of this pleading, in so far as they dealt with the question of normal tax, consisted of an allegation that the income of the appellant's spouse had exceeded $660 and was not earned income, and the statement that the appellant was subject to normal tax at the rate of nine per centum, as provided by *Rules* 2 and 3 of sec. 1 of Paragraph A of the First Schedule of the *Income War Tax Act.* This plea did not comply with *Rule* 88 of the Exchequer Court which requires (as does its counterpart, O. 19, R. 4 of the Supreme Court of Judicature) that every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies. Whenever the right claimed or the defence raised is the creature of statute, being unknown to common law, every fact must be alleged necessary to bring the case within the statute (Odger, 12th Ed. p. 86). Here, instead of alleging the facts relied upon to make applicable the provisions of subpara. (*a*) of *Rule* 1, the defence pleaded a conclusion of law. Allegations of this nature need not be

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traversed (Bullen & Leake, 9th Ed. p. 541): the appellant, however, in his reply denied that he was a married person described in the subparagraph and in this form the pleadings must be taken to raise the issue (*Lush* v. *Russell,* 1850, 5 Exch. 203).

In this state of the pleadings the appellant, whose position was that of the plaintiff in the trial referred to in sec. 60, ss. 2, was entitled to rest his case, that he was subject only to the lower rate of normal tax imposed by subpara. (*b*) of *Rule* 1, upon the admissions made in the Statement of Defence and the further written admissions made on behalf of the defendant. The effect of the defendant's plea in the circumstances was to allege affirmatively that the appellant was a married person who supported his spouse within subpara. (*a*) and, therefore, liable to taxation at the higher rate. The onus was upon the defendant to prove that this was a fact but he tendered no evidence. The matter was, therefore, left in this state that it was admitted by the parties that the appellant's spouse was in receipt of a private income in excess of $660 and less than $16,420, that the husband and wife occupied the same dwelling, both contributing to the maintenance there of a common household, and that the whole of the wife's income was expended for her personal expenses and as a contribution to the expenses of the household. The meaning to be assigned to the written admission is, in my opinion, that the wife clothed herself and provided the money for her personal incidental expenses, that this did not exhaust her income and that she contributed the balance to the upkeep of the family home. The learned trial Judge found that the evidence did not establish whether or not the appellant supported his wife and considering the onus of proving the facts to be on the appellant held that the appeal failed. As, in my opinion, the onus was upon the defendant to prove affirmatively that the appellant did support his spouse during the taxation year and as this was not done the claim of the Minister fails and the appellant was entitled to a declaration that he was taxable under subpara. (*b*) of *Rule* 1.

It was argued before us that there was a presumption of fact that the appellant "supported his spouse" within the meaning of subpara. (*a*) upon the ground that at law it is the duty of the husband to maintain his wife according to

his condition or estate in life or according to his means of supporting her, and it should be inferred that he discharged this legal duty. I am not of the opinion that any such presumption of fact should be made in a matter of this nature. If there was such a presumption of fact in the present case it appears to me to be rebutted by the written admission made on behalf of the Minister that the wife clothed herself and contributed to the upkeep of the family home. The word used in subpara. (*a*) of *Rule* 1 is "support" and the word is to be assigned its ordinary meaning: this is a taxing statute and in accordance with long recognized principles is to be construed strictly: the subject is not to be taxed unless the language of the statute clearly imposes the obligation (Maxwell, *On the Interpretation of Statutes,* 9th Ed. p. 291). Here it is established by the admission that the spouse, at least partially, supports herself and assists in the maintenance of the family home. I do not think that subpara. (*a*) of *Rule* 1 is to be interpreted as if it read: "a married person who supported his spouse or contributed to her support": and upon the admitted facts it must be given this interpretation if liability under this subparagraph is to be found.

The appellant argued before us that even if there had been evidence that he was a married person who supported his spouse within the meaning of that expression as used in subpara. (*a*) that he was also clearly within subpara. (*b*) of *Rule* 1 and entitled to the lower rate. In the state of the record I consider it unnecessary to deal with this question.

The appellant further claimed to be entitled to a declaration that he was entitled to deduct $150 from the graduated tax under the terms of subpara. (*b*) of *Rule* 3 of sec. 2 of the First Schedule to the Act. The Minister has disputed this on the ground that the appellant was a married person described by subpara. (*a*) of *Rule* 3 of Sec. 2, the terms of which are identical with those of subpara. (*a*) of *Rule* 1. This contention was not supported by any evidence while the fact that the appellant was a person with three children under eighteen years of age wholly dependent upon him for support was admitted. It follows, in my opinion, that the appellant was entitled to this deduction from the graduated tax.

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The appellant further claims to be entitled to deduct from the taxes otherwise payable by him the sum of $1,000 under the terms of subpara. (i) of para. (*d*) of sec. 7A of the Act: the defendant contends that as the appellant is a person subject to tax under *Rule* 3 of sec. 1 of para. A of the First Schedule this deduction should be $800 only. As the appellant was, in my opinion, a person subject to tax under subpara. (*b*) of *Rule* 1 of sec. 1 and as $1,000 is less than ten per centum of his taxable income he is entitled to deduct that amount.

The appeal should be allowed, with costs in this Court and in the Exchequer Court, and the appellant assessed for the taxation year 1944 in accordance with the above findings.

Appeal dismissed with costs.

Solicitors for the Appellant: *Johnston, Heighington & Johnston.*

Solicitor for the Respondent: *W. S. Fisher.*

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Feb. 23, 24
June 25

IN THE MATTER OF THE ESTATE OF ALICE GRANT MACKAY, DECEASED

CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH (DEFENDANTS).. } APPELLANTS;

AND

THE TORONTO GENERAL TRUSTS CORPORATION (PLAINTIFF)..... } RESPONDENT;

AND

WILLIAM HENRY OLIVER STOBIE (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Will—Construction—Charitable Trust—Bequest to Church "to be added to the Endowment Fund"—No Endowment Fund—Whether good charitable gift or void for uncertainty.

A testatrix made a residuary bequest—"To pay all the rest, residue and remainder of my estate to the St. Andrew and Wesley Church, Vancouver, B.C., to be added to the endowment fund."

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

Held: (Kerwin J. dissenting), that the gift was a good bequest, its purpose prima facie religious, and so charitable. (*Schoales* v. *Schoales* [1930] 2 Ch. 75; *White* v. *White* (1893) 2 Ch. 41 followed.)

Per, Kerwin J., dissenting, the gift failed because it did not fall within the preamble and intendment of the statute of Elizabeth since the absence of an endowment fund does not permit a court of equity to establish a fund with objects that could undoubtedly be charitable within the meaning of the rule. (Williams v. Inland Revenue Commissioners [1947] A.C., 447; *Dunn* v. *Byrne* [1912] A.C. 407; In re Lawton [1940] 1 Ch. 984, followed.)

Appeal allowed and judgment of the trial judge (1) restored.

APPEAL from the judgment of the Court of Appeal for British Columbia (2) allowing, O'Halloran and Bird JJ.A. dissenting, the appeal from the judgment of Wilson J. (1). The appeal to this Court was allowed (with costs of all parties to be paid out of the Estate) and the judgment of the trial judge restored. Kerwin J. dissented.

W. G. Currie K.C. for the appellant.

D. K. MacTavish K.C. for The Toronto General Trusts Corpn., Executors of the deceased's Estate.

T. G. Norris K.C. and *G. E. Beament* for William Henry Oliver Stobie, as representing all the next-of-kin and other persons interested.

KERWIN J. (dissenting)—The clause in the will of Mrs. McKay which has raised the difficulty in the present case is as follows: —

> 30. TO PAY OR TRANSFER all the rest, residue and remainder of my estate to the ST. ANDREW AND WESLEY CHURCH, Vancouver, B.C. to be added to the endowment fund.

The question is, has the testatrix by this clause evinced an intention that her trustees should convey the residue of her estate for charitable purposes. We have had the advantage of a very complete argument but, as Lord Simonds, speaking for a unanimous House of Lords, points out in the most recent case on the subject, *Williams Trustees* v. *Inland Revenue Commissioners* (3):—

> The cases in which the question of charity has come before the courts are legion and no one who is versed in them will pretend that all the decisions, even of the highest authority, are easy to reconcile.

(1) [1946] 2 W.W.R. 657.
(2) [1947] 1 W.W.R. 97.
(3) [1947] A.C. 447 at 455.

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MACKAY ESTATE *In re* ST. ANDREW'S-WESLEY CHURCH *v.* TORONTO GENERAL TRUSTS CORPORATION AND W. H. O. STOBIE *et al*

Kerwin J.

It is not disputed here any more than it was in that case that "for charitable purposes" means "for charitable purposes only."

The Church did not have an endowment fund at the time of the making of the will, or at the time of the death of the testatrix, and for the purposes of this appeal the efforts since made to establish such a fund are unavailing. The testatrix apparently thought that there was an endowment fund in existence since the article "the" is used. If there had been such a fund, evidence as to its objects and the manner in which the interest therefor was to be used would have permitted the determination whether, the gift being localized and the nature of the benefit defined, the bequest could be regarded as falling within the spirit and intendment of the preamble to the statute of Elizabeth. (See the *William Case supra* pp. 459-460). While a gift to a church simpliciter has uniformally been held a good charitable gift, in *Dunne* v. *Byrne,* (1) the Judicial Committee determined that a residuary gift "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may adjudge most conducive to the good of religion in this diocese" did not fall within the rule on the ground that the terms of bequest were not identical with religious purposes. Lord Macnaghten, who delivered the judgment and who had in *Commissioners of Income Tax* v. *Pemsel* (2) classified charity in its legal sense into four principal divisions, said that the language of the bequest to use Lord Langdale's words would be "open to such latitude of construction as to raise no trust which a court of equity could carry into execution." Lord Simonds, whose judgment in the *Williams Case,* it is generally considered, will be as much a *locus classicus* on the subject as has Lord Macnaghten's judgment in 1891, had decided in *Re Lawton* (3) as Simonds J. There a testator by his will gave all his residuary estate to the trustees of a parish church to be used by them at their discretion for any object or purpose permitted by the trust deed under which they operated. There never were any trustees and there never was any such trust deed. Simonds J. held that the bequest failed because there was no general

(1) [1912] A.C. 407 at 411.
(2) [1891] A.C. 531.
(3) [1940] 1 Ch. 984.

charitable intention, therein following the decision of Vice-Chancellor Sir George Giffard in *Aston* v. *Wood* (1). As Lord Simonds, he pointed out in the *Williams Case* that in *Farley* v. *Westminster Bank* (2) a testatrix had bequeathed the residue of her estate in equal parts to the respective vicars and church wardens of two named churches "for parish work", and that the bequest failed because it did not fall within the preamble and intendment of the statute of Elizabeth. Similarly, I am of opinion that here the gift failed and for the same reason since the absence of an endowment fund does not permit a court of equity to establish a fund with objects that could undoubtedly be charitable within the meaning of the rule.

The church authorities to whom the money would be paid, if the bequest were valid would, in the absence of an endowment fund, be obliged to constitute one, which on any interpretation of the words "endowment fund" would involve the retention of the corpus and use of the interest. In that event, such use could include, or indeed be restricted to, trusts that are not charitable within the legal definition of that term.

So far I have dealt with the only matters argued orally before us. However, at the suggestion of the Bench, written arguments were submitted on the point as to whether the words "to be added to the endowment fund" were words merely expressing a wish and not constituting a direction. We are obliged to counsel for the submissions subsequently made by them on this point but I need only say that after giving the matter consideration, I have come to the conclusion that there is no substance in it.

The appeal should be dismissed but under all the circumstances the costs of all parties may be paid out of the residuary estate, those of the executors as between solicitor and client.

The judgment of Taschereau, Rand and Kellock, JJ. was delivered by:

RAND J.: This appeal raises the question of the construction of a clause in a will in these words:—

30. TO PAY OR TRANSFER all the rest, residue and remainder of my estate to the St. Andrew and Wesley Church, Vancouver, B.C., to be added to the endowment fund.

(1) (1868) L.R. 6 Eq. 419. (2) [1939] A.C. 430.

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Rand J.

The church, of which the testatrix was a member, did not have an endowment fund, but during her membership had received at least two bequests of substantial sums.

It is contended on behalf of the next of kin that the language of the concluding phrase shows the testatrix to have had in mind an endowment fund which so far as is known might have embraced any number of special purposes not charitable; and investing it with such purposes would render the bequest void for uncertainty of objects.

I take the clause to mean a bequest to the church by way of a general endowment. I do not treat the words "to be added to the endowment fund" as making the bequest conditional upon the existence of a fund so designated; and I construe them to imply the application of income for church purposes. The testatrix could not have intended any specific purposes because there was no constituted fund; and in the collocation of these words with the rest of the clause, the fair, and I think the only, inference to be drawn is that she had in mind the ordinary and usual purposes of a permanent fund for the benefit of a church. The use of the article "the" strengthens that view.

The word "endowment" is said in Stroud's Judicial Dictionary, 2nd Ed. at p. 619 by metaphorical transference to mean "the setting out or severing of a sufficient part or portion to a Vicar for his perpetual maintenance when the BENEFICE is appropriated."; and that is confirmed *In re Robinson.* (1) Here there is the addition of the significant word "fund".

What, then, is the prima facie meaning of church purposes? I take it to be religious purposes. In *Schoales* v. *Schoales* (2) a gift to "the Roman Catholic Church" was held prima facie to be a gift to the operative institution which ministers religion and gives spiritual edification to its members and for the purposes of religion. From such purposes it followed that the gift was a good charitable bequest. I see no distinction between that and the present gift, and the purposes here are therefore, prima facie, religious, and so charitable. In *White* v. *White* (3) the bequest was "to the following religious societies, viz: * * * to be divided

(1) [1892] 1 Ch. 95, 100.
(2) [1930] 2 Ch. 75.
(3) [1893] 2 Ch. 41.

in equal shares among them.", but the names were not inserted. The Court of Appeal held that prima facie religious societies meant societies with religious purposes and therefore charitable purposes, and the bequest was held not to have failed for uncertainty. While the inference of religious purposes from religious societies was questioned in *Dunne* v. *Byrne* (1) by Lord Macnaghten, as the object here is a church, the inference is warranted, and in the absence of evidence to the contrary, unassailable. In *Public Trustee* v. *Ross* (2) a bequest "unto the Vicar of St. Alban's Church—for such objects connected with the church as he shall think fit" was held to be valid as charitable; on the true construction of the concluding words, the discretion vested in the vicar was to be exercised within the scope of church and not parochial purposes.

I would, therefore, allow the appeal and restore the trial judgment. The costs of all parties should be paid out of the estate, those of the executor as between solicitor and client.

ESTEY J.: The late Alice Grant MacKay of Vancouver, B.C., by her will provided:

> To pay or transfer all the rest, residue and remainder of my estate to the St. Andrew and Wesley Church, Vancouver, B.C., to be added to the endowment fund.

In fact there was no endowment fund. There were, however, two funds bequeathed to the church which had not been set up in the accounts as an endowment fund nor had they been known as such. If, therefore, the testatrix, who was a member of that church, had any it was but a very imperfect knowledge of the existence of these bequests. The word "endowment" under these circumstances was of her own choosing. The provision when read in the light of these facts indicates an intention on the part of the testatrix to give the residue of her estate to that church as an endowment. "Endowment", it is pointed out in Halsbury, 2nd Ed., Vol. 4, p. 356, para. 620, and in the recognized dictionaries, may be used in different senses. It, however, generally imports the provision of a fund for the support of, over a long time or permanently, some institution or person. The adoption by the testatrix of this phrase "endowment fund" in this residuary clause im-

(1) [1912] A.C. 407. (2) [1930] 1 Ch. 224.

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Estey J.

ports that the fund would remain intact and the income therefrom should be used by the church. In other words, that the church would hold this fund in trust. Such appears to be the real intention of the testatrix. The fact that she was mistaken in thinking that an endowment fund really existed does not detract from the fact that she intended that her money should be an endowment for church purposes.

This gift by way of an endowment to St. Andrew's-Wesley Church constitutes in law a charitable trust. In *In re White* (1) the will provides:

> I do give and bequeath the whole of my property to the following religious societies, viz * * *

No such societies were in fact mentioned. It was held the gift was for religious purposes and that being for religious purposes it was a gift for a "charitable purpose, unless the contrary can be shewn." Lord Macnaghten, referring to *In re White, supra, in Dunne* v. *Byrne* (2) stated at p. 411:

> All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift.

In *In re Bain* (3) the residuary clause read:

> I devise and bequeath all the residue of my estate whatsoever and wheresoever unto the Vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the Church as he shall think fit.

Lord Hanworth, M.R., at p. 232 states:

> It is because we have got the church as the centre of this bequest and not the parish that I think we are right in rejecting outside considerations and in saying that this is a good bequest to the Vicar as a trustee for the purposes of his church, that is, for the fabric and for the services which are conducted therein.

Lord Justice Lawrence at p. 233:

> The bequest in question is to the Vicar of St. Alban's Church as an ecclesiastical corporation, and it is therefore a gift to a religious institution. Prima facie, such a gift is a bequest for a charitable purpose * * *

The testatrix in making this gift has given it to the church prima facie for religious purposes. That appears to follow from the statement of Farwell, J.:

> It is only, in my judgment, in a case where the trust itself is not specified that the character of the trustees may be sufficient to indicate the purpose of the trust.

Re Ashton's Estate, Westminster Bank, Ltd. v. *Farley* (4)

(1) [1893] 2 Ch. 41.
(2) [1912] A.C. 407.
(3) [1930] 1 Ch. 224.
(4) [1938] 1 All E.R. 707 at 716.

His judgment was approved in the House of Lords: *Farley* v. *Westminster Bank* (1). See also *Gordon* v. *Craigie* (2).

Under all the circumstances of this case, the authorities warrant the conclusion that this residuary clause creates a valid charitable trust in favour of the church.

The appeal should be allowed and the judgment of the learned trial Judge restored. The costs of all parties in this Court and the Court of Appeal are to be paid out of the residuary estate; those of the executors as between solicitor and client.

Appeal allowed with costs.

Solicitor for the (Defendants) Appellants: *Dugald Donaghy.*

Solicitor for the (Plaintiff) Respondent: *Arthur J. Cowan.*

Solicitor for (Defendant) Respondent: *Norris & McLennan.*

Reporter's Note:

Following delivery of judgment, an application was made at the next session of the Court on behalf of the respondent Stobie for leave to re-hear the appeal solely with respect to the disposition of costs in this Court and the Court of Appeal for British Columbia. Leave having been granted and counsel heard, judgment was reserved, and on the 18th October, 1948 rendered as follows: The judgment is amended by providing that all parties are entitled to their costs in the Court of Appeal as between solicitor and client. There will be no costs of this motion.

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(1) [1939] A.C. 430; (1939) 3 All E.R. 491.
(2) [1907] 1 Ch. 382.

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*Mar. 23, 24
*June 25

HIS MAJESTY THE KING.....APPELLANT;

AND

PETER QUON .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law—Possession of a firearm capable of being concealed upon the person while committing any criminal offence—Whether the words "any criminal offence", The Criminal Code, s. 122, includes any criminal offence the essential element of which is the possession of a firearm—The Criminal Code, R.S.C., 1927, c. 36, s. 122 as re-enacted by S. of C., 1938, c. 44, s. 7.

Held: (Kerwin J. dissenting)—To avoid the absurdities, inconsistencies or repugnancies which a perusal of other sections of the *Code* would otherwise give rise to, the words "any criminal offence" as used in s. 122 are restricted to an offence of which the possession of a firearm capable of being concealed upon the person, is not an essential element. In the result *Rex.* v. *Maskiew* (1945) 53 Man. R., 281, overruled.

Per Kerwin J. (dissenting)—By themselves the words "any criminal offence" do not admit of two interpretations and therefore the applicable rule is that set out in *Grey* v. *Pearson* 6 H.L. Cas. 61 at 106; *Victoria City* v. *Bishop of Vancouver Island,* [1921] A.C. 384 at 387.

Another principle in the construction of statutes applicable to s. 122 is: "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity"—*Reg.* v. *Judge of City of London Court,* (1892) 1 Q.B. 273, 290; *Cook* v. *Charles A. Vogaler Co.,* [1901] A.C., 102, 107. The remedy lies with Parliament and not with the Courts—*Canadian Performing Right Society* v. *Famous Players Canadian Corp.* [1929] A.C. 456 at 460.

APPEAL by leave granted under section 1025 of the *Criminal Code,* from a judgment of the Court of Appeal for Ontario (1) quashing a conviction of the respondent. The respondent was charged on two counts. The first laid under section 446 (*c*) of the *Code,* alleged robbery while armed; the second, laid under section 122 of the *Code,* alleged possession of a firearm capable of being concealed upon the person while committing a criminal offence. The accused pleaded guilty to the first charge and not guilty to the second. He was convicted on both and sentenced to two years imprisonment on the first, and to an additional two years on the second. He appealed his conviction on the second charge.

W. P. Common, K.C. for the appellant.

Arthur E. Maloney for the respondent.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

(1) [1947] O.L.R. 856.

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The judgment of the Chief Justice and Estey, J. was delivered by:

ESTEY J.:—The accused, Peter Quon, on the early morning of the 30th of March, 1947, entered a restaurant in the City of Toronto and there, armed with a revolver, intimidated and robbed the proprietor, Sam Lun, of $75. In the proceedings that followed he pleaded guilty to an offence contrary to section 446(*c*) of the *Criminal Code,* and was found guilty of an offence of having on his person a revolver, contrary to section 122 of the *Criminal Code.* He was sentenced under sec. 446(*c*) to a term of two years in the penitentiary and to a further term of two years under sec. 122.

The Crown appeals from a judgment of the Appellate Court for Ontario quashing the conviction under the second count on the basis that the words "any criminal offence" in sec. 122 "do not include any criminal offence an essential element of which is the possession upon the person of a pistol, revolver or any firearm capable of being concealed upon the person."

The learned Judges of the Appellate Court while of the opinion that the words "any criminal offence" standing by themselves were exhaustive and would include every offence created by the *Code,* were of the opinion that Parliament did not intend these words as used in sec. 122 should be given that exhaustive meaning but rather the restricted meaning above indicated. In this regard the learned Judges disagreed with the decision of *Rex* v. *Maskiew* (1) a decision of the Appellate Court in Manitoba.

Sec. 122 reads as follows:

122. Everyone who has upon his person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence.

Sections 118 to 129 of the *Criminal Code* were repealed in 1933 and as re-enacted embody several material changes.

(1) (1945) 85 C.C.C. 138; (1945) 53 Man. R. 281.

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Sec. 122, prior thereto sec. 120, was one of these sections. As amended it applied only to a pistol, revolver or other firearm capable of being concealed upon the person (the rifle and shotgun were added in 1938). At the same session Parliament enacted sec. 118 and provided that "every one * * * who not having a permit in Form 76, has upon his person, elsewhere than in his own dwelling house, shop * * * a pistol, revolver, or other firearm, capable of being concealed upon the person" is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years. The identical weapons are dealt with in 1933 in both secs. 118 and 122. The learned Judges of the Appellate Court point out that a literal construction of the language used in 1922 would result in that one found guilty under 118 is also guilty of an offence under sec. 122 and liable to a further minimum term of two years imprisonment. The learned Judges also referred to secs. 115, 116, 117, 123 and 124, and pointed out that with respect to these a similar absurdity or repugnancy would result.

Then with respect to the offence of burglary under sec. 457, paragraph (2) thereof provides:

> 457. (2) Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped.

This subsection covers with respect to burglary all that sec. 122 provides for if the latter be given the meaning contended for by the Crown. It cannot be that Parliament intended sec. 122 should apply to burglary in view of the provisions of sec. 457(2).

The foregoing absurdities, inconsistencies or repugnancies are such as to justify a Court adopting that construction of the language in sec. 122 as may avoid them. In *Grey* v. *Pearson* (1) at p. 104, Lord Wensleydale stated:

> I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

This passage has been repeatedly approved.

(1) (1857) 6 H.L. Cas. 61.

The construction given to this section by the learned Judges of the Appellate Court avoids these absurdities and repugnancies. Moreover, that construction seems to be supported by a perusal of many sections of the *Code*. The group of sections such as 115 to 129 deal in the main with custody and possession of the specified weapons under certain circumstances; then the offences such as sec. 264 (attempts murder); sec. 273 (wounding with intent); sec. 446 (robbery) cover those cases in which the weapons are used in the manner as therein described. In all of these latter offences the maximum punishment provided is life imprisonment. In those sections where possession or custody is the basis of the offence, Parliament has in mind the mischief or risk to the public occasioned by the possession of one of these firearms. Apart from 122 there is no section that deals with the having, with or without a permit, the firearms specified in 122 upon the person of one while committing a criminal offence. A firearm upon the person of a criminal while committing an offence is fraught with the greatest possible danger to the public, when detected, he resorts to his firearm with usually serious and sometimes fatal consequences to one or more of the public. It is in sec. 122, as in the other sections with which it is associated under the heading "Offensive Weapons", that Parliament seeks to punish and to that extent to protect the public against the possession or custody of these firearms and thereby avoid the consequences already suggested.

The construction adopted by the Court of Appeal removes the absurdities, inconsistencies and repugnancies, and in my opinion is consistent with the position of sec. 122 in the *Code* in relation to the other offences.

The appeal should be dismissed.

KERWIN J. (dissenting):—By leave granted under section 1025 of the *Criminal Code*, the Attorney-General of Ontario appeals to this Court from a judgment of the Court of Appeal for that province (1) quashing a conviction of the respondent Quon. The basis of the reasons for that decision, delivered by Mr. Justice Roach on behalf of the Court, is that the words "any criminal offence" in section 122 of the *Code* do not include a criminal offence an essential element

(1) [1947] O.L.R. 856.

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of which is the possession upon the person of a pistol, revolver or any firearm capable of being concealed upon the person. Section 122 at the relevant time was as follows:—

122. (1) Every one who has upon his person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence.

Quon was convicted of an offence under this section and it was that conviction that was set aside. He had already pleaded guilty to a charge that at the City of Toronto on or about the 30th day of March, 1947, being armed with an offensive weapon, to wit, a pistol, he robbed Sam Lun of the sum of $75 in money, which charge was laid under section 446(*c*) of the *Code*:—

446. Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who

* * *

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person.

It is common ground that the pistol mentioned in this charge is the same pistol referred to in the charge under section 122.

The reasoning of the Court of Appeal applies even though an accused has never been convicted or even charged under section 446 and, as pointed out by Roach J.A., the decision is in conflict with the judgment of the Court of Appeal for Manitoba in *Rex* v. *Maskiew* (1). Chief Justice Macpherson in that case gives the history of the two sections of the *Code* set out above and in my view that history emphasizes the all inclusiveness of the words "any criminal offence" in section 122. Even though some of the results set out by Mr. Justice Roach may in certain circumstances ensue, I am unable, with respect, for that reason, to cut down the meaning of those plain unambiguous words.

By themselves the words do not admit of two interpretations and therefore the applicable rule is set out by Lord

(1) (1945) 85 C.C.C. 138; (1945) 53 Man. R. 281.

Atkinson, speaking for the Judicial Committee, in *Victoria City* v. *Bishop of Vancouver Island* (1) in the second paragraph of the following extract at 387-388:—

In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. In *Grey* v. *Pearson* (2) Lord Wensleydale said: "I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Lord Blackburn quoted this passage with approval in *Caledonian Ry. Co.* v. *North British Ry. Co.* (3), as did also Jessel M. R. in *Ex parte Walton* (4).

There is another principle in the construction of statutes specially applicable to this section. It is thus stated by Lord Esher in *Reg.* v. *Judge of the City of London Court* (5):

"If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this:—If the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation." And Lord Halsbury in *Cooke* v. *Charles A. Vogeler Co.* (6) said: "But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the legislature has said." Which necessarily means that for this latter purpose it is legitimate to take into consideration the reasonableness or unreasonableness of any provision of a statute.

Again a section of a statute should, if possible, be construed so that there may be no repugnancy or inconsistency between its different portions or members.

I have quoted these three paragraphs because Lord Wensleydale's statement in *Gray* v. *Pearson,* referred to in the first paragraph, has been relied upon by the Court of Appeal in coming to its conclusion but since there is no ambiguity in the words themselves, "any criminal offence", the relevant rule in my opinion, as I have stated, is that set forth in the second paragraph. It is true that there are cases in the books where the meaning of a word of general import

(1) [1921] 2 A.C. 384.
(2) 1857 6 H.L. 61 at 106.
(3) (1881) 6 App. Cas. 114 at 131.
(4) (1881) 17 Ch. D. 746, 751.
(5) [1892] 1 Q.B. 273, 290.
(6) [1901] A.C. 102, 107.

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has been restricted. Examples of such cases are *River Wear Commissioners* v. *Adamson* (1) and *Cox* v. *Hakes* (2), but no decision of authority can be found to say that where, as here, two offences are created by the same Act, a general expression found in one section is to be cut down because a Court may think such construction would lead to some inconvenience or absurdity. The remarks of Lord Chief Justice Reading, speaking for the Court of Criminal Appeal in *Frederick Miles* (3), at 15, are appropriate: "But it is perfectly plain that in such a case as this, if a jury have given a verdict for one offence, a jury can give a verdict for another offence." Here, there is a separate and distinct offence created by section 122 and what I consider, with deference, to be the plain intent of Parliament must be given effect to. The remedy lies with Parliament and not with the Courts, as pointed out in the judgment of the Judicial Committee in *Canadian Performing Right Society* v. *Famous Players Canadian Corp.* (4) at 460:—

> Strenuous efforts, however, have been made by counsel for the appellants to induce their Lordships to accept a construction other than the literal one, and it is necessary therefore to consider whether such a construction is the correct one. Great stress is laid by the appellants on the extreme inconvenience of a literal construction. It may, it is said, be practically impossible, when occasion arises to register an assignment, to obtain a duplicate without which, as it would appear, registration is impossible.
>
> One answer to this argument is that it ought to be addressed to the legislature and not to the tribunal of construction, whose duty it is to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship.

Counsel for the accused argued that he was entitled to uphold the order setting aside the conviction upon the ground of *res judicata.* The members of the Court of Appeal were unanimous and, if they really decided the point against the accused, the latter has not the right to ask us to determine it as that would in effect permit him to appeal to this Court in a case not provided for by the *Code.* In an early part of his judgment, Mr. Justice Roach states: "In my opinion it is clear that the appellant has a complete defence to the second charge but it is not the defence of *res judicata*" but, towards the end, after referring to a number of cases cited on behalf of the accused, he continues: "On my interpretation of section 122, neither

(1) (1876-7) 2 App. Cas. 743.
(2) (1890) 15 App. Cas. 506.
(3) (1909) 3 Cr. App. R. 13.
(4) [1929] A.C. 456.

the defence of *autrefois convict* or *res judicata* has any application." I take it from these two extracts that the Court of Appeal did not consider the defence of *res judicata* and, if that be so, the proper order is that the case be remitted to that Court in order that it may pass upon that defence: *The King* v. *Boak* (1). On the other hand, if the Court of Appeal decided the point against the accused, the result will be that his conviction will be affirmed.

TASCHEREAU J.—The Attorney General for Ontario appeals from a judgment of the Court of Appeal, unanimously quashing the conviction of the respondent Quon. Special leave to appeal was granted by the Honourable Mr. Justice Estey, on the ground that this judgment conflicts on a question of law with a judgment of the Court of Appeal of the Province of Manitoba, *Rex* v. *Maskiew* (2).

The respondent was charged on two counts:

1. That at the City of Toronto on or about the 30th day of March, 1947, being armed with an offensive weapon, to wit: a pistol, he robbed Sam Lun of the sum of $75 in money, the property of Melody Lunch and Sam Lun, contrary to the Criminal Code.

2. And further, at the City of Toronto on or about the 30th day of March, 1947, he had upon his person a pistol or revolver or firearm, capable of being concealed upon the person while committing a criminal offence, contrary to the Criminal Code.

The respondent pleaded guilty to the first count and not guilty to the second. He was sentenced on the first charge to two years in the Penitentiary, and having been found guilty on the second charge, he was sentenced to a further term of two years consecutive.

The charge under the first count was laid pursuant to the provisions of section 446(*c*) of the Criminal Code which reads as follows:

446 (*c*). *Robbery while armed.*—Being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person.

The charge under the second count was made pursuant to section 122, which is as follows:

122. *Armed while committing offence.*—Everyone who has upon his person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be

(1) [1925] S.C.R. 525.

(2) (1945) 85 C.C.C. 138; (1945) 53 Man. 281.

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sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence.

It is common ground that on the 30th day of March, 1947, the respondent entered a restaurant of which the proprietor was Sam Lun, at the south-west corner of Carleton and Jarvis Streets in the City of Toronto. The respondent had a revolver in his hand and intimidated the proprietor and robbed him of about $75. It is to be noted that the charge on the first count relates to the 30th day of March, 1947, and that the charge on the second count also relates to the same date. It is admitted that the revolver which Quon had in his hand and the possession of which is an essential element of the crime committed under the first count, is the same offensive weapon which can be concealed, and which is mentioned in the second count.

This section 122 which is an amendment to the *Criminal Code* (1938), was enacted in order to increase the punishment when certain crimes are committed while the authors are bearers of arms which may be concealed, and which give to the offences a more dangerous character. It has however very far reaching consequences which the draftsman obviously did not all foresee. It applies to anyone who while committing *any* criminal offence has on his person a weapon which may be concealed. It would therefore apply to a man who, while writing a defamatory libel, has a revolver in his pocket, or to a person for example who, while violating the provisions of sections 221 and 222 of the *Criminal Code* relating to common nuisances, is in possession of an arm which may be concealed. But, fortunately, we have not to decide these cases, and they are matters to be dealt with by the proper legislative authorities, and not by the judiciary.

The question put before this Court is:

Does section 122 of the *Criminal Code* find its application, when it is an essential element of the "criminal offence", that the guilty person be the bearer of an offensive weapon? (a revolver in the present case).

It is submitted that the plain grammatical interpretation of section 122, is that the section applies to any person who, while committing *any* criminal offence, has upon his

person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person. It is argued that the language of this section is plain and unambiguous and that the judgment of the Court of Appeal is wrong in that the principles applied by that Court in its reasons for judgment are to be applied, only when the language of the statute to be interpreted, is ambiguous and capable of more than one meaning.

I do not think that this reasoning applies here. If the Crown's contention is adopted, it will mean that the respondent is to be punished for a robbery of $75 when armed with a revolver, and that he will receive an additional punishment because he had on his person that very same revolver, which was an element of the first criminal offence.

I have had the occasion of reading the reasons for judgment of my brother Kellock, and I agree with him that Parliament never contemplated such an unreasonable and shocking result. Words are primarily to be construed in their popular sense unless such a construction would lead to a manifest absurdity. If they lead to an absurdity, the words may be modified so as to avoid it. (Halsbury's Laws of England, 2nd Ed. Vol. 31, at pages 480, 482 and 483).

I believe that this rule must be applied here, and that it should be held that the words "any criminal offence", found in section 122 mean an offence, where the possession of a firearm susceptible of being concealed, is not an element.

I think that the Court of Appeal of Ontario was right in its conclusion, and I would therefore dismiss this appeal.

KELLOCK J.:—The respondent was charged in the County Court Judge's Criminal Court on two counts as follows:

1. That at the City of Toronto on or about the 30th day of March, 1947, being armed with an offensive weapon, to wit a pistol, he robbed Sam Lun of the sum of $75 in money, the property of Melody Lunch and Sam Lun, contrary to the Criminal Code.

2. And further that at the City of Toronto on or about the 30th day of March, 1947, he had upon his person a pistol or revolver or fire-arm capable of being concealed upon the person while committing a criminal offence contrary to the Criminal Code.

He pleaded guilty to the first count and not guilty to the second count. Evidence was submitted on the second count and he was found guilty. The sentence on the first count was two years in the penitentiary and on the second

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count a further term of two years. The charge under the first count was laid under the provisions of section 446(*c*) of the Criminal Code and that under the second under section 122.

The facts are not in dispute. In the early morning of the 30th of March, 1947, the respondent entered a restaurant in the City of Toronto, the proprietor of which was one Sam Lun. Respondent had a revolver in his hand and with it intimidated Lun, and effected the robbery. It is common ground that both charges arise out of these circumstances and that the pistol referred to in the second charge is the same pistol as is referred to in the first charge.

On appeal to the Court of Appeal for Ontario the appeal was allowed and it was held that the words "any criminal offence" in section 122 do not include an offence an essential element of which is the possession of a firearm capable of being concealed upon the person. The Crown now appeals pursuant to leave granted, on the ground of conflict between the judgment here in question and the decision of the Court of Appeal of Manitoba in *Rex.* v. *Maskiew* (1).

The relevant sections of the *Code* are as follows:

445. Robbery is theft accompanied with violence or threats of violence to any person or property used to extort the property stolen, or to prevent or overcome resistance to its being stolen.

446. Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person;

447. Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment and to be whipped.

Section 122, as enacted by 2 Geo. VI, *cap.* 44, section 7, reads as follows:

122. (1) Every one who has upon his person a rifle, shot-gun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence.

(1) (1945) 53 Man. R. 281; [1946] 1 D.L.R. 378.

On the view of the appellant as to the effect of these two sections, the possession of the revolver by the respondent in the commission of the robbery took the respondent out of section 445 and raised the offence to one within section 446(*c*), while at the same time, the *same fact,* i.e., the possession of the revolver constituted an additional and separate offence within section 122.

In approaching the question as to the proper view to be taken of the meaning of the statute, I think there are well settled principles to be kept in mind. The first is illustrated by *Wemys* v. *Hopkins* (1). In that case a complaint was preferred against the appellant under 5 and 6 Wm. IV, c. 50 (1), s. 78, for that being the driver of a carriage on a highway, by negligence or wilful misbehaviour, viz., by striking a certain horse ridden by the respondent, caused her hurt and damage. The appellant was convicted on this charge and fined. Subsequently a complaint was preferred against him under 24 and 25 Vict., c. 100, s. 42, for that he did on the same date as that in question on the first complaint and by reason of the same conduct, unlawfully assault, strike, and otherwise abuse the respondent. On this charge he was also convicted and fined. The question for the court was whether, the appellant having been convicted on the first, could also be convicted on the second complaint. It was held he could not. Blackburn, J., at p. 381 said:

> The defence does not arise on a plea of autrefois convict, but on the well established rule at common law, that when a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam,* that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence * * * It is necessary in the present case to have it proved * * * that on a former occasion the appellant was charged with the same assault, although not in the same words, yet in terms the same, and that he was then convicted and punished.

The above principle is embodied in section 14 of the *Code.* The common law principle is as applicable, in my opinion, in the case of two sections of the same statute as in the case of separate statutes.

There is also to be borne in mind the second principle, as stated by Cockburn, C.J., in *Queen* v. *Elrington* (2) at 696, viz.: "the well established principle of our criminal

(1) (1875) L.R. 10 Q.B. 378. (2) (1861) 1 B. & S. 688.

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law that a series of charges shall not be preferred and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form". Section 907 embodies this latter principle.

It is obvious of course that Parliament may, if it sees fit, constitute two separate offences out of the same act or omission or make part of an act or omission or one or more of a series of acts or omissions a separate offence additional to that constituted by the complete act or omission or the whole series.

In the light of the principles referred to, which are fundamental principles of the criminal law, one asks one's self whether Parliament has in fact as to the statutory provisions here in question, departed from these principles and shown the intention that the possession of a firearm in the commission of the offence of robbery, which thereby raises the offence to that of armed robbery, shall also constitute a separate and distinct offence under section 122. In other words, does the statute, taken as a whole, indicate that the words "any criminal offence" in section 122 are used in other than their literal all inclusive sense?

The argument for the appellant is based squarely upon the literal interpretation of this phrase. Where statutory language admits of only one meaning, then, of course no other meaning may be applied but it is the intention of the legislature upon the whole statute that is the determining factor. The matter is put thus in Maxwell, *On the Interpretation of Statutes*, 7th Ed. p. 2.

> The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar. From these presumptions it is not allowable to depart where the language admits of no other meaning. Nor should there be any departure from them where the language under consideration is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the Legislature. If there is nothing to modify, nothing to alter, nothing to qualify, the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The great fundamental principal is:—
>
> "In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to,

unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther."

However, the mere use of a general word, even the "any" does not end the matter. In *Cox* v. *Hakes* (1) Lord Halsbury, L.C., at p. 517 said:

* * * it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy.

While it was in that case admitted that the case with which the House was dealing fell within the literal meaning of the statute this meaning was rejected. In the words of Lord Bramwell at p. 526:

* * * if the result would be futile, or lead to an absurdity, the right way of dealing with those words is to put a limit on them;

In *River Wear Commissioners* v. *Adamson* (2) where the House had to deal with a similar question, Lord Blackburn said at page 763:

In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

And at page 764 he said:

* * * and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear.

In *Astor* v. *Perry* (3) the principle of the above authorities was applied again to the word "any" and additional words were implied by the House to give a limiting meaning to the general language used in the statute.

What is meant by "absurdity" is well explained by Lord Blackburn in *Rhodes* v. *Rhodes* (4) at 205, where he said, quoting Lord Cranworth in *Thelluson* v. *Rendlesham* (5):

(1) (1890) 15 App. Cas. 506.
(2) (1876-7) 2 App. Cas. 743.
(3) [1935] A.C. 398.
(4) (1882) 7 App. Cas. 192.
(5) (1858) 7 H.L. Cas. 428.

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The rule on which the appellant relies is that universally recognized and acted on, namely, that words are to be construed according to their plain ordinary meaning unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is, perhaps, involved in the former, for, supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to shew that the words could not have been used in their ordinary sense.

Lord Blackburn continued:

Lord Wensleydale once more repeated the rule as laid down in *Warburton* v. *Loveland* (1) but it is worth observing that by "an absurdity" can hardly be meant a result which the Court who construe the will thought ought not to have been the intention of the testator. If that had been so, the Thelluson will itself would have been upset. Lord St. Leonards says, p. 509, that much thought and learning had been bestowed for the purpose of endeavouring "to counteract, and properly too, if it could be done, the ambitious views of the testator," but the intention was too clearly expressed. Lord Cranworth, therefore, seems quite correct when he says that the latter branch of the rule is but a means by the context of shewing that the words were not used in their ordinary sense, as it is not to be presumed that the testator meant an absurdity; but that if it is shewn that it was intended to use them so as to work this absurdity, that intention, if it be not illegal, must be carried out.

It is necessary to see therefore whether there is anything to indicate the sense in which the words here in question were used.

The ancestor of section 122, so far as I have been able to trace it back, is section 2 of 40 Victoria, (1877), *cap.* 30: "An Act to make provision against the improper use of Firearms." Sections 2 and 3 of that statute read as follows:

2. Whosoever, when arrested either on a warrant issued against him for an offence or whilst committing an offence, has upon his person a pistol or air gun, shall be liable on conviction thereof to a fine of not less than twenty dollars or more than fifty dollars, or to imprisonment in any gaol or place of confinement for a term *not exceeding* three months.

3. Whosoever has upon his person a pistol or air gun, with intent therewith unlawfully and maliciously to do injury to any other person, shall be liable on conviction thereof, to a fine of not less than fifty or more than two hundred dollars, or to imprisonment in any gaol or place of confinement for a term *not exceeding* six months:

(2) The intent aforesaid may be *prima facie* inferred from the fact of the pistol or air gun being on the person.

It is evident that the question which is involved in the present appeal arose in 1877 on the enactment of the original legislation. If the argument for the Crown is sound, the proper construction of these two sections is that you take the conduct described by section 3 as constituting the

(1) Hud. & Br. (Ir.) 648.

offence therein provided for, and automatically you also take a part of that same conduct and, by adding it to its whole, make out the additional offence under section 2. In my opinion statutory language which produces such a result should be very clear and free from all indication of a contrary intent. I think the language here under consideration does indicate such a contrary intent.

Parliament has, in my opinion, provided in section 3 that the *totality* of the conduct there described shall constitute one offence punishable by a fine of *not more* than two hundred dollars or by imprisonment for a term *not exceeding* six months. How can effect be given to this clear and unambiguous expression of intention in section 3 except by construing section 2, as Roach, J.A., has construed the present section 122, as applying only to offences which do not include as an element thereof any of the conduct described in section 3, or more specifically, the possession upon the person of a pistol or air gun?

Again, to read the two sections together in accordance with the contention of the appellant they would read somewhat as follows:

> Whosoever when arrested whilst having upon his person a pistol or air gun with intent etc., which intent may be inferred from the fact of possession, has upon his person a pistol or air gun shall be liable to conviction * * *

To so read the sections is to reduce them to the merest tautology and to render them absurd. I think therefore that the statute provides the necessary internal evidence that these sections are to be read in accordance with the principle applied by Roach, J. A.

Coming to the *Code* as it now stands, one finds that section 122 is embodied in a group of sections commencing with section 115. When these are examined the same consideration appears as in the case of sections 2 and 3 of the Act of 1877. For instance, section 118, as enacted by 23-24 Geo. V., *cap.* 25, section 1, is as follows:

> 118. Every one is guilty of an indictable offence and liable to imprisonment for a term *not exceeding* five years, who, not having a permit in form 76,—
>
> (*a*) has upon his person, elsewhere than in his own dwelling house, shop, warehouse, counting house, or premises, a pistol, revolver, or other firearm, capable of being concealed upon the person;

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If a person is without the statutory permit he is guilty of the offence described by this section if he has upon his person in the circumstances mentioned, a firearm capable of being concealed. For the *totality* of this conduct the penalty prescribed by Parliament is a term *not exceeding* five years. If the appellant's argument be sound, the existence of one element of this very conduct would subject the defendant to an additional penalty of two years merely by the process of a separate charge being laid against him under the provisions of section 122. It seems to me that Parliament, in the use of the phrase "not exceeding" in section 118, has clearly indicated that that section is exhaustive as far as the conduct to which it relates is concerned, and that therefore section 122 is to be confined in its operation, notwithstanding the use of the words "any offence", to offences of which the possession of a firearm capable of being concealed upon the person is not an element.

The same situation arises under many of the sections in the group and I think they are to be construed in the same manner. Section 129, however, as enacted by 23-24 Geo. V., *cap.* 25, section 1, does not include in the offence thereby created the possession or use of offensive weapons and the above reasoning would therefore not apply to it.

The force of the considerations above set out is enhanced when section 457 is referred to. The section reads as follows:

457. Every one is guilty of an indictable offence and liable to imprisonment for life who

(*a*) breaks and enters a dwelling-house by night with intent to commit any indictable offence therein; or

(*b*) breaks out of any dwelling-house by night, either after committing an indictable offence therein, or after having entered such dwelling-house, either by day or by night, with intent to commit an indictable offence therein.

2. Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped.

In my opinion it would be absurd to say that a person liable to conviction under the provisions of subsection 2 is also liable to be convicted under the provisions of section 122, if the offensive weapon is a firearm. The absurdity

of such a construction is heightened by the fact that the penalty provided by section 457, subsection 1, is imprisonment for life.

Coming to section 446(*c*), Parliament has by this provision, declared that for that offence, involving as one of its main elements, the presence on the offender of an offensive weapon, the penalty may be imprisonment for life and whipping. That is expressly the penalty for the totality of that conduct. I do not think therefore, that there is to be attributed to Parliament the intention that one part of that conduct (where the weapon in question is a firearm) may be made the subject of a separate charge under section 122, a procedure which would be ineffective and absurd where the maximum penalty had been imposed. In any case where the maximum is not imposed, it is to be taken that it is because the trial tribunal did not consider that the conduct involved merited such a penalty. Surely it cannot be said that in such a case Parliament has expressed the intention, nonetheless, that the same tribunal may be called upon to impose an additional penalty for the same conduct under the guise of a separate charge. While it is the fact that in the case of the offences provided for by clauses (*a*) and (*b*) of section 446, the penalty is the same as in the case of an offence under clause (*c*), an offensive weapon is not there in either case involved. The same considerations therefore do not apply as in a case under clause (*c*).

It is quite true that under the provisions of section 122, subsection 1, a conviction for the offence thereby provided does not depend upon a conviction for the other offence to which the subsection refers but it does depend upon such offence being proved to have been in fact committed. I do not think, therefore, that this situation has any bearing upon the construction of the section from the standpoint above set forth.

In my opinion, therefore, Roach, J. A., was right in the conclusion to which he came.

In *Rex* v. *Maskiew* (1), the following, which is the ratio decidendi of the judgment of the Chief Justice, occurs at p. 143:

> Section 122 is for the purpose of governing the carrying of firearms. In its original form, in 1886, the section was comparatively simple and

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the punishment not severe; but conditions and the increase of crime having made it necessary to amend same for the protection of the public, the amendments of 1932 and subsequent years indicate the importance of prohibiting the carrying of concealed weapons and that there should be a certainty of additional punishment imposed upon a convicted criminal found in such possession. If it had been the intention of the Legislature to have made a special exemption of a conviction under s. 446(c), it would have been quite easy to have done so; but the section does not make any exception.

This appears to say that because a general word has been used without any express exception, the literal interpretation must be applied. With respect, the authorities to which I have referred establish that that is not the law.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitor for the Appellant: *C. P. Hope.*

Solicitor for the Respondent: *A. W. Maloney.*

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*Mar. 16, 17, 18, 19, 22, 23
*June 25

DOUGLAS LAMONT ROSS (DEFENDANT) ..APPELLANT;

AND

MARIUS H. NECKER (PLAINTIFF).....RESPONDENT.

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

Bankruptcy—Trustee—Sale of assets by trustee to one inspector—Securities pledged by purchaser—Money advances made by trustee—Bankruptcy Act, R.S.C. 1927, c. 11, s. 43, 103 (6)—Arts. 14, 1484 c.c.

The respondent was the president of "La Société Générale des Ponts et Chaussées Limitée", which went into bankruptcy in 1930. The appellant, as trustee, sold the assets of the bankruptcy situated in Jamaica to respondent who was at the time one of the inspectors. The trustee had a general authorization from the inspectors, approved by the Court, to dispose of the assets in Jamaica as he might deem proper. Respondent pledged as security for the payment of the purchase price and for money advances made by the trustee, securities of which some "Rentes Françaises", valued at $22,076.91. Respondent having met with financial difficulties in Jamaica, the assets were liquidated and the operations came to an end. Respondent, then, instituted legal proceedings in which he asked that the agreement of sale be declared null and void and that appellant be condemned to remit the securities pledged. The Superior Court held the agreement null but refused to grant the other conclusions of the action. Both parties appealed and the Court of Appeal held the agreement to be null and void and also that present respondent was entitled to the securties pledged.

*PRESENT: Rinfret C.J. and Taschereau, Kellock, Estey and Locke JJ.

Held: As the trustee did not have the permission to do the particular thing which has been done and as the respondent-inspector did not have the prior approval of the Court to purchase (s. 43 and 103 (6) of the Bankruptcy Act), the agreement of sale is therefore null and void.

Art. 1484 of the Civil Code does not apply to the present case.

Appellant must remit the value of the securities pledged after deducting the amount of the advances made, but he cannot be held personally liable as he has acted only in his capacity of trustee.

APPEALS and CROSS-APPEALS from two decisions of the Court of King's Bench, Appeal Side, Province of Quebec (1), the first one confirming (Barclay and McDougall JJ.A. dissenting) the part of the judgment of the Superior Court, MacKinnon J., declaring the agreement of sale between the trustee in bankruptcy and one of the inspectors to be null and void, and the other decision reversing (Barclay and McDougall JJ.A. dissenting) the other part of the same judgment of the Superior Court, refusing to grant the other conclusions of the action viz: to remit to plaintiff the securities pledged.

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. and *L. P. Gagnon K.C.* for the appellant.

Bernard Bourdon K.C. for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—The plaintiff-respondent Necker was the president of "La Société Générale des Ponts et Chaussées Limitée", which went into bankruptcy in January, 1930. The appellant Ross was appointed interim receiver, custodian, and finally trustee, and the respondent was appointed one of the inspectors. "La Société" which had its head office in the City of Montreal, performed road building contracts in the Province of Quebec, and had also been engaged in constructing roads and bridges in the Island of Jamaica.

(1) Q.R. [1947] K.B. 401.

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The Banque Canadienne Nationale had made to "La Society" substantial advances which were secured by Necker personally, who pledged some "Rentes Françaises", having a value of $22,076.91, and also by a transfer by the Company of all amounts that the Government of the Province of Quebec owed for work done by "La Société" in connection with the construction of "Le Boulevard Taschereau", between the southern end of the Jacques Cartier Bridge which spans the St. Lawrence River at Montreal, and the Village of Laprairie.

The financial situation of "La Société" in Jamaica was critical. An investigation of the Company's assets and obligations was made by Ross in January, 1930, and it was found that the financial needs of "La Society" in Jamaica were immediate. Ross, therefore, before he became trustee and while still only custodian, sent £1,000 to Jamaica on the 30th of January, 1930, and he authorized the representative of "La Société" in Jamaica, Mr. W. C. MacDonald, to open and operate a new account in which the money was deposited. Ross reported the whole situation to the inspectors, and on the 7th of March, 1930, they instructed him as follows:—

> To proceed to Jamaica as rapidly as possible, to there judge the situation by himself and take on the spot all decisions, steps and actions which in his absolute discretion may appear proper; specifically empowering him to enter into any and all agreements with the Government of Jamaica or any department thereof, or the Admiralty, with any and all Banks, Trust Companies, Corporations, partnerships, firms or persons whatsoever, whether by way of sale, purchase, guarantee, exchange, or otherwise whatsoever and on such terms, stipulations, conditions and for such considerations as he in his absolute discretion may deem advisable, and, but without in any way limiting the generality of the foregoing, specially to dispose of all or any part of the undertaking of the Société in Jamaica to such person or persons as he may deem proper for such consideration and terms as he may judge proper, further authorizing the said trustee to do all and every of these acts, things and deeds either personally or by representatives and attorneys duly appointed by him, and generally and without limitation to do, perform and execute or cause to be done, performed and executed in Jamaica and/or in reference to the Société's Jamaica contracts and undertakings and commitments every act, agreement and transaction that the company itself might do if not in bankruptcy either through its Board of Directors or in annual or special general meeting of shareholders.

This resolution of the inspectors was approved by the Court on the 8th of March, 1930, Mr. Justice Patterson giving the following order:—

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DOTH GRANT said Petition, DOTH CONFIRM RATIFY AND APPROVE the above mentioned resolution of Inspectors, and DOTH AUTHORIZE the Trustee to proceed to Jamaica and to deal with and act in connection with the business, assets and affairs of the Company in the manner authorized by the said resolution, and that all such costs as the Trustee may incur shall form part of the expenses of his administration as such Trustee; the whole with costs to follow.

On the 10th of March of the same year, Ross and Necker left for Jamaica and on arriving there, Necker was obviously anxious that it should not be known that "La Société" was in financial difficulties or that Ross had been appointed trustee in bankruptcy. It was then decided that Ross would sell the Jamaica business to Necker and a contract was negotiated and executed in Jamaica the 26th of March, 1930. This contract stipulates that Ross agrees to sell and Necker agrees to purchase all the assets, claims, contracts, agreements of the Company in Jamaica, including any moneys owing to them or on deposit with any bank, together with the full right and benefit accruing under any contract, agreement or claim and all chattels, effects, chose in action, and things of the Company in Jamaica, for the sum of £6,000 sterling. It was further stipulated that the payment of this sum would not be required before the 31st day of December, 1930, and in the meantime, and until payment, Ross held a lien on all shares held by the purchaser in the Company. Necker agreed in addition, to assume and pay all liabilities of the Company in connection with the business in Jamaica, and was entitled to the absolute and exclusive use in Jamaica of the name "La Société Generale de Ponts et Chaussées Limitée".

In addition to the first advance of £1,000 already mentioned, Ross, in order to allow the Jamaica enterprise to meet its financial obligations, made further substantial advances until November, 1930, and with which I shall deal later more extensively.

When Necker came back from Jamaica in October, 1930, he signed with Ross a new agreement, always under the same authority. It had been agreed on the 26th of March, 1930, that Ross and Necker would execute any further document which might be required for more effectually giving effect thereto and, we read in the preamble of this new agreement of the 7th of October, 1930, the three following paragraphs:—

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Whereas said agreement of 26th March, was entered into on the expectation that the securities pledged by the Purchaser with the Banque Canadienne Nationale as collateral security would be shortly released, which expectation, however, has not materialized owing to the refusal of the Minister of Roads of the Province of Quebec to make the expected payment on account of the claim of La Société against the Government; and,

Whereas, furthermore, since that time the Vendor has made further advances and commitments for the benefit of the enterprise of La Société in Jamaica and for the benefit of the Purchaser; and,

Whereas it therefore becomes necessary both under the authority of the resolution of the Inspectors ratified and approved by the Superior Court on the 8th day of March, 1930, and under the terms of the agreement of the 26th day of March itself, to amplify, correct and more fully set forth the agreement between the Parties:

It was stipulated that the payment of the sum of £6,000 would not be required from Necker until the claim of Ross es qual. against the Quebec Government that was then before the courts, amounting to $720,000 and which had been transferred to the Banque Canadienne Nationale, should be settled either by final judgment or by amicable agreement and paid, and it was understood that this amount of £6,000 would become due and exigible only thirty days after payment of the said claim. It was also agreed that notwithstanding the fact that Necker was allowed control and possession of "La Société's assets in Jamaica, he would become owner and proprietor of these assets, only after paying the purchase price of £6,000 sterling, and after reimbursing all advances made by Ross es qual. whether prior or after the 7th of October, 1930. Necker also assumed and undertook to pay all the liabilities of "La Société" in connection with the Jamaica business, and Necker further transferred as collateral security to Ross es qual. the following assets:—

(a) All the rights, title and interest of the Purchaser in and to certain Railway equipment, situated in the Province of Quebec, or elsewhere, and now in the possession of the Vendor, in his quality of trustee.

(b) All his rights, title and interest in and to that certain Marmon convertible coupe, (serial No. E. 3 T. A. 95, motor No. T.15465) sold to the Purchaser under conditional sales contract and on which the Vendor has made certain advances to allow payments to be made to the Vendor of the said motor car,

(c) All the equipment and machinery brought from the P. Lyall & Sons Construction Company Limited, in liquidation, payment of which has been guaranteed by the Vendor.

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(*d*) All the securities pledged by the Purchaser with the Banque Canadienne Nationale as collateral security; these securities being now pledged to the Vendor as sub-collateral security, it being agreed that if, as and when, the said securities or any portion of them are released by the Banque Canadienne Nationale, the said securities so released shall be transferred to the Vendor and the Purchaser hereby undertakes to instruct the Banque Canadienne Nationale accordingly, provided always that upon payment of the full sum of Six Thousand Pounds Sterling (£6,000) and upon the reimbursement of all advances made by the Vendor either as trustee or personally or both, the Vendor's lien shall become extinguished and all collateral security shall be returned to the Purchaser, but failing payment of the purchase price of Six Thousand Pounds Sterling (£6,000) and the reimbursement of advances made, as herein stipulated, the Vendor will be entitled without further notice to the Purchaser not only to retake possession of the Jamaica enterprise but to realize upon the collateral security and all other security mentioned in this contract to the extent of his claim against the Purchaser, either in his quality of trustee or personally as the case may be or both.

After the signing of this contract, Necker made several other trips to Jamaica, where he met with financial difficulties and others, and the assets were then liquidated and the operations came to an end.

In 1938, Necker instituted legal proceedings against the appellant in which he asked that the two contracts signed by the parties on the 26th of March, 1930, and the 7th of October, 1930, be declared illegal, null and void. He also prayed that defendant Ross be condemned to remit the "Rentes Françaises" which had been pledged to the Banque Canadienne Nationale and subsequently to him, that he be condemned equally to remit 500 tons of industrial rails as well as the Marmon automobile and the Gotfredson truck, and finally that if these securities were not remitted to him within fifteen days, that the defendant be condemned personally as well as in his quality of trustee, to pay the value of these securities forming a total sum of $88,364. The Honourable Mr. Justice MacKinnon who heard the case, decided that the two agreements were null and void, but refused to grant the other conclusions of the action.

Both parties appealed (1) from this judgment, Necker to obtain the conclusions that had been refused by Mr. Justice MacKinnon, and Ross appealed against that part of the judgment of the trial judge which declared null and

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void the two contracts entered into. Necker's appeal was allowed; the court ordered Ross to pay $22,076.91, the product of the sale of the "Rentes Françaises"; $2,500 value of the Gotfredson truck, and the value of the Marmon automobile, $1,500, less $1,354.50 amount disbursed by the defendant, leaving a balance of $165.50. Messrs. Justices Barclay and Errol McDougall were dissenting and thought the appeal should have been dismissed. Ross' appeal was dismissed, Barclay and McDougall, JJ. also dissenting. Ross es qual. now appeals to this Court from both judgments, and Necker entered cross-appeals to obtain a personal condemnation against Ross.

I will deal first with the validity of the two contracts that have been entered into.

It will be remembered that Necker was an inspector of the bankrupt estate, and that, under the contracts of the 26th of March and of the 7th of October, he was also the purchaser of the Jamaica assets. It is alleged that in view of section 103, para. 6, of the *Bankruptcy Act*, he did not have the capacity to purchase. This section reads as follows:

> No inspector shall, directly or indirectly, be capable of purchasing or acquiring for himself or for another any of the property of the estate for which he is an inspector, unless with the prior approval of the court.

It is further argued that the Resolution of the 7th of March, 1930, approved by Mr. Justice Patterson the next day, is not "prior approval of the court" within the meaning of the section. The approval has to be a specific approval.

It is also submitted that the trustee did not have the legal power to dispose of this Jamaica property in favour of Necker, because he had not obtained the required permission of the inspectors of the estate, as required by section 43 of the *Bankruptcy Act* which says:

> 43. The trustee may, *with the permission in writing* of the Inspectors, do all or any of the following things:—
>
> (*a*) sell all or any part of the property of the debtor, including the goodwill of the business, if any, and the book debts due or growing due to the debtor, by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.

Paragraph 2 of the same section reads:

> The permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things, but shall only be a permission to do the particular thing or things or class of thing or things which the written permission specifies.

Ross contends that under section 43(*a*) he did not need the ratification of the Court but only the authorization of the inspectors in order to have the capacity to sell this property to Necker and give him a good and valid title. It is to make absolutely sure that his powers were beyond question that he sought to obtain the approval of the competent Court. It is argued that the inspectors had authorized the trustee "specially to dispose of all or any part of the undertaking of "La Société" in Jamaica to such person or persons as he may deem proper, for such consideration and terms as he may judge proper." The inspectors learned what the trustee had done, asked for a copy of the contract, and it is submitted that tacitly at least, they approved this contract. At no time, was the contract of March the 26th or that of October the 7th, which was incidental to the first, criticized by the inspectors.

It would appear that the contract of the 26th of March was submitted to a meeting of the inspectors, on the 10th of April, 1930, but it was merely decided to forward copies of the agreement to the inspectors and to the members of the consulting committee "for their perusal". As to the agreement of October the 7th, it was first mentioned to the inspectors only at the meeting of July the 2nd, 1931, which is nine months after its signature. Nowhere does it appear that the *written permission* of the inspectors has been given to the trustee to sell this undertaking and, apart from this general authorization, there is no permission to do the *particular thing* which has been done, as required by section 43(2) of the *Bankruptcy Act*. The same remark may be applied as to section 103(6) and we see no *prior approval* of the Court authorizing Necker who was an inspector to purchase the Jamaica assets. The general authorization cannot be construed as being a permission to Necker to buy these assets of the bankrupt company.

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I entirely concur with what Mr. Justice MacKinnon says in his judgment:—

> It seems to the Court almost futile to argue that by the resolution of the Inspectors of the 7th of March, the defendant was authorized to sell all the assets of the Company in Jamaica to one of the Inspectors.

The prohibitions found in sections 43 and 103 of the *Bankruptcy Act* are imperative, and under the authority of our *Civil Code,* section 14, they import nullity, although such nullity be not therein expressed.

In *Montreal Trust Company* v. *Canadian National Railway Company* (1), Lord Russell of Killowen said:—

> Their Lordships, however, agree with the principle there laid down, that *prohibition* of a contract by statute *renders the contract void and of no effect.*

It has been argued that the law, as found in the *Bankruptcy Act,* derives from the *English Bankruptcy Act,* section 316, which is now section 347 and which reads as follows:—

> Neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule may be set aside by the Court on the application of the Board of Trade or any creditor.

This section of course cannot apply to the present case for in that section it is clearly stated that only the Board of Trade or a creditor may attack a sale made in violation of the law. There is no such limitation in the *Bankruptcy Act.*

Section 1484 of the *Civil Code* has also been cited and an argument has been made to show that Necker himself cannot invoke and ask for the nullity of both contracts. This section 1484 is to the effect that certain persons cannot become buyers either by themselves or by parties interposed, and the article further says that the incapacity declared in the article cannot be set up by the buyer, but that it exists only in favour of the owner and others having an interest in the things sold. The appellant cannot invoke this article of the Code to support his contention. The Civil Code specially specifies who may attack the sale,

(1) [1939] A.C. 613 at 627.

and if it were not for the last paragraph of the article, all interested parties would be entitled to have the sale set aside.

Before examining the results that flow from the nullity of this agreement to sell, it must be remembered that "La Société Générale des Ponts et Chaussées Limitée" was indebted to the Banque Canadienne Nationale and this debt, up to $50,000, had been guaranteed by Necker personally. Moreover, Necker's guarantee was secured by a substantial amount of "Rentes Françaises", which were his personal property. To further secure the debt, "La Société Générale des Ponts et Chaussées Limitée", who was constructing for the Provincial Government of the Province of Quebec, the highway known as the "Boulevard Taschereau", transferred a claim which it had against the Quebec Government, and on the 27th of August, 1929, this transfer was accepted by the Honourable J. E. Perrault, then Minister of Highways.

The Provincial Government and "La Société Générale des Ponts et Chaussées Limitée" did not agree as to the final amount which was to be paid to the contractor, and after the matter had been fought before the courts, a final amount was determined and paid to the Banque Canadienne Nationale by the Quebec Government. After certain deductions had been made, a cheque for $57,277.97 was sent to the bank. On the 16th of March, 1936, the bank opened an account in the name of D. L. Ross es qual. and credited the account for that amount. At that moment "La Société Générale des Ponts et Chaussées Limitée" owed the Banque Canadienne Nationale $43,804.44, and the amount of the cheque received from the Provincial Government during the first days of March, 1936, was therefore sufficient to pay all the indebtedness of "La Société Générale des Ponts et Chaussées Limitée", to the Banque Canadienne Nationale.

The Banque Canadienne Nationale had opened an account in the name of "gérant in trust re H. Necker, Société Générale des Ponts et Chaussées Limitée", and being the holder of the "Rentes Françaises", credited the account with the interest in 1932, and on the 1st of December, 1932, sold 6,750 francs (rentes) which realized $5,267.43 making a total with interest of $6,102.88. In

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1933, $312.60 interest were added, and on the 30th of October, 1933, 12,000 francs (rentes) brought in an additional $15,676.86 so that on that date, after having deducted certain debits, this account had a credit of $22,076.91. *On the 30th of April,* 1936, after the amount of $57,277.97 had been received from the Provincial Government, the bank applied this amount of $22,076.91 to the debt owed by "La Société Générale des Ponts et Chaussées Limitée", which was then $43,804.44 leaving a balance due of $21,727.53. The interest amounting then to $13,995.06 was compromised at 50 per cent, leaving a balance to be paid of $28,725.06. This amount of $28,-725.06 was paid out of the proceeds of the Government cheque, and an amount of $28,552.91 was *paid to* Ross es qual.

It has been submitted and, I think established, that Ross es qual. has made substantial advances to Necker personally in an amount of $18,783.08. It was to allow Necker to continue the work in Jamaica and to obtain new contracts that these advances were made, and on many occasions he has acknowledged his personal liability, and his conduct and his dealings in Jamaica all tend to show that these advances were not made to the former bankrupt company but to him personally. After the first trip he made with Ross in Jamaica in March, 1930, the business became Necker's business, and it is because he has assumed personal liability for these advances, that he transferred to the appellant es qual. all, the assets which he is now claiming. The amount of these advances which has been established to my satisfaction at $18,783.08 has not been seriously challenged, and it was due by Necker to Ross es qual.

If there were no other features in this case, it would follow that Necker, if the contract is void *in toto,* would be entitled to claim $22,076.91, value of the "Rentes Françaises". He merely guaranteed the debt due to the bank by "La Société", and the "Rentes Françaises" were transferred only as collateral security. The money payable by the Provincial Government to the bank was an asset of the principal debtor, and when the bank was paid, the securities were freed. The payment by the Provincial Government discharged Necker as surety, and therefore,

the sum of $22,076.91 held in trust by the bank, in lieu of the "Rentes Françaises", is Necker's property. The bank, in view of the authorization given by Necker, had the right to sell some of the "Rentes Françaises", and receive payment of those which had matured, but it never applied this money to the debt due by "La Société". It was kept "in trust" in a special account, obviously because the bank expected that a sufficient amount would be paid by the Provincial Government to cover the total liability of the principal debtor. Ross es qual. having received this amount which was Necker's property, is paid and his claim against Necker is extinguished. Necker would also be entitled to claim $2,500 value of the Gotfredson truck, and the value of the Marmon automobile $1,500 less $1,334.50 paid by Ross es qual., being the balance of the purchase price, leaving an amount of $165.50, and making a grand total of $24,742.41. On these two last items, I fully agree with the Court of Appeal (1) that these two items are due to Necker, but any amount which have been credited to Necker in respect of these two automobiles, should be added to the amount of the advances, viz: $18,783.08, if they are not already included.

It is true that Ross es qual. never had the possession of the "Rentes Françaises", and Necker therefore cannot claim these "Rentes". As the learned trial judge said, the plaintiff cannot ask that defendant be condemned to return securities which never came into his hands. But I do not think that this reason is sufficient to dismiss this part of the action. Ross es qual. never had possession nor the control of the "Rentes Françaises", but he received the value of these "Rentes", and this is precisely what is claimed alternatively in the action.

It is arguable that the contracts are not null *in toto,* and that the guarantees held by Ross es qual. have been legally transferred, but I do not think it necessary to determine this point. Whether the contract is null *in toto* or only partially void, does not affect the result of the case. If the transfer is valid, the money received by Ross es qual. was paid to reimburse the advances made by him to Necker, and if it is invalid the same result follows.

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But Ross es qual. has been overpaid. He received $24,742.41 while he should have received only $18,783.08, amount of the advances made, leaving a balance of $5,959.33 which he owes es qual. to Necker with interest at the rate of 5 per cent since the service of the action. I do not think any valid reasons have been given to hold Ross personally liable as he has acted only in his capacity of trustee.

The appellant has lodged two appeals. The first one from the judgment of the Court of King's Bench No. 2107 (1), confirming the judgment of the trial judge, and the second one from the same court, No. 2111 (1), allowing the appeal of the present appellant. It follows that the first appeal from the judgment declaring null and void the alleged sale of the Jamaica assets should be dismissed with costs and that the second, in respect of the "Rentes Françaises" and the two automobiles, should be allowed in part with costs. The costs of printing the case and the factums for the purpose of these two appeals here, should be apportioned one-third in the first appeal, and two-thirds in the second. The judgment of the trial judge should therefore be modified by adding that the plaintiff will have judgment for the sum of $5,959.33 plus interest at the rate of 5 per cent since the service of the action. From this sum of $5,959.33, however, should be deducted any credit given to Necker for the two automobiles, if not already included in the sum of $18,783.08, and if the parties cannot agree as to the exact amount, the matter may be spoken to before the Court upon the application of either party. The plaintiff will be entitled to his costs in the Superior Court and to the costs of both appeals in the Court of King's Bench. The cross-appeals are dismissed with costs.

Solicitors for the appellant: *Hackett, Mulvena and Hackett.*

Solicitors for the respondent: *Beaulieu, Gouin, Bourdon and Beaulieu.*

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KENNETH H. SHOOK, EXECUTOR OF THE WILL OF SARAH CATHERINE SHOOK, DECEASED.....(PLAINTIFF) — APPELLANT;

AND

GORDON H. MUNRO and LAURA JANE DAVIDSON, EXECUTORS OF THE ESTATE OF CHARLOTTE DICKSON, DECEASED .....(DEFENDANTS) — RESPONDENTS.

*1947 Nov. 26
*1948 April 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Limitation of Actions—Mortgage—Whether in the absence of a written agreement, a voluntary forbearance by a mortgagee to enforce payment of principal and interest and mortgagor's acceptance of extension of time, prevents the running of the Statute of Limitations, R.S.O., 1937, c. 118, s. 23—Statute of Frauds, R.S.O., 1937, c. 146, s. 4.

Held: Voluntary forbearance by a mortgagee to enforce payment of a mortgage will not, in the absence of anything done or promised by the mortgagor to bind the mortgagee to forbear, prevent the running of the *Statute of Limitations*, R.S.O., 1937, c. 118, s. 23.

Per Kellock J.:—Assuming that the parties to the mortgage verbally agree to extend the time of payment until the mortgagor should be able to pay, the agreement cannot, by reason of the *Statute of Frauds*, be permitted to be proved for the purpose of varying the terms of the mortgage.

APPEAL from a decision of the Court of Appeal for Ontario, reversing, Hogg J.A. dissenting (1) the judgment of Kelly J. at the trial in favour of the Plaintiff.

The judgment of the Chief Justice, Taschereau, Rand and Estey, JJ. was delivered by:

RAND J.:—The facts in this appeal show that in 1923 the deceased, Sarah Catherine Shook, then a widow, of whose will the appellant, her son, is the executor and trustee, mortgaged her home property to three persons to secure the sum of $2,000 as to one and $1,000 as to each of the others with interest payable half-yearly. The principal sums were to be repaid in 1928. The mortgagor died in October, 1943. Nothing was ever paid on account of either principal or interest of the debt. The deceased

(1) [1947] O.R. 73; [1947] 3 O.L.R. 271.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

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lived on the property until her death. In 1942 it had been purchased at a tax sale by the solicitor for the respondents, but in the following year the son redeemed it. During that time, rents of tenants were paid to the respondents and insurance for a small fire likewise. From March until July, 1944 the respondents collected rents from a tenant of part of the house and in July of that year the property was again sold for taxes. Following the death of his mother, the son who had then been staying with her for some months continued to live on the premises.

In May, 1944, after considerable negotiation with the solicitor of the respondents over the mortgage, indebtedness on which was not disputed, the appellant consented to an order purporting to be made under *The Landlord and Tenant Act* which was to issue if possession had not been surrendered by June 15th following. On that day, he notified the solicitor that he would not vacate and the order issued. In his absence, the sheriff, under a writ of possession, removed the furniture and effects from the house and on behalf of the respondents took possession. This action was then brought.

At the trial Kelly J. found that there had been some understanding between the parties that the deceased would not be pressed for the money during her lifetime, or would be left until she was able to pay it without embarrassment; but when it arose or what precisely were its terms did not appear. The son claimed the mortgagees had given their "word of honour" that his mother would not be disturbed during her lifetime. As his father, who had died in 1919, had been the general manager for many years of a lumber business carried on by the father of the mortgagees, that statement of the understanding is probably as accurate as can be given.

The trial judge held the respondents to have lost their rights in the land by force of the *Limitations Act* and that the procedure under *The Landlord and Tenant Act* was a nullity. He, therefore, maintained the claim, ordered possession to be delivered to the appellant and an account taken of rent and profits received, and awarded damages. The Court of Appeal reversed that holding. In the view of Henderson J.A., "agreements extending the time for

payment of indebtedness, whether payable under mortgage or otherwise, are of every-day occurrence and the effect of such agreement is to prevent the *Statute of Limitations* from running against the creditor or in favour of the debtor. This constitutes the consideration on both sides, for the agreement. Here, the agreement was fully performed by the creditor, and the benefit of it was received and accepted by the debtor, who, in my opinion, cannot now be heard to repudiate it * * * In my opinion, further, the *Statute of Limitations* did not commence to run upon the mortgage until the date of Mrs. Shook's death and the result is that the defendants have a good, valid and subsisting mortgage, and are entitled to enforce the same." Hope J.A. took the same view and was concerned only to find a consideration for the promise to forbear which he did in a variation of the terms of the mortgage as to the time for repayment binding on both the mortgagor and the mortgagees. Hogg J.A. dissented. He could discover no consideration, and agreed with the trial judge that the mortgagees had lost their interest in the land by the operation of the statute. He likewise agreed that the order under *The Landlord and Tenant Act* was made without jurisdiction.

No doubt a mortgagor and a mortgagee can bind themselves to new times for the payment of the moneys, to be substituted for those provided in the mortgage. The effect would be to postpone the mortgagee's right to payment, extend the mortgagor's obligation to pay interest, and affect the times of both redemption and foreclosure. But the question here is not whether forbearance or a promise of it is good consideration: it is rather whether anything had been done or promised by the mortgagor to bind the mortgagees to forbear. If, for instance, the latter had in 1930 brought foreclosure proceedings, could they have been restrained on the ground that the mortgagor was not in default? Hope J.A. says yes, but I am forced to the conclusion that nothing had taken place that could have supported that plea: the forbearance was at most a voluntary abstention from exercising rights by the mortgagees which of itself could not affect the running of the statute.

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Rand J.

Voluntary forbearance may too in appropriate circumstances be sufficient when performed to bind the person requesting it to a new obligation arising at that time: i.e. if you forbear for a year, I will then pay you: but at any time during the year action could be taken on the existing default. In such case, it is not whether, by reason of the performance of the requested forbearance, the estate has become liable then as on a new promise to pay, but whether, by operation of the statute the right of entry and the title to the property in the mortgagees have not in the meantime been extinguished, whether the mortgagees have not in fact forborne themselves into the statute. It may be that the personal obligation would in effect be preserved, but that is not the point here.

On that view of the evidence, the question of the application of the *Statute of Frauds* does not arise.

There remains the fact that two of the mortgagees, Martha Dickson, who died on June 2, 1931 and Charlotte Dickson, who died on June 11, 1934 mentioned indebtedness to them of the mortgagor in their wills. The former reference was:

> And I direct and instruct my executors to use the same consideration in respect of any indebtedness due me by Sarah Catherine Shook as I have done in the past.

and the latter:

> And I direct and instruct my said executors and trustees to use the same consideration in dealing with Mrs. S. C. Shook as my sister and myself have done in the past and to postpone any action in respect of any indebtedness due by the said Mrs. S. C. Shook to myself until after her death.

The third, Mary A. Hazlitt, who died on April 10, 1926, and whose will contained no such reference, appointed her sisters, Charlotte Dickson and Martha Dickson executrices of her will; Martha Dickson had nominated her sister, Charlotte Dickson and the respondent Laura Jane Davidson to be executrices and trustees; and Charlotte Dickson, the respondents.

It is contended that by these provisions an effective restraint was placed upon any action against the mortgagor and that it constituted an extension of the time at the end of which the right of entry now asserted arose. But the act was voluntary and unilateral on the part of the mortgagees. If there was a binding injunction on the executors

it was self-imposed, and I cannot consider it any more significant to the questions raised than the self-imposed restraint by the mortgagees during their lifetime. But the intention to preserve the mortgages is clear and just as the latter, if it had been brought to their notice that some act or writing was essential to do that, could have either insisted upon that act or writing from the mortgagor or taken such steps as would otherwise have maintained them, so under the testamentary directions, the representatives of the mortgagees could I think act in a similar manner. Even assuming a property interest to pass to the mortgagor, such liberty of action is necessarily entailed. The default remained: it was a decision not to act for a certain time on the default. No obligation binding the mortgagor could on what is before us be inferred as on an implied acceptance by her of its benefit, nor could the mortgagees by such provisions affect the interest of the mortgagor detrimentally. Taking it, then, that at least as to two portions of the debt the testamentary provisions can be deemed to be referable to the mortgage and to involve some degree of restriction of proceedings, I am unable to attribute to them the effect for which Mr. Walsh argued.

I would allow the appeal with costs here and below and restore the judgment at trial.

KELLOCK J.:—Assuming that the parties to the mortgage verbally agreed to extend the time of payment until the mortgagor should be able to pay, that agreement cannot, by reason of the *Statute of Frauds,* be permitted to be proved for the purpose of varying the terms of the mortgage; *Goss* v. *Nugent* (1); *Marshall* v. *Lynn* (2) at 117. That being so, there is nothing to interfere with the operation of section 23 of the *Limitations Act,* R.S.O., 1937, *cap.* 118, as none of the requirements of that section for interrupting the running of the statute exist.

The only other question is with respect to the order made under the Overholding Tenants' provisions of the *Landlord and Tenant Act* on the 16th of June, 1944. The County Court judge had, it is clear, no jurisdiction to make such an order; *Re Premier Trust Co.* and *Haxwell* (3);

(1) (1833) 5 B. & Ad. 58.
(2) (1840) 6 M. & W. 109.
(3) [1937] O.R. 497.

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Jones v. *Owen*, (1). The order is therefore a nullity; *MacFarlane* v. *Leclair* (2) at 185; *McLeod* v. *Noble* (3); *Dunn* v. *Board of Education* (4) at 459; *Perkin* v. *Proctor et al* (5) at 383. Nor is it possible to treat it as binding because made on consent. The parties did not intend to have their rights determined outside of the ordinary jurisdiction of the court; *Pickard* v. *Allen and Dewar* (6).

I would therefore allow the appeal with costs here and below.

Appeal allowed and judgment at trial restored with costs.

Solicitor for the appellant: *W. J. Arthur Fair.*

Solicitor for the respondent: *J. C. N. Currelly.*

LEONARD A. KIRBY (DEFENDANT).....APPELLANT;

AND

1948
*Jun. 11
*Oct. 5

PAUL KALYNIAK (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Motor vehicle—Negligence—Pedestrian struck by car making right-hand turn—Duty of driver—Statutory onus—The Highway Traffic Act, R.S.M. 1940, c. 93, s. 56 (1), 81 (1)—The Tortfeasors and Contributory Negligence Act, R.S.M. 1940, c. 215, s. 4 (3) 8.

Action for damages sustained by respondent when, at an intersection, he was struck by the projection of a grain box attached behind the cab of appellant's truck while it was making a right-hand turn onto the street respondent was crossing. The trial judge dismissed the action and the Court of Appeal held that respondent was entitled to recover the full amount of the damages assessed by the trial judge.

Held: The appellant's negligence in not complying with the provisions of section 56 (1) of the Highway Traffic Act and in not keeping a proper lookout, makes him liable for two-thirds of the damages; the respondent was also at fault for not keeping a proper lookout before entering the intersection.

Kellock and Locke JJ. would have allowed respondent one-half of his damages.

The Eurymedon 1938 Prob. 41 and Sershall *v.* Toronto Transportation Commission [1939] S.C.R. 287 referred to.

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*PRESENT: Kerwin, Taschereau, Kellock, Estey and Locke JJ.

(1) (1848) D. & L. 669.
(2) (1862) 15 Moo. P.C. 181.
(3) (1897) 28 O.R. 528.
(4) (1904) 7 O.L.R. 451.
(5) (1768) 2 Wils. 382.
(6) (1932) 41 O.W.N. 399.

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APPEAL from the decision of the Court of Appeal for Manitoba (1), reversing (McPherson C.J.M. dissenting in part) the judgment of the trial judge, Williams C.J. K.B., and awarding plaintiff the full amount of the damages assessed.

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

E. D. Honeyman K.C. for the appellant.

S. Greenberg for the respondent.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.: The respondent suffered personal injuries when struck by appellant's truck. His action for damages was dismissed at trial but allowed by the Court of Appeal in Manitoba (1) (McPherson, C.J.M., dissenting in part); therefore this further appeal.

About seven-thirty in the evening of August 13, 1946, the appellant drove his two and one-half ton truck in a northerly direction on Watt Street and turned eastward into Montrose Avenue in East Kildonan, Manitoba. Watt Street is sixty-six feet and Montrose Avenue thirty-three feet in width between the building lines. This truck was about twenty-two feet four inches in length and carried a grain box thirteen feet four inches long and eight feet five inches wide. From the front of this grain box to the front bumper was nine feet. The street was muddy and rough and appellant was proceeding at a low rate of speed. It was still daylight and visibility good. As he drove north he saw a boy at or near the intersection in question in the path of his truck. He sounded his horn and the boy moved westward. Because of the boy, however, he did slow down and continued to round the corner into Montrose Avenue at a speed of about five or six miles per hour.

The appellant had passed the respondent and one Tchir walking together in a northerly direction, as well as another man walking just behind them on the sidewalk along the east side of Watt Street somewhere between the lane (south of Montrose Avenue) and Montrose Avenue. He was

(1) [1947] 2 W.W.R. 993;
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proceeding slowly and thought respondent "just about kept up with me." Nevertheless, as he was about to turn into Montrose Avenue he looked and did not see the respondent nor any other person. He proceeded and as he "was just getting around the corner," or "just getting directly east on Montrose" he heard someone yelling, as a result of which he stopped in less than half the length of his truck and found that he had struck and passed over the respondent's leg. He then recognized him as one of the parties he had just passed on Watt Street.

The learned trial Judge found that when about fifteen feet from the intersection appellant sounded his horn "for the boy," who was on the highway in front of his truck at or near the intersection; he drove his truck around the corner in second gear at not more than five or six miles per hour and entered into the intersection before the respondent began to cross the highway (that portion of Montrose Avenue used by vehicles); that the front part of the truck, nine feet long, had passed over the sidewalk before the plaintiff was hit; that the respondent made one step from the east side of the sidewalk into the highway of Montrose Avenue and when he was taking the second step he was hit by the right front corner of the grain box; and that the appellant stopped his truck in a distance of less than half its length as soon as he heard "some yelling". These findings of fact are supported by the evidence and involve at least in part questions of credibility. Counsel for the appellant stressed that not only these findings but all findings of fact made by the learned trial Judge should not be disturbed by an appellate tribunal. The authorities support his contention where the findings are based upon questions of credibility. *Merchants Bank of Canada* v. *Wilson* (1); *Powell* v. *Streatham Manor Nursing Home* (2). But as stated by Lord Halsbury in *Montgomerie & Co.* v. *Wallace-James* (3):

> . . . where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.

(Adopted by the Privy Council in *Dominion Trust Company* v. *New York Life Ins. Co.* (4)).

(1) [1925] 4 D.L.R. 200.
(2) [1935] A.C. 243.
(3) [1904] A.C. 73 at 75.
(4) [1919] A.C. 254 at 257.

There are at least two findings of the learned trial Judge in this case that are founded upon such evidence. First, "that the defendant kept a proper lookout," and second, "in the circumstances of this case there was no need to blow the horn as he entered the intersection". The first of these findings is based largely upon the evidence of appellant and his father-in-law Koblinsky, who was a passenger sitting beside him in the truck. There were in fact three men approaching this intersection from the south walking on the sidewalk on the east side of Watt Street—the respondent and Tchir together, and Stanford a few feet behind them—all of whom the appellant had noticed as he passed them. The appellant deposed:

Q. When you looked south did you see the men?
A. There was nobody in sight when I made my turn.

. . . . . .

Q. You say when you were making the turn you looked south?
A. Yes.
Q. And there was nobody there?
A. There was nobody at that corner.
Q. Did you look east?
A. Well, that would be south-east. When you are making that turn it would be south-east you are looking.
Q. You know now there were three men there. Can you give any explanation why you would not see them?
A. Because they were not there to be seen.

And again:

When I turned the corner it was all clear, not a soul in sight, and that is when this fellow walked into the truck.

. . . . . .

There was nobody there when I was making the turn.

The appellant was also asked when he found his truck had passed over respondent's leg:

Q. Had you seen this fellow previously?
A. I seen him on the street. He was about half way from the back lane on Montrose, just in between there when I passed him. I was going slow and I think he just about kept up with me. When I came to the corner there was no one in sight.

This evidence goes no further than to establish that the appellant looked and saw no person but does not in any way establish that he looked with that care that a reasonable man would have exercised under the same circumstances. This is the more apparent when considered with the evidence of Warda, who was at the intersection on the north side of Montrose Avenue, and whose evidence

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the learned trial Judge accepted. He saw the three men walking before he saw the truck and the last time he saw them they had passed a church near the south-east corner, (which church the photograph filed as an exhibit showed to be some feet south of the southerly sidewalk on Montrose Avenue), and at the same time the truck was swinging around the corner. This would indicate that even if it was as the learned trial Judge found, that the appellant's truck entered the intersection first, the respondent entered it immediately thereafter. Under these circumstances, the respondent and his companion Tchir would be well within the area over which a reasonably prudent driver would have made his observations. They would have been seen and their proximity to the highway and conduct would be factors which, for the reasonable man, would have largely determined whether he should proceed, and if so, what, if any, precautions he should take in order that he might proceed with safety.

This view is in accord with and strengthened by the finding of the learned trial Judge that the respondent was struck as he was taking the second step in the highway on Montrose Avenue and when about nine feet of the truck had passed over the pedestrian walk crossing that avenue. The turning of the truck into Montrose Avenue and the respondent stepping onto the highway would take, under the circumstances, not more than two or three seconds, which indicates the proximity of the respondent to the highway when appellant was making his observations. The conclusion appears unavoidable that the appellant was negligent in making his observations and therefore did not before turning from a direct line use reasonable care to ascertain that such movement might be made in safety as required by the provisions of section 56(1) of *The Highway Traffic Act*, (1940 R.S.M., c. 93).

56. (1) The driver of a vehicle upon a highway before starting, stopping or turning from a direct line shall use reasonable care to ascertain that such movement can be made in safety and shall reasonably indicate his intention by an audible or visible signal.

Moreover, in turning eastward into Montrose Avenue the appellant made a "turning from a direct line" within the meaning of section 56(1) and did not "reasonably indicate his intention by an audible or visible signal" as

required by section 56(1). It is true he sounded his horn "for the boy" who was on the highway in front of his truck. That sounding of his horn would not indicate even to one observing the truck that the driver intended to make a turn at that intersection. He does not suggest any other conduct on his part that would constitute an audible or visible signal.

The learned trial Judge found "in the circumstances of this case there was no need to blow the horn". That finding is closely associated with and arises largely out of the same evidence as that the appellant "kept a proper lookout". If the defendant had seen, as a person exercising reasonable care in the circumstances would have seen, the respondent and Tchir walking practically at the intersection in a manner that would indicate they had no knowledge of the appellant's presence, and being in the area where if both the appellant and respondent continued a collision might happen, as in fact it did, he should have sounded his horn or taken other appropriate precautions.

The learned trial Judge found that the respondent was walking on the east side of Tchir (who stated that had he not jumped back he would have been struck first), and that the respondent made one step from the east side of the sidewalk into the highway on Montrose Avenue, and that as he was taking the second step he was hit with the right front corner of the grain box, and that the respondent "did not look before he stepped into the roadway and that he walked into the truck." This necessarily involves a finding, which is fully supported by the evidence, that the respondent did not himself keep a proper lookout and that his negligence in this regard also contributed to his own injuries.

This is a case in which both parties were negligent in that neither maintained a proper lookout. That the negligence of each persisted to the moment of impact and constituted a contributing cause thereto. Section 81(1) of the said *Highway Traffic Act* places the onus of proof in a case of this type upon the appellant to prove that "the loss or damage did not arise entirely or solely through" his negligence or improper conduct. In this regard the language of Chief Justice Duff in *McMillan* v. *Murray* (1),

(1) [1935] S.C.R. 572.

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though the language of the statute under consideration was somewhat different, is appropriate where he stated at p. 575:

> We think that, under the statute, standing by itself, the defendant may acquit himself of the onus cast upon him by establishing . . . that the mischief was directly caused by the negligence of the plaintiff as well as that of himself co-operating together.

I am therefore in agreement with the learned Chief Justice in the Appellate Court (1) that both parties were negligent and I agree with his apportionment of the fault, two-thirds against the appellant and one-third against the respondent. The learned trial Judge fixed the respondent's damages: special $707.90 and general $1,600. No question was raised in this Court as to the respective amounts and the respondent will therefore receive special damages $471.95 and general damages $1,066.65.

In my opinion the respondent should have the costs of the trial and the appeal to the Court of Appeal, and the appellant one-third of his costs in this Court.

TASCHEREAU J.:—I have come to the conclusion that this appeal should be allowed in part.

For the reasons given by Chief Justice McPherson (1), I think that both parties were negligent and that the liability should be apportioned one-third against the plaintiff-respondent and two-thirds against the defendant-appellant.

The respondent should have the costs of the trial and the appeal to the Court of Appeal, and the appellant one-third of his costs in this Court.

KELLOCK J. (dissenting in part):—Accepting as I do the findings of fact of the learned trial judge as to negligence on the part of the respondent, the appeal must succeed to that extent. With respect to the appellant, however, I draw a different inference on the facts as found than did the learned trial judge.

The appellant said in evidence:

> Q. You were going north on Watt Street in second gear and what happened? A. Well, I was going no more than six miles an hour and just before I got to Montrose, starting to make my turn, there was a young kid just ahead, right near the truck, and when he seen me he

(1) [1947] 2 W.W.R. 993;
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didn't know just where to go, whether to cross or to go back, and I had to slow up for him, so I just about stopped and he went across. I tooted my horn about eighteen feet before that corner and I tooted my horn for this young fellow.

Q. What do you mean by tooting your horn? A. Well, it is the average horn. I just had it installed two weeks before the accident. I just had a new horn put in.

Q. And what happened that? A. Well, the young kid started to go across the street and I proceeded on and if anybody was there they should have heard my horn. When I turned the corner it was all clear, not a soul in sight, and that is when this fellow walked into the truck.

Q. Had you seen this fellow previously? A. I seen him on the street. He was about half way from the back lane on Montrose, just in between there when I passed him. I was going slow and I think he just about kept up with me. When I came to the corner there was no one in sight.

Q. And what happened? A. This man must have walked into my truck. I heard some yelling and I stopped right away.

. . . . .

Q. What do you say about the turn into Montrose? How did you make the turn? A. I made just the average turn. I didn't have much clearance, on account of a car on the corner and there was also a pile of gravel. I couldn't take a long turn, I had to make it fairly close.

Q. And you say you stopped at one time? A. I didn't stop. I came to about a stop.

Q. Did you look to see where these three men were before turning into Montrose? A. I didn't make my turn right then. I had to proceed at least ten feet more.

Q. All right. When you were about to make the turn did you look to see where these three men were? A. Yes. I always do.

Q. Just at the time you were about to make the turn you did look? A. Yes.

Q. Which way did you look? A. I looked south. That would be south.

Q. When you looked south did you see the men? A. There was nobody in sight when I made my turn.

The learned trial judge in the course of his reasons for judgment in speaking of the appellant said:

He said he looked into Montrose before he made the turn and also looked south when about to make the turn; that there was nobody at the corner when he was turning. I believe him. Tchir's evidence—which I have set out—shows conclusively that the Defendant (appellant) had driven the front of the truck across the intersection before the two men arrived at the roadway. This confirms the Defendant's statement that there was no one to be seen at the intersection when the truck entered it. I find that the Defendant kept a proper look-out. I find also that in the circumstances of this case there was no need to blow the horn as he entered the intersection.

The learned judge also found that the respondent made one step into the roadway of Montrose Street and that as he was taking a second he was hit by the right front corner of the grain box of the truck. In speaking

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of taking a step into the "roadway", I understand that the learned judge is speaking of that part of Montrose Street lying immediately to the north of the northerly edge of the sidewalk on the south side of that street.

Accordingly, from the point where the respondent and his companion reached the southerly edge of the south sidewalk on Montrose Street to the point of impact there was a distance of roughly ten or twelve feet only. During the time taken by the respondent to traverse this distance the appellant's truck was also moving at the rate of five or six miles an hour and the front of the truck had reached a point some nine feet beyond the actual point of impact. For the front of the truck to travel from the point, some ten feet from the corner where it had come to "about a stop", to the point it had reached when the accident occurred would have taken approximately three seconds at the speed it was travelling. In my opinion the respondent and his companions must have been clearly visible to the truck driver had he looked as he said he looked. If he did look he must have proceeded on the assumption that while the respondent showed no indication of having heard the horn or realized the intention of the truck to proceed into Montrose Street he would do so before reaching the truck. In my opinion this was negligence and the appellant has failed to meet the obligation resting upon the driver by section 56, subsection 1 of the *Highway Traffic Act,* R.S.M., 1940, cap. 93. In my opinion the parties were equally negligent.

I would therefore allow the appeal and direct the entry of judgment in favour of the respondent for one-half of the damages as ascertained by the learned trial judge, namely, $1,152.95. The respondent should have his costs in the Court of King's Bench and one-half the costs in the Court of Appeal. The respondent should have one-half the costs of the appeal to this court.

LOCKE J. (dissenting in part):—The appellant's account of the accident is that when he was approaching the intersection, driving the truck in second gear at a rate not exceeding five or six miles an hour, he sounded the horn to warn a child who was in the intersection, this being done at a time when the front of the truck was about

fifteen feet to the south of the southerly limit of the intersection, and that thereafter he turned into Montrose Avenue after looking to his right and seeing no one at the corner or crossing. The appellant had seen the respondent and his two companions walking north on the sidewalk on the east side of Watt Street and had passed them when they were a little to the north of the lane in the block between Montrose Avenue and Harbison Avenue to the south. The evidence does not show the distance between this lane and the crossing where the accident occurred but the appellant said that when he passed them he was travelling about five miles an hour and that the respondent just about kept up with him and, in view of the fact that he says he checked his speed by reason of the presence of the child in the intersection, he was undoubtedly aware that the respondent and his companions would be at least quite close to the point of intersection of the concrete sidewalks on Montrose Avenue and Watt Street at the time he turned his truck to the east. In explaining his failure to see the respondent, the appellant said: "When I turned the corner it was all clear, not a soul in sight, and that is when this fellow walked into the truck", and again: "When I came to the corner there was no one in sight" and on cross-examination: "They were not in sight of my vision when I made my turn", and again, when asked if he could explain how it was that he had not seen them, said: "I cannot give you any explanation because there was no one there in my sight when I made my turn". The learned trial Judge found as a fact that the appellant did look to his right as he was turning into Montrose Avenue and while the description of the cab of the truck is unfortunately inadequate and there is no evidence as to the size of the windows, either at the back or on the right side of it, I think the conclusion is irresistible that the appellant's field of vision was so restricted by it that he could not see the respondent and the others who were approaching from his right on the sidewalk as he turned. Watt Street is sixty-six feet in width and a single street car line runs down the center of it. The portion of the roadway reserved for traffic between the most easterly car track and the concrete sidewalk was sixteen feet five inches in width. Montrose Avenue, where it intersects with Watt Street, is thirty-

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three feet in width and the travelled portion of the roadway reserved for vehicles is something less than twenty-seven feet in width, there being small ditches on each side of it. No plan of the intersection is in evidence but a photograph which was filed shows that a telephone pole stands on the south east portion of the intersection, apparently in line with the westerly limit of the sidewalk on the east side of Watt Street and some two or three feet to the north of the north west corner of the intersection of the two sidewalks. The appellant admittedly made the turning in such a manner that the right side of the grain box on the truck passed within a foot and a half of this telephone pole. In explaining this he said that he did not have much clearance since there was a car on the corner and a pile of gravel, though where these were placed is not stated. The photograph which, with the information as to the width of these streets, is the only material available in considering the matter does not indicate any reason why the truck should have been driven so close to the telephone pole and thus so close to the intersection of the sidewalks which the respondent and his companions had either reached or were about to reach as the truck was turned into Montrose Avenue: while the truck was some twenty-two feet four inches in length and the grain box eight feet five inches wide, there was ample room to permit it being driven across the center of the crossing into Montrose Avenue. While the horn had been sounded before the vehicle reached the intersection, this in itself would not indicate to the respondent an intention to turn. The fact that the appellant did not know just how far distant were the pedestrians from the point where he proposed to enter Montrose Avenue cast a duty upon him under these circumstances, in my opinion, to warn them that he was turning to the right and he failed in that duty. The learned trial Judge found that the respondent was struck by the right front end of the grain box as he was taking his second step to the north of the sidewalk intersection: he would then be just slightly to the north of the telephone pole. Had the horn been sounded as the truck turned, the accident would not, in my opinion, have occurred. With great respect for the contrary opinion of the learned trial Judge, I think this appellant was guilty of negligence which materially contributed to the occurrence of the accident.

It was found as a fact at the trial that the appellant had entered into the intersection with his truck before the respondent began to cross the highway used for the passage of vehicles, that the latter did not look before he stepped into the roadway and that he walked into the truck. Since it was also found that the truck was not proceeding at more than five miles an hour as it turned into Montrose Avenue and that the plaintiff was struck by the right front portion of the grain box which was some nine feet back from the bumper of the car, it is apparent that the truck was in the process of turning and that the front wheels were either at or very close to the crossing when the respondent stepped from the north of the sidewalk intersection into the crossing. The findings on this point are, in my opinion, fully supported by the evidence. The respondent says that he did not see the truck before the impact, which can only mean that he did not keep any lookout: had he done so the accident would not have occurred. Coyne, J.A. (1) in dealing with this aspect of the matter has said that assuming that the respondent should have looked and that he did not, such lack of care would not have been the cause of the accident, nor would it in a legal sense have "contributed" to it because the appellant by exercise of reasonable care and skill on his part could have avoided the accident notwithstanding the respondent's negligence. In *The Eurymedon* (2), Greer, L.J. summarized the law arising out of what he called the principle in *Davies* v. *Mann* (3), and said in part that if one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff, and that this rule applies where one party is not in fact aware of the other party's negligence but could by reasonable care have become aware of it and by exercising reasonable care could have avoided causing damage to the other party. In the present case, however, the negligence of the respondent as found by the learned trial Judge was in failing to keep any lookout and

(1) [1947] 2 W.W.R. 993; [1948] 1 D.L.R. 464.
(2) 1938 Prob. 41, 48.
(3) 10 M. & W. 546.

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in walking into the side of the truck. The appellant did not know and, even had he seen the respondent as the latter came to the sidewalk intersection, could not I think have discerned, either that the latter was not keeping any lookout or that he intended to step into the roadway. I do not, therefore, think that this is a case where the rule of law as stated by Greer, L.J. (1) which, it may be noted, was adopted by Davis, J. in *Sershall* v. *Toronto Transportation Commission* (2), is applicable. The acts of negligence of the parties were, in my opinion, either contemporaneous or came so closely together, the second act of negligence being so much mixed up with the state of things brought about by the first act, as to make it a case for contribution within the rule as stated by Viscount Birkenhead, L.C. in *Admiralty Commissioners* v. *S. S. Volute* (3), and *The Tortfeasors and Contributory Negligence Act*, cap. 215, R.S.M. 1940, applies. I am further of the opinion that this is a case where subsection 3 of section 4 of the *Act* should be applied and the parties held equally at fault.

Section 8 of the *Act* provides that where the damages are occasioned by the negligence of more than one party the court shall have power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just. In the present case I think justice will be done between the parties if the respondent is awarded one half of his taxable costs of the trial: one half of his taxable costs in the Court of Appeal and the appellant one half of his taxable costs in this Court.

Appeal allowed in part.

Solicitors for the appellant: *Scarth & Honeyman.*

Solicitors for the respondent: *Greenberg & Rice.*

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(1) 1938 Prob. 41, 48.
(2) [1939] S.C.R. 287 at 303.
(3) [1922] 1 A.C. 129, 137, 144.

THE CORPORATION OF THE VILLAGE OF LONG BRANCH (RESPONDENT) ..... APPELLANT;

AND

GLENCOE HARVEY HOGLE and IRENE HOGLE (APPLICANTS)..... RESPONDENTS.

*1948
April 1
April 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal Corporations—By-Laws—Approval of Municipal Board—By-Law illegal in part—The Municipal Act, R.S.O., 1937, c. 266, s. 406, as re-enacted by 1941, c. 35, s. 13, and amended by 1943, c. 16, s. 11 and 1946, c. 60, s. 50. "Repealed and amended" s. 406(4).

The appellant corporation passed a by-law approved by the Municipal Board pursuant to the provisions of s. 406 of the Municipal Act, R.S.O., 1937, c. 266 and amendments, prohibiting the use within a defined area of land, or the erection or use of buildings, for other than residential purposes. The second paragraph of the by-law provided a penalty for breach thereof, and by the second sentence therein, that each ten days during which the prohibited conditions were maintained should constitute a separate offence.

S. 406(3) of the Municipal Act provided that no part of any by-law passed under the section should come into force without the approval of the Municipal Board and ss. 4 provided no part of any such by-law approved by the Board should be repealed or amended without the approval of the Board. The respondents applied to the Supreme Court of Ontario for an order determining their rights and for an order quashing the by-law for illegality.

The trial judge quashed the by-law. On appeal to the Court of Appeal all members of that Court agreed that the second sentence of paragraph two of the by-law was not authorized by the provisions of s. 406, but the majority were of the view that because of the provisions of ss. 3 and 4, there could be no severance.

Held: That the words "repealed or amended" in s. 406(4) are not referable to any order or judgment of a Court but are applicable merely to an attempt on the part of a municipality to amend or repeal a by-law which has already been approved by the Municipal Board.

City of Chatham v. *Sisters of St. Joseph* 1940 O.W.N., 548 distinguished.

Per Rand and Kellock JJ.: The principle of severance can be applied to a by-law which is invalid in part when the invalid part is not enacted under s. 406 and is not therefore subject to the approval of the Municipal Board.

APPEAL by special leave of The Supreme Court of Canada from the judgment of the Court of Appeal for Ontario (1), Hogg J.A. dissenting in part, dismissing the

(1) [1947] O.R. 436; [1947] O.W.N. 466.

*PRESENT: Rinfret, C.J. and Kerwin, Taschereau, Rand and Kellock. JJ.

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VILLAGE OF LONG BRANCH v. HOGLE

appeal of the appellant from the judgment of Gale J. quashing By-Law 866 passed by the Council of the Corporation of the Village of Long Branch.

M. Grant for the appellant.

J. L. G. Keogh K.C. for the respondent.

The judgment of the Chief Justice, Kerwin and Taschereau, JJ. was delivered by:

KERWIN J.:—The respondents applied to the Supreme Court of Ontario for an order declaring and determining their rights, depending upon the construction of By-law No. 866 of the Village of Long Branch, and also for an order quashing the by-law for illegality. An order was made granting the relief secondly claimed and directing (by paragraph 4) that while preserving all rights of the parties with respect thereto, no order be made upon the first motion. No reasons were given by the learned judge so far as we are informed but on appeal to the Court of Appeal for Ontario (1) Laidlaw J.A., speaking on behalf of himself and Aylesworth J.A., dismissed the appeal for reasons to be mentioned later.

By-law 866 is as follows:—

VILLAGE OF LONG BRANCH BY-LAW NO. 866

A By-law to restrict the use of lands shown on Plan 2180 and the portion of Lot 10 in the Broken Front on the West side of Thirty-seventh Street, lying south of a line drawn 120 feet Southerly from and parallel to the South limit of Lake Shore Road as widened, to residential uses.

WHEREAS the Council have received a petition to restrict the use of the above lands to residential purposes and the Council deem it advisable to comply with the said request.

THEREFORE THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE VILLAGE OF LONG BRANCH ENACTS as follows:

1. The use of the land or the erection or use of buildings for any other than residential uses is prohibited within that part of the Village of Long Branch lying south of a line drawn 120 feet Southerly from and parallel to the Southerly limit of Lake Shore Road as widened, as shown on Plan 2180, and the portion of Lot 10 in the Broken Front on the West side of Thirty-seventh Street.

2. Any person convicted of a breach of any of the provisions of this By-law shall forfeit and pay at the discretion of the convicting Magistrate, a penalty not exceeding (exclusive of costs) the sum of Fifty Dollars ($50) for each offence. The imposition of one penalty for any violation shall not permit it to continue, and all such persons shall be required

(1) [1947] O.R. 436;
[1947] O.W.N. 466.

to correct or remedy such violations or defects within a reasonable time, and when not otherwise specified each 10 days that the prohibited conditions are maintained shall constitute a separate offence.

PASSED this Fifth day of September, A.D. 1946.

"G. H. Clarkson" Clerk — "Thos. F. Carter" Reeve

(Seal)

This by-law was passed in pursuance of section 406 of the *Municipal Act*, R.S.O. 1937, chapter 266, and amendments, the relevant provisions of which are as follows:—

406.—(1) *By-laws may be passed by the councils of local municipalities*:

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within any defined area or areas or abutting on any defined highway or part of a highway.

2. For prohibiting the erection or use of buildings or structures, for or except for such purposes as may be set out in the by-law, within any defined area or areas or upon land abutting on any defined highway or part of a highway.

* * * *

(3) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board, and such approval may be for a limited period of time only, and the Board may extend such period from time to time upon application made to it for such purpose.

(4) No part of any by-law passed under this section and approved by the Municipal Board shall be repealed or amended without the approval of the Municipal Board.

In accordance with subsection 3, the by-law was approved by the Municipal Board on October 26, 1946.

All the members of the Court of Appeal were of opinion that the second sentence in paragraph 2 of the by-law was invalid and that conclusion is not attacked by the appellant. The majority considered that in view of the provisions of subsections 3 and 4 of section 406 of the *Municipal Act*, the by-law, having been approved by the Municipal Board, could not be declared by the Court to be invalid only in part. Mr. Justice Hogg was of opinion that the words "repealed or amended" in subsection 4 were not referable to an order or judgment pronounced by a Court but were applicable merely to an attempt on the part of a municipality to repeal or amend a by-law which had already been approved by the Board and with this interpretation I agree.

The view of the majority of the Court of Appeal is based upon an *obiter dictum* of the Chief Justice of Ontario in

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City of Chatham v. *The Sisters of St. Joseph* (1) where he states at page 554:—"It is very doubtful whether any part of a by-law which depends for its coming into effect upon the approval of it as a whole by the Municipal Board, must not stand or fall as a whole. The council cannot amend it without the Board's approval, yet in effect that is what the Court would do if it should hold part of the by-law to be invalid and other parts of it to be valid and in force." That statement had already been approved in another *obiter dictum* by Mr. Justice Laidlaw in *Wilmot* v. *City of Kingston* (2). In the Chatham case the Chief Justice of Ontario proceeded, after the extract quoted above, as follows:—

> These by-laws for imposing building restrictions usually set up a scheme which is designed and adopted as a whole, and, quite apart from the question of the approval of the Municipal Board, it is from the very nature of the by-law a delicate operation for the Court to sever one part of such a by-law from the rest with any assurance that what is left of it sets forth any scheme that the council had put in operation.

I quite agree with these last remarks as referable to the situation before the Chief Justice but they are not applicable to the present case. As Middleton J.A. stated in *Morrison* v. *City of Kingston* (3) at 27, a part of a by-law found invalid must be clearly severable in order to uphold the remainder but that condition exists here where the only part found invalid is the additional penalty imposed by the second sentence of paragraph 2 of the by-law. That additional penalty is not so bound up with the provision in paragraph 1 as to form part of the scheme adopted by the council of the municipality.

The appeal should be allowed and the order made by the judge of first instance should be amended by striking out paragraphs 1 and 2 there and substituting therefor an order that the second sentence of paragraph 2 of By-law 866 be quashed. Paragraph 3, directing the municipality to pay the applicants their costs of and incidental to the application to quash, and paragraph 4 preserving the rights of all parties on the branch of the motion for the determination of the rights of the applicants depending upon the construction of the by-law, may remain. The appellant is entitled to its costs in the Court of Appeal and in this Court.

(1) [1940] O.W.N. 548; [1941] 1 D.L.R. 506.
(2) [1946] O.R. 437.
(3) [1938] O.R. 21.

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Rand J.

RAND J.:—This appeal concerns the validity of a by-law passed by the Village of Long Branch under section 406 of the Municipal Act of Ontario, the material parts of which are as follows:—

1. The use of the land or the erection or use of buildings for any other than residential uses is prohibited within that part of the Village of Long Branch lying south of a line drawn 120 feet southerly from and parallel to the southerly limit of Lake Shore Road as widened, as shown on Plan 2180, and the portion of Lot 10 in the Broken Front on the West side of Thirty-seventh Street.

2. Any person convicted of a breach of any of the provisions of this By-law shall forfeit and pay at the discretion of the convicting Magistrate, a penalty not exceeding (exclusive of costs) the sum of Fifty Dollars ($50) for each offence. The impostion of one penalty for any violation shall not permit it to continue, and all such persons shall be required to correct or remedy such violation or defects within a reasonable time, and when not otherwise specified each 10 days that the prohibited conditions are maintained shall constitute a separate offence.

An application by the appellants to quash was granted by Gale J. On appeal (1) Laidlaw J.A., speaking for the court, held that the principle of severability was not applicable to a by-law requiring for its validity the approval of the Municipal Board. On that ground, the order to quash was affirmed.

Section 406 deals with special powers, and under ss. (3) no part of any by-law "passed under this section" shall come into force without the approval of the Board. Subsection (7) empowers the Board to approve "any such by-law in whole or in part". The section does not contain express power to impose penalties, but that is conferred by section 520 which authorizes fines not exceeding $50 exclusive of costs. Then section 525 provides that in addition to any other remedy provided by the Act and to any penalty imposed "by the by-law, the contravention may be restrained by action at the instance of a ratepayer or the Corporation."

From those provisions I think it clear that it is only by-law legislation which derives its force from section 406 that requires approval by the Board, and that the penalty provision of the present by-law, therefore, drawing its efficacy from section 520, is not a matter for approval. That the powers arising under the two sections may be exercised in one by-law, is, I think, unquestionable, and the fact that the matter of one power is subject to approval

(1) [1947] O.R. 436.

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does not impliedly incorporate the separate matter as an essential of the by-law under 406, making it likewise subject to approval. From this it follows that the approval of the Board is effectual only to the first paragraph of this by-law, and the principle upon which the Court of Appeal acted is not applicable. In the authorities cited where such a rule seems to have been approved, the matters which were being dealt with arose exclusively under section 406.

The remaining question is whether the latter part of the second paragraph, being ultra vires, is distinct and severable from the rest of the by-law. What the Council obviously had in mind, as its primary purpose, was to enact a building or use restriction; what it sought secondarily was the most effective means for enforcing compliance; and I think it scarcely arguable that because the Council tried to multiply penalties it should be assumed that the main object was to be conditional upon the effectiveness of every sanction; that would be to reverse the order of importance and make the substantial purpose merely a peg on which to hang penalties for their own sake. The Council had the same end in view as lies behind section 525, to make its prohibition effective.

I would, therefore, allow the appeal and direct the last sentence of the second paragraph of the by-law to be declared quashed with costs as proposed by my brother Kerwin.

KELLOCK J.:—It is not necessary to repeat the provisions of the by-law here in question. The by-law was attacked on the ground that the last sentence of paragraph 2 was not authorized by the provisions of section 406 of the *Municipal Act*, R.S.O., 1937, cap. 266, as amended, and that the by-law not being severable, must be declared void *in toto*. All of the members of the court appealed from agreed that the sentence objected to was invalid but the majority were of the view that because of the provisions of subsections 3 and 4 of section 406 there could be no severance.

Counsel for the appellant submits that there is nothing in section 406 which authorizes the council to enact any part of paragraph 2 of the by-law and that accordingly the approval of the Board must be taken to be limited to

the subject matter of paragraph 1 with which alone it is by the section authorized to deal. He, accordingly, contends that subsections 3 and 4 have no application to that part of the by-law which is alleged to be invalid and that there is no obstacle in the way of severing the good from the bad.

In my opinion this position is well taken. Section 406 does not enable the council to legislate with respect to any penalty for a breach of the by-law. When the legislature intends to give such authority it does so expressly. Paragraph 11 of section 420 is an illustration. By section 408, paragraph 11 also, provision is made for the passing of a by-law with the approval of the Municipal Board relating to the subject matters therein mentioned but the section by clause (*b*) provides its own penalty. A by-law passed under this provision therefore could not effectively provide a penalty.

Section 520 makes provision generally for penalties for the contravention of by-laws. This section would of course not operate in the cases covered by the special provisions of sections 408 (11) and 420 (11). With the provisions of a by-law passed pursuant to section 520, whether standing alone or forming part of such a by-law as that here in question, the Municipal Board has nothing to do. In my opinion, therefore, the approval of the Municipal Board must be taken to be confined to the matters within its jurisdiction, namely, the provisions of paragraph 1 of the by-law, with the result that subsections 3 and 4 of section 406 do not prevent and have no application to the question of severance.

I see no reason to differ from the court below in the view that the last sentence of paragraph 2 goes beyond the authority granted to the council by section 520 and I agree also that the case is a proper one for severing the invalid part from the remainder of the by-law; *Rex.* v. *Van Norman* (1) at 455.

In support of the judgment appealed from counsel for the respondent referred to *Chatham* v. *Sisters of St. Joseph* (2) at 553. In the passage in the judgment of Robertson C. J. O., relied upon, the learned Chief Justice was there

(1) (1909) 19 O.L.R. 447. (2) [1940] O.W.N. 548.

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referring to a provision in the by-law there in question which dealt with the building scheme itself. The cases are clearly distinguishable.

I would, therefore, allow the appeal and vary the order of Gale J., by limiting paragraph 1 to the concluding sentence of paragraph 2 of the by-law. The costs should be disposed of as proposed by my brother Kerwin.

Appeal allowed and order made by judge of first instance amended by striking out paragraphs 1 and 2 and substituting therefore an order that the second sentence of paragraph 2 of By-Law 866 be quashed. Appellant entitled to its costs in the Court of Appeal and in this Court.

Solicitors for the appellant: *Grant and Grant.*

Solicitors for the respondent: *Bench, Keogh, Rogers & Grass.*

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*March 31
*April 1
*Oct. 5

MARGARET PHYLLIS BOOTH, wife of STANLEY BOOTH, and the said STANLEY BOOTH; ARNOLD H. BOWLER; and WILLARD J. McCORMACK (PLAINTIFFS) ..... APPELLANTS;

AND

THE CORPORATION OF THE CITY OF ST. CATHARINES and THE BOARD OF PARK MANAGEMENT OF THE CITY OF ST. CATHARINES, (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Licensee—Peace Celebration spectators in city park injured when boys climbing on flag tower caused its collapse—Duties imposed on licensor.

In response to a notice published by the Mayor of St. Catharines requesting citizens to observe and co-operate in a programme prepared for the observance of "Victory-over-Japan Day", a large crowd gathered in Montebello Park the evening of August 15, 1945. Here, in addition to band concerts and dancing, a display of fireworks was given under the direction of "G", the manager of the city's Board of Park Management. The fireworks were set off in the "Rose

PRESENT: Rinfret C.J., and Kerwin, Rand, Kellock and Estey JJ.

Garden" which had been fenced off for that purpose. Some 25 feet from the fence there was a tower constructed of a light iron framework, some 70 feet high, surmounted by a flagpole. Earlier in the evening "G" had twice ordered small children off this structure. Later, while he was directing the fireworks display, a number of boys climbed upon the tower. Their combined weight caused it to collapse and fall upon the spectators thereby killing the daughter of one of the appellants and injuring two of the other appellants.

Held: The respondents were liable for negligence.

Per Rinfret C.J., Kerwin and Estey JJ.:—The maxim *novus actus interveniens* did not apply because the presence of the boys upon the tower, even though unauthorized, was the very thing that should have been anticipated.

The Court was unanimously of opinion that on the facts of the case it was not necessary in fixing liability to determine whether the members of the public attended the park as invitees. Rinfret C.J. and Kerwin J., agreed with the trial judge that the respondents were liable as licensors whose duty it was to warn a licensee of any concealed danger known to the licensor, and that "G" knew of the danger created by the weight upon the tower. *Baker* v. *Borough of Bethnal Green* [1945] 1 A.E.R. 136 at 140.

Per Estey J.: This was a case of a licensee after entering upon the premises being injured by virtue of the negligence of the licensor within the principle of *Gallagher* v. *Humphrey* (1862) 6 L.T. 684.

Per Rinfret C.J. and Kerwin J.: Having permitted the public to enter the park, the respondents were under a duty not to create or permit others to create a new danger without giving warning of its existence. The presence of the boys on the tower was a danger respondents permitted to be created and to continue. No warning was given and,

Per Rinfret C.J., Kerwin and Estey JJ.: The danger was not apparent to the parties injured.

Per Rand J.: The standard of reasonable foresight was applicable to the circumstances of the demonstration. The city's act in bringing about the gathering was of such a nature as called for reasonable precautions against foreseeable risks and dangers lurking in fact within it, an act which unaccompanied by that degree of prudence, became a misfeasance.

Per Kellock J.: A reasonably prudent man would have anticipated, having seen the fact demonstrated on two occasions, that young people would repeat their attempts to climb the tower and that if too many climbed on it, it was likely to fall, and would have taken means to prevent such use of the tower.

Per Estey J.: The injuries here claimed for were suffered not because of any defect in the condition of the premises but rather that the respondents were negligent in not taking reasonable steps to prevent the boys from climbing upon the flagpole.

Decision of LeBel J. [1946] O.R., 628, affirmed

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APPEAL from an Order of the Court of Appeal for Ontario (1) whereby the judgment of LeBel J. (2) was reversed.

J. L. S. Keogh K.C. and *S. W. Fullerton* for the appellants.

F. J. Hughes K.C. and *J. R. Cartwright K.C.* for the respondents.

The judgment of the Chief Justice and Kerwin, JJ. was delivered by:

KERWIN J.:—The plaintiffs in this action are Stanley Booth and his wife, Arnold H. Bowler, and Willard J. McCormack. On the 15th of August, 1945, Mrs. Booth and Mr. Bowler were injured, and Grace Ann McCormack was killed, in Montebello park in the City of St. Catharines, Ontario, under circumstances to be mentioned later, and suit was brought by those injured to recover damages, by Stanley Booth for his expenses and loss of consortium, and by Willard J. McCormack for damages under *The Fatal Accidents Act* for the death of his daughter, Grace Ann. The proceedings were brought against the Corporation of the City of St. Catharines and the Board of Park Management of that city and came on for trial before Lebel J., who awarded damages, as to the amount of which there is no question except those awarded Willard J. McCormack. The Court of Appeal for Ontario set aside this judgment and dismissed the action.

The respondents make no point of distinction between the City and the Board, in the latter of which resides the general management, regulation and control of the park by virtue of the provisions of *The Public Parks Act,* R.S.O. 1937, chapter 285, and which park, under section 2 thereof, is open to the public free of all charge. On August 11, 1945, the Mayor of the City published in a local newspaper a notice that on the evening of the day that peace should be declared with Japan, a memorial service would be held on the City Hall lawn, commencing at seven o'clock in the evening; that following the service, there would be a general parade ending at Montebello Park where there

(1) [1947] 1 D.L.R. 917.

(2) [1946] O.R. 628; [1946] 4 D.L.R. 424.

would be band concerts, dancing and other entertainment, concluding with a fireworks display. By the notice, the public was asked for its co-operation and assistance in the program so that the day would be observed in a fitting manner. While counsel for the appellants made this notice the basis of an argument that those who in response thereto entered the park on the evening of August 15th did so as invitees, I find it unnecessary to consider that argument or to pass upon the proposition that, irrespective of the notice, the members of the public attended the park as invitees. I assume that within the well-known division of visitors to premises, they were licencees.

On the evening of August 15th, the parade was held, ending at the park where were gathered a large crowd of people, including Mr. and Mrs. Booth, Mr. Bowler and Grace Ann McCormack. By order of Herbert L. Gray, who was and had been for many years the city parks manager, acting under express instructions of the Mayor, an area in the park, known generally as the Rose Garden, had been segregated by the erection of a snow fence within which it was proposed to set off the fireworks. This fence was about 1,000 feet in length and its nearest point was 25 feet from a steel flag tower which had been constructed and erected in 1907 in another location but which, in 1916, had been moved to, and re-erected in, the park. It was 70 feet high and supported a flagpole on top The tower proper was rectangular in shape, tapering upwards and stood on four posts, bolted to steel anchors imbedded in concrete. There was no horizontal bracing but there was diagonal bracing and there were horizontal struts about five feet apart. The bottom strut was about seven feet from the ground but the diagonal bracing came to within eighteen inches of the ground. The tower fell while the evening celebrations were in progress, with the results noted above, and the question is whether the respondents are liable, as found by the trial judge.

Two volleys of noise making bombs, the first being fired at approximately 7.30 p.m. and the second at about 8 p.m. preceded a display of sky rockets, which were first set off about eight thirty o'clock,—twenty minutes before the fall of the tower. Mr. Gray was on hand and at about 7.20 his attention was called by one of his assistants to the fact

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that several children were on the tower. He went to a spot in the enclosed rose garden nearest to the tower and told them to get down, which they did immediately. The same thing happened again, about 8 p.m., and on each occasion Mr. Gray testified children aged about four to six years were on the first horizontal strut or climbing on to it. From the time of the second occurrence until the disaster, he paid no attention to the tower. He testified that he had never seen children on the tower before and that it had not occurred to him that the children he saw that night, or anyone else, might damage the tower or cause it to fall. From other evidence, which was not contradicted, it appears that at different times on the evening of August 15th there were at least ten boys on the tower and that their ages varied from ten to sixteen years. One had climbed to a point above an electric light bulb, which would put him 35 to 40 feet from the ground. Most of these boys were on the tower ten to fifteen minutes before it fell. They leaned backwards to better follow the course of the rockets through the air and this action caused a swaying of the tower, and according to all the experts, this swaying was the cause of the buckling and fall of the tower.

While Mr. Gray said that his whole concern was merely for the safety of the boys that he saw on the tower, the trial judge was unable to accept that as a complete statement. It is true that the tower was sufficient for the purpose of holding the flagpole but Mr. Gray knew that the tower was not built to bear the weight of a group of people because when the rope attached to the flag had broken on several occasions, he had seen to it that no person was allowed to climb the tower to repair the rope. Instead, an extension ladder of the City Fire Department had been used and the ladder had always been kept clear of the tower.

On these facts I agree with the trial judge that the respondents are liable as licensors. Avoiding any controversial points, an occupier must warn a licensee of any concealed danger of which the occupier knows or, as it is put by Lord Green in *Baker* v. *Borough of Bethnal Green* (1) at 140:—"A licensee must take the premises as he finds

(1) [1945] 1 A.E.R. 135.

them, subject to this important qualification, that, if the licensor knows of a danger which is not apparent, or would not reasonably be apparent to the licensee, it is his duty to take steps to protect the licensee against it." Accepting the findings of the trial judge that, notwithstanding the protestations of Mr. Gray the latter knew of the danger created by weight upon the tower, the respondent must be held responsible.

Mr. Gray saw children on the tower and while it is true that he saw them very near the ground and of a very young age, I cannot accede to the proposition that the appellants fail unless they prove that Gray saw a greater number of children at higher points. The trial judge saw the witness and was entitled to accept part of his testimony and reject part. He was entitled to consider all of the evidence, including that as to the care that had been exercised not to place the fire department ladder against the tower when repairing the flag rope, and to conclude that Gray knew of the danger of the tower's collapse; that is, that from his experience he knew that a number of persons on the tower would cause it to fall; on two occasions he saw children on the tower, whom he warned off, but he failed to take any precaution to ensure that they or others would not climb the tower and bring it down. The maxim *novus actus interveniens* has no application because while the structure was sufficient for its purpose as a flag tower, in view of the great concourse of people and of the fireworks, the presence of boys upon the tower, even though unauthorized, was the very thing that should have been anticipated. Furthermore, having permitted the public to enter the park, the respondents were under a duty not to create or permit others to create a new danger without giving warning of its existence. The presence of the boys on the tower for ten to fifteen minutes before it collapsed was such a danger which the respondents permitted to be created and to continue. Certainly no warning of its existence was given and I agree with the trial judge that the danger was not apparent to the parties injured or to Grace Ann McCormack.

The appellant McCormack by cross-appeal to the Court of Appeal and in the appeal to this Court asked that the damages awarded him for the loss of the life of his daughter

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under *The Fatal Accidents Act* be increased from $1,000 to $3,000. By an amendment of 1943 to that Act, he is entitled to $125 for funeral expenses and it is argued that the sum of $875 for the death of his daughter is not adequate. She was eighteen years of age, living at home but earning by outside employment $17 to $19 per week. She contributed $6 each week to the family budget and gave her mother from time to time an additional $1 to $2 for the same purpose. She also helped with the housework. I cannot say that under these circumstances the amount awarded is so small as to demand an increase.

The appeal should be allowed with costs throughout and the judgment at the trial restored.

RAND J.:—This action was brought to recover damages resulting from the collapse of a steel flag tower standing in Montebello Park, St. Catharines, on the occasion of the celebration on the night of August 15, 1945 of the surrender of Japan. The park was managed and controlled by the Board of Park Management under *The Public Parks Act,* chapter 285 of the Revised Statutes of Ontario of 1937, but it was stated by counsel for the respondents that no question was raised as to any distinction in liability between the City and the Board of Management.

The celebration was officially initiated by a notice published on August 11th in a daily newspaper addressed to the citizens and requesting them to "observe and co-operate in the following program": a memorial service on the City Hall lawn to which military units would parade from the Armories; from there, a parade to the Park where band concerts, dancing and other entertainment would conclude with a fireworks display. Then followed this paragraph:—

> The public is asked for its co-operation and assistance in this program, details of which will be announced through the local press and radio, so that the day will be observed in a fitting manner, in keeping with both victory and sacrifice.

The flag tower had been originally erected on St. Paul Street in July, 1907 and in June, 1916 had been transferred to the Park. It was pyramidal in shape, resting on four legs attached to steel angle bars set in concrete. The base

was 11 feet square; the angles of the legs or corner beams were 2″ x 2″ and 3/16″ thick. They extended to a height of 70 feet and the structure was surmounted by a flag pole about 20 feet high which rested on a casting about six feet below the top of the tower. On each side were angle bar horizontal struts at intervals of about five feet, the first approximately seven feet from the ground, with angles $1\frac{1}{2}$″ x $1\frac{1}{2}$″ and 3/16″ thick up to a height of 30 feet and above that $1\frac{1}{4}$″ x $1\frac{1}{4}$″ x $\frac{1}{8}$″. Up each side were $\frac{3}{8}$″ steel rods forming cross diagonals of two spaces of horizontal struts. The first of these rods reached within a foot or so of the ground. There was no interior bracing. It was found that for flag purposes the structure was adequate and would have lasted indefinitely.

A large crowd of over 10,000 people gathered in the Park. The fireworks were to be set off in the Rose Garden, around which for safety purposes a fence was put up of a somewhat irregular shape and between 200 and 300 feet in diameter. The flag tower was about 25 feet north of the fence. There was a variety of fireworks, consisting of sound bombs, rockets and other display pieces. Five or six men had been detailed to keep the crowd back from the fence.

The Park was under the superintendence of a manager of 23 years' service in the Park who was given charge of the arrangement. Under his direction the fence was erected and guarded. He had been requestd by the Mayor to bring the display on early to enable the younger children to see it. About 7:20 p.m. the first sound bombs were fired off and about that time his attention was called to several children between four and six years of age climbing up the tower. Walking over to the fence, he told the children to get off which they did. About 8:00 o'clock the second discharge of bombs was made and again his attention was called to children on the tower, and again he warned them off and they obeyed. No further attention was paid to the tower. At 8:30 the fireworks commenced. The people were closely crowded around the fence, and between that time and about ten minutes to nine when the tower collapsed from ten to twenty boys up to 15 or more years of age were seen on the tower at different heights. They were probably on the north side where

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they would face the Rose Garden, and it is stated that as the pieces were shot into the air the boys would bend backward to follow their courses. It is stated that at least one was higher up than 30 feet, and towards the end several older boys, dressed in some kind of uniform, joined the climbers. Shortly before the collapse, the tower was noticed to be swaying but no attention was paid to it by any one in authority, and finally one of the legs, probably the northeast corner, buckled, bringing the structure down and causing the injuries complained of. A young lady, the daughter of the plaintiff McCormack, was killed, and the other plaintiffs were injured.

It was the case for the respondents and I think established that the collapse was caused by the bending of one or more of the horizontal struts which drew in the supporting beams and led to the displacement of the thrusts along the latter. This bending in turn was brought about by the weight and movement of the boys or young men on the struts. Once the balanced forces were displaced, the swaying would affect both the bending and the collapse.

The evidence of the engineer witnesses, although not as specifically directed to the point as it might have been, satisfies me that to a person with the intelligence and skill required of a superintendent of such a park or of a person competent to be given charge of arrangements for such a demonstration, and acting reasonably, the presence of four or five boys in their teens on one of these struts either below or above the 30-foot point would threaten the stability of the tower. The lowest strut was only 2″ on each angle and 3/16″ thick, and being 11 feet in length, the strain of such a weight would seem to suggest the question of safety to any ordinary practical judgment. The superintendent admittedly knew all the facts of the structure, its age, dimensions and general strength. He told of two occasions a year or so before the accident when the rope on the pole had been replaced by using the ladder apparatus of the City Fire Department. In using the ladder no part of the tower or pole was touched; but the fact that such an elaborate piece of public equipment would be used to do so small a job furnishes some support for the disbelief by the trial Judge of the superintendent's explanation that he warned the boys off, "so that they

wouldn't hurt themselves". We are not told how in the earlier years replacements of the rope had been made or to what extent, if at all, there had ever been any climbing done on the tower for that or any purpose.

Recovery is resisted on the ground that these 10,000 and more persons came into the Park to witness the public celebration as licensees, that they assumed the risk of any untoward condition of the Park except that of a concealed danger actually appreciated by some responsible person, of which it is said there was none. On the footing of licence the trial Judge found the existance of such a danger of which the superintendent had notice and following *Ellis* v. *Fulham* (1), held the respondents liable. The Court of Appeal allowed the appeal and dismissed the action. Before this Court, Mr. Keogh supported the trial judgment as well as the view that the case was one of invitees.

On the basis of prudent foresight, it must have been anticipated as natural and probable that boys of all ages would climb the tower to get a better view of what was going on; and, coupled with the admitted knowledge of the other facts mentioned, that there would be created a probable danger to persons attending the celebration. If actual appreciation of that fact did not occur to any one in responsibility, is the City to be excused? In *Coates* v. *Rawtenstall* (2); *Ellis* v. *Fulham* (*supra*) and in *Baker* v. *Bethnal Green* (3) the risk was so appreciated; but is that a reasonable requirement toward structures in public places which in certain circumstances can become dangerous to those who are entitled to be in those places?

I find it unnecessary to decide that or any other of the much debated questions arising out of the relation of either licence or invitation, because in another aspect I must hold the standard of reasonable foresight to be applicable to the circumstances of the demonstration. The City, with a public interest and duty, brought about this gathering of thousands of its inhabitants; the developing scene as a whole was its act; it was not a mere neutral suggestion that they betake themselves to the Park to celebrate individually; it was a complex act of such a

(1) [1938] 1 K.B. 212.
(2) [1937] 3 A.E.R. 602.
(3) [1945] 1 A.E.R. 135.

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nature as called for reasonable precautions against foreseeable risks and dangers lurking in fact within it, an act which unaccompanied by that degree of prudence became a misfeasance: *Shrimpton* v. *Hertfordshire* (1). In the words of Scrutton L.J. in *Purkis* v. *Walthamstow* (2) used in commenting on the latter decision, this is "a case of a local authority doing something and doing it badly".

I would, therefore, allow the appeal and restore the judgment at trial with costs both in this Court and in the Court of Appeal.

KELLOCK J.:—Essentially the respondents' contention is that the appellants were licensees and were obliged to accept the premises as they found them. This, according to the respondents, involved acceptance of risk of injury arising from circumstances such as are present in this case. In my opinion this contention must fail. In Charlesworth on Negligence, 2nd Ed., the following appears at page 210:

> Neither the occupier nor any other person is entitled to act negligently towards persons whom he knows or ought reasonably to know will be lawfully on the premises. In this connection there is no difference between liability to invitees and licensees.

In my opinion this is a correct statement of the law.

In *Glasgow Corporation* v. *Muir* (3), Lord Wright at page 460 quoted from Lord Atkin's words in *Donoghue* v. *Stevenson* (4), at 580, as follows:

> You must take reasonable care to avoid acts *or omissions* which you can reasonably foresee would be likely to injure your neighbour.

In answering the question which he put "Who is my neighbour?" Lord Atkin had said:

> The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In Muir's case Lord Wright said at 460:

> The issue can be stated on the general principles of the law of negligence without any reference to the special rules relating to the position of those who come as invitees upon premises.

In the same case Lord Macmillan, at page 459, said:

> No special point arises from the circumstance that the injured children were invitees on the defenders' premises. They were entitled to rely on not being exposed while on the premises to any risk occasioned by the negligence of the defenders or their servants.

(1) (1911) 104 L.T. 145.
(2) (1934) 151 L.T. 30.
(3) [1943] A.C. 448.
(4) [1932] A.C. 562.

In my opinion in the present case it is not necessary to determine whether the persons injured were invitees or licensees. It is sufficient that they were on the premises with the consent of the respondents.

At page 461 of Muir's case, in referring to *Excelsior Wire Rope Co., Ld.* v. *Callan* (1), Lord Wright also said:

> The House did not consider whether the appellants there were occupiers or whether the children were invitees * * * or bare licensees or trespassers. It was enough that a danger to the children was created by the act of the appellants in that case and that they either knew *or ought to have known* of the danger. That simple principle is enough to decide the present appeal subject to the question of fact whether there was the creation of an obvious danger.

At page 462, in referring to the men who were carrying the tea urn, he said:

> If the tea urn had been upset by the negligence of the appellants' servants, the appellants would have been liable in negligence. Whether or not they would have been liable as invitors in the alternative would depend on other considerations.

The liability to the children injured in such circumstances would therefore have depended merely upon the presence or absence of negligence on the part of the defendant's servants to persons on the premises. Whether such persons were invitees or licensees would make no difference.

In *Thatcher* v. *The Great Western Railway Company* (2), the plaintiff had gone to one of the defendants' stations to see some friends off on the train. While standing on the platform after the train started the plaintiff was struck by the open door of one of the vans, and suffered injury. It was argued that there was no liability upon the defendant, the plaintiff being a mere licensee, but the Court of Appeal held in favour of the plaintiff. The Master of the Rolls, Lord Esher, held that if a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former. Although in his view the defendants in strict logic did not have the same amount of duty to persons in the position of the plaintiff as they had to persons who paid them money in consideration of being carried as passengers, nevertheless, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between the duty

(1) [1930] A.C. 404.

(2) (1893) 10 T.L.R. 13.

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of the railway to the one class of persons and to the other. In short, it was their duty to take reasonable care with regard to both.

This view of Lord Esher received the approval of Lord Shaw in *Mersey Docks* v. *Procter* (1) at 268.

The question in the present case therefore, is, did the respondents take reasonable care to avoid acts or omissions which its servants could reasonably foresee would be likely to injure persons lawfully on its premises at the time and under the circumstances here in question?

According to the evidence of Herbert L. Gray, Manager of the Board of Park Management, the first volley of bombs was fired off just after 7.20 p.m., and the second just before 8.00 p.m. The fireworks commenced just before 8.30 p.m. and the flagpole fell some twenty minutes later. Gray says that his attention was called to some small children on the flagpole tower just after the first volley of bombs was fired. These he told to get off. Again, about 8.00, it was reported to him that there were children on the flagpole and he went down and told them to get off. On each occasion the children were reaching up to the first strut about six feet from the ground. Gray said he told the children to get down because he was afraid they would get hurt and that it did not occur to him that if they proceeded further up they might cause the pole to fall. He also deposed that he did not pay any particular attention to the pole after 8.00 p.m. and gave no instructions and took no precautions to prevent children climbing on the pole.

The learned trial judge found that the collapse of the tower was due to the fact that a number of boys of varying ages had climbed upon it as a point of vantage to better witness the display of fireworks and that the undue weight upon the tower, together with the movement of the boys caused it to collapse. He found that there were more than ten boys on the pole, most of them being on the lower struts, some on the higher and one had climbed as high as 35 or 40 feet from the ground. He was also satisfied that, with the exception of some sea cadets, most of the boys were on the tower from 10 to 15 minutes before it fell. I quote from the reasons of the learned judge:

(1) [1923] A.C. 253.

I am convinced that a real source of danger existed by reason of the boys' presence on the tower, and I find as a fact that Mr. Gray had notice of the danger. Many thousands of people of all ages were expected to join in the celebration and the flag tower was situate but a very short distance from the place in the rose garden where the fireworks were to be set off. What was more natural in the circumstances than that boys or even thoughtless adults would use the tower as a point of vantage from which to witness the display? That is what actually happened, and it was not sufficient to order two groups of children away, especially when the probability was that different groups would be attracted to it.

* * *

I also find as a fact that Mr. Gray's failure to take any reasonable precaution whatever for the protection of the people in the park was negligence for which the defendants are liable. He could very readily have spared someone to act as a guard who could have warned the crowd back if he found it impossible to keep the boys off the tower. Incidentally, there was no evidence to show that the boys would have disobeyed anyone in authority. The only evidence on the point is to the contrary. Mr. Gray should have done that much in my opinion, at the very least, and at the last if he failed to realize until then that the boys were climbing upon the tower; it is idle to suggest, as it was argued, that there was nothing he could have done since he had insufficient time to cause a temporary fence to be erected around the tower after he had been informed that boys were climbing upon it. To ignore the danger created by notice that boys were attracted to the tower, and to go ahead with the fireworks display, without at least posting a guard near the tower, was inexcusable in the circumstances.

* * *

It should also be mentioned that the times at which the boys were seen upon the tower by Mr. Gray coincided fairly well with the times at which the two volleys of noise making bombs were fired. If boys had not been seen upon the tower before, as Mr. Gray seemed to say, what conclusion could any reasonable person reach other than that the boys were attracted to the structure by the display. Furthermore, I am unable to yield to Mr. Hughes' argument that notice of the presence of small boys was not notice of the likelihood of larger boys or even thoughtless adolescents being on the tower. It is well known that the presence of even one boy upon such a structure will attract others, regardless of age; and it seems to be the rule, speaking generally, that the older the boy the more chances he will take.

In my opinion it was open to the learned trial judge to come to the conclusion that the defendants were negligent and I would not interfere with it. Whether Gray's concern was limited to the safety of the boys whom he ordered down off the tower need not be considered. In *Muir's case* Lord Macmillan at page 457 said:

Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation * * * The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal

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equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen.

In the same case Lord Thankerton at page 454 said:

* * * this is essentially a jury question, and in cases such as the present one, it is the duty of the court to approach the question as if it were a jury, and a Court of Appeal should be slow to interfere with the conclusions of the Lord Ordinary.

I do not think it is too much to say that a reasonably prudent man, having the responsibility of Mr. Gray, and knowing that large crowds would be and actually were in Montebello Park close to the flagpole, which was in turn close to the spot set apart for setting off the fireworks, would have anticipated, after having seen the fact demonstrated on two occasions, that younger persons would be likely to repeat their attempts to employ the flagpole tower as a point of vantage and that in that event, as it obviously had never been built for such a purpose, it would, if too many climbed upon it, be likely to fall. Having so anticipated, the reasonably prudent man would have taken means to prevent such a use of the tower. Mr. Gray had means at his disposal to do so. This was the view of the learned trial judge and, as I have said, I think he was entitled to come to that conclusion.

I would allow the appeal with costs here and below. I do not think the evidence is sufficient to disturb the finding of the learned trial judge as to the damages awarded the appellant Willard J. McCormack.

ESTEY J.:—The appellants, Margaret Phyllis Booth and Arnold H. Bowler and the late Grace Ann McCormack, daughter of the appellant Willard J. McCormack, were injured while in attendance at a V-J Day celebration in Montebello Park in the City of St. Catharines on August 15, 1945. Three actions claiming damages for these injuries were commenced and before trial consolidated by order of the Court. The judgment directed at the trial for the plaintiffs was reversed in the Court of Appeal.

Montebello Park is a public park owned by the City of St. Catharines and managed by The Board of Park Management of the City of St. Catharines (hereinafter referred to as the Parks Board) under the authority of *The Public Parks Act* (1937 R.S.O., c. 285, and By-law No. 3451 passed by the City of St. Catharines on January 8, 1923).

The mayor on August 11, 1945, issued a proclamation to the citizens for the "observance of 'Victory-over-Japan Day' ". It set forth that on the day peace was declared a Memorial Service would be held at seven p.m. on the City Hall lawn and a parade therefrom to Montebello Park where "there will be band concerts, dancing and other entertainment, concluding with a fireworks display." Further: "I hereby request the people of this City to observe and co-operate in the following programme" and "The public is asked for its co-operation and assistance in this programme, . . . so that the day will be observed in a fitting manner, in keeping with both victory and sacrifice." All the parties above mentioned were in attendance in response to this request.

Under the supervision of H. L. Gray, Manager of the Parks Board, a portion of Montebello Park was selected as the place from which the bombs and fireworks should be discharged. This portion was fenced "to protect the people from bombs being set off" and "to keep them from crowding in."

In Montebello Park the City had erected in 1916 a steel flagpole, rectangular in shape and tapering upwards. The four "vertical legs" or uprights at each corner were 2″ x 2″ x 3/16″. At the surface of the ground these were about eleven feet apart and extending upwards about seventy feet they converged to a position that permitted of the insertion of a 2½″ pole extending upwards, near the top of which the flag was placed. In addition there were horizontal struts 1½″ x 1½″ x 2/16″ about five feet apart and diagonal steel rods or braces about ⅜″ diameter throughout the panels created by the horizontal struts. The bottom strut was about seven feet above but the diagonal braces came within eighteen inches of the ground. This flagpole was within twenty-five feet of the above-mentioned fence, and as the learned trial Judge found "It was designed as a flagpole tower and as such could have stood indefinitely."

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As the parade left the City Hall five bombs were discharged from within this temporary enclosure in the park and then as the parade entered the park five more bombs were discharged. Shortly after the first five bombs were discharged, or at about 7.20 in the evening, Gray found two or three boys on the first strut of the flagpole "pulling themselves up." Gray asked them to go away and they did so. Again, about 8.00 after the second five bombs were discharged, one of Gray's men told him that "the children were on the flagpole again." He proceeded toward the flagpole and found the boys doing "exactly the same thing." He again asked them to go away and they did so. He thought the boys were from four to six years of age and was concerned lest they might be hurt while climbing the flagpole. He had not seen any need for fencing the flagpole and his evidence would indicate that it never occurred to him that the boys climbing up on the flagpole might injure or cause it to collapse. In any event, no steps were taken after the warning at eight o'clock to keep the boys from climbing thereon.

There were perhaps 10,000 people in the park. Seven policemen were there on duty and eight men of the Parks Board were patrolling inside of the temporary fence to see that the crowd kept back. The fireworks commenced about 8.30 p.m. and under the weight of a number of boys who had climbed thereon the flagpole collapsed about 8.50 p.m. and injured the parties above-mentioned.

The evidence varies as to the exact number of boys on the flagpole at the time it fell. The learned trial Judge found "I am satisfied on the evidence that there were more than ten and that their ages varied from ten to sixteen years." Most of the boys were on the lower part of the flagpole, some higher and one as high as thirty-five or forty feet from the ground. The learned trial Judge further found that "it was clearly established that, with the exception of the sea cadets, most of the boys were on the tower from 10 to 15 minutes before it fell."

The injuries here claimed for were suffered not because of any defect in the condition of the premises but rather that the respondents were negligent in not taking reasonable steps to prevent the boys from climbing upon the flagpole. The injured parties were in the park at the request of

the respondent City and in this position were at least licensees who may recover for injury suffered due to negligent conduct on the part of a licensor, its officers and servants.

A licensee does not, however, take the risk of negligence by the servants of the owner of the property on which he is permitted to go.

The licensee has the right to expect that the natural perils incident to the subject of the licence shall not be increased without warning by the negligent behaviour of the grantor, and, if they are so increased, he can recover for injuries sustained in consequence thereof. A grantor of a licence to come on to his premises, who is aware that a licensee is actually there, is bound to take reasonable care not to do anything to injure him. 28 Halsbury, 2nd ed., para. 860, p. 610.

Gallagher v. *Humphrey* (1), *Barrett* v. *Midland Rly. Co.* (2), *Thatcher* v. *The Great Western Rly. Co.* (3), *Tough* v. *North British Rly. Co.* (4), *The King* v. *Broad* (5).

In our own Courts in *Green* v. *C.P.R.* (6), it was held that a railway must use due care with respect to a licensee at a railway crossing. Martin, J.A., (now Chief Justice) at p. 159 states:

* * * when it is stated that a licensee must accept the premises as he finds them and with their "concomitant conditions and, if may be, perils," acts of negligence on the part of the owner or his servants are not included.

Gray had been manager of respondents' Parks Board for twenty-three years. From time to time he had inspected the flagpole when he "made sure everything was all right." In May of 1945 and in the Fall of 1944 the rope from this flagpole was stolen and he arranged to have it replaced by the Fire Department, for which purpose an aerial ladder was used which did not touch the flagpole. There was an intimation that this rope had disappeared on previous occasions but it is not disclosed how it was then replaced, nor throughout the evidence an intimation that a person had ever climbed up this flagpole for any purpose. It is clear, however, that Gray was familiar with the flagpole and was in the park supervising preparations for this celebration both in the morning and afternoon of August 15, 1945.

The standard of care required of the respondents is that which a reasonable man would have exercised in the management and direction of this celebration. A reason-

(1) (1862) 6 L.T. 684.
(2) (1858) 1 F. & F. 361.
(3) (1893) 10 T.L.R. 12.
(4) 1914 S.C. 291.
(5) [1915] A.C. 1110.
(6) [1937] 2 W.W.R. 145.

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able man making preparations for the programme of bombs and fireworks would have, in addition to the precautions taken to erect the fence and provide the men to keep the crowd back from the fireworks, observed the flagpole, the nature of its construction and its proximity to the fireworks. He would have realized that this flagpole was rather easy to climb and boys seeking a point of vantage from which to view the fireworks would do so. Out of a crowd, such as would be in attendance at such a celebration, would be many boys who, if precautions were not taken to prevent them, would endeavour to climb up this flagpole and in doing so not only might they injure themselves but persons close by and even the pole itself. Their weight and conduct on the pole would impose a burden and create stress and strain it was not constructed to withstand. At some point the number of boys would be such as to cause it to give way in one particular or another and effect a partial or a complete collapse. In fact under the weight of the boys the steel struts bent or bowed, and one of the experts stated that ten boys with an average weight of 125 lbs. would cause just such a collapse of this flagpole as in fact occurred. A reasonable man in the position of manager of this park would not be expected to possess such detailed information but he would know the nature and character of the flagpole and that steel struts of the size in this flagpole would, under sufficient weight, bow or bend, and so reduce the strength of the flagpole that it might fall over or collapse. He would therefore upon an occasion such as this take reasonable precautions to prevent boys, not only of tender years but those in their teens, from climbing thereon. Under such circumstances, therefore, Gray should have foreseen this possibility and taken reasonable precautions earlier. In fact at 7.20 that evening he had actual knowledge that boys were climbing this flagpole and admitted that he realized the possibility of injury resulting therefrom. That in itself should have caused him to take appropriate precautions. However, neither earlier, at that time nor at about eight o'clock when he was again apprised of their doing so did he take any steps to prevent the boys from continuing to climb. In the last group of boys some of them were well up the flagpole for ten to fifteen minutes before it fell. Moreover, that evening Gray had in the

park his own men assisting him in keeping the crowd back and in addition there were policemen on duty. Under these circumstances, Gray's not placing a man at or near the flagpole to warn or prevent the boys from climbing or in not taking some other precautions to attain that end left a dangerous condition which might have been removed had he taken reasonable precautions to do so. His failure in this regard constituted negligence. *Ellis* v. *Fulham Borough Council* (1), at p. 225.

This case is distinguishable from that of *Hambourg* v. *The T. Eaton Co. Ltd.* (2), cited by the respondents. There a licensee while playing a piano was injured by the bursting of a lense in a spotlight. The lens was the same as in other bulbs and nothing to indicate or suggest impending danger. It was held that the licensor did not know of any defect in the lens or reason why it should burst and was under no duty to the licensee with respect thereto. In the present case the injury is not due to any defect in the flagpole but rather because boys in attendance at the celebration were, by the negligent conduct of the respondents, permitted to climb thereon and subject the flagpole to a weight and force it was never intended to support. This is a case of the licensee after entering upon the premises being injured by virtue of the negligence of the licensor and therefore comes within the principle of *Gallagher* v. *Humphrey, supra,* and the other cases mentioned.

The injuries suffered by the parties mentioned followed as a direct result of the negligent conduct of the respondents and therefore the fact that it was not one which was foreseen or anticipated is not material. As stated by Lord Justice Scrutton in *In Re Polemis and Furness, Withy & Co.* (3), at p. 577.

> To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no con-

(1) [1938] 1 K.B. 212.
(2) [1935] S.C.R. 430.
(3) [1921] 3 K.B. 560.

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nection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial.

The boys in climbing the flagpole exceeded any licence or permission given to them and were as a consequence trespassers thereon. It was this very trespass that a reasonable man would have foreseen and therefore their conduct in this regard cannot constitute a *novus actus interveniens*: *Haynes* v. *Harwood* (1).

It was contended that, as the presence of the boys was known to all of the injured parties prior to its collapse, their remaining in such close proximity thereof as to be injured in the event of its collapse constituted negligence on their part. The evidence, however, does not warrant such a conclusion. It is true that the boys were seen but it was not established that the parties either knew or had an opportunity to know the nature and character of the flagpole. This flagpole collapsed within about twenty minutes after the fireworks started. Some of the witnesses who were close to it and who had some experience with steel material did realize the danger once they reached a point where they appreciated what was taking place and warned the people nearby. On the other hand, some who were close and saw the struts commence to bend appreciated the danger, but that was just minutes before it collapsed. All this emphasizes that those unfamiliar, as all of the injured parties were, with this type of structure and who had neither time nor opportunity to make such observations as might inform them of the possible consequences could not be reasonably expected to appreciate the danger.

It would appear that respondent Parks Board was, as found by the learned trial Judge, an agent of the respondent City and at the trial judgment was directed against both defendants. No issue was raised in this appeal suggesting that in the event of liability being found judgment was improperly directed against both defendants.

The appellant Willard J. McCormack asked that the damages in the sum of $1,000 awarded for the death of his daughter, who was eighteen years of age, should be increased. The learned trial Judge in determining this

(1) [1935] 1 K.B. 146.

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amount does not appear to have overlooked any factor nor acted upon any wrong principle and therefore I think the amount should not be changed.

The appeal should be allowed with costs and the judgment of the learned trial Judge restored.

Appeal allowed and judgment of trial judge restored with costs throughout.

Solicitors for the appellants: *Bench, Keogh, Rogers & Grass.*

Solicitor for the respondents: *Murton A. Seymour.*

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*June 14
*Oct. 27

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

THE GREAT WESTERN GARMENT COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Salary "free from income tax"—Payment of income tax as part of salary—Bonus—"Rate of salary established and payable"—Income War Tax Act, R.S.C. 1927, c. 97—Excess Profits Tax Act 1940, S. of C. 1940, c. 32—Wartime Salaries Order, P.C. 1549, February 27, 1942.

At a general meeting of the shareholders of the respondent on June 2, 1941, resolutions were passed directing that its general manager and four of its officials as of January 1, 1941, should be paid certain specified amounts as salary "free from income tax", although by the Articles of Association of the company the directors had the power to make such arrangements. Article 103 of the said Articles provided that the directors might from time to time appoint one of their body as managing director; Article 105 provided that the remuneration of the managing director should be fixed by the directors and Article 123 provided that the directors might appoint such managers, secretaries, officers, etc., as they consider necessary and fix their salaries. The resolutions passed by the shareholders remained unchanged, but changes in the Income War Tax Act required that the respondent pay larger amounts as income tax on behalf of each of the officials. In assessing the respondent for income and excess profits tax, the appellant, in 1943 and 1944, disallowed certain sums as "unauthorized salary increases" on the basis that the payments of the increased income taxes represented increases in the "rate of salary" of these officials contrary to section 2 of the Wartime Salaries Order, P.C. 1549, dated February 27, 1942. It was also contended by the Minister that the resolutions were not legally binding upon the

*PRESENT: Rinfret C.J. and Rand, Kellock, Estey and Locke JJ.

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company because they did not conform to the constitution of the company or to the Companies Act. The Exchequer Court held that the resolutions were binding, that the payment of income tax was not a bonus and that the "rate of salary established and payable" was not increased.

Held: The resolutions were valid and binding upon the parties. (Barron *v.* Potter [1914] 1 Ch. 895; Foster *v.* Foster [1916] 1 Ch. 532 and Worcester Corsetry Ltd *v.* Witting [1936] 1 Ch. 640 followed. Kelly *v.* Electrical Construction Co. [1907] 10 O.W.R. 704; Colonial Ass. Co. *v.* Smith [1912] 22 Man. R. 441; Automatic Self Cleansing Filter Syndicate Co. Ltd. *v.* Cunninghame [1906] 2 Ch. 34 and Salmon *v.* Quin [1909] 1 Ch. 311 distinguished).

Held (Kellock and Estey JJ. dissenting): The rate of salary was not increased by maintaining the mode of determining it. (Judgment of the Exchequer Court [1947] Ex. C.R. 458 affirmed).

Per The Chief Justice, Rand and Locke JJ.:—The "rate of salary" in this case was that determined by a mathematical computation in which one of the factors was the variable scale of income tax rates; the words "rate of salary" are to be interpreted as meaning the salary arrangement and not the quantum of the salary.

Per Kellock and Estey JJ. (dissenting):—The salary rate "established and payable" was the amount per annum which the respondent was paying the employee, and therefore the payment of additional amounts by reason of an increase in income tax rates over and above the rate existing on November 6, 1941, falls within the prohibition of sec. 2 (*a*) of the Order.

On the question as to whether the payment of income tax could be regarded as a bonus within the meaning of sec. 2 (*d*) of the Order, The Chief Justice, Rand and Kellock JJ. expressed no opinion while Estey and Locke JJ. held that it was not a bonus. Even assuming that it was a bonus, The Chief Justice and Rand J. held that it would fall within the exception of sec. 2 (*d*) (*i*) (Kellock and Estey JJ. Contra).

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1), maintaining an appeal from the decision of the Minister of National Revenue confirming respondent's assessment levied upon him for the taxation years 1943 and 1944 under the provisions of The Income War Tax Act and The Excess Profits Tax Act.

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

W. R. Jackett and *E. S. MacLatchy* for the appellant.

G. H. Steer K.C. for the respondent.

(1) [1947] Ex. C.R. 458.

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

RAND J.—This appeal raises the question whether a "salary free from income tax" when it amounts to more than that actually received in the basic year is contrary to the provisions of the Wartime Salaries Order P.C. 1549.

The preamble to the Order recites its purpose of "stabilizing the rates of managerial and executive salaries paid during wartime in the same general way as wage rates are stabilized under the Wartime Wages and Cost of Living Bonus Order."

Clause 1 (*c*) defines "salary" to include "wages, salaries, bonuses, gratuities, emoluments or other remuneration, including any share of profits or bonuses dependent upon the profits of the employer . . ." Under a proviso, a salesman's commission is not deemed to be a salary.

Clause 2 (*a*) forbids an employer to "increase the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941 . . ." Paragraph (*d*) forbids him to "pay as bonus (which . . . shall include gratuities and shares of profits, but . . . not . . . cost of living bonus) a larger total amount to any one salaried official during any year following November 6, 1941, than the total amount paid to the said salaried official as bonus in the base year; provided that,

(1) Where the salaried official has a contractual right evidenced in writing which existed at November 6, 1941 to receive such a bonus, defined as a fixed percentage of or in fixed ratio to his salary, the profits of the business or the amount of sales, output or turnover of the business, the employer may continue to pay the said bonus at the same fixed percentage or ratio as that contracted for previous to November 7, 1941.

Some question was raised as to the sufficiency of the resolution passed by the shareholders authorizing the salary for officials who were also directors, but I think it was clearly shown on the argument that there was no substance in the point.

What the Order does is not to fix the quantum of remuneration but in contradistinction to fix the rates at which the remuneration is paid, an effect which the language of clause 2 (*a*) "the rate of salary paid" seems to me to place beyond doubt. I cannot imagine why the words "rate of" should have been added to the word "salary" if

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they were not intended to be significant. In the fluctuating bonus under clause 2 (*d*), increases in the actual amount are expressly contemplated; and considering the operation in 1942 and subsequent years of a bonus based upon a percentage of profits, sales, or output, any doubt as to the underlying intention disappears.

That the rate of salary in this case was that determined by a mathematical computation in which one of the factors was the variable scale of income tax rates is perfectly clear. The official, in reporting his income, must have shown such a sum as with the tax referable to it deducted would leave a balance of $15,000. The salary is thus fluctuating, but if the amount received in 1941 is taken as the rate, an entirely new form is given to it. The words of the Order must be taken to envisage different salary bases, and that here is not of an unusual nature. A specific sum related indefinitely to a unit of time is itself the rate for that period and is ordinarily referred to as the salary; but an increase in such a rate is to be distinguished from an increase or decrease in amount when the latter is the function of a variable; in that case the rate cannot be expressed otherwise than in terms of a mathematical relation.

It was contended that that portion of the salary representing the tax was a bonus within clause 2(*d*). Even assuming this to be so, I would agree with Mr. Steer that it is within the first proviso. It would be a bonus "in fixed ratio to" the salary. These mathematical expressions in the proviso must be interpreted in the context and scheme of the Order, and I see no difference in the intention between a fixed percentage, say, related to a variable quantity and a variable factor applied to a fixed quantity. In each case there is a fixed ratio within the language used.

I am, therefore, of opinion that the rate of salary has not been increased by maintaining the mode of determining it and that the appeal must be dismissed with costs.

KELLOCK J. (dissenting):—The question for decision on this appeal turns upon the meaning of the words "rate of salary" in paragraph 2(*a*) of P.C. 1549 of the 27th of February, 1942.

By paragraph 2 of the Order here in question an employer, unless otherwise permitted by paragraphs 3, 4 and 5, is prohibited on or after November 7, 1941, from increasing "the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941 . . ."

It is contended on behalf of the respondent that the "rate of salary" in the case of a managing director, to take the case of one employee as an example, was on the 6th day of November, 1941, $15,000 per year, plus income tax, and that although the tax has been increased by reason of legislation since that time, the rate of salary has remained the same and payment by the respondent of the net sum of $15,000 has involved no increase in the rate within the meaning of the Order. On the other hand, it is contended on behalf of the appellant that the rate of salary "established and payable" on the relevant date was the yearly sum actually being paid by the respondent to the employee inclusive of income tax during the relevant year.

The Order by paragraph 1 (*c*) expressly provides that "salary" shall include "payments to persons other than the employee in respect of services rendered by the employee" so that "salary" within the meaning of the Order includes any amount paid in respect of the employee's income tax.

In its recital the Order refers to the earlier Order replaced by P.C. 1549 and the fact that the earlier Order was made for the purpose of stabilizing the "rates" of managerial and executive salaries paid during wartime in the same general way as wage rates are stabilized under the Wartime Wages and Cost of Living Bonus Order, and permitting the payment of a specified cost of living bonus to salaried officials earning less than $3,000 per year.

It is further recited that it has been found that the earlier Order bears more severely than intended upon industries engaged in war production which, by reason of the fact that many of them were in the process of organization or expansion during the period before the earlier Order came into effect had not had sufficient opportunity to "adjust the salaries" of their officials and the Minister of

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Munitions and Supply was of opinion that there would be serious interference with such industries if some provision was not made for "adjustments in salaries."

It is also recited that it is desirable to permit, under certain circumstances, the "adjustment of the salary rate" payable to a salaried official, appointed or promoted after January 1, 1941.

So far as the recital is concerned there would appear therefore to be no distinction drawn so far as the object of the Order is concerned between "adjustment of salaries" and "adjustment of the salary rate" or the "rate of salary."

In my opinion the most recent "salary rate established and payable" prior to November 7, 1941, in paragraph 2 (*a*) means the amount per month or per year the official is actually receiving at that time. Under the contract referred to above the respondent had agreed to pay the employee a "salary of fifteen thousand ($15,000) dollars per year as from January 1, 1941, free from income tax."

In my opinion the meaning of this contract was an agreement to pay a salary at the rate of $15,000 per year with a covenant to indemnify the employee against income tax not only at the existing rates but at any rate which might be authorized by Parliament during the term of the contract. The salary rate *"established* and *payable"* was, however, the amount per annum which the respondent was then actually paying the employee, namely, $15,000 plus the tax at the then existing rate. An examination of other provisions of the order, in my opinion, bears out this view.

By paragraph 1(*b*) "salaried official" includes every employee above the rank of foreman or comparable rank and for the purpose of the order any employee *"receiving"* salary or wages (excluding cost of living bonus) at a rate of less than $175 per month, is to be deemed not above the rank of foreman or comparable rank.

If the employee under the contract referred to above were entitled say, to $1,200 per year, free from income tax, instead of, as the fact is to $15,000, then, in order to determine whether or not he came within the definition, assuming the existence of no guide to determine the question other than the amount of remuneration, if the actual salary of $1,200, together with the income tax at the then existing rate amounted together to less than $2,100, the

provisions of paragraph 2(*a*) would not, in my opinion, apply to that employee at all as the prohibition of that paragraph refers only to payments to "salaried officials". It seems clear, therefore, that the amount of the salary actually being paid on November 6, 1941, is what is dealt with in paragraph 2(*a*). "Salary" is really meaningless without reference to some period of time with respect to which it is payable. In my opinion "salary" involves in its very nature not only the idea of amount but also the period with respect to which the amount has reference, in other words, rate, and when paragraph 2(*a*) speaks of a rate of salary "established and payable" prior to November 7, 1941, it means the same thing as is dealt with by paragraph 3(*d*), namely: "salary level . . . established at November 6, 1941," and the same thing as the "level of salaries paid" in paragraph 3(*a*).

Had the official above referred to been granted an increase in "salary rate" under paragraph 3(*a*), then, by reason of clause (*d*) of that paragraph the increase in "salary" would have resulted in a new salary "level" as if it had been "established" at November 6, 1941. In my view this clause would, in such case, operate to prevent thereafter the official here in question from receiving in *amount* anything more than the amount he was receiving at the time of the increase, plus the increase itself. Any subsequent increase in income tax would therefore clearly fall upon the employee and the employer would be prohibited from paying it. If that be so, the same applies to the "salary level" actually being received by the employee on November 6, 1941.

Again, by paragraph 4, provision is made for payment of a cost of living bonus in certain cases and it is provided by clause (*b*) of that paragraph that if the salary rate "payable" to a salaried official on November 6, 1941, included a cost of living bonus determined in a certain manner an additional amount of bonus may be paid and "the total salary, including such added amount of bonus shall be regarded for the purposes of this Order as the rate of salary in effect at November 6, 1941."

While the provisions of this clause apply to a specific case it expressly proceeds upon the same view of the Order as that already referred to in dealing with paragraph 3,

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namely, that the "salary rate established and payable" prior to November 7, 1941, is the amount per annum, or per month or per week, or whatever the period may be, actually being paid by the employer and received by the employee.

In my view therefore the payment by the respondent of additional amounts by reason of an increase in income tax rates over and above the rate existing on November 6, 1941, falls within the prohibition of the Order. I think that the words "no employer shall on or after November 7, 1941, increase" the rate means no employer shall "pay more than."

If the tax could be regarded as "bonus" within the meaning of paragraph 2(*d*), that clause prohibits payment of a larger amount of bonus than that paid to the same official in the base year, provided that where the bonus is covered by a contract evidenced in writing, in existence on November 6, 1941, the right to such bonus is preserved where it is defined as a "fixed" percentage of, or in a "fixed" ratio to the salary. In my opinion the "fixed percentage" and the "fixed ratio" are complementary and a tax in the later year which is 33⅓ per cent of $15,000 (the net amount actually received by the employee) is not in fixed ratio to a tax of 20 per cent of the same amount. Neither is the tax a fixed percentage of the salary but rather a percentage which fluctuates.

There is no difficulty created by the existence of a contract made prior to November 6, 1941, in view of the provisions of paragraph 9 of the Order.

In my opinion the appeal succeeds and should be allowed with costs here and below.

ESTEY J. (dissenting):—At a general meeting of the shareholders of the respondent on June 2, 1941, resolutions were passed directing that its general manager and four of its officials as of January 1, 1941, should be paid certain specified amounts as salary "free from income tax."

These resolutions remained unchanged at all times material hereto, but changes in the *Income War Tax Act* required that the respondent pay larger amounts as income tax on behalf of each of the officials. This practice of paying the income taxes of certain of its officials had existed

for many years prior to the outbreak of war, respondent's method being to deduct the salary, as that term is used in the above-mentioned resolutions, plus the amount paid on account of its officials' income taxes, as expenses in computing its profits. The amounts (hereinafter set out) paid for the years here in question were so treated and were included in the tax returns as filed under the item "Salaries including Plant and Sales Supervision."

In assessing the respondent for income and excess profits tax the taxing authorities in 1943 disallowed the sum of $30,791.97 as "unauthorized salary increases," and on the same basis in 1944 the sum of $26,868.34. These disallowances were made on the basis that the payments of the increased income taxes represented increases in "the rate of Salary" of these officials contrary to the provisions of Wartime Salaries Order P.C. 1549, dated February 27, 1942. The decision to disallow these amounts was reversed in the Exchequer Court (1) and the Minister of National Revenue appeals from the judgment of that Court. No question is raised as to the computation of the amounts nor the fact that they were paid consequent upon increases in the income tax.

P.C. 1549 consolidates and amends the Wartime Salaries Order P.C. 9298, dated November 27, 1941. It recites that P.C. 9298 was "for the purpose of stabilizing the rates of managerial and executive salaries paid during wartime . . .," that this Order "bears with special and unintended severity upon industries engaged in the production, repairing and servicing of war supplies," and that "serious interference with and loss of production in war industries may result if some provision is not made whereby adjustments in salaries can be made in proper cases," and that it is desirable that the adjustment of salaries in certain cases should be made. These recitals clearly evidence that this Order P.C. 1549 was passed with the purpose and intent of stabilizing managerial and executive salaries but to provide for such adjustments as may be necessary to assist war production. This Order P.C. 1549 provides in para. 7:

7. The amount of any salary, found by the Minister of National Revenue to have been paid in excess of the amounts permitted by this Order or to have been paid in violation of this Order, shall be deemed

(1) [1947] Ex. C.R. 458.

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to be an unreasonable and abnormal expense of the employer for all purposes including the purposes of the Income War Tax Act and The Excess Profits Tax Act 1940, and pursuant to subsection (2) of Section 6 of the Income War Tax Act 1940, such amount shall be disallowed as an expense of the employer in assessing the employer's profits subject to taxation under the said Acts.

The shareholders' resolutions embodied the respondent's obligations as employer to remunerate or pay these officials. Each of the latter was entitled both to the salary, as that term was used in the resolutions, and to the payment of his income tax as consideration for his services to the respondent. The latter, in paying the income tax, discharged a liability to each of the officials and thereby provided to them a benefit or gain just as effectively as if they had received that added amount from the respondent and used it in payment of their respective income taxes.

The term "salary" is defined in P.C. 1549 as follows:

1. For the purpose of this Order, unless the context otherwise requires,

. . . . . .

(*c*) "Salary" shall include wages, salaries, bonuses, gratuities, emoluments or other remuneration . . . and shall include payments to persons other than the employee in respect of services rendered by the employee . . .

The word "emolument" is defined in the Oxford Dictionary:

Profit or gain arising from station, office, or employment; dues, reward, remuneration, salary.

Webster's Dictionary includes the word "compensation." The payment of the income tax was either a gain or a part of the remuneration realized by these officials arising out of their employment. It would seem to follow that the scope and meaning of the phrase "emoluments or other remuneration" is sufficiently wide and comprehensive to include the payment of the officials' income taxes by the respondent to the Receiver General of Canada within the definition of "salary" in para. 1(*c*) of P.C. 1549. Moreover, this definition contemplates just such a payment as here made on behalf of the officials to the Receiver General of Canada.

Then para. 2(*a*) of P.C. 1549 provides:

2. Unless otherwise permitted by paragraphs 3, 4 and 5 hereof, no employer shall, on or after November 7, 1941:

(*a*) increase the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941, or if no rate of salary for a particular salaried official

were established and payable prior to November 7 because the said salaried official was not employed by the employer prior to the said date, increase the rate of salary above the rate of salary first payable to the said salaried official.

A cost of living bonus established and payable prior to November 7, 1941, shall be regarded as part of the rate of salary established and payable to a salaried official prior to the said date, and as such may continue to be paid at the same rate, but may not subsequently be increased by reason of any increase in the cost of living index unless permitted by paragraph 4 hereof.

The foregoing provision "no employer shall, on or after November 7, 1941, increase the rate of salary paid to a salaried official" is imperative. Thereafter an employer must not increase the rate of the employee's salary whether that increase be called for under the terms of an existing contract or however it may be provided for. This view is in accord with para. 9 under which the employer is protected against the enforcement of "an increase in the rate of salary" where such is provided for in an agreemnt. Para. 9 reads as follows:

9. No agreement providing for an increase in the rate of salary above the rate payable at November 6, 1941, shall be enforceable in respect of such increase except and to the extent that such increase is within the amount that may be permitted by paragraphs 3 or 4 hereof, and no action shall lie against any person for breach of contract for complying with the provisions of this Order or for refusing to pay any salary in excess of the amount permitted by this Order.

The issue largely turns upon the meaning of the phrase "rate of salary" where it precedes the word "paid" in para. 2(*a*). In the second paragraph of 2(*a*) it is provided that a cost of living bonus established prior to November 7, 1941, shall be regarded as part of the rate of salary. This in itself indicates that it is the total salary paid in the year or other period prior to November 7th that is expressed in terms of a rate of salary paid that is stabilized by this Order.

Paragraphs 3, 4 and 5 provide for adjustments as exceptions to the general prohibition in para. 2. In para. 3(*a*) in respect to promotions and new appointments the Minister of National Revenue may approve certain increases in the rate of salary, subject to a proviso "that the total salary including the increase is not higher than the level of salaries paid to salaried officials for similar services in like businesses." In 3(*b*) the Minister may "authorize a temporary increase in salary and subsequently one further

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increase, . . . provided that the increased rate of salary ultimately payable shall not be higher than the limit mentioned . . ." in 2(*b*). In that paragraph 2(*b*) the limit is expressed "no employer shall . . . pay . . . a rate of salary higher than the rate previously paid . . ." In para. 3(*c*) the phrase "rate of salary" is used throughout. Then in 3(*d*) it is provided:

> 3. (*d*) After any increase in salary has been approved in accordance with sub-paragraph (*a*), (*b*) or (*c*) of this paragraph and a new salary level so established, the provisions of this Order shall apply to the said salary level from the effective date of that increase as if it had been established at November 6, 1941.

The new salary level referred to in para. 3(*d*) is the rate of salary prior to November 7, 1941, plus the increase "in the rate of salary" under 3(*a*), or the "temporary increase in salary" and one further increase if there be one under 3(*b*), or in the "rate of salary" under 3(*c*). The new salary level is the amount of the actual salary or salaries paid, including the foregoing increases, and thereafter the provisions of this Order apply as if these increases, though only payable from the "effective date," had been established at November 6, 1941, and therefore the prohibition in para. 2 would thereafter apply. It seems to follow that with every increase in the amount paid a new rate of salary is established. In every case it is the amount of salary paid to the officials which is expressed in terms of a rate.

Then para. 4 provides that in certain cases, without the approval of the Minister of National Revenue, an employer may pay a cost of living bonus, subject to the limitations included in that paragraph. In 4(*b*) it is provided that "if the salary rate payable to a salaried official on November 6, 1941, included a cost of living bonus . . . there may be added to such bonus an amount based . . . on the rise in the index number for October 1, 1941 . . . and the total salary including such added amount of bonus shall be regarded, for the purposes of this Order, as the rate of salary in effect at November 6, 1941."

The language in this paragraph appears to express even more clearly than in para. 3 that the new rate of salary is the salary paid prior to November 6, 1941, plus additions permitted thereafter, or the total of these, expressed in terms of a rate. It should be noted in this connection that the phrase "total salary" appears also in para. 3(*a*).

In para. 5(*a*) the Minister of National Revenue may approve of an increase "in the rate of salary paid," and then in 5(*b*) "no payment of an increase in salary pursuant to the provisions of this paragraph . . . until notification has been received by the employer . . . that an increase in salary has been approved and the amount thereof." It is significant in this paragraph that the only approval provided for is that of an increase "in the rate of salary paid," and yet in para. (*b*) it is "an increase in salary" which has been approved and the amount thereof.

In the foregoing summary such phrases as "total salary" and "new salary level" are expressions synonymous with the phrase the amount of salary. Then in para. 5 the phrase "increase in salary" is synonymous with an increase in the "rate of salary."

Moreover, in para. 6 it is provided that "any employer . . . who pays or contracts to pay a salaried official a salary in violation of any provision of this Order . . ." The phrase "rate of salary" is not mentioned in this para. 6 and yet it is the increase in the rate of salary that is prohibited in 2(*a*). It must follow that the word "salary" as used in this paragraph means the rate of salary.

It would be present to the minds of those passing this Order for general application throughout Canada that the salaries paid and subject thereto would be expressed in many ways. In order that there might be a common basis for comparison, it was provided that however expressed as between the employer and the salaried official, the total salary paid should, for the purposes of this Order, be expressed in terms of a rate. It is that salary so expressed that is stabilized. It is the total salary paid subsequent to the 6th of November, 1941, and expressed in terms of a rate that is compared with the total salary so expressed and paid prior thereto.

The salary contracts as evidenced by the above-mentioned resolutions were not expressed in terms of a rate. It cannot be doubted but that the parties in effecting such an agreement in 1941, under the circumstances of war, would have in mind the possibility of changes in the income tax. Under this Order it is the total of the two sums (that paid and styled as salary and that paid as income tax) that constitutes the rate of salary paid, and it is that rate which

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is stabilized. If the total of these two sums in subsequent years is increased then within the meaning of this Order the rate of salary paid is increased. In fact this Order by its express terms is only concerned with the contractual relations between the parties in order to ascertain the total paid as salary in the period prior to November 7, 1941, and in so far as its provisions for future increases may be contrary to this Order.

The position of the appellant is identical with an employer who agreed on January 1, 1941, to pay his manager a fixed amount as salary and an annual increase to be determined in each year. Under this Order as each increase was paid a new rate of salary would be established. A perusal of the terms of this Order, and particularly the use of the words "paid" and "payable" in para. 2(*a*) and 9, indicates that it is the actual amount paid as salary prior to November 7, 1941, expressed in terms of a rate that is stabilized.

The foregoing construction of the above-quoted para. 2(*a*) not only appears to give to the words their literal meaning but is consonant with the express purpose of the Order. *Reigate Rural Dist. Council* v. *Sutton Dist. Water Co.* (1); *Re George Edwin Gray* (2).

In *McBratney* v. *McBratney* (3), Duff, J., (later Chief Justice), after referring to the language in a statute, continued:

> Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; and if one finds there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it.

Moreover, it would seem that under the terms of sec. 9 these officials could only enforce payment of their salaries up to the amount computed on the basis of the rate of their respective salaries as it obtained prior to November 7, 1941.

The total salary paid to each official expressed in the terms of a rate of salary paid per year in each of the years

(1) 99 L.T. 168 at 170.
(2) (1918) 57 S.C.R. 150 at 169.
(3) (1919) 59 S.C.R. 550 at 561.

here in question was greater than the rate paid in the basic period and therefore contrary to the provisions of para. 2(*a*). The increases were, as a consequence, properly disallowed by the Minister under para. 7, *supra*.

I am in agreement with the learned trial Judge (1) that the payments here made to the Receiver General of Canada were not by way of a bonus. The word "bonus" may have many meanings and as used in statutes has been variously defined. See *Ward* v. *City of Edmonton* (2); *Colonial Investment Co.* v. *Borland* (3), affirmed 6 D.L.R. 211. It is not defined in Order P.C. 1549, but as used it does not appear to have any other than its usual and ordinary dictionary significance. There it imports an extra or additional payment by way of an inducement or reward for some undertaking or effort. The contract here provides for the payment of the income tax without regard to the success or achievements of the business as a whole, or to the efforts or attainments of the individual official. It is a contractual salary obligation on the part of the respondent payable in any event and irrespective of whether the business realized a profit or attained any particular objective in a given year. If, however, the payment to the Receiver General of Canada could be regarded as a bonus within the meaning of Order P.C. 1549, then it is specifically prohibited by para. 2(*d*) and it does not come within any of the exceptions of para. 2(*d*) (i), 2(*d*) (ii) or 2(*d*) (iii).

I agree that the above-mentioned resolutions relative to the payment of the officials' income taxes passed by the shareholders and acted upon by the respondent were valid.

The appeal should be allowed with costs.

LOCKE, J.:—By paragraph (*a*) of section 2 of the Wartime Salaries Order, P.C. 1549, it was provided that no employer should on or after November 7, 1941 "increase the rate of salary paid to a salaried official above the most recent salary rate established and payable prior to November 7, 1941", and paragraph 7 of that Order provided that the amount of any salary found by the Minister to have been paid in excess of the amounts permitted by the Order should be deemed an unreasonable and abnormal expense of the employer for the purposes of the *Income War Tax*

(1) [1947] Ex. C.R. 458.
(2) [1932] 3 W.W.R. 451.
(3) [1911] 1 W.W.R. 171.

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Act and the *Excess Profits Tax Act,* 1940. It was on the footing that the increased amounts which became payable to Messrs. Jacox, McAulay, Sutcliffe, Shaw and Roscoe for the years 1943 and 1944, by reason of the increase in the income tax rate, contravened the provisions of section 2 that the Minister disallowed them under subsection 2 of section 6 of the *Income War Tax Act.* On the appeal to the Exchequer Court (1) an order was made for the delivery of pleadings, and upon this being done an issue was raised by the Minister as to whether the arrangements for the remuneration of these five persons said to have been authorized by the shareholders' resolution of June 2, 1941, or to have become otherwise binding upon the company were in fact legally binding upon it. I do not feel called upon to decide whether, under the wording of paragraph (*a*) of section 2 of the Wartime Salaries Order, it was incumbent upon the taxpayer to do more than to establish that the salary rates in question were treated both by the company and its employees as binding upon both of them and that both acted upon the assumption that they were so binding, but propose to deal with the matter on the footing that the Crown is entitled to rely upon any non-compliance with the Articles of Association of the company or of the *Alberta Companies Act* which might render these employment contracts unenforceable.

The respondent company was incorporated by Memorandum of Association under the *Alberta Companies Act* in November, 1910. C. D. Jacox was employed by the company in the capacity of general manager in February, 1931, the arrangement being made with him by the then managing director, C. A. Graham. There was no written contract and the matter was not considered by the Board of Directors. R. W. Roscoe, the present Secretary of the company was employed on May 1, 1941, the arrangement being made with him by Mr. Jacox on behalf of the company, and his remuneration being agreed upon at $3,600 a year, free of income tax, without the intervention of the directors. Mr. Graham had died in December, 1940, and the position of managing director had not been filled at the time of the employment of Roscoe. W. A. McAulay was employed by the company as sales manager and had originally been

(1) [1947] Ex. C.R. 458.

employed by Graham when the latter was managing director. W. B. Shaw was the factory superintendent and F. B. Sutcliffe was the secretary-treasurer of the company but the evidence is silent as to the manner in which they were engaged.

Different considerations apply in determining the position of Jacox who became the managing director in 1941 and those of the remaining four employees. Dealing first with the case of Jacox: Article 103 of the Articles of Association provided that the directors might from time to time appoint one of their body as managing director, and article 105 that the remuneration of the managing director "shall from time to time be fixed by the directors and may be by way of salary or commission or participation in profits or by way of all of these modes." On May 10, 1941, Sutcliffe as secretary sent out notices calling the annual general meeting of the ordinary shareholders for the 2nd of June, the purposes of the meeting being stated to be to receive the report of the auditors for the year ending December 31, 1940, and to elect the directors and auditors of the company for the ensuing year. On May 23rd a further notice was sent by the secretary to the shareholders, giving notice that further business would be proposed, namely, to appoint Jacox managing director of the company at a salary of $15,000 per year, free from income tax, to be effective as from January 1, 1941, and to provide that the salaries of McAulay, Sutcliffe, Shaw and Roscoe as then in effect be free of income tax and subject to adjustment from time to time at the discretion of the managing director effective as from the same date. No explanation was given in the evidence as to the reason for asking the shareholders either to appoint the managing director or to fix his remuneration. As to the other four, however, Jacox said that while he could have made the new arrangements with them on behalf of the company he thought that since they were changing the basis of pay it was a reasonable thing to have the matter determined by the shareholders, and it may perhaps be assumed that it was for the same reason that the new arrangement to be made with him was submitted to them. All of the shareholders other than Northwest Securities Corporation Ltd. were present at the meeting either in person or by proxy:

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in the case of that company McAulay, the Vice-President, was apparently authorized to act on its behalf and represented it and the resolutions were unanimously adopted. Jacox, McAulay, Sutcliffe and Shaw had been directors for the past year and were all re-elected. At a meeting of the newly elected board held later on the same day Mr. Jacox was elected President and appointed Managing Director and Messrs. McAulay and Sutcliffe were re-elected as Vice-President and Secretary respectively. The minutes are silent as to the remuneration of Jacox and of the other four officials. The respondent company acted upon the authority of the resolutions and paid Jacox and the others on the basis authorized, a procedure which was apparently considered by the directors at a meeting held on September 24, 1941, when a statement giving detailed records of the operations of the company for the eight months ending August 1941 was read and discussed and apparently approved. The evidence is very meagre as to what took place at this meeting which may be accounted for by the fact that Mr. Sutcliffe, the Secretary, had died some time before the trial but apparently all the figures showing the expenses of operation were available to the directors and these would show that monthly instalments of income tax were being paid on behalf of Jacox and the others in the manner authorized. On March 2, 1942, at a further meeting of the directors the auditor's statement which showed expenditures for salaries, including, without detailing them, the amounts paid for income tax on behalf of Jacox and the others, was approved by the Board and it was made clear from the evidence of Mr. Evans, one of the two directors appointed to represent the preferred shareholders, that all of the directors were aware of and approved the arrangements which the shareholders had purported to authorize in the previous June.

The Companies Act of Alberta does not deal with the question as to whether contracts of this nature are to be made or authorized by the directors or by the shareholders, so that the principles upon which such cases as *Kelly* v. *Electrical Construction Company* (1) and *Colonial Assurance Company* v. *Smith* (2) were decided are inapplicable. Nor is this a case where there is a conflict as to the respec-

(1) (1907) 10 O.W.R. 704. (2) (1912) 22 Man. R. 441.

tive rights of the shareholders and the directors to deal with the matter, such as in *Automatic Self Cleansing Filter Syndicate Co. Ltd.* v. *Cuninghame* (1) and *Salmon* v. *Quin* (2). Here I think it is a proper inference from the evidence that the directors were unwilling to exercise the authority given to them and that it was at their request that the matter was submitted to and dealt with by the shareholders and I think the resolutions so passed were binding upon the company. *Barron* v. *Potter* (3); *Foster* v. *Foster* (4); *Worcester Corsetry Ltd.* v. *Witting* (5), Lawrence, L.J. at 651, 652. Article 105 authorizing the directors to fix the remuneration of the managing director does not require them to deal with the matter by resolution, or to contract in the company's name in any particular form. While the company was, in my opinion, obligated by the passing of the resolution, if there were doubt as to this the arrangement authorized should be taken to have been ratified and confirmed by the directors at their meetings of September 24, 1941, and March 2, 1942, and having been acted on by both parties bound both of them.

Different considerations apply in the case of McAulay, Sutcliffe. Shaw and Roscoe. Article 123 provided that without prejudice to the general powers conferred upon the directors to manage the business of the company they might appoint such managers, secretaries, officers, clerks, agents and servants as they consider necessary for the conduct of the company's affairs and fix their salaries. Jacox said that he had the power to employ these men and fix their remuneration without reference to the Board and it was clear that in the case of Roscoe he did so. The action of Graham in employing Jacox as general manager in 1931 and Shaw at a later date, without the intervention of the Board, indicates, in my opinion, that the officer managing the company's business was entrusted by the Board with the power to employ and fix the remuneration of other employees of the company. Since McAulay, Sutcliffe and Shaw were directors, apparently Mr. Jacox considered it proper to obtain the authority of the shareholders and, as in the case of his own arrangement, this was done with the authority and approval of the directors. The arrange-

(1) [1906] 2 Ch. 34.
(2) [1909] 1 Ch. 311; [1909] A.C. 442.
(3) [1914] 1 Ch. 895.
(4) [1916] 1 Ch. 532, 551.
(5) [1936] 1 Ch. 640.

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Locke J.

ment so authorized was acted upon by these employees and by the company and the directors at the meetings referred to, approved and ratified the arrangements. I have no doubt that upon these facts the respondent company became liable to pay the salaries agreed upon and such additional amount as these individuals might be required to pay as income tax under the arrangement.

The prohibition in paragraph (*a*) of section 2 of the Wartime Salaries Order is against increasing the rate of salary paid to a salaried official. The arrangements in question here were made prior to November 7, 1941, and made effective as from January 1st of that year. The arrangement in the case of each of the five officials was that they should be paid fixed amounts free of income tax. The amount to be paid each under this arrangement was materially increased by amendments to the *Income War Tax Act* made after the year 1941 increasing rates of taxation upon individual incomes. It is contended on behalf of the Minister that the expression "rate of salary" should be interpreted as meaning the amount of the salary. I think that this is not the meaning to be assigned to the expression. In my opinion the words "rate of salary" are to be interpreted as meaning the salary arrangement. I think whether the employment contract provided remuneration at the rate, say, of $1,000 a year or $1,000 and 500 bushels of wheat or $1,000 plus an amount sufficient to pay the employees' income tax, each arrangement would be described in ordinary language as the rate of salary. I think further that if the arrangement was for a payment partly in cash and partly in kind such as $1,000 in cash and 500 bushels of wheat, an increase in the market value of wheat in subsequent years would not be an increase in the salary rate, and that if the contract required the employer to also pay an amount sufficient to pay the employees' income tax the rate is not changed if Parliament in later years increases the amount of the taxation. I think it is significant that in paragraph (*d*) of section 2 of the Order the prohibition is against paying a "larger total amount" as bonus during any year following November 6, 1941, than the total amount paid as bonus in the base year, with certain exceptions. Had it been intended to

prohibit an increase in the amount of salary rather than to prohibit a change in the salary arrangement paragraph (*a*) would have been so worded.

It was further contended that the agreement to pay the amount of the income tax was a bonus within paragraph (*d*) of the Order. That paragraph says that the word "bonus" for the purpose of the subparagraph shall include gratuities and shares of profits and the arrangement in question is neither one nor the other. It cannot be said that an amount payable to an employee pursuant to the terms of a contract is a gratuity.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Fisher.*

Solicitors for the respondent: *Milner, Steer, Dyde, Poirier, Martland & Layton.*

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The accused agreed to sell them for Ward and they were delivered by Ward to the accused at the Low Level Service Station in Edmonton in a truck bearing the letters R.C.A.F. on the door. The six tires sold by the accused were recovered and all the others were recovered either at his house or at the service station. *Held:* This was not a conviction on the uncorroborated evidence of an accomplice. *Held:* The conduct of the accused and the circumstances under which he received and disposed of the tires established his guilt, and even if the trial judge's direction lacked that precision which the law contemplates, no substantial wrong or miscarriage of justice had occurred under section 1014 Cr. Code. *Held:* The remarks made by the trial judge in the course of his passing sentence, even if he had them in mind when considering his verdict, would not, in the circumstances, warrant a setting aside of the conviction. LOPATINSKY v. THE KING..... **220**

3.——*Accused charged of murder entitled to have all his defences adequately put to jury by trial judge—Appellant conspired with two others to hold up and rob bank, when block away turned back, were intercepted by police and appellant disarmed—Companion attempting to escape killed policeman—Whether appellant party to offence of murder within meaning of S. 69 (2) Criminal Code, or had abandoned common intention to prosecute unlawful purpose—Whether such common intention was (a) attempt to rob bank; (b) to resist arrest by violence and assist each other in doing so; or (c) conspiracy to rob bank—Whether trial judge erred in charging jury appellant guilty of an attempt to rob bank within meaning of S. 72 (2) of Criminal Code.*—The appellant together with M and C, each having provided himself with a revolver and ammunition, proceeded in a motor car to hold up and rob a bank. The police having learned of the plot had parked a police car near the bank. When the trio were a short distance from it they turned the car about, abandoned it about a mile away, and walked to some railway tracks. They were there intercepted by two policemen in plain clothes who escorted them back to a detective also in plain clothes. The latter after asking the appellant his name and receiving no reply, noticed the appellant's revolver and took it from him without resistance, objection or protest. At this moment the suspects, who were standing in line, sprang in different directions, the police giving chase. M in his flight turned and shot his pursuer. The police returned the fire. As a result of the shooting, C and the two policemen were killed, M and the detective, wounded. The appellant took no part in the shooting but in his flight joined M and was subsequently arrested while hiding with him. M and the appellant were charged jointly with the murder of the policeman shot by M, but were tried separately, and both

found guilty. M was executed and the present appeal is from the conviction of the appellant. *Held:* The appellant was entitled to have each of his defences adequately put to the jury by the trial judge, and since this was not done with regard to his principal defence, that of abandonment (Kerwin J. dubitante), there should be a new trial. *Per* Kerwin, Estey and Locke JJ.: There was evidence upon which the jury might properly find that there had been an attempt to commit an offence within the meaning of S. 72 of the *Criminal Code*. *Per* Kerwin J.: Such offence constituted an attempt to rob the bank and in leaving the question to the jury, the trial judge did not prejudice the accused. *Per* Taschereau and Kellock JJ.: The question was, whether on the evidence the trio had sufficient reason for thinking they had rendered themselves liable to arrest and had determined to resist to the extent of using violence if necessary. It was open to the jury on the evidence to conclude that the appellant at the time of the shooting was a party to the prosecution of an unlawful purpose; it was also open to them to come to a contrary conclusion, if they were of opinion that even had there been an earlier unlawful intention, it had, so far as the appellant was concerned, been abandoned. Before the appellant could be convicted it was essential that these alternatives should have been put to the jury by the trial judge from the standpoint of the Defence as well as the Crown, which was not done. *Per* Taschereau J.: The conspiracy to rob the bank was complete and this in itself was a crime, but the subsequent facts revealed by the evidence did not show the essential ingredients of an attempt to rob the bank within the meaning of S. 72 of the *Criminal Code*. An intent, an act of preparation, and an attempt, must not be confused. A mere intent is not punishable in criminal law, even if coupled with an act of preparation. *Reg.* v. *Eagleton*, Dears C.C. 515; It cannot be held that the mere fact of going to a place where the contemplated crime is to be committed, constitutes an attempt. There must be a closer relation between the victim and the author of the crime; there must be an act done which displays not only a preparation for an attempt, but a commencement of execution, a step in the commission of the actual crime itself. The trial judge erred in charging the jury that "they could be prosecuted for attempting to rob a bank" and "the attempt is complete when they take any steps in connection with it." This confused the issue and was prejudical to the accused. The question of whether the bandits were guilty of an attempt is foreign to the case. Their common unlawful purpose to hold up and rob the bank and to assist each other in the prosecution of that purpose, having been frustrated, was obviously not pursued, and it was not therefore in the prosecution of such purpose that the mur-

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19 (c) of the *Exchequer Court Act* is not confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury. *Per* the Chief Justice, Kerwin and Estey JJ.: The effect of the trial judge's finding that Coyle was negligent in driving the vehicle without lights when he was so far out of his proper position in the convoy, cannot be dissipated by saying that Coyle could not change the lighting equipment of the transport driven by him. *Per* Kellock and Locke JJ. (dissenting): Where damage ensues to a person by the act of another person who is acting in the pursuance of lawful orders the wrongful act, if any, occasioning the damage is not the act done in obedience to orders, but negligence in the giving of the order itself. *Reney* v. *Magistrates* [1892] A.C. 264; *The Mystery* [1902] p. 115; *Hodgkinson* v. *Fernie* 2 C.B.N.S. 415. On the law thus stated, applied to the case at bar, it cannot be considered that there was any negligence on the part of Coyle either causing or contributing to the accident in question. THE KING v. MURPHY.... **357**

6.——*Motor vehicle—Pedestrian struck by car making right-hand turn—Duty of driver—Statutory onus—The Highway Traffic Act, R.S.M. 1940, c. 93, s. 56 (1), 81 (1)—The Tortfeasors and Contributory Negligence Act, R.S.M. 1940, c. 215, s. 4 (3), 8.*—Action for damages sustained by respondent when, at an intersection, he was struck by the projection of a grain box attached behind the cab of appellant's truck while it was making a right-hand turn onto the street respondent was crossing. The trial judge dismissed the action and the Court of Appeal held that respondent was entitled to recover the full amount of the damages assessed by the trial judge. *Held:* The appellant's negligence in not complying with the provisions of section 56 (1) of the Highway Traffic Act and in not keeping a proper lookout, makes him liable for two-thirds of the damages; the respondent was also at fault for not keeping a proper lookout before entering the intersection. Kellock and Locke JJ. would have allowed respondent one-half of his damages. The Eurymedon (1938 Prob. 41) and Sershall v. Toronto Transportation Commission (1939) S.C.R. 287 referred to. KIRBY v. KALYNIAK..... **544**

7.——*Licensee—Peace Celebration spectators in city park injured when boys climbing on flag tower caused its collapse—Duties imposed on licensor.*—In response to a notice published by the Mayor of St. Catharines requesting citizens to observe and co-operate in a program prepared for the observance of "Victory-over-Japan Day", a large crowd gathered in Montebello Park the evening of August 15, 1945. Here, in addition to band concerts and dancing, a display of fireworks was given under the direction of "G", the manager of the city's

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Board of Park Management. The fireworks were set off in the "Rose Garden" which had been fenced off for that purpose. Some 25 feet from the fence there was a tower constructed of a light iron framework, some 70 feet high, surmounted by a flagpole. Earlier in the evening "G" had twice ordered small children off this structure. Later, while he was directing the fireworks display, a number of boys climbed upon the tower. Their combined weight caused its to collapse and fall upon the spectators thereby killing the daughter of one of the appellants and injuring two of the other appellants. *Held:* The respondents were liable for negligence. *Per* Rinfret C.J., Kerwin and Estey JJ.:—The maxim *novus actus interveniens* did not apply because the presence of the boys upon the tower, even though unauthorized, was the very thing that should have been anticipated. The Court was unanimously of opinion that on the facts of the case it was not necessary in fixing liability to determine whether the members of the public attended the park as invitees. Rinfret C.J. and Kerwin J., agreed with the trial judge that the respondents were liable as licensors whose duty it was to warn a licensee of any concealed danger known to the licensor, and that "G" knew of the danger created by the weight upon the tower. *Baker* v. *Borough of Bethnal Green* [1945] 1 A.E.R. 136 at 140. *Per* Estey J.: This was a case of a licensee after entering upon the premises being injured by virtue of the negligence of the licensor within the principle of *Gallagher* v. *Humphrey* (1862) 6 L.T. 684. *Per* Rinfret C.J. and Kerwin J.: Having permitted the public to enter the park, the respondents were under a duty not to create or permit others to create a new danger without giving warning of its existence. The presence of the boys on the tower was a danger respondents permitted to be created and to continue. No warning was given and, *Per* Rinfret C.J., Kerwin and Estey JJ.: The danger was not apparent to the parties injured. *Per* Rand J.: The standard of reasonable foresight was applicable to the circumstances of the demonstration. The city's act in bringing about the gathering was of such a nature as called for reasonable precautions against forseeable risks and dangers lurking in fact within it, an act which unaccompanied by that degree of prudence, became a misfeasance. *Per* Kellock J.: A reasonably prudent man would have anticipated, having seen the fact demonstrated on two occasions, that young people would repeat their attempts to climb the tower and that if too many climbed on it, it was likely to fall, and would have taken means to prevent such use of the tower. *Per* Estey J.: The injuries here claimed for were suffered not because of any defect in the condition of the premises but rather that the respondents were negligent in not taking reasonable

TAXATION—*Assessment Act, Statutes Nova Scotia, 1938, c. 2—Assessment of companies—No incompatibility between s. 10 and s. 28—S. 28 not an exclusive code for assessment of companies—Company a person under s. 10 and neglect of company to comply with assessor's demand under s. 10 entails penalty under s. 15 of loss of right of appeal—N.S. Assessment Act, 1938, c. 2, ss. 2, 10, 12, 13, 15, 28-30 and 38.*—Section 10 of *The Assessment Act*, Statutes of Nova Scotia, 2 Geo VI, 1938, chapter 2, requires every person to give all necessary information to the assessors if required by them, for the purpose of enabling them properly to assess him. Section 15 provides that every person, who—(*a*) refuses to give the assessors information by them reasonably required; or (*b*) refuses to furnish any particulars required by this Act or by the forms prescribed thereby; or (*c*) neglects to fill up and return the form referred to in Section 10 of this Act after being requested by an Assessor to do so, shall not be entitled to appeal from the assessment of his property or income. Section 28 (1) provides that in assessing the property of any joint stock company, other than a banking company, and its agencies, the assessors shall, before the assessment for the whole municipality is made up, notify in writing the managers or resident agents of the several joint stock companies in the town or municipality of the value at which they estimate the property of such companies, and require such manager or agents, if they object to such valuation, to severally furnish to such assessors * * * written statements, under oath * * * of the actual value of the real property and of the personal property of such companies * * * Sub-section (2) provides after service of the notice upon any such manager or agent 14 days shall be allowed him to furnish the assessors with such written statement, under oath * * * Section 29 provides where the manager or resident agent delivers such written statement * * * the assessors shall adopt the valuation sworn to, which shall be binding, subject only to appeal by the clerk under the provisions of this Act. Section 30 provides that if such statement is not furnished within the time and in the manner prescribed, the assessors shall proceed upon their own original valuation, and such valuation shall then be binding, subject only to appeal under the provisions of this Act. *Held:* There is no incompatibility between the subject matter of section 10 and section 28. The former provides information on which the assessors' valuation is in large measure based, and which is in fact a prior necessity under section 28. The latter section does not embody an exclusive code for the assessment of companies. A company is therefore a "person" within the meaning of section 10. *Held:* Since the right of appeal given companies under section 30 lies only "under the provisions of this Act"; neglect by a company to comply with the provisions of section 10, an obligation placed on all ratepayers, entails the penalty under section 15, of the loss of the right to appeal from the assessors' valuation. OXFORD PAPER CO v. MUNICIPALITY OF THE COUNTY OF INVERNESS..... **115**

2.——*Exemption from taxation—Proviso to The City of Charlottetown Incorporation Act, P.E.I., 1931, chapter 31, section 65—"provided that no property in transit or awaiting shipment abroad shall be assessed;"—Goods in stock and held for preparation and disposal prior to shipment excluded from exemption.*—The appellant engaged in the buying and selling at wholesale of canned fish, chiefly lobsters. It bought from packers along the shores of the Maritime Provinces, the Magdalen Islands and Newfoundland. The goods were delivered to appellant's warehouse at Charlottetown; here they were tested for defects in canning, graded, labelled, assembled in cases and stored. On receipt of directions from its head office in Montreal, they were then shipped out of the Province to various points, mostly in carload lots. The City of Charlottetown assessed the goods so stored and the appellant claimed exemption under the proviso contained in the City of Charlottetown Incorporation Act, *21 Geo. V.* (1931) *ch. 31 sec 65* i.e. "provided that no property in transit or awaiting shipment abroad shall be assessed:" (Reporter's note:—It was common ground that the word "abroad" as used in the Statute meant "out of the Province" and that the canned goods were not "in transit".) *Held:* The transitory nature of the "awaiting" envisaged in the words "awaiting shipment" in section 65, City of Charlottetown Incorporation Act, P.E.I., 1931, chapter 31, excludes goods which are in stock and are held for preparation and disposal. J. W. WINDSOR CO. LTD. v. CITY OF CHARLOTTETOWN..... **287**

3.——*Constitutional law—Statutory exemption from taxation—Parliamentary contract—Public statute—Severance tax—Levies—Indirect taxation—Interpretation Act, c. 2 of Consolidated Act, 1877, of B.C.—Forest Act, c. 102, R.S.B.C. 1936, s. 123, am. c. 29, Statutes of 1946—Constitutional Questions Determination Act, c. 50, R.S.B.C., 1936* **403**

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